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 EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

Comes now Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, by counsel, and respectfully submits the following Reply Comments to the initial comments filed in this case pursuant to the Public Utilities Commission of Ohio ("Commission") Entry issued in the above referenced docket on December 16, 2015 ("Entry"). The Companies appreciate the opportunity to provide Reply Comments to address the comments filed in this proceeding related to the issue of submetering of utility service in Ohio. Since the Companies all are electric light companies pursuant to R.C. 4905.03(C) and electric distribution utilities pursuant to R.C. 4928.01(A)(6), their reply comments will be from that perspective, however, the reply comments may equally apply on a broader scale to other utility services.[1]

[1] The decision of the Companies to not address a particular initial comment in these Reply Comments may not be interpreted as the Companies' agreement with or acquiescence to such comment or comments.

I. Introduction

While the Commission posed three discrete questions in its Entry generally related to submetering, based upon the discussion in the initial comments, taken together the questions really boil down to whether the *Shroyer* test[2], as the sole determinant of whether an entity should be treated as a public utility in a submetering situation, should be reassessed at this time; to which the Companies answer "yes". While the Entry focused on *Shroyer*, the Companies believe the Commission must step back and consider the language and intent of existing statutory and administrative code provisions, and then view the court precedent in context and scope. These reply comments will then next discuss the existing *Shroyer* test and its continuing applicability, and finally assess the harms and benefits that may arise from submetering arrangements. The Commission should also consider the impact on electric distribution utilities if significant changes to existing submetering arrangements are made.

II. The Analysis Of Whether An Entity Is A Public Utility In A Submetering Situation Should Not Begin And End With The *Shroyer* Test.

Not unexpectedly, the initial comments filed on January 21, 2016 addressed a wide range of arguments for and against submetering, with strongly divergent views on the legality and impacts of submetering. As most commenters pointed out, R.C. 4905.03 provides a definition of public utility. For electric light companies, the statutory language reads in R.C. 4905.03(C) as follows:

> (C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

[2] *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992)

As pointed out by commenters, it is the "when engaged in the business of" language that has historically been interpreted to permit landlords to provide submetered utility service to their tenants in buildings or on property that the landlord owns.[3] But this statute does not require that providing electricity be the only business of a landlord, or even the primary business of a landlord.

Other statutory authority that must be kept in mind that wasn't as specifically discussed in the initial comments is the certified territory law, specifically R.C. 4933.81 et seq. As is well known to most, this law provides electric light companies the exclusive right to provide electric service to customers located within their certified territory. If submetering companies are permitted to install their own meters, construct their own distribution infrastructure, read the meters of the end-use consumers, and bill for the service rendered, then that submetering company is fulfilling the role of the electric distribution utility, which is inconsistent with the certified territory law. This law was originally enacted in 1979 and therefore post-dates some of oft-cited legal precedent for submetering.

If a new test is to be developed, perhaps the following two questions should be included: 1) Are any rights under the Certified Territory Act, R.C. 4933.81 et seq., being violated?; and, 2) Is a submetering company an 'electric supplier' providing 'electric service' to an 'electric load center' within the 'certified territory' of any electric utility? In concert with the definition of the public utility discussed above, the certified territory law must be given effect, and including these two questions as part of the Commission's analysis should help accomplish that goal.

Another existing administrative rule provision that was overlooked in the initial comments is the Commission's rule regarding the master metering of residential premises. The

[3] *Shroyer* at pp. 8-9; *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371; *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 468.

Commission itself has already determined that, at least as to residential customers, a "utility company shall provide service to a master-metered premise only if the customer is the landlord/owner of the premises". O.A.C. 4901:1-18-08(H).[4] This rule makes clear that unless the master-metered premises is owned by the landlord, the electric light company is not permitted to master-meter the premises. As quoted by Nationwide Energy Partners from *Shroyer*, the Commission "has neither the staff nor statutory authority to insert [itself] into the landlord-tenant relationship *as long as the landlord's actions are consistent with the tariffs of the regulated utility from which the service is obtained*."[5] But given the language of this rule, and additionally that all electric distribution utility tariffs must conform to and be in compliance with Commission rules, submetering to residential customers in a manner inconsistent with the cited rule would simply be prohibited by existing law and no analysis under *Shroyer* or otherwise would be permitted or appropriate.

Under this rule, the burden and obligation is on the landlord to "provide to the [electric light] company an accurate list specifying the individual mailing addresses of each unit served at the master-metered premises". *Id.* Therefore, at least as to residential customers, the Commission has already promulgated a rule that would prohibit the submetering of condominium associations or any situation where the direct customer of the electric distribution utility is the landlord/owner does not own the "downstream" premise.

Of course, this rule is consistent with the legal precedent cited by nearly all of the commenters regardless of which side of the debate they fall. For example, in the *Brooks*

[4] For purposes of this Ohio Administrative Code chapter, a consumer is defined as "any person who is an ultimate user of electric, gas, or natural gas utility service." O.A.C. 4901:1-18-01(F). And a "customer" is "any person who enters into an agreement, whether by contract or under a tariff, to purchase: electric, gas, or natural gas utility service." O.A.C. 4901:1-18-01(G).

[5] Nationwide Energy Partners Comments at pp. 9-10 (Emphasis added).

decision, while the Supreme Court of Ohio determined that an electric utility could not restrict the resale or redistribution of electric service by a landlord, the express conditions placed on this finding were that *the property was owned by the landlord*, and that the landlord was not operating as a public utility.[6] This "landlord ownership" requirement then was carried forward in both the *FirstEnergy Corp.* case and the *Pledger* case.[7] Therefore, it unclear how a submetering company providing electric service to property-owning end-use customers in a condominium complex, where there is no landlord in the picture at all, could be said to be permissible under Ohio law or Court precedent.

III. The Continued Vitality of the *Shroyer* Test

The Companies believe, and agree with the approach offered by Mr. Whitt in his comments, that whether an entity is a public utility subject to the jurisdiction of the Commission, or whether an entity is not acting in a manner consistent with the law when engaging in a submetering scheme with end-use consumers, are dependent on factual circumstances that must be judged in light of the law and the individual circumstance.[8]

The Companies also agree, consistent with Mr. Whitt's comments, that while the existing *Shroyer* test elements may be considered by the Commission in appropriate circumstances, it should not and may not be viewed as the exclusive test to be used to determine whether a submetering entity is a public utility, and that the Commission should be able to consider any

[6] *Brooks v. Toledo Edison Co.,* 1996 Ohio PUC LEXIS 292, PUCO Case No. 94-1987-EL-CSS (Emphasis added).
[7] *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371; *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 468.
[8] Whitt Comments at pp. 4-7.

number of other factors in reaching a determination regarding public utility status - - in a manner consistent with existing statutes and rules.[9]

It is curious that the *Shroyer* test arose out of a complaint case filed in 1990 and resolved in 1992, yet the Commission Opinion and Order does not rely upon or even cite to the *Atwood Resources* case that was issued by the Supreme Court of Ohio in 1989.[10] No commenters offered an explanation or opinion as to why the Commission did not follow the holding in *Atwood Resources* in deciding the *Shroyer* complaint case. In *Atwood Resources*, the Court found that Atwood Resources was "in the business" of supplying natural gas to consumers and therefore met the definition of a public utility despite: 1) serving only two customers; 2) not "being affected with the public interest"; and, 3) not holding itself out to serve the public generally.[11] In this case, the Supreme Court relied more on the volume of utility service provided and the extended time period over which the service occurred, rather than factors later included in the *Shroyer* test by the Commission.[12]

Since the Commission in *Shroyer* did not address the Supreme Court's holding in the *Atwood Resources* case, and the *Shroyer* case was not appealed, it is unclear on what basis the Commission departed from this Supreme Court precedent in deciding to come up with a new test that was not necessarily consistent with the precedent set in *Atwood Resources*. One explanation may be that the Commission did not view the test in *Shroyer* to have the sort of universal application that has seemed to evolve over the years, but rather was more limited to the facts and circumstances presented in the complaint case before the Commission at that time.

---

[9] Whitt Comments at p. 10.
[10] *Atwood Resources, Inc. v. Public Util. Comm'n* (1989), 43 Ohio St. 3d 96.
[11] *Id*. at p. 101.
[12] *Id*.

As discussed by Mr. Whitt in his initial comments, another concern with the *Shroyer* test, if taken literally, is that it is a bit of a *fait accompli*, i.e., an entity must already be clearly a public utility under law in order to be found to be a public utility under the test. Under the first prong of the test, an entity must have a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right of way. These are typically privileges granted by law to entities that are *already* public utilities. The standard set forth in the first prong of the *Shroyer* test is neither found in nor appears to rest on any statute or rule cited above, nor upon *Atwood Resources* or its predecessors. In fact, *Atwood Resources* held that an entity need not be affected with the public interest", and does not need to hold itself out to serve the public generally in order to be found to be a public utility.[13] While the elements of the *Shroyer* test may be considered by the Commission, they are not required to be the exclusive considerations of the Commission and, as discussed above, are insufficient as a general rule.

IV. Impacts Of Submetering On Consumers

The impact of submetering on both ultimate end-use consumers and public utilities can be significant in terms of the potential harm caused to both. AEP and Duke in their initial comments spelled out in some detail the types of harms that can arise from submetering companies serving end-use consumers instead of being directly served by electric distribution utilities.[14] The Companies will not repeat the concerns raised by AEP and Duke, but there should be additional items added to the list for the Commission's consideration.

A. Submetering may be detrimental to ultimate end-use consumers.

[13] *Id*.
[14] *See* Initial Comments of AEP and Duke, pp. 2-16.

In addition to the potential harms to consumers identified by AEP and Duke, consumers being served by submetering companies or similar entities deprive customers of the ability or opportunity to take advantage of energy efficiency programs and peak demand reduction programs offered by the electric distribution utility through its approved energy efficiency portfolio program or otherwise. Submetering denies consumers the opportunity to reduce their electric bills through participation in these programs, and serves to make it more difficult for electric distribution utilities to achieve the savings levels required by the statutory benchmarks in R.C. 4928.66.

Another aspect of service from an electric distribution utility that submetering customers would not receive is the benefit of periodic inspections of distribution facilities by the utility as monitored by the Commission Staff.[15] Under existing Commission rules, electric distribution utilities conduct inspections of their facilities including poles, lines, transformers, substations, etc. Reports are filed with the Commission Staff, which periodically conducts physical inspections of designated facilities. In addition, electric distribution utilities must inspect and maintain their meters to achieve the accuracy requirements found in the Commission rules.[16] With submetering, the electrical facilities between the master meter and the customer's meter would not be subject to such rules and regulations, which could lead to both reliability and safety issues.

With the move in the state among electric distribution utilities toward smart grid modernization business plans, if a customer was a submetering customer, they would not receive a smart meter under the electric distribution utility's program and would not be able to take full advantage of the benefits provided by deployment of smart meters and smart grid technologies.

[15] *See* O.A.C. 4901:1-10-27.
[16] *See* O.A.C. 4901:1-10-05

B. Additional harm to the electric utility.

An additional negative impact on nonresidential customers and electric distribution utilities is the potential disconnection of service. If a landlord, submetering company, or association fails to pay the electric bill, they subject the entire property to disconnection of electric service. Under current Commission rules, electric distribution utilities are prohibited from informing nonresidential tenants and appropriate governmental agencies of the imminent disconnection of a nonresidential property. This situation creates difficulties for both tenants and the utility. In the case of disconnection, "downstream" tenants may suffer disruption of their businesses even though they are current on their electricity payments under the submetering arrangement, and the utility suffers through harm to its reputation in the community and with local leaders, not to mention potential lawsuits by disgruntled tenants.

Historically, the Commission had a rule, O.A.C. 4901:1-10-25 that addressed notice provisions related to disconnection where there existed a master-metered arrangement. In 2009, the rule was rescinded from 4901:1-10, and later reappeared for residential customers in O.A.C. 4901:1-18-08. The Companies believe that the Commission should take action to permit electric distribution utilities to provide reasonable notice to nonresidential occupants in master-metered situations and appropriate governmental agencies of an upcoming disconnection situation. The notice period permitted should be adequate to give the customers to take actions necessary to protect their business interests and for public officials to address any safety, operational, or other issues. Such information permitted to be disclosed should be sufficient to advise the nonresidential occupants and governmental officials of the magnitude and nature of the circumstances leading to disconnection, and timing of the disconnection, as well as steps that can be taken to avoid disconnection.

V. Electric Distribution Utilities Must Be Given Adequate Time To Adjust To And Implement Changes

If, based upon this investigation or otherwise, the Commission changes the status quo related to submetering or master-metered arrangements in such a way that results in new direct customers of the electric distribution utility and significant capital expenditures will be required for utility distribution systems, then the electric distribution utilities must be given adequate time and a reasonable recovery mechanism, either through an existing rider or otherwise, to effect those changes. For example, an electric distribution utility would need to perform an in-depth engineering investigation to determine what type of infrastructure is behind the meter. Once the investigation is complete, some or all of the infrastructure behind the meter may need to be rebuilt to accommodate individual meters, which will be a significant capital investment for the electric distribution utility. Finally, there will be certain increased ongoing maintenance and administrative costs.

VI. Conclusion

The Companies respectfully request that the Commission consider the Reply Comments set forth above.

Date: February 5, 2016

Respectfully submitted,

/s/ James W. Burk

James W. Burk (0043808)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com

ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I certify that these comments were filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 5th day of February, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Robert M. Endris
One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

Summary: Comments Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Mr. Robert M. Endris on behalf of Burk, James W. Mr.