

**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.)	

**MEMORANDUM OPPOSING OHIO POWER COMPANY'S MOTION FOR TARIFF
AMENDMENT BY INDUSTRIAL ENERGY USERS-OHIO**

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I. INTRODUCTION

On April 12, 2016, the Office of the Ohio Consumers' Counsel ("OCC") filed a complaint against the Ohio Power Company ("AEP-Ohio") seeking an order directing AEP-Ohio to enforce the resale provisions of its current Terms and Conditions of Service or directing AEP-Ohio to amend the Terms and Conditions to include restrictions on submetering and resale of electric service provided to residential customers. Complaint *passim* (April 12, 2016). The amendment that OCC seeks would limit the availability of submetering to residential landlord-tenant arrangements "where the landlord is not otherwise operating as a public utility." *Id.*, Attachment A. Further, the tariff revision would prohibit the resale or redistribution of utility service "at a charge that is above the landlord's cost of purchasing the service." *Id.*

In response to the Complaint, AEP-Ohio filed an Answer and a Motion for Tariff Amendment on April 27, 2016. Ohio Power Company's Motion for Tariff Amendment

(April 27, 2016) (“Motion”). In the Motion, AEP-Ohio requests that the Public Utilities Commission of Ohio (“Commission”) amend its Terms and Conditions of Service to “clarify” the resale restrictions contained in its Terms and Conditions of Service. *Id.* at 3. The amendments would permit AEP-Ohio to terminate service to customers and restrict resales of electricity service “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.” *Id.*, Exhibit B-2 (Redline Copies of Proposed Schedule Sheets). According to AEP-Ohio, These new restrictions on resale service should apply to all end users because the harms caused by submetering are not limited to residential customers. *Id.* at 8-9.

AEP-Ohio’s rationale to support an amendment of its Terms and Conditions of Service to address issues unrelated to residential electric service is not supported by its Motion or the ongoing investigation of submetering and would impose unreasonable restrictions on resale. Accordingly, the Motion seeks approval of restrictions that are unlawful and should be denied.

II. ARGUMENT

A. **Under R.C. 4928.40(D), an electric utility in this state shall not prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service**

Attempts by utilities to impose restrictions on master metering are not new, and the Commission previously has looked to its statutory authority to determine if the restrictions are lawful. In a 1995 decision, the Commission addressed concerns of

commercial tenants of a mall that sued the landlords, stating that the landlords were violating a resale restriction in the Toledo Edison tariffs and that the landlords were operating illegally as public utilities. *Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987, Entry (Mar. 16, 1995) (“*Brooks*”). Applying a three-part test the Commission had adopted in a case addressing residential water rates, *In re Complaints of Inscho v. Shroyer’s Mobile Homes*, Case Nos. 90-182-WS-CSS, *et al.*, Opinion and Order (Feb. 27, 1992) (“*Shroyer*”), the Commission dismissed the complaint against the landlords. In a separate entry, the Commission dismissed the complaint against Toledo Edison, holding that the utility company had no valid right or interest in restricting redistribution and resale by a landlord if the landlord was not acting as a public utility and the landlord owned the property on which the redistribution took place. *Brooks*, 1996 Ohio PUC LEXIS 292 at *32 & *41 (May 8, 1996).

After the Commission issued its decision in *Brooks*, the General Assembly enacted legislation, Amended Substitute Senate Bill 3 (“SB 3”), restructuring the regulation of retail electric service. SB 3 declared that retail electric generation service is a competitive electric service and limited the Commission’s jurisdiction over retail electric services. R.C. 4928.03 & 4928.05(A) & (B). Additionally, the legislation directed that “no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service.” R.C. 4928.40(D).¹ Under this section, the Commission cannot authorize terms and

¹ Following the enactment of SB 3, the Commission, applying its decision in *Brooks*, held that electric distribution utilities may not impose undue restrictions on the resale of retail electric generation service. In response to tariffs filed by the electric distribution utilities that restricted resale, the Commission directed all utilities to file revised tariffs removing restrictions that did not conform to the Commission’s previous decision permitting submetering. *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for*

conditions that “unnecessarily intrude[] into the landlord-tenant relationship.” *FirstEnergy*, Entry on Rehearing at 2 (Mar. 15, 2001).

B. Authorization of AEP-Ohio’s proposed amendments to its Terms and Conditions of Service concerning resale are unlawful and unreasonable and therefore would violate the requirements of R.C. 4928.40(D).

In the last two years, certain companies that provide submetering and which have been alleged to be engaged in the direct provision of utility services to residential customers have triggered media, legislative, and regulatory attention. In response to a recent consumer complaint, the Commission opened its investigation into submetering. *In the Matter of the Commission Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Entry (Dec. 16, 2015) (“*Submetering Investigation*”).

AEP-Ohio has used the *Submetering Investigation* to advance a broader agenda to impose restrictions on master-metering arrangements and restrictions on resale of retail electric service. See *id.*, Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc. (Jan. 21, 2016) (proposing a redefinition of “public utility” as a means of regulating submetering). In particular, AEP-Ohio (in comments filed with Duke Energy Ohio (“Duke”)) proposed to eliminate unregulated submetering by focusing on the billing arrangement between the service provider and its customer, treating any reseller that charges for resale services as a public utility for purposes of R.C. 4905.03 AEP-Ohio/Duke Comments at 24. Under the AEP-Duke proposal, Commission jurisdiction would cover all landlords and submetering companies that assess separate rates or markups for utility usage. *Id.* at 24-25. As Industrial Energy Users-Ohio (“IEU-Ohio”)

Approval of Their Transition Plans and for Authorization to Collect Transition Revenues, Case No. 99-1212-EL-ETP, Entry at 3-4 (Jan. 18, 2001), *aff’d* on rehearing, Entry on Rehearing (Mar. 15, 2001) (“*FirstEnergy*”).

noted in Reply Comments filed in the *Submetering Investigation*, the attempt by AEP-Ohio and Duke to redefine the Commission's jurisdiction was too broad, unreasonable, and unlawful because it would unduly interfere with private agreements such as shared service arrangements² that have been long recognized as beneficial to customers and lawful. *Id.*, Reply Comments of Industrial Energy Users-Ohio (Feb. 5, 2016).

In this proceeding, AEP-Ohio continues to advance its agenda to impose restrictions on resale of electric generation service to recommend a significant and unjustified broadening of restrictions on resale of retail electric service. Alleging that “[s]ubmetering is ... harmful in the context of commercial and industrial customers,” Motion at 8-9, AEP-Ohio proposes that it be authorized to amend its Terms and Conditions of Service concerning resale to provide that “[e]lectric 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.” *Id.*, Exhibit B-2. (AEP-Ohio proposes to include this new language in both the standard service offer tariff and the distribution tariff.) Additionally, AEP-Ohio seeks to restrict the resale of electricity by a landlord to those instances in which “the landlord does not assess any charge for electric service except as provided

² Shared services arrangements are agreements among multiple non-residential consumers located on property, such as a campus, which includes facilities, plant, and equipment that allow each consumer to receive electricity, natural gas, water or wastewater treatment services through a “master-meter,” or jointly or individually owned facilities, plant, or equipment. These arrangements arise voluntarily and have become more common over time because corporations have spun off or separated individual business units that may have separate corporate identities even if commonly owned. Typically, these arrangements are ancillary to and not the primary purpose of the relationship between the individual non-residential consumers. *Submetering Investigation*, Initial Comments of Industrial Energy Users-Ohio at 8 (Jan. 21, 2016).

above.” *Id.* (This language appears only in AEP-Ohio’s proposed standard service offer tariff.)

The resale restrictions that AEP-Ohio seeks to impose are unreasonable for several reasons.

Initially, AEP-Ohio fails to demonstrate any factual basis for expanding the remedy sought by OCC for the alleged injuries suffered by residential customers. Although AEP-Ohio alleges that “[s]ubmetering is also harmful in the context of commercial and industrial customers, and there is no reason to limit tariff changes to residential customers,” Motion at 8-9, AEP-Ohio’s broad claim is made without citation or support. The claim is also contradicted by the record developed in the *Submetering Investigation*. No commenter indicated that submetering adversely affected commercial or industrial customers. To the contrary, IEU-Ohio demonstrated (and no commenter suggested otherwise) that shared service arrangements that may include master metering are used and beneficial to commercial and industrial customers.

Additionally, AEP-Ohio’s proposed tariff change would undermine shared services arrangements in at least two ways, neither of which is reasonable.

First, the proposal would permit AEP-Ohio to terminate service to the parties served by a shared services arrangement if any fee is charged, including something as reasonable as an administrative fee agreed to by the parties to the shared services arrangement.³ While common sense dictates that the Commission should permit an

³ The notion that any fee would trigger termination of service may be a response to comments filed by IEU-Ohio concerning the attempt by AEP-Ohio and Duke to extend the Commission’s jurisdiction to any arrangement that was not a “pass-through” arrangement. The AEP-Ohio/Duke Comments demonstrate that the proposal lacks any well-defined concept of what is the centerpiece of the exception. In a footnote, the Comments recognize that the Commission would have to define “exactly” what a pass-through is. Then the Comments add that additional rules would be needed to avoid “gaming” if the landlord shops for competitive generation service. AEP-Ohio/Duke Comments at 28, n.1.

agreement among sophisticated parties as to collection of administrative costs, AEP-Ohio could “turn out the lights” under its ill-conceived amendments that fail to define what constitutes a “mark up.”

Second, the proposal would permit AEP-Ohio to terminate service to the parties served by the shared services arrangement if charges among the parties are allocated in a manner other than “actual usage.” Shared service agreements, however, are often used in instances in which an end-user’s utility service is not metered. In those instances, there would be no practical way to determine whether the end-user is being billed for “actual usage.” Even if the end user is metered, however, AEP-Ohio provides no definition as to what constitutes “actual usage,” leaving it complete discretion to determine under what circumstances it may terminate service.

Moreover, AEP-Ohio fails to demonstrate why these amendments are necessary to protect its interest. AEP-Ohio has no pecuniary interest in interrupting service unless its position is a poorly veiled attempt to increase distribution charges or impose new charges for the additional metering its amendment would impose.⁴ These pecuniary interests cannot be considered legitimate when AEP-Ohio can already recover its cost of service through its existing fees, charges, and rates.

⁴That AEP-Ohio is using this proceeding as an attempt to increase its charges to customers is explicit. According to AEP-Ohio, it “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.” Motion at 5 n.1. AEP-Ohio’s attempt to increase revenue ignores that these newly enrolled customers will be subject to AEP-Ohio’s base distribution rates and riders that afford AEP-Ohio the opportunity to recover the cost of metering in its base rates. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually, and, if Their Proposed Merger Is Approved, as a Merged Company (collectively, AEP-Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, *et al.*, Staff Report passim (Sept. 15, 2011). AEP-Ohio’s attempt to double recover metering costs from customers should not be approved in this proceeding (or any other).

AEP-Ohio's proposed amendment would also place an undue burden on the Commission. Under AEP-Ohio's proposed amendment, the Commission would be required to police the arrangements among AEP-Ohio, master metered customers, and end users. As the Commission has previously found, the Commission has neither the statutory authority nor the staff to insert itself into the landlord-tenant relationship. *Shroyer*, Opinion and Order, *passim* (Feb. 27, 1992). It is no better positioned to police shared service arrangements.⁵

In summary, AEP-Ohio is seeking to terminate retail electric services to commercial and industrial customers based on unreasonable and unnecessary conditions. Under R.C. 4928.40(D), however, an electric utility in this state shall not prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service. Accordingly, the Commission should deny AEP-Ohio's Motion.

III. CONCLUSION

As IEU-Ohio anticipated in a Motion to Intervene in a complaint against a submetering company many months ago,⁶ the Commission is being called upon to use the legitimate concerns of residential customers to intrude into long accepted business practices of commercial and industrial customers that are not subject to the Commission's

⁵ Rejecting AEP-Ohio's unlawful restrictions on the provision of electric service and resale does not mean that end users of electric service will not be protected from unlawful behavior. If a company is operating as an electric distribution company or electric service company under long-standing and well-understood statutory requirements, it is subject to the Commission's jurisdiction. R.C. 4905.02, R.C. 4905.03, & R.C. 4928.05. If that company also is acting unlawfully or unreasonably, the Commission has a range of tools to protect end users. R.C. 4905.26, R.C. 4928.08, & R.C. 4928.09. The Commission's authority, however, does not extend to granting to AEP-Ohio the boundless discretion it seeks to terminate service through unreasonable restrictions on resale of retail generation service.

⁶ *Mark A. Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS, Motion to Intervene and Memorandum in Support of Industrial Energy Users-Ohio (June 23, 2015).

jurisdiction. In this case, the Commission should reject the attempt by AEP-Ohio to extend its ability to interfere with sound business practices that include shared service agreements because the Commission cannot authorize an electric utility to prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service. R.C. 4928.40(D).

Respectfully submitted,

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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 *Memorandum Opposing Ohio Power Company's Motion for Tariff Amendment by Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio to the following parties of record this 10th day of May 2016, *via* electronic transmission.

/s/ Frank P. Darr

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