BEFORE THE
PUBLIC UTILITIES COMMITTEE
OF THE OHIO HOUSE OF REPRESENTATIVES

REPRESENTATIVE ROBERT CUPP, CHAIRMAN

HOUSE BILL 247
PROPONENT TESTIMONY
OF

THE OHIO MANUFACTURERS' ASSOCIATION

BY
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Chairman Cupp, Vice Chairman Carfagna, Ranking Member Ashford, and members of the House Public Utilities Committee, my name is Kim Bojko. I am a partner with the law firm Carpenter Lipps & Leland LLP, and I lead the firm's energy and utilities practice.

I am testifying today on behalf of The Ohio Manufacturers' Association (OMA) in support of House Bill 247 (HB 247), which will provide much needed consumer protections for manufacturers and will enhance the competitive energy markets. OMA is a non-profit trade association with over 1,300 member companies of all different sizes and energy use profiles, most of which are Ohio retail customers.

I will address some of the concerns or claims that the Ohio utilities raised in testimony prior to the holidays. First, to be clear, generation is a competitive service that the regulated distribution utilities are not authorized to supply directly to consumers (even the default service for non-shopping customers is competitively bid and supplied by electric suppliers). Ohio's utilities provide distribution services to customers. Under deregulation, the Ohio distribution utilities cannot offer and compete on generation service as they were required to spin off their generation assets and not own those assets unless the assets are needed to support the distribution system.[1] HB 247 does not change that prohibition.

SB 3 and SB 221 required the Ohio regulated utilities to be fully separated from their unregulated affiliates who own competitive generation and who offer competitive retail electric services. Unfortunately, the bright line separation between regulated and unregulated has been blurred and is no longer recognizable. The lack of vigilant adherence to the corporate separation rules for many years has resulted in steady erosion of the intended goals of deregulation and the corporate separation mandates. The ESPs have been used to foster the erosion and HB 247 is needed to end this inequity.

[1] Although the PUCO has ordered the regulated utilities to explore ways to exit the OVEC obligation, the OVEC generation assets are still owned by three of the Ohio utilities.

For example, Ohio's regulated utilities have used or attempted to use customer dollars to subsidize their unregulated affiliates. Contrary to the Ohio utilities' claims, other states have prevented similar subsidies by protecting or restricting the activities of the regulated utilities and prohibiting customer funding from being used to support unregulated affiliates. Some states have utilized "ring-fencing" to operationally, structurally, and financially isolate regulated utilities from their unregulated parent and affiliates.[2] This is not anticompetitive; it is a strategy used to protect customer dollars and the financial health of regulated utilities. The provision in HB 247 regarding the Ohio regulated companies' affiliates is another way to protect customer dollars and addresses an inequity by leveling the playing field. Other generator owners that do not have regulated affiliates cannot use ratepayer monies to fund the generators' activities. Without protections in place, Ohio's regulated utilities can and have used customer dollars to fund unregulated activities by their affiliates. Placing restrictions around the Ohio regulated utilities falls within the State's purview and in no way infringes on the jurisdiction of the federal government. HB 247 does not ban "any entity from owning and operating new generation in the state" as alleged by the Ohio utilities,[3] it only bans Ohio regulated utilities from being affiliated with the owners of generation capacity in Ohio. The parent companies may have an ownership interest in a company that owns

[2] States have implemented ring-fencing both legislatively and through their state utility commissions. For example, Wisconsin enacted several statutes governing affiliate dealings with energy utilities to effectuate successful ring-fencing strategies and requires the Public Service Commission of Wisconsin to audit public utility holding companies and report its findings to the state legislature for review. See e.g., Wis. Stat. § 196.795. The Public Service Commission of Maryland approved ring-fencing measures in response to an affiliate risk issue affecting a state utility company. See *In the Matter of the Current and Future Financial Condition of Baltimore Gas and Electric Company*, Maryland PSC Case No. 9173, Phase II, Order No. 82986 (Oct. 30, 2009). The Public Utilities Commission of Oregon instituted ring-fencing measures and approved the assessment of fines and penalties against a parent holding company and its wholly owned subsidiary, an Oregon public utility, for violations of the ring-fencing measures. See *In the Matter of the Application of ENRON CORP for an Order Authorizing the Exercise of Influence Over Portland General Electric Company*, Oregon PUC Docket UM 814, Oder No. 97-196, Stipulation §21. Similarly, the New Jersey Board of Public Utilities adopted affiliate rules regarding annual audits assessing company compliance with ring-fencing measures and penalties for violations. See *Final Interim Affiliate Relations, Fair Competition and Accounting Standards and Related Reporting Requirements*, adopted *In the Matter of the Promulgation of Standards by the Board Pursuant to the Provisions of the Electric Discount and Energy Competition Act of 1999, P.L. 1999, C.23*, NJ PUC Order EX99030182 (March 15, 2000).

[3] Duke Opponent Testimony on HB 247 at 8 (December 12, 2017).

generation or an affiliated company may own generation in another state, but generation assets in Ohio simply cannot be affiliated with the Ohio regulated entity. Remember, Ohio regulated utilities are already banned from owning generation and have been since the end of the market development period—that prohibition was enacted in 1999 through SB 3.

HB 247 furthers many of the original objectives of the deregulation bill passed in 1999. It promotes competitive electric markets and ensures effective competition by avoiding anticompetitive subsidies. R.C. 4928.02. If HB 247 is simply furthering many of the original objectives of the deregulation bill, why are we here? Why is HB 247 necessary? Among other reasons, HB 247 is necessary to remove a safety net that was put in place in 2008, called electric security plans or ESPs. ESPs were created in SB 221 as a customer safety net at a time when markets, at least in AEP's service territory, had not yet fully developed. In 2008, OMA absolutely supported the customer safety net as a temporary measure to protect customers while the competitive retail energy market developed. But 10 years later, the market has developed and competition is working and saving customers billions of dollars. The reasons stated for needing the safety net no longer exist and it is time to move forward and allow the markets to work without government intervention and without above-market charges imposed by regulated utilities.

Also, back in 2008 when this safety net was supported, OMA (and I doubt others) never envisioned that the utilities would propose and the Public Utilities Commission of Ohio (PUCO) would approve the number and level of above-market charges through the ESPs. And in all fairness to the customer groups that supported the temporary measure, the Supreme Court of Ohio has even ruled that many of the charges proposed and granted to the Ohio utilities are beyond the scope of what is allowed under the ESP provisions embedded in SB 221. The Court has deemed these charges to be unlawful. OMA could not have possibly envisioned that unlawful charges would have been placed on customers' bills when supporting a safety net that was intended to protect customers as the market developed. Eliminating the very thing that is authorizing the utilities to

collect excessive charges (many of which have been later deemed unlawful) from customers is good public policy.

Given the magnitude of the above-market charges that have been collected from customers to date that have later been deemed to be unlawful by the Supreme Court of Ohio (collected over a combined $856 million[4]), HB 247 offers a solution—a way to put money back in the pockets of customers if the charges are later deemed unlawful. If the Ohio utilities are authorized to collect charges that are later deemed to be unlawful by the Court, HB 247 requires the money to be refunded to customers. Charges collected by utilities that are deemed improper should not be kept by the Ohio utilities as a windfall. If the law is enacted and the utilities are put on notice that the charges will be collected from customers subject to refund, contrary to the utilities' claims, there is no retroactive ratemaking. The "subject to refund" tool has been previously utilized by the PUCO to protect consumers and it was not deemed to be retroactive ratemaking.

Why is a stay insufficient? Let's take the example of a recent Supreme Court of Ohio decision where the Court found that the Commission unlawfully allowed AEP to collect approximately $500 million in provider of last resort charges, $368 million of which AEP collected prior to the Court's determination that they were unlawful. Therefore, in order for a customer to obtain a stay from the Court, they could be required to post a bond for the full amount of dollars at issue in the case. The customer (appellant) does not just post a bond for the amount of money that it would owe under the utilities' charge, the customer may be required to post a bond sufficient to cover the entire amount of any alleged damages resulting from the stay, even though the customer would only be required to pay a fraction of that amount if the appeal is ultimately unsuccessful. If the customer cannot post such a bond itself, it will need to obtain one from a third party. Third parties will require the customer to pay an annual premium, often between 1 and 2 percent of the total amount of the bond. Thus, for the

[4] In 2009, AEP customers lost on out on $63 million in a case involving "over collection." In 2014, AEP customers lost out on $463 million in a case involving "Provider of Last Resort Charges." In 2016, DP&L customers lost out on over $330 million in a case involving a decision on the Stability charges.

AEP appeal, if a customer challenging the charge were required to post a bond of approximately $500 million, that customer might be required to pay a premium of between $5 million and $10 million during the first year the appeal is pending plus a pro-rated amount for increments of a year after the first year that the appeal remains pending. Some appeals have remained pending for approximately three years. Requiring one customer, a group of customers, or non-profit trade associations (like OMA) to post a bond of this magnitude is unfair, impractical, and unreasonable.

Even if the Supreme Court of Ohio decided some lesser amount of bond would suffice, requiring one customer, a group of customers, or non-profit trade associations to pay this amount is still unreasonable and impractical. In a recent case, without explanation, the Court required appellants to post a bond equal to approximately 2.5% of the total amount at issue on appeal. If the Court would have required a 2.5% bond of the $500 million in the AEP case, customers would have been required to post a bond of $12.5 million. It would likely cost between $125,000 and $250,000 for an annual premium for that bond during the first year the appeal is pending plus a pro-rated amount for increments of a year after the first year that the appeal remains pending.

Contrary to the arguments of the utilities, HB 247 is not taking away the PUCO's responsibility to set the electric distribution rates for the Ohio electric utilities that are regulated. HB 247 is not attempting to change the hearing process or eliminate public due process for interested parties in the setting of distribution rates. In fact, HB 247 encourages traditional rate cases before the PUCO and eliminates single issue ratemaking and above-market charges that have been allowed through the ESP process. OMA supports traditional ratemaking for the setting of distribution base rates and welcomes the robust, public ratemaking process where an Ohio utility has to come to the PUCO and open its books and show "in detail all of its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable." R.C. 4909.18(B).

Also contrary to the opponents' claims, HB 247 does not eliminate any economic development or job retention tools that the General Assembly has given to the PUCO to assist customers. HB 247 does not prohibit or eliminate reasonable arrangements authorized by SB 221 set forth in R.C. 4905.31. Pursuant to its statutory directive, the PUCO created robust rules governing various types of reasonable arrangements, including economic development arrangements. Those rules are utilized regularly and can be located in Chapter 4901:1-38 of the Ohio Administrative Code.

The Ohio Manufacturers' Association strongly believes that above-market charges imposed on consumers and manufacturers through the ESP process are not consistent with competitive markets and are not good for Ohio – in either the short term or the long term. For these reasons, the OMA and many other groups firmly support the elimination of ESPs and support the other provisions of HB 247 that eliminate inequities and protect customers. At the last hearing, you heard that HB 247 was solely an OMA effort. It is not. HB 247 is supported by a broad coalition of customer groups (see attached), including AARP, Ohio Farm Bureau, The National Federation of Independent Business/Ohio, Northeast Ohio Public Energy Council (NOPEC), Office of the Ohio Consumers' Counsel, Ohio AgriBusiness Association, The Ohio Cast Metals Association, Ohio Chemistry Technology Council, Ohio Hotel & Lodging Association, and Ohio State Grange. You have also heard testimony in support from several other non-customer organizations.

Chairman Cupp and members of the committee, this concludes my prepared remarks. Thank you for your kind attention. I would be happy to respond to any questions that you may have.

# # #

Electricity Ratemaking Reforms To Protect Consumers

The successes of Ohio's transition to a competitive market for electricity generation are now documented. They include billions of dollars in savings for standard-offer consumers, governmental aggregation and other shopping consumers, numerous robust new natural gas-fired generation plants planned and coming online, and more than adequate reserve margins for reliability as determined by the Regional Transmission Organization, PJM Interconnection.

Nonetheless, there are some ratemaking provisions in current law that are anti-competitive or unfair—and bad for consumers and Ohio's economy. A broad-based coalition of electricity consumers is working with legislators to resolve the concerns outlined in this document and thereby improve outcomes for consumers and for Ohio. The legislative solution we seek is enactment of House Bill 247 (Romanchuk, R-Ontario), which was introduced in the Ohio General Assembly on May 24, 2017.

PROBLEM #1: Customers Are Denied Refunds for Charges That Are Later Determined to Be Improper.

Current law allows a utility to keep what it has collected from customers, even if the Supreme Court of Ohio determines the charges were improper.

SOLUTION: House Bill 247 would allow refunds to customers for all charges that are later found to be improper by the Supreme Court of Ohio or other authority.

PROBLEM #2: Utility Charges to Customers Under Electric Security Plans (ESPs)

The ESPs, allowed in the 2008 energy law (SB 221), are enabling utilities to request of the Public Utilities Commission of Ohio (PUCO) customer charges that exceed market prices. The result: Ohioans may not benefit from the lower electric bills that should flow from the lower prices in competitive electricity markets. In Ohio's competitive electricity market, ESPs—essentially, rate plans for the supply and demand of electric generation—are unnecessary and should be eliminated. Instead, a market-based option should be used to price service to customers.

Eliminating ESPs will fix a number of provisions that are unfair and costly to Ohioans under current law, including the following:

- **Utilities Are Not Required to Refund Customers All of the Utilities' Excessive Profits.** Even if the PUCO determines that a monopoly electric utility has "excessive" profits, the utility is not required to return the excess profits to customers. Only if the utility's earnings are deemed "significantly excessive" is the utility required to refund the significantly excessive portion of profits to its customers.
- **Customers Are Charged for Non-Generation Charges in an ESP.** Utilities use ESPs to set the price of the standard service offer to customers. However, the law also permits a utility to propose additional distribution-related charges in an ESP. Utilities have used the law to collect a number of so-called distribution charges from customers through non-bypassable riders. (That is, customers cannot "shop around" charges that are non-bypassable.) But some of these riders have nothing to do with distribution service. For example, FirstEnergy

AARP

Ohio Farm Bureau

The National Federation of Independent Business/Ohio

Northeast Ohio Public Energy Council (NOPEC)

Office of the Ohio Consumers' Counsel

Ohio AgriBusiness Association

The Ohio Cast Metals Association

Ohio Chemistry Technology Council

Ohio Hotel & Lodging Association

The Ohio Manufacturers' Association

Ohio State Grange

was granted a "distribution modernization rider" to provide credit support to the corporation without a requirement to spend the consumers' payments on distribution modernization. That is not the way a competitive, free-market system should work.

- **Customers Are Not Protected from Paying Too Much for Service Under an ESP.** One consumer protection in the 2008 law provided that ESPs could not be approved unless the result is "more favorable in the aggregate" to customers when compared to the expected results from the market-rate option. But the PUCO has been considering both quantitative and qualitative factors to determine if the ESP is more favorable in the aggregate than a market rate—and the Supreme Court of Ohio has declined to prohibit the PUCO's approach. The consideration of qualitative factors can allow above-market charges, and that has undermined the consumer protection that prices in ESPs should compare favorably to market prices.
- **Utilities Can Veto Any PUCO-Ordered Modification to Their ESPs.** If a utility doesn't like a PUCO ruling that modifies its proposed ESP, the utility can withdraw its application. In effect, the 2008 law gave the utilities—but no other stakeholder—veto power in ESP cases. This is a decidedly anti-customer policy.

SOLUTION: House Bill 247 would eliminate language in Ohio law that permits utilities to file ESPs, which would eliminate above-market charges to customers now allowed in ESPs. Utilities then would provide customers the standard service offer through a competitive bidding process. Utilities' distribution rates would continue to be set through distribution rate cases by the PUCO. This approach would allow the PUCO to review all expenses and revenues when a utility seeks a distribution rate increase, instead of the current approach that allows utilities to add charges to customers' electric bills using single-issue riders.

PROBLEM #3: Customers Are Not Protected from Subsidizing the Operations of a Utility's Corporate Affiliate.

Prior to the 1999 deregulation law (Amended Substitute Senate Bill 3, enacted with strong bipartisan support), utilities owned and operated generation plants. SB 3 changed that, prohibiting utilities from owning generation. Rather than complete divestment of the generating plants, however, several of the utilities spun off the assets to a corporate affiliate. In recent years, the utilities have used the poor financial performance of their unregulated generation affiliates to seek above-market charges from captive customers.

SOLUTION: House Bill 247 would protect Ohio customers from new and expanded above-market charges by clarifying that Ohio's 1999 deregulation law means utilities and their affiliates cannot own generation.

The forgoing proposals will protect consumers by restoring balance in the ratemaking process through repeal of unfair provisions in the 2008 law and making other changes. The proposals will prevent anti-competitive results from the law. And, limiting above-market charges will free up money for business expansion and job creation, spurring Ohio's economy.