BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Michael E. Brooks, et al.,	)	
Complainants,	)	
v.	)	Case No. 94-1987-EL-CSS
The Toledo Edison Company,	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) On May 8, 1996, the Commission issued its opinion & order which dismissed this complaint against Toledo Edison Company (Toledo Edison or company). In the opinion, we held that Paragraph 19(I) of Toledo Edison's tariff P.U.C.O. No. 7 (resale tariff provision) is void to the extent the provision prohibits or restricts the electrical service and related billing practices of Simon Property Group, Inc. and Simon Property Group, L.P., dba Simon Real Property Group, L.P. (Simon) and S-S-C Company (SSC) to their respective tenants at the North Towne Square Mall (North Towne or mall) and the Southwyck Shopping Center (Southwyck) in Toledo, Ohio. The Commission found that Toledo Edison had no obligation to directly serve the tenants at either North Towne or Southwyck absent the landlords' request for such direct service. Accordingly, we concluded that the company's power to prohibit or restrict electrical service between the landlords and tenants must end at the landlord's property line, and that Toledo Edison has no valid right or interest in attempting to prohibit such resale or redistribution of electrical service. Consequently, we determined that the company's resale tariff provision was unreasonable and void to the extent it prohibits Simon's and SSC's practices, thereby making the issue of the alleged tariff violations moot.

(2) On June 4, 1996, the complainants filed an application for rehearing which lists ten separate grounds. On June 7, 1996, applications for rehearing were also filed by Toledo Edison and Simon. Simon also filed memorandum contra to both

the complainants' and the company's applications for rehearing on June 14 and June 17, 1996, respectively.

(3) The complainants' first ground for rehearing simply claims that our decision is unlawful and unreasonable, but states no specific basis as required by Section 4903.10, Revised Code. The second and third grounds merely conclude, without further comment or reasoning, that our opinion conflicts with the holdings in *Inscho, et al. v. Shroyer's Mobile Homes*, Case No. 90-182-WS-CSS, et al. (February 27, 1992); and *Shopping Centers Ass'n v. Pub. Util. Comm.*, 3 Ohio St.2d 1, 208 N.E.2d 923, 59 P.U.R.3d 403, 32 O.O.2d 1 (1965). Both the *Shroyer* and *Shopping Centers* decisions are discussed in the opinion (at 9-11, 13-14, and footnote 11 at 16), and our holding in the case at bar is entirely consistent with these decisions. As complainants have failed to specify or explain their assertions to the contrary, we need not repeat our analysis of these two cases here.

The complainants' forth and eighth assignments of error contend that this Commission is obligated to regulate electrical service to the end-user and that our opinion amounts to a breach of such duty. This contention is simply incorrect. As noted in the opinion at 14-16, our jurisdiction is limited by statute to the regulation of public utilities, and does not extend to all situations in which end-users may ultimately receive utility services. With respect to the instant case, this Commission has neither the statutory authority nor compliance tools necessary to directly insert itself as an arbiter of landlord-tenant disputes, absent a finding that a landlord is operating as a public utility.[1] A fundamental regulatory purpose of this Commission is the protection of the public interest from the potential excesses inherent in a monopolistic utility system. We believe that such protection does not warrant Commission regulation of the resale or redistribution of utility services within commercial malls or shopping centers where the landlord owns the property upon which such resale or redistribution takes place and is not otherwise operating as a public utility. Indeed, we find that

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1 However, as noted in footnote 12 of the opinion, this finding does not limit the Commission's authority, which includes the residential master-metered rules and disconnection procedures in Rules 4901:1-18-05(A)(3) and 4901:1-18-07, O.A.C., to set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service, such as landlords, are providing such service to the ultimate end user in a manner which is safe and consistent with the public interest (Opinion at 16).

within the context of a landlord/tenant lease agreement, there can not be a resale of electricity where the consideration for electrical service is only one inseparable portion of the total consideration paid.

Grounds 5-7 erroneously assert that our opinion makes a finding that the complainants were not damaged by the landlords' alleged tariff violations, and that our dismissal of the complaint was based upon such finding. Although footnote 7 at page 11 observed that the complainants had not proffered any evidence to quantify their alleged damages, we did not reach the issue of whether the alleged violations actually occurred, nor did we determine any associated damages given our conclusion that the company's resale tariff provision is void.

Complainants' ninth assignment of error claims that this Commission erred in failing to strike certain testimony of Simon's witness, Ms. Hagadone. Complainants apparently base this claim on the fact that the company's resale tariff provision was amended by the company and approved by the Commission during the pendency of *Toledo Premium Yogurt, Inc., dba Freshens Yogurt, v. Toledo Edison Company, et al.*, Case No. 91-1528-EL-CSS, the predecessor to the instant case. Complainants argue that the resale tariff provision, upon approval by the Commission, carries the force and effect of statute. Therefore, according to complainants, the tariff must (as must a statute) speak for itself, and any testimony of Ms. Hagadone which interprets the meaning of the company's resale tariff provision is irrelevant and should be stricken. As noted on pages 8-9 of the opinion, Ms. Hagadone's testimony is very relevant in understanding the complex method Simon uses to recover its costs in providing its tenants with electrical service. Her testimony, however, did not provide any basis for our interpretation of the company's tariff or validity of same, nor for any finding made in the opinion. While the witness expressed her perception of the industry's understanding of the resale tariff provision, the complainants were not prejudiced by the admission of such testimony into the record of this proceeding.

Finally, the complainants' tenth ground for rehearing repeats the complainants' assertion that Toledo Edison and this Commission must enforce the company's approved tariffs notwithstanding the validity or reasonableness of the specific

tariff provision, an argument which we have already considered and rejected (Opinion at 14-15). As complainants have failed to set forth a valid ground for rehearing, their application for rehearing will be denied.

(4) With respect to Toledo Edison's request for rehearing, the company apparently misinterprets our opinion as broadly invalidating its resale tariff provision with respect to any resale or redistribution of electrical service. Our decision, however, is limited to circumstances such as presented in the instant case where a landlord provides electrical service to a tenant upon property owned by the landlord and the landlord is not otherwise operating as a public utility. Accordingly, Paragraph 19(I) of Toledo Edison's tariff P.U.C.O. No. 7 is void only to the extent it applies to such resale or redistribution of electrical service by a landlord to a tenant, and the company is directed to modify this provision to exclude such circumstances from its general prohibition against resale or redistribution of electrical service by Toledo Edison customers.

In reviewing the company's remaining arguments, we are surprised by Toledo Edison's insistence that its tariff provision is valid and necessary in the landlord/tenant situation given the testimony of Ms. Hagadone and that of the company's own witness in this proceeding. As noted in the opinion at 15, it is impossible for the company to determine that a specific North Towne tenant is being charged the same amount for electrical service as if the tenant had been a Toledo Edison customer due to the fact that the tenant's actual usage is never metered.[2] In fact, the company was only able to verify that Simon had applied the correct Toledo Edison tariff rate in computing the tenants' electric service charge, but did not present any analysis which would establish that Simon's

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2 As noted in the opinion at 6, Simon periodically compares the mall's total actual consumption adjusted for weather and internal use and the total tenant projected consumption reflected in the tenants' electrical service charges. Ms. Hagadone testified that this "metered-to-calculated" difference at North Towne was approximately four percent from 1986 through 1994. Since Simon's total projected usage differed somewhat from the total actual usage, it would seem fair to assume Simon's electrical charges which are based on such projections must have also differed somewhat from the electrical service charges Toledo Edison would assess if the company directly served the mall tenants. Moreover, there is no evidence that specific individual tenants are charged precisely the same as they would be if directly served by Toledo Edison; and such a comparison can not be made without installing individual tenant meters, a measure which Ms. Hagadone described as cost prohibitive (Simon Ex. 1, at 24-35, Tr. 194-96).

underlying tenant usage projections were accurate. Moreover, Toledo Edison would rely on tenant complaints to discover landlord violations, a monitoring method which would undoubtedly burden tenants with the time and expense of litigation in proceedings similar to the case at bar and its predecessor (Tr. 232-36, 248-51). Finally, the only remedy available to the company would be the disconnection of all service to the mall, a remedy which is clearly so impractical as to be unenforceable.[3] Thus, we conclude that Toledo Edison's resale tariff provision, as it applies to the resale or redistribution of electrical service by a landlord to a tenant upon property owned by the landlord and where the landlord is not otherwise operating as a public utility, is so unreasonable from both a legal and practical standpoint as to be void. Accordingly, the company's application for rehearing will be denied.

(5) Simon's application for rehearing is limited to two items: the correction of a clerical error on page 12 of the opinion, and the characterization of certain evidence made in footnote 10 at page 15 which is immaterial to our holding in this case. As requested, the first sentence of the first full paragraph of page 12 of the opinion should be corrected to read as follows:

> In addressing the issues raised by this Commission, Simon contends that under the Ohio Electrical Suppliers Certified Territory Act, Sections 4933.81-4933.90, Revised Code, (Certified Territory Act), North Towne is an "electric load center", the tenants of which Toledo Edison has neither the obligation nor right to serve.

Simon also claims that footnote 10 should be changed to reflect that Simon's tenants paid "substantially the same amount" (rather than a lesser amount than they would have paid had they been directly served by Toledo Edison. While we agree that this observation is immaterial to our decision in this opinion, we see no reason to modify this statement given the absence of individual tenant metered data as discussed in Finding 4 above. Accordingly, we will deny this part of Simon's application for rehearing.

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3 On cross-examination, Company witness Wack insinuated that Toledo Edison would be loath to exercise this measure and would seek Commission approval before doing so, notwithstanding the witness's assertion in his prefiled testimony that this Commission should refrain from involving itself in analyzing landlord billing practices (Co. Ex. 2, at 7; Tr. 210-11).

It is, therefore,

ORDERED, That the applications for rehearing filed by the complainants and Toledo Edison are denied. It is, further,

ORDERED, That Simon's application for rehearing is granted to the extent indicated in Finding 5, and that page 12 of the May 8, 1996 Opinion and Order issued in this case be amended, *nunc pro tunc*, to read as set forth in Finding 5 of this entry. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Richard M. Fanelly

Ronda Hartman Fergus

David W. Johnson

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