BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

The Office of the Ohio Consumers' Counsel	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 16-0782-EL-CSS
	)	
Ohio Power Company	)	
	)	
Respondent.	)	

OHIO POWER COMPANY'S
MOTION FOR TARIFF AMENDMENT

Under Ohio Revised Code ("RC") 4905.26 and 4905.37, and Ohio Administrative Code ("OAC") 4901-1-12, Ohio Power Company ("AEP Ohio") hereby moves to amend its tariff as a proposed resolution to this Complaint. As described in the attached Memorandum, AEP Ohio does not agree with key aspects of the Complaint filed by the Ohio Consumers' Counsel ("OCC") in this case. But AEP Ohio *does* agree with the Complaint's assertion that the practice of "submetering" has proliferated in recent years and has caused substantial harm to customers in AEP Ohio's territory. Accordingly, AEP Ohio proposes to amend its tariff to provide that AEP Ohio will not provide electric service to any submetered premises where a landlord, condominium association, "submetering company," or any other entity is assessing a markup or separate charge to individual tenants or occupants. As explained in the attached Memorandum, this tariff change will begin to address the harms associated with submetering and will provide substantial benefits to customers whose premises is currently submetered.

Attached to this Motion as Exhibit A is a copy of the existing tariff sheets at issue in this motion. Attached as Exhibit B-1 is a clean copy of AEP Ohio's proposed tariff sheets, and attached as Exhibit B-2 is a redline copy of AEP Ohio's proposed tariff sheets. This proposed

tariff amendment will not result in the an increase in rates, joint tolls, classifications, charges, or rentals.

Respectfully submitted,

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	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF OHIO POWER COMPANY'S MOTION FOR TARIFF AMENDMENT

As reflected in AEP Ohio's Answer filled concurrently with this Motion, AEP Ohio does not agree with key aspects of the Complaint filed by OCC in this case. But AEP Ohio *does* agree with the Complaint's assertion that the practice of "submetering" has proliferated in recent years and has caused substantial harm to customers in AEP Ohio's territory. (*See, e.g.*, Compl. pg. 1-2, ¶ 10.) AEP Ohio also agrees, as a general matter, with the Complaint's assertion that AEP Ohio's tariff does not currently prohibit submetering, and though AEP Ohio does not agree with the proposed language in Attachment A of the Complaint, AEP Ohio does agree that the Commission should revise AEP Ohio's tariff to clarify what is permissible and to limit the harm caused by submetering. (*Id.* ¶¶ 27, 31, 40.)

Accordingly, as a proposed resolution to this case, AEP Ohio requests that the Commission amend AEP Ohio's tariff as set forth herein as a means to limit submetering in AEP Ohio's service territory.

I. As AEP Ohio Described in Its Comments in Case No. 15-1594-AU-COI, the Commission Should Act to Curtail the Substantial Harm Caused by Submetering

As AEP Ohio described at length in its initial and reply comments in Case No. 15-1594-AU-COI (which AEP Ohio filed jointly with Duke Energy Ohio, Inc.), the practice of "submetering" has proliferated in recent years and has brought considerable harm to electric

customers in AEP Ohio's service territory. Submetering is a practice whereby a landlord, condominium association, or – in recent years – a "submetering company" (purportedly acting as a landlord's "agent") takes master-meter service from a Commission-regulated public utility and then resells that service to tenants or condominium owners. This practice is called "submetering" because the landlord, condominium association, or submetering company typically installs its own "submeters" and other internal distribution facilities behind the master meter to measure each customer's utility usage and assess utility charges based on that usage.

Submetering causes substantial harm to customers by denying them the critical protections and benefits that are afforded customers of Commission-regulated public utilities such as AEP Ohio. AEP Ohio and Duke described these harms at length in their initial and reply comments in Case No. 15-1594-AU-COI, and AEP Ohio attaches those comments to this Motion and incorporates them by reference here. (*See* Exhibits C and D.) In summary, submetering harms customers because, among other things: It denies customers the ability to shop for competitive generation supply. It denies customers the critical protections of Commission rate-regulation and thus subjects customers to high (and hidden) rates. It denies customers the consumer protections enshrined in the Revised Code and the Ohio Administrative Code, including, especially, protections related to disconnection for non-payment. It potentially threatens the reliability of customers' electric service. And because submetering is poorly understood by the general public, and because submetering companies such as American Power & Light ("AP&L") and Nationwide Energy Partners ("NEP") intentionally portray themselves as akin to public utilities, the harmful practices surrounding submetering undermine public confidence in this Commission and threatens the public reputation of Commission-regulated utilities such as AEP Ohio.

In their comments in Case No. 15-1594-AU-COI, AEP Ohio and Duke proposed one way for the Commission substantially curtail the harmful submetering practices that have recently proliferated in AEP Ohio's service territory: The Commission should revisit the test articulated in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992) ("*Shroyer*"), and adopt a revised test for determining whether an entity is a "public utility" under R.C. 4905.02 and 4905.03. Specifically, AEP Ohio and Duke proposed that the Commission recognize that all entities – including submetering landlords, condominium associations, or submetering companies – are "public utilities" if they assess a separate rate or mark-up for utility service. *See* Case No. 15-1594-AU-COI, AEP Ohio & Duke Initial Cmts. 21-26; AEP Ohio & Duke Reply Cmts. 3-9. AEP Ohio stands by that argument and continues to urge the Commission to adopt AEP Ohio's revised test. Not only is that test closer to the plain language and intent of R.C. 4905.02 and 4905.03, but it would substantially discourage – if not outright end – the harmful submetering practices that have proliferated in the years since the Commission first articulated the *Shroyer* test.

II. Amending AEP Ohio's tariff is one means of limiting submetering.

Although AEP Ohio stands by its arguments and recommended outcome in Case No. 15-1594-AU-COI, the Complaint filed by OCC in this docket raises an alternative method for the Commission to begin to[1] address submetering: The Commission can use its *existing* jurisdiction over AEP Ohio to amend AEP Ohio's tariff to limit submetering.

[1] As noted in AEP Ohio's comments in Case No. 15-1594-AU-COI, there are several issues that may arise if the Commission takes action to limit submetering and encourage existing submetering premises to convert to a situation in which AEP Ohio provides individual meter service to tenants or occupants. For example, for AEP Ohio to provide service to tenants or occupants who are currently submetered, AEP Ohio may need to install new infrastructure or take over infrastructure that was installed by landlords or submetering companies. Accordingly, if the Commission grants the tariff amendment proposed by AEP Ohio, the Commission should also provide for an appropriate transition process, including, among other things, cost recovery for necessary expenditures related to transitioning away from submetering.

The Ohio Supreme Court has made clear that this Commission can – and should – exercise its full jurisdictional powers with respect to the provision of electric service from a public utility to a submetering landlord. Put differently, no matter the jurisdiction the Commission may have over submetering (a topic addressed in Case No. 15-1594-AU-COI), there can be no question that the Commission has full jurisdiction over the "master meter" service provided by the public utility to the submetered premises. Specifically, in *Shopping Centers Association v. Public Utilities Commission of Ohio*, 3 Ohio St. 2d 1 (1965), this Commission had taken the position that it did not have jurisdiction to regulate sales between public utilities and landlords who resell utility service because those landlords are not "consumers" under R.C. 4905.03(C). But the Supreme Court reversed that determination, holding that "office buildings, apartment houses and shopping centers" are "consumers" under R.C. 4905.03 even when they resell utility service to tenants. *Id.* at 4-5. Thus, the Commission has its full jurisdiction under Title 49 of the Revised Code to regulate the provision of electric service from a public utility such as AEP Ohio to submetered premises.

Moreover, although the Commission has previously denied attempts by utilities to use their tariffs to prohibit "resale" of utility service, *see, e.g.*, *Brooks v. Toledo Edison Co.*, Case No. 94-1987, 1996 WL 331201 (May 8, 1996), *aff'd on reh'g* at 1996 WL 470528; *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371, 372-73 (2002), all of those previous cases were decided before the recent proliferation of harmful submetering practices adopted by companies such as AP&L and NEP. As described in AEP Ohio's reply comments in Case No. 15-1594-AU-COI, NEP's CEO has admitted that his company is "new" and "very unique" and that his company'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* Case No. 15-1594-AU-COI AEP Ohio & Duke

Reply Cmts. 7-8 (quoting OCC Initial Cmts. Attach. 1, at 4). When the Commission previously addressed utility tariff provisions on "resale," it did not address the "new" and "very unique" business practices of NEP and similar submetering companies. Nor did the Commission have the benefit of the recent scrutiny on submetering arrangements, now that they have become so prevalent. Where, as here, the Commission adopted tariff language to deal with one set of circumstances, that language can be revised by the Commission as circumstances change and the Commission gains more experience with the former language's shortcomings.

Accordingly, exercising its jurisdiction over the master-meter sale between AEP Ohio and a submetered premises, the Commission should amend AEP Ohio's tariff to make clear that electrical service will not be provided to any premises in AEP Ohio's territory where any markup or additional charge is assessed to end-use customers for electric service. Specifically, as shown on Exhibits B-1 and B-2, AEP Ohio proposes adding the following language to Section 17 of the Terms of Service for its Standard Service (i.e., "non-shopping") and Open Access Distribution (i.e., "shopping") tariffs:

> *Standard Service Tariff:*
>
> Electric service will not be supplied to any premises where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges without markup to such occupants or tenants and where such charges are allocated based on each occupant's or tenant's actual usage.
>
> *Open Access Distribution Tariff:*
>
> Electric service will not be supplied to any premises where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges and any generation supply charges (not to exceed the Company's current standard service offer generation rate) without markup to

such occupants or tenants and where such charges are allocated based on each occupant's or tenant's actual usage.

This tariff change would prohibit *anyone* – whether a landlord, condominium association, or "submetering company" such as AP&L and NEP – from assessing any "markup" or extra charge to submetered customers located on premises served by AEP Ohio. Were any such charges assessed, this tariff language would allow AEP Ohio to disconnect service. As such, the tariff change would effectively accomplish, through different means, the objective set forth in AEP Ohio's comments in Case No. 15-1594-AU-COI by prohibiting the "submetering-for-profit" model that has proliferated and caused so much harm in recent years. But it will also leave in place the "traditional" form of submetering in which landlords merely "pass on" utilities costs without markup.[2]

Most importantly for purposes of this docket, moreover, this tariff change will accomplish all of these objectives without the Commission expressly exercising jurisdiction over any submetering landlords, condominium associations, or "submetering companies" like AP&L and NEP. Instead, the Commission will merely regulate the terms and conditions under which *AEP Ohio* provides electric service – and that falls with the core of the Commission's powers under Title 49.

Finally, although AEP Ohio's proposed tariff change is similar in effect to the tariff language proposed by OCC in Attachment A of the complaint, OCC's proposed language is misguided in several respects and should not be considered as an alternative to AEP Ohio's proposal here. As an initial matter, OCC's proposed language is limited to residential customers (without explanation). Submetering is also harmful in the context of commercial and industrial

[2] For instance, in its initial comments in Case No. 15-1594-AU-COI, the Utility Management & Conservation Association ("UMCA") claimed that its UMCA says that its "best practice guidelines recommend that the amount billed to residents not exceed the owner's actual costs incurred." Case No. 15-1594-AU-COI, UMCA Initial Cmts. 5.

customers, and there is no reason to limit the tariff change to residential customers. Moreover, OCC's proposed tariff change contains certain language that may be misinterpreting as applying too narrowly – for example, OCC's language only refers to "landlords," but not condominium associations or submetering companies, and OCC focuses on "resale and redistribution," rather than the broader concept of "any charges" for electric service. OCC's focus on prohibiting "resale" also incorrectly suggests that the tariff is regulating the submetering sale, rather then regulating the conditions under which *the utility* will provide service. AEP Ohio submits that its revised tariff language, though similar in substance, is broader and more likely to accomplish the shared objective of limiting submetering with the least room for misinterpretation and loopholes.

III. This motion should not be misconstrued as agreement with the Complaint.

As described above, AEP Ohio believes that the revised tariff proposed in this motion is one means for the Commission to limit submetering in AEP Ohio's territory. As such, AEP Ohio agrees with certain paragraphs of the Complaint that recognize that AEP Ohio's tariff does not currently prohibit submetering and that claim that a tariff change is necessary. (*See* Compl. ¶¶ 27, 31.) However, it is important to note that there are many allegations in the Complaint that AEP Ohio does not agree with. (*See generally* AEP Ohio's Answer.) For instance, AEP Ohio does not agree with the Complaint's alternative theory alleging that AEP Ohio "may not be enforcing its approved tariff provisions to prohibit submetering entities . . . from reselling and redistributing electric utility and related services to Ohioans." (*See* Compl. ¶¶ 28, 33.) This request for a revised tariff should not be construed as any agreement with – or acquiescence in – these and other paragraphs of the Complaint.

CONCLUSION

For the foregoing reasons, AEP Ohio respectfully requests that the Commission grant the tariff revisions set forth in

Respectfully submitted,

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Case No. 16-782-EL-CSS
AEP Ohio's Motion to Amend Tariff
Exhibit A
Existing Schedule Sheets

P.U.C.O. NO. 20

TERMS AND CONDITIONS OF SERVICE

17. RESALE OF ENERGY

Electric service will not be supplied to any party contracting with the Company for electric service (hereinafter in this Section called "Customer") except for use exclusively by (i) the Customer at the premises specified in the service request on contract between the Company and the Customer under which service is supplied and (ii) the occupants and tenants of such premises.

Resale of energy will be permitted only by legitimate electric public utilities subject to the jurisdiction of the Public Utilities Commission of Ohio and only by written consent of the Company. 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.

P.U.C.O. NO. 20

TERMS AND CONDITIONS OF
OPEN ACCESS DISTRIBUTION SERVICE

17. RESALE OF ENERGY

Electric service will not be delivered to any party contracting with the Company for distribution service (hereinafter in this Section called "customer") except for use exclusively by (i) the customer at the premises specified in the service request or contract between the Company and the customer under which service is supplied and (ii) the occupants and tenants of such premises.

Case No. 16-782-EL-CSS
AEP Ohio's Motion to Amend Tariff
Exhibit B-1
Clean Copies of
Proposed Schedule Sheets

P.U.C.O. NO. 20

TERMS AND CONDITIONS OF SERVICE

17. RESALE OF ENERGY

Electric service will not be supplied to any party contracting with the Company for electric service (hereinafter in this Section called "Customer") except for use exclusively by (i) the Customer at the premises specified in the service request on contract between the Company and the Customer under which service is supplied and (ii) the occupants and tenants of such premises. Electric service will not be supplied to any premises where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges without markup to occupants or tenants and such charges are allocated based on each occupant's or tenant's actual usage.

Resale of energy will be permitted only by legitimate electric public utilities subject to the jurisdiction of the Public Utilities Commission of Ohio and only by written consent of the Company. 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, the landlord owns the property upon which such resale or redistribution takes place, and the landlord does not assess any charge for electric service except as provided above..

P.U.C.O. NO. 20

TERMS AND CONDITIONS OF
OPEN ACCESS DISTRIBUTION SERVICE

17. RESALE OF ENERGY

Electric service will not be delivered to any party contracting with the Company for distribution service (hereinafter in this Section called "customer") except for use exclusively by (i) the customer at the premises specified in the service request or contract between the Company and the customer under which service is supplied and (ii) the occupants and tenants of such premises. Electric service will not be supplied to any premises where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges and any generation supply charges (not to exceed the Company's current standard service offer generation rate) without markup to occupants or tenants and such charges are allocated based on each occupant's or tenant's actual usage.

Case No. 16-782-EL-CSS
AEP Ohio's Motion to Amend Tariff
Exhibit B-2
Redline Copies of
Proposed Schedule Sheets

P.U.C.O. NO. 20

TERMS AND CONDITIONS OF SERVICE

17. RESALE OF ENERGY

Electric service will not be supplied to any party contracting with the Company for electric service (hereinafter in this Section called "Customer") except for use exclusively by (i) the Customer at the premises specified in the service request on contract between the Company and the Customer under which service is supplied and (ii) the occupants and tenants of such premises. Electric service will not be supplied to any premises where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges without markup to occupants or tenants and such charges are allocated based on each occupant's or tenant's actual usage.

Resale of energy will be permitted only by legitimate electric public utilities subject to the jurisdiction of the Public Utilities Commission of Ohio and only by written consent of the Company. 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, and the landlord does not assess any charge for electric service except as provided above..

P.U.C.O. NO. 20

TERMS AND CONDITIONS OF
OPEN ACCESS DISTRIBUTION SERVICE

17. RESALE OF ENERGY

Electric service will not be delivered to any party contracting with the Company for distribution service (hereinafter in this Section called "customer") except for use exclusively by (i) the customer at the premises specified in the service request or contract between the Company and the customer under which service is supplied and (ii) the occupants and tenants of such premises. Electric service will not be supplied to any premises where the Customer, the Customer's agent, or any other entity assesses any charge for electric service to occupants, tenants, or any other end-user, except where the Customer passes on the Company's charges and any generation supply charges (not to exceed the Company's current standard service offer generation rate) without markup to occupants or tenants and such charges are allocated based on each occupant's or tenant's actual usage.

Case No. 16-782-EL-CSS
AEP Ohio's Motion to Amend Tariff
Exhibit C
Initial Comments of Ohio Power Company
and Duke Energy Ohio, Inc. in
Case No. 15-1594-AU-COI

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

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

In an Entry issued on December 16, 2015 ("Entry"), the Commission created this docket and initiated an investigation into so-called "submetering" practices in the State of Ohio. Submetering is a practice whereby a landlord, condominium association, or – in recent years – a "submetering company" takes master-meter service from a Commission-regulated public utility and then resells that service to tenants or condominium owners. This practice is called "submetering" because the landlord, condominium association, or submetering company typically installs its own "submeters" and other internal distribution facilities behind the master meter to measure each customer's utility usage and assess utility charges based on that usage.

The Commission requested comments on three questions related to submetering, *see* Entry 2-3, and Ohio Power Company ("AEP Ohio") and Duke Energy Ohio, Inc. ("Duke") respectfully submit these Initial Comments in response to the Commission's request. AEP Ohio and Duke will first describe the substantial harm that submetering causes utility customers in Ohio. Then, in answering the Commission's three questions, AEP Ohio and Duke will propose a solution to eliminate these harms to the greatest extent possible. Specifically, as described in detail below, AEP Ohio and Duke propose that the Commission revisit its *Shroyer* test and articulate a new test that recognizes that any entity that profits from charging end-use customers for utility service is a "public utility" under Ohio law. The hope is that by adopting this test, the

Commission will effectively address the harmful submetering practices that currently exist in this State and ensure that utility customers – including those customers currently subject to submetering arrangements – are afforded the protections and benefits given to customers of Commission-regulated public utilities.

In these Initial Comments, AEP Ohio and Duke will focus on submetering as it relates to the provision of electric service, since that is their area of operation. But many of the points made below apply equally to the provision of gas, water, or sewer service through submetering arrangements.

I. Submetering Causes Substantial Harm to End-Use Utility Customers by Denying Them the Critical Protections and Benefits Afforded Customers of Commission-Regulated Public Utilities

When tenants and condominium owners live in a submetered building, they have no choice but to accept utility service from the landlord, condominium association, or "submetering company" in question. As further discussed below, moreover, renters are typically under short-term lease arrangements and can move or select another landlord more readily than a property owner (such as a condominium owner) can purchase new property.

Although submetered tenants and condominium owners are essentially "captive" utility customers, they are denied many of the critical protections and benefits afforded customers of Commission-regulated public utilities such as AEP Ohio and Duke. In this way, certain submetering arrangements can be viewed as causing substantial harm in a manner that is at odds with the clear utility policies of both the General Assembly and this Commission.

A. Submetering Customers Are Denied the Right to Shop for Competitive Generation Supply and Cannot Take Advantage of Government Aggregation or Competitive SSO Procurement

Submetering denies to end-use customers one of the foundational tenets of Ohio utility policy in recent years: Submetered customers cannot "shop" for generation supply, nor do they

receive any benefit from government aggregation or competitive Standard Service Offer ("SSO") procurement.

As the Commission is well aware, following the passage of Senate Bill 3 in 1999, customers of investor-owned utilities such as AEP Ohio and Duke now have the right to shop for competitive electric services, including, most significantly, generation supply. *See generally* R.C. 4928.01-4928.10. Although the market for competitive generation supply was slow to develop primarily due to market price conditions, it has grown significantly in the past several years. Competitive Retail Electric Supply ("CRES") providers now offer several different types of competitive offers to residential, commercial, and industrial customers. (For examples of CRES offers currently available to residential customers, see the Commission's "Apples to Apples" website at www.energychoice.ohio.gov.) Shopping for generation supply provides customers some ability to choose generation supply pricing options to suit their needs. For example, CRES offers are now available for customers who value a short-term, relatively stable rate; a variable rate; or even renewable generation sources. Customers who are allowed to shop have taken advantage of these options in large numbers. For AEP Ohio, for example, 70% of AEP Ohio's total load – and 50% of AEP Ohio's total customers by customer count – shop for generation supply from a CRES provider.

For customers who elect not to shop for generation supply, moreover, Ohio law provides other important options for procuring generation supply from competitive sources. For example, municipalities may aggregate load within their borders and use competitive processes to procure municipality-wide generation supply for non-shopping customers. *See generally* R.C. 4928.20. Moreover, under Senate Bill 221, electric distribution utilities such as AEP Ohio and Duke now have considerable flexibility to offer market-based generation supply options to non-shopping

customers. For example, as the Commission is well aware, AEP Ohio's current SSO includes generation supply that is procured for all of AEP Ohio's non-shopping load through competitive auctions. *See* Opinion & Order of Feb. 25, 2015, at 27-32, *In re Application of Ohio Power Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO et seq. Two-thirds of AEP Ohio's *residential* customers, moreover, currently take service under AEP Ohio's SSO.

Yet none of these competitive generation supply options are available to submetering customers. To the contrary, shopping, aggregation, and auction-based SSO rates are only available to those customers who take service directly from a Commission-regulated electric distribution utility such as AEP Ohio or Duke. That is, in submetering arrangements, shopping, aggregation, and auction-based SSO rates are available to the *master meter* customer (e.g., the landlord or submetering company). But currently there is nothing requiring a landlord or submetering company to pass on competitive generation pricing to the individual end-use customers (e.g., tenants, condominium owners). If an end-use customer disagrees with the choice of generation supply made by the landlord or submetering company – for example, if the end-use customer prefers a CRES rate, renewable generation, or even the utility's SSO – there is no way for the end-use customer to opt-out of submetering and become a customer of the electric distribution utility. In other words, even if a landlord or submetering company secures direct savings in electric generation rates through shopping, there is no guarantee that the savings will be passed through to the end-use customer. To the contrary, experience shows that some landlords and submetering companies charge a significant markup to end-use customers.

As a result, individual submetering customers are denied many of the benefits provided by Senate Bill 3 and Senate Bill 221. That outcome may be at odds with many of the precepts of

State policy established in recent years by the General Assembly. *See, e.g.*, R.C. 4928.02(B) ("It is the policy of this state to do the following throughout this state: . . . Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs."); R.C. 4928.02(C) ("Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers . . . ."). It also conflicts with this Commission's often-stated goal of encouraging the development of competitive generation supply and ensuring that competitive generation options are widely available.

B. Submetering Utility Rates Are Hidden from Customers and Subject to No Oversight

The problem is not just that submetering customers are unable to shop for competitive services such as generation supply. Submetering customers are also denied the critical protection of Commission rate regulation for noncompetitive distribution service and SSO service. Ohio law grants electric distribution utilities such as AEP Ohio and Duke the exclusive right (and obligation) to provide distribution service and other noncompetitive services within their service territories. *See* R.C. 4933.82. This means that customers in an electric distribution utility's service territory *must* take distribution service from that utility. At the same time, because customers are unable to switch to another distribution provider, Ohio law requires that a utility's distribution rates, other noncompetitive rates, and SSO rates be set by the Commission, often after lengthy hearings, arguments, and deliberations.

As described below, Commission rate regulation offers numerous protections to customers – protections that are completely denied to submetering customers.

1. Submetering Utility Rates Are Not Public

As an initial matter, noncompetitive utility service rates and SSO rates are established through open, public hearings that are conducted only after notice has been given to the public. *See generally* R.C. Chapter 4903; *see also, e.g.*, R.C. 4909.18-4909.19 (public notice of certain rate cases). Commission-approved utility rates are also reflected in public utility tariffs that the Commission and utilities are required to make available to customers in a variety of formats. *See, e.g.*, R.C. 4903.23; OAC 4901:1-1-01; OAC 4901:1-1-03.

Moreover, the Commission exercises detailed control over the bills sent by Commission-regulated utilities such as AEP Ohio and Duke. Bills received by customers of AEP Ohio and Duke contain numerous items of Commission-mandated information, including, to list just a few, the utility name and contact information, OAC 4901:1-10-22(B)(1)(3); a statement concerning customers' rights to bring complaints at the Commission or enlist the assistance of the OCC, OAC 4901:1-10-22(B)(5); the applicable rate schedule, OAC 4901:1-10-22(B)(6); beginning meter readings, ending meter readings, demand meter readings, and any multipliers, OAC 4901:1-10-22(B)(8); the due date, any current balance or amounts past due, and applicable late fees, OAC 4901:1-10-22(B)(10)-(14); precise information concerning non-tariffed charges, OAC 4901:1-10-22(B)(16); information concerning any payment plans, OAC 4901:1-10-22(B)(19); an "explanation of codes and abbreviations used," OAC 4901:1-10-22(B)(20); definitions for terms such as "customer charge, delivery charge, estimated reading, generation charge, kilowatt hour, and late payment charge," OAC 4901:1-10-22(B)(21); historical consumption over the past year, OAC 4901:1-10-22(B)(23); and a "price-to-compare notice" to enable consumers to make informed decisions about generation supply options, OAC 4901:1-10-22(B)(24).

Submetering customers, by contrast, often have no way of knowing what their utility charges will be because submetering rates are not set pursuant to public hearings, and

submetering "tariffs" – if such things even exist – are not public. As a result, submetering customers often are unaware of their utility service rates until they receive their first bill. Even then, moreover, the basis of how submetering utility charges are calculated is often undisclosed, because submetering bills are not subject to any of the detailed bill requirements applicable to Commission-regulated utilities.

In this way, submetering landlords and submetering companies can hide the true cost of living in a submetered premises. For example, a submetering landlord can entice tenants with a low monthly rent but then "make up" considerable additional compensation by charging high utility rates – rates that are hidden from the tenant until after the tenant has signed a lease and received his or her first utility bill.

The experience of Mark Whitt, who brought the complaint case that gave rise to this Investigation, is emblematic of how non-public submetering rates are often hidden and catch customers by surprise. As alleged in Mr. Whitt's complaint, Mr. Whitt arranged to purchase a condominium in the North Bank building at 300 W. Spring Street, Columbus, Ohio, which falls within AEP Ohio's service territory. Complaint ¶ 6, *In re Complaint of Whitt v. Nationwide Energy Partners*, No. 15-697-EL-CSS ("*In re Whitt*"). If the North Bank building were not submetered, Mr. Whitt would have had full access to the AEP Ohio residential tariff under which he would be charged for electric service. As it happened, however, it was not until closing that Mr. Whitt was informed that a submetering company, Nationwide Energy Partners ("NEP") – and not AEP Ohio – was "the exclusive provider of utility service to North Bank" and that "[i]n order to receive electric, water, and sewer service, [Mr. Whitt] was required to execute a service agreement with NEP." *Id.* Mr. Whitt had no way of knowing what his true utility rates would be until closing, and even then, it is not clear that NEP's full rates and terms were disclosed (or have

ever been disclosed) to Mr. Whitt. Such a take-it-or-leave-it option is a Hobson's Choice for customers that should be addressed by the Commission. Moreover, as anyone who has purchased property can attest, closing is far too late in the home-buying process for the buyer to be given notice that the new home does not have the benefit of utility service from a Commission-regulated public utility.

2. Submetering Customers Are Provided No Opportunity to Be Heard on Submetering Rate Decisions

Because customers in the service territory of AEP Ohio and Duke have no choice but to accept noncompetitive electric service from each respective utility, Ohio law and Commission regulations provide all customers and stakeholders a thorough opportunity to present argument and evidence to the Commission concerning AEP Ohio's rates. Intervention in Commission proceedings is liberally permitted. *See* R.C. 4903.221; OAC 4901-1-11. Once permitted to intervene, parties are "granted ample rights of discovery," R.C. 4903.082, and in recent ratemaking proceedings, for example, AEP Ohio and Duke have answered hundreds of interrogatories, requests for admission, and requests for production of documents concerning proposed rates. *See* OAC 4901-1-19 (interrogatories); OAC 4901-1-20 (production of documents); OAC 4901-1-21 (requests for admission). Parties also have the right to take depositions, *see* R.C. 4903.06; OAC 4901-1-21, to present their own expert testimony, *see* OAC 4901-1-29, and to examine witnesses at hearings, *see* OAC 4901-1-27. After a Commission order setting rates, parties are able to apply to the Commission for rehearing, R.C. 4903.10, and then appeal the Commission order directly to the Ohio Supreme Court, R.C. 4903.12.

By contrast, none of this due process exists for submetering customers to provide input into their utility rates. Once a lease is signed – or, in Mr. Whitt's example, once a property is purchased – submetering customers have no choice but to accept whatever rates the submetering

landlord or submetering company charge. If the submetering landlord or submetering company wish to raise rates, there will be no hearing, no investigation of the basis for the rate increase, no discovery, no presentation of witnesses, no Commission order, and no appeal to the Ohio Supreme Court. In short, there is no regulatory process whatsoever. Despite the fact that submetering customers are essentially "captive," there is no government oversight of any kind, nor any opportunity to be heard. Ohio law long ago prohibited this kind of "company town" price setting for utility service by establishing the Commission and requiring full ratemaking proceedings. Yet submetering customers continue to be denied those critical regulatory protections, especially where end-use customers are charged a higher rate than the landlord or submetering company is paying for the master-meter service.

3. Nothing Stops a Submetering Entity from Setting Rates that Are Unjust, Unreasonable, or Discriminatory

Lastly with respect to submetering rates, but perhaps most importantly, the Commission may only approve rates of Commission-regulated public utilities if it finds that the rates are just, reasonable, and nondiscrimatory. *See, e.g.*, R.C. 4909.17, R.C. 4909.18, R.C. 4909.26, R.C. 4909.27. To that end, the Commission has developed a process, a set of rules for that process, and a body of jurisprudence to ensure that SSO rates and rates for noncompetitive utility service are generally based on the utility's cost of service, that rate proposals provide ample benefits to customers, and that rates are nondiscriminatory.

But submetering landlords and submetering companies currently have no limit on the amount they can charge for utility service. Nothing stops a submetering landlord or submetering company from charging exorbitant rates that have no basis in their cost of service and that provide no benefits to customers. Moreover, nothing stops a submetering landlord or submetering company from charging discriminatory rates – that is, charging different rates to

similarly situated customers. Today, a landlord or submetering company can change rates over time in a manner that is erratic, volatile, and unfair to consumers – all with impunity. Submetering customers must take utility service from their submetering landlord or submetering company, yet there is currently no regulation whatsoever ensuring that the rates they pay are reasonable.

C. Submetering Customers Are Denied a Host of Critical Protections Surrounding Disconnection of Utility Service

Submetering customers are also denied many of the protections afforded non-submetering customers when it comes to disconnection of service. Electric distribution utilities are subject to numerous, highly detailed statutory provisions and Commission regulations governing disconnection (and reconnection) of service. *See generally* R.C. 4933.122; OAC Chapter 4901:1-18 ("Termination of Residential Service").

As an initial matter, utilities are only permitted to disconnect service for certain expressly enumerated reasons. *See generally* OAC 4901:1-18-03. For example, among other reasons, utilities may disconnect for nonpayment, when the supply of utility service to the customer creates a hazard, or when the customer has committed fraud or prevented the utility from accessing the meter. OAC 4901:1-18-03(D), (E)(1), (E)(3), (H). At the same time, utilities are expressly *prohibited* from disconnecting service for certain enumerated reasons, including "[f]ailure to pay any amount which is in bona fide dispute." OAC 4901:1-18-10(C).

In addition, utilities are required by statute to provide "reasonable prior notice" of disconnection, R.C. 4933.122(A), and what constitutes such "reasonable prior notice" is spelled out by detailed Commission regulations. For example, for residential customers, the Commission requires that utilities provide at least fourteen days' written notice prior to disconnection. OAC 4901:1-18-06(A). Such notice must contain specific information, including

the billing account number, the amount the customer must pay to avoid disconnection, the earliest date disconnection may occur, and the local or toll-free number and address of a utility office the customer can contact. OAC 4901:1-18-06(A)(5)(a)-(c). The notice must also contain a statement regarding the customer's rights to contact the Commission or the Ohio Consumer Counsel (OCC) for assistance. OAC 4901:1-18-06(A)(5)(d). And the notice must contain statements regarding eligibility for payment plans, such as the percentage of income payment plan (PIPP), as well as a statement regarding eligibility for medical certifications. OAC 4901:1-18-06(A)(5)(g)-(h). If this notice is provided as part of a monthly bill, the notice must be "prominently identified as a disconnection notice." OAC 4901:1-18-06(A)(5).

Utilities are also subject to numerous regulations about how and when the actual disconnection may occur. As an initial matter, utilities are prohibited from disconnecting in winter months – i.e., "November first through April fifteenth" – unless the utility fulfills several additional requirements. OAC 4901:1-18-06(B). Utilities are also prohibited from disconnecting after 12:30 p.m. on a Friday or any other day "preceding a day on which all services necessary for the customer to arrange and the utility company to perform reconnection are not regularly performed." OAC 4901:1-18-06(A)(1). And when utilities are permitted to disconnect, utilities must attempt to provide personal notice on the day of disconnection. If the customer is not home, utilities must attempt to provide notice to another "adult consumer" or else "attach written notice to the premises in a conspicuous location prior to disconnecting service." OAC 4901:1-18-06(A)(1).

Utilities face further regulations concerning disconnection of customers with medical issues. *See* R.C. 4933.122(C); OAC 4901:1-18-06(C). Utilities are prohibited from disconnecting service for nonpayment when doing so "would be especially dangerous to the

health of any consumer who is a permanent resident of the premises" or "would make operation of necessary medical or life-supporting equipment impossible or impractical." OAC 4901:1-18-06(C)(1)(a)-(b). To that end, the Commission has established detailed rules for customers to certify medical conditions to utilities. *See* OAC 4901:1-18-06(C)(1).

Utilities are also subject to strict requirements concerning *reconnection* of service. For example, upon proof of payment of the delinquent amount, and if the customer's service has been disconnected for ten days or fewer, the utility must reconnect service "by the close of the following regular utility company working day." OAC 4901:1-18-07(A)(1). And if a customer provides a valid medical certificate to the utility before 3:30 p.m., the utility must restore service within the same day. OAC 4901:1-18-06(C)(3)(g).

Critically, however, submetering landlords and submetering companies are free to disregard all of these important disconnection-related protections. For example, submetering landlords or submetering companies may disconnect utility service for any reason, including reasons unrelated to the provision of utility service. Thus, submetering landlords or submetering companies may use disconnection (or the threat of disconnection) as a means of gaining leverage over an end-use customer. Even where customers have fully paid for utility service, submetering landlords or submetering companies can use the threat of disconnection to speed an eviction process. In addition, submetering landlords or submetering companies are able to disconnect service even where the customer disputes charges. Thus, submetering landlords or submetering companies could potentially charge unjustified fees and simply disconnect service if the end-use customer refuses to pay.

Submetering customers also lack any of the critical safeguards related to notice, day-of-disconnection, medical certification, and reconnection. Thus, unlike Commission-regulated

public utilities, submetering landlords or submetering companies may disconnect end-use customers without providing advanced notice, without providing personal notice on the day of disconnection, and without informing the customer of the amount due and the customer's rights. Submetering landlords or submetering companies also may disconnect at any time of day or night, including on weekends and during winter months, and need not provide any relief to customers with serious medical ailments. And submetering landlords or submetering companies face no time restrictions concerning *reconnection* of service, and thus are free to leave service disconnected for days even after payment has been made.

Finally, submetering customers lack any ability to enter into Commission-mandated payment plans. AEP Ohio, Duke, and other electric distribution utilities are required by the Commission to offer payment plans to low income customers so that these customers are able to pay an income-adjusted amount to avoid disconnection. But no such protections are afforded submetered customers. If a low-income submetering customer is having trouble paying his or her bills, the landlord or submetering company can disconnect immediately for failure to pay the *full* amount, and need not offer any payment plan. Indeed, none of the foregoing consumer protections, which have been painstakingly designed and administered by the Commission, apply to customers served by landlords and submetering companies.

D. There Is a Potential for Submetering Service to Be Unreliable

The Commission requires public utilities to provide reliable service to customers. To that end, AEP Ohio and Duke have established numerous Commission-regulated policies to ensure that transformers, lines, meters, and other distribution infrastructure installed by AEP Ohio and Duke are maintained properly and provide reliable service to customers. But no such Commission reliability standards apply to submetering arrangements, though 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. This has the potential to result in unreliable service.

For example, AEP Ohio and its affiliates operating in other states have had experience taking over "private" distribution lines and other distribution infrastructure that was installed by developers or property owners. In many such cases, AEP Ohio has found that the developer has attempted to save costs by installing certain equipment – or engaging in certain maintenance practices – that would never pass muster under AEP Ohio's Commission-regulated reliability standards. In such cases, AEP Ohio faces the difficult choice of either taking over operation of the substandard or poorly maintained equipment or replacing the equipment at substantial cost. Submetering only exacerbates these problems by encouraging landlords and submetering companies to install and maintain their own distribution infrastructure. When an apartment or condominium complex is *not* submetered, by contrast, a Commission-regulated utility installs and maintains the necessary infrastructure, and reliability is overseen by the Commission.

E. Submetering Undermines Public Confidence in This Commission, and Threatens the Reputation of Commission-Regulated Utilities

Although submetering greatly harms submetering customers, the harm caused by submetering is not limited to customers. Submetering also undermines public confidence in this Commission and damages the reputation of Commission-regulated public utilities such as AEP Ohio and Duke.

The public and lawmakers expect the Commission to exercise careful oversight of utility service in Ohio, especially in the service territories of Commission-regulated public utilities. When a customer receives a utility bill, he or she expects that the charges and terms of service reflected on that bill were subject to intense scrutiny by the Commission, its staff, and numerous stakeholders. In addition, the public expects that the Commission will ensure the reliability and

quality of their utility service. And the public expects that the Commission will protect customers from any unfair utility practices.

Thus, when the public perceives that their utility service is inadequate on any of these grounds – if they believe their utility rates are too high, their service is too unreliable, or their utility's actions toward them are unfair – the public's confidence in the Commission suffers. And that is precisely what happens with submetering. When landlords and submetering companies are free to charge exorbitant rates and deny utility customers the protections and benefits that the Commission ensures, they erode the public's confidence in the Commission. The public does not distinguish between submetering utility service and utility service from a Commission-related utility. In all cases, the public assumes that the Commission is ultimately responsible.

The same can be said of the reputation of Commission-regulated public utilities. AEP Ohio and Duke work hard to maintain a positive reputation among their customers. But when submetering customers in the service territory of AEP Ohio and Duke are unhappy with their service, they often do not distinguish between a submetering company and the Commission-regulated utility. For instance, AEP Ohio's call centers often receive calls from unhappy submetered customers who do not understand that AEP Ohio is not, in fact, their distribution provider.

Moreover, submetering companies often adopt corporate names that give the impression that the submetering company is – or is affiliated with – a Commission-regulated public utility. For example, two of the largest submetering companies operating in AEP Ohio's territory are Nationwide Energy Partners and American Power & Light. On their face, these names make the submetering companies appear as if they are Commission-regulated public utilities. It is easy to

imagine how a submetered customer in AEP Ohio's service territory could confuse "American Power & Light" with "American Electric Power." Thus, when landlords and submetering companies are free to charge exorbitant rates and deny basic protections to their customers, they harm the reputation of other Commission-regulated entities by association.

II. The Commission's Three Questions Should Be Answered in a Way That Limits Submetering to the Greatest Extent Possible in This State

A. Assuming the Continuing Validity of the *Shroyer* Test, Condominium Associations and Their Agents Qualify as "Public Utilities" Under That Test

The Commission's first request for comments asks: "Are condominium associations and similarly situated entities, including third-party agents of those entities, public utilities pursuant to the *Shroyer* test[?]" Entry 2. This question assumes that the three-part test articulated in *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992), continues to be valid and should apply to condominium associations. As discussed below, *see infra* Section II.B, AEP Ohio and Duke propose that the Commission reconsider the *Shroyer* test in all circumstances (including condominiums) and instead adopt a test that would effectively eliminate submetering in nearly all cases. Nonetheless, assuming the continuing validity of *Shroyer*, condominium associations and their agents *are* "public utilities" under that test.

Shroyer articulated a three-part test to determine whether an entity is operating as a "public utility" under R.C. 4905.02. The *Shroyer* test was developed in the context of determining whether mobile home park owners are public utilities when they provide water service to tenants. Removing language related to mobile homes and water so that the test applies more generally, *Shroyer* asks:

(1) Has the entity "manifested an intent to be a public utility by availing [itself] of special benefits available to public utilities such as accepting a grant of a franchised territory, a certificate of public convenience and necessity, the use of eminent domain, or use of the public right of way for utility purposes"?

(2) Are the utility services offered by the entity "available to the general public rather than just to tenants"?

(3) Is the provision of utility service "ancillary to the [entity's] primary business"?

See Entry 1-2 (quoting *In re Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., Opinion and Order (Feb. 27, 1992)); *see also Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 465 (2006). Under each prong of the *Shroyer* test, both condominium associations and their agents should be considered "public utilities."

1. Condominium Associations Are "Public Utilities" Under the *Shroyer* Test

Before applying the three-part *Shroyer* test to condominium associations, it is important to note that the *Shroyer* test was designed in the context of a landlord–tenant relationship and applies most clearly in that context. There are important differences between the landlord–tenant relationship and the condominium association–condominium owner relationship, and those differences should inform the application of the *Shroyer* test.

Most importantly, whereas tenants merely lease the premises they occupy, condominium owners *own* their condominiums. There may be some intuitive appeal to the idea of a landlord installing electrical infrastructure *in his own building* and then charging tenants for the utility service that he provides. But that simplistic picture breaks down in the context of condominiums, where each resident owns his or her premises. When the condominium association resells utility service to numerous individual owners of property, it functions more like a Commission-regulated public utility. Indeed, this Commission has been much more willing to find that an entity is a "public utility" if it resells utility service to customers that own

their own land (i.e., are not tenants). For instance, in *Meek v. Gem Boat Service, Inc.*, No. 85-1891-WS-CSS (1987), *available at* 1987 WL 1466799, the Commission held that a business that provided water and sewer service to vacation cottages in a marina was a "public utility." In so doing, the Commission expressly distinguished a previous vacation-home case in which "residents leased their land from the company's majority stockholder." *Id.* at *7. The provider of water and sewer service in *Meek* was a "public utility," the Commission reasoned, in part because its "customers own their property outright." *Id.*

Moreover, individual condominium owners are far more "captive" than tenants are. An individual who rents an apartment or store front in a mall signs a lease with an express term, often, in the case of apartments, a one-year lease. As a result, if a tenant is unhappy with the utility rate being charged by a submetering landlord, the tenant has the ability to leave the premises at the expiration of the lease. But not so for condominium owners. It is much more difficult – and costly – for condominium owners to sell their condominium if submetered utility service is provided at unreasonable rates or unjust terms.

Keeping in mind these important distinctions between submetered tenants and submetered condominium owners, submetering condominium associations should be considered "public utilities" under the *Shroyer* three-part test. First, condominium associations "avail[] themselves of special benefits available to public utilities" by establishing a *de facto* "certified territory" within the condominium complex. Just as established public utilities such as AEP Ohio have the exclusive right to serve customers within their territory, submetering condominium associations use condominium agreements and rules to establish the same exclusive right for condominium owners. Condominium owners also can use the functional

equivalent of "eminent domain" or "public right of way" by requiring condominium owners to provide access to association-owned electric, gas, or water infrastructures.

The second *Shroyer* factor – whether utility services offered by the entity are "available to the general public rather than just to tenants" – expressly references the concept of "tenants" and thus underscores how condominium associations are different than landlords. Condominium associations do not limit their provision of services to "tenants." Rather, they provide utility service to all *owners* – essentially, "members of the general public" – within the association.

Finally, the third *Shroyer* factor – whether the provision of utility service is "ancillary to the [entity's] primary business" – also epitomizes the difference between condominium associations and landlords. Unlike a typical landlord, whose "primary business" is to lease premises for use as dwellings or businesses, the condominium association does not have *any* business. It is merely an association of property owners who have agreed to be bound by certain rules as a condition of sharing common buildings and other infrastructure. Thus, when condominium associations resell utility service to condominium owners, that is their *only* "business." Under all three prongs of the *Shroyer* test, condominium associations should be considered "public utilities" subject to the Commission's jurisdiction.

2. Submetering Companies Acting as Agents of Condominium Associations Are "Public Utilities" Under the *Shroyer* Test

The Commission's first request for comments expressly asked whether "third-party agents" of condominium associations are "public utilities" under the *Shroyer* test. As the Commission is now aware from the *Whitt* complaint case, an industry of "submetering companies" has developed in recent years. (The submetering company at issue in the *Whitt* case is Nationwide Energy Partners ("NEP"). *See In re Whitt*, Complaint ¶ 6.) These entities purchase utility services and then resell them to submetered customers, sending these customers

utility bills and attempting to collect if customers refuse to pay. The Commission should find that these entities are "public utilities" – and thus, in many instances, illegally providing electric distribution services in violation of the Certified Territory Act and other Ohio laws – regardless of whether they are "agents" of condominium associations.

Under the first prong of the *Shroyer* test, submetering companies have clearly "availed themselves of special benefits available to public utilities" because they cloak themselves in the appearance of a public utility in order to compel customers to pay their bills. Once again, the *Whitt* complaint case provides a telling example. The example utility bills attached to Mr. Whitt's complaint shows that NEP has designed its bills to appear just like a bill of a Commission-regulated public utility. The NEP bill contains many of the indicia of a utility bill: a "service address," a "billing period," a "meter number" for electric and water meters, and charts showing historical electric and water charges and history. *See In re Whitt*, Complaint Ex. A. The bill also contains utility charges that are virtually identical to Commission-regulated utility charges, including, for electric service, a "customer charge," a "generation charge," a "transmission charge," and a "distribution charge." The bill is clearly designed to make customers think that NEP is a public utility, and in this way, submetering companies like NEP have "availed themselves of special benefits available to public utilities" under the first prong of the *Shroyer* test.

Under the second prong of the *Shroyer* test, utility services offered by submetering companies are "available to the general public rather than just to tenants." Unlike a landlord who may assess utility charges only to the tenants of his building, submetering companies like NEP are operating in numerous buildings across the territories of Commission-regulated utilities.

Their utility services are clearly "available" to any "member of the general public" residing in one of their submetered buildings.

Under the third prong of the *Shroyer* test, the provision of utility services is not "ancillary" to a submetering company's "primary business"; the provision of utilities service *is* these companies' primary business. Submetering companies such as NEP have established themselves as alternative providers of utility services within the certified territory of Commission-regulated public utilities. That should not be permitted under Ohio law. Under all three prongs of the *Shroyer* test, the Commission should find that submetering companies are "public utilities" and thus are providing electric distribution service in violation of the Certified Territory Act and several other provisions of Ohio law.

B. The Commission Should Replace the *Shroyer* Test with a New Test that Effectively Eliminates Submetering by Recognizing that Any Entity that Charges End-Use Customers for Utility Service Is a "Public Utility"

The Commission's second request for comments asks: "Are there certain situations in which the *Shroyer* test cannot or should not be applied[?] If the *Shroyer* test cannot or should not be applied, what test should the Commission apply in those situations[?]" Entry 3. In response to this question, AEP Ohio and Duke submit that the Commission should revisit the *Shroyer* test in *all* circumstances and create a new or revised test that would limit, to the greatest extent possible, the substantial harms caused by submetering.

1. The *Shroyer* Test Is Not Mandated by Statute, and the Commission Can Alter That Test Pursuant to the Commission's Expert Authority to Implement R.C. 4905.02 and R.C. 4905.03

It is important to note at the outset that the *Shroyer* test is a creation of the Commission, not of any statute, and just as the Commission had the authority to create the *Shroyer* test, the Commission has the authority to alter or amend it. The plain text of the Revised Code's definition of "public utility" does not create any exception for landlords or submetering

companies providing utility services to submetered customers. *See* R.C. 4905.02-4905.03. To the contrary, the statutory definition of "public utility" is broad and, by its terms, does not differentiate between utility service provided by a Commission-regulated public utility such as AEP Ohio and utility service provided by a submetering landlord or submetering company.

In particular, R.C. 4905.03 lists the different types of public utilities (e.g., electric, gas, water, and sewer), and its definitions are exceedingly broad, applying to *any* business that provides the utility service in question. For instance, R.C. 4905.03 defines an "electric light company" as any entity "supplying electricity for light, heat, or power purposes to consumers within this state," R.C. 4905.03(C); a "natural gas company" as any entity "supplying natural gas for lighting, power, or heating purposes to consumers within this state," R.C. 4905.03(E)); and a "water-works company" as any entity "supplying water through pipes or tubing, or in a similar manner, to consumers within this state," R.C. 4905.03(G).

Accordingly, as the Supreme Court has expressly recognized, the "statutory definitions" of the public utilities identified in R.C. 4905.03 "are not self-applying when considered in the context of a landlord-tenant relationship." *Pledger v. Pub. Util. Comm. of Ohio*, 109 Ohio St. 3d 463, 2006-Ohio-2989, ¶ 17. To the contrary, "[s]omething more than the words of the statute is needed," and to fill that gap, the Commission "developed the *Shroyer* test" in order "to assist in its determination of the jurisdiction question" when it comes to submetering arrangements. *Id.* ¶ 17. In *Pledger*, the Supreme Court accepted the *Shroyer* test, but only as the Commission's expert *implementation* of the statute. As the Court expressly recognized, "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Id.*

¶ 40. That was the basis on which the Court accepted the *Shroyer* test – not as a test required by statute, but as a test developed by the Commission to *interpret* the statute.

Therefore, just as the Commission developed the *Shroyer* test to implement R.C. 4905.02 and R.C. 4905.03, the Commission can change the *Shroyer* test. And though it is no doubt true that the Supreme Court has upheld previous Commission determinations that some landlords are not "public utilities" when they resell utility service to their tenants, *see., e.g.*, *FirstEnergy Corp. v. Pub. Util. Comm. of Ohio*, 96 Ohio St. 3d 371, 2002-Ohio-4847, if the Commission revisits those determinations (as AEP Ohio advocates below), the Supreme Court will defer to this determination as a "statutory interpretation[] by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Pledger*, 2006-Ohio-2989, ¶ 40. That is especially true if, as set forth below, the Commission replaces the *Shroyer* test with a revised test that gives effect to the plain and broad meaning of R.C. 4905.03, which recognizes no distinction between utility service provided by a Commission-regulated public utility and utility service provided by a submetering landlord or submetering company.

2. The Commission Should Revisit *Shroyer* and Adopt a Revised Test that Recognizes that Any Landlord or Submetering Company that Charges for Utility Service Is a Public Utility Under Ohio Law

As discussed at length above, submetering harms utility customers in numerous ways by denying them many of the critical benefits and protections afforded customers of AEP Ohio, Duke, and other Commission-regulated public utilities, especially when the end-use customers are charged a higher rate than customers of a Commission-regulated utility would otherwise pay. It also causes reputational harm to legitimate public utilities such as AEP Ohio and Duke, and it erodes public confidence in the Commission. Putting aside potential issues of reliability of energy delivery, the electric energy that powers submetering customers' homes and businesses is

indistinguishable from the electric energy provided to customers of Commission-regulated public utilities. But when it comes to the critical benefits and protections that Ohio law provides to utility customers, submetering customers are essentially second-class citizens, subject not to the protection of law, but to the whim and caprice of landlords and submetering companies.

Accordingly, AEP Ohio and Duke propose that the Commission revisit *Shroyer* and establish a new test for defining a "public utility" that identifies current and future submetering arrangements as what they are: The provision of utility service that should be subject to the strictures of Ohio law and Commission regulation. Specifically, AEP Ohio and Duke propose replacing the three-part *Shroyer* test with a new, simple test that would essentially eliminate unregulated submetering:

> 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.

This test would give effect to the plain and broad language of R.C. 4905.03, which does not distinguish between utility service provided by a Commission-regulated public utility and utility service provided by a submetering landlord or submetering company. And as the "[s]omething more" needed to implement R.C. 4905.03 in the context of submetering, *Pledger*, 2006-Ohio-2989, ¶ 17, the test proposed by AEP Ohio and Duke adds two additional components to flesh out R.C. 4905.03's meaning.

First, the proposed test focuses on *charges* for utility service. For example, Section 4905.03(C) of the Revised Code provides that an entity constitutes an "electric light company" if it is "engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state." To give meaning to that provision, AEP Ohio and Duke submit that any entity that *charges* for the supply of electricity – for example, any entity that assesses

separate rates or charges for kWh of electric energy delivered – is necessarily engaged in "the *business* of supplying electricity . . . to consumers." R.C. 4905.03(C) (emphasis added). This would, of course, include all landlords and submetering companies that assess separate rates or markups for utility usage.

Second, AEP Ohio's proposed test focuses on *end-use customers*. This gives effect to R.C. 4905.03's repeated reference to "consumers." Although previous Commission interpretations of R.C. 4905.03, affirmed by the Supreme Court in deference to the Commission's judgment, have found that some submetered customers are not "consumers" under R.C. 4905.03, *see, e.g.*, *FirstEnergy*, 2002-Ohio-4847, ¶ 9, AEP Ohio and Duke respectfully request that the Commission revisit that determination. As described above, all end-use customers in submetering arrangements – i.e., the tenants and condominium owners who actually *use* the electricity or other utility service – are utility "consumers" in precisely the same way as customers of Commission-regulated utilities. But submetered end-use customers are denied the critical protections and benefits provided to end-use customers of Commission-regulated utilities, most notably rate protections. Thus, the Commission should give proper meaning to the term "consumer" in R.C. 4905.03 by defining it as *any* end-use tenant or condominium owner in a submetering arrangement – i.e., the person who actually uses the electricity to power electric-consuming devices, who burns the gas in stoves or heaters, or who drinks the water coming out of the tap.

The effect of the test proposed by AEP Ohio and Duke would be to recognize that all landlords, condominium associations, and submetering companies that meter utility service and assess usage-based utility charges to end-use tenants or condominium owners are acting as "public utilities" under state law. If landlords, condominium associations, and submetering

companies that assess separate rates or markups for utility service are "public utilities," then in nearly all cases, their provision of electric distribution service (and potentially other utility services) to end-use customers would violate the Certified Territory Act by encroaching on the exclusive rights of established public utilities such as AEP Ohio and Duke to provide noncompetitive electric service within their territories. *See* R.C. 4933.83. And even if the Certified Territory Act could be set aside (at least for electric utilities, it cannot be), any submetering landlord, condominium association, or submetering company – if properly recognized as a public utility – would be subject to Commission regulation and would have to follow all laws and Commission rules, including Commission approval of rate tariffs. AEP Ohio and Duke expect that many submetering landlords, condominium associations, or submetering companies would cease submetering instead of complying with these regulations. That outcome would prove the point: Submetering exists – and is profitable – only because submetering entities can charge higher rates and need not comply with the many legal requirements that apply to established public utilities such as AEP Ohio and Duke.

3. If the Commission Were to Adopt the Test Proposed by AEP Ohio and Duke, AEP Ohio and Duke Would Not Oppose a Statutory Interpretation that Maintains Some Existing Submetering Arrangements

AEP Ohio and Duke recognize that the adoption of their proposed test would significantly alter the status quo for many existing submetering arrangements. Transitioning to a situation where established public utilities such as AEP Ohio or Duke would take over utility service to current submetered customers could take time and significant resources (or, in some cases, be impractical). Thus, AEP Ohio and Duke propose three ways to interpret and apply the statutory definitional test in a manner that permits existing submetering arrangements to continue

without being regulated as a "public utility" so long as they do not unduly profit from submetered customers.

First, under the proposed test, landlords and condominium associations that "include utilities" in rent or condominium dues need not count as "public utilities." For example, 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. AEP Ohio and Duke would support an interpretation of its proposed test under which such a landlord is not "charg[ing] end-use customers for utility service" and thus is not a public utility. Although this outcome would not alleviate all of the problems with submetering described above, *see supra* Part I, it would eliminate most of them, including the significant issues concerning submetering rates that are much higher than regulated rates. If utilities are "included" in rent or condominium dues, then prospective tenants or condominium owners will have full disclosure of those fees before signing a lease or purchasing a condominium, and they necessarily would not be subject to volatile or unreasonably high charges for utility services. And if the rent or condominium dues are too high, the prospective tenant or owner can simply choose a different apartment to rent or a condominium to purchase.

Indeed, exempting landlords and condominium associations that "include utilities" in rent or condominium dues would provide a straightforward and practical approach if the test proposed by AEP Ohio and Duke were adopted. That is, rather than requiring that the established public utility such as AEP Ohio or Duke take over service to all currently submetered customers, submetered apartment buildings, condominiums, shopping malls, etc. could switch to a system in which utility charges are "included" in rent or condominium dues. For example, if a landlord has installed lines, transformers, and other infrastructure to provide electric service to

tenants, AEP Ohio or Duke need not purchase that infrastructure and take over service to each tenant. Rather, the landlord could simply provide utility service as part of its rent charges that, among other things, would still recover both the landlord's utility costs and his sunk infrastructure investment. In statutory terms, that landlord does not create a separate transaction for the sale of utility services and, thus, would not be in the business or supplying utility services – even though the costs for procuring utility services for tenants would still be passed through and recovered as part of rent payments.

Second, and relatedly, AEP Ohio and Duke would not oppose an interpretation of their proposed test that would exempt from the definition of "public utility" any existing submetering arrangement where the landlord or submetering company merely passes-through utility charges without any markup.[1] This approach is consistent with the test proposed by AEP Ohio and Duke (which is based on the governing statutory definitions) that focuses on a separate sales transaction between the submetering agent and the end-user through the levying of an additional charge (i.e., something beyond just requiring the end-user to pay its fair share of the charges paid to purchase the utility services). Like a group of six friends that split the check when sharing dinner at a restaurant, there is no upcharge or additional fee gathered (and no food vendor license required) for the individual who volunteers to interact with the restaurant as the customer and is

[1] If the Commission were to adopt this proposal, the Commission would have to define exactly when a landlord or submetering company is passing through utility costs without any markup. As an initial proposal for such a definition in the context of electric service, AEP Ohio suggests that landlords and submetering companies be exempted from the definition of "public utility" only if the total bills to submetered customers do not exceed the amount the landlord or submetering company paid on the master-meter bill. In the event the landlord or submetering company shops for generation supply for the master meter, additional restrictions need to be implemented to avoid gaming or subterfuge by a submetering agent that is acting in concert with a CRES provider to inflate the bill presented to the submetering agent. Specifically, such landlords or submetering companies should be exempted from the definition of "public utility" only if the total bills to submetered customers do not exceed the sum of (a) the noncompetitive service charges on the master-meter bill and (b) either the competitive service charges on the master-meter bill or the distribution utility's SSO generation rate, whichever is lower.

reimbursed for the others' share of the bill; only one person is the customer of record while the other five diners also pay their fair share (and nothing more or less). The person who pays the check is no more in the business of supplying food to customers than the other five people in his dinner party.

This interpretation of the test proposed by AEP Ohio and Duke would hold that any landlord or submetering company that merely allocates master-meter utility charges to individual residents is not truly "charg[ing] end-use customers" for utility service, but simply passing-through utility costs with no markup. This would constitute a significant accommodation allowing existing submetering arrangements to continue. Although it would not provide all of the regulatory protections for submetering customers that are addressed above, it would prevent egregious submetering rate mark-ups while recognizing that the many submetering arrangements that currently exist may face difficulty transitioning to a non-submetering arrangement.

Third, more generally, AEP Ohio and Duke would not oppose other reasonable accommodations by the Commission as a means of easing the transition away from submetering. For example, AEP Ohio and Duke would not oppose a Commission order adopting the test proposed by AEP Ohio and Duke to define "public utility" but allowing current submetering arrangements to continue for a reasonable period of transition. For example, in order to "include utilities" in rent or condominium dues, landlords or condominium associations may have to wait for the expiration of current long-term leases or condominium agreements. It would be reasonable to exempt such entities from the definition of "public utility" for a period of transition. There may be additional special circumstances that the Commission could consider to likewise exempt – temporarily or even, potentially, permanently – some existing submetering arrangements for which transition to utility service by an established utility would be difficult or

impractical. To that end, if the Commission is inclined to adopt the test proposed by AEP Ohio and Duke, the Commission should consider opening a submetering "Phase II" docket or workshop to address the more granular, logistical details that will likely arise if the Commission adopts the proposed test.

C. If the Commission Were to Assert Jurisdiction Over Submetering Providers that Charge Separate Rates to End-Use Customers, It Would Benefit Nearly All Customers and Stakeholders

The Commission's third request for comments asks: "What impacts to customers and stakeholders would there be if the Commission were to assert jurisdiction over submetering in the state of Ohio[?]" Entry 3.

In Part I above, AEP Ohio and Duke catalogued the significant harm that submetering causes customers. Insofar as the Commission were to assert jurisdiction over submetering by adopting the proposed replacement of the *Shroyer* test and recognizing that any submetering entity is a "public utility" where it charges a separate rate or markup, then as described in Section II.B above, the Commission would substantially curtail unregulated submetering in this State and alleviate many of the substantial harms it causes. This would benefit all customers and stakeholders except those landlords and submetering companies who have profited from customers by charging for utility service without being subject to Ohio utility law or Commission regulation.

Insofar as the Commission's third request for comments contemplates some lesser kind of "jurisdiction over submetering," AEP Ohio and Duke would oppose such action. For example, if the Commission were to assert jurisdiction over submetering entities but subject them to some but not all of the many requirements imposed on established public utilities such as AEP Ohio and Duke, that would create an unjust double-standard that would find no basis in Ohio law. All utility providers should be subject to the same laws, regulations, and standards. The

Commission should reject any proposal that would impose "utility regulation lite" on submetering arrangements.

CONCLUSION

For the foregoing reasons, the Commission should revisit the *Shroyer* test and adopt a revised test that finds that any entity – including a submetering landlord, condominium complex, or submetering company – 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 their submetering company agents are "public utilities" under the *Shroyer* test.

Respectfully submitted,

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Summary: Comments -Initial 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.

Case No. 16-782-EL-CSS
AEP Ohio's Motion to Amend Tariff
Exhibit D
Reply Comments of Ohio Power Company
and Duke Energy Ohio, Inc. in
Case No. 15-1594-AU-COI

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,

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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.

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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.

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion for Tariff Amendment* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 27th day of April 2016, via electronic transmission.

/s/ Steven T. Nourse
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Summary: Motion Ohio Power Company's Motion for Tariff Amendment electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company