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

REPLY COMMENTS
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

After the fallout of Am. Sub. House Bill 6 (H.B. 6), the 134th General Assembly passed Am. Sub. House Bill 128 (H.B. 128), which repealed portions of H.B. 6 and created the Solar Generation Fund. H.B. 128 requires the Public Utilities Commission of Ohio (Commission) to establish a revenue requirement that is sufficient to produce an 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 under R.C. 3706.55.[1] A plain reading of H.B. 128 authorizes the Commission to only collect from customers an amount necessary to pay the subsidies earned by the qualifying solar resources during the prior twelve months.

To assist the Commission in establishing the methodology to allocate the annual revenue requirement (up to $20 million) for the Solar Generation Fund to the customer classes for billing and collection pursuant to R.C. 3706.46, the Commission sought comments on Staff's Proposal

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

regarding the establishment of the Solar Generation Fund Rider (Rider SGF), allocation of the revenue requirement, and the rate design.[2]

On May 18, 2021, the Ohio Manufacturers' Association Energy Group (OMAEG) and other stakeholders filed comments on Staff's Proposal to implement Rider SGF.[3] In accordance with the Commission's directive on April 27, 2021,[4] OMAEG hereby submits its reply comments to the comments filed on Staff's Proposal.

Again, contrary to some comments filed, the Commission should adhere to the plain language of H.B. 128 by only establishing Rider SGF's revenue requirement at a level sufficient for the total disbursements required under R.C. 3706.55, excluding the Commercial Activity Taxes (CAT), and on a per customer basis as explicitly stated in H.B. 128. The Commission should adopt the revenue allocation and rate design methodologies as recommended by OMAEG to avoid abrupt or excessive charges for Ohio's non-residential customers. Furthermore, the inclusion of refund language in Rider SGF's tariffs will provide customers with refunds in the event that the Commission's establishment of Rider SGF is later challenged and deemed unlawful. While the Commission previously may have implemented the various H.B. 6 provisions in a way that did not prioritize customer protections and that were inconsistent with the plain language of H.B. 6,[5] H.B. 128 is the start of a new era. H.B. 128 was a direct response to the H.B. 6 scandal and H.B. 128 made several changes to Ohio law to prevent the unjust enrichment of others at the expense

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2 *See* Comments and Recommendations in Regard to Establishing the Solar Generation Fund Rider of PUCO Staff (April 19, 2021) (hereinafter, "Staff's Proposal"); Entry at ¶ 10 (April 27, 2021).

3 *See* OMAEG's initial comments (May 18, 2021).

4 Entry at ¶ 10 (April 27, 2021).

5 *See, e.g., In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Case No. 20-1143-EL-UNC, Entry at ¶ 23 (August 26, 2020) (declining to include refund language in the Clean Air Fund Rider's, hereinafter "Rider CAF", tariffs, which would have allowed customers refunds in the event that the rider was deemed unlawful).

of Ohio consumers. In keeping with the spirit of H.B. 128, OMAEG respectfully requests that the Commission address the novel issues set forth in H.B. 128 and, to the extent necessary, revisit any previous issues and rulings that may have been presented in the cases implementing H.B. 6. Contrary to some comments, the Commission should not be beholden to prior decisions that it may have made regarding the implementation of a separate piece of legislation that was riddled with deceit and scandal, and ultimately repealed (at least in part to date). There was no precedent created as this is a new piece of legislation that the Commission is interpreting and implementing. However, even if the Commission believes that precedent was created, this is the time to depart from such precedent as such departure is more than warranted under the circumstances. The Commission should establish Rider SGF in a way that is consistent with the plain language of H.B. 128 and that provides Ohio utility consumers the protections that they deserve and that were intended by the General Assembly.

II. REPLY COMMENTS

A. The Commission Should Establish Rider SGF's Revenue Requirement Only at a Level Sufficient and Necessary for Disbursements Owed to Qualifying Facilities for Generation Reported and Credits Earned.

Invenergy Renewables LLC (Invenergy) submitted initial comments advocating that the Commission should consult with the Ohio Air Quality Development Authority (OAQDA) to establish Rider SGF's revenue requirement at the appropriate level under H.B. 128. Specifically, Invenergy explained that Rider SGF's revenue requirement should be sufficient for disbursements to qualifying facilities based on credits earned and generation reported for 2020 and generation projected for 2021.[6] OMAEG agrees. Contrary to Staff's Proposal and comments by the Industrial Energy Users-Ohio (IEU), the maximum revenue requirement allowed under the law is not

[6] *See* Invenergy's initial comments at 2 (May 18, 2021).

necessary in order to disburse funds for the minimal number of credits that have been earned to date for generation reported by qualifying facilities. As Invenergy stated, not all qualifying facilities were operating and generating electricity in the preceding 12-month period.[7] Therefore, 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, consequently, no credits have been earned or will be earned. In addition, the Commission should 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.

Neither Staff or the other commenters 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 Staff, OAQDA, or others 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. In fact, as stated previously, the only information presented, supports OMAEG's position that the full revenue requirement allowed is *not* necessary to satisfy the Solar Generation Fund's current and impending disbursement obligations.

As articulated in OMAEG's initial comments, basing Rider SGF's annual revenue requirement on the credits earned and generation reported to OAQDA (or the credits that will be earned and generation that is projected) is consistent with the plain language of R.C. 3706.55 and

[7] *Id.*

3706.46(A)(1).[8] Adhering to Invenergy and OMAEG's recommendations on Rider SGF's revenue requirement will ensure compliance with H.B. 128's statutory requirements and prevent over-recovery from customers. The Commission should protect customers by ensuring that the electric distribution utilities (EDUs) do not collect any revenues from customers that exceed Rider SGF's authorized revenue requirement under the new law, which does not take effect until June 30, 2021.

B. Staff's Proposal to Include CAT in Rider SGF Does Not Comport with the Letter or Spirit of H.B. 128.

IEU's initial comments broadly endorsed Staff's Proposal and asserted that, "the proposal accurately reflects the letter and spirit of H.B. 128.[9] While OMAEG supports some components of Staff's Proposal, the recommendation to include the CAT in Rider SGF charges is inconsistent with both the plain language and legislative intent of H.B. 128. As OMAEG explained in in its initial comments, nowhere in the text of H.B. 128 does it state that the Commission has the authority to pass the CAT onto customers through Rider SGF.[10] Because the Commission is a creature of statute it cannot read words into H.B. 128 that do not exist.[11]

Moreover, H.B. 128's overarching purpose was to "further ratepayer protections and rate decreases for some Ohio ratepayers over current law."[12] Requiring customers to pay additional charges that are wholly unrelated to the electric distribution services that they receive is inconsistent with this stated purpose and the various provisions of H.B. 128 that seek to reduce

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8 *See* OMAEG's initial comments at 6-9 (May 18, 2021).

9 IEU's initial comments at 4 (May 18, 2021).

10 OMAEG's initial comments at 10 (May 18, 2021).

11 *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.").

12 *See* Representative Jim Hoop's sponsoring testimony before the Senate Energy and Public Utilities Committee, 1st Hearing on H.B. 128 (March 23, 2021).

customers' charges. Therefore, OMAEG respectfully requests that the Commission exclude the CAT from Rider SGF.

C. The Commission Should Not Rush to Implement Rider SGF Because of the Injunction That Delayed Revenue Collection for the Solar Generation Fund.

Hillcrest Solar I, LLC (Hillcrest) advocated that after the comment period ends, the Commission should act quickly to establish Rider SGF because of delays in revenue collection caused by "the preliminary injunction issued by the Franklin County Court of Common Pleas in connection with litigation related to the nuclear funding element of R.C. 3706.46 and 3706.55."[13] While OMAEG appreciates Hillcrest's support for a robust comment process, it has some concerns regarding Hillcrest's recommendation. First, Attorney General Yost's civil suit against FirstEnergy Corp., former Speaker Larry Householder, and others does not merely concern the nuclear provisions of H.B. 6 but also the entire process in which the law was enacted and the subsequent referendum effort that was thwarted. Second, the Franklin County Court of Common Pleas' injunction of Rider CAF, which included funds for qualifying solar facilities, if anything, suggests that the Commission should act deliberately and with full information prior to implementing Rider SGF. Lastly, Hillcrest noted that R.C. 3706.59 provides qualifying facilities a remedy for overdue payments.[14] Thus, as recognized by Hillcrest itself, any potential harm to the few qualifying recipients of limited payments from the Solar Generation Fund can be remedied should the Commission need additional time to properly implement Rider SGF.

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[13] *See* Hillcrest's initial comments at 2-3 (May 18, 2023).

[14] *Id.* at 3.

D. The Commission Should Adopt Staff's Simplified Methodology for Rider SGF's Revenue Allocation and Rate Design.

IEU recommended that the Commission adopt the revenue allocation and rate design methodologies included in Staff's Proposal.[15] OMAEG supports this recommendation with regard to the creation of a single non-residential statewide kWh charge, which will reduce the potential for similarly situated non-residential customers being charged disparate amounts based on their EDU's service territory. Additionally, as IEU explained, the statewide kWh charge proposal is familiar to customers,[16] and is unlikely to result in "abrupt or excessive total net electric bill impacts," consistent with R.C. 3706.46(B).

However, in order to further comply with this statutory prohibition against abrupt or excessive bill impacts, the Commission should ensure that non-residential customers who are not self-assessing purchasers are subject to the Rider SGF charge on a per customer basis as directed by the explicit language of R.C. 3706.46(B) (effective June 30, 2021). The Commission should also adhere to the plain language of H.B. 128 and establish the cost caps for industrial customers eligible to become self-assessing purchasers on a per customer basis as explicitly delineated in R.C. 3706.46(B) (effective June 30, 2021).[17]

Even if the statute was ambiguous (which it is not), the Commission should still follow traditional canons of interpretation and implement Rider SGF on a per customer basis. Only when a statute's language is ambiguous should the Commission take into consideration (1): the General Assembly's objective in enacting the statute; (2) the circumstances surrounding the enactment of the statute; (3) legislative history; (4) common law or earlier statutes on a similar subject;

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15 IEU's initial comments at 4 (May 18, 2021).

16 *Id.*

17 *Columbia Gas Transm. Corp. v. Levin*, 2008-Ohio-511, ¶ 19, 117 Ohio St. 3d 122, 125, 882 N.E.2d 400, 406 (When a statute is unambiguous, the Commission "may not delete words used or insert words not used.").

(5) consequences of a particular interpretation; and (6) the administrative construction of a statute.[18]

As explained by H.B. 128's sponsor, Representative Jim Hoops, H.B. 128 was drafted to provide further protections to electric retail customers in Ohio.[19] H.B. 128 is a direct result of the circumstances surrounding the now infamous H.B. 6 and the harm caused to customers.[20] A review of the multiple H.B. 6 versions, including the "as introduced"[21] version and the "as passed by the Senate"[22] version, the Ohio Legislative Service Commission's multiple analyses[23] and substitute bill comparative synopses,[24] and the many hours of committee hearings and testimony[25] 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. H.B. 128's amendments to R.C. 3706 did not change the "per customer" language (even after the utilities raised the purported hardships of implementing the H.B. 6 charges on a per customer basis and the claimed necessity of implementing the charges on a per account basis). The Commission should not deviate from the legislative intent that the rider should be assessed on a per customer basis,

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[18] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Decoupling Mechanism*, Case Nos. 19-2080-EL-ATA, et al., Order at ¶ 25 (January 15, 2020) at ¶ 26 (citing *State ex. rel. Fockler v. Husted*, 150 Ohio St.3d 422, 82 N.E.3d 1135, 2017-Ohio 224).

[19] *See* Representative Jim Hoop's sponsoring testimony before the Senate Energy and Public Utilities Committee, 1st Hearing on H.B. 128 (March 23, 2021).

[20] *Id.*

[21] H.B. 6 As Introduced in the House:search prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb6/IN/00?format=pdf.

[22] H.B. 6 As Passed in the Ohio Senate: search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb6/PS/05?format=pdf.

[23] *See* H.B. 6 OLSC Analysis: www.legislature.ohio.gov/download?key=12555&format=pdf.

[24] *Id.*

[25] *See*, e.g., Testimony of Anthony Smith before the Senate Energy and Public Utilities Committee at 9, 3rd hearing on H.B. 6 (June 18, 2019) (explaining how assessing Rider CAF on a per account basis would result in substantial increases to non-residential customers' electric bills).

which was clearly written in a purposeful manner and intended to minimize the impact of this subsidy on businesses paying the subsidy. The consequences of interpreting H.B. 128 as requiring Rider SGF to be implemented on a per account basis are evident. 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 the monthly Rider SGF charge for each account.

Lastly, the Commission should require utilities to include refund language in the tariffs of Rider SGF as doing so is consistent with the reconciliation language contained in the new version of the law, R.C. 3706.55(B) (effective June 30, 2021). Moreover, refund language that specifies that any charges later deemed unlawful shall be returned to customers will protect all Ohio consumers who will pay the nonbypassable Rider SGF. The United States Attorney for the Southern District of Ohio characterized the H.B. 6 scandal as "likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio".[26] When implementing Rider CAF, the mechanism for providing the subsidies at the heart of the H.B. 6 scandal, the Commission declined to add refund language to its tariffs.[27] Absent the injunction secured by the Ohio Attorney General[28] (or the Supreme Court of Ohio granting a stay),[29] consumers would have

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[26] 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.

[27] *In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Case No. 20-1143-EL-UNC, Entry at ¶ 23 (August 26, 2020).

[28] *State of Ohio v. FirstEnergy Corp., et al.*, Case Nos. 20-CV-06281 et al., Entry and Order, Granting Relator and Plaintiffs' Motions For Preliminary Injunction Under Civ. R. 65 (Dec. 21, 2020).

[29] "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

had no remedy and been required to pay the unlawful subsidies. The Office of the Ohio Consumers' Counsel (OCC) estimates that Ohioans have been denied $1.5 billion in electric refunds after Supreme Court of Ohio reversals of Commission decisions since 2009 alone.[30] The Commission should bring an end to this injustice and protect Ohio utility consumers consistent with OMAEG's recommendation regarding the adoption of refund language in Rider SGF's tariff.

III. CONCLUSION

The Commission should follow the plain language of H.B. 128 and establish an annual revenue requirement that only collects from customers a per customer charge in an amount necessary to pay the required disbursements from the Solar Generation Fund that are actually earned by the qualifying solar resources during the prior twelve months or projected to be earned in subsequent periods. In addition, the Commission should require tariff language that would provide customer refunds in the event that Rider SGF is later deemed unlawful.

afford." *In re Dayton Power & Light Co.*, 164 Ohio St.3d 237, 2018-Ohio- 4009, 113 N.E.3d 507 (Kennedy, J., concurring in judgement only).

[30] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Tariff Amendments,* Case No. 21-101-EL-ATA, OCC comments at 3 and 9 (March 4, 2021).

For the foregoing reasons, OMAEG respectfully requests that the Commission adopt the recommendations as set forth in its initial comments and reply comments when implementing Rider SGF.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on May 28, 2021 upon the parties listed below.

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