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

APPLICATION FOR REHEARING
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) July 14, 2021 Entry in the above-captioned proceeding. In its Entry, the Commission established the Solar Generation Fund Rider (Rider SGF) to produce $20 million annually for disbursements from the Solar Generation Fund.[1] The Entry also established Rider SGF's rate design to be effective November 1, 2021 through December 31, 2027, subject to reconciliation, and the method for allocating the $20 million annual revenue requirement to each electric distribution utility (EDU).[2]

Specifically, OMAEG requests that the Commission find that its Entry was unlawful, unjust, and unreasonable in the following five respects:

> **ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully establishing a revenue requirement that exceeds the amount required for disbursements from the Solar Generation Fund in violation of R.C. 3706.46, 3706.55, and 4903.09.**
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> **ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully establishing the nonbypassable Rider SGF on a per account basis instead of on a per customer basis in violation of R.C. 3706.46(B).**

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1 Entry at ¶ 1 (July 14, 2021).

2 *Id.* at ¶¶ 18-19.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully applying the $242 monthly cost cap to any non-residential customers eligible to become self-assessing purchasers instead of only industrial customers eligible to become self-assessing purchasers in violation of R.C. 3706.46(B).

ASSIGNMENT OF ERROR NO. 4: The Commission erred by unjustly, unreasonably, and unlawfully including the CAT in Rider CAF in violation of Ohio law and industry practices.

ASSIGNMENT OF ERROR NO. 5: The Commission erred by unjustly, unreasonably, and unlawfully failing to require refund language in Rider SGF's tariffs.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The Commission should grant rehearing and abrogate or modify its July 14, 2021 Entry as requested herein by OMAEG.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On March 30, 2021, Governor Mike DeWine signed Am. Sub. House Bill 128 of the 134th General Assembly (H.B. 128) into law, which became effective June 30, 2021. H.B. 128 repealed certain provisions of Am. Sub. H.B. 6 (H.B. 6), including the provision that authorized the infamous nuclear resource subsidy of up to $150 million per year. H.B. 128, however, retained a related construct of H.B. 6—the solar resource subsidy. H.B. 128 created the Solar Generation Fund and requires the Public Utilities Commission of Ohio (Commission) to establish a revenue requirement of *up to* $20 million per year 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. Consequently, Rider SGF should only collect from customers an amount *necessary to pay the disbursements earned* by the qualifying solar resources *during the prior twelve months*.

On April 19, 2021, the Staff of the Commission (Staff) filed comments recommending proposed methodologies to collect the annual revenue requirement through the Rider SGF.[3] On April 27, 2021, the Commission invited stakeholders to file comments on Staff's

[3] Staff's Comments and Recommendations (April 19, 2021).

recommendations.[4] Thereafter, OMAEG and other stakeholders filed initial comments on Staff's recommendations on May 18, 2021 and reply comments on May 28, 2021.[5]

On July 14, 2021, the Commission issued an Entry that established Rider SGF and adopted Staff's recommendations for the rate design and allocation methodology of the revenue requirement. More specifically, the Commission approved a $20 million revenue requirement despite the plain language of H.B. 128 and no record of the qualifying solar facilities' generation output during the relevant periods.[6]

Under the approved rate design, residential customers will pay $0.10 per month and then the non-residential portion of the total revenue requirement will be calculated by subtracting the revenue projected to be collected from residential customers from the total revenue requirement.[7] The Commission further ordered that non-residential customers will pay a $/kWh charge for all kWhs up to 833,000 per month per customer, not to exceed $242.[8] Although H.B. 128 provides that Rider SGF shall be charged on a *per customer* basis, the Commission implemented Rider SGF on a per account basis.[9] Also contrary to the plain language of H.B. 128, the Commission applied the $242 monthly cap to all non-residential customers eligible to become self-assessing purchasers instead of just industrial customers eligible to become self-assessing purchasers.[10]

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4 Entry at ¶ 5 (April 27, 2021).

5 *See* OMAEG's comments (May 18, 2021); OMAEG's reply comments (May 28, 2021).

6 Entry at ¶ 13 (July 14, 2021).

7 *Id.* at ¶ 19.

8 *Id.*

9 *Id.* at ¶ 16.

10 *Id.* at ¶ 15.

The Commission further ordered that customers must pay the Commercial Activity Tax (CAT) through Rider SGF,[11] even though Rider SGF is not recovering costs for EDU services. Finally, the Commission determined that Rider SGF should not include language in its tariffs which would allow any charges later deemed to be unlawful to be refunded to customers.[12]

Granting OMAEG's application for rehearing of the Entry establishing Rider SGF will ensure that customers only incur just, reasonable, and lawful charges. In accordance with R.C. 4903.10 and Ohio Adm. Code 4901-1-35, OMAEG hereby files its application for rehearing of the Commission's July 14, 2021 Entry.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully establishing a revenue requirement that exceeds the amount required for disbursements from the Solar Generation Fund in violation of R.C. 3706.46, 3706.55, and 4903.09.

The Commission established the revenue requirement of Rider SGF at an amount that exceeds disbursements required from the Solar Generation Fund. Moreover, the July 14, 2021 Entry failed to set forth the reasons for its decisions based upon factual findings. As explained further below, the Commission should protect customers by modifying its Entry so that Rider SGF only collects an amount sufficient to fund the solar subsidies as prescribed by the plain language of H.B. 128.

In the July 14, 2021 Entry, the Commission set the revenue requirement of Rider SGF at $20 million per year and stated, "[c]ontrary to the claims of OMAEG and OCC, the amount of the recovery is fixed by statute and not subject to the Commission's discretion."[13] OMAEG agrees

[11] *Id.* at ¶ 14.

[12] *Id.* at ¶ 17

[13] *Id.* at ¶ 13.

with the Commission that H.B. 128 governs the revenue requirement of Rider SGF and that as a creature of statute,[14] the Commission must give effect to H.B. 128. However, the Commission ignored the plain language of the statute, specifically deleting words of the statute in rendering its decision.

R.C. 3706.46(A)(1) included in H.B. 128, requires the Commission to establish a recovery mechanism "***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."[15] R.C. 3706.55, in pertinent part, directs that monies from the solar generation fund will be distributed 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."[16]

As used in R.C. 3706.46(A)(1), "sufficient" is defined as "enough to meet the needs of a situation or a proposed end."[17] Accordingly, R.C. 3706.46(A)(1) directs the Commission to establish a recovery mechanism with a revenue requirement, of up to $20 million, that is enough to meet the total disbursements required under R.C. 3706.55. R.C. 3706.55 requires that monies from the solar generation fund be distributed in the amounts equal to the number of credits earned during the prior twelve months multiplied by the credit price. Taken together, R.C. 3706.46 and 3706.55 require the Commission to establish a revenue requirement of up to $20 million that is sufficient for disbursements from the solar generation fund equal to the number of credits earned

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[14] *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 97 (1973) ("The Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.") (Citations omitted).

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

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

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

in the prior twelve months by a qualifying facility multiplied by the credit price. Under the plain language of the statute, if there are zero credits earned in the prior twelve-month period, then the revenue requirement should be zero.

The July 14, 2021 Entry ignores portions of the statute and reads H.B. 128 to require an annual revenue requirement of $20 million regardless of the amounts of credits earned by the solar generation resources. However, such a reading would render meaningless the words "sufficient" and "for total disbursements required under section 3706.55 of the Revised Code from the solar generation fund" in R.C. 3706.46(A)(1). *See 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)).

Additionally, the Supreme Court of Ohio has long held that courts and administrative agencies are prohibited from adding or removing words from statutes that do not exist. S*tate ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 45 (2008) (holding, "[w]e 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) (holding, "[i]t 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"); *see also Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999). Here, the July 14, 2021 Entry unlawfully seeks to strike the words "sufficient" and "for total disbursements required under section 3706.55 of the Revised Code from the solar generation fund" from H.B. 128.

Furthermore, the July 14, 2021 Entry violates R.C. 4903.09 because the decision to set the annual revenue requirement of Rider SGF at $20 million was not based on factual findings. R.C. 4903.09 provides that the written opinions of the Commission must "set[] forth the reasons prompting the decisions arrived at, based upon said findings of fact." However, neither Staff's recommendations nor the July 14, 2021 Entry reference any data, filings, documents, or other information demonstrating the number of credits that were actually earned for the prior twelve-month period. The July 14, 2021 Entry also makes no findings regarding the number of credits that the Ohio Air Quality Development Authority (OAQDA) has already issued or the level of funds needed to pay the required disbursements from the Solar Generation Fund to qualifying resources for the previous twelve months or any subsequent twelve-month period. Finally, the July 14, 2021 Entry makes no findings as to whether qualifying facilities were actually operating and earning credits during the prior twelve-month period or will be operating and earning credits during the entirety of the next twelve-month period. Simply put, it is unjust and unreasonable to require customers to pay solar subsidies for periods where no generation occurred and no credits were earned. That was not and could not have been the intent of the General Assembly when establishing H.B. 128.

Accordingly, OMAEG respectfully requests that the Commission modify its July 14, 2021 Entry so as to set the revenue requirement of Rider SGF equal to the amount of credits earned by solar facilities during the relevant statutory period, not to exceed $20 million annually.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully establishing the nonbypassable Rider SGF on a per account basis instead of on a per customer basis in violation of R.C. 3706.46(B).

The Commission established the nonbypassable Rider SGF, effective November 1, 2021, on a "per account" basis instead of on a "per customer" basis in violation of H.B. 128.[18] More specifically, the July 14, 2021 Entry determined that R.C. 3706.46(B) is "clear and unambiguous"[19] and that "per customer" means "in connection with each billing account established in accordance with the applicable contract or tariff."[20] The Entry further noted that other recovery mechanisms are assessed on a per account basis. Lastly, the Entry incorporated its reasoning from a prior case involving a similar cost cap provision related to the coal subsidy included in tainted H.B. 6.

R.C. 3706.46(B) provides:

> In authorizing the level and structure of any charge to be billed and collected by each electric distribution utility, 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. For nonresidential customers that are not self-assessing purchasers, the level and design of the charge shall be established in a manner that avoids abrupt or excessive total net electric bill impacts for typical customers. (Emphasis added).

The plain language of R.C. 3706.46(B) unequivocally directs the Commission to establish the Rider SGF monthly costs caps on a per customer basis. The Commission cannot stretch the meaning of "per customer" to mean "per billing account." As previously explained, the Commission is a creature of statute and must implement the intent of the General Assembly as

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[18] Entry at ¶ 16 (July 14, 2021).

[19] *Id.*

[20] *Id.*

expressed through the text of H.B. 128.[21] Again, the Supreme Court of Ohio has long held that courts and administrative agencies are prohibited from adding or removing words from statutes that do not exist. S*tate ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 45 (2008) (holding, "[w]e 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) (holding, "[i]t 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"); *see also Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999).

Furthermore, while other recovery mechanisms may be implemented on a per account basis, that fact cannot supersede the plain language of R.C. 3706.46(B). The Commission recognized this principle of law when it previously stated, "[i]n construing a statute, our paramount concern is legislative intent. ***If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary***."[22]

Nonetheless, even if R.C. 3706.46(B) was ambiguous (which it is not) other considerations still support the conclusion that Rider SGF must be assessed on a per customer basis. R.C. 3706.46(B) prohibits the Commission from establishing a rate design for Rider SGF that results in "abrupt or excessive total net electric bill impacts" for non-residential customers who are no eligible to become self-assessing purchasers. Pursuant to the July 14, 2021 Entry, non-residential customers with multiple accounts and meters and customers with multiple facilities within the

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[21] "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.

[22] *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) (citing *WorldCom, Inc. v. City of Toledo*, Case Nos. 02-3207-AU-PWC, 02-3210-EL-PWC, Opinion and Order (May 14, 2003); (*State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Ed.*, 74 Ohio St. 543, 660 N.E.2d 463 (1996); (*Akron Management Corp. v. Zaino*, 94 Ohio St.3d 101, 760 N.E.2d 405 (2002)). (Emphasis added).

same EDU's electric service territory will be charged Rider SGF for each account (subject to the monthly cap). This application of H.B. 128 directly conflicts with the statutory prohibition against "abrupt or excessive" bill impacts. Since R.C. 3706.46(B) directs the Commission to implement Rider SGF on a per customer basis, charging non-residential customers for each account is in itself excessive and unlawful.

Any argument that the monthly cost caps in H.B. 128 already ensure that Rider SGF charges are not "abrupt or excessive," is flawed. It is unlikely that the General Assembly would take care to include the prohibition against "abrupt or excessive" bill impacts in R.C. 3706.46(B) if the monthly cost caps were viewed as a sufficient safeguard. This interpretation conflicts with the cannon against surplusage and would make the prohibition against "abrupt or excessive" bill impacts meaningless.[23]

Additionally, legislative history and intent supports that Rider SGF must be assessed on a per customer basis. The Ohio House of Representatives' "as introduced" and "as passed" versions of H.B. 6 sought to require that "[e]ach retail electric customer of an electric distribution utility in the state shall pay a ***per-account monthly charge***" to be deposited into the Clean Air Fund (comprised of the nuclear generation and renewable generation funds).[24] However, the "as enrolled version" of H.B. 6 removed references to per-account monthly charges and instead references "per-customer monthly charges."[25] The Legislative Services Commission's (LSC)

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[23] *See Teays Valley Local School Dist. Bd. of Edn.,* 131 Ohio St.3d at ¶ 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") (citations omitted).

[24] H.B. 6 As Introduced before the Ohio House of Representatives, https://searchprod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb6/IN/00?format=pdf (emphasis added).

H.B. 6 As Passed by the Ohio House of Representatives, https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb6/PH/03?format=pdf.

[25] *See* R.C. 3706.46 (B), as enacted by H.B. 6, 133rd General Assembly (October 22, 2019 version) https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb6/EN/06?format=pdf.

analyses also reflect the modification of the Clean Air Fund charge from a per account charge to a per customer charge.[26] In addition, the General Assembly was made aware of the impact of a per account charge on non-residential customers through stakeholder testimony on H.B. 6.[27]

Although H.B. 128 eliminated the nuclear generation fund and renamed the renewable generation fund the "solar generation fund," H.B. 128 retained language of H.B. 6 regarding a per customer charge. Consequently, if the General Assembly had intended the recovery mechanism for the solar subsidies to be assessed on a "per account" basis it would not have removed the original "per account" language from H.B. 6. Additionally, if the General Assembly intended Rider SGF to be assessed on a "per account basis" it could have amended H.B. 6 to include such language. However, the General Assembly declined to do so. Instead, it explicitly placed "per customer basis" language in H.B. 128.

Finally, interpreting R.C. 3706.46(B) as requiring Rider SGF to be assessed on a "per customer" basis is consistent with statements made by H.B. 128's sponsor. Representative Jim Hoops (R-Napoleon) stated that the purpose of H.B. 128 was, in part, to ensure additional protections for Ohio's utility customers.[28] A per customer charge is wholly consistent with this purpose.

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[26] *See* LSC Analysis of H.B. 6 As Introduced, https://www.legislature.ohio.gov/download?key=11627&format=pdf; LSC Analysis of H.B. 6 as Enrolled, https://www.legislature.ohio.gov/download?key=13060&format=pdf.

[27] *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 the Clean Air Fund Rider on a per account basis would result in substantial increases to non-residential customers' electric bills).

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

For the foregoing reasons, OMAEG respectfully requests that the Commission modify its July 14, 2021 Entry so that Rider SGF is assessed on a per customer basis instead of on a per account basis.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully applying the $242 cost cap to any non-residential customers eligible to become self-assessing purchasers instead of only industrial customers eligible to become self-assessing purchasers in violation of R.C. 3706.46(B).

R.C. 3706.46(B) provides that, "the per-customer monthly charge for industrial customers eligible to become self-assessing purchasers pursuant of division (C) of section 5727.81 of the Revised Code shall not exceed two-hundred forty-two dollars." The plain and unambiguous language of R.C. 3706.46(B) sets a $242 monthly cap on Rider SGF charges for ***industrial customers*** eligible to become self-assessing purchasers (as defined in the Ohio Revised Code). Despite this straightforward language, the Commission interpreted the $242 monthly cap to apply to ***all non-residential customer****s* eligible to become self-assessing purchasers, instead of just industrial customers eligible to become self-assessing purchasers.[29] As a creature of statute, the Commission is bound by the unambiguous text of H.B. 128 and cannot add or delete words from R.C. 3706.46(B).[30]

Furthermore, interpreting the cost cap to apply to all non-residential customers eligible to become self-assessing purchasers violates, among other things, the canon of statutory interpretation of "*expresio unius.*" This canon instructs that the express mention of a single item implicitly excludes other items from the same class.[31] R.C. 3706.46(B) includes an internal

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[29] Entry at ¶ 15 (July 15, 2021).

[30] *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 97 (1973) ("The Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.")

[31] *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

reference to R.C. 5728.81, which specifically defines industrial customers eligible to become self-assessing purchasers. The General Assembly likely would not have included this level of specificity had it intended the monthly cost cap to apply generally to all non-residential customers eligible to become self-assessing purchasers.

Lastly, 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 non-residential customers in violation of the R.C. 3706.46(B)'s prohibition against "abrupt or excessive" bill impacts.

For these reasons, OMAEG respectfully requests that the Commission modify its July 14, 2021 Entry and apply the monthly cost cap in R.C. 3706.46(B) only to industrial customers eligible to become self-assessing purchasers instead of to all non-residential customers eligible to become self-assessing purchasers.

ASSIGNMENT OF ERROR NO. 4: The Commission erred by unjustly, unreasonably, and unlawfully including the CAT in Rider CAF in violation of Ohio law and industry practices.

The Commission determined that customers must pay the CAT through Rider SGF because H.B. 128 does not explicitly state that the amounts collected through Rider SGF should be adjusted for the CAT.[32] However, nowhere in the text of H.B. 128 is there language authorizing EDUs to pass the CAT associated with these charges through to customers. Accordingly, the Commission should adhere to Supreme Court of Ohio precedent and not read words into a statute that do not exist as explained above.[33]

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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…."

[32] Entry at ¶ 14 (July 15, 2021).

[33] "We cannot generally add a requirement that does not exist in the Constitution or a statute.". *Levin*, 2008-Ohio-511 at ¶ 19.

Even if H.B. 128 was ambiguous in regards to the CAT (which it is not), various factors support that EDUs should not be permitted to pass through the CAT onto customers. When a statute's language is ambiguous, the Commission should 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; (5) consequences of a particular interpretation; and (6) the administrative construction of a statute.[34]

The General Assembly's objective in acting H.B. 128 weighs in favor of excluding the CAT from Rider SGF. H.B. 128's sponsor, Representative Jim Hoops testified that:

> House Bill 128 will result in further ratepayer protections and rate decreases for some Ohio ratepayers over current law. This is the result of the elimination of the FirstEnergy decoupling provision (~$115 million per year), the elimination of the nuclear subsidies ($150 million per year), and setting up future legislation to control the rapid growth of transmission costs.[35]

Excluding the CAT from Rider SGF is consistent with the General Assembly's intent that customers should not be assessed unnecessary amounts, particularly when customers are not receiving a service from their EDU.

The circumstances surrounding the enactment of H.B. 128 include the fallout from H.B. 6 and the largest public corruption scandal in Ohio history.[36] Consequently, it would be reasonable and prudent to provide more protection to customers by excluding the CAT from Rider SGF.

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[34] *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 ¶ 26 (January 15, 2020) (citing *State ex. rel. Fockler v. Husted*, 150 Ohio St.3d 422, 82 N.E.3d 1135, 2017-Ohio 224).

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

[36] *See id.*; 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". 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.

Statutes on a similar subject also support that the CAT should be excluded from Rider SGF. R.C. 5751.02 subjects persons engaging in business activity in Ohio to the CAT. R.C. 5751.02(A) 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." R.C. 5751.02(B)(1) 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." Taken together, these provisions mean that businesses pay the CAT and those businesses may include the cost of the CAT in the price of goods or services that they provide.

Contrary to the in *pari materia* canon of statutory interpretation, the July 14, 2021 Entry fails to reconcile the plain language of R.C. 5751.02 with that of H.B. 128. *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."). Rider SGF is not recovering a cost for any good or services provided by the EDUs and therefore the EDUs cannot pass on the CAT to customers.

Finally, the Commission's interpretation of H.B. 128 will shift costs to non-residential customers who are not subject to a cost cap. Pursuant to R.C. 3706.46(B), Rider SGF includes a monthly cost cap for residential customers and industrial customers eligible to become self-assessing purchasers. However, there is no equivalent cost cap for non-residential customers who are not eligible to become self-assessing purchasers. Non-residential customers who are not subject to a cost cap will also pay the CAT and may incur additional costs that are displaced by including the CAT in the established cost caps for other classes of customers. Therefore, the

Commission's interpretation may also contribute to "abrupt or excessive" bill impacts for non-residential customers who are not eligible to become self-assessing purchasers, in violation of R.C. 3706.46(B).

For the foregoing reasons, OMAEG respectfully requests that the Commission modify its July 14, 2021 Entry and exclude the CAT from Rider SGF.

ASSIGNMENT OF ERROR NO. 5: The Commission erred by unjustly, unreasonably, and unlawfully failing to require refund language in Rider SGF's tariffs.

In its July 14, 2021 Entry, the Commission declined to add tariff language to Rider SGF that would refund charges to customers should the rider later be deemed unlawful.[37] The Commission determined that adding such refund language would be "inconsistent with the legislative intent as to the rider."[38] The Commission further reasoned that H.B. 128 already includes a refund provision.[39]

Contrary to the findings in the Entry and the Commission's own admission, the legislative intent and purpose of H.B. 128 is wholly consistent with a refund requirement. As explained above, H.B. 128 contains various provisions that seek to reduce costs to customers and enact greater protections. The sponsor of H.B. 128 attested to this exact purpose of the law.[40]

While it is true that H.B 128 itself includes a refund provision, the refund provision specifically refers to any amounts remaining in the Solar Generation Fund as of July 31, 2027, minus any remittances that are required up to July 21, 2028. *See* R.C. 3706.55. While this is an important provision that should also be recognized in tariff language, this provision is distinct from

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37 Entry at ¶ 17 (July 15, 2021).

38 *Id.*

39 *Id.*

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

tariff language that would allow amounts collected and dispersed from the Solar Generation Fund to be returned to customers in the event that Rider SGF is deemed unlawful. Should Rider SGF later be deemed unlawful, Ohio customers are entitled to nothing less than the *full amount* of charges that they paid.

The Commission 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). Due to *Keco*'s prohibition against retroactive ratemaking, absent a stay or change of law, customers have no remedy for unlawful charges that they have paid.[41] The Office of the Ohio Consumers' Counsel (OCC) estimated that Ohio customers have paid $1.5 billion in unlawful electric charges since 2009 but have received no refund of these amounts because of *Keco*.[42] The Supreme Court of Ohio has recognized "that this particular outcome is unfair,"[43] but has also stated that the outcome can be avoided if the Commission adds refunds language to a rate mechanism's tariffs. 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." *In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 23.

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[41] "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." *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).

[42] *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).

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

Finally, the Clean Air Fund Rider, the predecessor of Rider SGF, and its enabling statute, H.B. 6, were at the heart of the largest public corruption scandal in Ohio history. These events should prompt greater scrutiny of subsidies and result in greater consumer protection. Accordingly, the Commission should add refund language to the tariff in the event that the Commission's implementation of the law is incorrect and overturned by the Court.

Additionally, 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 ¶ 16 (July 14, 2021). Although the PUCO seemed to recognize that R.C. 3706.55 entitles customers to a refund of "any amounts remaining in the [solar 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.

III. CONCLUSION

For the aforementioned reasons, OMAEG respectfully requests that the Commission grant this application for rehearing and modify its order as set forth herein.

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 August 13, 2021 upon the parties listed below.

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