BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation of Submetering in the State of Ohio	)))	Case No. 15-1594-AU-COI

REPLY COMMENTS OF OHIO POWER COMPANY AND DUKE ENERGY OHIO, INC.

Ohio Power Company ("AEP Ohio") and Duke Energy Ohio, Inc. ("Duke") respectfully submit these comments in reply to the initial comments filed on January 21, 2016.

I. The Parties' Initial Comments Confirm that Submetering Imposes Substantial Harm on Utility Customers

Several other parties – including the Ohio Consumer Counsel ("OCC"), the Ohio Law & Poverty Center ("OLPC"), Ohio Partners for Affordable Energy ("OPAE"), and Dayton Power & Light ("DP&L") – echoed the concerns with submetering that AEP Ohio and Duke raised in their initial comments. It should now be clear to the Commission that submetering causes substantial harm to utility customers because it denies them the same rights and protections afforded by Ohio law to the vast majority of Ohioans who are served by Commission-regulated utilities. Among other things, submetering denies customers the right to shop for competitive generation supply. Submetering allows customers' utility rates to be set without any oversight to ensure that the rates are reasonable, stable, based on cost, and nondiscrimatory. Submetering denies customers meaningful visibility or input into how their utility charges are calculated. Submetering denies customers critical protections such as payment plans and limitations on disconnection. And submetering can make service unreliable. *See* AEP Ohio & Duke Initial Cmts. 2-16; DP&L Initial Cmts. 3-5; OCC & OLPC Initial Cmts. 14-20; OPAE Initial Cmts. 3-4.

It is telling, moreover, how few meaningful *benefits* the proponents of submetering identified in their comments. For instance, the Utility Management & Conservation Association ("UMCA") asserts that submetering encourages conservation. UMCA Initial Cmts. 3. In the same vein, the Ohio Apartment Association ("OAA") and the International Council of Shopping Centers ("ICSC") claim that submetering "helps solve . . . inequities" among tenants "by ensuring that no tenant is over- or under-charged." OAA & OCSC Initial Cmts. 4. But those are not true benefits of submetering. Without submetering, a Commission-regulated utility would assess the same customers a usage-based charge (e.g., a kWh charge for electric utilities), and that usage-based charge would encourage conservation and achieve fairness without all of the other harms caused by submetering.

Importantly, moreover, the alleged benefits identified by UMCA, OAA, and ICSC – conservation and fairness – are only truly beneficial to customers if the landlord or submetering company is merely passing on their costs and not charging a substantial markup to customers. UMCA, OAA, and ICSC assert that submetering is not a "profit center" for their members. OAA & ICSC Initial Cmts. 5; *see also* UMCA Initial Cmts. 5 (similar). But they provide no verification for that claim, and the experience of other parties tells a different story. OCC explains from first-hand experience in dealing with customer complaints that submetered rates are often excessive. *See* OCC Initial Cmts. 14-19. Moreover, the "ten month investigation" by the *Columbus Dispatch* that OCC cites found that "residents pay markups of 5 percent to 40 percent when their landlords enter into contracts with certain submeter companies." *See id.* Attach. 1, at 1. Allocating utility charges to tenants based on usage is only a "benefit" of submetering if the underlying rates are not themselves excessive, and experience shows that they often are.

Lastly, it is striking that Nationwide Energy Partners ("NEP") – the respondent in the *Whitt* complaint that gave rise to this investigation, as well as one of the principal subjects of the *Columbus Dispatch* article cited by OCC – failed to identify, in ten pages of comments, a single benefit to customers of submetering. It is clear that, from NEP's perspective, the only benefit to submetering is its own profit.

II. Contrary to Some Parties' Claims, the Commission Possesses Legal Authority to Alter the *Shroyer* Test, Including by Adopting the Test Proposed by AEP Ohio and Duke

Several parties' comments give the impression that the present legal status of submetering is permanently ensconced in Supreme Court case law going back to 1928. *See* NEP Initial Cmts. 8; Building Owners and Managers Association of Greater Cleveland ("BOMA") Initial Cmts. 3; Industrial Energy Users – Ohio ("IEU") Initial Cmts. 2-9. But that unquestioning adherence to the status quo is what Justice Holmes once called "the government of the living by the dead." *See Remarks at the Annual Dinner of the Harvard Law School Association*, 29 Am. L. Rev. 604, 610 (1895). Contrary to some parties' wishes, "the present has a right to govern itself so far as it can." *Id.* Where, as here, a test was created by the Commission to deal with one set of circumstances, that test can be revised by the Commission as circumstances change and the Commission gains more experience with the former test's shortcomings. The revision to the *Shroyer* test proposed by AEP Ohio and Duke here, moreover, accords fully with the statutes governing the Commission's jurisdiction, as well as all Supreme Court precedent (modern and ancient) interpreting those statutes.

AEP Ohio and Duke propose that the Commission replace the current *Shroyer* test with a revised test that would recognize that any entity that assesses a separate rate or mark-up for utility service is a "public utility" under R.C. 4905.02 and 4905.03. The test that AEP Ohio and Duke propose would provide as follows:

> For purposes of determining whether an entity constitutes an "electric light company," a "natural gas company," or any other type of utility provider set forth in R.C. 4905.03, any entity that *charges end-use customers* for the utility service in question satisfies the statutory definition.

See AEP Ohio & Duke Initial Cmts. 24. Moreover, AEP Ohio and Duke propose that, in applying this test, the Commission hold that landlords or condominium associations that either "include utilities" in rent as a flat rate or that merely allocate and pass-on utility costs to tenants without any mark-up are not "charging end-use customers for utility service" and thus are not "public utilities." *See id.* at 27-28.

This revised test proposed by AEP Ohio and Duke is based directly on the expansive statutory definitions in R.C. 4905.03. For example, the statute defines "electric light company" as any entity that is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state." R.C. 4905.03(C). Under the ordinary, commonsense meaning of that language, landlords, condominium associations, and submetering companies that charge a separate rate or mark-up for providing electric service plainly *are* "engaged in the business of supplying" electricity because they not just passing on their costs but are *profiting* from their provision of electric service. Thus, the test proposed by AEP Ohio and Duke would follow the broad statutory language and require that any entity that assesses a separate rate or mark-up for utility service *is* "charging for utility service" and thus *is* a "public utility" under R.C. 4905.02 and 4905.03. At the same time, however, under the statutory language, a landlord who merely passes on its own electric costs (i.e., the master-meter costs) to tenants without profit is not "engaged in the business" of providing electric service because the landlord does not earn any pecuniary gain from providing its tenants electricity. The test proposed by AEP Ohio and Duke accounts for this by recognizing that any landlord or condominium association that either

"include utilities" in rent or that merely allocate and pass on utility costs to tenants without mark-up are *not* "charging end-use customers for utility service" and thus are *not* "public utilities."

Several parties cite what they characterizes as "a line of Ohio cases recognizing that landlords and similarly situated persons and entities are not public utilities when they redistribute utility services to their tenants," NEP Initial Cmts. 8, but the test proposed by AEP Ohio and Duke is consistent with all of the cases these parties cite. Most importantly, in the Supreme Court's most recent decision on submetering, *Pledger v. Pub. Utils. Comm'n of Ohio*, 109 Ohio St. 3d 463, 2006-Ohio-2989, the Court expressly recognized that "[s]omething more than the words of the statute is needed" in the context of submetering, and it is *the Commission's* responsibility to fill that gap. Therefore, just as the Commission created the *Shroyer* test to provide the "[s]omething more" needed to implement the statute, the Commission may alter or amend its approach as the flaws with the *Shroyer* test become apparent. Thus, far from foreclosing the revised test proposed by AEP Ohio and Duke, *Pledger* confirms that the Supreme Court has given the Commission broad discretion to interpret R.C. 4905.03 in the manner that the Commission, in its expert judgment, deems best.

Moreover, the test proposed by AEP Ohio and Duke is consistent with two other cases many parties cite: *FirstEnergy Corp. v. Public Utilities Commission of Ohio*, 96 Ohio St. 3d 371, 2002-Ohio-4847, and *Shopping Centers Association v. Public Utilities Commission of Ohio*, 3 Ohio St. 2d 1 (1965). *See* NEP Initial Cmts. 8 (relying on those cases). *FirstEnergy* and *Shopping Centers* held that "office buildings, apartment houses, and shopping centers are 'consumers' of electricity" under R.C. 4905.03 "even though these consumers may resell, redistribute, or submeter part of the electric energy to their tenants." *FirstEnergy*, 2002-Ohio-4847, ¶ 9; *Shopping Centers*, 3 Ohio St. 2d at syllabus ¶ 2 (same). But all that means is when a

Commission-regulated utility such as AEP Ohio or Duke provides "master meter" service to a submetering landlord,[1] the landlord is a "consumer" under R.C. 4905.03, and thus the Commission may regulate *the master meter service*. AEP Ohio and Duke do not challenge that holding – the Commission may (and currently does) regulate master meter service even when the service is then resold through submetering.

What AEP Ohio and Duke are proposing is that the Commission take an additional step and hold that the submetered tenant is *also* a "consumer" under R.C. 4905.03 – a holding that neither *FirstEnergy* nor *Shopping Centers* foreclosed. That is, the Commission should recognize that in submetering arrangements, there are *two* "consumers" – and thus two "public utilities" – under R.C. 4905.03. For the master meter service, the submetering landlord is the "consumer" under R.C. 4905.03, and the provider of master-meter service (e.g., AEP Ohio or Duke) is a "public utility" subject to Commission regulation. Then, when the landlord resells the service to submetered tenants, the tenants are "consumers" under R.C. 4905.03 and the submetering landlord is also a "public utility." That outcome, which AEP Ohio and Duke propose here, was not foreclosed by *FirstEnergy* or *Shopping Centers*.[2]

Furthermore, insofar as *Pledger*, *FirstEnergy*, and *Shopping Centers* affirmed previous Commission determinations that submetering landlords are not public utilities, those cases never addressed the nuance that AEP Ohio and Duke propose here: They did not address whether there is a valid statutory distinction between landlords who merely pass on master meter costs and landlords who profit from submetering by charging a separate rate or markup to submetered

[1] For brevity, AEP Ohio and Duke will refer only to submetering "landlords" in this section, but the points here are equally applicable to condominium associations or submetering companies.

[2] Insofar as other parties also rely on *Jonas v. Swetland Co.*, 119 Ohio St. 12 (1928), that case did not in any way engage with the statutory language at issue here. Thus, it should not inform the Commission's expert interpretation of the statute, nor stand as an obstacle to the Commission revisiting its *Shroyer* test in light of the changed circumstances discussed below.

tenants. Accordingly, the test proposed by AEP Ohio and Duke is consistent with *Pledger*, *FirstEnergy*, and *Shopping Centers* for the additional reason that it would allow submetering landlords to continue to resell utility service to tenants without regulation as a "public utility" so long as they merely pass on master-meter costs without markup. That gives continued effect to the holdings of those cases by applying them to situations where landlords do not profit from submetering, but also recognizes that submetering landlords who *do* profit from reselling utility service are "engaged in the business of supplying" utility service under R.C. 4905.03.

Finally, even if the Commission were to conclude that the test proposed by AEP Ohio and Duke is in tension with Supreme Court case law (it is not, as discussed above), the Supreme Court would give deference to this Commission if it finds, in its expert judgment, that the previous decisions of the Court and the Commission should be revisited in light of changed circumstances and the Commission's new understanding of the substantial harms caused by submetering. As *Pledger* made clear, the Court gives "[d]ue deference . . . to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." 2006-Ohio-2989, ¶ 40. That principle has been repeated in many other cases as well. *See, e.g., Weiss v. Pub. Utils. Comm'n of Ohio*, 90 Ohio State 3d. 15, 17-18 (2000). If the Commission were to determine that previous approaches to submetering were misguided, the Supreme Court would defer to the Commission's judgment.

Indeed, the Commission can point to many changed circumstances that warrant revising previous approaches to submetering. As explained in the Initial Comments of UMCA, the past several years have witnessed the formation of submetering companies such as Nationwide Energy Partners and American Power & Light whose business model is to exploit the lack of regulation over submetering and to extract profit from tenants. UMCA Initial Cmts. 4-9.

Indeed, as the CEO of Nationwide Energy Partners said in an 2010 investor presentation – which was quoted in the *Dispatch* article OCC cites in its comments – NEP views itself as the "new utility" and believes its business is "very unique." *See* OCC Initial Cmts. Attach. 1, at 4. Moreover, NEP's leaders were "very deliberate when [they] started the business 10 years ago to put it in a place where it was not regulated." *See id.*

When the Supreme Court decided *Pledger*, *FirstEnergy*, and *Shopping Centers*, the Court did not address the "new" and "very unique" business practices of NEP and similar submetering companies. Rather, it appears that the Court was addressing the "traditional" model of submetering in which landlords merely allocate utility costs without markup. AEP Ohio and Duke do not wish to upend that "traditional" model, and the test proposed by AEP Ohio and Duke would not consider such landlords as "public utilities" so long as they do not profit from the resale of utility service. But where landlords and submetering companies exploit the lack of regulation by charging different utility rates or mark-ups to tenants, they should be regulated as public utilities, and would be so regulated under the test proposed by AEP Ohio and Duke.

Another reason for revisiting previous approaches to submetering is the recent public scrutiny of submetering and the improved understanding of all parties of the harms that submetering can cause. Although *FirstEnergy* briefly addressed the fact that submetering customers cannot shop for competitive generation supply, *see* 2002-Ohio-4847, ¶ 10, none of the Court's previous cases fully engaged with the many harms of submetering identified in several parties initial comments – including, for example, the fact that submetering rates can represent large markups, that rates are often hidden from submetered customers, that submetered customers have no right to be heard in the setting of their rates, that submetered customers have

no protections surrounding rate disclosure or disconnection of service, and that submetered service can be unreliable.

III. Although Assuming Jurisdiction over Certain Submetering Arrangements Will Likely Raise Additional Issues for the Commission's Consideration, the Commission Is Capable of Addressing Those Issues Without Undue Strain on Its Resources

Some parties claim that revising the *Shroyer* test to bring some landlords and submetering companies under the Commission's jurisdiction would affect established contractual relationships and lead to "unintended confusion/complications." *See, e.g.*, NEP Initial Cmts. 9; OAA & ISCS Initial Cmts. 6; BOMA Initial Cmts. 4. AEP Ohio and Duke acknowledge that altering the status quo and regulating certain forms of submetering may raise complicated issues, but the Commission is up to the task. Moreover, as explained in their initial comments, AEP Ohio and Duke would not oppose reasonable accommodations by the Commission to ease the transition to regulation of certain forms of submetering. *See* AEP Ohio & Duke Initial Cmts. 29-30. To that end, if the Commission decides to adopt the test proposed by AEP Ohio and Duke, the Commission should consider opening a submetering "Phase II" docket or workshop to address additional issues that may arise. *See id.* at 30.

In addition, some parties claim that asserting jurisdiction over certain forms of submetering would "strain the Commission's limited time and resources." NEP Initial Cmts. 9. But if the Commission adopts the test proposed by AEP Ohio and Duke, currently submetered buildings could avoid regulation as "public utilities" by simply "including utilities" in rent or passing on utility costs to customers without mark-up. Indeed, OAA and ICSC assert that submetering is not a "profit center" for their members, OAA & ICSC Initial Cmts. 5, and UMCA says that its "best practice guidelines recommend that the amount billed to residents not exceed the owner's actual costs incurred," UMCA Initial Cmts. 5. If those claims are sincere, then the test proposed by AEP Ohio and Duke would not affect the members of OAA, ICSC, and UMCA.

If those claims are inaccurate, then this merely underscores the need for the Commission to adopt the proposed test.

Insofar as existing submetering landlords or submetering companies chose not to include utilities in rent or pass on costs without markup, they can explore switching to individual meter service to tenants by an existing Commission-regulated utility such as AEP Ohio or Duke. Although such a transition may involve complex issues requiring the Commission's attention, the Commission can likely settle these issues through a general rulemaking or in a limited number of "test cases" – the Commission will not have to oversee the transition of each submetering arrangement. Furthermore, AEP Ohio has already begun to explore options involving advanced meters whereby AEP Ohio could assume service to individual tenants in submetered buildings without purchasing or otherwise taking over existing distribution infrastructure behind the master meter. Although the logistics of this process still need to be finalized – which may require guidance from the Commission in a submetering "Phase II" proceeding – it could potentially provide a streamlined process for converting submetered buildings to individual-meter service by established Commission-regulated utilities.

In sum, adopting the test proposed by AEP Ohio and Duke will likely raise some issues for the Commission's further consideration, but the Commission is fully capable of addressing these issues without significant "strain" on the Commission's "limited time and resources." NEP Initial Cmts. 9.

IV. At a Minimum, the Commission Should Hold that Condominium Complexes and Submetering Companies are "Public Utilities"

Even if the Commission does not adopt the test proposed by AEP Ohio and Duke, it should still hold that submetering condominium associations and submetering companies such as NEP and American Power & Light are "public utilities" under existing standards. As for

condominium complexes, none of the Supreme Court's precedents has ever addressed whether the resale of utility service to *separate owners* constitutes operation as a "public utility." And there are good reasons to distinguish condominiums from apartment complexes. Most importantly, even if it is true that the "competitive nature of the market to secure tenants" imposes some limits on the ability of apartment complexes to charge excessively high utility fees, *see* OAA & ICSC Initial Cmts. 5, there are far higher barriers to condominium owners selling their properties if they are unhappy with the submetered utility service.

As for "submetering companies" such as NEP and American Power & Light, the initial comments of AEP Ohio and Duke catalogue the many ways in which these companies cloak themselves in the indicia of public utilities in order to collect bills and make a profit. *See* AEP Ohio & Duke Initial Cmts. 19-21. Those points are echoed by other parties, including UMAC, which describes how NEP and American Power & Light are different from the "traditional" submetering model in which landlords pass on utility costs to tenants. *See* UMAC Initial Cmts. 6-9. And although NEP has backtracked now that the Commission has taken note of its dubious business model, NEP's CEO previously did not hide the fact that NEP expressly intends to be a public utility. In touting NEP's achievements to prospective investors, he stated: "NEP is the new utility. . . . We do everything that a utility does except generate power." *See* OCC Initial Cmts. Attach. 1, at 4. That statement speaks for itself. NEP intends to be a "utility," and so it should be regulated like one.

Although AEP Ohio and Duke would prefer that the Commission adopt a test that prohibits unregulated "submetering for profit" in all circumstances, at a minimum, the Commission should regulate it in condominium complexes and for any entities that adopt the business model of NEP or American Power & Light.

CONCLUSION

For the foregoing reasons, AEP Ohio and Duke respectfully request that the Commission revisit the *Shroyer* test and adopt a revised test that finds that any entity is a "public utility" under Ohio law if it charges a separate rate or a markup for utility service.

In the alternative, the Commission should find that condominiums and submetering companies such as NEP and American Light & Power are "public utilities."

Respectfully submitted,

OHIO POWER COMPANY

/s/ Steven T. Nourse
Steven T. Nourse
Matthew S. McKenzie
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: 614-716-1608
Fax: 614-716-2950
stnourse@aep.com
msmckenzie@aep.com

DUKE ENERGY OHIO, INC.

/s/ Elizabeth H. Watts
Amy B. Spiller
Deputy General Counsel
Elizabeth H. Watts
Associate General Counsel
Duke Energy Business Services LLC
139 East Fourth Street
1303-Main
Cincinnati Ohio 45202
Telephone: 513-287-4359
Fax: 513-287-4385
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Comments of Ohio Power Company and Duke Energy Ohio, Inc. was served by email on counsel for all parties on this 5th day of February, 2016.

/s/ Steven T. Nourse

Email service list:

amy.spiller@duke-energy.com
campbell@whitt-sturtevant.com
aemerson@porterwright.com
bryce.mckenney@puc.state.oh.us
cmooney@ohiopartners.org
dstinson@bricker.com
dborchers@bricker.com
elizabeth.watts@duke-energy.com
fdarr@mwncmh.com
gkrassen@bricker.com
glpetrucci@vorys.com
ibatikov@vorys.com
jennifer.spinosi@directenergy.com
joliker@igsenergy.com
bojko@carpenterlipps.com
kyle.kern@occ.ohio.gov
whitt@whitt-sturtevant.com
mcorbett@calfee.com
msmckenzie@aep.com
mpritchard@mwncmh.com
mswhite@igsenergy.com
mjsettineri@vorys.com
msmalz@ohiopovertylaw.org
randall.griffin@dplinc.com
stnourse@aep.com
slesser@calfee.com
william.wright@puc.state.oh.us

Summary: Reply Comments of Ohio Power Company and Duke Energy Ohio, Inc. electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company and Duke Energy Ohio, Inc.