TESTIMONY BEFORE THE HOUSE PUBLIC UTILITIES COMMITTEE
IN OPPOSITION TO 132-HOUSE BILL 247 UTILITY LAW - AS INTRODUCED
By AMY SPILLER, DEPUTY GENERAL COUNSEL FOR DUKE ENERGY

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Introduction

Chairman Cupp, Vice Chair Carfagna, Ranking Member Ashford, and members of the House Public Utilities Committee, my name is Amy Spiller and I am Deputy General Counsel for Duke Energy. My main focus is on the Company's legal and regulatory business before the state government in Ohio and specifically the Public Utilities Commission of Ohio (PUCO). Thank you for the opportunity to provide opponent testimony on House Bill 247.

The existing laws of the state of Ohio should be altered or new laws enacted only when there is an admitted inequity to correct or a void to fill. But House Bill 247 does neither. And this is because there is no present inequity or void. As such, there is simply no need for the bill. In fact, enactment of this legislation, as proposed, would disrupt the balance of the state's regulatory paradigm, drive up costs for all utility customers, create inequities, bar legitimate participation in competitive markets, and invade the province of the Federal Energy Regulatory Commission (FERC). Duke Energy Ohio thus opposes House Bill 247 and urges the members of this committee to refrain from favorably recommending the bill for passage by the full House of Representatives.

Through my comments, I do not intend to address every aspect of this bill. Instead, I focus on those issues that are of greatest concern.

House Bill 247 means higher costs for all utility customers.

Retroactive Ratemaking

No state in the country recognizes that which is being pursued in this legislation – asymmetrical, retroactive ratemaking. Ohio has long-since adhered to the prohibition against such a practice, for very good reasons.

Utility ratemaking is a legislative function that has been delegated to the PUCO. This means that when the PUCO issues an order establishing rates, it carries the weight of law. And as the Legislature directed, a public utility may only charge those rates approved by the PUCO.[1] To do otherwise would be charging an unlawful rate. As our statutes confirm, a PUCO-approved rate remains a lawful rate unless and until it is changed by the Ohio Supreme Court.

Because utility rates are, in effect, laws, adjustments to rates, like changes in other laws, may only be prospective in nature. In the case of utility rates, this means that there is no settlement of the costs incurred between the time that a company files for cost recovery and the time of a PUCO order approving that recovery. Further, the utility company is barred from unilaterally adjusting rates to recover additional dollars from customers when its costs are later increased or when the implementation of new rates is for some reason delayed. Similarly, customers are not entitled to refunds if an approved rate is later reduced. This customer-utility balance, rooted in our legislative, regulatory, and judicial systems, provides rate predictability that benefits all stakeholders.

[1] Section 4905.32, Revised Code.

The wisdom of the Legislature in crafting the current approach was recognized by the Ohio Supreme Court and has been cited in other states during the six decades following Ohio's landmark decision in *Keco Industries, et al. v. The Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (1957). In *Keco Industries*, the Supreme Court recognized the value to all parties of avoiding additional utility costs due to the injection of unnecessary risk into ratemaking and it affirmed that ratemaking was not a retroactive exercise.

For the company's part, maintaining access to capital under favorable borrowing conditions also helps keep costs low. To this end, financial rating agencies need to know that any later change in established rates will not carry a retroactive effect – a factor that weighs into their overall rating of a regulated utility. And why does this matter to customers? Because these ratings influence the cost to the utility for accessing capital markets, of entering into financing arrangements necessary to provide safe, reliable, and affordable utility services. These costs are paid by customers. Needlessly injecting uncertainty in the ratings process by upsetting the current structure will, in the end, increase the burden on customers.

<u>Increased Appeals of PUCO Orders</u>

Utility operations are capital intensive and rate cases are generally protracted and expensive proceedings, for both utilities and the customers they serve. House Bill 247 invites additional costs because it encourages every customer, customer group and advocacy group to appeal every PUCO decision. Indeed, there is no downside to not appealing, regardless of the merit, or lack thereof, of the legal challenge. But clogging up the

Court's docket with all of these *additional* cases will undeniably extend the lifespan of *every appeal*.

Under this bill, where the Court determines that the PUCO erred in authorizing cost recovery, dollars would be refunded to customers. But the proposed legislation is not symmetrical. It does not allow a utility company that has been denied cost recovery to recoup such costs from its customers. House Bill 247 disrupts the balance that has been deliberately created by the General Assembly, administered by the PUCO, and upheld by the Court. Significantly, there is no need to create and codify such an imbalance as proposed in House Bill 247, as current law already provides a remedy.

Others have shared their view of current law, contending that it allows a utility to keep what it has collected from customers, even if the Supreme Court later determines the charges were improper. But this view is incomplete. It ignores the statutory right of every appellant to seek and obtain a stay of a PUCO order.[2] Such a stay would prevent the collection of rates during the pendency of the appeal and is an available remedy to parties claiming a grievance. The Ohio Supreme Court stated as much in the *Keco Industries* decision when it held that the General Assembly had provided a method whereby rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court.[3] So, with respect to retroactive ratemaking, there exists neither an inequity to be corrected nor a void to be filled by House Bill 247.

[2] Section 4903.16, Revised Code.
[3] *Keco Industries, et al., v. The Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (1957).

House Bill 247 removes options for utilities to provide safe, reliable, and affordable service. It is an anti-competitive, competition bill.

Elimination of Electric Security Plan Option

Proponents of House Bill 247 focus a great deal of their support on the elimination of electric security plans, or ESPs. In doing so, they claim fault with this rate structure, arguing that it has merely served to allow for the recovery, by every electric utility, of unlawful charges. This assertion is patently false and ignores the substantial benefits that the ESP structure has afforded customers and customer groups alike.

Recall Senate Bill 221 – the law that introduced the ESP – and the regulatory environment that existed at the time.

In 2008, Ohio's electric utilities were operating under rate stabilization plans that had been encouraged by the PUCO because of the concern, at that time, of the impact of market rates on customers' bills. Under these rate stabilization plans, the electric utilities were directed to retain direct ownership of their legacy generating assets. Senate Bill 221 created two different structures for the provision of the standard service offer for generation service. The first – a market rate offer, or MRO – addresses only the pricing and supply of generation service. Importantly, for those electric utilities that still owned generation in 2008, there was a statutorily imposed glide path to full market prices for generation supply. Under this dictate, it would take at least five years to complete the transition to full market prices and, in that five-year period, the utility would be permitted to recover costs associated with its generation used to serve customers.

On the other hand, the ESP structure provides no such restriction and, consequently, it was the ESP that provided non-shopping customers with access to market prices far faster than what would have been allowed under the transition to a MRO.

The MRO structure, standing alone, does not provide for necessary system investments, programs to advance economic development, or job retention initiatives. The MRO statute does not permit the utility to propose or the PUCO to approve structures to provide stability and certainty with regard to retail electric service. Thus, a utility operating under an MRO would still be required to file a rate case, or series of rate cases, to recover necessary system investments – legitimate investments to maintain or improve the reliability of its distribution system. But there would be no opportunity, under a distribution rate case, for the PUCO to authorize rate structures or mechanisms necessary to provide certainty and stability in respect of retail electric service. This results in the need to file multiple, expensive, rate cases to address all the issues at hand.

Conversely, the ESP structure, as approved by the General Assembly, provides the PUCO with the necessary authority to enable proactive investments that enhance and modernize the distribution grid. The ESPs also have been used to promote economic development. And, as mentioned, for Duke Energy Ohio's customers, the ESP was the vehicle that provided full access to market prices for generation service on an expedited basis.

There can be no dispute on these points. Indeed, according to 31 stakeholders and signatories to a 2011 settlement agreement, Duke Energy Ohio's approved ESP:

- Was quantitatively better than the MRO
- Allowed customers to benefit from a fully competitive market as soon as practicable
- Encouraged and supported the development of competitive retail markets in Ohio
- Supported economic development
- Provided low-income assistance
- Expanded wholesale competition
- Mandated divestiture of Duke Energy Ohio's generation assets

It has been inferred that ESPs have contributed to significantly higher rates since their inception. But this suggestion is quickly dismissed by comparing price changes since that time to inflation.

Since 2008, when the MRO and ESP structures were first introduced, the Consumer Price Index has increased about 13.6%. But in that same time period, Duke Energy Ohio's residential customers have seen their typical bills go up by 7.4%, only about half the rate of inflation. Importantly, however, Duke Energy Ohio's average residential customer is paying less today than they were in 2010 – while the company has operated under an ESP. So, the argument that ESPs are causing exorbitant price increases is a fallacy.

It is also critical to acknowledge that Duke Energy Ohio's customers would be paying the same rates today, whether the Company functioned under an ESP or an MRO. Whether taking generation service from Duke Energy Ohio or a competitive supplier, all customers pay market-based rates for generation supply. And all customers pay unavoidable charges, which for Duke Energy Ohio customers are charges for distribution investments, distribution storm costs, lost distribution revenues, and statutorily imposed mandates. These charges are recoverable. They reflect necessary investments and costs related to the provision of distribution service or compliance with existing law. Thus, whether Duke Energy Ohio was operating under an ESP or an MRO, the costs it currently recovers from customers would, on a total bill basis, be the same.

There is no legitimate need to eliminate the ESP and doing so prematurely could have unintended negative outcomes for customers and the State.

Anti-Competition Dichotomy

House Bill 247 is anti-competitive. It does not do that which it contends – it does not promote competition. As proposed in this bill, Section 4928.28 and its related sections are quite troubling in that they seek to restrict not only the state's regulated utilities but their unregulated affiliates from owning any generation in the state of Ohio — competitive or otherwise — as well as offering competitive products and services. Doing so raises Takings Claims and Equal Protection Claims. But for what purpose? Why ban any entity from owning and operating new generation in the state? Why hamper development in Ohio? Why deprive customers of choices for products and services that help them manage their energy usage and enhance their experience?

Given the fluctuation in commodities markets and the uncertainties of a transitioning federal policy situation, limiting options just doesn't seem right. Existing law properly ensures that there is no undue advantage afforded an entity simply because of its affiliation with an Ohio electric distribution company. These laws, and the PUCO regulation promulgated thereunder, have worked well to ensure a fair and level playing field.

Now, however, House Bill 247 seeks to erect a significant barrier to competition. It would restrict the competitive field and deny the opportunity for more choices and, ultimately, truly competitive pricing. Instead of precluding any participant in the energy industry from investing in the state and its customers, Ohio should find ways to encourage such investment under the structure of current law.

House Bill 247 would have the PUCO encroach upon the jurisdiction of the federal government.

Market Power Overreach

House Bill 247 proposes that the state supersede federal authority with respect to mitigation of market power issues, thereby inviting legal challenges and associated litigation costs. The legislation presumes an existing problem in Ohio. Yet, to the extent a wholesale market power issue does exist, resolution of that issue resides squarely within the exclusive jurisdiction of the FERC and the General Assembly of Ohio cannot control market power issues. Attempts to regulate market power issues in the wholesale markets will be seen as an overreach by the state and certainly come under legal challenge.

Conclusion

In summation, there is no need for this legislation; there is no inequity to correct or void to fill. House Bill 247 instead would put Ohio on a perilous path of uncertainty and increased costs. It would do so by injecting unnecessary risks, introducing inequitable solutions that contradict decades of precedent, and barring true competition. House Bill 247 should not become law.

Thank you for the opportunity to provide this testimony and for your attention to Duke Energy Ohio's position on these important issues.