REVISED PUBLIC TESTIMONY OF JANINE MIGDEN-OSTRANDER

ON SUB. S.B. 2

BEFORE THE OHIO SENATE ENERGY COMMITTEE

Chairman Chavez and Members of the Committee,

My name is Janine Migden-Ostrander. I am the former Consumers' Counsel for the State of Ohio, having held that position from April, 2004 through September, 2011. I also served as a Principal at the Regulatory Assistance Project advising governments and regulators on clean energy policy. Currently, I am a Fellow at Pace University Law School, Energy and Climate Center. I am offering this testimony, however, on my own behalf and as a resident of Ohio.

This revised testimony is the same as the recent testimony I filed on March 8; however, I am adding a section at the end addressing my concerns with respect to amendments to this legislation that address the expedited approval process for power plants before the Ohio Power Siting Board (OPSB). The new material will appear at the end.

My testimony will cover several points:

- Support for Sec. 4905.321 ORC to require refunds for utility overcharges after a PUCO-approved charge has been found to be unlawful by the Ohio Supreme Court;
- Support for the repeal of the OVEC surcharges that have cost Ohioans $445,679/day;
- Support for ending the Electric Security Plans; and,
- Reinstatement of Energy Efficiency Standards.

1. Requiring Refunds for Overcharges after a PUCO Decision is found to be Unlawful

I commend the legislature for finally addressing this issue as it is long overdue and I strongly urge the passage of this provision to prevent the travesty that the current situation has caused. According to OCC, customers have paid $1.5 billion in refunds since 2009. This is money that utilities collected as a result of an Order from the Public Utilities Commission that was later found to be unlawful. When I was Consumers' Counsel, I fought to have this corrected, but was unfortunately unsuccessful. The Supreme Court had ruled that they believed this inequity should be corrected but also held the legislature had to fix it. So, it is good to see the legislature doing that now. When you think about what the $1.5 billion could have been used for by consumers over the years, to help stave off a disconnection for nonpayment or to pay for needed household goods, it is sad to see that the utilities have been able to pocket their money that they were not entitled to. At the end of the day, this is money that is due them and should be returned with interest in the same way utilities charge customers for interest on expenditures they make that are not recovered until a later date.

2. **Repeal of the OVEC Surcharge**

To date, Ohioans have paid approximately $450 million to subsidize two uneconomic coal plants – one of which is not even located in Ohio! This has been more of a tax than it has been a payment for generation that has provided a value or service to most customers. With the exception of this charge, Ohio law requires that for a utility to recover the cost of generation, that generation must be used and useful, which is not the case for a good portion of the citizens of this state. The continuation of this charge has been unconscionable in that it has requires customers to subsidize utilities that receive generous rates of returns for power that is uneconomic and that continues to pollute the air and contribute to global warming by releasing approximately 58 million tons of carbon dioxide so far and rising.

If you take the $1.5 billion in lost refunds and add that to the charge for the OVEC corporate welfare, the sum is approximately $2 billion that utilities have been able to take from customers' – your constituents – pockets without any benefit being derived by those customers. When consideration is given to the fact that approximately 1 in 10 customers may be disconnected from electric or gas service because they don't have enough money to pay their bills, these spurious charges become reprehensible. How many disconnections could have been averted? How many Ohioans didn't have enough food to eat or went without medicine to pay their electric bill? Or, how many of those Ohioans could have used that money to pay for a myriad of things that they may have needed for their households? These decisions that translate into healthy bonuses for corporate executives come at a cost to every day families working hard to make ends meet.

3. **Termination of Electric Security Plans (ESP)**

Electric Security Plans were never good for consumers and as the Consumers' Counsel when SB 221 passed, which enacted these provisions, we opposed it. ESP's allowed distribution companies to recover large sums of money with little scrutiny and gave a lot of power to utilities to control the process. A straight competitive bid process for generation with utilities recovering distribution costs through traditional rates will return Ohio to a competitive market that is closer to what was envisioned when SB 3, the retail bill on competition originally passed in 1999.

When I was the Consumers' Counsel and would oppose an ESP settlement, some of the utilities would tell me that if I didn't support it, they might choose to go to the market. My response was always the same: Please do, because if the utilities thought for one second that they could make more money for their shareholders by going to market instead of filing an ESP, they would have done that. They never did

4. **Reinstitution of Energy Efficiency Standards**

When HB 6 passed, the power plant subsidies were paid for by eliminating energy efficiency programs. The energy efficiency and demand reductions requirements of HB 221 should be

added back in and continued from where it was interrupted so that Ohioans can enjoy the benefits of energy efficiency and demand response programs. When looking to the portfolio of resources to meet Ohio's growing energy needs (due in large part to the location of data centers in Ohio), energy efficiency is the least cost option when compared to renewable energy, fossil fuel and nuclear resources. Not only does it lower system costs, but every participating customer will enjoy a reduction in their monthly energy bill because they are using less. It is the best conservation tool for reducing wasted electricity and keeping costs down for residents and businesses alike.

Utilities in this state have not sufficiently tapped distributed energy resources such as demand response. Demand response programs can send price signals to customers that match the cost to the utility at a given time to the price the customer pays. Most of the state has smart meters and therefore, the utilities can record the customer's usage in 15-minute intervals so that customers can be offered time of use rates with on-peak and off-peak rates that are reasonably and fairly designed. Utilities can also install chips on a voluntary basis that allows the utility to cycle down air conditioning for example for a 15-minute interval every hour or so. This can help the utility manage peak load on hot day and avoid rolling black outs. The customers who participate in these programs receive a discount to compensate them for their reductions. Note, that without these programs, utilities need to bring on line peaking plants or purchase scarce power in the market which can be very expensive. Because utility rates anticipate these episodes in the flat kwh charge, customers in general pay more for electricity in order to cover these frequent events. When rates are set based on the cost to utilities, all customers save.

ADDITIONAL NEW TESTIMONY:

Amendments to Sub. S.B. 2 call for expediting the approval process at the OPSB. This section covers my opposition to the following:

- The provision that would allow approval of generating facilities in priority investment areas in a 45-day approval process; and,
- The requirement that all other projects must be approved within 120 days.

While there may be a concern that the approval process for a power plant is too long, a 45-day or 120-day approval process is not the answer. A 275-day period, analogous to the time period for a utility rate case seems more appropriate. Based on my personal experience with litigation before the Public Utilities Commission of Ohio (PUCO), this is necessary. Any real application for siting approval involves a complex filing that must be thoroughly analyzed to ensure the project poses no significant environmental problem.

Section 4906.06 Ohio Revised Code requires the Applicant to provide a summary of any studies that have been made on the environmental impact of the facility; a statement as to the need for the facility; and, the reasons why the location chosen is the most suited, among other things. After reviewing an application, which can take a significant amount of time depending on the

materials provided in the application, an Intervenor can submit discovery questions to the Applicant who has twenty days to respond. Assuming the Applicant responds on time and responds fully, (which in my experience does not often happen), the Intervenor must then commence the arduous task of reviewing voluminous and highly technical reports. This will most like result in the Intervenor needing to send out discovery seeking answers to questions or issues identified in the reports. The Applicant then has another twenty days to respond and if the answers are inadequate, the Intervenor must send out yet another round of questions and requests for documents, or if the Intervenor's budget permits, call for depositions of the Applicant's witnesses in order to adequately prepare his/her case.

Often Applicants try to run the clock. By being as minimally cooperative as possible, they leave intervenors handicapped in their preparation. It bears mentioning that the Applicant prior to filing has the luxury of taking its time to prepare its Application and its case and knowing all the details – strengths and weaknesses. Intervenors are reluctantly engaged in a game of hide and seek with the Applicant.

If we look at the back end of the case, the OPSB will want hearings to commence 2 months prior to the deadline – especially since failure to meet the deadline would mean automatic approval according to the proposed amendments. Therefore, looking at a timeline under the 120-approval process, the following should help demonstrate the serious problems that such a meager timeframe would impose:

- Day 1 – Application is filed
- Day 1-15 – Within 15 days, the Applicant must file public notice of its Application. Interested parties can then file motions to intervene.
- Day 2 – 45 – Intervenors and OPSB staff review the Application. The review by the Applicant may in some instances not commence until much later than Day 2, depending on when in the 15-day timeframe allotted for public notice, the Applicant files the public notice. (One thing that would help here is to require the Public Notice to be given on the day the Application is filed). Within this 30-45 day period that an Intervenor has, it must review the Application, which can be voluminous and technically complex, send out discovery questions, wait 20 days for the Applicant to respond, then review all reports and responses provided, assuming the Applicant is cooperative and provides the complete materials withing 20 days. This leaves no time for follow up questions and information.
- Day 45 -52 – Intervenors and OPSB staff prepare testimony on complex technical issues
- Day 53 – All testimony is filed. (Typically, testimony is filed 1-2 weeks before a hearing to give all the parties the time to review the multiparty, multi-testimony submissions and prepare for cross-examination at the evidentiary hearing.
- Day 60 – 67 – the hearing takes place. (Based upon the number of Intervenors and the amount of testimony filed, including opportunities for rebuttal and surrebuttal testimony if permitted, more or less than 5 business days may be needed.

- Day 68 -90 – The parties prepare their briefs in which they present what is essentially their closing argument. Because of the technical nature and the need to comb through transcripts and pre-filed testimony to present the evidence and legal arguments, this takes time. Briefs are typically filed within 14 days after the hearing, followed by Reply Briefs one week later, where all the parties to the case have the opportunity to respond to each other's Briefs
- Day 91 – 120 – The OPSB has 30 days to review all the Briefs and render its decision by drafting an Order that includes detailed, complex and technical findings of fact and conclusions of law. Depending on the complexity of the case, this will put pressure on the OPSB to get the Order prepared in time.

The above schedule is severely compressed and is not really workable, especially at the front end when it comes to giving Intervenors adequate time to prepare. This process basically is an unconstitutional denial of due process because it does not allow the public to participate in a meaningful way.

A forty-five-day process means anyone can pretty much file anything it wants and see it approved because there is absolutely no time for a review or public participation. There's no time for a hearing, and if there is one, no time for preparation and review. A fleeting opportunity for public comment is not a substitute for a thorough review and consideration of the impacts of a power plant on a community. These plants will be around for at least 30 years, potentially must longer. Imagine if it was in your backyard. What assurances would you and your neighbors have that the plant was safe, that it wasn't violating clean air regulations and polluting the lungs of your young children. For the protection of the health and safety of your children and all Ohioans, the OPSB must be permitted to do their job and interested parties must be afforded the opportunity to participate in a meaningful way. Note that if problems are identified during the review process, the Applicant can have the opportunity to make changes so that they can proceed and the public can have the assurances that these gas plants are safe.

As a final note, it makes no sense, that the legislature has slapped rigorous restrictions on wind and solar which are legitimate sources of clean energy, while giving *carte blanche* to polluting fossil fuel plants. This is not in the public interest and does not serve your constituents well.

In conclusion, I urge you to retain the provisions in Substitute Senate Bill 2 that are discussed in my testimony above and to amend the language to include the energy efficiency and demand response standards. I further urge you to remove from the legislation the sections regarding the expedited approval processes before the OPSB.

Thank you for your consideration of my testimony.

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