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

NATIONWIDE ENERGY PARTNERS, LLC'S MEMORANDUM CONTRA TO THE APPLICATIONS FOR REHEARING FILED BY OCC, OPLC, OHIO POWER COMPANY, DUKE ENERGY OHIO INC., OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND TOLEDO EDISON COMPANY

I. INTRODUCTION

Nationwide Energy Partners, LLC ("NEP") submits this Memorandum Contra to the arguments raised in two of the applications for rehearing filed in this matter on January 6, 2017, namely, the joint rehearing filings by (a) the Office of the Ohio Consumers' Counsel and the Ohio Poverty Law Center (collectively "OCC"); and (b) Ohio Power Company, Duke Energy Ohio Inc., Ohio Edison Company, The Cleveland Electric Illuminating Company and Toledo Edison Company (jointly "Utilities"). Notably, both applications for rehearing ignore the Supreme Court of Ohio authority and Commission precedent that hold that the reselling and redistribution of utilities to tenants and condominium associations is not an area for Commission regulation. The lack of reliance on legal authority is understandable, as both OCC and the Utilities make claims and arguments that should be directed to the General Assembly – not the Public Utilities Commission of Ohio. Nevertheless, because OCC and the Utilities are trying to rewrite law through the Commission, NEP submits this memorandum contra to certain arguments raised in OCC's and the Utilities' applications for rehearing.

II. ARGUMENT

A. OCC fails to understand that only the utility customer can resell or redistribute utilities, not a third-party service provider.

OCC claims at page 3 in its application for rehearing that the Commission should have specifically found and asserted its jurisdiction over "submeterers" because for some, "the resale or redistribution of public utility services is their primary business." OCC's claim, however, shows a basic misunderstanding of submetering. Specifically, it is the customer of the public utility who purchases the utility service and it is that customer who can consume the utility service purchased and/or resell/redistribute the utilities. When a service provider assists a customer who is a landlord, condominium association or similar entity, the service provider does not resell or redistribute the utility service because the service provider is not the customer that purchases the utility service. OCC ignores that it is the customer of the public utility who is reselling/redistributing utility service – a key determination under the Commission's proposed jurisdictional test. The Commission should therefore, reject OCC's first assignment of error calling for immediate regulation of certain entities that are not utility customers, including NEP.

B. The Utilities want the Commission to regulate the relationships between landlords and tenants and between condominium associations and unit owners.

The Utilities want the Commission to broadly regulate the resale/redistribution of utility service behind the utility meter. The best example of this is the Utilities' argument that a landlord should collect "administrative" or "internal distribution costs" through rent and not (as claimed by the Utilities) through a "markup on utility charges."[1] Applying the Utilities' viewpoint, a landlord that recovers the cost to install and maintain internal electric systems and allocate usage among tenants through rent charges would not be a public utility while a landlord

[1] Utilities' Application for Rehearing at page 11, fn. 2.

that recovers costs, allocates usage and other charges through traditional submetering and separate bill collection is a public utility. To the contrary, the amount and manner in which a landlord or condominium association – the utility consumer – charges its tenant or condominium owner for utilities is a contractual matter between those entities. *See e.g. Jonas v. Swetland*, 119 Ohio St. 12 (1928) (landlord that resold electricity to its tenant was not a public utility).

Only the General Assembly can dictate whether the Commission should control how landlords charge tenants and how condominium associations structure charges for unit owners. The Commission made that clear in 1992, stating that "[w]e have neither the staff **nor the statutory authority** to insert ourselves into the landlord-tenant relationship as long as the landlord's actions are consistent with the tariffs of the regulated utility from which the service is obtained." *Inscho v. Shroyer's Mobile Homes*, Case Nos. 90-182-WS-CSS, Opinion and Order (February 27, 1992) at 5 (emphasis added). The Commission should reject not only the Utilities' attempt to control landlord/tenant and similar relationships, but also their proposed rebuttable presumption that any entity that allocates utility charges other than on a pass-through basis is a "public utility."

C. The Utilities' hypothetical "examination of the economics of submetering" is misleading.

The Utilities argue at page 6 of their application for rehearing that "the Commission's rebuttable presumption is effectively toothless because it would allow submetering entities to make a substantial profit while avoiding regulation as a public utility." To support this claim the Utilities then present an example of what they believe represents the economics of submetering, concluding that submetering companies will achieve 45% profit margins if electric service is passed on to tenants at residential rates rather than commercial rates.

The Utilities' example is prejudicial and misleading. First, the Utilities ignore (as did OCC) that it is the utility consumer that resells or redistributes utilities – not entities that provide services to those utility consumers. *See FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002 Ohio 4847, 775 N.E.2d 485 (finding that landlords are "consumers" for purposes of R.C. 4905.03); *Shopping Centers Ass'n v. Pub. Util. Comm*., 3 Ohio St. 2d 1, 4, 208 N.E.2d 923 (1965) ("we see no good reason why office buildings, apartment houses, and shopping centers, which use electric energy in their own operations, cannot fairly be classed as 'consumers'…").

Second, the Utilities' example allocates the entire difference between the commercial charges and residential charges to the "submetering entity."[2] The Utilities imply that to manage utility allocation to 100 apartment units, the submetering entity would receive a monthly profit of $3,928 based on the "spread" between commercial charges and residential charges. Ignoring the accuracy of the calculations and underlying numbers, the Utilities, however, leave out an important line in their table – deductions from gross revenues such as managing/maintaining utilities for a 100-apartment complex. To claim that property owners and submetering entities are receiving a 45% profit based solely on a gross revenue calculation is misleading and prejudicial. Indeed, the Commission need only ask itself, when have the Utilities ever requested that the Commission review their earnings on a no-expense basis?

The Utilities' application for rehearing is without merit, and unsupported both factually and legally.

III. CONCLUSION

One component in developing and managing apartment complexes and condominium developments is providing both energy infrastructure and energy management services.

[2] Utilities' Application for Rehearing at 7.

Landlords and condominium associations that elect to contract with service providers to construct the infrastructure and subsequently allocate and manage utility usage within the complexes should not and cannot be brought under Commission jurisdiction. Likewise, service providers that contract with landlords and condominium associations to provide those services should not and cannot be subject to Commission jurisdiction. OCC and the Utilities want the Commission to control what happens within the apartment complex or condominium complex. That, however, is not the role of the Commission. OCC's and the Utilities' applications for rehearing should be denied, and the Commission should make a definitive statement that it does not have jurisdiction over condominium associations, landlords and similar entities that submeter utilities to end-users.

Respectfully submitted,

/s/ Michael J. Settineri
Michael J. Settineri (0073369)
Gretchen L. Petrucci (0046608)
Ilya Batikov (0087968)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5462 / Fax: 614.719.5146
E-mail: mjsettineri@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com

Counsel for Nationwide Energy Partners, LLC

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the parties. In addition, I hereby certify that a service copy of the foregoing document was sent by or on behalf of the undersigned counsel to the following parties of record this 17th day of January, 2017 via electronic transmission.

william.wright@ohioattorneygeneral.gov
randall.griffin@aes.com
slesser@calfee.com
mcorbett@calfee.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
fdarr@mwncmh.com;
mpritchard@mwncmh.com
cmooney@ohiopartners.org
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
sdismukes@eckertseamans.com
dclearfield@eckertseamans.com
sstoner@eckertseamans.com
joliker@igsenergy.com
mswhite@igsenergy.com
robinkharper1@yahoo.com
rick.sites@ohiohospitals.org
frice@spectrumutilities.com
aemerson@porterwright.com
stnourse@aep.com
msmckenzie@aep.com
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com
terry.etter@occ.ohio.gov
bojko@carpenterlipps.com
jljeczen@yahoo.com
msmalz@ohiopovertylaw.org
rickcashman@yahoo.com
jeckert@firstenergycorp.com
rendris@firstenergycorp.com
kjohnson@oneenergyllc.com
joemaskovyak@cohhio.org
ejacobs@ablelaw.org
ndinardo@lascinti.org
rbrundrett@ohiomfg.com

/s/ Michael J. Settineri
Michael J. Settineri

Summary: Memorandum Contra to Applications for Rehearing electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC