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August 12, 2019

Via E-mail

Mr. Brandon Lynaugh
lynaugh@battlegroundstrategy.com

Re: Submitted Petition for Referendum on Am. Sub. H.B. 6

Dear Mr. Lynaugh,

On July 29, 2019, in accordance with the provisions of the Ohio Revised Code ("ORC") Section 3519.01(B), I received a written petition containing (1) a copy of a referendum to repeal Am. Sub. H.B. 6 of the 133rd General Assembly, and (2) a summary of the same measure.

It is my statutory duty to determine whether the submitted summary is a "fair and truthful statement of the measure to be referred." ORC Section 3519.01(B)(3). If I conclude that the summary is fair and truthful, I am to certify it as such within ten business days of receipt of the petition. In this instance, the tenth business day falls on Monday, August 12, 2019.

The Ohio Supreme Court has defined "summary" relative to an initiated petition as "a short, concise summing up," which properly advises potential signers of a proposed measure's character "without the necessity of perusing [it] at length." *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24 (1931). After reviewing the submission, I have concluded that I am unable to certify its summary as a fair and truthful summing up of the measure to be referred.

I have identified numerous instances where the Summary is either inaccurate or contains material omissions of the statutory language. For ease of reference, I have numbered the bullet points of the Summary, which was submitted to my office unnumbered.

- The first bullet point of the Summary inaccurately states that newly enacted R.C. 3706.40 defines "electric distribution utility" as being "an electric utility that provides at least *residential* service." (Emphasis added.) This is inaccurate. R.C. 3706.40 incorporates the definition of "electric distribution utility" that already exists in R.C. 4928.01(A)(6). R.C. 4928.01(A)(6) defines "electric distribution utility" as "an electric utility that supplies at least *retail electric distribution service*[,]" which is not the same as saying "at least residential service" as set forth in the Summary.

- The second bullet point of the Summary addresses R.C. 3706.41, which sets forth the required content of an application for renewable energy credits. Among other things, a qualified renewable or nuclear resource must include "the cost of operational and market risks that would be avoided by ceasing operation of the resource [.]" The term "operational risks" is a defined term. The Summary states that "operational

risks…include the risk that operational costs could be higher because of future regulatory burdens and requirements[.]" But this language is not complete in that operational risk includes the risk that operating costs will be higher than anticipated because of "equipment failures and the risk that per-megawatt- hour costs will be higher than anticipated because of a lower than expected capacity factor." The omitted language establishes other considerations as to why an application for credits could be approved and is therefore material.

- The third bullet point of the Summary states, in part, "(iii) that an application for renewable credits shall be approved if the resource meets the renewable resource definition[.]" This excludes language in R.C. 3706.43(A), which provides: "The resource meets the definition of a *qualifying nuclear resource* or qualifying renewable resource[.]" (Emphasis added.) The Act provides only two resources that can qualify for credits, and failing to identify in the Summary one that could be approved is material.

- The third bullet point of the Summary also states "that an application for nuclear credits shall be approved…if the *owner or operator* of the qualifying resource maintains a principal place of business in Ohio and a substantial business presence in Ohio." (Emphasis added.) This is inaccurate. R.C. 3706.43(B)(2) actually provides that an application shall be approved if "[t]he resource's *operator* maintains both a principal place of business in this state and a substantial presence in this state…" (Emphasis added.) An owner's principal place of business/business presence in Ohio is not considered in the approval process.

- The fifth bullet point of the Summary states that "ORC § 3706.45 requires qualifying nuclear and renewable resources to report their megawatt hours generated on a quarterly basis to the Authority, for which it shall issue one credit for each megawatt hour reported[.]" In contrast, R.C. 3706.45(B) of the Bill actually provides that "The authority shall issue one renewable energy credit to a qualifying renewable resource for each megawatt hour of electricity that is both reported under division (A) of this section *and approved by the authority*." Omitting language regarding approval of credits by the Authority is misleading.

- The seventh bullet point of the Summary provides that the measure "creates the nuclear generation fund and the renewable generation fund, into which the revenue from the monthly customer charges shall be deposited and shall gain interest in the custody of the state treasurer[.]" But the Summary does not mention the provision in R.C. 3706.49(A) which provides "Each fund shall be in the custody of the treasurer of state *but shall not be part of the state treasury*." (Emphasis added.) Likewise, the Summary does not disclose that "The interest generated by each fund shall be retained by each respective fund and used for the purposes set forth in [the cited statutory provisions][,]" as set out in R.C. 3706.49(A). The omission of language establishing that each fund, and its interest, does not become part of the state treasury is material.

- The eighth bullet point of the Summary incorrectly describes the Commission's responsibility for paying qualifying resources for credits. It states that "ORC § 3706.53 apportions the revenue collected through the utility charges…subject to reduction or suspension by the Commission[.]" R.C. 3706.53 cites R.C. 3706.61 as providing the manner in which the revenue is apportioned, reduced and suspended. But the relevant sub-section, R.C. 3706.61(D), does not give the Commission any authority to apportion, reduce, or cease payment of anything. Instead, R.C. 3706.61(D) provides that the Authority, in consultation with the Commission, may cease or reduce payments of nuclear resource credits. Simply put, contrary to what the eighth bullet point represents, credits are not subject to reduction or suspension by the Commission.

- The ninth bullet point of the Summary incorrectly states the calculation for distributing money from the funds. The Summary states that the Ohio air quality development authority is "(i) to distribute money from the generation funds between April 2021 and January 2028 to qualifying resources in amounts equal to the credits earned in the same quarter of the prior year, provided there is sufficient money in the relevant funds[.]" But the Act states that in order to distribute money from the funds the Authority must take "the number of credits earned by the resources during the quarter…multiplied by the credit price[.]" R.C. 3706.55(A)(1). Failing to include the correct calculation for distributing money under the Act is material.

- The ninth bullet point of the Summary also incorrectly states the procedure for refunding money to customers from the funds. It states: "ORC § 3706.55 requires the Authority to…(ii) refund to customers any amount remaining in the funds as of December 31, 2027, after distributions have been made through January 21, 2028." But the Act does not provide that remaining funds are automatically refunded to customers. Instead, R.C. 3706.55(B) provides that "any amounts remaining in the nuclear generation fund and the renewable generation fund…shall be refunded to customers in a manner that shall be determined by the authority in consultation with the public utilities commission." Omitting this language from the Summary is material.

- Sub-point three of the eleventh bullet of the Summary incorrectly states that the Authority is responsible for determining the amount of payments that will be made into the nuclear generation fund, as set forth in R.C. 3706.61(E)(1). It states "[the measure] permits the *Authority* to reduce or cease revenue requirements, collection of charges from customers, and credit prices accordingly[.]" (Emphasis added.) This is incorrect. The Act provides that "the *commission* shall do all of the following…[i]f the authority determines it necessary to make reductions under division (D) of this section[.]" (Emphasis added.) R.C. 3706.61(E)(1). Simply put, the Summary incorrectly states that the Authority reduces or adjusts the amount being put into the funds, when the Act gives the Commission that power.

- The eleventh bullet point also incorrectly states that the Authority may cease or reduce payments to the nuclear generation fund if, among other reasons, a resource "decommissions." But the Act provides that the Authority may cease or reduce payments to the nuclear generation fund if, among other reasons, "the resource's owner or operator applies, before May 1, 2027, to decommission the resource." R.C. 3706.61(D)(3). The distinction between applying to decommission a nuclear resource (which could take years) and actually decommissioning a nuclear resource is a big one, and the mischaracterization of the language in the Act is material.

- Sub-point three of the eleventh bullet point of the Summary also incorrectly states when the Authority may act to reduce or cease payments for nuclear resource credits. It states that the Authority may act if "market price index exceeds the strike price." But this statement does not reflect the temporal limitation that is actually set out in the Act. R.C. 3706.61(D)(4) allows the Authority to reduce or cease payments for resource credits when "the market price index exceeds the strike price *on the first day of June in the year in which the report is submitted*[.]" (Emphasis added.) Thus, reduction or cessation of payments is not authorized whenever the market price exceeds the strike price, such authority is tied to a specific date for that determination.

- The fourteenth bullet point explains that the term "net metering system" is amended in the Act to apply to "a facility located on a customer's premises…" This mischaracterizes the amendment. In the Act, R.C. 4928.01(A)(31)(d) amends the "net metering system" definition only with respect to "an industrial customer-generator with a net metering system" and sets forth capacity requirements for such industrial customer-generators.

- Sub-point two of the fourteenth bullet point attempts to summarize the definition of "prudently incurred costs related to a legacy generation resource" as amended in R.C. 4928.01(A)(42). These are costs that the Commission may allow electric distribution utilities to recover through an existing bypassable charge from customers. The definition in the Summary fails to mention that the formula for calculating such costs provides "that where the net revenues exceed net costs, those excess revenues shall be credited to customers." R.C. 4928.01(A)(42). It thus fails to disclose a credit that customers might receive.

- The fifteenth bullet point of the Summary discusses R.C. 4928.148, but entirely omits newly enacted R.C. 4928.148(B), which requires "[a]n electric distribution utility…shall bid all output from a legacy generation resource into the wholesale market and shall not use the output in supplying its standard service offer provided under section 4928.142 or 4928.143 of the Revised Code."

- The seventeenth bullet point of the Summary discusses R.C. 4928.471, but omits that "an electric distribution utility may file an application to implement a decoupling mechanism for the 2019 calendar year and each calendar year thereafter." Decoupling is a process through which the PUCO approves a utility rate set in a manner so that profits are less seasonal for the utility company. The significance of

this omission is that consumer groups, such as the Ohio Consumers' Counsel, object to decoupling as not benefitting all consumers. Environmental groups also object to decoupling.

- The twenty-first bullet point of the Summary incorrectly states that "self-assessing purchasers" is "a defined term." The Act does not actually define "self-assessing purchaser" anywhere.

- The twenty-fifth bullet point of the Summary incorrectly states that the Act "amends" R.C. 4928.75. But the Act "enacts" this entirely new section of law.

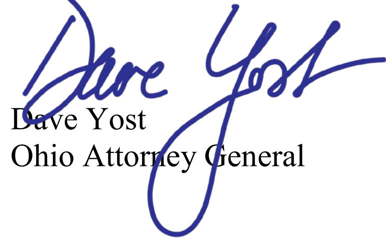
- The twenty-eighth bullet point misstates the threshold size of energy projects that are eligible for property tax exemption. Specifically, the Summary states that the Act "amends ORC § 5727.75: to permit energy projects of *up to 20 megawatts, instead of 5 megawatts*, to be exempted from property taxation without the formal approval of a county commissioners board[.]" R.C. 5727.75(B)(1)(c) actually provides: "For a qualified energy project with a nameplate capacity *of twenty megawatts or greater*, a board of county commissioners of a county in which property of the project is located has adopted a resolution under division (E)(1)(b) or (c) of this section to approve the application submitted under division (E) of this section to exempt the property located in that county from taxation."

- The twenty-eighth bullet point also incorrectly states that the Act "amends ORC § 5727.75…to permit energy projects of *up to 20 megawatts, instead of 2 megawatts*, to be exempt from the prerequisite of career training[.]" In fact, this exemption applies to "energy projects with a nameplate capacity of *twenty megawatts or greater*[.]" R.C. 5727.75(F)(4).

- This twenty-eighth bullet point also misstates the requirement for an energy project to provide training and equipment to first responders as set out in the Act. The Summary states that the Act "amends ORC § 5727.75: to permit energy projects….to be *exempt* from other prerequisites for tax exemptions, including repair of affected public infrastructure and *training and equipping emergency responders*." (Emphasis added.) In fact, R.C. 5727.75(F)(5) provides that the owner or a lessee of a qualified energy project *shall* "Provide or facilitate training for fire and emergency responders for response to emergency situations related to the energy project[.]" The Act does reference an exemption from taxation for training fire and emergency responders, as stated in the Summary.

For these reasons, I am unable to certify the Summary as a fair and truthful statement of the measure to be referred. However, I must caution that this is not intended to be an exhaustive list of all defects in the submitted summary.

Very respectfully yours,



Dave Yost
Ohio Attorney General

Cc: Mr. David Langdon, Counsel for Petitioners (*by email*)