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Industrial Energy Users

Prepared Statement of Sam Randazzo
House Bill 247 ("HB 247")

My name is Sam Randazzo and I am General Counsel of the Industrial Energy Users-Ohio ("IEU-Ohio" – http://www.ieu-ohio.org). Since 1992, IEU-Ohio has helped Ohio businesses address issues affecting the price and availability of energy. By providing continuing education to Ohio's businesses through things like the Manufacturers' Education Council's annual Ohio statewide energy conference and engaging all branches of state and federal government, IEU-Ohio strives to identify and implement energy-related policies that are customer-attentive and customer-driven.

Today, I will discuss HB 247 as an interested party. More specifically, below I summarize the major provisions of HB 247 and how they or other reforms might work to better serve customers' interests while remaining mindful of the need to provide suppliers (regulated and competitive) with a fair opportunity to obtain "just and reasonable" compensation.

HB 247 is important for several reasons. This proposed legislation has helped to shine some much-needed light on issues that deserve timely attention and meaningful consideration. I only pause in firmly offering this conclusion to observe that some of the problems that HB 247 proposes to address result from the General Assembly's adoption of recommendations made by some of the stakeholders that are now vocally supporting HB 247. For example and not so long ago, the advocacy of some of these stakeholders included demands for the Electric Security Plan ("ESP") option that they now urge the General Assembly to eradicate.

And, on the other side, there are opponents of HB 247 who, not so long ago, urged the General Assembly to use **bypassable** charges and competitive markets to set the price paid by non-shopping customers for default electric generation supply.

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HB 247 (Eliminating the Electric Security Plan Option – Major Provisions and Comments)

1. Eliminates the Electric Security Plan ("ESP") option used currently to determine the Standard Service Offer ("SSO") which contains the generation supply pricing mechanism applicable to customers not obtaining generation supply from a competitive retail electric services ("CRES") provider.

Comment

Current Ohio law provides two options that the Public Utilities Commission of Ohio ("PUCO") can use to establish the default electric generation supply service compensation which non-shopping customers pay to Ohio's electric distribution utilities ("EDU"). The service relationship between non-shopping retail electric customers and EDUs is specified in what is known as the Standard Service Offer ("SSO").

One option for establishing the SSO is the ESP (RC 4928.143) and the other is the Market-Rate Offer ("MRO", RC 4928.142). Whether the ESP or MRO path is taken initially depends on the election of each EDU through the filing of an application at the PUCO to establish the SSO. Neither the ESP nor the MRO can be used to set the SSO unless or until it is approved by the PUCO. The EDU obligation to provide the SSO is set forth in RC 4928.141.

The ESP option must contain some elements (such as elements for the supply and pricing of electric generation supply) and may contain a number of other provisions ("Discretionary Provisions") that affect the price and availability of service. The MRO option does not contain the ESP's Discretionary Provisions and calls for a competitive bidding process to set the compensation an EDU may receive for the SSO service.

Because of the statutory differences between the MRO and the ESP working in combination with the overarching procompetitive objectives of Ohio's energy and communications policies (RC 4927.02, RC 4928.02 and RC 4929.02), the ESP option contains an important limitation.

Pursuant to RC 4928.143(C)(1), the PUCO's approval of an ESP depends on it finding that the ESP and all its provisions and terms provides results that are better, in the aggregate, than the results that would otherwise be obtained under the MRO. And, if the PUCO approves an ESP, Ohio law requires the PUCO to take other steps to make sure the ESP remains better than the MRO [RC. 4928.143(E), ESP longer than three years] and to eliminate any "significantly excessive earnings" that have been or may be produced by an ESP [RC 4928.143(E) and RC 4928.143(F)].

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From customers' perspective, most of the problems that have been and continue to be attributed to the ESP option are **not** problems that necessarily result from the law itself. Rather, these problems are a byproduct of the choices – some unlawful – that the PUCO has made on the implementation side of the law.

For example, the PUCO has displayed a strong generic bias in favor of the ESP option. This bias is reflected in the PUCO's decisions and in the extent to which the PUCO has used its discretion to specify details regarding the formula used to determine if an ESP is better than the MRO. While the statutory language indicates that this test is a quantitative test – one that looks at the net present value of the relative billing consequence of the ESP as compared to the MRO – the PUCO has resorted to sometimes vague and always qualitative factors to tilt the scales in favor of the ESP option. **More bluntly stated, the PUCO has found that an ESP is better than the MRO even in cases where it has also found that the ESP would cost customers hundreds of millions of dollars more than the MRO.**

The ESP option also equips EDUs with significant control over how and when the PUCO can modify an ESP proposal submitted by an EDU. RC 4928.143(C)(2)(a) states that an EDU can withdraw an ESP application in the event the PUCO modifies the as-filed ESP. The PUCO's pro-ESP bias in combination with this EDU veto opportunity, has, since 2009, worked at times to redirect Ohio law towards anti-competitive and anti-consumer outcomes rather than pro-consumer and pro-competitive outcomes that are set forth in Ohio's policy (RC 4928.02).

In a similar way, the PUCO has used its discretion to specify methods of computing the "significantly excessive earnings test" ("SEET") that degrade or eliminate the already very weak consumer protections provided by the SEET.

The mismatch between ESP results and the pro-consumer and pro-competitive goals of Chapter 4928 result, in part, from the mismatch between expectations that dominated Amended Substitute Senate Bill 221 ("SB 22"1) debate in 2007 and 2008 and actual conditions during the time the PUCO has administered the law. Since 2008, this mismatch has often been discussed in legislative hearings held to consider proposals to modify the arbitrary, anti-competitive and anti-consumer portfolio mandates in RC 4928.64 and RC 4928.66. Yet, this mismatch is also relevant as part of the discussion regarding the issues raised by HB 247.

During 2007 and 2008 when SB 221 was before the Ohio Senate and House, most people expected that our overheated economy would continue to roar forward (causing significant growth in electricity demand) and not be put in reverse by the Great Recession. Most energy supply and price forecasts in 2007 and 2008 told us that the future would be dominated by natural gas supply declines, increased dependence on foreign imports and high and volatile natural gas prices. As you now know, our current reality includes an abundant domestic supply of natural gas (and oil) that is relatively "cheap." Based on the expectations in 2007 and 2008, the proponents of the ESP feature of SB 221 argued that the ESP was needed to protect consumers from the "rate shock" attributed to dependence on the price-setting results of market forces. A similar rationalization accompanied the push for inclusion of portfolio mandates.

It is somewhat ironic that many of the stakeholders that now urge the elimination of the ESP (by supporting HB 247) are the same stakeholders who strongly supported the inclusion of the ESP option in Ohio law. When some of these same stakeholders push to eliminate the ESP in favor of more clear market-based mechanisms (the MRO) and, at the same time, are urging the General Assembly to maintain arbitrary portfolio mandates that imply a fundamental mistrust of market forces, more confusion follows.

In any event, with this PUCO implementation history and reality in mind, it is reasonable to wonder if eliminating the ESP statutory option will, on the implementation side of the law, produce the improvements currently being attributed to HB 247.

Rather than eliminating the ESP as proposed in HB 247, would customers be better served by the General Assembly simply prohibiting the PUCO from resorting to qualitative factors for purposes of conducting the ESP v. MRO better-in-the-aggregate test?

2. Requires the PUCO to ensure that an SSO of the MRO variety does not have an adverse effect on large-scale government aggregation.

Comment

Current law [RC 4928.20(K)] requires the PUCO to adopt rules that encourage large-scale government aggregation and to consider the effect of an ESP's non-bypassable charges on large-scale government aggregation programs. Current law [RC 4928.20(J)] also provides government aggregators and their customers with options to avoid paying charges for "standby service" that may be authorized as part of an ESP (one of the Discretionary Provisions).

The ESP-related choices of the PUCO on the implementation side of the law have brought complaints from government aggregators that allege that the PUCO actions disadvantage government aggregation programs. This may explain why HB 247 requires the PUCO to ensure that an MRO does not harm large-scale aggregation programs.

Government aggregation is one of the ways that customers can obtain competitive retail electric service and avoid the SSO.

However and from a broader public policy perspective, the letter and spirit of Ohio law ought to command the PUCO to ensure that neither an ESP nor an MRO work against "customer choice" regardless of whether "customer choice" is accomplished through a government aggregation program, a non-governmental aggregation program or decisions made by individual customers.

3. Allows currently-approved ESPs to be used as the SSO for customers not obtaining generation supply from a CRES provider until the customer is supplied by a CRES provider or until an SSO of the MRO variety is in place.

Comment

The currently-approved ESPs have extended terms and are being contested through appeals to the Ohio Supreme Court. Thus and practically speaking, changes required by HB 247 may not become effective for several years. Additionally, it is reasonable to expect that parties opposing ESP appeals already in the pipeline may claim that HB 247, if enacted, protects current ESPs against litigation risk.

4. Requires the use of a competitive bidding process ("CBP") for an ESP of the MRO variety.

Comment

RC 4928.142(A)(1) requires an MRO to "be determined through a competitive bidding process."

5. Leaves a modified version of the MRO in place to establish the generation supply pricing mechanism applicable to customers not obtaining generation supply from a CRES provider.

No Comment

6. Modifies current corporate separation requirements by precluding an "electric utility"[1] and its affiliates from providing a CRES except as it may be included in the SSO of the MRO variety and precluding, effective January 1, 2019, an electric utility and its affiliates from owning and controlling any installed generating capacity in Ohio. To the extent a service is declared or classified competitive in the future, an electric utility is permitted to provide such newly-determined competitive service outside an SSO. Each electric utility must submit a "market power mitigation plan" to the PUCO for the PUCO's review, modification and approval. If a market power mitigation plan is not approved by the PUCO prior to January 1, 2019, the PUCO may require an electric utility to auction any generation capacity entitlements it may hold until such a plan is approved by the PUCO.

[1] The bill modifies the current definition of "electric utility" so that it fits with other changes proposed in the legislation. If the legislation is enacted, it ("electric utility") would mean an "… electric light company that has a certified territory and is engaged on a for-profit basis in the business of supplying at least a non-competitive retail electric service in this state." An "electric distribution utility" is also an "electric utility."

Comment

Corporate separation requirements produce line of business restrictions that preclude an entity having a line or lines of business from engaging in other specified lines of business. Generally, line of business restrictions are designed to promote fair and dynamically efficient competition or remedy anticompetitive structures or conditions. Corporate separation requirements are frequently included in state and federal laws applicable to electric utilities, communication businesses and natural gas utilities to both promote fair and dynamically efficient competition and remedy the problems created by an anticompetitive industry structure dominated by vertically integrated firms.

Whatever worthwhile purpose might be served by corporate separation requirements, the ultimate effect of corporate separation requirements depends heavily on the quality and the scope of the enforcement effort. And, in turn, the quality and scope of the enforcement effort depends on the quality and scope of the skills of people (often regulators) who have enforcement duties.

Current law (Chapter 4928 and, for example, RC 4928.17) contains extensive corporate separation requirements and the statutory requirements are supplemented by rules the PUCO is required to adopt and enforce. It is unclear how the provisions of HB 247 will improve upon the current corporate separation requirements. And, as discussed above, any improvements attributed to HB 247 imply assumptions regarding the scope and quality of the PUCO's enforcement.

7. Gives the PUCO broader authority to address violations of corporate separation requirements as they may be reflected in the legislation's mandatory divestiture requirement.

No Further Comment

8. Requires that all charges paid by customers that are subsequently held, by the Ohio Supreme Court, the PUCO or another authority, to be unreasonable, unlawful, imprudent or otherwise improper to be refunded promptly to the customers who paid such charges.

Comment

As a result of an Ohio Supreme Court decision from the 1950s, the Ohio Supreme Court has created an attractive gap in Ohio law that effectively leaves injured parties with no remedy for unlawful or unreasonable actions by the PUCO. In appeals currently pending with the Ohio Supreme Court, the Court is being asked to modify or overturn this decision. HB 247 proposes to address and, in part, reverse the Court's precedent as it may be

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applied to prevent consumers from obtaining a refund of unlawful or unreasonable rates and charges.

Some stakeholders have asserted that the wrong-without-a-remedy problem that HB 247 seeks to address is really a problem created by the Ohio Supreme Court's failure to timely issue decisions (see RC 4903.20). This assertion invites inattention to the other things that happen at the PUCO prior to an appeal; things that delay the opportunity to initiate an appeal to the Ohio Supreme Court.

No court other than the Ohio Supreme Court can modify, vacate or otherwise review an order of the PUCO. RC 4903.12. Appeals to the Ohio Supreme Court cannot proceed until the PUCO issues a "final order." Typically, there is no "final order" until and unless the PUCO has completed the rehearing process (RC 4903.10) and the scope of any appeal is limited to issues raised during the rehearing process.

When an application for rehearing is filed with the PUCO (see RC 4903.10), the PUCO may grant or deny the rehearing request. If the rehearing request is granted, the PUCO is required to specify the purpose for which the rehearing is granted and the scope of any additional evidence that will be taken provided that the evidence could not have, with reasonable diligence, been previously presented. RC 4903.10 indicates that the PUCO is required to issue a rehearing decision within 30 days. RC 4903.10(B) states that if the PUCO does not issue a decision within 30 days of a rehearing application, the rehearing application is denied by operation of law. Denial of a rehearing application produces a "final order" that may be appealed to the Ohio Supreme Court.

Ohio law contains requirements that the PUCO issue decisions within a specified period of time. For example, the ESP statute [RC 4928.143(C)(1)] requires the PUCO to issue an order within 275 days of the application (other than an EDU's first ESP application where the PUCO must act within 150 days). The PUCO typically does not issue a decision within the time period specified by Ohio law and the Ohio Supreme Court has held that the General Assembly's "shot clock" is advisory (not mandatory). In other words, the PUCO frequently does not issue a decision within the time specified by the General Assembly and it does so without legal accountability.

Ohio law does permit the Ohio Supreme Court to stay the execution of a PUCO order but only if the party seeking the stay executes a "surety" (bond) in such sum as the Court proscribes. RC 4903.16. Given the large dollar value of issues that come before the Court as a result of appeals from PUCO decisions, the bond requirement has thus far worked to block the availability of a stay even in cases where the Court finds (eventually) that the PUCO acted unlawfully.

The wrong-without-a-remedy problem created by the Oho Supreme Court precedent described above is significantly worsened by the PUCO's control of the rehearing clock. Experience indicates that the PUCO has and will use its control of the rehearing process clock to block or significantly delay the opportunity for parties to commence and

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meaningfully prosecute an appeal from an adverse PUCO decision. The same is true with regard to the Ohio Power Siting Board ("OPSB"), a division of the PUCO.

More specifically, rather than issuing a substantive decision in response to an application for rehearing within the 30-day period referenced in RC 4903.10(B), the PUCO often grants rehearing for the purpose of giving itself more time to consider an application for rehearing. After giving itself more time to consider the issues raised on rehearing, the PUCO can and has taken many months (in some cases more than one year) to issue a decision that addresses the rehearing request on its merits. And, since completion of the rehearing process must typically occur before an appeal can be commenced, the PUCO can use the rehearing process to effectively insulate its decisions from a timely appeal.

At the federal level, the ratemaking protocols of the Federal Energy Regulatory Commission ("FERC") allow proposed rate increases to, after a brief suspension period, go into effect subject to refund. FERC's final rate orders can come many months after the rates go into effect. When the final order determines that implemented rates are different than "just or reasonable rates," the unjustness or unreasonableness of the subject-to-refund rates is remedied, with interest.

The FERC approach is not offered here as a recommendation that it be adopted. Rather, it is mentioned to illustrate alternatives that may be more effective in remedying the Ohio Supreme Court's wrong-without-a-remedy precedent and the PUCO's equally troubling practice of using its control over the rehearing clock to delay a timely and meaningful appeal.

Conclusion

I hope this information is helpful. IEU-Ohio is willing and prepared to respond to any questions you may have regarding this prepared statement or otherwise.