IN THE SUPREME COURT OF OHIO

In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46.	)	Case No. 2020-1488
	)	
	)	Appeal from the Public Utilities
	)	Commission of Ohio
	)	
	)	Public Utilities Commission of Ohio
	)	Case No. 20-1143-EL-UNC

MOTION TO STAY CHARGES ASSESSED TO CUSTOMERS TO SUBSIDIZE THE H.B. 6 CLEAN AIR FUND BY THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Kimberly W. Bojko (0069402)
(Counsel of Record)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4124
Facsimile: (614) 365-9145
bojko@carpenterlipps.com

COUNSEL FOR APPELLANT,
THE OHIO MANUFACTURERS'
ASSOCIATION ENERGY GROUP

David Yost (0056290)
Attorney General of Ohio

John Jones (0051913)
Section Chief, Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8767
john.jones@ohioattorneygeneral.gov

COUNSEL FOR APPELLEE,
PUBLIC UTILITIES COMMISSION OF
OHIO

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CHARGES ASSESSED TO CUSTOMERS
TO SUBSIDIZE THE H.B. 6 CLEAN AIR FUND
BY
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

For the purpose of preventing irreparable harm to its members and other electric distribution utility customers, Appellant the Ohio Manufacturers' Association Energy Group ("OMAEG") respectfully moves this Court, under R.C. 4903.16, for a stay of the August 26, 2020 Entry (*see* Attachment A) and the October 21, 2020 Entry on Rehearing (*see* Attachment B) issued by the Public Utilities Commission of Ohio ("PUCO") and the effective date (January 1, 2021) of new charges that will be assessed to and collected from retail electric customers. That Entry and Entry on Rehearing unreasonably, unjustly, and unlawfully created a nonbypassable rate mechanism, named the Clean Air Fund Rider ("Rider CAF"), for the retail recovery from customers of annual amounts of up to $170 million to fund the nuclear generation fund and renewable generation fund (collectively, "Clean Air Fund") for disbursements to qualifying nuclear and renewable generation resources required under Am. Sub. H.B. 6 ("H.B. 6").[1] The

[1] *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) (hereinafter, "Entry").

Entry also established the Rider CAF charge's rate design and the methodology for allocating the $170 million annual revenue requirement to customer classes and to each electric distribution utility for collection from retail electric customers.[2] Unless stayed by this Court, all retail electric customers will begin paying these new charges to subsidize certain nuclear and renewable generation resources on January 1, 2021 and will continue paying them through at least December 31, 2027.[3]

More specifically, OMAEG hereby seeks to stay the execution of the PUCO's Entry and Entry on Rehearing, including the effective date (January 1, 2021) of the Rider CAF charges that will begin being collected from retail electric customers in order to fund the Clean Air Fund. A stay is necessary in order to prevent irreparable harm to OMAEG members and other retail electric customers in Ohio during the pendency of OMAEG's appeal of the PUCO's decisions in the case below.

OMAEG respectfully notes that, pursuant to R.C. 4903.20, "all actions and proceedings in the supreme court" under the Revised Code Chapters at issue in this appeal "shall be taken up and disposed of by the court of their order on the docket."

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2 *Id.* at ¶ 25.

3 *Id.* at ¶¶ 1, 2, 24; *see also In re Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Pub. Util. Comm. No. 20-1143-EL-UNC, Entry on Rehearing at ¶ 2 (October 21, 2020) (hereinafter, "Entry on Rehearing").

For the reasons set forth in the following Memorandum in Support, the requested stay should be granted.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
(Counsel of Record)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4124
Facsimile: (614) 365-9145
bojko@carpenterlipps.com

COUNSEL FOR APPELLANT,
THE OHIO MANUFACTURERS' ASSOCIATION
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On August 26, 2020, the PUCO stated that it established the Rider CAF charge pursuant to H.B. 6.[4] Rider CAF is a rate mechanism that allows retail electric customers to be charged up to $170 million annually beginning January 1, 2021 to fund the newly created Clean Air Fund, which will be in the custody of the Treasurer of State. *Id.* at ¶ 1. H.B. 6 requires the monies collected from the Rider CAF charges to be deposited into the Clean Air Fund, which the Treasurer of State will then disperse to operators of qualifying generating facilities, as instructed by the Ohio Air Quality Development Authority ("OAQDA"). R.C. 3706.53 and 3706.55. As explained further below, the rate design of the Rider CAF charges, the level of the Rider CAF charges, and the overarching context in which the PUCO established the Rider CAF charges are contrary to Ohio law and the public interest. Because the Rider CAF charges are set to become effective January 1, 2021 and because there is no refund mechanism available to customers once the monies are collected and disbursed, OMAEG members and other electric retail customers throughout Ohio face imminent harm from the PUCO's orders.

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[4] Entry at ¶¶ 1, 2, 24.

The PUCO erred in establishing the new Rider CAF charges and by authorizing the collection of $170 million annually from retail electric customers, beginning on January 1, 2021 and continuing through at least December 31, 2027, to subsidize certain nuclear and renewable generation in violation of Ohio law. Additionally, the PUCO erred in establishing the rate design for the Rider CAF charges and the methodology for allocating the $170 million annual revenue requirement to customer classes and to each electric distribution utility for collection from retail electric customers. Absent a stay of the PUCO's orders during the pendency of this appeal, the State of Ohio will receive the funds collected from customers through the Rider CAF charges that may later be found by this Court to be unlawful, resulting in the State of Ohio, and later, unregulated generation resources from being unjustly enriched. And unfortunately for customers, it is likely that any money collected from customers and disbursed -- even though later found to be unlawfully collected -- will not be returned to customers.

This is an outcome that was experienced in an appeal of the electric security plan ("ESP") of Columbus Southern Power Company and Ohio Power Company (collectively "AEP"). *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 54. In regard to unlawful charges paid by AEP's customers, this Court found that $368 million in unjustified provider of last resort revenues collected by the utility could not be returned to customers because of the rule against retroactive ratemaking. *Id.* In *Columbus S. Power Co.*, the Court recognized the "unfair" nature of an outcome where the utility was permitted to retain a windfall in the form of $386 million. *Id.* at ¶ 56. The Court noted that the Appellants failed to obtain a stay in order to prevent that unfair outcome. *Id.* at ¶ 57. Additionally, this Court has found that customers are prohibited from receiving refunds for charges or rates collected pursuant to utilities' tariffs, unless the tariffs

themselves provide a refund mechanism. *See In re Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 23, *citing* R.C. 4905.32.

Fortunately, the Court has long recognized the right to stay final PUCO orders authorizing the collection of new rates. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655, ¶ 17 (citing *Keco Industries Inc. v. Cincinnati & Suburban Tel. Co.*, 166 Ohio St. 254, 257 (1957)). OMAEG satisfies the requirements that the General Assembly affixed to the Court's authority to stay and can establish that conditions are present that favor the Court exercising its authority to stay the PUCO's unlawful orders. More specifically, OMAEG can demonstrate that: 1) there is a strong likelihood that it will prevail on the merits of its pending appeal; 2) irreparable harm to its members and other retail electric customers will occur absent a stay; 3) no harm to electric distribution utilities or any other entity exists if a stay is granted; and 4) the public interest supports the Court granting a stay. Accordingly, OMAEG respectfully requests that the Court grant its Motion to Stay the PUCO's orders authorizing Rider CAF charges and the collection from retail electric customers of amounts sufficient to produce $170 million annually for disbursements to non-regulated entities from the Clean Air Fund by the Treasurer of State, a subsidy created by H.B. 6.

II. STANDARD OF REVIEW

There is no controlling authority in Ohio providing the factors under which this Court will stay a final order of the PUCO. *In re the Commission's Investigation into the Modification of Intrastate Access Charges*, Pub. Util. Comm. No. 00-127-TP-COI, 2003 Ohio PUC LEXIS 62, at 5 (February 20, 2003) (citing *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (1987) (Douglas, J., Dissenting). However, in a dissenting opinion,

Justice Douglas urged the adoption of the following four-part analysis in *MCI Telecommunications Corp.*, which has since become the de facto test cited by appellants.

Justice Douglas recommended that the Court consider the following four factors when evaluating a request to stay a final order of the PUCO: 1) whether the movant has made a strong showing of the likelihood of prevailing on the merits; 2) whether the movant has demonstrated that absent the stay, irreparable harm will be suffered; 3) whether irreparable harm to other parties would result if the stay is issued; and 4) "and above all, in these types of [public utility] cases, where lies the interest of the public." *MCI Telecommunications Corp.* at 606.

Additionally, R.C. 4903.16 provides for technical requirements that must be met for the Court to issue a stay of execution regarding the PUCO's final orders:

> A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

The law imposes three conditions on the Court's exercise of its power to stay. As such, in an appeal from the PUCO, the Court will sustain a motion for a stay of execution if the movant satisfies the three technical requirements contained in R.C. 4903.16: 1) application to the Court; 2) notice to the PUCO; and 3) upon granting of the stay by the Court, execution of a bond in the amount prescribed by the Court for damages caused by the delay and for the repayment of all monies paid for the commodity or service in excess of the charges complained of in the event the order is sustained.

III. LAW AND ARGUMENT

A. OMAEG has Satisfied the Requirements Established in R.C. 4903.16 for the Court to Grant a Stay.

OMAEG has satisfied the technical requirements set forth in R.C. 4903.16 for the Court to grant a stay of the PUCO's final orders. First, there must be an "application" to the Court. R.C. 4903.16. OMAEG has applied to the Court by filing this Motion and complying with all of the Court's applicable filing rules. Second, OMAEG has provided the requisite three days' notice to the PUCO. Exhibit C attached to this Motion contains the date-stamped copies. Third, R.C. 4903.16 requires that if a stay is allowed, the Appellant shall execute an undertaking -- a bond that satisfies certain conditions: 1) the bond must be "payable to the state"; 2) the bond must be in an amount sufficient to protect against damage caused during a pending appeal if the Court should affirm the PUCO's orders; 3) and the bond must be in an amount sufficient for the repayment of all monies paid for the commodity or service in excess of the charges complained of if the Court should affirm the PUCO's orders.

Under the unique facts of this particular case, a bond is not necessary under R.C. 4903.16 to effectuate a stay of the PUCO's orders because no damages will be incurred during the pendency of the appeal and repayment of monies will not be necessary as the charge in dispute is not for a commodity or service provided to the retail electric customers by the entity collecting the charge (i.e., the utilities).

Specifically, in the context of customers challenging a rate or charge on their utility bills, the Court has interpreted R.C. 4903.16 to require a bond to safeguard the *utility* from the damage it would incur during the stay of its rates pending appeal. *See In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 20. In *Columbus S. Power Co.*, the Court held that the PUCO erred when it authorized a utility to collect an unlawful charge totaling over

$500 million over the course of the utility's ESP. *Id.* at ¶ 29. But, absent a stay of the PUCO order, the Court could not provide the utility's customers a remedy because the Court held that ratemaking is prospective only. *Id.* at ¶ 16. In explaining the bond requirement of R.C. 4903.16, the Court stated, "that the legislature has seen fit to attach a significant requirement to the court's stay power: the posting of a bond sufficient to protect the *utility* against damage." (Emphasis Added.) *Id.* at ¶ 20.

More recently, in *Dayton Power & Light Co.*, the Court held that it could not order a remedy for a disputed rate once the utility's ESP and the charge under the ESP were no longer in effect. *In re Dayton Power & Light Co.*, 164 Ohio St.3d 237, 2018-Ohio- 4009, 113 N.E.3d 507, ¶ 8. In her concurrence in judgment only, Justice Kennedy, stated that "the protection provided by the legislature against the collection of these rates that are alleged to be unlawful is a stay secured by a bond in an amount sufficient to protect the *utility* against damage, a bond most litigants cannot afford." (Emphasis added.) *Id.* at ¶ 26 (Kennedy, J., concurring in judgement only).

As Justice Kennedy acknowledged, litigants requesting stays of final PUCO orders have historically been unable to afford the bond requirement and secure a stay. This is because utilities regularly recoup several millions of dollars for the services that they provide to customers through their PUCO-approved rates. For example, in *City of Columbus,* the Court denied a city a stay of charges collected for electric service because the city failed to execute a bond of more than a nominal amount. *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 109, N.E.2d 167 (1959). Similarly, the Court in *Columbus S. Power Co.* held that a consumer group was not entitled to a refund and recognized that the consumer group did not execute a bond commensurate to the disputed charges totaling $500 million under the utility's ESP. *Columbus S. Power Co.* at ¶ 29.

In *Columbus S. Power Co.*, the utility asserted that the charge was necessary to compensate it for the risk of being the default provider of electricity for customers who shop and then return to the utility for generation service. *Id.* at ¶ 23. Again, in *In re Duke Energy, Ohio Inc.*, the Court denied movants a stay of rates to compensate a utility for $55.5 million in remediation and investigation costs for abandoned manufactured gas plants. *In re Application of Duke Energy, Ohio Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 34. The Court denied the stay because movants were unable to execute a bond beyond a nominal amount. *Id.*

In all of these cases cited above, the disputed rates or charges were intended to compensate the utilities for a service provided, an investment made, or a risk taken in relation to their public utility function and service to customers. Simply put, the utilities were the beneficiaries of the rates and charges in dispute. In those situations, the posting of a bond pursuant to R.C. 4903.16 could have protected the utilities as the beneficiaries of the rates during a stay pending appeal and prevented damage to the utilities. As such, under R.C. 4903.16, a litigant challenging the rates or charges assessed by a public utility for a service or commodity provided by that utility generally must execute a bond in an amount commensurate to the disputed utility rates to safeguard the utility from damage.

But in this appeal, the utilities will not incur any damages if the Court stays the collection of the charge and the utilities will not require repayment of any charges as the utilities are not retaining the monies that they collect to compensate them for a service provided, an investment made, or a risk taken in relation to their public utility function and service to customers. The charges at issue are wholly distinguishable from those in the aforementioned cases because, here, the utilities are not the beneficiaries of the Rider CAF charges. Rider CAF charges do not compensate the utilities for any services that they have provided or will provide, investments they

have made or will make, or risks that they have incurred or will incur. Instead, the beneficiary of the charges is the Clean Air Fund in the custody of the Treasurer of State. In the unique context of H.B. 6 and the established Rider CAF charges, the utilities are acting solely as a conduit of the State and will not retain any of the charges that they collect from customers.

According to R.C. 3706.53, the Rider CAF charges that the utilities collect will be deposited into the Clean Air Fund in the custody of the Treasurer of State. Upon direction of the OAQDA and not until April 2021, the Treasurer will remit the Clean Air Funds to owners or operators of qualifying nuclear and renewable resources in amounts equivalent to credits earned based upon the generation produced by the qualifying facility. R.C. 3706.45 and 3706.55.

Therefore, the utilities will not be harmed if the Court ultimately affirms the PUCO's orders. Instead, retail electric customers, including OMAEG members, will be harmed should the Court affirm the PUCO's decisions. Given that a bond is not required to protect the utility against damage or to compensate the utility for a service provided, an investment made, or a risk taken, a bond is not required under R.C. 4903.16. Thus, should the Court grant this Motion to Stay and subsequently affirm the PUCO's decisions, Ohio's utilities cannot demonstrate any damages because the Rider CAF charges are not designed to compensate the utilities for any action that they have taken or services that they have provided.

Moreover, no third party can demonstrate harm from the Court granting a stay. The Treasurer will not disperse Clean Air Funds until April 2021, and the funds will be disbursed based upon credits earned from generation produced by qualifying facilities beginning in January 2020. R.C. 3706.45 and 3706.55. Therefore, qualifying recipients of the Clean Air Fund are not harmed by the Court maintaining the status quo. In fact, in the event the Treasurer does not make payments beginning in April 2021, H.B. 6 allows OAQDA to direct the Treasurer to remit money from the

Clean Air Fund to pay for unpaid credits that were earned in prior periods when the Clean Air Fund had insufficient funds. R.C. 3706.59. Additionally, H.B. 6 provides a mechanism to adjust the revenue collected from customers to reconcile the amount collected with the actual revenue needed to meet the revenue requirements necessary to provide the requisite disbursements under R.C. 3706.55 that may be due and owing to the qualified facilities. R.C. 3706.46(C). Such adjustment includes a continuation of the charges beyond December 31, 2027. *Id.*

Because the Treasurer is receiving and retaining the funds collected from customers, not the utilities, the utilities will not incur any damages, regardless of how the Court rules on Appellant's pending appeal. Additionally, no third party will incur damages from the Court granting a stay based on the statutory framework of H.B. 6, allowing credits to be earned beginning in January 2020, and accumulated, and then paid in subsequent periods. Accordingly, the Court should hold that no bond is required under R.C. 4903.16.

Nonetheless, if this Court finds that a bond is required, the Court should determine that only a nominal bond is necessary as no damages will occur to the regulated utilities, the Treasurer of State, or the recipients of the Clean Air Fund. Given that the plain language of R.C. 4903.16 does not provide a precise calculation of the bond required for the Court to stay a final PUCO order, the Court should rely on its previous interpretations of the statute and find that the bond amount should be sufficient to safeguard the utilities from the damage that they would incur during the stay of the charges pending appeal. *See In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 20. As explained above, given that no damages should occur to the utilities (or any other entity), the amount of the bond that should be sufficient to safeguard the utilities from damage is nominal. As such, if the Court determines that a bond is necessary,

OMAEG requests that the Court prescribe a nominal bond. The posting of a nominal bond will satisfy the requirements of R.C. 4903.16 to effectuate the stay of the PUCO's orders.

B. The Court Should Grant this Motion Because All of the Factors Supporting a Stay are Present.

There is a strong likelihood that OMAEG will prevail on the merits of its appeal because of the statutory language of H.B. 6 and the context surrounding the PUCO's decisions establishing the Rider CAF charges. Absent a stay, Ohio's retail electric customers, including OMAEG members, will incur irreparable harm and pay up to $1 billion in Rider CAF charges from January 1, 2021 through December 31, 2027. Conversely, because utilities are mere conduits to collect the Rider CAF charges and not beneficiaries of the Clean Air Funds they will not suffer any harm, let alone irreparable harm. Also as explained above, no other entity will suffer harm from the stay. Finally, the public interest favors a stay because it will protect customers from paying unlawful H.B. 6 subsidies during OMAEG's pending appeal and as the various H.B. 6 proceedings develop.

1. There is a strong likelihood that OMAEG will prevail on the merits of its appeal to protect its members and other electric retail customers.

OMAEG can demonstrate that it is likely to prevail on the merits of its appeal challenging the PUCO's orders establishing the Rider CAF charges. Specifically, the PUCO established Rider CAF charges in a manner inconsistent with the plain language of R.C. 3706.46 and related provisions, adopted a rate design and revenue allocation likely to result in disparate rates for similarly situated customers in violation of R.C. 4903.35, and willfully disregarded its duties by establishing Rider CAF charges despite the pending proceedings and investigations related to H.B. 6 and the Clean Air Fund.

a. 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.

The Court has long held that the PUCO "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." (Citations omitted.) *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999). Despite this limitation, the PUCO established the rate design and revenue allocation for the Rider CAF charges in contravention of the plain text of R.C. 3706.46. R.C. 3706.46(B) provides that the "the commission *shall* ensure…that the per-customer monthly charge for *industrial* customers eligible to become self-assessing purchasers…does not exceed two thousand four hundred dollars." (Emphasis added.) However, the PUCO capped monthly bill charges for *all* nonresidential customers eligible to become self-assessing purchasers at $2,400. Entry at ¶ 19. The PUCO determined, without explanation, that the cost cap will apply to *all* nonresidential customers eligible to become self-assessing purchasers and not just industrial customers.[5] Even if the provision was ambiguous, which it is not, the PUCO did not identify any rationale that would support its determination in violation of R.C. 4903.09.[6] Accordingly, OMAEG is likely to prevail on the merits of this assignment of error because the PUCO Entry disregarded the unambiguous language of R.C. 3706.46(B).

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5 Entry at ¶ 19.

6 R.C. 4903.09 provides that "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

b. 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).

R.C. 5751.02 imposes the commercial activity taxes (CAT) on those engaging in business activity in Ohio. Section (A) of the statute provides that, "the tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser." The statute further states, "nothing in this section prohibits a person from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section." R.C. 5751.02(B)(1). In plain language, these provisions mean that businesses pay the CAT but may include the cost of the CAT in the price of goods or services that they provide.

The utilities that collect the Rider CAF charges are not providing any good or service and are mere intermediaries between customers subject to Rider CAF charges and the Treasurer of State who disperses the Clean Air Funds. Yet, the PUCO increased the established revenue requirements to include an amount to cover the CAT and did not cite to any language in R.C. 3706.46 supporting its decision in violation of R.C. 4903.09. Entry at ¶ 18. The PUCO's sole rationale for including the CAT in the revenue requirement for the Rider CAF charges was that there was no language in R.C. 3706.46 explicitly prohibiting the inclusion of CAT in the amounts collected from customers.[7] But, conversely, there is no explicit language in R.C. 3706.46 authorizing the PUCO to include the CAT in the revenue requirement. R.C. 3706.46 only authorizes the PUCO to establish revenue requirements sufficient to meet the disbursements required under R.C. 3706.55, which are based upon the number of credits earned by the qualifying facility and do not include CAT.[8] The consequence of interpreting R.C. 3706.46 to include the

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[7] Entry at ¶ 18.

[8] R.C. 3706.45 provides that "[OAQDA] shall issue one nuclear resource credit to a qualifying nuclear resource for each megawatt hour of electricity that is both reported under division (A) of this section and approved by [OAQDA]. [OAQDA] shall issue one renewable energy credit

CAT in the Rider CAF charges is that customers would be required to pay a tax-gross up on the $170 million annual revenue that the utilities will collect.

Furthermore, the PUCO erred by failing to reconcile its interpretation of R.C. 3706.46 with the plain meaning of R.C. 5751.02. *See State ex. rel. Fockler v. Husted*, 150 Ohio St.3d 422, 82 N.E.3d 1135, ¶ 13 (stating that, "[a]ll statutes which relate to the same general subject must be read in *pari materia*. And in reading such statutes in *pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes."). Typically, customers only pay a CAT tax-gross up for utility services and private businesses are generally responsible for paying their own CAT.[9]

Therefore, OMAEG is likely to prevail on the merits of this assignment of error because the plain language of the relevant statutes do not support the PUCO's decision to increase the revenue requirements to include the CAT in the Rider CAF charges.

c. 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 the plain language of R.C. 3706.46(B) requiring the PUCO to select a rate design that avoids abrupt or excessive bill impacts.

The PUCO improperly established the rate design for the Rider CAF charges without a bill impact analysis, concluded the rate caps included in H.B. 6 are sufficient, and stated that the simplicity of the Rider CAF charges allows customers to determine the bill impact for themselves.

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to a qualifying renewable resource for each megawatt hour of electricity that is both reported under division (A) of this section and approved by [OAQDA]".

9 "Gross receipts subject to CAT are broadly defined to include most business types of receipts from the sale of property or realized in the performance of a service." State of Ohio, Department of Taxation, *Commercial Activity Tax (CAT) General Information*, https://tax.ohio.gov/wps/portal/gov/tax/business/ohio-business-taxes/commercial-activities/cat-general-information (accessed December 16, 2020).

Entry at ¶ 23. R.C. 3706.46(B) requires the PUCO to establish the level of Rider CAF charges and the rate design for nonresidential customers that are not self-assessing purchasers "in a manner that avoids abrupt or excessive total net electric bill impacts for typical customers." Without a bill impact analysis there is no certainty that the PUCO has complied with the statutory prohibition against "abrupt or excessive charges."

Furthermore, the General Assembly likely would not have included the prohibition against abrupt or excessive charges if it believed that rate caps included in H.B. 6 were sufficient safeguards. Such an interpretation would render the prohibition against abrupt or excessive charges meaningless, which is inconsistent with the canon against surplusage. *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.,* 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 19 (holding that, "[n]o part of the statute should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative") (citing *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917)). Lastly, R.C. 3706.46(B) places the burden on the PUCO to establish a compliant rate design. The PUCO's placement of the burden on customers to determine the bill impacts of the Rider CAF charges conflicts with the plain language of the statutory text and renders the prohibition against excessive rates meaningless because customers have no recourse once the rates are established. For these reasons, OMAEG is likely to prevail on the merits of this assignment of error.

d. The PUCO violated the plain language of R.C. 3706.46 and R.C. 3706.55 by establishing revenue requirements that exceed the amounts required for disbursements from the Clean Air Fund.

The PUCO established revenue requirements in a manner inconsistent with what is required under R.C. 3706.46. *See* Entry at ¶ 24. In pertinent part, R.C. 3706.46 authorizes the PUCO to establish a rate mechanism that is:

> *sufficient* to produce the following revenue requirements:
>
> (a) one hundred fifty million dollars annually for *total disbursements required under section 3706.55 of the Revised Code* from the nuclear generation fund
>
> (b) Twenty million dollars annually for *total disbursements required under section 3706.55 of the Revised Code* from the renewable generation fund. (Emphasis added.)

Sufficient as used in R.C. 3706.46 means "enough to meet the needs of a situation or a proposed end."[10] R.C. 3706.55 directs the OAQDA to remit money from the Clean Air Fund "in the amount equivalent to the number of credits earned by the resources during the quarter that ended twelve months prior to the last day of the previous quarter multiplied by the credit price." Taken together, the two provisions direct the PUCO to establish revenue requirements of up to $170 million that are sufficient to produce the amount necessary to pay the required disbursements from the Clean Air Fund that a qualifying facility has earned based on the facilities' generation output. Of pertinence, at the time of the PUCO's orders, there was nothing in the record to demonstrate that OAQDA or the PUCO had determined the number of credits that would be earned and issued or the level of funds needed to pay the required disbursements from the Clean Air Fund to qualifying nuclear and/or renewable facilities under R.C. 3706.55.

[10] Merriam-Webster's Collegiate Dictionary (11th Ed.2019).

Accordingly, the PUCO established the Rider CAF charges in a manner inconsistent with the plain language of R.C. 3706.46 and the referenced provision in R.C. 3706.55 when it established Rider CAF's revenue requirements prior to establishing the sufficiency of the revenue necessary to pay the requisite disbursements under R.C. 3706.55. Given that the PUCO is bound by the unambiguous language of the statute, OMAEG is likely to prevail on the merits of this assignment of error.

e. 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 should a surplus exist in the Clean Air Fund as of December 31, 2027.

The PUCO established Rider CAF charges without requiring refund language in the Rider CAF tariffs because "Rider CAF does not involve any prudency determination" and does not require a refund provision "other than those already provided by statute." Entry at ¶ 23. Although the PUCO seemed to recognize that R.C. 3706.55 entitles customers to a refund of "any amounts remaining in the nuclear generation fund and the renewable generation fund as of December 31, 2027," the PUCO failed to include such refund language in the Rider CAF tariffs despite this Court's holdings that such is necessary.

This Court has previously held that without tariff language specifying that customers are entitled to a refund, the PUCO cannot effectuate a refund. For example, the Court held that, "despite our finding that the DMR is unlawful, no refund is available to ratepayers for money already recovered under the rider. R.C. 4905.32 bars any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism." (Citations omitted.) *In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 23. Given the Court's ruling, the PUCO should have added refund language to the tariffs applicable to the Rider CAF charges in

order to set forth the refund mechanism to effectuate R.C. 3706.55. The PUCO's failure to do such will likely cause OMAEG to prevail on this assignment of error.

f. The PUCO erred by establishing a rate design and allocation methodology 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.

In addition to the establishment of revenue requirements and tariff language for the Rider CAF charges in a manner inconsistent with the plain language of H.B. 6, the rate design and allocation method established by the PUCO are also discriminatory in violation of R.C. 4905.35. In selecting the allocation of Rider CAF's revenue requirement, the PUCO erroneously determined that it fairly apportioned the amount to each electric distribution utility. Entry at ¶ 20. The PUCO allocated the total annual revenue requirement to each utility based on the total number of kWhs that the utility sold in 2019. *Id.* at ¶ 25. The PUCO then determined that nonresidential customers should be charged the total revenue requirement allocated to a utility minus the revenue generated by the utility's residential class. *Id.* Each public utility serves a different number of residential customers and those customers' consumption patterns differ in part due to geography.[11] Accordingly, similar nonresidential customers will be arbitrarily charged disparate rates due to being located in different service territories. This Court has held that, R.C. 4905.35 prohibits a utility from imposing undue and unreasonable prejudice on customers. *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 734, 778, N.E.2d 775 (2000). The allocation of the revenue requirements results in different rates for similarly situated customers solely due to a geographical classification that is wholly unrelated to the purpose of the Rider CAF charges or the enabling legislation, H.B. 6. The PUCO's decision violates principles of horizontal equity and this Court's interpretation of R.C.

[11] *See* U.S. Energy Information Administration, *Electric Sales, Revenue, and Average Price*, Table 6, https://www.eia.gov/electricity/sales_revenue_price/.

4905.35. OMAEG is likely to prevail on the merits of this assignment of error as similarly situated nonresidential customers will be charged disparate rates which were arbitrarily implemented without justification and that are unjustly discriminatory in violation of R.C. 4905.35.[12]

g. The PUCO erred by willfully disregarding its duties and unreasonably establishing the Rider CAF charges despite the pending proceedings, investigations, and prosecutions related to H.B. 6 and the Clean Air Fund.

Finally, OMAEG is likely to prevail on the merits of its appeal because the PUCO willfully disregarded its duties by unreasonably establishing the Rider CAF charges as set forth herein and failing to conduct the proceeding in which it established the Rider CAF charges with fundamental fairness. Mere weeks before the PUCO established the Rider CAF charges over the objections of the parties, the United States Attorney for the Southern District of Ohio filed a criminal complaint alleging that the enactment of H.B. 6 and the defeat of the subsequent referendum effort were predicated on public corruption.[13] Thereafter, the PUCO established Rider CAF charges on August 26, 2020 before initiating proceedings to review H.B. 6-related claims and issues surrounding the public corruption scandal and the impact on retail electric customers and before soliciting any input from stakeholders on such proceedings. Shortly after the PUCO established Rider CAF charges to collect up to $170 million from retail electric customers, the PUCO opened

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[12] *See, e.g.*, *In the Matter of the Application to Establish the Clean Air Fund Rider*, Pub. Util. Comm. No. 20-1708-EL-ATA (November 17, 2020) (proposing a Rider CAF rate for nonresidential customers of the Dayton Power and Light Company of $0.0008830/kWh for the first 833,000 kWh per month); *In the Matter of the Application to Establish the Clean Air Fund Rider*, Pub. Util. Comm. No. 20-1699-EL-ATA (November 16, 2020) (proposing a Rider CAF rate for nonresidential customers of the FirstEnergy Utilities of $0.00219/kWh for the first 833,000 kWh per month).

[13] *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).

up its own proceedings to review the role of certain regulated entities in the allegations surrounding H.B. 6.[14]

Indeed, the PUCO enjoys discretion in managing its docket and had a statutory obligation to enact Rider CAF charges for an effective date of January 1, 2021. However, the PUCO also has a duty to determine the justness and reasonableness of charges and must account "for other matters as are proper according to the facts of each case." *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 77, 781 (1976) (citing R.C. 4909.15). In implementing Rider CAF charges, the PUCO did not account for the events surrounding H.B. 6 and abdicated its responsibility to assess relevant facts affecting the charges at issue in the proceeding.

The PUCO's abject failure to address the events surrounding H.B. 6 before swiftly establishing a rate mechanism pursuant to the potentially tainted law amounts to a willful disregard of its duties to serve Ohio's retail electric customers. For the aforementioned reasons, OMAEG is likely to prevail on the merits of this assignment of error.

OMAEG has demonstrated that the PUCO established Rider CAF in violation of the plain language of H.B 6 and other statutory provisions, erred by establishing a discriminatory rate design, and willfully disregarded its duties by failing to address the allegations surrounding H.B. 6. Thus, the Court should find that OMAEG is likely to prevail on the merits of its appeal, the first

[14] *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); *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).

of four factors in favor of a stay under R.C. 4903.16 as articulated in Justice Douglas's dissenting opinion.

2. The implementation of Rider CAF charges is likely to cause irreparable harm to retail electric customers.

The second factor to consider in favor of a stay is whether the movant will suffer irreparable harm should the stay be denied. OMAEG has established that beginning January 1, 2021 the $170 million annual Rider CAF charges will become effective and the charges will be collected from retail electric customers.[15] As discussed above, absent a stay of the PUCO's decisions pending this appeal, there is no remedy available to OMAEG's members or any other customers. This Court has held:

> It was the intention of the General Assembly to provide that utility rates are solely a matter for consideration by the Public Utilities Commission and the Supreme Court. The utility must collect the rates set by the commission, unless some one by affirmative act secures a stay of such order. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465, 468 (1957).

Even if the Rider CAF charges are later deemed to be unlawful by this Court, the charges cannot be retroactively refunded to customers.[16] Consequently, OMAEG members and other customers throughout Ohio will suffer irreparable harm absent a stay.

3. The stay that is needed to protect OMAEG and other customers during the process of the appeal will not cause irreparable harm to others.

The third condition that favors a stay of a final PUCO order is whether the Court would cause irreparable harm to others by granting a stay. *MCI Telecommunications Corp.*, 31 Ohio

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[15] *MCI Telecommunications Corp.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (1987) (Douglas, J., Dissenting).

[16] *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶¶ 48-49 (2014) (holding, "[n]either the commission nor this court can order a refund of previously approved rates, based on the doctrine set forth in *Keco*. These cases teach that present rates may not make up for excessive rate charges due to regulatory delay.").

St.3d 604 at 606. As OMAEG explained previously, the utilities are not the beneficiaries of the Rider CAF charges and they relinquish the funds to the Treasurer of State who then remits the Clean Air Funds to operators of qualifying facilities. As such, the utilities cannot show any harm from a stay pending appeal, let alone *irreparable* harm.

In addition, the Court granting a stay would not irreparably harm any third parties, including the recipients of the Clean Air Funds. As discussed above, the Treasurer of State will not disperse Clean Air Funds until April 2021 and the funds will be disbursed based upon credits earned from generation produced by qualifying facilities beginning in January 2020. R.C. 3706.45 and 3706.55. H.B. 6 also provides Clean Air Fund recipients with remedies in the event of any missed payments or disbursements from the Clean Air Fund. R.C. 3706.59 and 3706.46(C). Accordingly, qualifying recipients of the Clean Air Fund are not harmed by the Court maintaining the status quo and no qualifying recipient can demonstrate irreparable harm from the Court maintaining the status quo.

Consequently, the Court should grant this Motion.

4. A stay to prevent customers from paying up to $170 million annually in Rider CAF charges during the appeal process would further the public interest.

In the dissent in which Justice Douglas recommended factors for consideration in granting a stay of PUCO orders, he emphasized that above all, public interest should be taken into account. *MCI Telecommunications Corp.*, 31 Ohio St.3d 604 at 606. He further acknowledged that PUCO orders "have effect on everyone in this state—individuals, business, and industry." *Id.* Absent a stay, Ohio's residential, commercial, and industrial customers will pay in the aggregate over a billion dollars in subsidies from January 1, 2021 until at least December 31, 2027, even if the Rider CAF charges are later deemed unlawful. Therefore, a stay undoubtedly furthers the public interest,

especially given the lack of harm to the utilities or any other entity. That public interest is exacerbated with the economic challenges that residential customers and Ohio's businesses are currently facing during the pandemic.

Furthermore, the backdrop of this case consists of various proceedings regarding the enactment of H.B. 6 and what the United States Attorney for the Southern District of Ohio has characterized as "likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio."[17] On July 17, 2020, the United States Attorney's Office for the Southern District of Ohio filed a criminal complaint alleging that numerous unlawful acts were committed to promote the Ohio General Assembly's enactment of H.B. 6.[18] Guilty pleas by two of the criminal defendants engaged in that corruption enterprise have been entered. Subsequently, the State of Ohio and other government entities filed civil lawsuits alleging that FirstEnergy Corp. and its subsidiaries, FirstEnergy Service Company and FirstEnergy Solutions (now Energy Harbor), engaged in a pattern of corruption to enact H.B. 6 and the Clean Air Fund.[19]

Moreover, the PUCO has 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.[20] More recently, on

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[17] WSYX ABC 6, *U.S. Attorney Update on Arrest of Ohio House Speaker Larry Householder and Four Associates*, YouTube (Streamed live on July 21, 2020) (statement starting at 00:48), https://www.youtube.com/watch?v=mYTY9GUnHMM.

[18] *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).

[19] *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).

[20] *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);

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.[21] The PUCO believed a corporate separation audit is necessary because FirstEnergy Corp. (the corporate parent of the FirstEnergy Utilities) filed a form 8-K with the United Securities and Exchange Commission ("SEC") stating that it terminated certain corporate officers due to the results of an internal investigation related to the H.B. 6 events.[22] And, after an additional SEC filing made by FirstEnergy, the Chairman of the PUCO resigned.

The outcomes of these various proceedings will impact the legitimacy of the Rider CAF charges and public perception of Ohio's state agencies and democratic processes. A stay pending appeal of the PUCO decisions that established the Rider CAF charges will protect consumers from any unjust or unlawful charges being imposed on customers until the appeal is resolved. With this backdrop, a stay to prevent customers from paying up to $170 million annually in Rider CAF charges during the appeal process would clearly further the public interest.

IV. CONCLUSION

As discussed above, OMAEG has applied to the Court and provided three days' notice to the PUCO of its intent to seek a stay pursuant to R.C. 4903.16. A bond is unnecessary to effectuate a stay under R.C. 4903.16 because Ohio's utilities will suffer no harm should the Court grant a stay as the utilities are not the beneficiaries of the Rider CAF charges. Additionally, no other entity will suffer harm should the Court grant a stay.

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[21] *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).

[22] *Id.* at ¶ 16.

Not only has OMAEG shown a strong likelihood of prevailing on the merits, OMAEG has demonstrated that irreparable harm will occur to its members and other retail electric customers if the stay is not granted, that no harm will occur if the stay is granted, and that there is a strong public interest in support of a stay. Accordingly, OMAEG respectfully requests that the Court grant this Motion for a Stay of Execution of the PUCO's Entry and Entry on Rehearing establishing Rider CAF charges to be collected from customers beginning January 1, 2021.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4124
Bojko@carpenterlipps.com
(willing to accept service by email)

COUNSEL FOR APPELLANT
THE OHIO MANUFACTURERS' ASSOCIATION
ENERGY GROUP

CERTIFICATE OF FILING

I certify that this Motion to Stay Charges Assessed to Customers to Subsidize the H.B. 6 Clean Air Fund by the Ohio Manufacturers' Association Energy Group 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 17, 2020.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

COUNSEL FOR APPELLANT
THE OHIO MANUFACTURERS' ASSOCIATION
ENERGY GROUP

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Stay Charges Assessed to Customers to Subsidize the H.B. 6 Clean Air Fund 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 17, 2020.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

COUNSEL FOR APPELLANT
THE OHIO MANUFACTURERS' ASSOCIATION
ENERGY GROUP

COMMISSION REPRESENTATIVES AND PARTIES OF RECORD

M. Beth Trombold, Acting Chairman
Lawrence K. Friedeman, Commissioner
Dennis P. Deters, Commissioner
Daniel R. Conway, Commissioner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, Ohio 43215

Robert Endris
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
rendris@firstenergycorp.com

David Yost
Attorney General of Ohio
John Jones
Section Chief, Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
john.jones@ohioattorneygeneral.gov

Michael L. Kurtz
David F. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

Rocco D'Ascenzo
Larisa M. Vaysman
Jeanne Kingery
Duke Energy Ohio, Inc.
139 East Fourth Street, ML 1301
Cincinnati, Ohio 45202

Michael J. Schuler
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
michael.schuler@aes.com

Rocco.DAscenzo@duke-energy.com
Larisa.Vaysman@duke-energy.com
Jeanne.Kingery@duke-energy.com
Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza
Columbus, Ohio 43215
Stnourse@aep.com

Michael Williams, Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, Ohio 43215
Michael.Williams@puco.ohio.gov

Matthew R. Pritchard
Rebekah J. Glover
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
mpritchard@mcneeslaw.com
glover@mcneeslaw.com

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[1]. 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 prudency determination, we decline to impose any reconciliation and refund requirements to the rider other than those already provided by statute.

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1 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

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in

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[1]; (2) the Ohio Attorney General's complaint against FirstEnergy Corp., et al., alleging a pattern of corrupt activity, money laundering, bribery, and evidence tampering[2]; and, (3) the Commission's own investigation of the political and charitable spending of FirstEnergy related to the enactment and H.B. 6.[3]

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

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

[3] *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[4], 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.

---

[4] 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 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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in

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

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

ATTACHMENT C

CARPENTER LIPPS & LELAND LLP

ATTORNEYS AT LAW

280 PLAZA, SUITE 1300

280 NORTH HIGH STREET

COLUMBUS, OHIO 43215

WWW.CARPENTERLIPPS.COM

TELEPHONE: (614) 365-4100

180 NORTH LASALLE STREET
SUITE 2640
CHICAGO, ILLINOIS 60601
TELEPHONE (312) 777-4300

1025 CONNECTICUT AVENUE N.W.
SUITE 1000
WASHINGTON, DC 20036-5417
TELEPHONE (202) 365-2808

WRITER'S DIRECT NUMBER
(614) 365-4124
bojko@carpenterlipps.com

December 9, 2020

VIA ELECTRONIC SUBMISSION

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street, 11th Floor
Columbus, Ohio 43215

Re: *In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Case No. 20-1143-EL-UNC

Dear Sir or Madam:

Without waiving or conceding any arguments with respect to the notice provision in R.C. 4903.16, the Ohio Manufacturers' Association Energy Group ("OMAEG") hereby notifies the Public Utilities Commission of Ohio ("Commission") of its intent to request that the Supreme Court of Ohio stay the Commission's August 26, 2020 Entry and October 21, 2020 Entry on Rehearing that established the Clean Air Fund Rider.

OMAEG intends to request, on or after December 14, 2020, that the Supreme Court of Ohio stay the above-referenced Commission orders pending the outcome of OMAEG's appeal. Please consider this letter to be the notice required under R.C. 4903.16.

Sincerely,

Counsel for the Ohio Manufacturers' Association Energy Group

cc: Parties of Record
Attorney Examiner

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in

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

Summary: Correspondence Regarding The Ohio Manufacturers' Association Energy Group Notice to File a Motion to Stay

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in

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

Summary: Notice of Filing of Motion to Stay Charges Assessed to Customers to Subsidize the H.B. 6 Clean Air Fund by the Ohio Manufacturers' Association Energy Group in the Supreme Court of Ohio Case No. 2020-1488 electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group