**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Commission's Investigation of Submetering in the State of Ohio | ) ) ) | Case No. 15-1594-AU-COI |

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

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As Ohio Power Company ("AEP Ohio") and Duke Energy Ohio, Inc. ("Duke") have explained previously in this proceeding, submetering causes substantial harm to utility customers in a manner that is at odds with the clear utility policies of both the General Assembly and this Commission. Among other things, submetering customers (1) cannot shop for generation supply, (2) often face hidden (non-transparent, complex, and confusing) rates, (3) do not have the benefit of Commission rate regulation, (4) lack important customer protections, such as those related to disconnection of service, and (5) are unable to participate in utility services such low-income assistance or energy efficiency programs. *See generally* Initial Comments of AEP Ohio and Duke Energy Ohio, Inc. (January 21, 2016) at 2-16. Remarkably, never have submetering entities such as Nationwide Energy Partners put forth any account of how submetering provides *benefits* to customers. Instead, all the benefits go to the submetering entities, whose very business model is to profit from the resale of utility service while escaping regulation as a public utility. Accordingly, AEP Ohio and Duke have contended – and continue to contend – that the Commission should adopt an approach that limits submetering to the greatest extent possible. *See id.* at 16-31.

In its December 7, 2016 Finding and Order ("Finding and Order") in this proceeding, the Commission signaled an intention to bring submetering arrangements within its jurisdiction and

to end the many harms submetering causes. Specifically, the Commission adopted a "rebuttable presumption" that a submetering entity fails the third prong of the traditional *Shroyer Test* if it charges a certain "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." Finding and Order at 9. The Commission then requested comments on the appropriate level of this "threshold percentage."

Although AEP Ohio and Duke commend the Commission for signaling an intention to address the many problems caused by submetering, AEP Ohio and Duke continue to believe that the Commission's proposed test is flawed and could be ineffective in stemming the tide of submetering in Ohio. Accordingly, AEP Ohio, Duke, and the First Energy Companies (collectively, "Joint Applicants"), filed an application for rehearing in this docket asking the Commission to clarify or reformulate its new "rebuttable presumption." As Joint Applicants explained, under the approach to the "rebuttable presumption" adopted in the Finding and Order, submetering companies will be able to earn considerable profit – as much as a 45% profit margin in a typical apartment building – while continuing to escape regulation as a public utility. *See* Joint Application for Rehearing of AEP Ohio et al. at 6-8. That outcome will do little to alleviate the many harms caused by submetering, and is unlikely what the Commission intended. Instead, as set forth in Joint Applicants' application for rehearing, the Commission should adopt a revised test that considers any submetering entity to be a public utility *if it makes any profit – or charges any markup to customers – in reselling utility service*.

To be clear, AEP Ohio and Duke are not advocating that the other factors of the *Shroyer Test* be ignored or that the Commission should bypass any case-specific adjudication of whether a particular submetering company is violating Title 49 of the Revised Code. For instance, the

first prong of the *Shroyer Test* asks whether an entity has "manifested an intent to be a public utility by availing itself of special benefits available to public utilities." Finding and Order at 2. No matter how the Commission determines the "rebuttable presumption," it could apply this first factor in a particular case if, for instance, a submetering entity has "manifested an intent to be a public utility" by sending customers an alleged "disconnection notice." It is notable that a public comment filed on January 12, 2017 on this docket included a bill from American Power & Light that stated that "[d]isconnection of service will occur on or after Jan. 29, 2017 unless before that date you pay the late amount due on your account." *See also* Complaint, Case No. 16-2401-EL-CSS (alleging that Nationwide Energy Partners has threatened to disconnect utility service for a submetered customer).

The Commission can apply the balance of the *Shroyer Test* and adjudicate such matters if and when presented in an actual proceeding; but its guidance in this docket is needed due to the proliferation of submetering activity and mushroom cloud of consumer harm being created across Ohio. In that context, it is appropriate for the Commission to be able to definitively advise the industry under such factual circumstances that a submetering company engaging in profit under the business model being addressed in this docket will result in a determination of unlawful public utility status – a submetering company (as defined through the undisputed facts of how the submetering industry works) operating for profit is clearly engaged in the business of a public utility. The remainder of the *Shroyer Test* can still be evaluated and discussed, but the "for profit" determination should be conclusive and dispositive. In other words, a submetering company that is operating for profit should result in "game over" for that company – both because it is operating unlawfully as an unregulated public utility and because it is operating in violation of the Certified Territories Act, R.C. 4933.81 *et seq*. Such a submetering company is

taking unlawful action that must be categorically prohibited. In sum, the Commission is on the right track of taking action to curtail submetering companies but it needs to adjust its approach in order to effectively resolve the problem.

AEP Ohio and Duke stand by their joint application for rehearing and urge the Commission to clarify or reformulate its test as described therein. Nonetheless, to work within the Commission's proposed approach, AEP Ohio and Duke file these comments as requested by the Commission.

## I. As set forth in the Joint Application for Rehearing of AEP Ohio *et al*., the Commission should establish a conclusive presumption that a submetering company operating for profit is unlawfully engaged in the business of an unregulated public utility and is violating the Certified Territories Act, R.C. 4933.81 *et seq*. If the Commission decides to set a mechanical threshold as a proxy for tentatively determining whether a submetering company is operating for profit, it should set the "threshold percentage" *below* the residential SSO rate to ensure that submetering entities are not profiting from resale of utility service while escaping regulation as a public utility.

If the Commission continues to apply its rebuttable presumption based on a certain "threshold percentage" of an electric utility's standard service offer (SSO) rate to residential customers, it should be a threshold percentage *below* the SSO – in particular, the Commission should employ a threshold that mirrors what the submetering entity itself pays for the utility service, which reflects a lower tariff rate for master meter service, without any markup. If a submetering company is paying a master meter rate that is lower than the rate each of its submetering customers would pay if they were an SSO customer of a real public utility, then the submetering company would only be permitted to pass the pro-rated portion of its master meter rate on to each submetering customer without any markup. The general rule should be simple: no markup of the rates paid by the submetering company to the public utility. The generation rate is the only component that needs a proxy, because otherwise a submetering company could form a CRES and or have an affiliate "kick back" arrangement that would subvert the no-profit

rule. In that context, the SSO generation rate for residential customers could be used as the proxy but only for the generation component of the bill.

Setting the threshold below the residential SSO rate is the only way to effectively end the proliferation of submetering in Ohio. As explained in Joint Applicants' application for rehearing, submetering companies make money by purchasing electric service to a building "master meter" from a public utility at a lower rate tariff and then marking-up the lower master meter service rates and charging each individual tenant under a higher rate. The key for a submetering company's business model is this difference (or "delta") between the master meter rate and what the company charges each individual tenant or owner. And as shown in Joint Applicants' application for rehearing, this delta, or profit margin, can be as much as 45%. *See* Joint Application for Rehearing of AEP Ohio *et al*. at 6-8. Thus, setting the "threshold percentage" below the residential SSO rate will be a rough approximation to ensure that submetering companies are merely passing on – and not profiting from – the resale of electric service. By contrast, if the Commission were to set the "threshold percentage" above this level, it would allow submetering entities to continue to profit, and continue to cause harm to customers, while escaping regulation as a public utility.

Setting the "threshold percentage" below the residential SSO rate is the right result for customers. It is fair for public utility customers to pay the residential SSO rate because that rate reflects the utility's cost of service, and because public utility customers have numerous benefits and protections – including Commission oversight and rate regulation, protections concerning disconnection and quality of service, and programs such as low-income assistance and energy efficiency measures. But submetering customers lack all of these benefits and protections of public utility service. Thus it is profoundly *unfair* for submetering customers to pay the full

residential SSO rate – let alone an amount *above* that rate – for such inferior service. Instead, if submetering entities are permitted to act outside the Commission's jurisdiction, it should only be if they charge their actual costs (*e.g.*, 45% less than or another reasonable percentage *below* the residential SSO rate) to reflect the fact that submetering customers are receive none of the benefits and protections of public utility customers.

Critically, furthermore, a threshold percentage below the residential SSO rate should only be viewed in the context of the Commission's "rebuttable presumption" that a submetering entity fails the third prong of *Shroyer Test*. The ultimate question in a proceeding to determine whether a submetering entity is operating as a public utility should be whether it profits – i.e., charges any markup – on the resale of utility service.

The approach proposed above is not only fair for customers and most likely to curb the harms caused by submetering; it is also accords with the relevant statutory definition. 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." On the one hand, a landlord or submetering entity that marks up master meter service and resells it to tenants at a profit is, straightforwardly, "*engaged in the business* of supplying electricity for light, heat, or power purposes to consumers within this state." R.C. 4905.03(C) (emphasis added). On the other hand, a landlord who merely passes through his own electricity costs without markup is not "engaged in the business" of supplying electricity – he may be supplying electricity, but not as a "business." Accordingly, setting the "threshold percentage" below the residential SSO rate accords with the statute because it focuses on whether the submetering entity is making any profit by selling utility service and is thus "in the business" of providing electric service. Setting the "threshold percentage" any higher would

be at odds with the statutory definition because it would allow a submetering company to continue to make substantial profit through resale of electric service, and thus continue to be "engaged in the business" of supplying electricity, while escaping regulation as a public utility.

Setting the "threshold percentage" or another reasonable percentage below the residential SSO rate also more closely matches the intent of the third prong of the traditional *Shroyer Test*, which focuses on whether "the provision of utility service is ancillary to the landlord's primary business"? If the submetering entity is merely passing on its costs, it is not making any profit and can plausibly contend that the provision of electric service is "ancillary" to its primary business under the third prong of the test. But if the submetering entity is charging more than its costs and making a profit, then the entity is using utility service as a profit center – utility service is no longer "ancillary" to the primary business of being a landlord, but is a profitable and separate line of business. Thus, the Commission should apply the "threshold percentage" below the residential SSO rate to ensure that submetering entities are not profiting from resale of utility service while escaping regulation as a public utility.

## II. AEP Ohio and Duke reserve the right to respond in reply comments to other parties' contentions.

In addition to the above, AEP Ohio and Duke reserve the right to reply to any arguments by submetering entities or other parties that the threshold percentage should be set at some level *above* the residential SSO rate (or any other contentions). Insofar as submetering entities claim that they have "administrative" or internal distribution costs that must be recovered, they should recover such costs – as with all the other costs of operating a multiunit building – through *rent*, not by assessing a markup on utility charges. Any submetering entity that marks up utility service – whether for profit or to recover alleged "administrative charges" – is engaged in the

business of providing utility service and should be regulated as a public utility. Accordingly, AEP Ohio reserves all rights to reply to such claims – and any other claims – in reply comments.

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 *Initial Comments of Ohio Power Company and Duke Energy Ohio, Inc.* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 13th day of January, 2017, via electronic transmission.

*/s/ Steven T. Nourse*

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**This foregoing document was electronically filed with the Public Utilities**

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**Case No(s). 15-1594-AU-COI**

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.