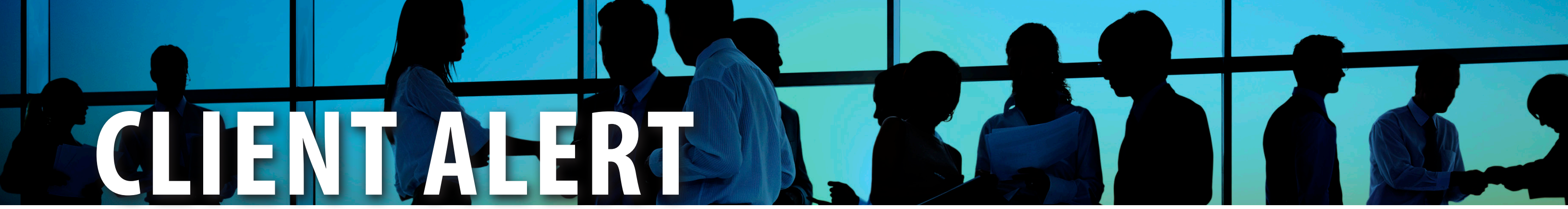


Contemplating a Repeal of Ohio House Bill 6: The Practical Effects of Hitting Reset on Ohio Energy Policy
By Madeline P. Fleisher and Terrence N. O'Donnell

On July 21, 2020, Ohio's energy landscape experienced a seismic event when federal prosecutors filed a criminal complaint alleging that the Speaker of the Ohio House of Representatives, Larry Householder, was the central figure in a bribery scheme funded by utility company FirstEnergy. The criminal complaint asserts that "Company A," widely understood to be FirstEnergy, paid over $60 million to Householder-controlled entities in exchange for passage of House Bill 6, the 2019 law that provides $1.2 billion of ratepayer money to subsidize FirstEnergy's two Ohio nuclear plants (Perry and Davis-Besse). As we summarized in a previous publication,[1] HB 6 also

- Subsidizes two aging coal plants (one in Ohio and one in Indiana) that are partially owned by Ohio's three other utilities;
- Eliminates the state's energy efficiency standard;
- Establishes $100 million in funding for six utility-scale solar plants; and
- Slashes Ohio's renewable portfolio standard.

Now policymakers from Governor DeWine on down are actively discussing – and have introduced legislation regarding – the repeal of HB 6. Ideas range from "repeal and replace" to a total revamp of Ohio energy policy, and everything in between.[2] But what would any of that actually mean, just over a year after HB 6 was enacted? Here we provide a brief overview of where HB 6 implementation stands, and what it might look like to try to unscramble that egg.

Nuclear Generation and Renewable Generation Fund (R.C. 3706.40-3706.65). The centerpiece of HB 6 was the creation of a Nuclear Generation Fund providing $150 million per year to Perry and Davis-Besse – now owned by "Energy Harbor," the former FirstEnergy subsidiary FirstEnergy Solutions that emerged as a newly independent entity out of bankruptcy in early 2020[3] – to be disbursed from 2021 through January 2028 in the form of payments for each megawatt-hour of generation. A late addition to the bill also provides similarly structured funding in the amount of $20 million per year to six previously permitted utility-scale solar projects, also from 2021 through January 2028.

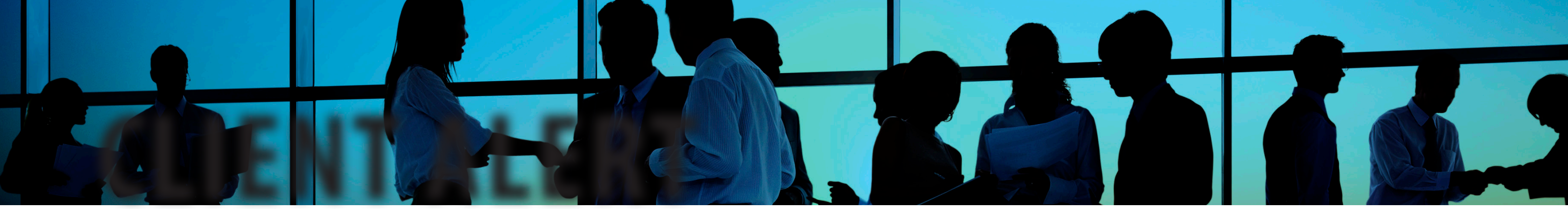
The Ohio Air Quality Development Authority (OAQDA), which administers the funds, has approved the two nuclear plants as eligible for funding along with several solar plants.[4] While those approved resources began reporting generation amounts as of April 2020, no payments are made until April 2021. Accordingly, while HB 6 provides for the Public Utilities Commission of Ohio to approve riders for collection of the necessary funds to support the OAQDA programs, the statutory deadline for implementing those riders is not until January 1, 2021, and no riders have yet been approved. The January 1, 2021 start date for these elements of HB 6 may, therefore, spur the Ohio legislature to take action on repeal before the end of 2020.

Coal Plant Cost Recovery (R.C. 4928.148). Three of Ohio's four electric utilities – AEP Ohio, Duke Energy Ohio, and Dayton Power & Light – hold an ownership stake in the Ohio Valley Electric Corporation (OVEC), which operates two coal plants located in Ohio and Indiana that have been unprofitable in recent years. (FirstEnergy also had an OVEC interest through its subsidiary FirstEnergy Solutions, but the parent company shed that obligation after FirstEnergy Solutions emerged from bankruptcy.) While each of these utilities had been receiving cost recovery for their OVEC losses through riders approved by the PUCO, HB 6 provided for those to be replaced with "legacy generation resource" cost recovery riders applicable to all electric customers, including FirstEnergy customers and extending through December 31, 2030.

The PUCO approved each utility's proposed tariff in late 2019, and the OVEC riders went into effect as of January 1, 2020, subject to monthly rate caps of $1.50 for residential customers and $1500 for other customer classes. Currently, the state-wide values for those charges are $0.58 per bill for residential customers and $0.000855 per kilowatt-hour (up to 833,000 kWh) for non-residential customers, although those are adjusted for each utility. The amounts collected leading up to any repeal would not be subject to refund based on new legislation, at least under current Ohio law. Additionally, it is not clear whether any repeal would immediately invalidate the OVEC riders or whether they would remain in effect pending PUCO action to implement a repeal.

Renewable Portfolio Standard (R.C. 4928.64-4928.644). While establishing new charges for the Nuclear and Renewable Generation Funds and OVEC cost recovery, HB 6 dramatically reduced the state's 2008 RPS requiring clean energy procurement by electricity suppliers. Pre-HB 6, the RPS benchmarks for each supplier rose to 12.5%, including a 0.5% solar energy resource requirement, by 2026 and continuing "every year thereafter." HB 6 took immediate effect in reducing the 2020 through 2026 benchmarks, removing the RPS's solar carve-out as of 2020, and eliminating the maintenance of the RPS standard (and thus a continuing market for renewable energy credits in Ohio) after 2026 as shown below. The law also reduced the RPS compliance requirement as a practical matter by providing for certain changes in calculating the compliance obligation.

[1] https://www.dickinson-wright.com/news-alerts/ohio-enacts-sweeping-energy-legislation
[2] Senate Bill 736, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-346; House Bill 738, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-738.
[3] John Funk, With tax liability, nuclear refueling issues settled, FirstEnergy Solutions to exit bankruptcy, Utility Dive (Feb. 7, 2020), https://www.utilitydive.com/news/with-tax-liability-nuclear-refueling-issues-settled-firstenergy-solutions/573059.
[4] OAQDA, State of Ohio Nuclear and Renewable Generation Fund Program, https://ohioairquality.ohio.gov/Our-Services/Nuclear-and-Renewable-Generation-Programs.



By End of Year	Renewable Energy Resources	Solar energy Resources
2009	0.25%	0.00%
2010	0.50%	0.01%
2011	1%	0.03%
2012	1.50%	0.06%
2013	2%	0.09%
2014	2.50%	0.12%
2015	2.50%	0.12%
2016	2.50%	0.12%
2017	3.50%	0.15%
2018	4.50%	0.18%
2019	5.50%	0.22%
2020	~~6.5~~ 5.5%	~~0.26~~ 0%
2021	~~7.5~~ 6%	~~0.3~~ 0%
2022	~~8.5~~ 6.5%	~~0.34~~ 0%
2023	~~9.5~~ 7%	~~0.38~~ 0%
2024	~~10.5~~ 7.5%	~~0.42~~ 0%
2025	~~11.5~~ 8%	~~0.46~~ 0%
2026 ~~and each calendar year thereafter~~	~~12.5~~ 8.5%	~~0.5%~~ 0%

If a repeal of HB 6 undoes these changes, it should immediately restore at least some value to the Ohio REC market, especially for solar resources. It is currently unclear how the state might handle compliance for 2020 in a transition back to the original RPS levels.

Energy Efficiency Standard (R.C. 4928.66-4928.6615). Along with the scaling back of the state RPS, HB 6 entirely eliminated Ohio's energy efficiency resource standard and funds for electric utility efficiency programs starting on January 1, 2021. The PUCO subsequently issued an order requiring implementation of these provisions through a "winding-down" of existing efficiency programs after September 30, 2020.[5] Although the legislative discussion of HB 6 had contemplated that the electric utilities would still be able to seek approval for "voluntary" efficiency programs (similar to existing demand-side management programs run by Ohio's major natural gas distribution utilities), the PUCO has not yet approved any such replacement programs. In fact, Duke Energy Ohio had proposed new programs to start in 2021 but withdrew that application in June 2020 after the PUCO *sua sponte* struck a proposed incentive payment mechanism from its application.[6] A repeal of HB 6 could restore the state's energy savings targets, which originally targeted a cumulative reduction of 22.5% of Ohio's electric energy use by the year 2027.

Utility Decoupling (R.C. 4928.471). Tucked in among HB 6's more prominent elements was a provision allowing Ohio utilities to file an application for a decoupling mechanism for 2019 and each year thereafter to decouple distribution rates for residential and commercial customers to calendar year 2018 levels, lasting until PUCO approval of new base distribution rates for the utility. FirstEnergy is the only Ohio utility to receive PUCO approval for such a decoupling mechanism, which the company's CEO described as a way to effectively "recession-proof" FirstEnergy's Ohio distribution utilities by insulating them from future declines in energy usage.[7] This decoupling rider has resulted in net charges to both residential and commercial customers since going into effect on February 1, 2020. Similar to the utility OVEC riders, amounts collected under this rider are not currently subject to refund based on a repeal of HB 6.

All in all, the nuclear bailout component of HB 6 may be the easiest part to deal with through a clean repeal since no money has yet been collected from customers and provided to the plant owner. But HB 6 made a number of other significant changes to Ohio energy law that are worth keeping in mind.

For more information, please contact the attorneys listed below.

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[5] PUCO Case No. 16-574-EL-POR et al., Finding and Order (February 26, 2020), http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=82f67991-a592-428c-a976-92d22b54efa4.
[6] PUCO Case Nos. 20-1013-EL-POR et al., Duke Notice of Withdrawal (June 26, 2020), http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=2d643e50-88a2-4c8e-89f6-a41a7d57f4e8.
[7] Larry Pearl, FirstEnergy nears proposal to decouple Ohio utility revenues, electricity consumption, Utility Dive (Nov. 5, 2019), https://www.utilitydive.com/news/firstenergy-nears-proposal-to-decouple-ohio-utility-revenues-electricity-c/566610.