BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MOTION TO INTERVENE AND COMMENTS
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Pursuant to R.C. 4903.221 and Ohio Adm. Code 4901-1-11, the Ohio Manufacturers' Association Energy Group (OMAEG) respectfully moves the Public Utilities Commission of Ohio (Commission) to intervene in this matter with the full powers and rights granted to intervening parties. As detailed in the attached Memorandum in Support, OMAEG has a real and substantial interest in this proceeding that may be adversely affected by the outcome herein, and which cannot be adequately represented by any other party. Accordingly, OMAEG satisfies the standard for intervention set forth in Ohio statutes and regulations.

Therefore, OMAEG respectfully requests that the Commission grant this Motion to Intervene and make OMAEG a full party of record in these proceedings. In addition, pursuant to the April 27, 2021 Entry in the above-captioned proceeding, OMAEG hereby submits its comments on Staff's Proposal for the implementation of the Solar Generation Fund Rider (Rider SGF).[1]

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[1] Staff Comments and Recommendations (hereinafter, Staff's Proposal (April 19, 2021)).

BEFORE
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On March 30, 2021, Governor Mike DeWine signed House Bill 128 of the 134th General Assembly (H.B. 128) into law, which becomes effective June 30, 2021. H.B. 128 repeals provisions enacted by House Bill 6 of the 133rd General Assembly (H.B. 6) related to subsidies for in-state nuclear resources. H.B. 6 established revenue requirements of up to $150 million annually for the nuclear resource subsidies and up to $20 million annually for solar resource subsidies – a total of up to $170 million annually. While H.B. 128 repeals the nuclear-subsidy provisions, it retains the solar subsidies and the maximum level of the annual revenue requirement for the credits earned by the qualifying solar resources. The new law creates the Solar Generation Fund and requires the Commission 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. Accordingly, the Commission should only collect from customers an amount necessary to pay the subsidies earned by the qualifying solar resources during the prior twelve months.

On April 19, 2021, the Staff of the Public Utilities Commission of Ohio (Staff) filed comments recommending proposed methodologies to collect the annual revenue requirement

through the Rider SGF.[2] More specifically, Staff's Proposal supported a Rider SGF monthly charge for residential customers of $.010, including Commercial Activity Taxes (CAT).[3] Staff's Proposal then recommended that the annual revenue requirement for non-residential customers be calculated by subtracting the revenue projected to be collected from residential customers from the total revenue requirement.[4] Staff's Proposal indicated that a monthly charge for all non-residential customers should be a $/kWh charge for all kWh used up to 833,000 kWh per customer per month.[5] Staff's Proposal stated monthly charges for customers eligible to become self-assessing purchasers should equal the non-residential monthly charge and not exceed $242, including CAT. Staff's Proposal also recommended that the electric distribution utilities (EDUs) update Rider SGF annually and the revenue requirement for the annual updates will be adjusted for over/under recovery during the prior periods.[6] Staff's Proposal then recommended that each EDU shall provide Staff the data to calculate the non-residential charge 60 days prior to the effective date of Rider SGF (including projected annual number of residential bills and projected non-residential annual kWh for all kWh up to 833,000 kWh per customer per month).[7] Lastly, Staff's Proposal stated that each EDU must file its annual application no later than 45 days prior to the effective date of the proposed Rider SGF and each EDU must file monthly reports regarding the actual revenue collected from customers.[8]

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2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

Pursuant to the Commission's Entry issued April 27, 2021, OMAEG hereby moves to intervene and file comments on Staff's Proposal to implement Rider SGF for consideration by the Commission.

II. INTERVENTION

OMAEG has a real and substantial interest that may be adversely affected by this proceeding and that interest cannot be adequately represented by any existing parties. R.C. 4903.221 and Ohio Adm. Code 4901-1-11 and 4901:-36-03(E) establish the standard for intervention in the above-captioned proceeding. R.C. 4903.221 provides, in part, that any person "who may be adversely affected" by a Commission proceeding is entitled to seek intervention in that proceeding. R.C. 4903.221(B) further requires the Commission to consider the nature and extent of the prospective intervenor's interest, the legal position advanced by the prospective intervenor and its probable relation to the merits of the case, whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding, and the prospective intervenor's potential contribution to a just and expeditious resolution of the issues involved.

OMAEG is a non-profit entity that strives to improve business conditions in Ohio and drive down the cost of doing business for Ohio manufacturers. OMAEG members and their representatives work directly with elected officials, regulatory agencies, the judiciary, and others to provide education and information to energy consumers, regulatory boards and suppliers of energy; advance energy policies to promote an adequate, reliable, and efficient supply of energy at reasonable prices; and advocate in critical cases before the Commission. Indeed, OMAEG has been a participant in other cases before the Commission involving implementation of provisions

enacted by H.B. 6, as well as other legislative provisions.[9] Here, OMAEG purchases electric services from Ohio EDUs and has a substantial interest in ensuring that any revenue recovery mechanism is just, reasonable, and consistent with Ohio law.

For these reasons, OMAEG has a direct, real, and substantial interest in the issues raised in this proceeding and is so situated that the disposition of these proceedings may, as a practical matter, impair or impede its ability to protect that interest. It is regularly and actively involved in Commission proceedings and, as in previous proceedings, OMAEG's unique knowledge and perspective will contribute to the full development and equitable resolution of the factual issues in this case. OMAEG's interest will not be adequately represented by other parties and its timely intervention will not unduly delay or prolong these proceedings.

Because OMAEG satisfies the criteria set forth in R.C. 4903.221 and Ohio Adm. Code 4901-1-11, it is authorized to intervene in this proceeding with the full powers and rights granted by the Commission to intervening parties. As such, OMAEG respectfully requests that the Commission grant this motion to intervene and that OMAEG be made a full party of record

III. COMMENTS

A. The Commission Should Not Establish the Rider SGF Revenue Requirement at $20 Million for Periods where No Generation Has Occurred.

The Commission should protect customers by ensuring that EDUs do not collect any revenues from customers that exceed Rider SGF's statutory revenue requirement. First, it is important to note that the new law, H.B. 128, does not even take effect until June 30, 2021.

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[9] *See, e.g.*, *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; I*n the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*; Case No. 20-1143-EL-UNC.

The version of R.C. 3706.46(A)(1) that will become effective June 30, 2021 states that for all bills rendered on or after January 1, 2021, Ohio's EDUs must collect from all of their retail electric customers in the state, a monthly charge, in the aggregate "*sufficient* to produce a $20 million annual revenue requirement for total disbursements *required* under section 3706.55 of the Revised Code from the solar generation fund."[10] Additionally, the version of R.C. 3706.46(A)(1) that will become effective June 30, 2021 states that "[e]ach charge authorized by the commission under this section shall be subject to adjustment so as to reconcile actual revenue collected with the revenue needed to meet the revenue requirement under division (A)(1) of this section."[11]

The version of R.C. 3706.55 that will become effective June 30, 2021 states, in pertinent part:

> (A) For the period beginning with April of 2021 and ending with January of 2028, the Ohio air quality development authority shall, in April of 2021 and every three months thereafter through the end of the period, and not later than the twenty-first day of the month, direct the treasurer of state to remit money from the solar generation fund created under section 3706.49 of the Revised Code. Subject to section 3706.59 of the Revised Code, the moneys from the fund shall be remitted to the owners or operators of qualifying solar resources, 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.[12] (Emphasis added).

"Sufficient" as used in the new version of R.C. 3706.46(A)(1) is defined as "enough to meet the needs of a situation or a proposed end."[13] The new version of R.C. 3706.55(A) directs the Ohio Air Quality Development Authority (OAQDA) to remit money from the Solar Generation Fund "in the amount equivalent to the number of credits earned by the resources during the quarter that

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[10] R.C. 3706.46(A)(1) (effective June 30, 2021) (emphasis added).

[11] R.C. 3706.46(C) (effective June 30, 2021).

[12] R.C. 3706.55(A) (effective June 30, 2021).

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

ended twelve months prior to the last day of the previous quarter multiplied by the credit price." Taken together, the two statutes direct the Commission 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.

Staff's Proposal, however, does not reference any data, filings, or other information demonstrating that OAQDA or the Commission have determined the number of credits that were actually earned for the prior twelve-month period, April 1, 2020 through March 31, 2021. Nor did the Commission or OAQDA provide documentation demonstrating the number of credits that OAQDA has already issued or the level of funds needed to pay the required disbursements from the Solar Generation Fund to qualifying resources under R.C. 3706.55 for the previous twelve months or for any subsequent twelve-month periods.

Upon information and belief, not all of the solar facilities qualified to date were operating in 2020 or 2021 and/or not all of the solar facilities qualified to date were operating during the entire prior twelve-month period from April 1, 2020 through March 31, 2021, or will be operating during the entirety of the next twelve-month period (i.e., April 1, 2021 through March 31, 2022). If the qualifying solar facilities were not operating and no generation was produced by those qualifying facilities, no credits would have been earned during those twelve-month periods. And, therefore, no monies could be remitted to those qualifying solar resources from the Solar Generation Fund.

Accordingly, the Commission 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. The Commission 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.[14] As a creature of statute,[15] the Commission should only establish the revenue requirement at a level sufficient to produce the amount necessary to pay the required disbursements from the Solar Generation Fund to qualifying facilities that have actually earned credits based on the facilities' generation output for the prior twelve-month period. *See* R.C. 3706.46(A)(1) and 3706.55.

B. The Commission Should Exclude CAT from Rider SGF to Prevent Customers from Incurring Unreasonable and Unlawful Costs.

Staff's Proposal recommended that CAT be included in the total amount recovered from customers. If a customer is subject to a cost cap, the Staff recommended that the cap include an amount associated with CAT.[16]

R.C. 5751.02 imposes the 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). The plain language of these statutory provisions states that businesses pay the CAT but may include the cost of the CAT in the price of goods or services that they provide. Staff's Proposal does not reconcile

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[14] The new version of R.C. 3706.45(A) and (B) that will become effective June 30, 2021 allow OAQDA to issue one solar energy credit to a qualifying solar resource for each megawatt hour of electricity generated by the resource that is reported and approved by OAQDA. The new version of R.C. 3706.45(C) that will become effective June 30, 2021 states that the price of each solar energy credit to be paid under R.C. 3706.55 shall be $9.00.

[15] The Supreme Court of Ohio has long held that the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

[16] *Id.*

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."). Ratepayers typically pay a tax gross-up for EDU charges, that tax gross-up is only for EDU services. Rider SGF is not recovering costs for EDU services. It is a pass-through to private electric generating companies. These businesses should be responsible for paying the CAT on revenues they receive, as is the case with any other private business.

Additionally, H.B. 128 does not include language that allows EDUs to pass CAT through to Ohio customers. Including CAT in the cost recovery would effectively amount to the Commission reading words into the statute that do not exist, which the Supreme Court of Ohio expressly forbids.[17] Again, the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute."[18]

Lastly, the inclusion of CAT in Rider SGF will unfairly shift costs to non-residential customers who are not subject to the cost caps for residential customers and industrial customers eligible to become self-assessing purchasers delineated in the law. *See* R.C. 3706.46(B) (June 30, 2021). While the new version of R.C. 3706.46(B) establishes monthly cost caps for residential customers and industrial customers eligible to become self-assessing purchasers, the law does not include a comparable cost cap for other non-residential customers. Thus, non-residential customers who are not subject to a cost cap will also pay CAT and may incur additional costs that

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[17] *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.")

[18] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

are displaced by including CAT in the established cost caps for certain customers. Such cost shifting coupled with the lack of a cost-cap for certain customers may result in "abrupt or excessive total net electric bill impacts" contrary to the new version of R.C. 3706.46(B).[19]

For these reasons, OMAEG recommends that the Commission exclude the CAT from Rider SGF.

C. The Commission Should Ensure that EDUs Assess all Rider SGF Charges on a Per Customer Basis.

Staff's Proposal does not clearly state that the utilities should assess all Rider SGF monthly charges on a per customer basis. The plain language of the new version of R.C. 3706.46(B) establishes cost caps for residential customers and industrial customers eligible to become self-assessing purchasers on a per customer basis. *See* R.C. 3706.46(B) (June 30, 2021) ("the commission *shall* ensure that the *per-customer* monthly charge for residential customers does not exceed ten cents and that the *per-customer* monthly charge for industrial customers eligible to become self-assessing purchasers pursuant to division (C) of section 5727.81 of the Revised Code does not exceed two hundred forty-two dollars)." (Emphasis added). Accordingly, the Commission should adhere to the plain language of H.B. 128 and establish the cost caps on a per customer basis because when a statute is unambiguous, it "may not delete words used or insert words not used."[20] Further, as explained previously, the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute."[21]

Moreover, the new version of R.C. 3706.46(B) directs the Commission to establish the level and design of the Rider SGF charge for non-residential customers that are not self-assessing

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[19] R.C. 3706.46(B) (effective June 30, 2021).

[20] *Columbia Gas Transm. Corp. v. Levin*, 2008-Ohio-511, ¶ 19, 117 Ohio St. 3d 122, 125, 882 N.E.2d 400, 406.

[21] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

purchasers "in a manner that avoids abrupt or excessive total net electric bill impacts for typical customers."[22] In order to comply with this statutory prohibition against abrupt or excessive bill impacts, the Commission should also ensure non-residential customers who are not self-assessing purchasers are subject to a Rider SGF charge on a *per customer basis*. Many non-residential customers have multiple accounts and would face abrupt or excessive charges if they are required to pay Rider SGF charges on a per account basis. If not assessed on a per customer basis as set forth in H.B. 128, a non-residential customer with multiple accounts and meters and with multiple facilities within the same EDU's service territory could get charged Rider SGF for each account. The potential harm to customers with multiple meters that would result from assessing Rider SGF on a per account basis would be further exaggerated by the lack of a monthly cost cap under H.B. 128 for non-residential customers who are not self-assessing purchasers. Such an application will lead to excessive charges to non-residential customers who are not self-assessing purchasers, in direct contravention of R.C. 3706.46(B).

For the foregoing reasons, OMAEG recommends that the Commission implement Rider SGF on a per customer basis.

D. The Commission Should Restrict the Cost Cap to Industrial Customers Only as Specified in the Ohio Revised Code.

Staff recommended that any non-residential customer eligible to self-assess taxes (e.g., customers who use more than 45,000,000 kWh per year)[23] shall have their revenue requirement capped at $242 per month.[24] H.B. 128 plainly states, that the monthly cap applies to "industrial customers," not to "any nonresidential customer" eligible to self-assess. The Commission cannot

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22 R.C. 3706.46(B) (Effective June 30, 2021).

23 R.C. 5727.81(2).

24 Staff's Proposal (April 19, 2021).

replace the term "industrial customer" with the term "any customer." "Industrial customer" is a specific term, which EDUs use in forms to the Commission and the US Energy Information Association.[25] For example, Form 861 defines an industrial customer as a manufacturer, construction, mining, agriculture, fishing, or forestry business.[26]

As stated previously, the Commission, as a creature of statute, may not read words into the statute that do not exist.[27] The Commission should implement the plain language of H.B. 128 and recognize the legislative history and intent of the General Assembly by applying the cost cap only to industrial customers eligible to self-assess. Extending the cap to non-industrial customers that can self-assess does not follow the law and would unfairly shift costs onto small to mid-size industrial customers and other small to mid-size nonresidential customers.

E. The Commission Should Adopt the Staff Recommendation for a Statewide Per kWh Charge for Non-residential Customers.

Staff's Proposal recommended that the "annual revenue requirement for non-residential customers be calculated by subtracting the revenue projected to be collected from residential customers from the total revenue requirement."[28] OMAEG understands this portion of Staff's Proposal to be recommending a statewide revenue requirement for non-residential customers, which will then be utilized to create monthly charges through a dollar per kWh charge for the various types of customers across the state. To the extent that understanding is correct, OMAEG supports the recommendation that the annual revenue requirement for all non-residential customers

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25 PUCO Form FE-D, https://www.puco.ohio.gov/puco-forms/long-term-forecast-forms/puco-form-fe-d/.

26 EIA Form 861 instructions, https://elecidc12c.eia.doe.gov/2017%20EIA-861%20Instructions.pdf

27 *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."); *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948) ("It is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom."); *also see Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999)..

28 Staff Proposal (April 19, 2021)

be calculated by subtracting the residential revenue from the total revenue requirement, resulting in a statewide per kWh charge for the various types of customers across the state. The adoption of this statewide proposal will eliminate the potential for any disparate impacts of Rider SGF among similarly-situated businesses located in different service territories.

F. The Commission Should Include Refund Language in Rider SGF.

Due to the precedent of *Keco*, unless the Supreme Court of Ohio grants a stay of the Commission's orders during the pendency of an appeal, utilities must collect the rates set by the Commission.[29] In effect, this precedent prohibits customers from receiving refunds for charges or rates collected pursuant to utilities' tariffs, even if the charges or rates are later deemed to be unlawful. This is an outcome that was experienced by customers in an appeal of the Electric Security Plan of AEP Ohio.[30] In regards to unlawful charges paid by AEP Ohio's customers, the 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.[31] The unequitable outcome that AEP Ohio's customers experienced is not unusual. Unfortunately, customers in Ohio are estimated to have paid $1.5 billion in unlawful charges that could not be refunded due to the rule against retroactive ratemaking.

Nonetheless, the Supreme Court of Ohio has also explained that the Commission can avoid a situation where customers are barred from refunds by requiring utilities to include refund language in the tariffs.[32] For example, in *In re Ohio Edison*, the Court stated, "[m]oreover, despite our

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[29] "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).

[30] *In re Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 54.

[31] *Id.*

[32] *See In re Ohio Edison*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 23, *citing* R.C. 4905.32.

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…."[33]

Because Rider SGF is a nonbypassable mechanism that will be implemented throughout the state, OMAEG urges the Commission to 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. Adding 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).

III. CONCLUSION

H.B. 128 requires the Commission to establish a revenue requirement 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. The Commission should, therefore, only collect from customers a per customer charge in an amount necessary to pay the subsidies actually earned by the qualifying solar resources during the prior twelve months. The Commission should also include refund language in the tariffs of Rider SGF so that any charges later deemed unlawful could be refunded to customers.

[33] *Id.* (Emphasis Added).

For the aforementioned reasons, OMAEG respectfully requests that the Commission adopt the recommendations articulated herein when implementing Rider SGF.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been filed on May 18, 2021 and the Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Summary: Motion to Intervene and Comments of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group