

Shifting Away From Coal Power: Prioritizing Ratepayers and Communities vs. Shareholders?

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Recommended Citation

Shanti Gamper-Rabindran, *Shifting Away From Coal Power: Prioritizing Ratepayers and Communities vs. Shareholders?*, 40 Pace Envtl. L. Rev. 54 ()
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PACE ENVIRONMENTAL LAW REVIEW

ARTICLE

Shifting Away From Coal Power: Prioritizing Ratepayers and Communities vs. Shareholders?

SHANTI GAMPER-RABINDRAN*

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INTRODUCTION

The United States currently faces the challenge of decarbonizing its electricity grid, moving away from carbon-rich sources like coal to renewable sources.¹ Several factors favor the transition. The National Academy of Sciences, Engineering and Medicine notes that decarbonizing up to 75 percent of the U.S. grid is feasible with existing technologies.² Generating electricity from new sources of utility-scale wind and solar generation is cheaper than generating electricity from existing coal plants in many parts of the United States.³ Moreover, by generating electricity from renewable energy, the United States will no longer suffer the immense pollution to air, water, and land from coal generation. However, the incumbent energy sector—specifically, owners of uneconomic coal plants who stand to lose from the energy transition—exert significant influence on state regulators, legislators, and governors. State governments, through their laws and policies, aim to strike a balance between competing interests that stand to benefit or lose from the transition. How should policies to assist the shift away from coal plants balance the interests of ratepayers, those of workers and communities reliant on coal plants, and those of shareholders of companies that own these coal plants? More broadly, how can energy policies navigate an orderly transition out of coal to renewable energy? Around 100 GW of coal capacity was retired in the US between 2002 and 2021.⁴ As of September 2021, 212 GW of utility-scale coal-fired electric-generating capacity was operating in the United States, with owners and operators reporting planned retirement of 28 percent (59 GW) of this generation by 2035.⁵ Studies project a slight increase in the share of coal generation in 2021-2023 as a result of the rise in natural gas prices.⁶ Relatedly, coal production has declined steadily across the United States since 2010, falling to its lowest level since

1. SHANTI GAMPER-RABINDRAN, *Renewable Energy: Setbacks, Successes and Strategies for the Energy Transition*, in *AMERICA'S ENERGY GAMBLE: PEOPLE, ECONOMY AND PLANET* (Cambridge Univ. Press 2022).

2. NAT'L ACADEMIES OF SCI., ENG'G, AND MED., *ACCELERATING DECARBONIZATION OF THE U.S. ENERGY SYSTEM* 67 (The National Academies Press 2021).

3. *Levelized Cost of Energy, Levelized Cost of Storage, and Levelized Cost of Hydrogen*, LAZARD (Oct. 28, 2021), <https://www.lazard.com/perspective/levelized-cost-of-energy-levelized-cost-of-storage-and-levelized-cost-of-hydrogen/> [<https://perma.cc/3YKG-223X>].

4. David Fritsch, *Of the Operating U.S. Coal-Fired Power Plants, 28% Plan to Retire by 2035*, U.S. ENERGY INFO. ADMIN. (Dec. 15, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=50658> [<https://perma.cc/HQ5Z-6VD2>].

5. *Id.*

6. See Ornella Kaze, *EIA Expects U.S. Fossil Fuel Production to Reach New Highs in 2023*, U.S. ENERGY INFO. ADMIN. (Jan. 21, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=50978> [<https://perma.cc/ZT53-7WYK>].

1965 in 2020.⁷ Coal production experienced a slight recovery—with a temporary rise in coal exports by 23 percent from 2020 to 2021—as a result of higher natural gas prices.⁸

Several state governments,⁹ such as Ohio¹⁰ and West Virginia,¹¹ have chosen policies to prolong their states' reliance on uneconomic coal power plants. These states have gone further to block the growth of renewable energy and energy efficiency efforts¹²—two potent avenues to provide cheaper electricity and to stimulate economic revitalization for host communities. Why have these states taken this approach? What are their justifications for doing so and are these justifications sound? Are there alternative strategies to move the energy transition forward, while protecting ratepayers and coal plant workers and communities, while meeting legal responsibilities, if any, to owners of coal plants that invested in these plants?

This paper provides a case study of Ohio policies, which exemplify how state regulators and governments prolong the operations of uneconomic

7. See Rosalyn Berry, *In 2020, U.S. Coal Production Fell to its Lowest Since 1965*, U.S. ENERGY INFO. ADMIN. (July 14, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=48696> [<https://perma.cc/UYG4-DDXQ>].

8. Bonnie Gajewski, *U.S. Coal Exports Increased 23% between 2020 and 2021*, U.S. ENERGY INFO. ADMIN. (Mar. 15, 2022), <https://www.eia.gov/todayinenergy/detail.php?id=51638> [<https://perma.cc/5MWW-SSV7>].

9. The federal government regulates the interstate electricity market and its policies on the federal tax credit influence the adoption of wind and solar. State governments regulate the intrastate electricity market and its policies governing generation, including policies that favor fossil fuel generation or incentives and barriers for renewable energy generation, influence the electricity mix in states. See Shanti Gamper-Rabindran, *Markets, States and the Federal Government in the Transition to Wind Energy*, 33 J. LAND USE & ENV'T L. 355, 356 (2018).

10. See Kathiann M. Kowalski, *Dark Money Helped Ohio Utilities Subsidize Coal Plants, Delaying Action on Climate Change at Ratepayers' Expense*, ENERGY NEWS NETWORK (Apr. 18, 2022), <https://energynews.us/2022/04/18/dark-money-helped-ohio-utilities-subsidize-coal-plants-delaying-action-on-climate-change-at-ratepayers-expense/> [<https://perma.cc/XY8Y-AZ7KX6WM-D2GX>].

11. See James Van Nostrand, *Time for the PSC to Protect WV Ratepayers (Opinion)*, CHARLESTON GAZETTE-MAIL (Sep. 17, 2021), https://www.wvgazette.com/opinion/op_ed_commentaries/james-van-nostrand-time-for-the-psc-to-protect-wv-ratepayers-opinion/article_ce2b1215-a2b4-51a6-9efd-0fc296631501.html [<https://perma.cc/7BPP-JF3Q>] (demonstrating cases where the West Virginia Public Service Commission authorized (1) AEP purchases of coal plants that were unable to compete in the marketplace and (2) Wheeling Power coal plant upgrades at tax payer expense despite the plant's own analysis shows retiring the plant would be \$27 million cheaper than keeping it open); see also JOHN VAN NOSTRAND, *THE COAL TRAP: HOW WEST VIRGINIA WAS LEFT BEHIND IN THE CLEAN ENERGY REVOLUTION* (Cambridge Univ. Press 2022) (discussing West Virginia politicians' decisions that harmed the West Virginians).

12. See, e.g., Gamper, *supra* note 9, at 356; see also Kowalski, *supra* note 10; see also Van Nostrand, *supra* note 11.

plants.¹³ Ohio's Public Utility Commission in 2017 and subsequently Ohio's legislature in its enactment of House Bill (HB) 6 in July 2019 imposed charges on ratepayers. These charges subsidized electricity distribution utilities (EDUs) to cover their losses from contracts with a related entity that owned and operated two uneconomic coal plants. This paper argues that the justifications offered for this bailout are simply unpersuasive. First, the commission and the legislature shielded these companies for a contract that is not under the realm of investments for which EDUs enjoy legal guarantees for fair returns on prudent investments.¹⁴ Ohio is a restructured electricity market in which EDUs are to purchase electricity from the cheapest source of generation, and not be compensated for purchases from more expensive affiliated generators. Second, other sources of generation provide far cheaper electricity than these two coal plants. Shutting down these two coal plants would not threaten the reliability of the electricity grid. Third, this action does not protect coal communities hosting these plants, which have lost significant property taxes that would support local services, as companies devalued these coal plant assets. Instead, funds from ratepayers, at even a fraction of the amounts transferred to EDUs, could have been better directed to coal plant workers and communities to diversify their economies and secure their longer-term prospects.

This paper also details how HB 6 did not simply shield coal plants but blocked the growth of renewable energy—one avenue for economic revitalization in host communities—and efforts at energy efficiency, which would have reduced the long-term electricity costs for ratepayers. These strategies raise electricity costs, block cheaper electricity generation, and make Ohio, including its manufacturing sector, less competitive compared to surrounding Midwestern industrial states.¹⁵

13. Cf. *PUCA Approves Next Steps on Largest Clean Energy Project in Ohio History*, SIERRA CLUB (Nov. 3, 2016), <https://content.sierraclub.org/press-releases/2016/11/puco-approves-next-steps-largest-clean-energy-project-ohio-history> [https://perma.cc/9732-8Z5P] (demonstrating other instances where Ohio took progressive steps in the retirement of their coal plants).

14. Cf. UDAY VARADARAJAN, *Securitization as a Model for an Equitable Transition*, in *SETTLING CLIMATE ACCOUNTS* 161, 163 (Thomas Heller & Alicia Seiger, eds., Spring Int'l Publ'g 2021) (concluding that securitization with careful checks to protect ratepayers can serve as a tool to share the benefits and burdens of coal retirements between shareholders of utility companies and ratepayers).

15. *Creates Ohio Clean Air Program: Fifth Hearing on H.B. 6 before the Energy and Public Utilities Comm.*, 133rd Gen. Assembly Regular Sess. 1, 14 (Oh. 2019) (testimony of Edward Hill, Professor of Economic Development, Ohio State University), http://webcache.googleusercontent.com/search?q=cache:8o65NJNo0lwj:search-prod.lis.state.oh.us/cm_pub_api/api/unwrap/chamber/133rd_ga/ready_for_publication/committee_docs/cmte_s_energy_pu_1/testimony/cmte_s_energy_pu_1_2019-06-25-

In June 2020, the Federal Bureau of Investigation (FBI) filed criminal complaints against key actors in utility companies, revealing the corrupt context of the HB 6 legislation.¹⁶ While criminal charges focused on players involved in the nuclear bailout, Ohioans have become increasingly aware of utility companies' lobbying efforts to secure benefits at the cost to ratepayers, as these companies captured regulators and legislators for their interests.

As a result, public support gathered for the repeal of HB 6¹⁷ and the nuclear bailout was repealed in April 2021. However, as of April 2022, the time of this writing, provisions for the coal bailout and the rollback of renewable energy and energy efficiency remain intact in Ohio's laws. Ohio legislators can choose to switch strategies to prioritize ratepayers and communities, as other states have done. For instance, Michigan's public utility commission, faced with an analogous case of a utility's imprudent decision, signaled it would not permit the shifting of losses to ratepayers.¹⁸ Colorado used taxpayer funds not to prop up coal plants, but instead to directly support economic diversification in communities reliant on coal plants.¹⁹

I begin by providing an overview of Ohio's mix of electricity resources and Ohio's electricity market (section I). Next, I detail the history behind the contracts between EDUs and coal plants and the decision of the Public Utility Commission of Ohio (PUCO) to authorize add-on charges for ratepayers to cover EDUs' losses from these contracts (section II-III). Next, I detail the Ohio legislature's enactment of HB 6, its provisions and costs, including the coal bailout, the nuclear bailout, the rollbacks to energy efficiency mandates and renewable energy mandates, and the subsequent repeal of several of these provisions (sections IV-IX). I then turn to how Ohio can take alternative approaches to the coal bailouts, by drawing from the decisions in

0930_774/edwardhilltestimony.pdf+&cd=8&hl=en&ct=clnk&gl=us&client=firefox-b-1-d [https://perma.cc/FG8G-MSY7].

16. Press Release, DOJ U.S. Att'y's Off., S. Dist. of Ohio, Federal Grand Jury Indicts Ohio House Speaker Enterprise in Federal Public Corruption Racketeering Conspiracy Involving \$60 million (July 30, 2020), <https://www.justice.gov/usao-sdoh/pr/federal-grand-jury-indicts-ohio-house-speaker-enterprise-federal-public-corruption> [https://perma.cc/K97C-MQCH].

17. See *generally Repeal HB6*, OHIO CITIZEN ACTION, https://www.ohiocitizen.org/repeal_hb6 [https://perma.cc/4SHA-YG25] (advocating for repealing Ohio HB 6).

18. See *MPSC Approves Indiana Michigan Power Co.'s Power Supply Cost Recovery Plan but Issues Warning About Future Expenses*, MICH. PUB. SERVICE COMM'N (Nov. 18, 2021), <https://www.michigan.gov/mpsc/commission/news-releases/2021/11/18/mpsc-approves-indiana-michigan-power-co-s-power-supply-cost-recovery-plan-but-issues-warning-about> [https://perma.cc/JR9E-UBBY].

19. *Colorado Just Transition Action Plan*, COLO. DEP'T OF LABOR AND EMP. (Dec. 31, 2020), <https://cdle.colorado.gov/sites/cdle/files/documents/Colorado%20Just%20Transition%20Action%20Plan.pdf> [https://perma.cc/4GLB-5NWC].

Michigan and approach in Colorado to directly assist coal communities (section X-XI). Finally, I turn to the corruption scandal surrounding HB 6, which underscores how legislators and regulators, subject to lobbying by utilities, have exalted their special interests over public interests.

I. Ohio's Electricity Generation

Ohio is one of the leading states in the United States that faces the challenges of coal retirements. In 2005, Ohio had 119 coal-fired generating units at 35 locations, with 23.8 GW of capacity, contributing 64.9 percent of the state's total electric generating capacity, and making Ohio the biggest state in the United States in electricity generation from coal.²⁰ By 2021, the capacity had halved to 10.6 GW.²¹ Based on announcements as of April 2022, 5.95 GW of that capacity is scheduled to retire (see Table 1). These coal plants are uneconomic with the relatively flat growth in electricity demand and increased competition from natural gas and renewables.²² By 2020, coal declined to 37 percent of electricity generation.²³

Ohio has seen a shift from coal to natural gas in its electricity generation. Natural gas increased from 2 percent in electricity generation in 2008 to 43 percent by 2020.²⁴ Ohio natural gas production increased with the shale boom, with Ohio producing 7 percent of the United States' natural gas.²⁵

The closure of coal plants, no doubt, posed financial and social challenges for workers and communities. The policy challenge is to identify the approaches that will provide better long-term prospects for these communities. As discussed in section 11, *infra*, coal plants serve as an economic anchor for communities. For instance, a study estimates that the closure of two Dayton Power and Light coal-fired power plants in Adams County, Ohio in 2018 would result in an estimated \$8.5 million loss in tax revenues for county and local governments and school districts, 370 direct jobs and

20. *Category: Existing Coal Plants in Ohio*, GLOBAL ENERGY MONITOR WIKI (Dec. 17, 2021), https://www.gem.wiki/Category:Existing_coal_plants_in_Ohio [<https://perma.cc/TZ5V-QPM3>].

21. *Preliminary Monthly Electric Generator Inventory (based on Form EIA-860M as a supplement to Form EIA-860)*, ENERGY INFO. ADMIN. (Feb. 25, 2021), <https://www.eia.gov/electricity/data/eia860M/index.php> [<https://perma.cc/22ZW-U5LZ>].

22. Slade Johnson and Kien Chau, *More U.S. Coal-Fired Power Plants are Decommissioning as Retirements Continue*, ENERGY INFO. ADMIN. (July 26, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=40212> [<https://perma.cc/7SW7-NDRT>].

23. *Ohio State Profile and Energy Estimates: Profile Analysis*, ENERGY INFO. ADMIN. <https://www.eia.gov/state/analysis.php?sid=OH> [<https://perma.cc/HPG4-FJ7T>].

24. *Id.*

25. *Id.*

another 761 associated jobs.²⁶ Local governments also face unique challenges in repaying debt accumulated through their sale of municipal bonds and in the cuts in their debt ratings by credit agencies.²⁷

Coal plant retirements have more limited spillover impacts on coal mines within Ohio, as Ohio imports three-quarters of the coal it consumes. In other words, unlike coal-producing states like West Virginia and Wyoming, coal plant retirements in Ohio have limited repercussions on coal mine communities within the state.

Table 1. Coal plants operating in Ohio in December 2021 but with announced retirement dates

Plant and location	Owner	Announced retirements
Zimmer plant, Clermont, Ohio (1,351 MW)	Vistra Energy	Retirement in 2022
Sammis plant, Stratton, Ohio (3 units, built in 1967, 1969 and 1971, with a total of 2,220 MW)	FirstEnergy	Retirement of 3 generating units in 2028 (four generating units was previously retired)
Cardinal plant, Brilliant, Ohio Unit 1 (615 MW built in 1967) Unit 2 (615 MW built in 1967) Unit 3 (650 MW built in 1977)	Unit 1: American Electric Power Units 2 and 3: Buckeye Power	Unit 1 with planned retirement in 2030. No announcement was made for units 2 and 3
Miami Fort, North Bend, Ohio (2 units, each of 557 MW, built in 1975 and 1978)	Vistra Energy	Retirement in 2027
Avon Lake (680 MW, built in 1970)	GenOn Energy	Retirement in 2022

Source: Ohio River Valley Institute, Global Energy Monitor and US Energy Information Administration.²⁸

26. See G. Jason Jolley et al., *The Economic, Fiscal, and Workforce Impacts of Coal-Fired Power Plant Closures in Appalachian Ohio*, 11 REG'L SCI. POL'Y & PRAC. 403, 407-08 (2019).

27. Adele Morris et al., *Revenue at Risk in Coal-Reliant Counties* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27307, 2020), <https://www.nber.org/papers/w27307> [<https://perma.cc/7KQJ-V5J5>].

28. O'Leary, *Another Round of Appalachian Coal Plant Retirements May Be Imminent*, OHIO RIVER VALLEY INST. (Nov. 19, 2021), <https://webcache.googleusercontent.com/search?q=cache:6vmq8EhVE4sJ:https://ohiorivervalleyinstitute.org/another->

Notes: The three largest remaining coal plants in Ohio are Gavin in Cheshire, Ohio (2 units with 1.3 GW each built in 1974 and 1975), the Cardinal plant, and the Kyger plant.

Renewable energy resources supplied only 3 percent of Ohio's total in-state electricity generation in 2020, with wind energy providing three-fifths of the generation, biomass providing nearly one-fifth, solar providing one-tenth, and hydro providing one-tenth.²⁹ Ohio's policies penalize renewable energy even when renewable energy is cost-competitive in parts of Ohio (section 8). As a comparison, Ohio lags behind the modest progress made in Michigan, a neighboring Midwest industrial state that was also dependent on coal plants. In 2020, Michigan's net electricity generation came from natural gas (33 percent), nuclear (29 percent), coal (27 percent) and renewable energy (11 percent, with wind contributing 6 percent of net electricity generation).³⁰

A. Ohio Electricity Markets

Ohio shifted into a restructured electricity market in 2001,³¹ separating utilities that own distribution networks from companies that own generation resources. The Public Utility Commission of Ohio (PUCO) regulates the electricity distribution utilities (EDUs) that own the local distribution network in its area of service. EDUs also provide the default electricity supply to ratepayers in the local service area who choose not to purchase electricity from other retailers. The EDUs receive payment for prudent investments in the interest of ratepayers plus legally guaranteed fair returns to prudent investments. For example, when improvements to distribution network is the cost-effective way to improve grid reliability for consumers, the EDUs can make the case for securing guaranteed fair returns to such investments.

By contrast, PUCO does not regulate companies that own the electricity generation resources and operate in the competitive wholesale

round-of-appalachian-coal-plant-retirements-may-be-imminent/+&cd=2&hl=en&ct=clnk&gl=us&client=firefox-b-1-d [https://perma.cc/QT5Y-5JU6]; Interactive Map of Existing Coal Plants in Ohio, in GLOBAL ENERGY MONITOR WIKI (Dec. 17, 2021), https://www.gem.wiki/Category:Existing_coal_plants_in_Ohio [https://perma.cc/WA4S-2475]; *Preliminary Monthly Electric Generator Inventory (based on Form EIA-860M as a supplement to Form EIA-860)*, U.S. ENERGY INFO. ADMIN. (Feb. 2022), <https://www.eia.gov/electricity/data/eia860M/index.php> [https://perma.cc/J9ZT-JCCP].

29. U.S. ENERGY INFO. ADMIN., *supra* note 23.

30. *Michigan State Profile and Energy Estimates: Profile Analysis*, U.S. ENERGY INFO. ADMIN. (June 17, 2021) <https://www.eia.gov/state/analysis.php?sid=MI> [https://perma.cc/Z45T-Y76C].

31. ANDREW R. THOMAS ET AL., UNDERSTANDING ELECTRICITY MARKETS IN OHIO 4 (2014).

electricity market. According to electricity restructuring legislation from 1999, “the utility shall be fully on its own in the competitive market”³² at the end of the transition period from the regulated market to the restructured market (utilities accepted transition subsidies during the transition). Ohio is located in the region serviced by PJM, the regional transmission organization, which coordinates the buying, selling and delivery of electricity in 13 states and the District of Columbia. To serve standard offer customers, EDUs purchase electricity from the wholesale electricity market, and acting in the interest of consumers, EDUs can choose cheaper resources. EDUs also purchase a share of their electricity from renewable energy resources and are subject to Ohio’s renewable energy mandates enacted in 2008.

That Ohio has a restructured electricity market matters in understanding if and when utility companies in Ohio are owed guaranteed fair returns on their prudent investments. In Ohio’s restructured electricity market, ratepayers owe no obligations to companies that own electricity generation resources or to companies that make imprudent decisions when contracting with electricity generation resources. Ohio’s restructured electricity market stands in contrast to some states’ regulated electricity market, in which their public utility commission regulates vertically integrated utility companies, which own the distribution network and the generation resources. Vertically integrated utility companies are reimbursed for their costs, and they receive fair returns on prudent investments into the distribution network and into generation resources. These fair returns are legally guaranteed, and if state governments do not distribute them to utilities, they can be charged with taking property belonging to these utilities. As section 2 makes clear, this is not the case for the two uneconomic coal plants that have received significant sizable subsidies from Ohio ratepayers since 2017.

II. The History of EDU Contracts With Two Uneconomic Coal Plants

The history of these two coal plants makes clear that EDUs operating in Ohio made their independent business decisions to contract with the Ohio Valley Electric Corp (OVEC), the entity that owns these two coal plants. They did not seek any review or approval by PUCO for these contracts. These contracts were made after OVEC had concluded its contract with the Department of Energy, and therefore, they are simply not related to any claims

32. *Repeal Legacy Generation Resource Provisions of H.B. 6: Hearing on S.B. 117 Before the S. Energy & Pub. Utilities Comm.*, 2021 Leg., 134th Sess. 2 (Ohio 2021) (testimony of Jeff Jacobson, Strategic Insight Group, Office of the Ohio Consumers’ Counsel).

of EDUs supporting US national security, a claim that has surfaced in the misinformation surrounding the coal bailouts.

The two uneconomic coal plants are the 1 GW Kyger Creek Power Plant in Cheshire, Gallia County, Ohio and the 1.3 GW Clifty Creek Generating Station in Madison, Indiana. These two coal plants, built in the 1950s, are owned by (OVEC)—an entity comprised of several investor-owned utilities from multiple states.³³ Investor-owned utilities in OVEC are known as sponsoring companies. Sponsoring companies with operations in Ohio include AEP Ohio, Duke Energy and AES Ohio (formerly Dayton Power and Light), which own a 19.93 percent,³⁴ 9 percent and 4.9 percent equity stake in OVEC, respectively.³⁵ (Toledo Edison owns 4.00 percent and Ohio Edison owns 0.85 percent equity stake in OVEC, but these did not have riders before HB 6. Buckeye also did not have a rider.)

OVEC had contracted with the Department of Energy to provide electricity to a uranium enrichment facility in Piketon, Ohio until 2001 when that facility shut down. When the contract between OVEC and the Department of Energy contract ended in 2003, the Department of Energy paid a \$97.5

33. OHIO VALLEY ELECTRIC CORP. & IND.-KY. ELECTRIC CORP., ANNUAL REPORT – 2019 1 (2019). (Explaining that several utilities, interlinked through affiliations and subsidiaries, are shareholders in OVEC, which owns the coal plants. These utilities are American Electric Power Company, Inc. with 39.17% equity stake (i.e., their affiliates or subsidiaries Ohio Power Company 19.93%; Appalachian Power Company 15.69%; Indiana Michigan Power Company 7.85); Duke Energy Ohio, Inc. 9%; the Dayton Power and Light Company (the AES Corporation) 4.9%; Allegheny Energy, Inc. 3.5%; the Toledo Edison Company 4%; Ohio Edison Company 0.85%; Buckeye Power Generating, LLC 18%; Louisville Gas and Electric Company 5.6%; Kentucky Utilities Company 2.5%; Peninsula Generation Cooperative 6.65%; and Southern Indiana Gas and Electric Company 1.5%. In turn, Allegheny Energy, Inc., the Toledo Edison Company and Ohio Edison Company are affiliates or subsidiaries of FirstEnergy Corp. Louisville Gas and Electric Company and Kentucky Utilities Company are affiliates or subsidiaries of PPL Corporation. Peninsula Generation Cooperative is an affiliate or subsidiary of Wolverine Power Supply Cooperative, Inc. Southern Indiana Gas and Electric Company is an affiliate or subsidiary in CenterPoint Energy. Buckeye Power, Inc. is Ohio's generation and transmission cooperative, providing power to the 24 Ohio-based electric cooperatives); *see also* Devi Glick, Public Testimony on the Application of Indiana Michigan Power Company for Approval of a Power Supply Cost Recovery Plan and Factors (Mar. 12, 2021), https://www.synapse-energy.com/sites/default/files/Testimony_of_Devi_Glick_20804_21-008.pdf [<https://perma.cc/7347-D837>] (“OVEC is an entity joined by 12 utilities in Ohio, Indiana, Michigan, Kentucky, West Virginia and Virginia.”); *see also* DAVID SCHLISSEL, INST. FOR ENERGY, ECON. & FIN. ANALYSIS, IT'S TIME TO RETIRE, NOT BAIL OUT, OVEC'S AGING AND EXPENSIVE COAL PLANTS: PASSAGE OF HB1414 REPRESENTS A SETBACK FOR INDIANA RATEPAYERS 1 (2020).

34. LONDON ECON. INT'L LLC, AUDIT OF THE LEGACY GENERATION RESOURCE RIDER OF AEP OHIO: FINAL REPORT 13 (2021).

35. Jake Zuckerman, *Ohioans Spent \$211 Million Subsidizing Two Coal Plants Over Last Two Years*, OHIO CAP. J. (Jan. 12, 2021), <https://webcache.googleusercontent.com/search?q=cache:UMeZvs08IsIJ:https://ohiocapitaljournal.com/2022/01/12/ohioans-spent-211-million-subsidizing-two%20-coal-plants-over-last-two-years/+&cd=4&hl=en&ct=clnk&g=us&client=firefox-b-1-d> [<https://perma.cc/3ZRC-Q98V>].

million “termination payment”³⁶ to OVEC to cover uncollected post-retirement and plant closure costs.³⁷

OVEC subsequently operated as a merchant generator, selling electricity to the wholesale electricity market. Several sponsoring companies signed the intercompany power agreement (ICPA) with OVEC in 2004 for the period 2006 to 2026 and signed another amended IPCA in 2011 to extend the contract until June 2040. Sponsoring companies are entitled to the electricity generated and obligated to pay for the costs of these plants including its debts.³⁸ In other words, sponsoring companies’ contracts in 2004 and 2011 bear no relationship with OVEC’s prior role supplying electricity to the Department of Energy.

It is worth noting that the sponsoring companies were not compelled to continue with these contracts. At least one of the original sponsoring companies chose to sell a portion of its equity position.³⁹ Between 2011 and 2013, OVEC spent \$1.2 billion in investments on air pollution controls for the plants to comply with the EPA’s Cross-State Air Pollution Rule. Compliance was necessary for these plants to continue to operate until 2026, the end date of the 2004 contract.⁴⁰ To secure the financing for the \$1.2 billion investments, OVEC had to spread out its payments over a longer period, and the amended IPCA was extended to 2040.⁴¹

Sponsoring companies that signed the contract took the financial gamble that the plants could still operate profitably until 2040 and repay their debt.⁴² An engineering report commissioned by OVEC postulated that the plants could operate for 85 years, longer than the typical life for coal plants, but acknowledged that major shifts in fuel prices could shorten the plants’ profitable operations.⁴³ Energy analyst Ezra Hausman of Synapse Energy stated that the sponsoring companies made a poor decision in taking on the debt because by 2010, a major shift in fuel prices was already occurring.⁴⁴

36. Jeffrey Tomich, *Money Pit or Fuel Hedge? In Midwest, It Depends on Who’s Paying*, ENERGY WIRE (May 25, 2018), <https://webcache.googleusercontent.com/search?q=cache:M1b8vljrPqwJ:https://www.eenews.net/articles/money-pit-or-fuel-hedge-in-midwest-it-depends-whos-paying/+&cd=17&hl=en&ct=clnk&gl=us&client=firefox-b-1-d> [https://perma.cc/636H-ZJHC].

37. *Creates Ohio Clean Air Program: Seventh Hearing on Substitute H.B. 6 Before the Energy & Pub. Utilities Comm.*, 2019 Leg., 133rd Sess. (Ohio 2019) (testimony of Michael Haugh, Consultant, Office of the Ohio Consumers’ Counsel).

38. See LONDON ECON. INT’L LLC, *supra* note 34, at 13-14.

39. Haugh, *supra* note 37.

40. Tomich, *supra* note 36.

41. *Id.*

42. See *id.*

43. *Id.*

44. *Id.*

By 2010, the shale boom was reducing the price of natural gas generation and outcompeting coal generation, while the price of renewable energy generation was also declining.⁴⁵

It is also worth noting that AEP, Duke Energy and AES Ohio did not seek PUCO's approval prior to signing these IPCAs.⁴⁶ In 2004 and 2011, these companies did not seek to transfer the benefits and obligations from these two coal plants to ratepayers. Jeremy Fisher from Sierra Club in his 2018 testimony to PUCO suggests that in 2004 and 2011, the companies may have still expected positive returns from these ICPAs, possibly anticipating that the costs of natural gas and renewable generation would still exceed the fixed and variable costs of generation from these coal plants. Since 2012, OVEC's electricity prices have exceeded the prevailing market rate in PJM.⁴⁷

By 2017, these companies sought the transfer risks of the OVEC contracts from their shareholders to Ohio ratepayers.⁴⁸ As of December 31, 2016, OVEC had \$1.5 billion in debt outstanding with "embedded interest rates that are above current rates."⁴⁹ About \$570 million of OVEC debt is due between 2031-2040.⁵⁰

III. PUCO Decisions: Shift of Losses From Investor-Owned Utilities to Ratepayers

PUCO approved add-on charges, known as riders, for AEP,⁵¹ AES,⁵² and Duke,⁵³ in 2017 and 2018. This approval shifted the risks from the gamble of these companies' ICPAs—made without approval from PUCO—to ratepayers in Ohio. In three separate proceedings, PUCO authorized AES to

45. Tomich, *supra* note 36.

46. Jeremy I. Fisher, Direct Testimony on the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates (June 25, 2018), <https://dis.puc.state.oh.us/View-Image.aspx?CMID=A1001001A18F25B22128J05794> [<https://perma.cc/T5QM-AT74>] (stating to PUCO that to his knowledge, Duke did not seek PUCO's approval to extend the contract in 2004 and 2011).

47. See *id.* at 33; see also Memorandum from John Seryak, PE & Peter Worley, Runnerstone, to the Ohio Manufacturers' Association (Sept. 30, 2021) (stating that the weighted price of electricity was 40% more expensive than the market price).

48. Fisher, *supra* note 46, at 20.

49. Haugh, *supra* note 37.

50. Seryak, *supra* note 47, at 6.

51. Jake Zuckerman, *Ohio consumer watchdog asks regulators to revisit coal plant bailouts*, OHIO CAP. J. (July, 13, 2021), <https://ohiocapitaljournal.com/2021/07/13/ohio-consumer-watchdog-asks-regulators-to-revisit-coal-plant-bailouts/> [<https://perma.cc/7VCS-9N7K>].

52. *Id.*

53. *Id.*

impose their costs from these coal plants on their ratepayers in Ohio until October 2023, AEP until May 2024 and Duke until May 2025.⁵⁴

In the hearings before PUCO, consumer groups including the Ohio Consumers Counsel, which represents residential ratepayers, the Ohio Manufacturers' Association, which represents the manufacturing sector,⁵⁵ and various environmental groups laid out their respective cases against these riders.⁵⁶

First, these companies signed their ICPAs with OVEC, making their own independent business decisions without any approval from PUCO. The risks that utilities took through imprudent, independent business decisions are pushed onto ratepayers and run counter to the philosophy underlying Ohio's shift to a restructured electricity market, which separated regulated electricity distribution companies from non-regulated companies engaged in electricity generation. The latter, unregulated by PUCO, should bear the risks and returns from competing in competitive wholesale electricity markets.⁵⁷

Second, these riders impose costs on ratepayers. While hypothetically ratepayers could earn credits if the OVEC contract yielded net revenues, in reality, it became clear even before the riders were approved that ratepayers would be saddled with losses. For instance, Duke already suffered losses from the ICPA between 2010 and 2016 and had anticipated further net losses of \$77 million for 2018 through 2025.⁵⁸

Despite the evidence presented, PUCO approved the rider on the grounds that the ICPA provided a good hedge to ratepayers against electricity price increases.⁵⁹ In reality, PUCO's justification ran counter to the facts: OVEC electricity was more expensive than electricity from alternative sources in the market from 2010 through 2016, and it was expected to become even more expensive than other sources. The coal plants were

54. OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 6, 133rd Gen. Assembly, at 11 (2019); *see also* Seryak, *supra* note 47, at 4; *see also* Zuckerman, *supra* note 51.

55. THE OHIO MFR'S. ASS'N, ENERGY COMM. 26 (May 27, 2021), <https://www.ohiomfg.com/wp-content/uploads/energymaterials052721.pdf> [<https://perma.cc/E9UE-PEY8>].

56. *E.g.*, Direct Testimony of Paul Chernick on Behalf of Sierra Club, Public Utilities Commission of Ohio; Case No. 14-1694-EL-AAM, 7 (Sept. 11, 2015), <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A15111B42101H02256> [<https://perma.cc/DF5F-9BYY>] ("The PPA is likely to be very expensive and uneconomic for ratepayers").

57. *See* Fisher, *supra* note 46, at 4–6.

58. *Id.* at 6.

59. *Repeal legacy generation resource provision of H.B.6: Second Hearing on S.B. 117 Before the Ohio Senate Energy and Public Utilities Comm.*, 134th Gen. Ass. Reg. Session 2021-2022 (2021) (supporter testimony of Neil Waggoner, Member, Sierra Club).

becoming less efficient,⁶⁰ while renewable energy generation was becoming cheaper.⁶¹ Consumers paid \$113.8 million through AEP Ohio's Rider PPA 2017-2019, \$16.4 million through DP&L's Reconciliation Rider 2017-2019 and \$28.3 million through Duke's PSR Rider.⁶²

Consumer and environmental groups further argued that these utilities can collectively make the decision to retire these plants and to end the ICPAs.⁶³ Pulling back the curtain of affiliates and subsidiaries,⁶⁴ the same set of companies are both the holders of equity stake in OVEC with decision-making powers on OVEC operations, and signatories on the ICPAs with OVEC. However, companies are not likely to make the decision to retire the OVEC plants that have substantial debt as long as they are able to secure bailouts from ratepayers and insulate their shareholders from those losses.⁶⁵

IV. HB 6: Bailout for Utilities for Losses From Two Coal Plants

In 2019, the Ohio legislature⁶⁶ enacted House Bill 6, despite opposition from manufacturing, consumer, environmental and economic development groups.⁶⁷ The legislation-imposed surcharges on ratepayers through the "Legacy Generation Rider" to compensate AEP, AES and Duke for their

60. See Seryak, *supra* note 47, at 6 tbl. 3.

61. Fisher, *supra* note 46, at 4-6.

62. Seryak, *supra* note 47, at 5 n.16.

63. See, e.g., *Repeal legacy generation resource provision of H.B.6: Second Hearing on S.B. 117 Before the Ohio Senate Energy and Public Utilities Comm.*, 134th Gen. Ass. Reg. Session 2021-2022 (2021) (supporter testimony of Neil Waggoner, Member, Sierra Club).

64. See DAVID POMERANTZ & MATT KASPER, MANY U.S. ELECTRIC UTILITIES PLAN SLOW DECARBONIZATION OVER NEXT DECADE, OUT OF SYNC WITH BIDEN PLAN "NET-ZERO" GOALS PROLIFERATE, BUT SPEED, INTEGRITY OF COMMITMENTS VARIES GREATLY (Energy and Policy Institute, 2020) (discussing how utility companies' strategies involving their affiliates result in entrenching dependence on fossil fuels power generation) <https://www.energyandpolicy.org/utilities-carbon-goal-biden-climate-plan/> [<https://perma.cc/3JUJ-LHDC>]

65. Waggoner, *supra* note 63, at 3.

66. Ohio was not the only legislature that chose to prolong the retirement of coal plant. Two investor-owned utilities in Indiana—Indiana Michigan Power and Vectren—own 9.35 percent of OVEC. In 2020, Indiana enacted HB 1414 which created a regulatory hurdle for electric utilities to retire their coal plants. That legislation, by requiring for electric utilities to participate in a new regulatory process before the Indiana Utility Regulatory Commission prior to retirement, can create uncertainties and dampen the interest among renewable energy developers about the opportunities to replace uneconomic coal plants. See Catherine Morehouse, *Indiana Passes Coal Plant Support Bill as Democrats Removed from Conference Committee Deliberations*, UTILITY DIVE (Mar. 11, 2020), <https://www.utilitydive.com/news/indiana-passes-coal-plant-support-bill-as-democrats-removed-from-conference/573902/> [<https://perma.cc/E4CD-X2S9>]; see also SCHLISSEL, *supra* note 33, at 1.

67. Hill, *supra* note 15.

losses from the power agreement with OVEC. These surcharges are the net costs from the utilities' obligations to OVEC's costs minus the revenue from the sale of electricity to PJM.

HB 6 went beyond PUCO riders in three ways.⁶⁸ First, it expanded the surcharges to all ratepayers in Ohio, including FirstEnergy ratepayers that had not previously paid these surcharges under the three approved riders. FirstEnergy's Toledo Edison and Ohio Edison, which operate as electricity distribution units in Ohio, are shareholders in OVEC.⁶⁹ Second, it extended the subsidy to at least 2030,⁷⁰ beyond the PUCO rider dates of 2023 and 2024. HB 6 placed a monthly cap on customer charges, but placed no cap over time, meaning that any "prudently incurred costs" greater than the caps can be recovered from customers in the future.⁷¹ Third, HB 6 removed the already weak protections for consumers.⁷² PUCO required AEP, Duke and AES to prove their cases if they wished to recover more payments from ratepayers in the 2020s. But HB 6 granted their bailout to at least 2030, without requiring these utilities to plead their case.⁷³ HB 6's language permits the utilities to recover "prudently incurred costs related to a legacy generation resource," but the bill does not define these "prudently incurred costs."

V. Costs of the Coal Bailout

Shortly after the passage of HB 6, Ohio's Legislative Commission concluded that in 2018 alone, Ohio utilities paid \$94 million more to purchase OVEC-generated electricity than they would have paid from the wholesale competitive PJM market.⁷⁴ The commission's report noted that OVEC electricity costs \$53.44 per MWh to cover variable and fixed costs (including debt amortization and interest expenses associated with financing) and to

68. OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 6, 133rd Gen. Assembly, at 11 (2019).

69. Seryak, *supra* note 47, at 1.

70. See OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 6, 133rd Gen. Assembly, at 11 (2019) (stating that while HB6 is silent on surcharges past 2030, "some deferred costs may still be recovered from ratepayers after that date").

71. LONDON ECON. INT'L, LLC. *supra* note 34, at 14.

72. See Waggoner, *supra* note 63, at 2 ("HB 6 does more than extend the duration of the OVEC bailout – it fundamentally alters the nature of the OVEC bailout and decreases regulatory oversight of it").

73. See *id.* ("HB 6 would essentially give the OVEC coal plants a blank check until 2030").

74. OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 6, 133rd Gen. Assembly, at 12 (2019) ("Ohio EDU's could have resold their OVEC power purchases in 2018 for a loss up to \$22.83 per MWh, or \$94.3 million").

cover pre-tax earnings as a return to equity for the utility.⁷⁵ In contrast, electricity from other PJM sources averaged at \$30.61 per MWh.⁷⁶ OVEC's electricity costs would likely increase as its aging plants lost efficiency.⁷⁷

The same report, commissioned by the Ohio Manufacturers' Association, reported that utilities collected about \$155.4 million through PUCO authorized riders from 2017 through 2019 and \$240.3 million from HB 6 provisions in 2020 and in 2021.⁷⁸ The report estimated that the utilities would collect \$1.4 billion from 2021 through 2030, meaning that the subsidies from 2017 to 2030 total to \$1.8 billion.⁷⁹ HB 6 is silent on subsidies after 2030, though the ICPA will not end until 2040. The utilities' success thus far in securing subsidies, estimated at about \$151 million in 2020, raises the possibility that the utilities could successfully secure another \$1.5 billion in subsidies between 2031 through 2040.⁸⁰

PUCO commissioned an audit of AEP in 2020 and of Duke in 2020. Both audits report that "OVEC plants cost customers more than the cost of energy and capacity that could be bought on the PJM wholesale markets."⁸¹ The audits highlight how provisions in the power agreement with OVEC put ratepayers at risk. Specifically, the ICPA does not impose a cap on annual capital investments by OVEC, leading to excessive capital investments by OVEC.⁸² OVEC plants may undertake ill-advised capital investments rather than retire these plants. In late 2020, the OVEC plants filed with the EPA, ensuring that each plant will comply with new environmental regulations rather than retire.⁸³ Notably, the audit of AEP underscored that other coal

75. *See id.*

76. *Id.*; Seryak, *supra* note 47, at 3-4 (reporting that (1) between 2012 and 2020, OVEC's average weighted cost of electricity of \$59/MWh was 40 percent more expensive than the market price of \$41/MWh, (2) OVEC lost \$1.8 billion based on the costs of generation alone compared to revenue, and (3) Ohio utilities lost an estimated \$600 million between 2012 and 2020 based on the utilities' 39 percent stake and 34 percent of its losses).

77. Seryak, *supra* note 47, at 4.

78. *See id.* at 3.

79. *See id.* at 1, 3.

80. *See id.* at 7.

81. *Id.* at 6 (noting that the cost of the generating electricity from OVEC plants – \$67.00/MWh – is higher than the levelized cost of electricity from a new Combined Cycle Gas Plant at \$36/MWh to \$50/MWh); THOMAS F. STACY & GEORGE S. TAYLOR, *THE LEVELIZED COST OF ELEC. FROM EXISTING GENERATION RES. 1* (2019), https://www.instituteforenergyresearch.org/wp-content/uploads/2019/06/IER_LCOE2019Final-.pdf [<https://perma.cc/K7NY-UB3A>]; LONDON ECON. INT'L, LLC, *supra* note 34, at 9.

82. *See* LONDON ECON. INT'L, LLC, *supra* note 34, at 88.

83. *See Annual Report – 2020*, OHIO VALLEY ELEC. CORP. AND SUBSIDIARY IND.-KY. ELEC. CORP., 3 (2021), <https://www.ovec.com/FinancialStatements/AnnualReport-2020-Signed.pdf> [<https://perma.cc/3P8Z-EPDT>]; *Repeal the HB6 Coal Bailout*, OHIO CITIZEN ACTION, https://www.ohiocitizen.org/yes_on_sb_117 [<https://perma.cc/W9WR-H4TM>].

plants in the PJM system were not undertaking capital investments, given their age and their poor economic outlook, and preparing for retirement.⁸⁴

The audits also reveal how OVEC plants operate in ways that add to their variable costs,⁸⁵ but utilities did not adopt the recommendations to make their operations more cost effective.⁸⁶ OVEC plants elect to operate in the PJM market as day-ahead must-run units, as opposed to an economic resource.⁸⁷ A must-run unit operates even when the cost of generating electricity exceeds the price of electricity in the PJM market.

PJM buys electricity from the cheapest available electricity resource first. The market price is set by the last unit dispatched to meet demand. Both OVEC plants, being more expensive resources, do not set the market price. When the market price is lower than an OVEC plant's variable cost of operation, the plant operates at a loss.

In other words, the plant incurs more losses when it runs than when it does not. AEP was not responsive to the auditors' recommendation that the OVEC Operating Committee meet more frequently to "prevent plants from running when energy prices are too low to cover variable costs."⁸⁸ Instead, AEP responded that it "felt the current meeting schedule was adequate and [did] not plan to make any changes."⁸⁹

The audit also noted that one component of the fixed costs charged by OVEC in the power agreement—i.e., "payment per common share (similar to a dividend)"⁹⁰—should not be recovered by utilities from Ohioan ratepayers. According to the Ohio law governing cost recovery by utilities from consumers, "prudently incurred costs... must exclude any return on investment in common equity. . ."⁹¹

In his testimony against HB 6, Ohio State University Economist Edward Hill details how more expensive electricity would impede Ohio's economic

84. See OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 6, 133rd Gen. Assembly, at 11–12 (2019).

85. See Jacobson, *supra* note 32, at 3.

86. See Joseph Daniel, *Coal Is No Longer a Baseload Resource, So Why Run Plants All Year?*, THE EQUATION (Jan. 15, 2020), <https://blog.ucsusa.org/joseph-daniel/coal-is-no-longer-a-baseload-resource-so-why-run-plants-all-year/> [<https://perma.cc/XZ9L-JBK2>] (cycling a coal plant, i.e., ramping the output of the power plant up and down over the course of a week, can increase maintenance costs. Even so, several coal plants have shifted to more carefully scheduling or operating only seasonally so that they operate when market prices are high enough to support their operations).

87. See Jacobson, *supra* note 32, a 3.

88. *Id.*

89. *Id.*

90. LONDON ECON. INT'L, LLC, *supra* note 34, at 9.

91. *Id.* at 9.

development.⁹² He explains that Ohio's expensive electricity puts its manufacturing sectors, including aerospace, automotive, advanced manufacturing and chemical industries and its appeal for energy-intensive data centers at a competitive disadvantage compared to neighboring states that enjoy cheaper electricity. He also notes that the Ohio legislature, instead of striving for competitive electricity costs for all companies, carved out the ability of PUCO to approve "reasonable arrangement" for some companies to cap their electricity costs.⁹³ This arrangement would reduce the costs for those companies that can exert influence to secure these "reasonable arrangements" while shifting those costs to other companies, and consumers, in Ohio, furthering raises their costs and diminishing their competitiveness.

It is worth noting that retiring the uneconomic coal plants does not raise reliability and resource adequacy issues for Ohio. Ohio is within the PJM market that enjoys sufficient electricity resources and grid reliability.⁹⁴ Ohio has been able to import cheaper electricity from other generation resources in the PJM market. Rocky Mountain Institute's study shows that 27 percent of the US coal fleet can be retired without new generation, 29 percent can be replaced with new solar and wind, and the rest can be retired with cost-effective clean energy portfolio notes that PJM is the region with the largest excess capacity to generate electricity.⁹⁵

VI. HB 6: Bailout for Two Nuclear Plants

HB 6 also imposed surcharges on ratepayers between 2021 and 2027 to provide \$150 million annually to two nuclear plants⁹⁶ and \$20 million for six utility-scale solar projects.⁹⁷ FirstEnergy Solutions, a subsidiary of FirstEnergy, an electric utility headquartered in Akron, Ohio, owned the 3.8 GW Perry nuclear plant, located 40 miles northeast of Cleveland, and the 895 MW Davis-Besse nuclear plant, located in Ottawa County, Ohio. Following

92. See Hill, *supra* note 15.

93. *Id.* at 2.

94. See *id.* at 7-8; see also SCHLISSEL, *supra* note 33, at 12.

95. See ALEX ENGEL ET AL., CUTTING CARBON WHILE KEEPING THE LIGHTS ON 6, 8 (RMI ed., 2021), <https://rmi.org/insight/cutting-carbon-while-keeping-the-lights-on/> [<https://perma.cc/B9VN-YTDU>].

96. See OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT, H.B. 6, 133rd Gen. Assembly, at 3-4 (2019) (stating that the nuclear plants receive \$9 for each MWh of electricity produced).

97. See *id.* at 3, 5.

FirstEnergy Solutions' bankruptcy proceedings in February 2020, Energy Harbor emerged as the new owner of these two plants.⁹⁸

Consumer, manufacturing and environmental groups opposed the nuclear bailout. They raised legitimate questions regarding why ratepayers in Ohio's restructured market should subsidize electricity generators. They also questioned FirstEnergy Solutions' assertion that the plants needed subsidies to continue operating. Legislators never required FirstEnergy to provide the evidence for that assertion⁹⁹ and HB 6 requires state regulators to audit Energy Harbor annually starting in 2021, only after ratepayer begin paying surcharges for the two nuclear plants.¹⁰⁰

Several facts called into question the necessity of the subsidies to keep the plants open. In December 2020, Energy Harbor told Rep. Bill Seitz, a Cincinnati Republican who was a key player in pushing HB6, that it wanted the option to decline the subsidies.¹⁰¹ Energy Harbor's desire for that option arose from the likelihood that the two nuclear plants, should they receive subsidies from the state of Ohio, would be penalized for their participation in the competitive PJM capacity market.¹⁰² That penalty would put the two power plants at a competitive disadvantage relative to other non-subsidized resources in the market. The Ohio Energy Association also noted that Energy Harbor spent \$800 million to buy back company stock, disputing the claim that FirstEnergy Solutions was unable to operate the plants without

98. See *Owners of Two Ohio Nuclear Plants May Decline Subsidies*, ASSOCIATED PRESS (Feb. 7, 2021), <https://www.wtap.com/2021/02/08/owners-of-two-ohio-nuclear-plants-may-decline-subsidies/>, [<https://perma.cc/27HZ-QYMJ>].

99. See Jeremy Pelzer, *Amid Debate Over Repealing House Bill 6, Energy Harbor Still Won't Say Whether Its Nuclear Plants Are Profitable*, CLEVELAND.COM (Sept. 25, 2020, 7:00 AM), <https://www.cleveland.com/open/2020/09/amid-debate-over-repealing-house-bill-6-energy-harbor-still-wont-say-whether-its-nuclear-plants-are-profitable.html> [<https://perma.cc/TQ9T-GEWH>].

100. See *id.*

101. See ASSOCIATED PRESS, *supra* note 98.

102. See Sonal Patel, *The Significance of FERC's Recent PJM MOPR Order Explained*, POWER (Dec. 26, 2019), https://webcache.googleusercontent.com/search?q=cache:A6fFA_RX5ncJ:https://www.powermag.com/the-significance-of-fercs-recent-pjm-mopr-order-explained/+&cd=13&hl=en&ct=clnk&gl=us&client=firefox-b-1-d

[<https://perma.cc/NWT7-WJTR>] (describing the December 2019 FERC order that set a price floor for all generation resources that receive state subsidies and participate in the PJM capacity market through which they bid on promises to deliver energy resource in the future and are penalized for failing to deliver); see also Miranda Wilson, *Fight Over FERC Grid Order Could Scramble Electricity Mix*, ENERGYWIRE (Nov. 9, 2021), <https://webcache.googleusercontent.com/search?q=cache:i-fmTZqDMmCJ:https://www.eenews.net/articles/fight-over-ferc-grid-order-could-scramble-electricity-mix/+&cd=4&hl=en&ct=clnk&gl=us&client=firefox-b-1-d> [<https://perma.cc/AQ84-X9RU>] (describing a change in the PJM rules in July 2021 which no longer required a price floor for resources that receive state subsidies).

subsidies and that FirstEnergy Solutions would close the plant without the subsidies.¹⁰³

The bailout for those nuclear plants had a positive spillover on FirstEnergy Solutions' Sammis coal plant. Investigations by Energy and Policy, a utility watchdog group, revealed that in June 2019, the CEO of FirstEnergy Solutions John Judge told the company's investors (the FirstEnergy Solutions Bondholder Group), that the billion-dollar bailout for the nuclear plants would make the company healthy enough to keep the Sammis coal plant running.¹⁰⁴ FirstEnergy Solutions announced the reversal of its decision to close the Sammis coal plant shortly after HB 6 passed.¹⁰⁵ However, In October 2021, Energy Harbor notified the EPA that it would close the Sammis coal plant by 2028.¹⁰⁶

VII. Rollbacks in Energy efficiency mandates

HB 6 not only protected uneconomic coal and nuclear plants, it also curbed Ohio's previously enacted energy efficiency requirements.¹⁰⁷ In 2008, Ohio enacted legislation that required utilities to invest in energy efficiency to reduce consumers' energy use by 22 percent relative to 2008 levels. HB 6 reduced that target to 17.5 percent, a level that some utilities had already achieved. In that same year, Ohio enacted SB 310, which froze the annual increases in the targets for renewable energy and energy efficiency for two years.¹⁰⁸

Supporters of HB 6 pointed to short-term savings for ratepayers to justify the rollbacks on energy efficiency targets. The removal of these energy efficiency requirements inflicts longer-term costs to Ohioans in foregone

103. Dave Anderson, Ohio corruption scandal hits Energy Harbor bankruptcy case, ENERGY & POL'Y INST. (Aug. 13, 2020), <https://www.energyandpolicy.org/energy-harbor-corruption-case/> [<https://perma.cc/7XAH-ZLFG>].

104. See Dave Anderson, *FirstEnergy's Wall Street Investors Lobbied for Bailout Bill in Ohio*, ENERGY AND POL'Y INST. (Aug. 26, 2019), <https://www.energyandpolicy.org/firstenergy-sammis-coal-plant/> [<https://perma.cc/XMR7-S83L>].

105. See *id.*

106. See Letter from Jay K. Bellingham, P.E., SVP Fossil, to Cent. Off. Permits and Compliance Section, Ohio Env'l Prot. Agency (Oct. 12, 2021) (on file with Northeast Ohio Media Group) [<https://perma.cc/LP6Z-V6WV>] (noting that new federal wastewater pollution discharge limits for coal power plants go into effect at the end of 2025).

107. David Roberts, *Ohio Just Passed the Worst Energy Bill of the 21st Century*, Vox (Jul. 27, 2019), https://www.agricanto.org/uploads/5/2/6/3/52634281/ohio_just_passed_the_worst_energy_bill_of_the_21st_century.pdf [<https://perma.cc/B6AJ-6Q5V>].

108. GWYNNE TARASKA & ALISON CASSIDY, THE ECONOMIC FALLOUT OF THE FREEZE ON OHIO'S CLEAN ENERGY SECTOR 1 (Ctr. for American Progress ed., 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/03/OhioEnergyBriefFinal.pdf> [<https://perma.cc/PKJ6-JLYD>].

energy savings from energy efficiency. Investments in energy efficiency yield longer-term benefits.¹⁰⁹ A report by The Ohio State University found that the 2008 legislation on energy efficiency reduced electricity prices by 1.4 percent from 2008 to 2012.¹¹⁰ Ohio utilities reported that energy efficiency programs cost \$456 million between 2009 and 2012, yielded \$1 billion in savings and are expected to yield \$4 billion in savings over a decade.¹¹¹ More recently, AEP estimated that energy efficiency measures in its 2017-2019 plan—which would cost \$284 million—would save customers \$2.2 billion over the life of the measures.¹¹²

Ohio consumers were forced to pay utilities that no longer undertook energy efficiency measures. While HB 6 ended the requirement for FirstEnergy to invest in energy efficiency, FirstEnergy continued to benefit from its decoupling rider.¹¹³ Such a rider is often approved to placate utilities that oppose energy efficiency mandates as consumers' reduced electricity demand, as a result of energy efficiency measures, can reduce utilities' revenue. The baseline to calculate the payment to FirstEnergy was set at 2018, a year of high consumption levels.¹¹⁴ As noted by FirstEnergy CEO, this rider provided the utility with protections against factors that could lead to losses of revenue, including an economic recession.¹¹⁵ The state's official utility watchdog, the Ohio Consumers' Counsel, calculated that FirstEnergy collected \$27 million from the decoupling rider in the year 2020.¹¹⁶ Fortunately, the Ohio Attorney General successfully challenged that rider and thus prevented FirstEnergy from collecting \$1 billion through 2029 from ratepayers.¹¹⁷

109. Schlissel, *supra* note 33 fig.3.

110. OHIO MFR.'S ASS'N, ECONOMIC ANALYSIS OF OHIO'S RENEWABLE ENERGY EFFICIENCY STANDARDS 2 (2013), https://www.ohiomfg.com/wp-content/uploads/2013-10-04_lb_energy_deeps_sept25_2013_model_results.pdf [<https://perma.cc/FYN9-ZNUD>].

111. TARASKA & CASSIDY, *supra* note 108, at 3.

112. Robert Kelter, *Want Lower Energy Bills in Ohio? Energy Efficiency is the Best Bet*, ENV'T L. & POL'Y CTR. (July 3, 2019), <https://elpc.org/blog/want-lower-energy-bills-efficiency-best-bet-ohio/> [<https://perma.cc/Y2YL-87DV>].

113. Hill, *supra* note 15, at 3.

114. Marty Schladen, *Scandal-Ridden FirstEnergy Agrees to Give Up New Upcharge*, OHIO CAP. J. (Feb. 2, 2021), https://webcache.googleusercontent.com/search?q=cache:_L_j0x4Kd48J:https://ohiocapitaljournal.com/2021/02/02/scandal-ridden-firstenergy-agrees-to-give-up-new-upcharge/+&cd=6&hl=en&ct=clnk&gl=us&client=firefox-b-1-d [<https://perma.cc/KU2V-MYH8>].

115. *Id.*

116. *Id.*

117. Press Release, Bethany McCorkle, Ohio Att'y Gen. Commc'ns Dir., AG Yost Has Spent Past Year Eradicating Corrupt HB6, Saving Ohioans \$2 Billion (Sept. 23, 2021), <https://www.ohioattorneygeneral.gov/Media/News-Releases/September-2021/AG-Yost-Has-Spent-Past-Year-Eradicating-Corrupt-HB> [<https://perma.cc/JTC8-FKPZ>].

VIII. Rollbacks in Renewable Energy

Ohio's legislators reversed the state's earlier support for renewable energy, including its 1999 net metering law and its 2008 renewable portfolio standard, which required the state's investor-owned electric utilities to source 12.5 percent of their electricity from renewable energy by 2024, with a 0.5 percent carve-out for solar.¹¹⁸ In 2019, HB 6 reduced the state's Renewable Portfolio Standard (RPS) from 12.5 percent to only 8.5 percent and established a 2026 sunset for the RPS. It also terminated the solar carve-out.¹¹⁹

HB 6 doubles down on Ohio's rollback of renewable energy, which began in 2014. SB 310, enacted that year, froze annual increases in renewable energy and energy efficiency targets for two years, with targets resuming in 2017. In 2014, Ohio also enacted HB 483, which adversely affected its wind industry. The bill increased the setback requirement, i.e., the minimum distance between the blades of a wind turbine to the nearest property line, regardless of whether the property has a residence, from 550 to 1,125 feet.¹²⁰ That setback measured the distance from the nearest property line, rather than the more typical requirement of the nearest property structure as stipulated in other states. The buffer zone for wind turbines exceeds that for coal mining¹²¹ and for shale wells.¹²²

118. Colton Smith et al., *The Solar and Wind Economy in Ohio*, 20 *CONSILIENCE* 43, 46 (2018).

119. JETTA COOK, *GREATER THAN THE SUM*, 5 (Berkeley L. Ctr. ed. 2021), <https://www.law.berkeley.edu/wp-content/uploads/2021/04/Greater-Than-the-Sum-Sub-national-Renewable-Energy-Policy-during-the-Trump-Administration-Jetta-Cook.pdf> [<https://perma.cc/YLZ2-PLFH>].

120. Smith, *supra* note 118, at 47.

121. See OHIO ADMIN. CODE 1501.13(5) (2016), [<https://perma.cc/239E-SUY5>] (creating a 300 foot setback from any occupied dwelling, unless the owner of the dwelling provides a written waiver consenting to mining operations closer than 300ft, public building, school, church, community or institution building, or public park).

122. See OHIO ADMIN. CODE 1509.021(H) (2011), <https://law.justia.com/codes/ohio/2019/title-15/chapter-1509/section-1509-021/> [<https://perma.cc/4D8N-EC3C>] (creating a 150ft setback for fracking wells and tanks for occupied dwelling in an urban area, unless the owner consents to a closer location no less than 100ft, and a 100ft setback for occupied dwellings or public buildings in non-urban areas). The setback is 75-150 feet for fracking wells. "The surface location of a new well or a tank battery of a well shall not be within one hundred fifty feet of an occupied dwelling that is located in an urbanized area unless the owner of the land on which the occupied dwelling is located consents in writing to the surface location of the well or tank battery of a well less than one hundred fifty feet from the occupied dwelling and the chief of the division of oil and gas resources management approves the written consent of that owner. However, the chief shall not approve the written consent of such an owner when the surface location of a new well or a tank battery of a well will be within one hundred feet of an occupied dwelling that is located in an urbanized area ... For areas that are not urbanized areas, the surface location

Already the 2014 rollbacks in energy efficiency and renewable energy negatively impacted the growth of both the wind and solar sectors.¹²³ Developers noted how these rollbacks, plus the extended setback requirements for wind turbines, hampered the financial feasibility of renewable projects in Ohio and made investments in Ohio far less attractive than in other states.¹²⁴ Likewise, the price of solar renewable energy credits in Ohio fell from \$85 to \$30 following SB 310, making solar projects infeasible.¹²⁵ Companies undertaking energy efficiency projects similarly noted a decline in their market activity.¹²⁶

In June 2021, Ohio legislators further blocked renewable energy progress by enacting SB32, which permitted county governments to pass resolutions to ban large wind and solar developments or to prohibit wind and solar projects in specific parts of their counties.¹²⁷ State legislators claimed the new law better respects local government autonomy, but this argument appears to be a fig leaf. State legislators have not enacted legislation to grant local governments the powers to regulate oil and gas extraction. In 2015, Ohio Supreme Court in its 4:3 decision ruled that local governments cannot restrict oil and gas extraction using zoning laws or other restrictions.¹²⁸ The Court reasoned these powers rested solely with the state as a result of Ohio lawmakers' authorization of Ohio Department of Natural Resources to regulate oil and gas.¹²⁹

These restrictions on renewable energy projects have caused Ohio to forego cheaper renewable energy generation. One study estimated that in Ohio, the amount of coal-generated electricity that is at least 25 percent more expensive than renewable-generated will jump from 709 MW in 2018 to a projected 6.8 GW in 2025.¹³⁰

of a new well shall not be within one hundred feet of an occupied private dwelling or of a public building that may be used as a place of assembly, education, entertainment, lodging, trade, manufacture, repair, storage, or occupancy by the public."

123. TARASKA, *supra* note 108, at 4–5.

124. *Id.* at 3, 5.

125. *Id.* at 7.

126. *Id.* at 8.

127. Dan Gearino, *Inside Clean Energy: Ohio Shows Hostility to Clean Energy. Again*, INSIDE CLIMATE NEWS (July 22, 2021), <https://insideclimatenews.org/news/22072021/inside-clean-energy-ohio-clean-energy/> [<https://perma.cc/HE2J-HZKN>].

128. State ex rel. Morrison v. Beck Energy Corp., 37 N.E.3d 128 (Ohio, 2015).

129. *Id.* at 138.

130. Kathiann M. Kowalski, *Analysis: New Wind, Solar Cheaper Than Operating Most Existing Coal Plants*, ENERGY NEWS NETWORK (Mar. 25, 2019), <https://energynews.us/2019/03/25/analysis-new-wind-solar-cheaper-than-operating-most-existing-coal-plants/> [<https://perma.cc/LQ6T-D72N>]; see generally ERIC GIMON ET AL., THE COAL COST CROSSOVER: ECONOMIC VIABILITY OF EXISTING COAL COMPARED TO NEW LOCAL WIND AND SOLAR RESOURCES (VCE & Energy Innovation eds., 2019), <https://energyinnovation.org/wp->

IX. Fate of HB 6: Provisions That Were Repealed and Those That Persist

The nuclear bailout was challenged in the courts, and the legislative provisions for the nuclear bailout have been repealed.¹³¹ In November 2020, Ohio Attorney General Dave Yost successfully won an injunction granted by a Franklin County judge.¹³² That injunction blocked FirstEnergy from starting collection of the nuclear bailout money from Ohioans.¹³³ It also blocked companies from collecting the solar subsidies.¹³⁴ In January 2021, Yost sought to block FirstEnergy from collecting on the “decoupling rider” and FirstEnergy agreed to stop using that rider.¹³⁵

In April 2021, the Ohio legislature enacted HB 128, repealing the provision of HB6 that provided subsidies to the two nuclear plants.¹³⁶ HB 128 also reduced the subsidies for the six utility scale solar plants that had been in HB 6.¹³⁷ It reduced the surcharge on residential ratepayers to \$0.10 per customer per month from \$0.85 and capped the charge for industrial customers at \$242 per month, down from \$2,400 per month.¹³⁸

However, as of April 2022, the Ohio legislature has not repealed the provision on the subsidies for the coal plants. In March 2021, Sen. Mark Romanchuk, a Republican from Ontario, and Sen. Hearcel Craig, a Democrat from Columbus, introduced SB 117, which would repeal those subsidies.¹³⁹ Several months earlier, in July 2021, the Ohio Consumers Counsel (OCC) asked PUCO to revisit its subsidy approvals granted to AEP and Duke Energy

content/uploads/2019/03/Coal-Cost-Crossover_Energy-Innovation_VCE.pdf [https://perma.cc/7ZD7-WDVD] (explaining the risk to coal-generated energy nationwide).

131. News Release, Ohio Att’y Gen. Dave Yost, AG Yost Has Spent Past Year Eradicating Corrupt HB6, Saving Ohioans \$2 Billion (Sept. 23, 2021), <https://webcache.googleusercontent.com/search?q=cache:NTBrd9QdoygJ:https://www.ohioattorneygeneral.gov/Media/News-Releases/September-2021/AG-Yost-Has-Spent-Past-Year-Eradicating-Corrupt-HB+&cd=2&hl=en&ct=clnk&gl=us&client=firefox-b-1-d> [https://perma.cc/JTC8-FKPZ].

132. *Id.*

133. McCorkle, *supra* note 117.

134. *Owners of Two Ohio Nuclear Plants May Decline Subsidies*, ASSOCIATED PRESS (Feb. 7, 2021), <https://www.wtap.com/2021/02/08/owners-of-two-ohio-nuclear-plants-may-decline-subsidies/>, [https://perma.cc/27HZ-QYMJ].

135. McCorkle, *supra* note 117.

136. Karen Kasler, *After Repealing Nuclear Bailout, Ohio Lawmakers May Still Change Controversial Energy Law*, THE STATEHOUSE NEWS BUREAU (Apr. 2, 2021), <https://www.statehouse.org/government-politics/2021-04-02/after-repealing-nuclear-bailout-ohio-lawmakers-may-still-change-controversial-energy-law> [https://perma.cc/7ZS5-SB3Y].

137. See LONDON ECON. INT’L, LLC, *supra* note 34.

138. *Id.*

139. ROCKY HERNANDEZ, OHIO LEGIS. SERV. COMM’N, BILL ANALYSIS, S. 134-117, at 1 (2021), <https://www.legislature.ohio.gov/download?key=16222&format=pdf> [https://perma.cc/47GM-FQVT].

in 2018¹⁴⁰ and the approval granted to AES in 2017. It asked that the burden of proof be on AEP, Duke Energy and AES to demonstrate their losses to OVEC.¹⁴¹ The hearings were held at the end of 2021 and as of April 2022, the case is still ongoing.¹⁴² Reevaluation of past PUCO decisions is essential to protect the interest of ratepayers.¹⁴³

X. Michigan: Signaling Opposition Against Cost-Shifting to Ratepayers

The Michigan Public Service Commission (MPSC) took a contrasting approach to that of PUCO and the Ohio legislature with regards to utility companies that had contracted with OVEC. Indiana & Michigan Company (I&M), with operations in Michigan, is one of the three subsidiaries of AEP¹⁴⁴ that hold an equity stake in OVEC. I&M owns 7.85 percent equity stake in OVEC.¹⁴⁵

In November 2021, MPSC warned that it would likely not permit I&M to recover excess costs from its ICPA with OVEC from Michigan ratepayers,¹⁴⁶ without additional evidence that continuing to purchase power from the units was in the best interest of its customers. MPSC underscored that I&M's purchase of electricity from OVEC was far more expensive than other market sources. MPSC, citing analysis from Sierra Club, noted that I&M ratepayers paid an extra \$2.5 million in 2020 alone because I&M purchased

140. Jake Zuckerman, *Ohio Consumer Watchdog Asks Regulators to Revisit Coal Plant Bailouts*, OHIO CAP. J. (July 13, 2021), <https://ohiocapitaljournal.com/2021/07/13/ohio-consumer-watchdog-asks-regulators-to-revisit-coal-plant-bailouts> [<https://perma.cc/4BYX-MVFW>].

141. *Id.*

142. The Review of the Power Purchase Agreement Rider of Ohio Power Company for 2019, Case No. 18-1759-EL-RDR (Public Utilities Commission of Ohio DIS, 2018), <https://dis.puc.state.oh.us/CaseRecord.aspx?Caseno=18-1759&link=DIVA> [<https://perma.cc/TFS4-BC96>].

143. DAYMARK ENERGY ADVISORS, AN AUDIT REPORT OF THE OHIO COMPANIES' RIDER DMR, 2, 5–8, <https://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A22A14B01753C02696> [<https://perma.cc/WX9S-QEWM>] (finding PUCO's Grid Modernization Rider was "not sufficient to protect ratepayers" since there was no tracking to ensure the funds collected under the rider were spent on grid modernization activities); *see also* Hill, *supra* note 16, at 14 (finding First Energy collected \$168 million a year under the rider from 2017 to 2019).

144. Glick, *supra* note 33, at 29.

145. *Id.*

146. News Release, Mich. Pub. Serv. Comm'n, MPSC Approves Indiana Michigan Power Co.'s Power Supply Cost Recovery Plan but Issues Warning About Future Expenses (Nov. 18, 2021), <https://www.michigan.gov/mpsc/commission/news-releases/2021/11/18/mpsc-approves-indiana-michigan-power-co-s-power-supply-cost-recovery-plan-but-issues-warning-about-> [<https://perma.cc/EED6-PGJT>].

electricity from OVEC.¹⁴⁷ MPSC, based on estimates from OVEC's other sponsoring companies, noted that an agreement would inflict on I&M losses of \$67 million between 2020 and 2025 and losses of \$267 million between 2019 and 2040.¹⁴⁸ MSPC requested that I&M, in its Integrated Resource Plan, provide analysis on two options—first, financial outlook with energy and capacity purchases from OVEC, and second, without those purchases and with optimized sources of potential replacements.

MPSC also noted that I&M did not seek the approval of MPSC for its decisions in 2004 and 2010 to extend the ICPA with OVEC.¹⁴⁹ I&M had the option of applying to MSPC for a review of the power agreement and to seek a certification of necessity for that agreement. Had MSPC approved a certification of necessity, provided the evidence warranted such a decision, I&M could recover costs from that power agreement from I&M ratepayers in Michigan.¹⁵⁰

MSPC reiterated the responsibilities of both the public utility commission and the utility companies. It underscored that Utility companies will need to “mak[e] good faith efforts to manage existing contracts... The Commission will expect to see evidence that utilities have taken steps to minimize costs, including efforts to renegotiate contracts, and will look to comparisons with other long-term supply options... the Commission has a duty to customers to assure utilities are not subsidizing uneconomic, unreasonable, and imprudent decisions through customer rates.”¹⁵¹

XI. Colorado: Funds for Direct Assistance to Workers and Communities

The strategy of imposing costs to ratepayers to buoy the uneconomic coal plants does not insulate local communities from immediate negative impacts. For instance, according to the study by the Institute for Energy Economics and Financial Analysis, the Gallia school district lost \$1.5 million to their tax base as a result of the devaluation of Kyger coal plant by \$45

147. The Application of Indiana Michigan Power Company for Approval to Implement a Power Supply Cost Recovery Plan for the 12 Months Ending Dec. 31, 2021, Case No. U-20804 21 (Michigan Power Supply E-Docket 2021), <https://mipsc.force.com/sfc/servlet.shepherd/version/download/0688y000001Cgb0AAC>. [<https://perma.cc/ET3M-VDTN>].

148. *Id.* at 20.

149. *Id.* at 13.

150. *Id.* at 17.

151. *Id.* at 19.

million.¹⁵² Similarly, the communities of Oak Harbor and Perry that host the two nuclear plants lost a sizable chunk of their tax base when FirstEnergy devalued their nuclear plants by 75 percent.¹⁵³ A strategy that responds to the needs of local communities would focus directly on the needs for those communities for transitional funding to support local services and to diversify their economies. Likewise, the strategy of directing financing to utility companies does not directly assist coal companies. For instance, First Energy announced that the Sammi coal plant will retire, and had HB 6 nuclear bailout provisions remained, the company would have benefitted from support for their nuclear plants without any responsibility for assisting communities around the Sammi coal plant. With the impending retirement of the Sammi coal plant, communities are left without any bridge funding to maintain their local services let alone to assist with the diversification of their economies.

Colorado exemplifies the approach of state governments that recognize (1) the reality that the shift to renewable energy provides a cheaper source of electricity with a smaller environmental and climate footprint and (2) the need for a just energy transition in which taxpayers provide direct *transitional* financial support to assist coal plant workers and communities to diversify their economies away from coal reliance.¹⁵⁴ Labor and environmental groups, alongside a subset of legislators, pushed for legislation that would combine both targets for renewable energy, while investing in coal reliant workers and communities to ensure they can also move forward with the transition.¹⁵⁵

In 2019, Colorado enacted HB 19–1314¹⁵⁶ titled Just Transition from a Coal-based Electrical Energy Economy. The legislation created a Just Transition Office in the Colorado Department of Labor and Employment and Just Transition Advisory Committee tasked with developing a Just Transition

152. DAVID SCHLISSEL, BAILOUT BILL A BONANZA FOR FIRSTENERGY SOLUTIONS 7 (IEEFA ed., 2019), https://ieefa.org/wp-content/uploads/2019/05/Bailout-Bill-a-Bonanza-for-FirstEnergy-Solutions_May-2019.pdf [<https://perma.cc/W6PC-HQUW>].

153. *Id.*

154. See Ann M. Eisenberg, *Transitions in Energy Communities*, 12 GEO. WASH. J. ENERGY & ENV'T. L., 107–08 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4020554 [<https://perma.cc/J7TM-8P7B>]; see also Elisa Hotchkiss et al., *Colorado Clean Energy Policy Landscape: A Case Study*, 35 ELEC. J. 4 (2022), <https://www.sciencedirect.com/science/article/pii/S1040619022000331> [<https://perma.cc/6YJ8-EEJV>].

155. BLUE GREEN ALLIANCE, AMERICA'S ENERGY TRANSITION 1 (2021), <https://www.blue-greenalliance.org/wp-content/uploads/2021/05/Americas-Energy-Transition-Case-Study-vFINAL.pdf> [<https://perma.cc/6ZMJ-MZPY>].

156. H.B. 1314, 72nd Gen. Assemb., 1st Reg. Sess. (Colo., 2019), https://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a_1314_rer.pdf [<https://perma.cc/U5DF-8MM9>].

Action Plan with a goal “help each community end up with more family-sustaining jobs, a broader property tax base, and measurably more economic diversity.”¹⁵⁷ To ensure that the push for renewable energy targets was coupled with plans to assist local communities, Colorado enacted Senate Bill 19–236 that required a utility to set out Workforce Transition Plans and Community Assistance Plans when retiring any existing coal plants.¹⁵⁸

Two years later, in 2021, Colorado enacted HB 1290, which provided funding from taxpayers for a just energy transition. The bipartisan¹⁵⁹ legislation provided \$8 million to the just energy transition cash fund, which funded the Office of Just Transition’s implementation of the Just Transition plan for Colorado and provided additional funding for existing state programs that the office identified as effective investment strategies for the coal transition communities.¹⁶⁰ The legislation also provided \$7 million for the coal transition worker assistance program.¹⁶¹ The Colorado Department of Labor and Employment had identified communities that were reliant on coal mines or coal plants as coal transition communities eligible for assistance, i.e. El Paso, Gunnison, La Plata, Larimer, Moffat, Montrose, Morgan, Pueblo, Rio Blanco, and Routt counties.¹⁶² While this approach is still in its early days and the approach has not been evaluated on its impacts,¹⁶³ Colorado’s approach provides an example of the approach of directly assisting coal workers and coal communities.

157. COLO. DEP’T OF LAB. AND EMP., *COLORADO JUST TRANSITION ACTION PLAN 1* (2020), <https://cdle.colorado.gov/sites/cdle/files/documents/Colorado%20Just%20Transition%20Actio21p43/esn%20Plan.pdf> [<https://perma.cc/Q7D2-SWRA>].

158. See CTR. FOR THE NEW ENERGY ECON., *STATE BRIEF: COLORADO 5* (2020), https://cnee.colostate.edu/wp-content/uploads/2020/07/State-Brief_CO_July_2020.pdf [<https://perma.cc/8U9L-QJ9D>] (describing the securitization process Colorado utilities must undergo to protect coal communities when closing coal plants under SB 19-236).

159. Chase Woodruff, *Republicans Called Colorado’s Just-Transition Office for Coal Workers ‘Orwellian.’ Now They Want to Boost its Funding.*, COLO. NEWSLINE, (May 10, 2021), <https://coloradonewsline.com/2021/05/10/republicans-called-colorados-just-transition-office-for-coal-workers-orwellian-now-they-want-to-boost-its-funding/> [<https://perma.cc/566C-VHZZ>].

160. H.B. 21–1290, 73d Gen. Assemb., Reg. Sess. (Colo. 2021).

161. *Id.*

162. COLO. DEP’T OF LABOR AND EMP., *FINAL FISCAL NOTE OF THE OFFICE OF JUST TRANSITION AND COAL TRANSITION WORKER ASSISTANCE PROGRAM*, H.B. 21-1290, at 1, 3 (2021).

163. SEAN O’LEARY & BEN HUNKLER, OHIO RIVER VALLEY INST., *THE CENTRALIA MODEL FOR ECONOMIC TRANSITION IN DISTRESSED COMMUNITIES 5–7* (2021), <https://ohiorivervalleyinstitute.org/wp-content/uploads/2021/07/The-Centralia-Model-FINAL.pdf> [<https://perma.cc/BRG6-BXS7>].

XII. Ohio's HB 6 Corruption Scandal

How did HB 6¹⁶⁴ win support when that legislation inflicted significant costs on ratepayers and Ohio's economic competitiveness, to the benefit of shareholders of utility companies? While this paper focuses on the transition away from coal plants, the scandal surrounding the passage of HB 6, centered on FirstEnergy's participation in the corruption of public officials to secure a bailout of its two nuclear plants, provides broader lessons on the political challenges of the transition away from uneconomic power plants.

First, the FirstEnergy case shows what is possible when a utility company is willing to employ lobbying and even bribery to secure financial bailouts. FirstEnergy's bribe of \$60 million and its penalty of \$230 million would be dwarfed by the proceeds from the financial bailout of \$150 million per year from 2021 through 2027, had that bailout been sustained. Second, public officials in the state legislature and in the public utility commission were willing to serve the interests of the utility company instead of those of ratepayers. Third, the US law provided and still provides a legal mechanism for companies and other donors to remain anonymous and to channel funds to support lobbying and political campaign contributions. That legal mechanism remains problematic, though in the Ohio case, several companies and public officials have been charged with crossing the line to illegal activities.

In July 2021, FirstEnergy announced it settled federal corruption charges and it paid a \$230 million penalty for bribing Ohio officials to ensure the passage of HB 6¹⁶⁵ FirstEnergy admitted that "[it] used the 501(c)(4) corporate form as a mechanism to conceal payments for the benefit of public officials and in return for official action. FirstEnergy Corp. used 501(c)(4) entities in this way because the law does not require disclosure of donors to a 501(c)(4) and there is no ceiling that limits the amount of expenditures that can be paid to a 501(c)(4) entity for the purpose of influencing the legislative process."¹⁶⁶

FirstEnergy and its subsidiaries donated \$59 million between 2017 and March 2020 to Generation Now, a 501(c)(4) entity controlled by Larry Householder, then Ohio's House Speaker.¹⁶⁷ In 2017, FirstEnergy also set up Partners for Progress, another 501(c)(4) entity, through which FirstEnergy

164. See Hill, *supra* note 15, at 17.

165. *FirstEnergy Agrees to Pay \$230M Fine for Bribing Ohio Officials to Bail Out Two Nuclear Plants*, UTILITYDIVE (Iulia Gheorghiu ed., July 23, 2021), <https://www.utilitydive.com/news/firstenergy-agrees-to-pay-230m-fine-for-bribing-ohio-officials-to-bail-out/603836/> [<https://perma.cc/CH6E-NRU6>].

166. *Id.*

167. Gheorghiu, *supra* note 168; Deferred Prosecution Agreement at 16, *United States v. FirstEnergy Corp.*, No. 1:21-cr-86 (S.D. Ohio July 20, 2021).

funneled \$25 million “to entities associated with public officials” over two years.¹⁶⁸

In July 21, 2020, the FBI filed criminal charges against Ohio Republican House Speaker Larry Householder on a conspiracy to participate in a racketeering scheme.¹⁶⁹ Householder allegedly participated in a \$60 million bribery case related to the passage of HB6.¹⁷⁰ The FBI also filed charges against Generation Now, the 501(c)(4) nonprofit linked Householder that was used to funnel millions of donations from FirstEnergy, its subsidiary and other electric companies.¹⁷¹ Householder, Matt Borges, former Ohio Republican Party chairman and Neil Clark, lobbyist and Republican operative (now deceased), pleaded not guilty. Generation Now, Juan Cespedes, FirstEnergy Solutions lobbyist, and Jeff Longstreth, a Republican political strategist, plead guilty.¹⁷² Investigative journalists’ review of emails uncovered during the corruption investigations into HB 6 revealed that lobbyists for American Electric Power, FirstEnergy and Energy Harbor were involved in the drafting of HB6.¹⁷³

FirstEnergy admissions and media investigations have also brought to light how PUCO failed to serve as an independent regulatory body that prioritizes the public interest over special interests. In August 2020, Ohio Attorney General Dave Yost expanded his civil racketeering lawsuit, naming PUCO chair Sam Randazzo, Charles Jones, CEO of FirstEnergy and Michael Dowling, fired senior vice president for FirstEnergy, as defendants.¹⁷⁴ In

168. Gheorghiu, *supra* note 167.

169. Complaint at 2, United States v. Matthew Borges, No. 1:20-MJ-00526 (S.D. Ohio July 17, 2020).

170. See *Removal of Ohio House Speaker Larry Householder from Office, 2020-2021*, BALLOTPEDIA (2021), https://ballotpedia.org/Removal_of_Ohio_House_Speaker_Larry_Householder_from_office,_2020-2021 [<https://perma.cc/ZNE3-VJQS>]; Jessie Balmert & Laura A. Bischoff, *Ohio Statehouse Corruption: Who you Need to Know in the Federal Bribery Case*, CINCINNATI (July 21, 2021, 12:00 AM), <https://www.cincinnati.com/storytelling/news/ohio-corruption-project/> [<https://perma.cc/H3D9-3D4S>].

171. *Id.*

172. Press Release, Dep’t of Just. U.S. Att’y Off. S. Dist. Of Ohio, Purported 501(c)(4) Admits to Being Used to Conceal Corrupt Payments Related to Passage of Legislation (Feb 19, 2021), [https://www.justice.gov/usao-sdoh/pr/purported-501c4-admits-being-used-conceal-corrupt-payments-related-passage-legislation#:~:text=February%2019%2C%202021-,Purported%20501\(c\)\(4\)%20admits%20to%20being%20used%20to,in%20U.S.%20District%20Court%20today](https://www.justice.gov/usao-sdoh/pr/purported-501c4-admits-being-used-conceal-corrupt-payments-related-passage-legislation#:~:text=February%2019%2C%202021-,Purported%20501(c)(4)%20admits%20to%20being%20used%20to,in%20U.S.%20District%20Court%20today) [<https://perma.cc/SN5G-78G8>]; Balmert & Bischoff, *supra* note 170.

173. Andrew J. Tobias, *Former Top Ohio Utility Regulator was Involved with Writing Tainted Nuclear Bill, Emails Show*, CLEVELAND (Jan. 11, 2021, 7:00 AM), <https://www.cleveland.com/open/2021/01/former-top-ohio-utility-regulator-was-involved-with-writing-tainted-nuclear-bill-emails-show.html> [<https://perma.cc/J454-HG4K>].

174. Media Release, Dave Yost, Ohio Attorney General, Ohio Att’y Gen., AG Yost Adds Jones, Dowling, Randazzo as Defendants in Amended FirstEnergy Racketeering Lawsuit (Aug.

October 2020, FirstEnergy fired CEO Charles Jones and two vice presidents connected to a \$4.3 million payout to Sam Randazzo ahead of his appointment as PUCO chair.¹⁷⁵

In its deferred prosecution agreement, FirstEnergy admitted that the payment was made in the expectation that Public Official B, identified by media investigators as Randazzo, would act in FirstEnergy's interests in reference to HB 6 and other legislative and regulatory priorities.¹⁷⁶ FirstEnergy also admitted that Public Official B, while working at PUCO, supported actions to the benefit of FirstEnergy, i.e. supporting provisions in HB 6 on the "decoupling provision" and favoring FirstEnergy's language on HB 6 on its significantly excessive earnings tests, and burying an order for a PUCO audit on the Distribution Modernization Rider received by FirstEnergy.¹⁷⁷

Yost's lawsuit sought to recover from Randazzo the alleged \$4.3 million bribe.¹⁷⁸ Randazzo, who served as a PUCO commissioner and PUCO chair from February 2019 but resigned in November 2020, has denied these allegations. Media investigations, based on their review of emails, allege that Randazzo played a role in supporting passage of HB 6 and in hindering the full repeal of provisions in HB 6.¹⁷⁹ In his testimony on HB 6 to state legislators as chair of PUCO, Randazzo's comments stressed the short-term cost to consumers of the renewable energy and energy efficiency standards, but

5, 2021), <https://www.ohioattorneygeneral.gov/Media/News-Releases/August-2021/AG-Yost-Adds-Jones-Dowling-Randazzo-as-Defendants> [<https://perma.cc/4J58-CR2B>].

175. John Funk, *FirstEnergy Fires CEO, 2 Other Top Executives in Wake of \$61M Political Bribery Scandal*, UTILITYDIVE (Oct. 30, 2020), <https://www.utilitydive.com/news/firstenergy-fires-ceo-2-other-top-executives-in-wake-of-61m-political-bri/588109/> [<https://perma.cc/QS9T-C6G4>].

176. Kathiann M. Kowalski, *Former Ohio Regulator Linked to \$4M Payoff Directed Agency to Limit Response to FirstEnergy Corruption*, ENERGY NEWS NETWORK (Feb. 15, 2022), <https://energynews.us/2022/02/15/former-ohio-regulator-linked-to-4m-payoff-directed-agency-to-limit-response-to-firstenergy-corruption/> [<https://perma.cc/FC6K-9X7Z>]; *Deferred Prosecution Agreement at 17*, *United States v. FirstEnergy Corp.*, No. 1:21-cr-86 (S.D. Ohio July 20, 2021).

177. *Id.*; DAYMARK ENERGY ADVISORS, AN AUDIT REPORT OF THE OHIO COMPANIES' RIDER DMR 3 (2022).

178. Media Release, Dave Yost, Ohio Attorney General, Ohio Att'y Gen., AG Yost Adds Jones, Dowling, Randazzo as Defendants in Amended FirstEnergy Racketeering Lawsuit (Aug. 5, 2021), <https://www.ohioattorneygeneral.gov/Media/News-Releases/August-2021/AG-Yost-Adds-Jones-Dowling-Randazzo-as-Defendants> [<https://perma.cc/4J58-CR2B>].

179. Kowalski, *supra* note 176; *see also*, Jeremy Pelzer, *Emails Show ex-PUCO Chair Sam Randazzo Fought HB6 Repeal, Reluctantly Ordered FirstEnergy Probe*, CLEVELAND (Feb. 15, 2022), <https://www.cleveland.com/news/2022/02/emails-show-ex-puco-chair-sam-randazzo-fought-hb6-repeal-reluctantly-ordered-firstenergy-probe.html> [<https://perma.cc/SGK3-DFTT>].

not their benefits.¹⁸⁰ In his testimony to an Ohio Senate committee on legislation to repeal HB 6, he emphasized the “unwinding” challenges to HB 6.¹⁸¹

Campaign contributions from utilities and the revolving door between officials working with the utility companies and with the state governor, state legislators or PUCO raise concerns about the appearance, let alone actual conflict of interest. DeWine’s 2018 gubernatorial campaign received \$1 million from FirstEnergy.¹⁸² DeWine hired as his legislative director Dan McCarthy, a former FirstEnergy lobbyist.¹⁸³ According to media reports, McCarthy founded a nonprofit group that was later used as a pass-through for \$15 million to another nonprofit allegedly controlled by Householder. Governor DeWine appointed Randazzo, a utilities lawyer, as PUCO chair over the objections of environmental groups that pointed to his positions against renewable energy.¹⁸⁴ Randazzo, in his confirmation hearings, argued that his prior positions were taken in service to his clients, and as PUCO chair, he would serve Ohioans’ public interest.

FirstEnergy is not the only utility company that has utilized lobbying to influence legislation. AEP, which benefited from subsidies for OVEC losses, provided funds to a 501(c)(4) nonprofit called Empowering Ohio’s Economy that in turn funneled funds to Generation Now. In June 2021, AEP disclosed that it received a subpoena from the Securities and Exchange Commission regarding the HB 6 corruption investigations. However, AEP argues that its participation in the HB 6 process was ethical and lawful.¹⁸⁵

180. John Funk, *How a Longtime Critic of Clean Energy Became Ohio’s Top Utility Regulator*, ENERGY NEWS NETWORK (Mar. 9, 2020), <https://energynews.us/2020/03/09/how-a-longtime-critic-of-clean-energy-became-ohios-top-utility-regulator/> [https://perma.cc/8M5A-FHX9].

181. SAM RANDAZZO, PUB. UTILITIES COMM’N OF OHIO AND OHIO POWER SITING Bd., PREPARED STATEMENT OF SAM RANDAZZO CHAIRMAN 5 (2020); Pelzer, *supra* note 179.

182. Laura Bischoff, *FirstEnergy pumped \$1M into backing DeWine, records show*, DAYTON DAILEY NEWS (Mar. 5, 2021), <https://www.daytondailynews.com/local/firstenergy-pumped-1m-into-backing-dewine-records-show/ZHCCGM5E6JB4RDNKUKZK7KYKEQ/> [https://perma.cc/8EWG-UKFM].

183. *Id.*

184. Funk, *supra* note 180; Andrew J. Tobias, *Top Aide to Ohio Gov. Mike DeWine Once Led Political Non-Profit Identified as Money Conduit in Federal Racketeering Complaint*, CLEVELAND (July 23, 2020), <https://www.cleveland.com/open/2020/07/top-dewine-aide-previously-led-political-non-profit-identified-as-money-conduit-in-federal-racketeering-complaint.html> [https://perma.cc/KJ5Z-BANR].

185. Kathiann M. Kowalski, *Ohio Utilities FirstEnergy and AEP Still Spending Big on Lobbying*, ENERGY NEWS NETWORK (Nov. 9, 2021), <https://energynews.us/2021/11/09/ohio-utilities-firstenergy-and-aep-still-spending-big-on-lobbying/> [https://perma.cc/P6MT-S57B].

CONCLUSION

This study illustrates how Ohio's strategy to prolong the operations of coal plants, undertaken in the name of protecting workers and communities, does not in reality address the needs of workers and communities to secure their longer-term economic prospects. In this case study, the argument that ratepayers are obligated to pay a fair return for the investments undertaken by utilities does not apply. The companies signed onto these contracts in a restructured retail market (and not a regulated market with approval from the public utility commission on their investments). These companies signed onto imprudent electricity procurement contracts with these uneconomic coal plant and at the same time, these companies are linked through corporate ties to companies that own of those coal plants. Indeed, in the face of these facts, Michigan Public Service Commission has warned that it would not approve utilities in Michigan recovery of cost from ratepayers that exceed the cheaper market costs of electricity.

By contrast, the public utility commission and legislators in Ohio have imposed costs on ratepayers while benefiting shareholders of utility companies. Meanwhile, they are not cushioning the immediate costs to local communities. As noted earlier, the imposition of costs to ratepayers to buoy the Kyger Creek Power Plant did not stem the devaluation of that uneconomic plant.¹⁸⁶ The local community suffered the reduction of property tax revenue from the plant and the loss of revenue adversely affected local services.¹⁸⁷ Arguably, if the strategy chosen was to direct payments from ratepayers (even at the fraction of the costs of coal plant bailout) to provide support economic diversification of coal plant reliant workers and communities, those investments could have set the stage for the longer term economic diversification of those communities. Colorado provides an example of the approach of directly assisting local communities reliant on power plants with these longer-term goals.

Ohio legislators' strategies that not only shielded uneconomic coal plants but blocked the growth of renewable energy—one avenue for economic revitalization in host communities—and efforts at energy efficiency, which would have reduced the long-term electricity costs for ratepayers. These strategies raise electricity costs, block cheaper electricity generation, and make Ohio, including its manufacturing sector, less competitive compared to surrounding Midwestern industrial states. Given all these costs, this paper supports the argument by consumer, environmental and

186. SCHLISSEL, *supra* note 33, at 2–3.

187. DAVID SCHLISSEL, BAILOUT BILL A BONANZA FOR FIRSTENERGY SOLUTIONS, BUT A BOONDOGGLE FOR OHIO CONSUMERS 7 (2019).

environmental groups for the repeal of provisions for the bailout of these two uneconomic coal plants. As of April 2022 (the time of writing), Ohio legislators have not enacted the proposed SB 117 which would repeal those subsidies.

This paper has focused on describing the pathway chosen by regulators and legislators and the deficiencies of this pathway. The Attorney General of Ohio, the Office of Consumer Counsel, consumer, industrial and environmental groups, as well as a number of Ohio legislators have played and continue to play an important role to advocate for the interest of ratepayers, local communities, and Ohioans to push for a strategy that prioritizes these interests. The criminal investigations surrounding HB 6's bailout of nuclear plants raise the larger question unaddressed by this paper, i.e., the extent to which utilities influence on the regulatory and legislative process, and how that influence can be curbed to ensure regulators and legislators prioritize the benefits to Ohioans.