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Ohio Legislative Service Commission

Office of Research and Drafting

Legislative Budget Office

H.B. 128
134th General Assembly

Fiscal Note & Local Impact Statement

Click here for H.B. 128's Bill Analysis

Version: As Reported by Senate Energy & Public Utilities

Primary Sponsor: Reps. Hoops and Stein

Local Impact Statement Procedure Required: No

Russ Keller, Senior Economist

Highlights

- The bill repeals select provisions enacted in H.B. 6 of the 133rd General Assembly. Repealing them would decrease costs for ratepayers, including the state and political subdivisions. Specifically, the bill:
  - Repeals the Nuclear Generation Fund which is a custodial fund outside the state treasury;
  - Reduces the charge originally scheduled to be implemented in January 2021, which enables electric distribution utility (EDU) customers to avoid up to $150 million in annual charges over seven years;
  - Repeals the revenue decoupling mechanism established under section 4928.471 of the Revised Code. Under the mechanism, FirstEnergy is entitled to $119 million in revenue from its electric ratepayers during calendar years 2020 and 2021. The bill refunds all prior collections to consumers.
- The bill modifies the significantly excessive earnings test (SEET) for Ohio EDUs, by requiring tests for each EDU to be considered separately from its affiliates. The provision may reduce rates paid by some ratepayers, including the state and political subdivisions. Such an outcome depends on numerous other circumstances that are not influenced by the bill, and would potentially affect only ratepayers in the FirstEnergy territory.
- The bill requires the Ohio Power Siting Board (OPSB) to submit a report to the General Assembly, by December 1, 2021, about the electric power transmission system and associated facilities investment.
- The bill explicitly authorizes the Ohio Air Quality Development Authority (OAQDA) to use up to $300,000 per year for administrative costs incurred from FY 2020-FY 2029.

Detailed Analysis

The bill makes numerous changes to codified laws governing electric distribution utilities (EDUs) and the charges paid by their customers. Some of these changes codify court decisions, as explained in more detail below. Ohio's six EDUs offer essential electric service to consumers under the terms of an electric security plan (ESP) approved by the Public Utilities Commission of Ohio (PUCO). Many provisions in the bill modify or repeal codified law enacted by H.B. 6 of the 133rd General Assembly.

Nuclear Generation Fund

The bill partially repeals the legal basis for a new customer charge that was originally scheduled to begin in January 2021.[1] The prospective charge, which was named the "Clean Air Fund rider" in PUCO proceedings, would annually raise up to $170 million to support two Ohio-based nuclear power plants and certain utility-scale, solar energy electric generating facilities.

Under the bill, customers would not be charged up to $150 million per year, from 2021 through 2027. These proceeds were to be deposited into the Nuclear Generation Fund, a custodial fund established by H.B. 6. The fund is eliminated by H.B. 128. The intended recipients of the Nuclear Generation Fund, which would have been dedicated to the nuclear power plants, do not receive any payments under the bill. Accordingly, the relevant cost caps for the Clean Air Fund rider are reduced for the various customer classes. For example, the residential customers' cap is revised to 10¢ per month, less than the H.B. 6 cap of 85¢ per month.

The Clean Air Fund rider did not begin as scheduled because of ongoing judicial proceedings. On December 21, 2020, the Franklin County Court of Common Pleas issued a preliminary injunction in *State of Ohio v. FirstEnergy Corp.,* et al., Case No. 20CV-06281, et al. Among other provisions in the preliminary injunction, the court ordered PUCO to revoke "authorization for electric distribution utilities to collect the H.B. 6 Rider."[2]

Solar Generation Fund (Renewable Generation Fund)

Whereas H.B. 6 imposed an application deadline for a qualifying solar-powered electric generation facility, H.B. 128 extends that deadline by one month. Only three of the eligible solar facilities applied to OAQDA by the original deadline on February 1, 2020.[3] By extending this application deadline, solar facilities in Hardin and Vinton counties could qualify for payments from the Renewable Generation Fund. Those solar projects comprised 445 megawatts (MW) of the 1,095 MW nameplate capacity among eligible solar farms originally anticipated to receive payments. Therefore, the provision could increase annual expenditures from the Renewable Generation Fund from $12 million to the $20 million limit in codified law. The bill also renames

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[1] The Clean Air Fund rider was imposed only on customers of Ohio's six EDUs. The charge is not applicable to customers of rural electric cooperatives and municipal electric utilities.

[2] The Ohio Air Quality Development Authority (OAQDA) subsequently informed PUCO that any payments to be made to Energy Harbor Corp. (Energy Harbor) and its affiliates and subsidiaries pursuant to Chapter 3706 will temporarily cease and that no further nuclear generation credits will be issued to Energy Harbor while the preliminary injunction remains in effect.

[3] https://ohioairquality.ohio.gov/Our-Services/Nuclear-and-Renewable-Generation-Programs.

the Renewable Generation Fund to the Solar Generation Fund. The Clean Air Fund rider remains as the sole funding source for the renamed custodial fund.

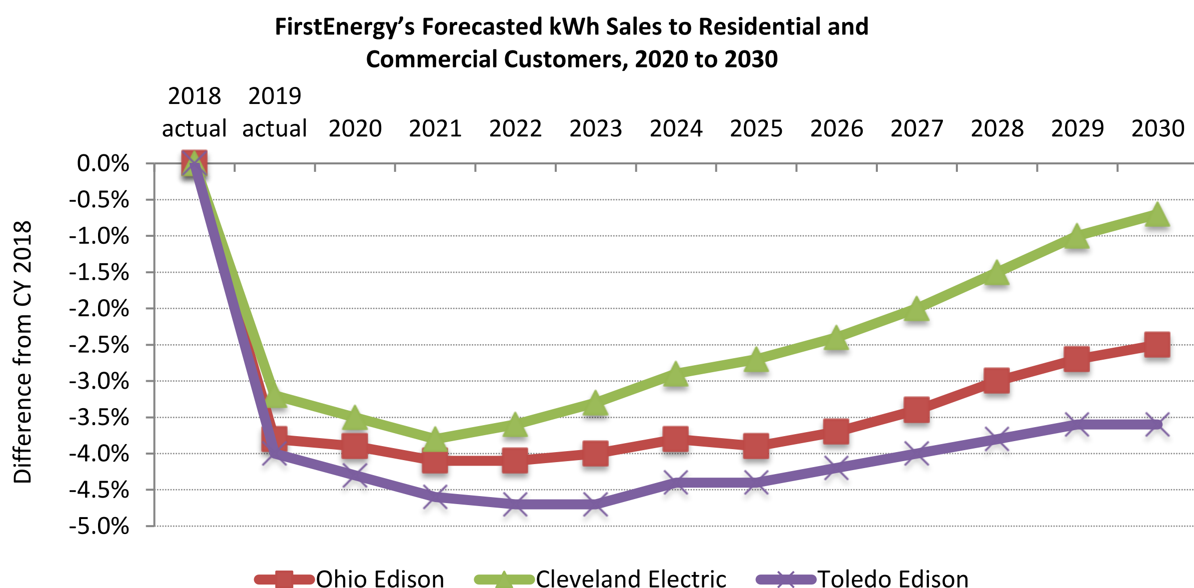
The bill declares that the Solar Generation Fund is administered by OAQDA, and it must request the Treasurer of State to create the account for the fund. The clarification in the bill will enable the fund to function as intended by H.B. 6. The bill also explicitly codifies OAQDA's permissible use of Solar Generation Fund receipts for its administrative purposes. Beginning in FY 2022 and continuing through FY 2029, OAQDA may use up to $300,000 per year for its related duties. However, the agency may seek an additional $600,000 in FY 2022 to pay for costs incurred in FY 2020-FY 2021. OAQDA must annually seek approval from the Controlling Board before using funds for its administrative costs.

Revenue decoupling mechanism

The bill repeals the legal basis for the revenue decoupling mechanism for EDUs enacted under H.B. 6. This mechanism is referred to as the "Conservation Support Rider" in filings with the PUCO, and PUCO approved an application by the relevant EDUs to reduce the rider to zero on February 2, 2021. The bill would therefore codify this PUCO action.

In general, a decoupling mechanism separates a utility's revenues from the volume of electricity it delivers. Consequently, a decoupling mechanism ensures that an EDU's revenue target[4] is reached, regardless of how much electricity is sold. Energy efficiency and peak demand reduction requirements began in 2009, upon the enactment of S.B. 221 of the 127th General Assembly. Decoupling riders were subsequently implemented for EDUs' residential and commercial customer bases.

The FirstEnergy companies were the only EDUs to implement a decoupling mechanism using the legal authority enacted in H.B. 6. The bill set base distribution revenues collected in calendar year (CY) 2018 as the baseline against which future years' receipts are measured. The three FirstEnergy EDUs imposed the Conservation Support Rider in February 2020, which collected the difference between CY 2019 receipts and the CY 2018 baseline amount.



[4] The type of revenue target can vary, whether based on revenue per customer or an aggregate amount.

Because the Conservation Support Rider does not normalize kilowatt-hour (kWh) sales for weather fluctuations or adjust for changing customer counts, the rider is highly correlated with the amount of kWh sold to residential and commercial customers. FirstEnergy's kWh sales are not expected to return to CY 2018 levels over the next decade.[5] Under this scenario, the Conservation Support Rider would likely yield a customer charge (rather than a credit on customers' electric bills) over its entire lifespan.

Table 1 summarizes the annual rider collections forecasted by FirstEnergy EDUs in their recent regulatory filings, as approved by PUCO. Codified law requires PUCO to approve any application that meets the eligibility criteria originally enacted by H.B. 6. FirstEnergy entered a settlement agreement with the Ohio Attorney General and stopped collecting these receipts on February 2, 2021. By repealing the codified law authorizing this decoupling rider, the bill eliminates any future revenue entitlement for the EDUs.

Table 1. Estimated Collections and Monthly Impact of H.B. 6 Decoupling Mechanisms*

EDU	Total Approved Rider Collections in 2020, All Customer Classes	Monthly Residential Rider in 2020	Total Approved Rider Collections in 2021, All Customer Classes	Monthly Residential Rider in 2021
Cleveland Electric Illuminating	$9,327,089	$1.01	$40,138,797	$4.01
Ohio Edison	$4,704,326	44¢	$44,631,811	$2.88
Toledo Edison	$3,088,997	79¢	$17,107,478	$3.92
Total	**$17,120,412**		**$101,878,086**	

Source: PUCO Case No. 19-2080-EL-ATA (FirstEnergy's EDUs)

*On February 2, 2021, PUCO approved, in Case No. 21-0101-EL-ATA, 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, to set the charges for the Conservation Support Rider to zero.

The bill further requires all H.B. 6 decoupling amounts to be refunded, so the entire sum in Table 1 identified for calendar year (CY) 2020 would be returned to customers, and an appropriate share of the CY 2021 annual amount would also be refunded under the bill. This bill's provisions to repeal and refund the Conservation Support Rider would codify a reduction in costs for ratepayers in the FirstEnergy territory, including the state and political subdivisions.

Significantly excessive earnings test

The bill repeals a provision enacted in H.B. 166 of the 133rd General Assembly that affected EDUs and how PUCO administers the SEET. The bill restores the previous law that

[5] FirstEnergy's most recent long-term forecast submitted to PUCO is the source for kWh sales data in the chart. Refer to FORM FE-D1 in PUCO Case No. 20-0657-EL-FOR, *In the Matter of the Long-Term Forecast Report* (April 15, 2020).

required affiliated EDUs to separately calculate their return on equity for their annual SEET proceeding. Beginning with the 2019 SEET, the three FirstEnergy-affiliated EDUs combined their reporting so a single return on equity, representative of the three EDUs, was submitted to PUCO. The other EDUs in Ohio are not affiliated, so the bill affects only the three FirstEnergy EDUs that operate under a joint ESP – Cleveland Electric Illuminating Company, Ohio Edison Company, and Toledo Edison Company.

SEET methodology

Pursuant to section 4928.143(F) of the Revised Code, PUCO is required to evaluate the earnings of each electric utility's approved market rate offer (MRO) or ESP to determine whether the plan or offer produces significantly excessive earnings for the electric utility. In making such a determination, the statute directs PUCO to evaluate the return on common equity of the EDU each year to determine if it is "significantly in excess of" the return on common equity during the same period earned by publicly traded companies (including utilities) that "face comparable business and financial risk, with such adjustments for capital structure as may be appropriate." If PUCO determines that result did occur, the statute provides customer refunds. The SEET was originally enacted by S.B. 221 of the 127th General Assembly. The statute did not provide more detailed direction than the above, so several details of the implementation were delegated to PUCO. The Commission later established policy and SEET filing directives for the electric utilities.[6]

> Staff endorses the concept that a return on common equity in excess of 1.28 times the standard deviation above the mean of a comparable group of companies should be defined as earnings significantly in excess, except in a low earnings environment when 200 basis points could be substituted.
>
> Having fully considered all the comments regarding establishing the threshold and in consideration of the discretion afforded the Commission in S.B. 221, the Commission, concludes that "significantly excessive earnings" should be determined based on the reasonable judgment of the Commission on a case-by-case basis.
>
> . . . . Passing a statistical test does not, in and of itself, demonstrate that excessive earnings did not occur. . . . The Commission may use a standard deviation test as one tool by which to determine whether an electric utility had significantly excessive earnings.
>
> However, the Commission is willing to recognize a "safe harbor" of 200 basis points above the mean of the comparable group. To that end, any electric utility earning less than 200 basis points above the mean of the comparable group will be found not to have significantly excessive earnings.

[6] PUCO Case No. 09-0786-EL-UNC, *Finding and Order* (June 30, 2010).

FirstEnergy's SEET proceedings

Table 2 below reprints values determined in FirstEnergy's annual SEET proceedings before PUCO from 2009 through 2019. Each FirstEnergy-affiliated EDU met PUCO's "safe harbor" standard in every year, except for a 2018 occurrence when Ohio Edison's return on equity exceeded that value. For that instance, Ohio Edison's earnings might be considered excessive, but not significantly excessive. As seen in the table, none of the EDUs' values exceeded the standard deviation test, which is what FirstEnergy regarded as the threshold for determining significantly excessive earnings.

The "standard deviation test" column in the table is not labeled as the "SEET threshold" because PUCO may adopt an alternative delineation point, if an EDU's financial situation warranted such attention. For example, FirstEnergy applies a different multiple to the standard deviation, 1.64, than the number originally recommended by PUCO staff, 1.28. These small differences demonstrate that the Commission accepts other methodologies as an appropriate alternative for determining the SEET threshold. Other minor variations in methodology have been incorporated since PUCO originally released its SEET directives in 2010.

Table 2. Annual Return on Equity Determined in FirstEnergy's SEET Cases Before PUCO, 2009 to 2019

Year	Safe Harbor Test	Standard Deviation Test	Cleveland Electric	Ohio Edison	Toledo Edison
2009	11.90%	15.80%	5.2%	6.2%	3.8%
2010	13.12%	17.74%	1.4%	11.7%	5.8%
2011	13.37%	19.97%	1.7%	10.0%	1.2%
2012	12.5%	17.67%	3.1%	12.2%	4.2%
2013	12.6%	18.10%	4.4%	11.3%	5.4%
2014	11.9%	15.8%	4.6%	11.5%	8.4%
2015	12.2%	14.5%	5.2%	10.8%	6.1%
2016	12.2%	14.8%	3.4%	10.2%	4.4%
2017*	14.3%	19.2%	4.0%	12.22%	6.4%
2018*	13.3%	19.3%	5.8%	13.9%	6.9%
2019*	12.9%	17.8%	10.9%, combined reporting after H.B. 166		

*Results for 2017, 2018, and 2019 are not yet final because PUCO has yet to issue an "Opinion and Order" in these proceedings.

Note: The Safe Harbor Test and Standard Deviation Test for 2009-2013 reflect those measures for Ohio Edison. Beginning in 2014, FirstEnergy submitted a single threshold for each metric rather than three different numbers tailored to each EDU.

Fiscal impact of recent Ohio Supreme Court decision

When performing the annual SEET for its EDUs, FirstEnergy adjusted their net income and common equity to "eliminate the revenue, expenses, or earnings of any affiliate company, to reflect items contemplated by the Companies' fourth Electric Security Plan ("ESP IV"), and for other non-recurring, special or extraordinary items." In doing so, FirstEnergy excluded the revenue impact of its Distribution Modernization Rider (DMR) in each of the three years the rider was levied, 2017-2019. The DMR was removed from FirstEnergy's ESP IV after the Ohio Supreme Court declared it unlawful in its June 19, 2019 decision.[7]

On December 1, 2020, the Ohio Supreme Court ruled that PUCO should not have excluded FirstEnergy's DMR in its SEET calculations. Thus, the Court reversed PUCO's previous order regarding FirstEnergy's 2017 SEET calculations. PUCO subsequently reopened its previous determination, and consolidated the case alongside SEET cases for 2018 and 2019 as well as ESP IV's regularly scheduled quadrennial review. The Court regarded a SEET as the appropriate mechanism for potential refunds arising from its June 2019 DMR decision, so FirstEnergy ratepayers could receive refunds, if warranted, by those ongoing Commission proceedings.

PUCO's original approval of the DMR enabled the three FirstEnergy utilities to collect a combined annual amount of $132.5 million. The revenue target was approved on an after-tax basis, so actual collections authorized by PUCO ranged from $168 million (under 21% federal corporate tax rate effective for 2018 and 2019) to $204 million (under previous 35% federal tax rate effective for 2017).

The amounts in Table 2 exclude the DMR revenues for 2017-2019, as those regulatory cases are awaiting PUCO's final opinion and order. With the addition of DMR revenues, Ohio Edison's 2018 return on equity could exceed the standard deviation test identified in Table 2. In its December 2020 decision, the Supreme Court instructed PUCO to determine a SEET threshold when it conducts a new SEET proceeding. Therefore, that particular standard deviation test may not be the standard used by PUCO in the future to evaluate significantly excessive earnings.

Fewer details are known about individual EDUs' circumstances during CY 2019 and CY 2020, but the bill requires PUCO to reconsider any SEET determination or order made between October 17, 2019 (effective date of H.B. 166), and the effective date of H.B. 128. FirstEnergy would likely be required to submit more information about their EDUs' respective returns on equity for those two years.

Ohio Power Siting Board

The bill requires OPSB to submit a report to the General Assembly, not later than December 1, 2021, on "whether the current requirements for the planning of the power transmission system and associated facilities investment in this state are cost effective and in the interest of consumers." The report may include any recommendations for legislative changes to ensure transmission planning is cost effective and in the interest of consumers. The bill enumerates nine topics that OPSB may address when making its recommendations. The report must be completed in consultation with JobsOhio, but OPSB may consult with or request the

[7] *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

assistance of PJM, the independent market monitor, and other interested stakeholders. Before completing the report, OPSB must hold at least one public meeting.

The Board does not have a funding source or appropriation for general purpose operating activities. All of its spending is billable to various utilities that submit applications for OPSB's consideration of specific projects. This fee-based system does not appear to offer a funding source for preparing the required report, unless another existing appropriation in the PUCO budget could be used.

Other provisions

The bill repeals other provisions enacted by H.B. 6 related to payments from the Nuclear Generation Fund. By repealing authorization for payments from this fund, these provisions would lose any relevance, so the bill repeals them as well. For example, the bill repeals a provision that required PUCO to conduct annual retrospective management and financial reviews of the owner or operator of a nuclear generation resource receiving payments from the Nuclear Generation Fund. Repealing this provision would reduce administrative costs for PUCO, which were to be paid from the Nuclear Generation Fund.

H.B. 128 also repeals certain public utility tangible personal property (PUTPP) tax valuation procedures related to the payments. H.B. 6 prohibited an owner from valuing PUTPP at less than its taxable value as of October 22, 2019, if the owner received such payments. Similarly, if the owner of such a facility petitioned for a reassessment of its taxable value below its value as of October 22, 2019, the Tax Commissioner was prohibited from granting such a reduction.

The amount of taxes (and their related PUTPP values) paid by these nuclear power station owners is privileged information, but an analysis of PUTPP values reported for relevant taxing jurisdictions suggests the nuclear plants' PUTPP has already declined by 65% to 85% from tax year (TY) 2016 to TY 2018. Although further devaluation is possible, it is unlikely to decline to a value of $0, even if the nuclear power plants cease operations.

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