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

JOINT APPLICATION FOR REHEARING OF THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF GREATER CLEVELAND AND THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF OHIO

Glenn S. Krassen
BRICKER & ECKLER LLP
1001 Lakeside Avenue East, Suite 1350
Cleveland, Ohio 44114
Telephone: (216) 523-5469
Facsimile: (216) 523-7071
E-mail: gkrassen@bricker.com

Dane Stinson
Dylan Borchers
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Facsimile: (614227-2390
E-mail: dstinson@bricker.com
dborchers@bricker.com

Attorneys for Building Owners and Managers Association of Greater Cleveland and Building Owners and Managers Association of Ohio

January 6, 2017

TABLE OF CONTENTS

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

JOINT APPLICATION FOR REHEARING OF THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF GREATER CLEVELAND AND THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF OHIO

Pursuant to R.C. 4903.10 and Rule 4901-1-35 of the Ohio Administrative Code ("OAC"), the Building Owners and Managers Association of Greater Cleveland ("BOMA Cleveland") and the Building Owners and Managers Association of Ohio ("BOMA Ohio", collectively "BOMA") jointly seek rehearing of the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission") on December 7, 2016.[1] The Order is unlawful and unreasonable for the following reasons:

A. Examining the "reasonableness" of submetering charges to determine if a landlord is a public utility unlawfully extends the Commission's jurisdiction over landlord/tenant relationships and will unreasonably result in the Commission second-guessing the terms of existing lease agreements.

B. A finding that an entity is a "public utility" if it meets only one prong of the *Shroyer* test violates Ohio Supreme Court precedent.

C. The Commission failed to provide an exception for commercial landlords despite the fact there is no evidence of submetering abuse in the commercial leasing context and despite the negative impact the Order will have on commercial building owners.

[1] BOMA's joint application is filed pursuant to R.C. 4903.10 which permits any affected person, firm, or corporation to file an application for rehearing in any uncontested proceeding such as this. With the filing of this Application for Rehearing, BOMA also submits a Motion to Intervene which shows that BOMA's vital interests are affected by the Commission's Order and explains why BOMA has standing to intervene as a party to this proceeding pursuant to R.C. 4902.221.

D. The Commission has engaged in rulemaking without complying with the requirements of R.C. 111.15.

As further discussed in the attached Memorandum in Support, BOMA requests that the Commission grant rehearing and modify the Order to comply with Ohio law.

Respectfully submitted,

/s/ Glenn S. Krassen

Glenn S. Krassen
BRICKER & ECKLER LLP
1001 Lakeside Avenue East, Suite 1350
Cleveland, Ohio 44114
Telephone: (216) 523-5469
Facsimile: (216) 523-7071
E-mail: gkrassen@bricker.com

Dane Stinson
Dylan Borchers
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Facsimile: (614227-2390
E-mail: dstinson@bricker.com
dborchers@bricker.com

Attorneys for Building Owners and Managers Association of Greater Cleveland and Building Owners and Managers Association of Ohio

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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

BOMA Ohio is a professional trade organization representing the six local BOMA associations located in Akron, Cincinnati, Cleveland,[2] Columbus, Dayton, and Toledo. Together they represent commercial property owners that lease over 182,000,000 square feet of office space throughout the great State of Ohio. BOMA Ohio estimates its collective electricity usage to be over 2.8 trillion kWh. BOMA Ohio contributes $5.67 billion to the state economy and supports over 46,500 jobs.

Although BOMA respects the Commission's efforts to address concerns regarding potentially excessive submetering charges in the residential sector, the Commission's Order creates a myriad of legal and practical problems that the Commission may not have envisioned. The Order transforms the *Shroyer* test[3] in such a way that the Commission will become the final arbiter regarding the "reasonableness" of all submetering charges, which will ultimately result in the Commission second-guessing the terms of existing lease agreements. In the past, the Commission correctly refrained from examining the reasonableness of submetering charges until it was established that an entity assessing submetering charges was actually acting as a public

[2] BOMA Cleveland, which filed initial and reply comments in this proceeding, represents nearly 40 million square feet of office space in the greater Cleveland area that houses more than 2,000 companies with existing lease arrangements.

[3] *In re Complaints of Inscho v. Shroyer's Mobile Homes*, PUCO Case Nos. 90-182-WS-CSS, 1990 Ohio PUC LEXIS 966, Opinion and Order, (Feb. 27, 1992) ("*Shroyer*").

utility. The Commission has reversed course in its Order. If a complaint is filed against a landlord, the Commission will now examine submetering charges to determine if the charge is too high ***before*** it has determined that the entity assessing the charge is actually public utility.

According to the Order, landlords and other entities that assess submetering charges may be considered public utilities based solely upon the amount they charge even though there may be no additional indication that they are a public utility. This expansion of the Commission's jurisdiction violates established Ohio Supreme Court and Commission precedent, which states that landlords and tenants have the right to enter into submetering arrangements, and that the Commission should avoid inserting itself into the landlord/tenant relationship. In addition, because the Order states that the Commission can find that an entity is a public utility if only one prong of the *Shroyer* test is established, the Order violates Ohio Supreme Court precedent which establishes that no single factor should be determinative in considering whether an entity is a public utility.

The Order is especially troubling statewide in the context of commercial leases where the lease terms are negotiated by sophisticated parties. Further, as the record in this case demonstrates, submetering is a necessity in many commercial buildings due to their physical infrastructure. The Order would impact many commercial landlords that provide utility service to their tenants pursuant to lease agreements. The Commission's Order goes well beyond the initial scope of this investigation which was initiated because of potentially excessive submetering charges for residential customers. There has been no indication or allegation that submetering abuses exist in the commercial leasing context. The Commission should modify its Order to avoid unlawfully expanding its jurisdiction to regulating the terms of commercial lease agreements.

II. LAW AND ARGUMENT

A. Examining the "reasonableness" of submetering charges to determine if a landlord is a public utility unlawfully extends the Commission's jurisdiction over landlord/tenant relationships and will unreasonably result in the Commission second-guessing the terms of existing lease agreements.

1. The Ohio Supreme Court has held that landlords and tenants have the right to enter into submetering arrangements, and the Commission has historically avoided inserting itself into landlord/tenant relationships.

"The commission is a creature of statute and has only those powers given to it by statute." *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 17 Ohio St. 2d 45, 46, 245 N.E.2d 351, 352 (1969). Under current Ohio law, the Commission only has jurisdiction over "public utilities" as that term is defined in R.C. 4905.02 and 4905.03. Although R.C. 4905.03 sets forth the statutory definitions of "public utilities," the definitions are not self-applying. *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 17.

To determine if a landlord was acting as a public utility, the Commission established a three-part test in *Shroyer*. The *Shroyer* test is a fact-driven, jurisdictional analysis. If the Commission does not have jurisdiction over the entity assessing submetering charges, it has no authority to consider the "reasonableness" of a charge. As the Commission correctly determined in *Shroyer*, examining the "reasonableness" of a charge "is only meaningful if the Commission has first established that it has jurisdiction over the entity providing the service." *Shroyer* at 4.

In *Pledger*, the Ohio Supreme Court affirmed the Commission's application of *Shroyer* as a reasonable method of determining if a landlord is acting as a public utility. *Pledger*, 109 Ohio St. 3d 463, 465, 2006-Ohio-2989, 849 N.E.2d 14, 16 at ¶ 40. The Court also reaffirmed the long-recognized principle that landlords are not automatically considered public utilities because they resell or redistribute public utility services. *Id.* at ¶ 39 citing *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶ 9 ("*FirstEnergy*"). In

FirstEnergy, the Court held that "office buildings, apartment houses, and shopping centers are 'consumers' of electricity even though these consumers may resell, redistribute, or submeter part of the electric energy to their tenants." *Id.* citing *Shopping Centers Assn. v. Pub. Util. Comm.,* 3 Ohio St. 2d 1, 208 N.E.2d 923 (1965). The Court also made clear that landlords and tenants have the right to "enter into lease agreements that appoint the landlord to secure, resell, and redistribute electric service to its tenants." *FirstEnergy*, 96 Ohio St. 3d 371, 2002-Ohio-4847, 775 N.E.2d 485, at ¶ 10. To implement this Ohio Supreme Court precedent, electric distribution utilities ("EDUs") have included this principle in their Commission-approved tariffs. For example, The Cleveland Electric Illuminating Company's tariff (P.U.C.O. No. 13 Original Sheet 4, page 10 of 21, Electric Service Requirements), provides as follows:

> C. Resale:
>
> 1. Electric service is provided for the sole use of the customer, who shall not sell any of such service to any other person, or permit any other person to use the same, without the written consent of the Company.
> 2. **The above provision does not apply to service provided to a landlord for resale or redistribution to tenants where such resale or redistribution takes place only upon property owned by the landlord and where the landlord is not otherwise operating as a public utility**." [Emphasis added.]

Consistent with Ohio Supreme Court precedent, the Commission has historically avoided inserting itself into the landlord/tenant relationship. This has been especially true with respect to commercial leases, where the Commission has consistently refused to second-guess the terms of agreements between landlords and tenants. *In re Brooks, et al. v. Toledo Edison Co.*, Case No. 94-1987, 1996 Ohio PUC LEXIS 292, Opinion and Order, *36 (May 8, 1996) ("[T]his Commission is ill-equipped to insert itself as an arbiter of landlord/ tenant disputes given our limited resources and statutorily-restricted enforcement powers."); *In re Toledo Premium*

Yogurt, Inc., Case No. 91-1528-EL-CSS, 1992 Ohio PUC LEXIS 850, Entry, *7 (September 17, 1992) ("[The complainant] seeks to extend our jurisdiction beyond the utility/customer relationship and employ the Commission as an arbiter of landlord-tenant disputes. We cannot agree. Pursuant to Sections 4905.04 and 4905.05, Revised Code, we find that the Commission lacks jurisdiction over the landlords and the claims against them."); and *In re Nader*, Case No. 99-475-EL-CSS, 1999 Ohio PUC LEXIS 188, Entry, *2 (August 26, 1999).

As the preceding shows, the regulatory scheme before the issuance of the Order established that commercial landlords were not public utilities and submetering charges assessed by these landlords were not regulated by the Commission. Many of BOMA's members relied on this long-established precedent to design and operate electrical and utility systems in their buildings.

2. The Order unlawfully and unreasonably extends the Commission's jurisdiction over existing lease agreements by focusing on the "reasonableness" of submetering charges, which will result in the Commission second-guessing the terms of existing lease agreements.

In its Order, the Commission established that it will "apply the third prong of the *Shroyer* test to determine if submetered customers are being charged unreasonably high rates…" Order at 10. If a landlord or other entity resells or redistributes utility services and charges the end user a "threshold percentage" above the default rate a similarly situated customer is being charged by the local utility, then the charges will create a rebuttable presumption that the provision of service is not ancillary to the landlord's or other entity's business. Order at 9-10. The Commission will be considering the "reasonableness" of the submetering charges between landlords and tenants **before** it determines if the landlord is a public utility. By focusing solely on the amount of a submetering charge, the Commission will necessarily become the final arbiter in landlord/tenant disputes regarding what constitutes a "reasonable" submetering charge. This

extension of the Commission's jurisdiction is unlawful and unreasonable considering Ohio Supreme Court precedent which states that landlords and tenants have the right to enter into submetering arrangements. *FirstEnergy*, 96 Ohio St. 3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶ 9. The Order is especially unreasonable in the context of commercial leases, where the landlord and tenant are both sophisticated parties capable of negotiating reasonable submetering arrangements. BOMA Cleveland Reply Comments at 5.

The problem of focusing on the reasonableness of submetering charges is exacerbated by the fact that a landlord may be considered a public utility if any one of the three prongs of the modified-*Shroyer* test are established. Order at 10-11. A landlord may be considered a public utility if it charges a certain "threshold percentage" above the local utility's default rate even though it never manifested an intent to be a public utility and does not provide utility service to the general public. The Commission indicated that the landlord may be able to rebut the presumption that it is public utility by showing that it provides utility services "at cost." Order at 10. However, this shifts the burden to the landlord to prove that its charges are not unreasonable even though the landlord's provision of utility service is clearly ancillary to its primary business and consistent with the terms of an existing lease agreement.

Further, the Order is overbroad because it is not limited to third-party submetering entities, but apparently applies when any entity reallocates utility charges another entity. The Commission initiated this investigation to "determine the scope of the Commission's jurisdiction over submetering by condominium associations and similar entities in the state of Ohio." Entry at 2 (December 16, 2015). The Order, however, applies to any entity the resells or redistributes utility services. Some landlords, in accordance with their lease agreements, bundle utility charges into the rent payment, but don't actually engage in "submetering." It is unclear how the

Commission will determine the reasonableness of bundled rent payments without deconstructing the terms of existing lease agreements. The Commission has no jurisdiction to determine the contractual rights private parties, *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 195, 383 N.E.2d 575 (1978), and should avoid creating a system of second-guessing the terms of existing lease agreements.

The Order unreasonably transforms the *Shroyer* test into a narrowly focused examination of the amount of specific submetering or utility charges, rather than a jurisdictional analysis of the actions of the landlord which indicate that it is or is not a public utility. BOMA's members have relied on Ohio Supreme Court precedent, Commission precedent, and utility tariffs which establish that the Commission does not regulate the terms of commercial lease agreements. The Commission's sudden decision to regulate the amount being charged for submetering services violates this long-standing regulatory construct.

B. A finding that an entity is a "public utility" if it meets only one prong of the *Shroyer* test violates Ohio Supreme Court precedent.

The Order departs from Ohio Supreme Court precedent which states that a number of factors must be considered when determining if an entity is a "public utility." The question of whether an entity is a "public utility" is a mixed question of law and fact. *A & B Refuse Disposers, Inc. v. Board of Ravenna Twp. Trustees*, 64 Ohio St.3d 385, 387, 596 N.E.2d 423 (1992). The Commission must examine the nature of the business in which an entity is engaged before it can determine if an entity is a public utility. *Indus. Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 21 N.E.2d 166 (1939), paragraph one of the syllabus. In *A&B Refuse*, the Court found that "[t]he main and frequently most important attribute of a public utility is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service." *A&B Refuse*, 64 Ohio St.3d at 387. This factor requires a showing that the

business "provides[s] its good or service to the public indiscriminately and reasonably." *Id*. "The second characteristic of a public utility most often addressed by courts is whether the entity, public or private, conducts its operations in such a manner as to be a matter of public concern." *Id*. at 388. The Court held that the determination of whether a particular entity is a public utility "requires a consideration of several factors related to the 'public service' and 'public concern' characteristics of a public utility." *Id.* at 389. Further, the Court stated that no one factor is controlling. *Id*.

The *Shroyer* test properly captures the various factors that must be weighed to determine if an entity is operating as a public utility. The factors of *Shroyer*, when considered together, address the primary question regarding whether the entity is providing a "public service" or operating in a manner that it is a "public concern." The Order modifies the *Shroyer* test to focus on one factor alone, which violates the holding of *A & B Refuse.*

C. The Commission failed to provide an exception for commercial landlords despite the fact there is no evidence of submetering abuse in the commercial leasing context and despite the negative impact the Order will have on commercial building owners.

Although this case arose from potential submetering abuses in the residential context, the Order sweeps all commercial landlords and building owners in the State under the Commission's jurisdiction. This is unreasonable based upon the record in this case. As stated above, BOMA represents commercial property owners that lease over 182,000,000 square feet of office space throughout the State of Ohio. BOMA Ohio estimates its collective electricity usage to be over 2.8 trillion kWh. BOMA Ohio contributes $5.67 billion to the state economy and supports over 46,500 jobs. See, also, BOMA Cleveland Initial Comments at 1. These commercial leases are the result of negotiations between sophisticated parties. BOMA Cleveland Reply Comments at 5. It is unreasonable for the Commission to upset the terms of these commercial landlord/tenant

agreements based solely upon alleged submetering abuses in the residential context. In fact, the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Poverty Law Center ("OPLC") supported limiting the Commission's regulation of submetering to the residential context by stating:

> Commercial and industrial customers have far more bargaining power than the average residential customer and thus are less susceptible to abusive practices arising from submetering arrangements. **For those reasons, OCC/OPLC supports limiting the PUCO's regulation over submetering to residential customers.**

OCC/OPLC Reply Comments at footnote 1. (emphasis added)

Further, the Order fails to recognize that submetering is a necessity in many commercial buildings. Many commercial buildings are not constructed to provide a direct public utility connection to each individual leasable unit within a structure. For example, many BOMA Cleveland members own office buildings in downtown Cleveland that were constructed more than fifty (50) years ago. The electrical systems in these buildings will not accommodate individual meters for tenants even if the landlord – or utility – wishes to install them. While the units in a particular residential building often are the same or very similar design, the units in commercial buildings often differ in size and configuration. Further, how each tenant uses its unit can vary greatly from unit to unit in commercial buildings. The Ohio Apartment Association and the International Council of Shopping Centers ("OAA/ICSC") share BOMA's concerns, explaining that, for many commercial buildings, "a direct public connection to every unit would not only be financially impossible but also physically impossible." OAA/ICSC Reply Comments at 2. Commercial building owners will have limited options with respect to providing basic utilities service as part of their lease arrangements with their tenants if the Commission suddenly extends its jurisdiction over submetering in the commercial leasing context.

While BOMA appreciates the Commission's concerns with protecting residential customers from submetering abuses, there is no indication that there is any price gouging in the context of commercial leases. As such, there is no reason for the Commission to insert itself into commercial landlord/tenant relationships. To the extent the Commission proceeds with the modified-*Shroyer* test, the Commission should clarify that Order does not apply to commercial landlord and tenant agreements.

D. The Commission has engaged in rulemaking without complying with the requirements of R.C. 111.15.

In the Order, the Commission has adopted "rules" within the meaning of R.C. 111.15, but it failed to comply with the rulemaking procedure set forth in R.C. 111.15. A "rule" is defined as "any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency." R.C. 115.15(A)(1). A rule has "general and uniform operation" for purposes of R.C. 111.15(A)(1) if it is uniformly applied by the promulgating agency to those affected by the rule. *B & T Express, Inc. v. Public Utilities Com.*, 145 Ohio App.3d 656, 665, 763 N.E.2d 1241 (10th Dist. 2001), citing *Ohio Ass'n. of Cty. Bds. Of Mental Retardation & Developmental Disabilities v. Public Employees Retirement System*, 61 Ohio Misc. 2d 836, 842, 585 N.E.2d 597 (C.P. 1990) ("*PERS*").

In *PERS*, the Franklin County Court of Common Pleas held that a "memorandum of understanding" ("MOU") entered into by State Teachers Retirement System ("STRS") and PERS constituted a rule that was subject to the rulemaking requirements of R.C. 115.15. *Id.* at 843. The court held that the MOU, which changed the definition of "teacher" under state retirement system, had "general and uniform operation" that would impact members of the retirement system as a whole. Id. As such, the Court held that STRS and PERS failed to comply

with R.C. 115.15 when they implemented the MOU without complying with the rulemaking procedures of R.C. 115.15. *Id.*

The Order is a "rule" because it will have general and uniform operation with respect to entities that resell or redistribute utility services. Further, the Order will have an impact on the existing legal rights of entities that are parties to submetering agreements. As such, R.C. 111.15 requires that the Commission comply with the statutory rulemaking procedures. This is especially true in this case because the impact of the Order goes well beyond regulating third-party submetering, which was the initial purpose of this investigation. All entities that will be impacted by the Order deserve an opportunity to comment on the legality and reasonableness of the Commission's decision. *Fairfield Cty. Bd. of Comm'rs v. Nally*, 143 Ohio St.3d 93, 2015-Ohio-991, 34 N.E.3d 873, ¶ 30 ["Requiring (an agency) to undertake rulemaking procedures before applying the new standard … ensures that all stakeholders … have an opportunity to express their views on the wisdom of the proposal and to contest its legality if they so desire."].

III. CONCLUSION

There are a number of avenues the Commission can take to address the potential concerns that led to this investigation. Although BOMA understands the Commission's concerns regarding high submetering charges for residential customers, the Commission should reconsider the scope of its Order in this case. The Order will potentially insert the Commission into the role of the final arbiter of landlord/tenant disputes over what constitutes a reasonable submetering charge under negotiated contractual agreements. This expansion of the Commission's jurisdiction violates Ohio law, and will result in potentially unworkable problems for many commercial landlords and building owners throughout the entire State.

Respectfully submitted,

/s/ Glenns S. Krassen

Glenn S. Krassen
BRICKER & ECKLER LLP
1001 Lakeside Avenue East, Suite 1350
Cleveland, Ohio 44114
Telephone: (216) 523-5469
Facsimile: (216) 523-7071
E-mail: gkrassen@bricker.com

Dane Stinson
Dylan Borchers
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
Telephone: (614) 227-2300
Facsimile: (614227-2390
E-mail: dstinson@bricker.com
dborchers@bricker.com

Attorneys for Building Owners and Managers Association of Greater Cleveland and Building Owners and Managers Association of Ohio

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Joint Application for Rehearing was served upon the parties of record listed below this 6th day of January 2017 *via* electronic mail.

/s/ Glenn S. Krassen
Glenn S. Krassen

whitt@whitt-sturtevant.com
mhpetricoff@vorys.com
Jodi.bair@occ.ohio.gov
Bojko@carpenterlipps.com
cmooney@ohiopartners.org
stnourse@aep.com
mjsatterwhite@aep.com
msmckenzie@aep.com
slesser@calfee.com
mcorbett@calfee.com
Randall.Griffin@aes.com
William.wright@puc.state.oh.us
joliker@igsenergy.com
mswhite@igsenergy.com
campbell@whitt-sturtevant.com
Bryce.mckenney@puc.state.oh.us
fdarr@mwncmh.com
mpritchard@mwncmh.com

Summary: Text Joint Application for Rehearing of the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio electronically filed by Teresa Orahood on behalf of Glenn S. Krassen