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

I. INTRODUCTION

Pursuant to Ohio Administrative Code ("OAC") Rule 4901-1-35, 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 submit their Memorandum Contra Application for Rehearing filed by Ohio Power Company (AEP-Ohio") and Duke Energy Ohio, Inc. ("Duke") (collectively "EDUs") on July 21, 2017.

BOMA Ohio is a professional trade organization representing the six local BOMA associations located in Akron, Cincinnati, Cleveland, Columbus, Dayton, and Toledo. Together they represent commercial property owners that lease over 182 million square feet of office space throughout Ohio. BOMA Ohio estimates its collective annual electricity usage to be over 2.8 trillion kWh. BOMA Cleveland 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. Many of BOMA's members are parties to existing lease agreements that contain terms that address submetering or reselling/redistributing of utility services. These utility service agreements between landlords and tenants are the result of negotiations between sophisticated parties, and have been determined to be lawful by the Ohio Supreme Court.

The EDUs want to use this investigation to eliminate submetering throughout Ohio, including submetering arrangements in the commercial and industrial context. This investigation, however, arose due to alleged abuses in the residential context. There have been no allegations or evidence of submetering abuse in the commercial or industrial context. As such, the Commission correctly determined that its application of the modified-*Shroyer* test will be limited to residential customers.

Further, by limiting the modified-*Shroyer* test to residential customers, the Commission avoids interfering with the terms of negotiated commercial lease agreements, which often contain utility service or submetering arrangements. The Commission correctly avoided second-guessing the terms contractual lease arrangements between sophisticated parties, a decision which is entirely consistent with Commission precedent. *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)(*"Brooks"*)("[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.").

The Commission's surgical approach to a specific issue that arose in the residential context is the right approach. The Commission should deny the EDUs' request to expand the impact of this investigation to commercial customers.

II. LAW AND ARGUMENT

A. The Commission's decision to limit the application of the modified-*Shroyer* test to solely the residential context was correct.

In their Application for Rehearing, the EDUs claim that the Commission erred by focusing on the type of customer being served when determining whether the modified-*Shroyer* test should be applied.[1] The EDUs' arguments are incorrect. The record demonstrates that the Commission's decision to distinguish between residential customers and non-residential customers was sound.

As an initial matter, the Commission should deny EDUs' request for rehearing because this issue (residential vs. non-residential) already has been thoroughly considered by the Commission. BOMA, IEU-Ohio, Ohio Hospital Association ("OHA"), Ohio Manufacturers' Association ("OMA"), Ohio Poverty Law Center ("OPLC") and Ohio Consumers' Counsel ("OCC") set forth a variety of reasons why the Commission's modified-*Shroyer* test should not apply to commercial and industrial customers. The EDUs, however, claimed that "[t]he Commission should adopt the same test for residential and non-residential contexts," and also argued that there was "no grounds for a special exemption for non-residential" entities.[2]

After considering the parties' various arguments, the Commission clarified in its Second Entry on Rehearing that its modified-*Shroye*r test will not apply to commercial or industrial customers.[3] Although the EDUs do not like Commission's decision, they fail to raise any new argument or reason why the modified-*Shroyer* test should be applied to commercial or industrial customers. The fact the Commission already carefully considered these arguments is enough to deny the EDUs' application for rehearing.

[1] EDUs Application for Rehearing at 4.

[2] Reply Comments of EDUs at 11 (February 3, 2017).

[3] Second Entry on Rehearing at ¶28.

Although the Commission has already considered (and rejected) their position, the EDUs continue to claim that there is "no basis" for distinguishing between residential customers and nonresidential customers. This is simply untrue. Submetering arrangements between commercial landlords and tenants are the result of negotiations between sophisticated parties. When parties negotiate commercial lease agreements, they consider a myriad of factors regarding the potential costs and value of a leasable unit. One of these factors is access to and the cost of utility service. Contrary to the EDUs' claims, commercial landlords do not provide utility service in order to "profit" off of their tenants. Rather, submetering is a necessity in many commercial buildings because these buildings are not constructed to provide a direct public utility connection to each individual leasable unit within a structure. The electrical systems in these buildings will not accommodate individual meters for tenants even if the landlord wishes to install them.

Even if installing a direct public utility connection is possible for some landlords, they will spend substantial amounts of money on reconfiguring their buildings. Modifying structures to accommodate each EDUs' particular metering requirements can result in a massive amount of cost and would be exceptionally burdensome in large commercial buildings. In addition, many commercial landlords throughout Ohio have incurred substantial costs installing and maintaining their current submetering systems. They installed these systems while relying upon Ohio Supreme Court and Commission precedent which clearly indicates that submetering arrangements between landlords and tenants are lawful.[4] These commercial landlords have incurred capital costs and installation costs related to meters, wiring, and automated meter reading software. These commercial landlords will be deprived of their significant investments

[4] *Pledger v. Pub. Util. Comm.*, 109 Ohio St. 3d 463, 2006-Ohio-2989, 849 N.E.2d 14 at ¶ 39; *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶ 9; and *Brooks*, Case No. 94-1987, Opinion and Order at *36 (May 8, 1996).

if they are suddenly forced to reconfigure their utility infrastructure to accommodate direct public utility connections to each unit. Contrary to the EDUs' claims, utility service arrangements between commercial landlords and their tenants present a myriad of complexities that go well beyond the scope of this residential submetering investigation.

Moreover, there is no evidence of any submetering abuse in the commercial context. Consumer advocates, OCC and OPLC, understood the limited scope of this proceeding, and agreed that the Commission's decision should be limited to residential customers:

> 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.**[5]

Further, the EDUs failed to cite a single example of abuse in the commercial context. The Commission should not allow EDUs to use an investigation into submetering abuses in the residential context as a way to upset valid lease agreements between commercial landlords and tenants. The Ohio Supreme Court has made it clear that landlords have the right to resell, redistribute, or submeter utility service to tenants.[6] The Commission should deny the EDUs' Application for Rehearing to the extent they seek to expand the modified-*Shroyer* test to the commercial context.

B. The Commission should reject the EDUs' attempt to use utility tariffs as an end-run around existing Ohio Supreme Court and Commission precedent.

The EDUs request that the Commission "clarify" that "its decisions in this docket do not limit or foreclose other avenues of addressing submetering, including utility tariffs concerning

[5] OCC/OPLC Reply Comments at footnote 1 (February 5, 2016). (emphasis added).

[6] *Jonas v. Swetland*, 119 Ohio St. 12 (1928); *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St. 2d 1, 4, 208 N.E.2d 923 (1965) and *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St. 3d 371, 2002-Ohio-4847, 775 N.E.2d 485, ¶ 10.

that issue."[7] The EDUs' request is related to AEP-Ohio's current attempt to implement a tariff that may substantially limit commercial landlords' ability to submeter tenants ("*AEP-Ohio Tariff Case*").[8] Although BOMA recognizes that the *AEP-Ohio Tariff Case* is a separate proceeding, the Commission should not to issue any order in this proceeding which allows AEP-Ohio or any other EDU to impose unlawful restrictions on submetering arrangements between the commercial landlords and tenants. The Commission determined long ago that EDUs cannot enforce tariff provisions that prohibit the redistribution of electric service between landlords and tenants.[9] In *Brooks,* the Commission stated:

> After reviewing the evidence of record and arguments of the parties, we conclude that Toledo Edison has no valid right or interest in prohibiting or restricting electric service and related billing practices as they apply to the resale or redistribution of electrical service from a landlord to a tenant where the landlord is not operating as a public utility, and the landlord owns the property upon which such resale or redistribution takes place. Accordingly, we find that Toledo Edison's resale tariff provision, which purports to prohibit such practices, void to that extent.[10]

Commission precedent, especially in the commercial leasing context, clearly prohibits AEP-Ohio from unilaterally terminating submetering agreements between landlords and tenants based upon its own interpretation of what constitutes "markup" or "profit". A discussed above, the Commission correctly determined that commercial and industrial landlords are exempt from the modified-*Shroyer* test, which also means that the Relative Price Test does not apply in the commercial or industrial context. Further, the Commission stated in the Second Entry on Rehearing that it will apply the traditional *Shroyer* test to commercial and industrial customers.

[7] EDUs Application for Rehearing at 15.

[8] *In re OCC* v. *AEP-Ohio*, Case No. 16-0782-EL-CSS, Ohio Power Company's Motion for Tariff Amendment (Apr. 27, 2016).

[9] *Brooks*, Case No. 94-1987, 1996 Ohio PUC LEXIS 292, Opinion and Order at *36 (May 8, 1996).

[10] *Id.* at *32.

The Commission does not examine the "reasonableness" of submetering charges under the traditional *Shroyer* test[11], so any attempt by AEP-Ohio to apply its own "reasonableness" test through a tariff would be inconsistent with the intent of the Second Entry on Rehearing. If the Commission choses to "clarify" its Second Entry on Rehearing, it should ensure AEP-Ohio cannot use tariffs to impose or infringe upon the rights of commercial or industrial landlords to enter into submetering arrangements with their tenants.

III. CONCLUSION

Based on the foregoing, BOMA requests that the Commission deny the EDUs' Application for Rehearing.

Respectfully submitted,

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[11] *In re Complaints of Inscho v. Shroyer's Mobile Homes*, PUCO Case Nos. 90-182-WS-CSS, 1992 Ohio PUC LEXIS 137, Opinion and Order at *8, (Feb. 27, 1992)("The reasonableness of a separate charge for water service is only meaningful if the Commission has first established that it has jurisdiction over the entity providing the service").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Joint Memorandum Contra Application for Rehearing of the Building Owners and Managers Association of Greater Cleveland and the Building Owners and Managers Association of Ohio* was served upon the parties of record listed below this 31st day of July 2017 *via* electronic mail.

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Summary: Memorandum BOMA Greater Cleveland and BOMA Ohio Memo Contra Application for Rehearing of Duke and AEP-Ohio electronically filed by Mr. Devin D. Parram on behalf of BOMA Cleveland