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

COMMENTS OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

I. INTRODUCTION

This proceeding was initiated by the Public Utilities Commission of Ohio ("Commission") in December 2015 to evaluate the scope of its jurisdiction over submetering by condominium associations and similar entities in the state of Ohio due to concerns that retail pricing to end-user customers in submetering arrangements may be unreasonably high. After reviewing an initial round of comments submitted by stakeholders on the issue, the Commission proposes in its December 7, 2016 Finding and Order ("Order") to extend to landlords, condominium associations, submetering companies, and other similarly-situated entities the historical test it uses to determine whether an entity is a public utility (known as the *Shroyer Test*). Further, the Order also proposes to revise the third prong of this test to create a rebuttable presumption that an entity is a public utility by comparing utility rates to what the charges are to end use customers and identifying a threshold percentage above which the pricing of the entity will subject it to regulation as a public utility. The Commission seeks further comments on how to set the threshold percentage which will serve as the baseline test to determine reasonableness.

Direct Energy Business, LLC and Direct Energy Services, LLC are retail suppliers in the state of Ohio and serve electric and natural gas customers in Ohio's investor-owned utility territories. As the Commission notes in its Order, retail suppliers like Direct Energy may supply

the energy to the landlord or building owner and the landlord/building owner in turn bills its tenants for the power purchased for the property. The prices retail suppliers offer to their customers (whether those customers are residential customers or building owners) are not regulated by the Commission. Direct Energy is concerned about the negative retail market impacts that may result from the Commission's decision to regulate landlords and building entities as public utilities based on a comparison of their retail end user prices to utility rates. This is because the price offers of retail suppliers to landlords and/or building entities are based on the usage and consumption of the building which does not translate to pure residential costs or usage. Therefore, Direct Energy is concerned the retail supply market will be constrained by the utility residential rates which do not tie to actual costs of a large building. In turn this will hamstring the ability of retail suppliers to develop market-based pricing and/or customer-specific pricing tailored to the specific needs of the commercial customer. Though not directly regulating the pricing of retail suppliers, such will be the practical end result of the Commission's proposal. In addition to this concern, the proposed comparison of the utility rate to that charged by the landlord and/or condominium association to end-user customers is mismatched and is not an appropriate way to address the concerns expressed by the Commission.

Therefore, while Direct Energy takes no position on the threshold question about the extent of the Commission's jurisdiction to regulate submetering by condominium associations and similar entities in Ohio, a much more reasonable way to address this issue is for the Commission to focus its efforts on establishing separate disclosure requirements for submetering companies. Thus ensuring customers of submetering companies understand the rates they will be charged similar to disclosure requirements in a traditional utility tariff or retail supplier consumer protection rules. At a minimum, these disclosures should clearly inform the end-user

customers about the nature of submetering as well as providing detailed information about the basis for the prices they are being charged. Direct Energy continues to believe that focusing on ensuring that end-user customers in these situations have specific and adequate disclosures about their pricing is a more reasonable narrowly tailored solution to address the problem the Commission is attempting to address without hamstringing the retail market.

If, however, the Commission continues to elect to continue down this path of determining how to limit what end-users in submetering situations are charged, then the only potentially reasonable way for the Commission to evaluate the reasonableness of a submetering company's charges is to look at each submetering company's costs to provide electricity and natural gas services. To do this, the Commission would need to perform an evaluation of each submetering company's costs to serve its customers as compared to total bill charges to the submetering company itself. The Commission could then set a threshold amount above the submetering company's costs that would trigger the rebuttable presumption that the submetering company is operating as a public utility. This is in line with how utility costs are treated today where the Commission reviews actual costs incurred not a comparison to some averaged cost of another utility. In addition, it ensures that a building which may at times not have full occupancy is not deprived of its ability to recover its costs to operate due to a low threshold average residential tariff or similar arbitrary cap. While not Direct Energy's preferred approach, this recommended modification utilizes the actual costs to set the threshold retail price upon which individual submetering pricing would be evaluated.

II. BACKGROUND

The Commission initiated this proceeding to assess whether condominium associations, submetering companies and similar entities should be regulated as public utilities when they

resell or redistribute utility services. To determine public utility status of an entity, the Commission has historically applied the *Shroyer Test*.[1] Pursuant to this three-part test, the Commission considers the following three factors:

1. Has the landlord 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. Is the utility service available to the general public rather than just to tenants?
3. Is the provision of utility service ancillary to the landlord's primary business?

During the initial round of comments, the Commission inquired as to whether the *Shroyer Test* should continue to be applied and whether it can be applied to condominiums and other entities. As a result of its review of the comments received, the Commission proposes that: (1) the application of its *Shroyer Test* be expanded to condominium associations, submetering companies, and other entities; (2) that the third factor of the test be reconfigured to determine whether those entities are acting as public utilities when they resell or redistribute utility service based on a comparison of their retail pricing to utility rates; and, (3) the failure of any one of the three factors of the *Shroyer Test* would demonstrate that an entity is unlawfully operating as a public utility.

For the revised third factor, the Commission proposes to establish a "reasonableness" threshold and retail pricing to end users above that threshold would subject the entity to regulation as a public utility. The Commission states that this rebuttal presumption can be overcome if the entity is able to show that it provides the utility service, in the aggregate at cost. If, however, a landlord or entity would fail to rebut that presumption, it would be classified as an

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[1] *In re the Matter of the Complaints of Inscho v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al., (Feb. 27, 1992) ("*Shroyer*" or "*Shroyer Test*").

unlawfully operating public utility and be subject to Commission regulation. In its Order, the Commission invites comments regarding the reasonable threshold percentage to establish.

Direct Energy submits these comments in response. As explained further below, Direct Energy is concerned that the Order will have a negative impact on the competitive market by relying on a comparison of market pricing with a utility rate unrelated to the energy costs of the building itself and recommends that the Commission refocus on developing adequate disclosures for end-user customers in submetering situations to better address the Commission's expressed concerns about the retail pricing for these customers. To the extent the Commission continues to pursue setting a threshold of comparison for the end-user retail pricing in submetering situations, then Direct Energy urges the Commission to shift its focus away from a comparison to utility rates and, instead, determine a reasonable price based on an evaluation of each submetering company's costs to serve its customers as compared to total bill charges to its customers.

Also of note is that there are several applications for rehearing of the Order currently pending. While not specifically addressed in its comments, Direct Energy agrees with numerous applicants that expressed concern for the Commission's departure from Ohio Supreme Court and Commission precedent in its proposed reconfiguration of the *Shroyer Test*.

III. COMMENTS

The Commission proposes the following as the third prong of the *Shroyer Test*: "[I]f a landlord or other entity resells or redistributes utility services and charges to an end use customer a threshold percentage above the total bill charges for a similarly situated customer served by the utility's tariffed rates, an electric utility's standard service offer, or a natural gas utility's standard choice offer, then it will create a rebuttable presumption that the provision of utility service is not

ancillary to the landlord's or entity's primary business."[2] The Commission seeks comment regarding the reasonable threshold to establish the rebuttal presumption.

Whether a submetering companies' charges exceed a threshold percentage above the local utility's tariffed rates is not a reasonable way to determine whether a submetering company is a public utility. Foremost, the approach will result in a defacto regulation of retail supplier pricing which will negatively impact the competitive market.[3] This results because retail suppliers, like Direct Energy, may supply the energy to the landlord or building owner through negotiated contracted prices. In this circumstance, the landlord or building owner is the commercial customer of the retail supplier. Because retail supplier prices are not regulated, the supplier can offer a price to the commercial customer that is based on market (capacity, ancilliaries, etc.) and usage factors which take into consideration the individual circumstances of the customer. The pricing between the retail supplier and the commercial customer is then negotiated and set forth in a contract between the two entities. If, as proposed by the Commission, the landlord or building owner must ensure that the retail price charged to the end-user customer must be constrained by the utility average residential rate which itself is based on a residential usage profile, then that will negatively impact how the retail supplier may elect to structure the price to its commercial customers. The cost and usage factors associated with large commercial usage are not a 1:1 translation to residential leading to a commercial expectation of

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2 Order at 9.

3 The Commission does not have the statutory authority to set competitive retail electric service ("CRES") provider rates or design products but the Commission does have the authority to: (1) set minimum standards related to unfair, deceptive, and unconscionable acts and practices regarding marketing, solicitation, sale of power and administration of contract; (2) hear and initiate complaints against CRES providers; and, (3) determine whether a service previously approved as competitive is no longer competitive. See Section 4928.10, 4928.16, and 4928.06, Ohio Revised Code. Similarly, Chapter 4929 which establishes the Commission's regulatory authority over competitive retail natural gas service suppliers does not empower it to set retail contract rates or terms of service. Further, Section 4929.02(A)(7) establishes state policy to eliminate rate making by the Commission for natural gas supplies under Chapters 4905 and 4928 of the Revised Code.

residential pricing which does not match their usage profile. Either result negatively impacts the competitive market and, ultimately, harms the end-user customer who is not receiving the benefit of a negotiated, market-based retail price.

Moreover, use of the utility rate is unreasonable as it relies on an arbitrary comparison. An electric utility's standard service offer is competitively bid with prices intermingled over time with procedures to allocate those prices to specific default rate schedules. A utility's standard service offers have riders with various reconciliation requirements for over and under collections which further renders using standard service offers as a comparison unreasonable. In addition, wires services for certain classes of customers may be set with deferrals or other considerations which again may create unbalanced recovery higher or lower when not directly tied to the submetering company's actual costs. Further, a submetering company's charges may incorporate charges for other services.

The Commission proposes that the *Shroyer Test* include an evaluation of a threshold percentage above an electric utility's standard service offer or a natural gas utility's standard choice offer. The Commission does not clarify whether "an electric utility's standard service offer" includes the standard service offer generation rate or whether it includes the fully bundled rate.

The Commission recommends evaluation of the threshold percentage based on a utility's costs to serve "similarly situated" customers. However, it does not consider that a utility's costs to serve "similarly situated" customers would vary drastically from costs to serve submetering company tenants based on the unique variables and needs of a condominium. For example, a condominium may need to take service at a particular voltage that could further complicate a comparison to tariffed rates, especially as each condominium has its own particular needs.

Moreover, the Commission did not identify whether a "similarly situated" customer is a "similarly situated" residential customer served pursuant to a residential tariff or a "similarly situated" landlord customer served pursuant to a tariff for service to the building's master meter.

In sum, the comparison of a utility's standard service offer to a submetering companies' charges is mismatched and offers no meaningful information to the Commission. As explained more fully below, rather than attempting to limit the amounts that can be charged to end-user customers, Direct Energy continues to urge the Commission to focus its efforts on establishing separate disclosure requirements for submetering companies. However, if the Commission nonetheless elects to continue to pursue regulating the pricing offered to end-use customers in submetering situations, then Direct Energy recommends that the Commission evaluate the reasonableness of a submetering companies' charges by evaluating each submetering companies' costs to provide electricity and natural gas services.

A. Direct Energy Supports The Establishment Of Contract Disclosure Requirements For Submetering Companies

For the reasons discussed above, Direct Energy has significant concerns about establishing rules that limit the amounts that can be charged to end-users in a submetering situation based on rates unrelated to a company's costs. Rather than focus on this aspect, Direct Energy encourages the Commission to implement a new set of rules that establish disclosure requirements solely for submetering that can be very similar to retail supplier disclosure rules. While the current retail supplier contract disclosure requirements can serve as a starting point for this review, Direct Energy does not support the Commission simply extending the current retail supplier contract disclosure requirements to submetering entities given the unique relationships present in submetering (i.e. the entity pricing the energy for the end-user customer is not the same entity providing the service). Rather, the required disclosures for submetering situations

should be developed with a focus on avoiding confusion in the market and more clearly defining the various relationships and pricing structures.

More specifically, submeterers should be required to disclose the pricing, terms, and conditions of their services to residential consumers prior to the provision of service. Therefore a starting place within the retail supplier rules of disclosure of variables which cause a price to fluctuate and descriptions of the term for a fixed period would require a submetering company to disclose not only the price per kWh but also the formula to determine usage amounts. In addition, including 12 month historical usage profile information similar to current utility billing practices for the unit would allow a customer to properly assess the costs.

Submeter disclosure requirements, if appropriately structured, can address the Commission's concerns about submetering companies. By requiring disclosure of certain factors, the Commission could deter landlords and property owners from attracting tenants or purchasers with below value rent or purchase payments just to recover those lost potential gains by marking up electric and/or natural gas service. Ensuring disclosures to customers about what is included in the price for the energy service would provide consumers with the information necessary to determine whether or not the landlord and/or property owner is engaging in such a practice.

Requiring these types of disclosures prior to a customer signing a lease or purchase agreement will act as a disincentive to landlords and/or property owners to engage in unreasonable mark-ups of energy pricing because they will be required to provide price structure information prior to the customer acquiring service. With this type of information available, consumers would be empowered to avoid future negative rental/lease situations.

In addition, to these disclosure requirements, the Commission could also establish requirements for the provision of a submetered bill, the date bills are issued and typically due, and a disclosure in the rental agreement or lease of the average monthly bill for all dwelling units in the previous calendar year. Again, requiring disclosure of this information empowers consumers to know and understand what they are being asked to pay and to make informed decisions based on that information.

Finally, by exercising jurisdiction over these entities and establishing clear disclosure requirements, the Commission will have the power to enforce its rules. With this power to enforce, the Commission would be able to hold these entities accountable – through Commission processes – where the Commission determines they have engaged in behavior against the public interest.

For these reasons, Direct Energy urges the Commission to implement a rulemaking proceeding to address disclosure requirements. Direct Energy believes that submetering disclosure requirements – coupled with the Commission enforcement power – will accomplish the goals of the Commission in this proceeding which does not risk harm to the retail competitive market or require the undertaking of an unreasonable comparison of competitive pricing to utility regulated rates.

B. If the Commission Elects To Continue To Limit The Amount That Can Be Charged To Submetering End-User Customers, Then The Threshold For Reasonableness Must Not Be Based On Utility Rates

For the reasons explained previously, attempting to determine a "reasonable" price that submeterers may charge end-user customers by comparing it with the utility rate amounts to an apples to oranges comparison. Direct Energy finds the only potentially accurate way for the Commission to evaluate the reasonableness of a submetering companies' charges is to look at each submetering companies' costs to provide electricity and natural gas services. The

Commission appears to recognize this by stating that submeterers can rebut the initial presumption by demonstrating that the submeterers' prices "in the aggregate" are "at cost." Rather than creating this standard as a way to overcome a rebuttable presumption that is based on a comparison of utility rates, however, the Commission should consider using this as the initial threshold standard because – similar to Direct Energy's position here – it is based on the individual costs of the submetering company.

While Direct Energy continues to maintain that limiting the prices of submetering companies is not the best manner to proceed to address the Commission's concerns, if the Commission is committed to evaluating a submetering companies' charges to its customers, Direct Energy recommends that the Commission perform an evaluation of each submetering companies' costs to serve its customers as compared to total bill charges to its customers. The Commission could then set a threshold amount above the submetering companies' costs that would trigger the rebuttable presumption that the submetering company is operating as a public utility.

IV. CONCLUSION

For the reasons discussed above, Direct Energy is concerned that the Commission decision to limit the amount that can be charged to end-users in a submetering situation through a comparison with the utility rate will negatively impact the competitive retail market and is not based on a reasonable pricing comparison. For these reasons, Direct Energy recommends that the Commission address its concerns with submeterers by initiating a rulemaking proceeding to establish disclosure requirements for submeterers. Adopting Direct Energy's recommendation would be more efficient and less burdensome for the Commission to implement than an evaluation of submeterer's charges pursuant to the Commission's proposed revised *Shroyer Test*. If, however, the Commission wishes to conduct such a review, Direct Energy recommends that

CERTIFICATE OF SERVICE

I certify that an accurate copy of the forgoing Comments has been filed with the Public Utilities Commission of Ohio on January 13, 2017, and electronically served upon all parties of record via the PUCO's electronic filing system. In addition, I certify that a service copy of the foregoing document was sent by or on behalf of the undersigned counsel on January 13, 2017 to the following parties of record via electronic transmission.

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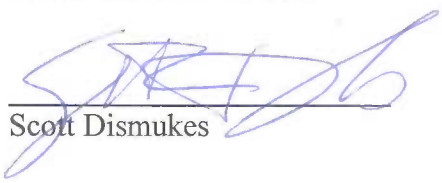

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the Commission evaluate the submeterer's actual costs to serve its customers with total bill charges to customers, as opposed to the local utility's costs to serve "similarly situated" customers.

Respectfully submitted,

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Date: January 13, 2017

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Summary: Comments Comments of Direct energy Services, LLC and Direct Energy Business, LLC electronically filed by Mr. Scott R. Dismukes on behalf of Eckert Seamans Cherin & Mellott, LLC