

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE OF OHIO <i>ex rel.</i>	:	
Dave Yost, Ohio Attorney General,	:	
	:	
Plaintiff,	:	
	:	Case No. 20 CV 007386
v.	:	
	:	
ENERGY HARBOR CORP., et. al.,	:	JUDGE DANIEL R. HAWKINS
	:	
Defendants.	:	
	:	

**BRIEF FOR AARP & AARP FOUNDATION AS AMICI CURIAE
IN SUPPORT OF PLAINTIFF’S MOTION
FOR PRELIMINARY INJUNCTION**

AARP and AARP Foundation strongly urge the Court to grant the State of Ohio’s Motion for Preliminary Injunction. Plaintiff’s underlying complaint alleges that Energy Harbor Corporation’s former parent—through corrupt practices alone—procured over \$1 billion in nuclear subsidies for itself in House Bill 6 (“HB 6”), to be funded by tariffs on Ohio residential and business electricity bills.¹ AARP vigorously opposed this measure, emphasizing especially the adverse impact on low-income older Ohioans on fixed incomes.² Utilities comprise a high proportion of such citizens’ household budgets, and many Ohio citizens over 65 find it a challenge to pay their existing bills.³ It would be unjust in the extreme for such citizens to be paying added tariffs for nuclear subsidies while the legitimacy of that requirement is under such

¹ “Energy Harbor” herein refers collectively to the Defendants in this case: Energy Harbor Corp. and its wholly owned subsidiaries Energy Harbor LLC and Energy Harbor Nuclear Generation LLC.

² *AARP Ohio Written Testimony on H.B. 6*, S. Energy and Pub. Utils. Comm. (Ohio June 19, 2019), <https://bit.ly/3m1Nka5>; Letter from AARP Ohio to Gov. DeWine (July 23, 2019); Letter from AARP Ohio to Ohio General Assembly Leadership (Nov. 10, 2020).

³ Half of Ohio’s citizens over 65 report incomes below \$23,100, and 8.45% report incomes below the federal poverty level. *AARP DataExplore*, AARP Pub. Pol’y Inst., <https://bit.ly/33UnRsR>.

serious question in this lawsuit. Nor would it be fair in this circumstance to force Ohio's age 50+ small-business owners to subsidize a publicly traded corporation slated to turn a profit of \$515 million this year.⁴

The State's requested preliminary injunction would be a critical first step in halting this inequity by enjoining consumers' first payment of \$150 million while the Court determines the legitimacy of the tariff. The injunction also would be timely, preventing the gross injustice of older Ohio residents and business owners having to pay such subsidies while fighting for their financial lives in the midst of a pandemic. Without question, this preliminary injunction would serve the public interest.⁵

I. The Court Should Enjoin the Forced Payment of \$150 Million to Avoid the Imposition of Tariffs Having No Demonstrated Benefit

On January 1, 2021, \$150 million per year will start being removed from the pockets of Ohio residents and business, to be collected into, and, as soon as April 2021, be paid out of, public funds to Energy Harbor. Plaintiff, importantly, alleges that Ohio law does not permit a refund of the tariff in this circumstance. Compl. Seeking Prelim. & Permanent Inj. ("Complaint") ¶¶ 88-91 (citing *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, ¶ 23 (construing R.C. 4905.32)). Injunctive relief is therefore necessary to stop at least the distribution, and ideally the collection, of HB 6's tariff.

⁴ See *Hearing on S.B. No. 346 Before the S. Energy and Pub. Utils. Comm.*, 133rd Gen. Assemb. (Ohio Nov. 10, 2020) (Testimony of Judith Lagano of NRG Energy, Inc.), <https://bit.ly/3gAWWak> [hereinafter *Testimony of Judith Lagano*] (stating that FES/Energy Harbor in its May 2020, 2020-2022 Financial Outlook projected \$515 million, \$585 million, and \$645 million in profit for next 3 years).

⁵ Generally, when weighing whether to grant a preliminary injunction, the court must consider whether (1) there is substantial likelihood that the plaintiff will succeed on the merits, (2) the plaintiff will suffer irreparable injury, (3) the preliminary injunction could harm third parties, and (4) the public interest would be served. See, e.g., *Vineyard Christian Fellowship of Columbus v. Anderson*, 2015-Ohio-5083, 53 N.E.3d 910 (Ohio Ct. App.).

The State properly argues that a major public interest supporting the injunction is sending the message that public corruption does not pay. Pl. Mem. in Supp. of Mot. for Prelim. Inj. “The public is greatly interested in not allowing a \$60 million public corruption, which has led to two guilty pleas, the removal of the Speaker of the Ohio House, the termination of multiple executives at a large publicly traded company, the altering of public debate and public priorities about the source of energy generation in Ohio and severe reputational harm to Ohio’s government The public interest would be served by not permitting Energy Harbor to profit \$150 million per year from the illegal corruption.” *Id.* at 11-12.

Amici respectfully submit there is a further related public-interest consideration: that the payment lacks any demonstrated economic justification. The Complaint alleges that, as a result of the corrupt practices, the legislature did not meaningfully analyze the true economic benefit to consumers of the nuclear subsidy:

In a few short months, the Enterprise had taken an idea that received no serious consideration during the previous General Assembly and transformed it into a top legislative priority on par with the state operating budget. The reasons for this are clear: with a billion-dollar corporate bailout at stake for FirstEnergy, and millions of dollars of political influence at stake for Speaker Householder and his cohorts, H.B. 6 was the was central purpose of the Enterprise.⁶

So it was not surprising that the bill that emerged offended the principles of just and fair utility ratemaking. For one, HB 6 violates the major tenet that energy company shareholders, rather than ratepayers, should bear the risk of investments. *See Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (explaining in analogous context of federal ratemaking that the setting “of ‘just and reasonable rates’ involves a balancing of the investor and consumer interests.”). AARP in its comments on HB 6 repeatedly emphasized that the bill

⁶ Compl. ¶ 39.

constituted an unjustified subsidy for a profitable company's shareholders.⁷ The State's own consumer watchdog, the Ohio Consumers Council, also testified that HB 6 offended this principle: "[F]undamentally the bill remains a bailout of aging nuclear power plants, at public expense, for bankrupt FirstEnergy Solutions and its big Wall Street creditors. Even in its improved form, the bill will transfer about a billion dollars in above-market charges from Ohio families and businesses to FirstEnergy Solutions' investors."⁸ That lack of demonstrated benefit, alone, justifies the issuance of a preliminary injunction.

II. A Further Consideration Is the Gross Injustice of Older Citizens and Small Business Owners Making These Non-Refundable Payments in the Midst of the Pandemic

The extreme inequity of Ohio families having to transfer wealth to Energy Harbor in the midst of these corruption allegations becomes even clearer when one considers the difficulty many families face in paying their existing utility bills. According to the U.S. Energy Information Administration, "[i]n 2015 an estimated 3.3 million households could not afford to heat their homes with heating fuel, electricity, or natural gas, and as a result they had their fuel deliveries discontinued or their natural gas or electricity disconnected."⁹ A May 2020 study showed almost 13% of respondents indicated that they could not pay an energy bill the prior

⁷ E.g., AARP Ohio Written Testimony on H.B. 6, S. Energy and Pub. Utils. Comm. (Ohio June 19, 2019), <https://bit.ly/3m1Nka5>.

⁸ Testimony of the Office of the Ohio Consumers' Council delivered by Michael Haugh (June 29, 2019), <https://bit.ly/3a0jGzC> [hereinafter *Ohio Consumers' Council Testimony*].

⁹ *One in three U.S. households faces a challenge in meeting energy needs*, U.S. Energy Info. Admin. (Sept. 19, 2018), <https://bit.ly/2JZnmGG>.

month, and 4.4% had their service disconnected.¹⁰ Further, 22% of respondents had to reduce or forgo expenses for basic household needs, such as medicine or food, to pay an energy bill.¹¹

Older citizens are an especially vulnerable group in this respect. Since many families live on a fixed income during their retirement years, the debt burden often becomes unmanageable. Increasing costs for medical care and housing, and unexpected events, such as death of a spouse, often stretch already tight budgets.¹² And, according to an AARP analysis of federal data, “[e]xpenditures on utilities as a percentage of average total expenditures in 2013 increased with age, from 6.9 percent for consumers under age 50, to 7.3 percent for consumers ages 50 to 64, and to 8.4 percent for consumers ages 65 and older.”¹³

The pandemic has only worsened the economic challenges faced by these older citizens, many of whom are struggling even to feed their families.¹⁴ As of December 7, 2020, there were 475,024 confirmed cases of COVID-19 in Ohio, with 29,233 hospitalizations and 6,959 deaths.¹⁵ The number of unemployed has increased by 86,000 Ohioans over the past twelve months.¹⁶ Not surprisingly, the pandemic’s challenges have, for many Ohioans, also translated into an inability to pay their existing utility bills. As of September 27, at least one Ohio utility provider had reported that 22,591 residential customers and 1,452 non-residential customers in Ohio and

¹⁰ *Energy is a basic need, and many Americans are struggling to afford it in the COVID-19 recession*, The Conversation (July 30, 2020, 8:19 A.M.), <https://bit.ly/36V0SQ1> [hereinafter *The Conversation Study*].

¹¹ *Id.* See also Diana Hernandez, *Understanding ‘energy insecurity’ and why it matters to health*, 167 Soc. Sci. & Med. 1-10 (2016).

¹² See William E. Gibson, *Far More Older Americans Are Going Bankrupt*, AARP (Aug. 6, 2018), <https://bit.ly/3qDjJqU>.

¹³ *Utility Expenditures by Older Consumers*, AARP Pub. Pol’y Inst. (Mar. 2015), <https://bit.ly/3glvfm1>.

¹⁴ *The Conversation Study*, *supra* note 10.

¹⁵ *Coronavirus (COVID-19)*, Ohio Dep’t of Health, <https://bit.ly/3n6m2jO>.

¹⁶ *Ohio and U.S. Employment Situation (Seasonally Adjusted)*, Ohio Dep’t of Job and Family Servs. (Nov. 20, 2020), <https://bit.ly/2JXh3nd>.

Kentucky had not made a payment in 60 days, more than triple the combined 7,724 residential and business customers who were 60 days past due on April 1.¹⁷

AARP's and AARP Foundation's constituencies also include the thousands of small-business owners in Ohio struggling to survive in the pandemic. Over half of small-business owners in the United States are age 50-plus, according to estimates.¹⁸ Those 50-and-above Ohio business owners, too, are being asked to contribute toward Energy Harbor's subsidies, many at uncapped electricity rates.¹⁹ Nationwide, it is small businesses such as these that have borne the brunt of employee job loss since March 2020, with a decline of more than 17 percent.²⁰

In sum, it would be grossly inequitable for Ohio's older residents and small-business owners to have to subsidize Energy Harbor's shareholders in the present circumstances. This is especially true given the contrasting financial condition of the company benefiting from the corrupt practices alleged here. From the start, opponents of HB 6, including the Ohio Consumers Council, had warned that HB 6 was requiring a needless subsidy of profitable companies.²¹ Energy Harbor's related company, FES/Energy Harbor, later confirmed the truth of this assertion, projecting it would earn profits of \$515 million, \$585 million, and \$645 million in 2020, 2021, and 2022, respectively.²² It would be profoundly unfair for Ohio ratepayers to have to pay even a penny to Energy Harbor in this circumstance. As Plaintiff and other amici have

¹⁷ Randy Tucker, *Duke Energy set to resume power shutoffs Monday after months-long moratorium*, The Cincinnati Enquirer (Oct. 1, 2020, 9:48 P.M.), <https://bit.ly/33SufAL>.

¹⁸ *The State of Small Business in America 2016*, Babson College, June 2016, at 8, <https://bit.ly/39Rg9mQ> ("On age makeup, a slight majority of business owners are 50, years old or older (51%), followed by 33% of owners in the 35-49 age group, and 16% in the under-35 age group.").

¹⁹ H.B. 6 Fiscal Note & Local Impact Statement, Ohio Legis. Serv. Comm'n, at 3 (no cap for businesses that are not defined as residential or large commercial), <https://bit.ly/2VMVDLV>.

²⁰ *Small Business Facts: Small Business Employment Plummet*, U.S. Small Business Admin. (June 1, 2020), <https://bit.ly/3qB6xTb>.

²¹ *Ohio Consumers' Council Testimony*, *supra* note 8, at 5.

²² *See Testimony of Judith Lagano*, *supra* note 4.

demonstrated, the Court should suspend the payment of these tariffs while the Court adjudicates the legality of the requirement and the need for a Permanent Injunction.

CONCLUSION

Amici AARP and AARP Foundation urge the court to enter a Preliminary Injunction order to halt the payment of \$150 million to Energy Harbor commencing January 1, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December 2020, the foregoing Brief of Amici Curiae was filed with the Court through the e-filing system, which shall provide notice of this filing to counsel for all parties.

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