

**IN THE SUPREME COURT OF OHIO**

In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46. ) Case No.  
)  
) Appeal from the Public Utilities  
) Commission of Ohio  
)  
) Public Utilities Commission of Ohio  
) Case No. 20-1143-EL-UNC  
)  
)

**NOTICE OF APPEAL  
OF  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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OHIO

**NOTICE OF APPEAL OF**  
**THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

The Ohio Manufacturers' Association Energy Group ("OMAEG" or "Appellant"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, hereby gives notice to this Court and the Public Utilities Commission of Ohio ("PUCO") of this appeal taken to protect its members and other electric distribution utility ("EDU") customers from unlawful, unjust, and unreasonable charges under Am. Sub. H.B. 6 ("H.B. 6"). The decisions being appealed are the PUCO's Entry entered in its Journal on August 26, 2020 (Attachment A) and the PUCO's Entry on Rehearing entered in its Journal on October 21, 2020 (Attachment B).<sup>1</sup> Under R.C. 4903.20, this appeal should be taken up and disposed by this Court out of order on its docket.

Appellant was and is a party of record in PUCO Case No. 20-1143-EL-UNC. In its Entry, the PUCO established a nonbypassable rate mechanism, named the Clean Air Fund Rider ("Rider CAF"), for the retail recovery of annual amounts of up to \$170,000,000 for disbursements required from the nuclear generation fund and renewable generation fund (collectively, "Clean Air Fund") from January 1, 2021 through December 31, 2027.<sup>2</sup> The Entry also established Rider CAF's rate design and the method for allocating the \$170,000,000 annual revenue requirement to each EDU.<sup>3</sup> See Attachment A. On September 25, 2020, Appellant timely filed an Application for Rehearing from the PUCO's August 26, 2020 Entry in accordance with R.C. 4903.10, where Appellant raised

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<sup>1</sup> Pursuant to S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached hereto.

<sup>2</sup> *In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Pub. Util. Comm. No. 20-1143-EL-UNC, Entry at ¶¶ 1, 2, 24 (August 26, 2020).

<sup>3</sup> *Id.* at ¶ 25.

the same issues that are the subject of this appeal.<sup>4</sup> Subsequently, through its October 21, 2020 Entry on Rehearing, the PUCO denied Appellant’s Application for Rehearing with regards to the issues raised in this appeal.

In the background of this appeal, there are multiple proceedings and investigations regarding the events surrounding the enactment of H.B. 6. While, as it stands today, H.B. 6 is the law in Ohio, these judicial and regulatory proceedings call into question the legitimacy of the Rider CAF charges, the level of the Rider CAF charges, and the process in which the PUCO established the rate mechanism to collect the H.B. 6 subsidies. For example, on September 15, 2020, the PUCO opened a proceeding to review Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s (collectively, “the FirstEnergy Utilities”) political and charitable spending in support of H.B. 6.<sup>5</sup> More recently, on November 4, 2020, the PUCO issued a request for proposal for audit services to further review the FirstEnergy Utilities’ compliance with Ohio’s corporate separation laws and regulations, and the PUCO-approved corporate separation plans.<sup>6</sup> The PUCO determined that an additional corporate separation audit is necessary because FirstEnergy Corp. (the corporate parent of the FirstEnergy Utilities) filed a Form 8-K with the United States Securities and Exchange Commission reporting that it terminated certain corporate officers due to the results of an internal investigation related to the various H.B.

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<sup>4</sup> *In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Pub. Util. Comm. No. 20-1143-EL-UNC, OMAEG’s Application for Rehearing at 1-2 (September 25, 2020).

<sup>5</sup> *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Pub. Util. Comm. No. 20-1502-EL-UNC, Entry at ¶ 5 (September 15, 2020).

<sup>6</sup> *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37*, Pub. Util. Comm. No. 17-974-EL-UNC, Entry at ¶ 1 (November 4, 2020).

6 investigations and legal proceedings.<sup>7</sup> Additionally, federal and state criminal and civil actions are pending.<sup>8</sup>

Appellant files this Notice of Appeal complaining and alleging that the PUCO's Entry entered in its Journal on August 26, 2020 (Attachment A) and the PUCO's Entry on Rehearing entered in its Journal on October 21, 2020 (Attachment B) are unlawful and unreasonable, and that the PUCO erred as a matter of law in the following respects, as set forth in Appellant's Application for Rehearing:

- A. The PUCO Erred by Unlawfully Establishing Rider CAF in a Manner Inconsistent with the Plain Language of R.C. 3706.46. (OMAEG's Application for Rehearing at 5-9).
  - 1. The PUCO Violated the Plain Language of R.C. 3706.46(B) by Applying the \$2,400 Monthly Cap to all Nonresidential Customers Eligible to Become Self-assessing Purchasers. (OMAEG's Application for Rehearing at 6-7).
  - 2. The PUCO Erred by Including the Commercial Activity Taxes in Rider CAF in Violation of R.C. 3706.46 and R.C. 5751.02(A). (OMAEG's Application for Rehearing at 7-8).
  - 3. The PUCO Erred by Selecting a Methodology for Revenue Recovery Without a Bill Impact Analysis, Concluding Rate Caps are Sufficient Safeguards, and Placing the Burden on Customers to Determine Potential Bill Impacts, Despite R.C. 3706.46(B) Requiring the PUCO to Select a Rate Design That Avoids Abrupt or Excessive Bill Impacts. (OMAEG's Application for Rehearing at 8).
  - 4. The PUCO Violated the Plain Language of R.C. 3706.46 and R.C. 3706.55 by Establishing a Revenue Requirement that Exceeds the Amount Required for Disbursements from the Clean Air Fund. (OMAEG's Application for Rehearing at 5-6).
  - 5. The PUCO Erred by Not Requiring Refund Language to be Included in Rider CAF's Tariffs Despite R.C. 3706.55 Authorizing Refunds to Customers

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<sup>7</sup> *Id.* at ¶ 17.

<sup>8</sup> *See, e.g., United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526 (S.D. Ohio); *State ex rel. Yost v. FirstEnergy Corp.*, Case No. 20-CV-006281, Complaint (September 23, 2020); *City of Columbus v. FirstEnergy Corp.*, Case No. 20-CV-107005, Complaint (October 27, 2020); *State ex rel. Yost v. Energy Harbor Corp.*, Case No. 20-CV-07386, Complaint (November 13, 2020).

Should a Surplus Exist in the Clean Air Fund as of December 31, 2027.  
(OMAEG's Application for Rehearing at 9).

- B. The PUCO Erred by Establishing a Rate Design Likely to Arbitrarily Result in Disparate Rates for Similarly Situated Customers that are Unjustly Discriminatory in Violation of R.C. 4905.35, When Other Lawful Alternatives Exist. (OMAEG's Application for Rehearing at 10).
- C. The PUCO Erred by Willfully Disregarding its Duties and Unreasonably Establishing Rider CAF Despite the Pending Proceedings, Investigations, and Prosecutions Related to H.B. 6 and the Clean Air Fund. (OMAEG's Application for Rehearing at 11-13).

WHEREFORE, Appellant respectfully submits that the PUCO's Entry entered in the PUCO's Journal on August 26, 2020 and its Entry on Rehearing entered in the PUCO's Journal on October 21, 2020 are unreasonable and unlawful in regards to the errors delineated above, and should be reversed or modified with instructions to the PUCO to correct the errors complained of herein.

Respectfully submitted,



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**CERTIFICATE OF FILING**

I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio as required by S.Ct.Prac.R.3.11(D)(2), and Ohio Adm. Code 4901-1-02(A) and 4901-1-36, on December 9, 2020.



\_\_\_\_\_  
Kimberly W. Bojko

COUNSEL FOR APPELLANT,  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal by the Ohio Manufacturers' Association Energy Group was served in accordance with S.Ct.Prac.R. 3.11(D)(1) and R.C. 4903.13 by leaving a copy at the Office of the Commission in Columbus and upon all parties of record via electronic transmission on December 9, 2020.



Kimberly W. Bojko

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# **ATTACHMENT A**

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF ESTABLISHING THE  
CLEAN AIR FUND RIDER PURSUANT TO  
R.C. 3706.46.

CASE NO. 20-1143-EL-UNC

## ENTRY

Entered in the Journal on August 26, 2020

### I. SUMMARY

{¶ 1} In accordance with applicable legislative directives, the Commission establishes a nonbypassable rate mechanism for the retail recovery of annual amounts of up to \$170,000,000 pursuant to R.C. 3706.46 for the period beginning January 1, 2021 and extending up to December 31, 2027.

### II. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} R.C. 3706.55, which became effective on October 22, 2019, requires the Commission to establish a rate mechanism to produce up to \$170,000,000 annually for disbursements required from the nuclear generation fund and renewable generation fund (collectively “Clean Air Fund” or “CAF”) for the period commencing January 1, 2021 and extending up to December 31, 2027. R.C. 3706.46

{¶ 3} With respect to the establishment or operation of the required rate mechanism, the Commission must: (1) determine the method to allocate the revenue requirement to each electric distribution utility (EDU) based on the relative number of customers, relative quantity of kilowatt hour (kWh) sales, or some combination of these factors; and, (2) ensure that the resulting charges do not: (a) exceed eighty-five cents per month for residential customers, (b) exceed two-thousand four hundred dollars per month for industrial customers eligible to become self-assessing purchasers, and (c) cause any abrupt or excessive total net bill impacts for typical nonresidential customers. The required rate mechanism must also be subject to adjustment to reconcile actual collected revenues with the required annual revenue. R.C. 3706.46

{¶ 4} Staff reviewed the compliance requirements of R.C. 3706.46 and filed a proposal for the establishment of the required rate mechanism on June 9, 2020. More specifically, Staff proposed the establishment of the Clean Air Fund Rider (Rider CAF) to satisfy the rate mechanism requirement to be billed and collected by each EDU. Rider CAF would be funded through an initial determination of each EDU's allocated revenue contribution based upon the total number of kWhs sold by that EDU. Then, after setting a monthly charge for residential customers at \$0.85 for each EDU, the remaining revenue contribution of each EDU would be funded by non-residential customers through a charge applicable to kWh usage up to 833,000 kWhs per month, with the total charge applicable to customers eligible to become self-assessing purchasers expressly capped at \$2,400 per month.

{¶ 5} In consideration of its obligation to establish the rate mechanism described above, the Commission opened this case for comment on June 10, 2020. Interested stakeholders were invited to file initial comments on or before July 17, 2020 and reply comments by July 27, 2020.

{¶ 6} Motions to intervene were filed by the Ohio Energy Group (OEG) and the Ohio Manufactures Association Energy Group (OMAEG). No objections were made to these motions. Accordingly, the Commission grants the motions to intervene filed by these entities.

{¶ 7} Comments were filed by OEG; OMAEG; Ohio Power Company (AEP-Ohio); Duke Energy Ohio, Inc. (Duke); Industrial Energy Users-Ohio (IEU-Ohio); The Dayton Power and Light Company (DP&L); and, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (First Energy).

{¶ 8} Reply comments were filed by AEP-Ohio, Duke, and OMAEG.



### III. SUMMARY OF THE COMMENTS

{¶ 9} AEP-Ohio, IEU-Ohio, and OEG fully support Staff's proposal. OEG notes that the proposed 833,000 kWh monthly recovery threshold for non-residential customers is favorable because: it will be easy to administer since the Commission has used this mechanism in other circumstances [*e.g.* Universal Service Fund Rider (USFR) and Legacy Generation Resources (LGR) Rider]; customers are accustomed to working with this kWh threshold; and, it is likely to help customers maintain monthly charges below the statutorily-mandated caps. Similarly, IEU-Ohio notes that the proposed rate design was adopted for another charge with which customers are familiar, and that the proposal avoids rate shock and other unreasonable outcomes.

{¶ 10} DP&L also agrees with Staff's recommendation, seeking only to clarify that Staff's proposal will employ annual reconciliations of actual "collected" versus "required" revenues, rather than only providing for a single reconciliation during the 2022 period.

{¶ 11} Duke agrees with Staff's recommendation with two exceptions: (1) the "true up" calculation that Staff proposes should be based on actual (not projected) annual data; and, (2) the requirement to provide annual kWh sales data should be clarified such that data provided on November 1 of each year would reflect the most current prior year's sales information, which relates to the period ending September 30.

{¶ 12} First Energy advocates that Rider CAF should be adjusted to account for the impact that Rider LGR had upon its customers' bills. According to First Energy, only its customers experienced bill increases associated with implementing Rider LGR. The company asserts that Rider CAF should be adjusted in a manner that considers the combined impact of riders CAF and LGR such that Rider CAF should be applied against its customers in a discounted manner.

{¶ 13} In its initial comments, OMAEG proposes five modifications to Staff's recommendation for constructing Rider CAF: (1) in order to account for disparate residential

customer usage, the Commission should allocate the annual revenue requirement to each EDU based on kWh sold up to 833,000 per month per customer, with separate allocation for residential customers; (2) Rider CAF should not include commercial activity tax (CAT) amounts; (3) Rider CAF's \$2,400 monthly cap should apply to only industrial, and not all, customers that are eligible to become self-assessing purchasers; (4) the Commission should require bill impact analyses from each EDU and solicit comments before establishing Rider CAF; and, (5) Rider CAF should be subject to reconciliation and refund.

{¶ 14} Reply comments from AEP-Ohio reiterate agreement with Staff's proposal, while providing specific rebuttal arguments to portions of proposals by First Energy and OMAEG. Relative to First Energy, AEP-Ohio argues specifically against: (1) the claim that Rider CAF should be established with consideration of the combined impact of riders CAF and LGR; and, (2) any attempt to reallocate the nonresidential customer funding aspects as First Energy proposes. AEP-Ohio claims that First Energy's combined impact proposal is not supported by the Rider CAF legislation, and that it would unreasonably shift costs to non-First Energy customers, or risk underfunding Rider CAF such that the collection time period would need to be extended. Relative to OMAEG, AEP-Ohio argues against: (1) assessing revenue requirements based on customers served, rather than according to the volume of kWh sold; and, (2) capping the nonresidential usage at 833,000 kWh per account for revenue allocation purposes instead of utilizing the actual, uncapped, usage of each customer; (3) reducing rider CAF remittances from the EDUs based on amounts that were paid subject to CAT; (4) applying the \$2,400 per month rate cap to only industrial customers; and, (5) subjecting rider CAF to reconciliation and refund beyond Staff's regular financial reconciliation audit. In general, AEP-Ohio rebuts OMAEG's proposals because they are not supported by calculations of customer impacts, unreasonably limit the rate design relative to Staff's proposed residential/nonresidential design, and are inconsistent with the controlling statutory language.

{¶ 15} Reply comments from Duke challenge OMAEG's comments regarding whether EDU remittances are inclusive of CAT, and whether nonresidential, nonindustrial



customers should see rider CAF caps at \$2,400 per month. Duke maintains that the EDU remittance provided for in Rider CAF is a “flow through” assessment from its customers to the CAF such that no CAT adjustment need occur, and that the \$2,400 customer cap should apply to all nonresidential accounts in order to maintain consistency as to billing practices across the differing EDU territories.

{¶ 16} Reply comments from OMAEG incorporate points asserted in its initial comments.

#### IV. ANALYSIS OF THE COMMENTS

##### A. *Rider CAF is established independent of LGR Rider.*

{¶ 17} Contrary to First Energy’s position, there is no basis for offsetting any Rider CAF amounts based on amounts recovered pursuant to Rider LGR. While both riders are established pursuant to legislative direction, there is no other connection between the two riders. Each rider is established with its own funding purpose, and neither purpose references the other in the legislation. First Energy’s position is incompatible with the plain meaning of the law, as it should well know.

##### B. *Rider CAF recovery shall not be reduced by CAT amounts.*

{¶ 18} Contrary to OMAEG’s position, the Commission finds that R.C. 3706.46 requires that the CAF be established, without consideration of any CAT reduction, at an annual amount of up to \$170,000,000. Had the legislature intended to establish the CAF at an initial amount reduced to account for any CAT offset, it would have expressly done so. The Commission finds the statutory language requires EDUs to collect and remit the dollar amount required by the CAF without regard to any CAT offset subject to such future adjustment as may be necessary in accordance with R.C. 3706.55 and the retrospective audit requirements contained therein.

- C. *The \$2,400 monthly bill cap shall apply to all nonresidential customers that are eligible to become self-assessing purchasers.*

{¶ 19} The Commission accepts Staff's recommendation to cap bills for all nonresidential customers eligible to become self-assessing purchasers, rejecting the proposal that the cap apply only to industrial customers. Staff's proposal to apply a nonresidential cap is consistent with Rider LGR, which established a cap at \$1,500 per nonresidential customer, and avoids abrupt and unreasonable bill increases for all nonresidential customers.

- D. *The allocation of EDU revenue contributions based on the ratio of annual total kWh sales is reasonable.*

{¶ 20} The Commission finds that Staff's recommendation to allocate Rider CAF contributions based on each EDU's percentage of kWh sales is reasonable, rejecting OMAEG's argument contra. Staff's proposal is easily administered and fairly apportions the funding for Rider CAF for each EDU based on the percentage of its customer's overall usage.

- E. *The annual kWh sales data shall be reported on November 1 for the 12 month period ending September 30.*

{¶ 21} The Commission finds that EDUs shall report kWh sales annually on November 1 for the 12 month period ending September 30, so that EDUs are consistently providing actual, rather than estimated, data.

- F. *The Commission finds that the true up based on revenue data through September 30, as provided by Staff, is reasonable.*

{¶ 22} Staff proposes that EDUs have two opportunities to adjust Rider CAF; where the collection balance is significantly over/under the expected amount, and based on revenues for the 12-month period ending each year, as incorporated in the next year's Rider

update<sup>1</sup>. We find that Staff's proposal is reasonable, rejecting Duke's request to annualize the collection data through September 30. The data provided by EDUs comparing "actual" versus "expected" collections through September 30 is sufficient to enable EDUs to reasonably evaluate prospective charges. Moreover, where an EDU's collections are significantly different than expected during any year, the EDU may seek authorization of an interim adjustment to Rider CAF to correct any collection anomalies that might otherwise occur and to mitigate the risk of abrupt or unreasonable customer impacts. We find these provisions are reasonable in regard to protecting EDUs and consumers regarding establishing and maintaining ongoing Rider CAF requirements.

***G. Rider CAF is established without the need for bill impact analysis by each EDU, and is not subject to reconciliation and refund.***

{¶ 23} As discussed earlier herein, Staff's proposal is designed with safeguards against abrupt and unreasonable bill impacts. Through the use of the residential/nonresidential allocation, the usage cap of 833,000 kWhs, and the rate caps of \$0.85 and \$2,400 described herein, Staff's funding plan reasonably spreads the funding provided by Rider CAF. Based on these safeguards, we find that there is no need to conduct bill impact analysis beyond Staff's recommendation and the information already provided in this proceeding. The simplicity of the math behind the development of Rider CAF and the stated revenue target should allow the parties themselves ample opportunities to identify any potential bill impacts. Further, as Rider CAF does not involve any prudence determination, we decline to impose any reconciliation and refund requirements to the rider other than those already provided by statute.

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<sup>1</sup> During the initial year of Rider CAF collections, the reconciliation will focus only on the 9 months of available revenue data ending September 30, 2021. In future years, the 12-month period ending September 30 will be the reconciliation period for subsequent updates.



## V. RIDER CAF RATE DESIGN

{¶ 24} The Commission establishes the Rider CAF rate design to be effective January 1, 2021, through December 31, 2027, subject to final reconciliation and adjustment, if any, that may result from the R.C. 3706.61 audits.

{¶ 25} Details of the Rider CAF rate design are as follows:

- (a) The total revenue requirement shall be allocated to EDUs based on their percentage of total kWhs sold during the preceding calendar year.
- (b) Each EDU shall initially charge its residential customers \$0.85 per month.
- (c) Each EDU will then collect the remainder (nonresidential portion) of its allocated share of the total revenue requirement by dividing the forecasted annual nonresidential kWhs, for all kWhs up to 833,000 per month per customer, to determine a per kWh (\$/kwh) rate for each nonresidential customer's usage up to 833,000 kWhs per month.
- (d) The amount collected through Rider CAF for all customers eligible to become self-assessing purchasers shall not exceed two-thousand four hundred dollars per month.
- (e) Each EDU shall update its Rider CAF annually to reflect its share of the total revenue requirement and to adjust for any over/under recovery of revenue for the period up to September 30 of the preceding year.
- (f) Staff shall annually calculate and provide EDUs their allocated share of the total revenue requirement in time for the EDUs to file their annual update.
- (g) Each EDU shall provide semi-annual reports to Staff to detail the monthly revenues collected from residential and non-residential customers, as well as the kWhs sold each month for the residential and non-residential customers.

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 26} R.C. 3706.46 requires the Commission to authorize a rate mechanism to produce \$170,000,000 annually, which shall be remitted in accordance with R.C. 3706.53.

{¶ 27} On June 9, 2020, Staff filed comments proposing that a recovery mechanism in the form of Rider CAF be authorized by the Commission to comply with R.C. 3706.46.

{¶ 28} On June 10, 2020, the Commission opened this case to receive comments on such recovery mechanism.

{¶ 29} Initial comments were received on July 17, 2020. Reply comments were received on July 27, 2020.

{¶ 30} In consideration of the statutory obligation to establish the recovery mechanism, the comments, and the reply comments filed in this case, the Commission authorizes each EDU to bill and collect from customers in such amount as permitted by Rider CAF as described in paragraph 25.

{¶ 31} Nothing herein shall be read or construed to preclude such adjustments or reconciliations of Rider CAF as may be appropriate to recognize the results of retrospective audits required by R.C. 3706.61. All amounts collected by Rider CAF are subject to such adjustment and reconciliation as may be appropriate to recognize such results.

## VII. ORDER

{¶ 32} It is, therefore,

{¶ 33} ORDERED, That Rider CAF is established as described above. It is, further,

{¶ 34} ORDERED, That EDUs responsible for collecting Rider CAF file their annual kWh sales data by November 1, and their annual rider approval applications no later than 45 days prior to the annual effective dates of Rider CAF. It is, further,

{¶ 35} ORDERED, That a copy of this Entry be served upon all parties of record.

**COMMISSIONERS:**

*Approving:*

Sam Randazzo, Chairman  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

MLW/hac

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

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**Case No(s). 20-1143-EL-UNC**

Summary: Entry establishing a nonbypassable rate mechanism for the retail recovery of annual amounts of up to \$170,000,000 pursuant to R.C. 3706.46 for the period beginning January 1, 2021 and extending up to December 31, 2027. electronically filed by Ms. Mary E Fischer on behalf of Public Utilities Commission of Ohio

## **ATTACHMENT B**



# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF ESTABLISHING THE  
CLEAN AIR FUND RIDER PURSUANT TO  
R.C. 3706.46.

CASE NO. 20-1143-EL-UNC

## ENTRY ON REHEARING

Entered in the Journal on October 21, 2020

### I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by The Ohio Manufacturers' Association Energy Group on September 25, 2020.

### II. DISCUSSION

#### A. *Procedural Background*

{¶ 2} Am. Sub H. B. 6 (H.B. 6), which became effective on October 22, 2019, required the Commission to establish a rate mechanism to produce \$170,000,000 annually for disbursements required by R.C. 3706.55 from the nuclear generation fund and renewable generation fund (collectively "Clean Air Fund") for the period commencing January 1, 2021 and extending up to December 31, 2027. R.C. 3706.46

{¶ 3} With respect to the establishment or operation of the rate mechanism, the Commission was required to: (1) determine the method to allocate the revenue requirement to each electric distribution utility (EDU) based on the relative number of customers, relative quantity of kilowatt hour (kWh) sales, or some combination of these factors; (2) ensure rate increases that are (a) not to exceed eighty-five cents per month for residential, (b) not to exceed two-thousand four hundred dollars per month for industrial customers eligible to become self-assessing purchasers, and (c) avoidant of abrupt or excessive total net bill impacts for typical nonresidential customers; and, (3) provide that the charges it approves are subject to adjustment to reconcile actual collected revenues with the required annual revenues. R.C. 3706.46

{¶ 4} On August 26, 2020, the Commission established the Clean Air Fund Rider

(Rider CAF) as the nonbypassable rate mechanism to be billed and collected by each EDU. Rider CAF will be funded through an initial determination of each EDU's allocated cost based upon the total number of kWhs sold by that EDU. Then, after setting a monthly charge for residential customers at \$0.85 for each EDU, the remaining costs will be recovered by each EDU from non-residential customers through a dollar per kWh rate for each non-residential customer's usage up to 833,000 kWhs per month, with charges for non-residential customers eligible to become self-assessing purchasers expressly capped at \$2,400 per month. Entry at ¶¶25, 30.

{¶ 5} Pursuant to R.C. 4903.10, any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the Commission's order is journalized.

{¶ 6} The Ohio Manufacturers' Association Energy Group (OMAEG) filed an application for rehearing on September 25, 2020, seeking the Commission's reconsideration of our decision regarding the establishment and manner of funding Rider CAF. No memoranda contra OMAEG's application for rehearing were filed.

***B. Summary of the Application for Rehearing***

{¶ 7} OMAEG asserts three assignments of error: (1) that the Commission erred in establishing Rider CAF in a manner inconsistent with the plain language in R.C. 3706.46; (2) that Rider CAF arbitrarily results in disparate rates for similarly situated customers that are unjustly discriminatory in violation of R.C. 4905.35; and, (3) that Rider CAF is unjustly and unreasonably established in light of the pending investigations and prosecutions related to the enactment of H.B. 6.

{¶ 8} Relative to its first assignment of error, OMAEG argues that the Commission committed four errors. First, OMAEG contends that there was error in extending a monthly cost cap of \$2,400 to all nonresidential customers, rather than limiting the cap to only industrial customers eligible to become self-assessing purchasers. OMAEG claims that the



absence of a required cap upon all nonresidential customers precludes the Commission from establishing a rate mechanism that provides for such a cap beyond that which was legislatively mandated. Second, OMAEG claims that Rider CAF is improper because it fails to reduce the \$170,000,000 annual revenue requirements by commercial activity tax (CAT) amounts, which OMAEG argues should be paid by the businesses that are expected to receive CAF payments. Third, OMAEG alleges error as to the failure to require a bill impact analysis. Finally, OMAEG alleges error regarding the failure to explicitly require a refund of over-collected Rider CAF amounts.

{¶ 9} Relative to its second assignment of error, OMAEG asserts that the Rider CAF rate design is improper because nonresidential rates will vary across EDU service territories depending on the number of residential customers served by the respective EDU. OMAEG asserts that the Rider CAF violates R.C. 4905.35 to the extent that nonresidential customers are impacted disparately depending on the service area of their EDU provider.

{¶ 10} Relative to its third assignment of error, OMAEG asserts that the pending investigations and prosecutions surrounding the passage of H.B. 6 bar the Commission from establishing Rider CAF. Specifically, OMAEG cites to three cases that purportedly estop the enactment of Rider CAF: (1) the U.S. Attorney's Office for the Southern District of Ohio filing of a criminal complaint related to the enactment of H.B. 6<sup>1</sup>; (2) the Ohio Attorney General's complaint against FirstEnergy Corp., et al., alleging a pattern of corrupt activity, money laundering, bribery, and evidence tampering<sup>2</sup>; and, (3) the Commission's own investigation of the political and charitable spending of FirstEnergy related to the enactment and H.B. 6.<sup>3</sup>

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<sup>1</sup> *United States of America v. Larry Householder, et al.*, Case No. 1:20-MJ-00526 (S.D. Ohio) (July 17, 2020).

<sup>2</sup> *State of Ohio v. FirstEnergy Corp., et al.*, Complaint at 8-11 (Franklin County Ohio) (September 23, 2020).

<sup>3</sup> *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC, Entry at ¶ 5 (September 15, 2020).



### C. *Commission Conclusion*

{¶ 11} We reject the arguments raised by OMAEG and affirm our decision from August 26, 2020.

{¶ 12} In rejecting the four claims asserted in OMAEG's first assignment of error, we note that each of these claims was previously considered and rejected. Entry at ¶¶18, 19, 20, 23 (August 26, 2020). Further, we find that Rider CAF is consistent with the plain language of R.C. 3706.46. Contrary to OMAEG's contention, there is nothing in R.C. 3706.46 that prohibits the Commission from establishing a nonresidential rate cap beyond the one explicitly required for industrial customers that are eligible to become self-insured purchasers. As we previously discussed, applying a nonresidential rate cap more broadly is consistent with our treatment regarding Rider LGR<sup>4</sup>, and avoids abrupt and unreasonable bill increases for nonresidential customers as explicitly required by R.C. 3706.46. Entry at ¶19. Similarly, the legislative direction to establish the CAF at an annual amount of \$170,000,000 is clear, and there is no indication that the Commission is permitted to set Rider CAF at a reduced amount in order to account for CAT amounts. Entry at ¶18. Regarding the bill impact analysis that OMAEG seeks to impose, we again find no such legislative requirement. Instead, through the use of the residential/nonresidential allocation, the usage cap of 833,000 kWhs, and the rate caps of \$0.85 and \$2,400, we affirm that Rider CAF has sufficient safeguards that ensure against abrupt and unreasonable bill increases. Entry at ¶19. Finally, OMAEG's claimed error regarding the failure to explicitly require a refund of over-collected Rider CAF amounts fails because OMAEG attempts to interject requirements that were not legislatively adopted while also ignoring the plain language of our prior decision, where we upheld refund requirements as provided by statute. Entry at ¶23.

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<sup>4</sup> The Commission established the Legacy Generation Resources Rider (Rider LGR) as required by H.B. 6 in Case No. 19-1808-EL-UNC. Entry (November 21, 2019).

{¶ 13} Further, we again reject OMAEG's claim that Rider CAF is improper because it results in varying impacts among the EDUs. The legislature expressly required that the Commission establish the revenue requirements of EDUs for Rider CAF based on the relative number of customers, relative quantity of kilowatt hour (kWh) sales, or some combination of these factors. Rider CAF was created in accordance with this mandate, with its collections being reasonably allocated among EDUs based on their relative percentage of kWh sales, which fairly apportions funding of the rider according to the overall usage of customers across the state. Accordingly, the approved allocation is appropriate and does not require further consideration. Entry at ¶20.

{¶ 14} Finally, we reject OMAEG's claim that allegations surrounding H.B. 6 require the delay in establishing Rider CAF. The Commission established the rider in compliance with the legislative direction it received. As OMAEG points out throughout its brief, the Commission must act according to the legislative direction that it receives. Accordingly, we are not empowered to disregard legislation that requires the establishment of Rider CAF regardless of the allegations associated with its enacting legislation.

{¶ 15} For the reasons stated herein, the Commission finds that OMAEG's application for rehearing should be denied.

### III. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That the application for rehearing filed by OMAEG on September 25, 2020, be denied. It is, further,

{¶ 18} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

COMMISSIONERS:

*Approving:*

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

MLW/kck

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Summary: Entry denying the application for rehearing filed by The Ohio Manufacturers' Association Energy Group on September 25, 2020. electronically filed by Kelli C. King on behalf of The Public Utilities Commission of Ohio

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**Case No(s). 20-1143-EL-UNC**

Summary: Notice Of Appeal of The Ohio Manufacturers' Association Energy Group  
electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group