BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Establishing the Nonbypassable Recovery Mechanism for Net Legacy Generation Resource Costs Pursuant to R.C. 4928.148.	))))	Case No. 19-1808-EL-UNC

JOINT APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP AND THE KROGER COMPANY

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) and the Kroger Company (Kroger) (collectively, Joint Applicants) hereby respectfully request rehearing of the Public Utilities Commission of Ohio's (Commission) November 21, 2019 Entry issued in the above-captioned matter. The Joint Applicants contend that the Order is unlawful, unjust, and unreasonable in the following respect:

> The Commission Erred by Imposing the Monthly Cap on a Per Account Basis Instead of on a Per Customer Basis as Required by HB 6.

For these reasons, and as further explained in the Memorandum in Support attached hereto, the Joint Applicants respectfully request that the Commission grant this Application for Rehearing.

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) 365-4100
Bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for Ohio Manufacturers' Association Energy Group

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0068774)
Carpenter Lipps & Leland, LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
paul@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Company

December 23, 2019

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Establishing the Nonbypassable Recovery Mechanism for Net Legacy Generation Resource Costs Pursuant to R.C. 4928.148.	))))	Case No. 19-1808-EL-UNC

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Am. Sub. H. B. 6 (HB 6), which became effective on October 22, 2019, requires the Public Utilities Commission of Ohio (Commission) to establish a replacement nonbypassable rate mechanism for the retail recovery of prudently incurred costs related to a legacy generation resource for the period commencing January 1, 2020 and extending up to December 31, 2030. R.C. 4928.148.

With respect to the establishment or operation of the replacement nonbypassable rate mechanism, the Commission was directed by HB 6 to: (1) subject the relevant decisions and actions of electric distribution utilities (EDUs) with legacy generation ownership (OVEC EDUs) to periodic prudency and reasonableness evaluations; (2) determine the proper rate design for the charge or credit to be applied to electric bills resulting from the nonbypassable rate mechanism's expense and revenue components; (3) provide for the discontinuation of the nonbypassable rate mechanism on December 31, 2030, subject to final reconciliation; and, (4) determine the manner in which charges are collected by any electric distribution utility that is not an OVEC EDU.

In its Entry issued on November 21, 2019 (Entry), the Commission replaces the existing recovery mechanism for each EDU that has an established rider to recover costs associated with

the legacy generation resource or the Ohio Valley Electric Corporation's (OVEC) generating units with a statewide recovery mechanism called the Legacy Generation Resource Rider (LGR Rider). For the EDUs that do not have an existing rider to collect costs related to OVEC (i.e., the FirstEnergy operating companies), the Commission establishes the LGR Rider as a new rider.

For all of the EDUs, the LGR Rider is divided into two rate components: a statewide rate (Part A Rate) and a specific EDU true-up or reconciliation rate (Part B Rate). The Part A Rate is a statewide rate designed to collect the forecasted net costs of the legacy generation resources and the over/under recovered amount from the prior period. The Part B Rate reconciles the over/under amounts associated with the forecasted billing determinants versus the actual billing determinants (i.e., projected collections versus actual collections). The Part B Rate will also include the estimated December 31, 2019 balance that exists, if any, within each EDU's current riders related to OVEC costs that are to be replaced by the new LGR Rider.

The Commission's Entry unjustly and unreasonably established the nonbypassable LGR Rider, effective January 1, 2020, on a "per account" basis.[1] The Commission should modify its Entry to apply the monthly cap on a per customer basis as directed by HB 6.

II. ARGUMENT

Assignment of Error: The Commission Erred by Imposing the Monthly Cap on a Per Account Basis Instead of on a Per Customer Basis as Required by HB 6.

Joint Applicants opposed Staff's proposal to establish the non-residential customer monthly caps on a "per month per customer account/premise."[2] The Commission rejected those

---

[1] Entry at ¶¶27, 33.

[2] See Comments of OMAEG at 4-6 (October 17, 2019); Comments of Kroger at 3-5 (October 17, 2019).

arguments and adopted an even more distant term, finding that the legislative use of the word "customer" in H.B. 6 is "clear and unambiguous" in meaning "account."[3]

The Commission's establishment of a "per account" cap deviates from the plain language of the statute and the Commission's interpretation of the words "per customer" in the statute to be synonymous with "per account" is flawed and strains statutory construction principles. The Commission may not read words into the statute that do not exist. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 45 (2008) ("We cannot generally add a requirement that does not exist in the Constitution or a statute."); *Columbia Gas Transm. Corp. v. Levin*, 2008-Ohio-511, ¶ 19, 117 Ohio St. 3d 122, 125, 882 N.E.2d 400, 406. If a statute is clear and unambiguous, "Courts may not delete words used or insert words not used." *Id.* The PUCO cannot read words into this unambiguous provision of HB 6.

HB 6 plainly states that the monthly cap is to apply on a "per customer" basis, not on a "per account" basis. Section 4928.148(A)(2), following enactment of HB 6, states:

> The commission shall determine the proper rate design for recovering or remitting the prudently incurred costs related to a legacy generation resource, provided, however, that the monthly charge or credit for those costs, including any deferrals or credits, shall not exceed one dollar and fifty cents per customer per month for residential customers. For all other customer classes, the commission shall establish comparable monthly caps for each class at or below one thousand five hundred dollars **per customer**.

R.C. 4928.148(A)(2) (emphasis added). But, the November 21, 2019 Entry states that "[t]he combination of Part A and Part B rates will be capped at $1.50 per month for residential customers and $1,500 per month for non-residential customers on a **per account basis**." Entry at ¶33 (page 12) (emphasis added). The Commission further explains that "[a] customer

---

[3] Entry at ¶27.

account/premise is synonymous with a billing account." Entry at ¶33 (page 11). And the Commission incorrectly concludes that the use of the word 'customer' in HB 6 depends on the contract or tariff relationship between the EDU and the party that receives electric services, and that contracts and tariffs attach responsibility for payment to an account or accounts so the General Assembly must have intended "per customer" to mean "per account."

The Entry points to the Ohio Administrative Code, which defines "Customer" as "any person who has an agreement, by contract and/or tariff with an electric utility or by contract with a competitive retail electric service provider, to receive service."[4] No portion of the Administrative Code defines "account," much less equates "customer" with "account."[5] While it is clear from the Ohio Administrative Code that a "customer" must have an account, there is no requirement that a customer must have only one account.[6] In fact, many non-residential customers have multiple accounts. Defining "customer" as an entity with at least one account is proper based on the Ohio Administrative Code, but it does not follow that a "customer" equals an "account," or that "customer" and "account" are synonymous.

Similarly, the mere fact that the Commission has assessed other riders on a per account basis does not mean that that was the intent of the General Assembly in HB 6. In fact, the legislative record clearly shows that the intention here was to deviate from that standard arrangement in order to minimize the impact of the HB 6 charges on customers. The statute is

---

[4] Entry at ¶27 (citing Ohio Admin. Code 4901:1-10-01(I) (The Entry referred to this as section "J" not "I")).

[5] Id.

[6] See id.

not ambiguous regarding whether the cap must be assessed on a "per customer" basis.[7] But even if "per customer" is deemed ambiguous, the legislative record shows that a "per account" cap was not intended. There was much debate in the many successive versions of HB 6 surrounding this specific issue. A review of the multiple HB 6 versions, including the "as introduced"[8] version and the "as passed by the Senate"[9] version, the Ohio Legislative Service Commission's multiple analyses[10] and substitute bill comparative synopses,[11] and the many hours of committee hearings and testimony reveals that the General Assembly decisively revised the legislation to limit the bill's financial impact on non-residential customers from a "per meter" basis to a "per customer" basis.[12] It would be completely improper for the Commission to revert to a "per account" cap when that was what the legislature explicitly turned away from during the legislative process—adoption of a "per account" cap violates, among other things, the canon of statutory interpretation of "*expresio unius.*"[13]

---

[7] Legislative intent may be inquired into if the enactment is "ambiguous upon its face." *Carmelite Sisters, St. Rita's Home v. Bd. of Review* (1969), 18 Ohio St.2d 41, 247 N.E.2d 477; *Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 190, 404 N.E.2d 159, 161–62 (1980).

[8] HB 6 As Introduced in the House:

search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb6/IN/00?format=pdf

[9] HB 6 As Passed in the Ohio Senate:

search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb6/PS/05?format=pdf

[10] See HB 6 OLSC Analysis: www.legislature.ohio.gov/download?key=12555&format=pdf

[11] Id.

[12] See Legislative Testimony: https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA133-HB-6

[13] *Expressio unius est exclusio alterius* ("explicit mention of one (thing) is the exclusion of another"), defined in Black's Law Dictionary (6th Ed.) 581, as: "A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred...."

Under the Entry, a customer with multiple accounts and meters and a customer with multiple facilities within the same EDU's service territory will get charged the LGR Rider for each account and will be subject to a $1,500.00 cap for each account. Typically, the EDU assigns an account number to each meter. Thus, if a customer has multiple meters, it will have multiple accounts that may or may not be on the same premise. As such, a customer will be subject to multiple LGR Riders and multiple $1,500.00 cost caps, in direct contravention of the statute.[14] Such an application will lead to significant charges to non-residential customers related to the legacy generation resource.

Assessing customers a monthly charge(s) that exceeds the stated cap or assessing customers multiple monthly caps directly contradicts the plain language of HB 6 and is unjust and unreasonable. By using the term "customer," the legislature intended to exclude any possible "per account" cap under the doctrine of *expressio unius est exclusio alterius*. Given the General Assembly's intent to limit the financial impact on customers, a customer's revenue responsibility should then not exceed its established monthly cap, which **shall** be set at or below $1,500.00.

---

[14] See R.C. 4928.148(A)(2).

III. CONCLUSION

For the reasons set forth herein, the Commission should apply the established monthly cap on a per customer basis to limit the financial impact of HB 6 on customers as specifically delineated in HB 6 and as intended by the General Assembly. OMAEG and Kroger request that the Commission grant rehearing and modify the statutorily-mandated cost cap to cap nonresidential customer charges at no more than $1,500 per month per customer.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for Ohio Manufacturers' Association Energy Group

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Carpenter Lipps & Leland, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
paul@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Company

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on December 23, 2019.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Summary: Application Joint Application for Rehearing of The Ohio Manufacturers' Association Energy Group and The Kroger Company electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group and The Kroger Co.