**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of Establishing the Solar Generation Fund Rider Pursuant to R.C. 3706.46. | ))) | Case No. 21-447-EL-UNC |

**REPLY COMMENTS FOR CONSUMER PROTECTION**

**BY**

**OFFICE OF THE OHIO CONSUMERS' COUNSEL**

# INTRODUCTION

 Tainted House Bill 6 created subsidies for qualifying solar resources and in-state nuclear resources. Recently enacted House Bill 128 repealed the subsidy for the in-state nuclear resources but kept the subsidy for qualifying solar facilities. Consumers could be charged up to $20 million per year for the solar subsidy. On April 19, 2021, the Staff of the Public Utilities Commission of Ohio (“Staff”) filed comments recommending proposed methodologies to collect from customers the solar subsidy through the Solar Generation Fund Rider (“Solar Subsidy”). Stakeholders filed comments on the PUCO Staff’s proposal on May 18, 2021.

 The Office of the Ohio Consumers’ Counsel (“OCC”) largely supports Staff’s proposal. But there are consumer protections that the Public Utilities Commission of Ohio (“PUCO”) should adopt beyond what the PUCO Staff is proposing. OCC appreciates this opportunity to file reply comments in support of those consumer protections.

# RECOMMENDATIONS

1. **To protect consumers, the PUCO should not establish a $20 million revenue requirement for the Solar Subsidy for periods when no solar generation occurred or did not occur at a level justifying a $20 million revenue requirement.**

In its comments, the Ohio Manufacturers Association Energy Group (“OMAEG”) explains how the statutes governing the Solar Subsidy[[1]](#footnote-2) direct the PUCO to “to establish a revenue requirement of *up to $20 million* that is sufficient to produce the amount necessary to pay the required disbursements from the Solar Generation Fund that a qualifying facility has earned based on the facilities’ generation output for the prior twelve-month period.”[[2]](#footnote-3) As a result, OMAEG recommends that the PUCO “should not establish a revenue requirement of $20 million for periods where no generation was produced or will be produced by qualifying solar resources and, therefore, no credits have been earned or will be earned.”[[3]](#footnote-4) OMAEG further recommends that the PUCO “should also not establish a revenue requirement of $20 million for periods where no generation was produced or will be produced at the level of which would result in a requirement of $20 million in payments to qualified solar resources for credits earned.”[[4]](#footnote-5)

OCC supports OMAEG’s comments and recommends that the PUCO adopt OMAEG’s recommendations for consumer protection. Consistent with the statutes governing the Solar Subsidy, consumers should not be charged to subsidize solar generation that does not occur or does not occur at a level justifying a $20 million solar subsidy.

1. **To protect consumers, the commercial activity tax should not be collected from consumers through the Solar Subsidy.**

In its comments, OMAEG recommends that the commercial activity tax should not be collected from consumers through the Solar Subsidy.[[5]](#footnote-6) The Solar Subsidy “is a pass-through to private electric generating companies. These businesses should be responsible for paying the [commercial activity tax] on revenues they receive, as is the case with any other private business.”[[6]](#footnote-7) House Bill 128 does not authorize collecting the commercial activity tax through the Solar Subsidy.[[7]](#footnote-8)

OCC supports OMAEG’s comments and recommends that the PUCO adopt OMAEG’s recommendations for consumer protection. The PUCO “is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.”[[8]](#footnote-9) H.B. 128 does not authorize collecting the commercial activity tax through the Solar Subsidy, so the PUCO should not (and cannot) allow it.

1. **To protect consumers, the PUCO should direct that Solar Subsidy tariffs provide that Solar Subsidy charges are subject to refund.**

OMAEG recommends in its comments that “[b]ecause Rider SGF is a nonbypassable mechanism that will be implemented throughout the state, [the PUCO should] protect all Ohio customers by requiring utilities to include refund language in the tariffs of Rider SGF so that any charges later deemed unlawful could be refunded to customers.”[[9]](#footnote-10) OCC recommends that the PUCO adopt OMAEG’s recommendation.

Without subject to refund language, any successful appeal of the legality of the Solar Subsidy would not cure the injury suffered by consumers caused by paying the unlawful charges. *See* *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957)*.*

Justice Pfeifer called this situation “unconscionable.” *In re Columbus Southern Power Co*., 138 Ohio St.3d 488, 2014-Ohio-462, ¶62 (dissent). In discussing the lack of refund to AEP consumers for $368 million in unlawful charges, he wrote that “it boggles the mind that this court would ever countenance such a proposition: that a public utility should be allowed to fatten itself on the backs of Ohio residents by collecting unjustified charges.” *Id.* at ¶63. He went on to further advocate against using the *Keco* precedent to deny refunds to consumers: “Doing so because of a 50-year-old case that is not supported by the statute on which it is based is ridiculous. The ratepayers of Ohio deserve better. I dissent.” *Id.* at ¶64.

But as OMAEG points out, “the Supreme Court of Ohio has also explained that the [PUCO] can avoid a situation where customers are barred from refunds by requiring utilities to include refund language in the tariffs.”[[10]](#footnote-11) And “[a]dding refund language to the tariffs is also consistent with the reconciliation language contained in the new version of the law, R.C. 3706.55(B).”[[11]](#footnote-12) To protect consumers, the PUCO require that Solar Subsidy tariffs include “subject to refund” language.

# III. CONCLUSION

The Staff’s proposal regarding the Solar Subsidy is not without merit. But it could be improved with additional consumer protections. It should be, as recommended by OMAEG and OCC.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Reply Comments was served on the persons stated below viaelectric transmission this 28th day of May 2021.

*/s/ William J. Michael*

William J. Michael
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The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. R.C. 3706.46, 3706.55. [↑](#footnote-ref-2)
2. *See* OMAEG’s Comments at 6-9. [↑](#footnote-ref-3)
3. *Id.* at 8. [↑](#footnote-ref-4)
4. *Id.* [↑](#footnote-ref-5)
5. *Id*. at 9-11*.* [↑](#footnote-ref-6)
6. *Id.* at 10. [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. *Tongren v. Pub. Util. Comm*., 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999). [↑](#footnote-ref-9)
9. OMAEG’s Comments at 15. [↑](#footnote-ref-10)
10. *Id.* at 14; *see In re Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 23, citing R.C. 4905.32. [↑](#footnote-ref-11)
11. OMAEG’s Comments at 14. [↑](#footnote-ref-12)