BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation of Submetering in the State of Ohio	)))	Case 15-1594-AU-COI

REPLY COMMENTS OF UTILITY MANAGEMENT AND CONSERVATION ASSOCIATION

A review of the initial comments filed in this docket confirm just how narrow the question underlying the Commission's investigation really is:

> **Question:** Does the Commission have jurisdiction to address consumer protection problems in the limited instances where two unregulated companies (Nationwide Energy Partners, LLC (NEP) or American Power and Light, LLC (APL)) own, operate, and assume responsibilities traditionally left to regulated local distribution utilities?
>
> **Answer:** Yes, the Commission has jurisdiction and can address the activities giving rise to this docket without asserting jurisdiction over any new entity. Specifically, it can order public utilities to adopt and enforce tariff language prohibiting service when a developer or agent seeks to (a) place a single master meter in front of utility infrastructure owned and installed by the developer or agent during new construction or (b) place a master meter in front of existing utility infrastructure that the entity desires to purchase from a public utility in a retrofit scenario.

This solution addresses all the problems identified in the initial comments without (1) exceeding the Commission's jurisdiction[1] and (2) imposing unnecessary regulation on Ohio's pro-consumer, competitive submetering industry.

The initial comments also highlight the danger of using the term "submetering" as shorthand for the service model under investigation in Case No. 15-697-EL-CSS. For example,

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[1] The commenters accurately recite the status of the law and provide thoughtful responses to the Commission's inquiry regarding the *Shroyer* test. Even if there was a factual record in which to do so, which there is not, there is no need for the Commission to assert jurisdiction over any new entity to address the activities at issue.

AEP/Duke state that "submetering often requires a landlord, condominium association, or submetering company to install and maintain substantial infrastructure to bring utility service from the master meter to each individual end-user."[2] Submetering, AEP/Duke allege, introduces reliability problems because it "encourages landlords and submetering companies to install and maintain their own distribution infrastructure."[3] This may be accurate with respect to NEP/APL's service model, but it represents a fundamental misunderstanding of the overwhelming majority of submetering in Ohio.

As the Utility Management & Conservation Association (UMCA) explained in detail at pages 2-9 of its initial comments, UMCA members do not specify, build, own, operate, or maintain utility infrastructure behind a master meter.[4] Submetering equipment is secondary to the utility infrastructure and equipment. Submeters and related equipment can only be put in place once the primary utility infrastructure and master meter have been established with the utility. The primary utility equipment and infrastructure is in place regardless of whether the landlord submeters, includes the cost of the utility service in rent, or allocates in another manner to recoup his cost. A submeter installation has no impact on the provision of service or the quality of service. To be sure, the electric distribution utility's meter, metering equipment, and associated property is not damaged, interfered with, tampered with, or bypassed in any manner.[5]

To UMCA's knowledge, there are only two companies providing submetering service in Ohio that specify, build, own, operate, or maintain utility infrastructure behind a master meter – NEP and APL. Because UMCA members only install secondary submetering equipment, the relevant local public utility addresses all service restoration and termination issues, consistent

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[2] AEP/Duke at 13-14.
[3] *Id.* at 14.
[4] The term "utility infrastructure" refers to specified, utility grade infrastructure that is traditionally the responsibility of the relevant public utility.
[5] *See* 4901:1-10-20 O.A.C.

with the Commission's rules. Also, unlike NEP/APL, UMCA members do not recover any associated construction cost for the utility infrastructure from residents either through the rates charged or an infrastructure fee. Indeed, UMCA best practices encourage that the amounts billed to end users not exceed the amount billed to the property owner by the utility.

UMCA members operating in Ohio (and to its knowledge *all* other submetering companies that operate in the Ohio with the exception of NEP/APL):

- do not specify, build, own, operate, or maintain utility infrastructure behind a master meter;
- do not provision utility services (let alone offer such services to the general public);
- do not disconnect or reconnect utility services;
- do not provide service restoration;
- do not attempt to replicate the utility's bill form/design. In fact, it is commonly stated on bills from UMCA members that the bill is not from the public utility; and
- do not inhibit choice for competitive utility services;[6]

UMCA members merely provide a service that allocates the owners' utility costs based on the submetered service and bill residents accordingly, plus a reasonable administrative fee set by a competitive market.[7] UMCA members have provided these valuable services to Ohio residential and commercial real estate markets for over 35 years. As a result, they have long-standing relationships with not only large real estate companies but also many medium and smaller family-owned businesses that rely on the enhanced accountability and conservation advantages submetering brings to a property.

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[6] As explained at page 12 of UMCA's initial comments, Ohio law is clear that the "consumer" exercising choice in the landlord-tenant context is the property owner not the tenant, even when the landlord submeters and resells the utility service to the tenant. *See Shopping Centers Ass'n v. Pub. Utilities Comm'n*, 3 Ohio St. 2d 1, 4-5 (1965) (holding that "office buildings, apartment houses and shopping centers" are "consumers" under R.C. 4905.03 even when they resell utility service to tenants). There is no reason the result should be any different merely because an association exercises choice on behalf of its member property owners. UMCA's proposed tariff solution would address instances when there may be a long-term contract for utility services that is not representative of an association's member/owners' interest.

[7] The Ohio Apartment Association and the International Council of Shopping Centers accurately state at page 4 of their initial comments, "Submetering is simply a method that allows landlords to more accurately assess and bill each tenant for their individual usage of utility services."

UMCA agrees with the potential harms identified by commenters of the NEP/APL service model.[8] But it is extremely important the Commission understand that those issues do not occur under the UMCA service model (see pages 4-9 of UMCA's initial comments). In fact, UMCA's best practices do not condone the activities that can lead to such consumer protection issues under the NEP/APL service model.[9]

The Commission should reject suggestions that it should regulate submetering unless the costs for utility services are folded into rent.[10] Burying utility service in rent reduces accountability and creates a disincentive for smart conservation practices. Further, it will increase housing costs to residents.[11] The Ohio Apartment Association and the International Council of Shopping Centers accurately describe the pitfalls of baking utility services into rent at page 4 of their initial comments, and UMCA agrees with their observation that submetering "empower[s] tenants to control their own utility costs by having costs reflect usage."

Several of the public comments make the case for more submetering. For example, if Ms. Hodson's mobile home had a submeter, she and her husband would know exactly how much water and electricity they use and what rate they are paying for the service. Submetering would also help the owner of that mobile home park identify if there is a leak in the water system, as Ms. Hodson suggests. At a minimum, if there is a leak, submetering would prevent the property owner from continuing to pass the costs of the increased useage on to residents who are not using the additional water.

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[8] *See* AEP/Duke at 2-16; OCC at 6-8.
[9] http://www.utilitymca.org/bestpractices.html
[10] AEP/Duke at 27-28.
[11] AEP/Duke seem to recognize that when a property is not submetered, "landlords often provide electric, water, and sewer service to tenants without a separate charge and simply collect a higher rent to make up for the landlord's costs of procuring utility services." Id.

UMCA agrees with the Building Owners and Managers Association of Greater Cleveland's (BOMA) assessment of the negative impact if the Commission attempts to regulate the mainstream submetering industry in Ohio. BOMA states the following at page 4 of its initial comments:

> A departure from the Shroyer test by the Commission could have significant and widespread consequences for landlords and commercial building owners. The inability to submeter tenants would require substantial changes to the internal electric distribution of the majority of buildings used primarily for office purposes in Northeast Ohio and throughout the State of Ohio. In many cases, these buildings have had existing electrical infrastructure in place for more than 50 years. The associated costs of changing internal electrical distribution would reduce the ability to use those funds to finance energy efficiency programs and new development throughout the state. Moreover, if the Commission were to assert jurisdiction over landlord submetering, it would create interference with, and impair, the prevailing contract between tenant and landlord governed by the lease arrangement and the basis for total cost of real estate occupancy that is set by market conditions when the lease is signed.

These concerns are legitimate and not insignificant. Ordering existing public utilities to adopt and enforce appropriate tariff language would not cause such disruptions. A narrowly tailored tariff clause would close the consumer protection gaps created by the NEP/APL service model, while protecting electric distribution utilities from encroachment on their exclusive retail electric distribution businesses.

Moreover, the tariff solution is consistent with the Commission's current practice, as it has approved narrow restrictions on resale that are in line with Ohio law. For example, the FirstEnergy companies' retail tariffs exclude from the general prohibition on resale "service provided to a landlord for resale or redistribution to tenants where such resale or redistribution takes place only upon property owned by the landlord and where the landlord is not otherwise

operating as a public utility."[12] Similarly, AEP Ohio's retail tariff provides, "In addition, resale of energy will be permitted for electric service and related billing as they apply to the resale or redistribution of electrical service from a landlord to a tenant where the landlord is not operating as a public utility, and the landlord owns the property upon which such resale or redistribution takes place."[13] An additional clause prohibiting service when a developer or agent seeks to (a) place a single master meter in front of utility infrastructure owned and installed by the developer or agent during new construction or (b) place a master meter in front of existing utility infrastructure that the entity desires to purchase from a public utility in a retrofit scenario will address the activities at issue.

Conclusion

In sum, there is no need for the Commission to creatively interpret or depart from its past precedent in order to assert jurisdiction over any new entity when it can address the activities at issue through its regulation of existing public utilities. UMCA urges the Commission to appreciate the important differences outlined in its comments between UMCA members' best practices and the NEP/APL service model, which is limited to Central Ohio and well outside the industry norm.

Respectfully submitted,

/s/ Andrew Emerson

Andrew C. Emerson
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Tel: (614) 227-2104
Email: aemerson@porterwright.com

Attorney for Utility Management and Conservation Association

[12] The Cleveland Electric Illuminating Company, Original Sheet 4, p. 10, Section VIII Use of Service (C)(2); Ohio Edison Company, Original Sheet 4, p. 10, Section VIII. Use of Service (C)(2); and The Toledo Edison Company, Original Sheet 4, p. 10, Section VIII Use of Service (C)(2).

[13] Ohio Power Company, 1st Revised Sheet No. 103-13, p. 24, Section 17. Resale of Energy.

CERTIFICATE OF SERVICE

I certify that I served a copy of UMCA's Reply Comments on the persons stated below via electronic transmission this 5th day of February 2016.

/s/ Andrew Emerson
Andrew C. Emerson
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Tel: (614) 227-2104
Email: aemerson@porterwright.com
Attorney for Utility Management and Conservation Association

SERVICE LIST

cmooney@ohiopartners.org
William.Wright@puc.state.oh.us
Kyle.kern@occ.ohio.gov
bojko@carpenterlipps.com
msmalz@ohiopovertylaw.org
stnourse@aep.com
msmckenzie@aep.com
amy.spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
Jennifer.spinosi@directenergy.com
joliker@igsenergy.com
mswhite@igsenergy.com
whitt@whitt-sturtevant.com
mjsettineri@vorys.com
glpetrucci@vorys.com
jbatikov@vorys.com
campbell@whitt-sturtevant.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
gkrassen@bricker.com
dstinson@bricker.com
slesser@calfee.com
mcorbett@calfee.com
randall.griffin@aes.com
rickcashman@yahoo.com
jljeczen@yahoo.com

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Summary: Comments Reply Comments electronically filed by Gretchen J Blazer on behalf of Utility Management and Conservation Association and Emerson, Andrew C. Mr.