

Testimony of Robert Kelter
Senior Attorney Environmental Law and Policy Center
Senate Environment and Public Utilities Committee
November 10, 2020

Chairman Wilson, Ranking Member Williams and members of the Committee, Environmental Law and Policy Center (ELPC) thanks you for the opportunity to testify today. We strongly support the passage of SB 346, which repeals HB 6. As indicated by our name, the Environmental Law and Policy Center focuses much of our efforts around the Midwest on legal issues, and we focus today on one such issue.

Our concern today is that if HB 6 fully goes in to effect on January 1, it will be very difficult for customers to get refunds. Absent the legislature's repeal of HB6, on January 1, 2021 the utilities will start collecting new fees to bail out the nuclear plants. Those fees will then be transferred to Energy Harbor, but even if the utilities don't transfer the funds they collect to Energy Harbor, it is unlikely consumers will ever get that money back. ELPC realizes this defies logic and reason, but the filed rate doctrine and the rule against retroactive ratemaking make it imperative that the legislature take action in 2020.¹

Essentially, the Ohio Supreme Court has explained that while “the [public utilities] commission has the power to invalidate a rate schedule and fix new rates, it may exercise this power prospectively only.” *In re Review of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St. 3d 289, 292 (2018). Ohio law also does not allow for Ohio courts to order refunds from appeals challenging PUCO orders, including tariff rulings. *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 516 (2011). If the PUCO approves utility charges for the nuclear power plant bailout—which it must do under House Bill 6—then a later invalidation by an Ohio court or the PUCO itself generally does not allow for a refund for customer spending on that charge while the court or the PUCO considered the case.

We understand the concerns expressed at the last hearing that former Speaker Householder and the accused are innocent until proven guilty and that the transgressions outlined in the complaint, while reflecting a system unduly influenced by money, do not necessarily reflect violations of law. However, that being said, we urge the Senate to consider the facts outlined in the FBI Complaint and the level of evidence that indicates wrongdoing. This includes the fact that two of the accused have now pleaded guilty and that First Energy has taken action to dismiss several key executives including CEO Chuck Jones and its two highest ranking legal officials—Chief Legal Officer Robert Reffner and General Counsel and Chief Ethics Officer Ebony Yeboah-Amankwah. Thus, while one can maintain innocence until proven guilty, the totality of the circumstances weigh heavily in favor of the legislature not delaying in taking the necessary steps to protect Ohio utility customers.

Finally, I want to make the point that the legislature should not only repeal HB 6, but it should also reverse HB6's policies on energy efficiency and renewable energy. Energy efficiency reduces the need for utilities to procure generation and delays the need for new power plants.

¹ We do not take the position it is impossible that consumers will ever get refunds, merely that the law makes it very difficult.

The requirement that energy efficiency must be cost-effective means that it must cost less than the electricity it replaces. On the renewable energy side, the portfolio standard is minimal. In 2026 utilities must only get 12.5% of the generation from renewable energy, meaning that 87.5% will still come from the traditional sources of nuclear, coal and natural gas. The clean energy policies HB 6 eliminated were not far reaching and constitute sound public policy.

Thank you again for the opportunity to testify, and we welcome any questions.

TO: HB 6 Interested Parties
FROM: Environmental Law and Policy Center
RE: Barriers to Customer Refunds of House Bill 6 Nuclear Bailout Charge
DATE: September 21, 2020

If the legislature does not repeal House Bill 6 before January 1, 2021, Ohio utilities will begin charging customers for the nuclear power plant bailout approved under that law. Attorneys have/will file class action suits to get customers refunds, and consumer advocates may make an attempt to use the Commission process in some way. However, any process will likely take several years and, two key doctrines will make it difficult for customers to recover those charges: the filed-rate doctrine and the rule against retroactive ratemaking. Thus, as legislators consider the timing of their actions, we want to provide some background on why they should take action before any HB 6 charges go into effect.

The filed-rate doctrine is based on Ohio Revised Code § 4905.32, which allows public utilities to charge customers only rates filed in tariffs and approved by the PUCO. The Ohio Supreme Court has interpreted the law to mean that the only legal rate a utility can charge a customer is the filed rate.² In other words, “a utility has no option but to collect the rates set by the Commission and is clearly forbidden to refund any part of the rates so collected.”³ The doctrine poses obstacles to customers using other laws—such as antitrust or contract law—to challenge the reasonableness of a rate outside of the PUCO.⁴ Should the General Assembly not repeal House Bill 6 until after customers begin to pay for the bailout on their energy bills, it is possible that the courts could find that the filed-rate doctrine prevents customers from recovering those funds because the utilities had no option other than to charge the PUCO-approved bailout tariff when HB6 was in effect.

² *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St. 3d 352, 358 (2014).

³ *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257.

⁴ *Id.*

The rule against retroactive ratemaking would also help Energy Harbor hold onto any money charged for the bailout on customers' bills before a House Bill 6 repeal. The Ohio Supreme Court has explained that while "the commission has the power to invalidate a rate schedule and fix new rates, it may exercise this power prospectively only."⁵ Ohio law also does not allow for Ohio courts to order refunds from appeals challenging PUCO orders, including tariff rulings.⁶ If the PUCO approves utility charges for the nuclear power plant bailout—which it must do under House Bill 6—then a later invalidation by an Ohio court or the PUCO itself generally does not allow for a refund for customer spending on that charge while the court or PUCO considered the case. For example, the PUCO approved a "distribution modernization rider" for the FirstEnergy utilities in 2017, which would have allowed those utilities to collect \$168 million to \$204 million from customers annually for three years.⁷ Various groups appealed the PUCO's decision to the Ohio Supreme Court, which agreed that the rider was an illegal charge.⁸ However, because the appeal took two years, FirstEnergy customers had already paid almost \$600 million under the rider.⁹ That money was not—and according to the rule against retroactive ratemaking could not be—refunded to customers even though the rider was invalid when the PUCO approved it.¹⁰

While the some aspects of the fraud here may distinguish the current situation, that is certainly unclear. These two doctrines could significantly limit customers' ability to challenge the nuclear bailout charge and receive repayment for any bailout funds paid through monthly utility

⁵ *In re Review of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St. 3d 289, 292 (2018).

⁶ *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 516 (2011).

⁷ *In re Ohio Edison Co.*, 157 Ohio St. 3d 73, 79, *reconsideration denied*, 156 Ohio St. 3d 1487, and *reconsideration denied*, 156 Ohio St. 3d 1487.

⁸ *Id.* at

⁹ See Mark Williams, *Ohio Supreme Court Strikes Down Fee Added to FirstEnergy Bills*, COLUMBUS DISPATCH (June 19, 2019), <https://www.dispatch.com/business/20190619/ohio-supreme-court-strikes-down-fee-added-to-firstenergy-bills>.

¹⁰ *In re Ohio Edison Co.*, 157 Ohio St.3d at 79.

bills. Moreover, the cases and appeals will likely play out over 5-7 years. Thus, while FirstEnergy has not been proven guilty, it is important to take all factors into consideration when considering the timing issue.