IN THE
SUPREME COURT OF OHIO

In the Matter of Establishing the Solar Generation Fund Rider Pursuant to R.C. 3706.46	:	Case No. 2021-1374
	:	
	:	On Appeal from the Public Utilities Commission of Ohio, Case No. 21-447-EL-UNC

MERIT BRIEF SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

Kimberly W. Bojko (0069402)
(Counsel of Record)
Thomas V. Donadio (0100027)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Tel.: 614.365.4124
Fax: 614.365.9145
bojko@carpenterlipps.com
donadio@carpernterlipps.com

Counsel for Appellant,
The Ohio Manufacturers' Association Energy Group

David Yost (0056290)
Attorney General

John H. Jones (0051913)
Section Chief

Jodi J. Bair (0062921)
(Counsel of Record)
Thomas M. Shepherd (0100164)
Assistant Attorneys General
30 E. Broad St., 26th Floor
Columbus, OH 43215
Tel.: 614.644.8599
Fax: 614.644.8764
jodi.bair@OhioAGO.gov
thomas.shepherd@OhioAGO.gov
john.jones@OhioAGO.gov

Counsel for Appellee,
Public Utilities Commission of Ohio

Steven T. Nourse (0046705)
(Counsel of Record)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Tel.: 614.716.1608
Fax: 614.716.2950
stnourse@aep.com

Counsel for Intervening Appellee, Ohio Power Company

March 8, 2022

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITY

PAGE

Cases

Statutes

Other Authorities

IN THE
SUPREME COURT OF OHIO

In the Matter of Establishing the Solar Generation Fund Rider Pursuant to R.C. 3706.46	:	Case No. 2021-1374
	:	On Appeal from the Public Utilities Commission of Ohio,
	:	Case No. 21-447-EL-UNC

MERIT BRIEF SUBMITTED OF BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

Am. Sub H. B. 128 (H.B. 128) requires the Public Utilities Commission of Ohio (Commission) to establish a rate mechanism for the retail recovery of costs related to Ohio's solar generation fund for the period up to December 31, 2027. The Commission established the rate mechanism in accordance with the legislative requirements.

Appellant Ohio Manufacturers' Association Energy Group (OMAEG or Appellant) challenges several aspects of the rate mechanism established by the Commission. In each instance, the Commission applied the plain language of the statute and adhered to its precedent in similar cases. The relief OMAEG seeks should come from the General Assembly, not the Court. The Commission's decision is lawful and reasonable in all respects, and it should be affirmed.

STATEMENT OF FACTS AND CASE

H.B. 128 was enacted on March 31, 2021, and became effective on June 30, 2021. This new legislation required the Commission to establish a rate mechanism for the retail recovery of costs related to the solar generation fund for the period up to December 31, 2027. R.C. 3706.46.

Among other things, H.B. 128 required the Commission to: (1) determine the method to allocate the revenue requirement to each electric distribution utility (EDU) based on the relative number of customers, relative quantity of kilowatt hour (kWh) sales, or some combination of these factors; (2) ensure rate increases that do not exceed $0.10 per month for residential customers, do not exceed $242 per month for industrial customers eligible to become self-assessing purchasers, and avoid abrupt or excessive total net bill impacts for typical nonresidential customers; and (3) provide that the charges approved are subject to adjustment to reconcile actual collected revenues with the required annual revenues. R.C. 3706.46. Based on a reading of the statute, certain elements of the Solar Generation Fund Rider (Rider SGF) were required without deviating from the General Assembly's plain instruction, and other elements required the Commission's experience and discretion in order to implement Rider SGF.

On April 19, 2021, Commission Staff filed comments in the docket reflecting its recommendations regarding various details in the implementation of Rider SGF, discussed further below. On April 27, 2021, the Attorney Examiner issued an Entry directing all interested stakeholders to file comments and reply comments, which were filed by several groups, including Appellant, on May 18, 2021, and May 28, 2021,

respectively. The Commission issued an Entry on July 14, 2021, which established Rider SGF. As several interested stakeholders disagreed on various pieces of Rider SGF's implementation, the Commission determined the following items at issue in the present case:

A. The Commission rejected Appellant's argument regarding the amount of the revenue requirement referenced in R.C. 3706.46(A)(1), finding instead that the revenue requirement under the plain language of the statute is set at $20 million, and not subject to Commission discretion. Entry at ¶ 13 (July 14, 2021), OMAEG App. at 28[1].

B. Following its own precedent, the Commission directed that Rider SGF be collected in the same manner as all other riders collected by EDUs. More specifically, each established billing account is assigned a Rider SGF amount for purposes of applying the $242 rate cap, rather than allowing nonresidential users to aggregate separate accounts across its operations to apply a single rate cap across its multiple accounts. Entry at ¶ 16 (July 14, 2021), OMAEG App. at 28.

C. To achieve the annual revenue requirement of $20 million mandated in R.C. 3706.46(A)(1), the Commission set Rider SGF to collect a

[1] References to the Appendix of Appellant's Merit Brief are denoted "OMAEG App. at __"; references to the Appendix attached to Appellee Public Utilities of Ohio Merit Brief are denoted "App. at ___".

monthly charge of $0.10 for residential customers and recovered the remaining solar generation fund costs from nonresidential customers through a dollar per kWh rate based on each nonresidential customer's usage up to 833,000 kWhs per month. The Commission, in its discretion, set a monthly cap of $242 for all nonresidential customers eligible to become self-assessing purchasers. Entry at ¶ 15 (July 14, 2021), OMAEG App. at 28.

D. Following the statutory directive and its own precedent, the Commission determined that the EDUs should collect the fixed amount required by the solar generation fund without regard to any commercial activity tax (CAT) offset. Entry at ¶ 14 (July 14, 2021), OMAEG App. at 28.

E. Because R.C. 3706.55 has no language setting a standard on prudence in connection to Rider SGF, the Commission declined Appellant's request to include refund language in the tariffs. The Commission also referred to the fact that R.C. 3706.46(C) explicitly provides for reconciliation and refund as of December 31, 2027, as support for its decision to not include refund language in Rider SGF itself. Entry at ¶ 17, (July 14, 2021), OMAEG App. at 28.

On August 13, 2021, Appellant filed an Application for Rehearing of the Commission's July 14, 2021 Entry, raising the same five assignments of error that are listed above. The Commission denied Appellant's Application for Rehearing in its Entry

on Rehearing issued on September 8, 2021. In denying the Application for Rehearing, the Commission affirmed its reasoning contained in its July 14, 2021 Entry, which was based on prior Commission precedent and the Commission's interpretation of the statute.

STANDARD OF REVIEW

A Commission order shall be reversed, vacated, or modified by this Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.,* 104 Ohio St.3d 530, 2004- Ohio-6767, 820 N.E.2d 885, ¶ 50. This Court will not reverse or modify a Commission decision as to questions of fact when the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. The Appellant bears the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id*. This Court will not reverse a Commission order absent a showing by the Appellant that it has been or will be harmed or prejudiced by the order. *Myers v. Pub. Util. Comm*., 64 Ohio St.3d 299, 302, 595 N.E.2d 873 (1992). Although the Court has "complete and independent power of review as to all questions of law" in appeals from the Commission, *Ohio Edison Co. v. Pub. Util. Comm.,* 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997), the Court may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are

involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.,* 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979); *Indus Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶¶ 12-13. The Commission's discretionary decisions receive deferential review. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 11.

PROPOSITION OF LAW NO. I:

The Commission properly established the annual revenue requirement for the Solar Generation Fund.

OMAEG argues that the Commission erred in establishing the annual revenue requirement for the Solar Generation Fund. According to OMAEG, the amount cannot exceed what is sufficient to fund disbursements from the Fund. OMAEG's argument lacks merit. Contrary to OMAEG's assertion, the Commission properly applied the governing statute to fix the revenue requirement.

R.C. 3706.46(A)(1)(b) provides, in pertinent part, that each "electric distribution utility shall collect from all of its retail electric customers in this state, each month, a charge or charges which, in the aggregate, are sufficient to produce the following revenue requirements: Twenty million dollars annually for total disbursements required under section 3706.55 of the Revised Code from the renewable generation fund." R.C. 3706.46(A)(1)(b), OMAEG App. at 66. As the Commission recognized, the statute clearly requires that the rider must produce a $20 million annual revenue requirement.

Where the language of a statute is clear and unambiguous, the duty of an agency or court is to simply apply the statute as written. As the Court has explained, "[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation." *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 2000-Ohio-470, 721 N.E.2d 1057 (2000). Rather, "[a]n unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), at paragraph five of the syllabus. The Commission simply did what the statute requires, to establish a rider that produces a $20 million revenue requirement.

Despite this statutory directive, OMAEG asserts that the word "sufficient" within the statute somehow requires the Commission to independently determine the annual amounts required to be collected by the rider. This interpretation is contrary to the express statutory language. As the Commission recognized, "the amount of the recovery is fixed by statute and not subject to the Commission's discretion." Entry at ¶ 13 (July 14, 2021) OMAEG App. at 28.

OMAEG also asserts that the Commission's Entry and Entry on Rehearing violate R.C. 4903.09 because the decision to set the annual revenue requirement of Rider SGF at $20 million was not based on any factual findings in the evidentiary record. This argument lacks any merit.

This Court has explained that the purpose of R.C. 4903.09 is "to enable this court to review the action of the commission without reading the voluminous records in Public Utilities Commission cases." *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32

Ohio St.3d 306, 311, 513 N.E.2d 337, (1987) quoting *Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 363, 102 N.E.2d 842 (1951). Strict compliance with the terms of the statute is not required. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89, 706 N.E.2d 1255 (1999). Moreover, detail need be sufficient only for this court to determine the basis of the PUCO's reasoning. *Allnet Communications Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209, 638 N.E.2d 516 (1994).

In this case, there was no need to examine a lengthy factual record and make findings thereon. All that was required was for the Commission to implement the statutory requirement to set the revenue requirement at $20 million. The Commission explained what it was doing and why it did so. Nothing further was required.

PROPOSITION OF LAW NO. II:

> **Rider SGF should be collected in the same manner that all other riders are collected by EDUs. Each separate billing account established according to an applicable contract or tariff shall pay the rider.**

The Appellant seeks to aggregate accounts so that those accounts are considered a single customer for purposes of paying the Rider SGF. If this position were adopted, nonresidential customers could aggregate together and avoid paying a higher Rider SGF. The language in the solar generation statute states that the SGF shall be paid on a per-customer monthly basis. R.C. 3706.46(2)(B), OMAEG App. at 66. OMAEG raised this issue in an earlier Commission case and the argument was rejected based upon the definition of customer in the Ohio Adm.Code 4901:1-10-01(I). *In re Establishing the Nonbypassable Recovery Mechanism for Net Legacy Generation Resource Costs*

Pursuant to R.C. 4928.148, Case No.19-1808-EL-UNC (*LGR Case*), Entry at ¶ 27 (Nov. 21, 2019).

The Ohio Administrative Code provides that customer "means 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." Ohio Adm.Code 4901-1-10-01-(I), App. at 1. As stated in the *LGR Case* Order, "the determination of customer depends on the contract or tariff relationship between the EDU and the party that receives electric service." *LGR Case* at ¶27. Tariffs and contracts contain billing provisions that attach responsibility for the payment of an account. *Id.* In addition, Ohio Adm.Code 4901:1-10-01-(K) defines customer premises to mean "the residence(s), building(s), or offices(s) of a customer." Ohio Adm.Code 4901:1-10-01-(K). The Commission stated that all other riders were collected by EDUs according to each billing account established by the applicable tariff or contract. *LGR Case* at ¶ 27. The Ohio Administrative Code does not consider the Appellant's suggestion that multiple meters/accounts be considered a single customer. For those reasons, the Commission determined that nonresidential customers could not group their billing accounts together to avoid paying the higher rider amounts. *Id*. The same facts presented in the *LGR Case* are present in this case.

Appellant OMAEG also relies upon the predecessor bill to H.B. 128, H.B. 6, and testimony before the Senate Energy and Public Utilities Committee Hearing on H.B. 6 to suggest that the legislature mandated that *customer* does not mean the same thing as *account*. This is contrary to the plain language of Ohio Adm.Code 4928-1-10-01-(I) and how this rule has been interpreted by the Commission in the *LGR Case*. In the *LGR Case*,

the Commission ruled that the "LGR Rider will be collected in the same manner that all other riders are collected by EDUs – in connection with each billing account established in accordance with the applicable contract or tariff." Entry at ¶ 17 (July 14, 2021), OMAEG App. at 28, citing *LGR Case* Entry at ¶27 (Nov. 21, 2019). In that case, the Commission did not allow nonresidential customers to aggregate or group their billing accounts to avoid paying LGR Rider amount. Entry at ¶ 17 (July 14, 2021), OMAEG App. at 28, citing *LGR Case* Entry at ¶ 27.

In interpreting the use of the word customer in R.C. 3706.46(2)(B), the Commission relied upon its precedent established in the *LGR Case*, the legislature's choice not to change the language, and the Ohio Administrative Code's definition of customer. This Court has previously held that "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18, 734 N.E.2d 775 (2000). For these reasons, the Commission rejected Appellant OMAEG's argument. The Commission reasonably and lawfully interpreted the statute and this Court should uphold that finding.

PROPOSITION OF LAW NO. III

The Commission's application of the $242 monthly cost cap to all nonresidential customers eligible to become self-assessing purchasers is consistent with applicable statutes, Commission precedent, and precedent of this Court.

With the implementation of H.B. 128, the Commission is required to design a method of collecting funds from customers that, in the aggregate, is sufficient to produce

the revenue requirement contained in R.C. 3706.55. R.C. 3706.46(A)(1). The General Assembly granted the Commission varying degrees of deference in how it instructs electric distribution utilities to collect funds from different classes of customers. For instance, when it comes to residential customers, the per-customer monthly charge may not exceed ten cents. R.C. 3706.46(B), OMAEG App. at 66. Similarly, for industrial customers eligible to become self-assessing purchasers, the monthly charge is not to exceed $242. *Id*. With other classes of customers, however, the General Assembly opted for more deference to the Commission, such as requiring nonresidential customers that are not eligible to become self-assessing purchasers to be assessed a charge "in a manner that avoids abrupt or excessive total net electric bill impacts for typical customers." *Id*.

When it comes to nonresidential, nonindustrial customers that *are* eligible to become self-assessing purchasers, the General Assembly has not given explicit instructions. In fact, R.C. 3706.46 does not mention this particular class of customers at all. As the Commission noted, had the General Assembly wished to prohibit the Commission from applying a cap to nonindustrial, nonresidential customers eligible to become self-assessing purchasers, they could have done so by including such language in H.B. 128. Entry ¶ 13 (July 14, 2021), OMAEG App. at 28. Absent a clear directive on what to do with this class of customers, the Commission is required to follow the General Assembly's more broad mandate to "fix just and reasonable rates, fares, tolls, rentals, and charges." R.C. 4909.15(A), App. at 5. The Commission followed this broader mandate in applying a $242 monthly cap for *all* nonresidential customers eligible to become self-assessing purchasers. This approach avoids unreasonable and unjust charges under Rider

SGF by assuring a maximum monthly charge for nonresidential, nonindustrial customers, just as industrial customers are afforded that protection.

Appellant is correct that the Commission is a creature of statute, and, as such, may not exert authority beyond that conferred by the General Assembly. OMAEG Brief at 24. However, the General Assembly gave the Commission authority in R.C. 3706.46(A)(2) to authorize "[t]he level and structure of the charge." Furthermore, as this Court has repeatedly held, the Commission is owed "great deference * * * on matters of rate design." *In re Application of Columbus Southern Power Co.,* 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734 at ¶58. Here, the Commission is utilizing the authority granted to it by the General Assembly and the deference affirmed by this Court to ensure a rate design that achieves the revenue requirement demanded by R.C. 3706.46(A)(1) in a just and reasonable manner for *all* customers.

The Commission's decision to apply the monthly cap of $242 to all nonresidential customers eligible to become self-assessing purchasers also follows the Commission's own precedent. In the recent *LGR Case*, the Commission rejected a proposal to create multiple rate caps for nonresidential customer classes, stating that "establishing separate class caps is unnecessary, would further complicate rate design and billing requirements, may inflate collection deferrals and complicate reconciliation, and could result in unreasonable cost shifting." *LGR Case*, Entry (Nov. 21, 2019) at ¶ 28. Similarly, in implementing Rider SGF here, the Commission opted to avoid these undesired outcomes by applying a uniform $242 monthly charge cap to all nonresidential customers eligible to become self-assessing purchasers, rather than allowing the monthly charge for one

class of customers to be capped while denying that protection to another class. Appellant's argument ignores the plain fact that the implementation of uniform rate caps across diverse customer classes had been a practice by the Commission, as evidenced by the *LGR Case*, at the time of H.B. 128's passage. The General Assembly opted to not include language in H.B. 128 that would have prevented the Commission from implementing a similar uniform monthly charge cap here. Thus, one must presume that it was not the General Assembly's intent to bar nonresidential, nonindustrial customers from receiving the protection of the monthly cap.

For these reasons, the Commission's decision to apply the $242 monthly bill cap to all nonresidential customers eligible to become self-assessing purchasers is just and reasonable, follows precedent of both this Court and the Commission, and follows the directive given by the General Assembly from H.B. 128.

PROPOSITION OF LAW NO. IV:

The Commission properly determined that Rider SGF shall not be adjusted for Commercial Activity Tax.

OMAEG fundamentally misunderstands how the Commission order treats the Commercial Activity Tax (CAT). According to OMAEG, "the PUCO established Rider SGF's annual revenue requirement by grossing it up to account for the CAT." OMAEG Merit Brief at 25. This is exactly the opposite of what the Commission actually did. The Commission's order expressly *disallows* any adjustments for CAT amounts. Entry at ¶14 (July 14, 2021), OMAEG App. at 28. OMAEG's argument, therefore, lacks merit and should be rejected.

The CAT is a tax levied "on each person with taxable gross receipts for the privilege of doing business in this state." R.C. 5751.02(A), OMAEG App. at 74. For purposes of the CAT, "'doing business' means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during a calendar year." Contrary to OMAEG's assertion, R.C. 3706.46 requires that Rider SGF be established, without consideration of any CAT adjustment, at an annual amount of $20 million, as the Commission recognized. Entry at ¶ 14 (July 14, 2021), OMAEG App. at 28. The Commission simply implemented the plain language of the statute – that the rates were designed to collect exactly $20 million without consideration of the CAT amounts. Where the language of a statute is clear, it should be applied as written. *Portage Cty. Bd. of Commrs. v. Akron,* 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 1996- Ohio 291, 660 N.E.2d 463 (1996).

In establishing the rider for the Clean Air Fund, the Commission likewise set the amount without consideration of any CAT reduction. *In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46* (*CAF Case*), Case No. 20-1143-EL-UNC, Entry at ¶ 18 (August 26, 2020). The Commission reasoned in that case that "had the legislature intended to establish the CAF at an initial amount reduced to account for any CAT offset, it would have expressly done so." *Id.*

As the Commission recognized, the General Assembly was aware of its prior statutory interpretation concerning treatment of the CAT [in the prior CAF case] when it enacted H.B. 128. Entry on Rehearing at ¶ 14 (September 8, 2021), OMAEG App. at 37.

As the Court has explained, "[i]t is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment." *Clark v. Scarpelli,* 91 Ohio St.3d 271, 278, 2001 Ohio 39, 744 N.E.2d 719 (2001). Furthermore, the Court has observed that "the General Assembly has shown no hesitation in acting promptly when it disagrees with appellate rulings involving statutory construction and interpretation." *In re Bruce S.,* 134 Ohio St.3d 477, 2012 Ohio 5696, 983 N.E.2d 350, ¶ 11, quoting *State v. Ferguson,* 120 Ohio St.3d 7, 2008 Ohio 4824, 896 N.E.2d 110, ¶ 23. Since the General Assembly did not include contrary language in R.C. 3706.46(A)(1)(b), it is to be presumed that it agreed with the Commission's treatment of the CAT.

The Commission properly determined that Rider SGF recovery shall not be adjusted by CAT amounts. This decision is lawful and reasonable and should be affirmed.

PROPOSITION OF LAW NO. V:

The Commission properly declined to impose any additional refund requirements beyond what the legislature expressly authorized for reconciliation and refund under R.C. 3706.55(B).

Appellant argues that the Commission erred by unjustly and unlawfully failing to require refund language in Rider SGF's tariffs. However, OMAEG is incorrect. The Commission stated in its July 14, 2021 Entry that "the statute explicitly provides for reconciliation and refund as of December 21, 2027, minus any remittances that are required up to January 21, 2028." Entry at ¶ 17 (July 14, 2021), OMAEG App. at 28. And

the Commission further provided that the legislature addressed the manner in which Rider SGF is to be administered. *Id*. at ¶ 17, OMAEG App. at 28. This language undoubtedly orders that there must be a reconciliation and refund. The law and the Commission's words could not be clearer.

The Commission denied Appellant's request to include additional refund language in Rider SGF. Entry at ¶ 17 (July 14, 2021) OMAEG App. at 28. The Commission explained that R.C. 3706.55 does not establish any prudency determination in connection with Rider SGF. *Id.* Accordingly, the Commission denied Appellant's request for refund beyond what is expressly allowed because it is not consistent with the legislative intent of R.C. 3706.55. The Commission in the *LGR Case* rejected the argument that the LGR Rider should be "subject to refund" if it is later invalidated, finding that the request was not consistent with the legislative intent of the OVEC recovery provisions. *LGR Case,* Entry at ¶ 31 (Nov. 21, 2019). The Commission also found in the *CAF Case* that Rider CAF did not involve any prudency determination and declined to impose any reconciliation and refund requirements to the rider other than those already provided by statute. *CAF Case,* Entry at ¶ 23 (Aug. 26, 2020). In this case, the Commission stated "[w]e decline to impose any additional refund requirements, finding that they are inconsistent with the legislative intent as to the rider." *Id.*

The Commission's decision regarding the refundability of Rider SGF follows Ohio law and this Court's prior decisions. OMAEG's argument is without merit and has no legal basis. The Commission's decision should be affirmed.

CONCLUSION

The Commission lawfully implemented Rider SGF. The Commission followed the language and intent provided in R.C. Chapter 3706. The five appealed errors that Appellant argued have no merit. The Commission provided a rationale demonstrating the reasonableness of its decision. The Commission's Entry should be affirmed.

Respectfully submitted,

David Yost (0056290)
Attorney General

John H. Jones (0051913)
Section Chief

/s/ Jodi J. Bair
Jodi J. Bair (0062921)
(Counsel of Record)
Thomas M. Shepherd (0100164)
Assistant Attorneys General
30 E. Broad St., 26th Floor
Columbus, OH 43215
Tel.: 614.644.8599
Fax: 614.644.8764
Jodi.Bair@OhioAGO.gov
Thomas.Shepherd@OhioAGO.gov
John.Jones@OhioAGO.gov

Counsel for Appellee,
Public Utilities Commission of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio** was served by electronic mail, upon the following parties of record, this 8th day of March, 2022.

/s/ Jodi J. Bair
Jodi J. Bair (0062921)
Assistant Attorney General

PARTIES OF RECORD:

Kimberly W. Bojko (0069402)
(Counsel of Record)
Thomas V. Donadio (0100027)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
bojko@carpenterlipps.com
donadio@carpenterlipps.com

Counsel for Appellant, The Ohio Manufacturers' Association Energy Group

Steven T. Nourse (0046705)
Counsel of Record
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com

Counsel for Intervening Appellee, Ohio Power Company

APPENDIX

APPENDIX TABLE OF CONTENTS

PAGE

Ohio Administrative Code

Rule 4901:1-10-01 Definitions.

Effective: November 1, 2021

As used in this chapter:

(A) "Advanced meter" means any electric meter that meets the pertinent engineering standards using digital technology and is capable of providing two-way communications with the electric utility to provide usage and/or other technical data.

(B) "Advanced meter opt-out service" means a service provided by an electric utility under the terms and conditions of a commission-approved tariff, which allows a customer to take electric distribution service using a traditional meter.

(C) "Applicant" means a person who requests or makes application for service.

(D) "Commission" means the public utilities commission of Ohio.

(E) "Competitive retail electric service provider" or "CRES" means a provider of competitive retail electric service, subject to certification under section 4928.08 of the Revised Code.

(F) "Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period for services from both an electric utility and a competitive retail electric service provider.

(G) "Consumer" means any person who receives service from an electric utility or a competitive retail electric service provider.

(H) "Critical customer" means any customer or consumer on a medical or life-support system who has provided appropriate documentation to the electric utility that an interruption of service would be immediately life-threatening.

(I) "Customer" means 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.

(J) "Customer energy usage data" means data collected from a customer's meter, which is identifiable to a retail customer.

(K) "Customer premises" means the residence(s), building(s), or office(s) of a customer.

(L) "Director of the service monitoring and enforcement department" means the director of the service monitoring and enforcement department of the commission or the director's designee.

(M) "Electric distribution utility" or "EDU" shall have the meaning set forth in division (A)(6) of section 4928.01 of the Revised Code.

(N) "Electric light company" shall have the meaning set forth in division (A)(4) of section 4905.03 of the Revised Code.

(O) "Electric services company" shall have the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.

(P) "Electric utility" as used in this chapter shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(Q) "Electric utility call center" means an office or department or any third party contractor of an electric utility designated to receive customer calls.

(R) "Fraudulent act" means an intentional misrepresentation or concealment by the customer or consumer of a material fact that the electric utility relies on to its detriment. Fraudulent act does not include tampering.

(S) "Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years.

(T) "Major event" encompasses any calendar day when an electric utility's system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 3.5 of standard 1366-2012 adopted by the institute of electrical and electronics engineers (IEEE) in "IEEE Guide for Electric Power Distribution Reliability Indices." The threshold will be calculated by determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility's daily SAIDI performance during the most recent five-year period. For purposes of this definition, the SAIDI shall be determined in accordance with paragraph (C)(3)(e)(iii) of rule 4901:1-10-11 of the Administrative Code.

(U) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(V) "Momentary interruption" means an interruption of electric service with a duration of five minutes or less.

(W) "Non-jurisdictional services" means services which do not meet the definition of "retail electric service" set forth in division (A)(27) of section 4928.01 of the Revised Code.

(X) "Outage coordinator" means the commission's service monitoring and enforcement department director or the director's designee.

(Y) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(Z) "Postmark" means a mark, including a date, stamped or imprinted on a piece of mail which services to record the date of its mailing, which in no event shall be earlier than the date on which the item is actually deposited in the mail. For electronic mail, postmark means the date the electronic mail was transmitted.

(AA) "Renewable energy credit" means the fully aggregated attributes associated with one megawatt hour of electricity generated by a renewable energy resource as defined in division (A)(35) of section 4928.01 of the Revised Code.

(BB) "Slamming" means the transfer of or requesting the transfer of a customer's competitive electric service to another provider without obtaining the customer's consent.

(CC) "Staff" means the commission staff or its authorized representative.

(DD) "Sustained outage" means the interruption of service to a customer for more than five minutes.

(EE) "Tampering" means to interfere with, damage, or by-pass a utility meter, conduit, or attachment with the intent to impede the correct registration of a meter or the proper functions of a conduit or attachment so far as to reduce the amount of utility service that is registered on or reported by the meter. Tampering includes the unauthorized reconnection of a utility meter, conduit, or attachment that has been disconnected by the utility.

(FF) "Time differentiated rates" means rates that vary from one time period to another, such as hourly, daily, or seasonally.

(GG) "Traditional meter" means any meter with an analog or digital display that does not have the capability to communicate with the utility using two-way communications.

(HH) "Transmission outage" means an outage involving facilities that would be included in rate setting by the federal energy regulation commission.

(II) "Universal service fund" means a fund established pursuant to section 4928.51 of the Revised Code, for the purpose of providing funding for low-income customer assistance programs, including the percentage of income payment plan program, customer education, and associated administrative costs.

(JJ) "Voltage excursions" are those voltage conditions that occur outside of the voltage limits as defined in the electric utility's tariffs and are beyond the control of the electric utility.

Ohio Revised Code

Section 4909.15 Fixation of reasonable rate.

Effective: March 27, 2013
Legislation: House Bill 379 - 129th General Assembly

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the

construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction

work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for

Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will

be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or

amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.