BEFORE THE SENATE ENERGY AND PUBLIC UTILITIES COMMITTEE
SENATOR BILL REINEKE, CHAIRMAN

TESTIMONY
OF
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Chair Reineke, Vice-Chair McColley, Ranking Member Smith and members of the Senate Energy and Public Utilities Committee, my name is Kim Bojko and I am a partner with Carpenter Lipps LLP. I specialize in regulatory law and have practiced around the PUCO and energy policy for nearly 25 years. I am here today on behalf of my client, the Ohio Manufacturers' Association. I serve as the chief energy counsel for the OMA.

The Ohio Manufacturers' Association is a mission-driven organization comprised of Ohio's manufacturing leaders, many of which are Ohio's largest energy consumers.

The OMA adopts public policy positions on legislation as a community of manufacturers. Our positions are based on guiding principles, data-driven research and analysis, and member input.

Anti-competitive, utility-driven policy reached a new low in Ohio with House Bill 6 (HB 6), which collapsed on the weakness of its own corruption. HB 6's political coalition has roots in the abusive Electric Security Plan (ESP) ratemaking process and increased profits to utilities.

Since its creation, the ESP process has turned into a windfall for regulated utilities. The utilities use the ESP mechanism to increase profits through numerous above-market charges added to customers' bills. Along with the notorious *Keco* precedent, which prevents customer refunds in many cases, ESPs stack the deck in favor of monopoly utilities at customers' expense.

Senate Bill (SB 102) is pending before the Ohio Senate on the premise of ending the abusive ESP process and excessive profits. But the as introduced version of the bill would do quite the contrary. Not only will SB 102 continue above-market charges, awarding the electric utilities with excessive profits between rate cases, SB 102 completely upends the traditional ratemaking process for all regulated utilities, not just electric utilities. Customers need real reform. But, instead of saving customers money, SB 102:

- Increases customers' distribution costs by authorizing new interim distribution riders that could equal up to 12% of an electric utility's base distribution revenue in certain years;
- Authorizes other new interim distribution riders that are not capped;
- Significantly alters the traditional ratemaking process for all regulated utilities;
- Limits discovery and parties' participation in rate cases;
- Weakens customer protections;
- Erodes the traditional used and useful standard;
- Mandates that carrying costs be accrued for all deferrals until the entire regulatory asset and carrying costs are collected from customers;
- Allows cash settlement payments in complaint cases;

- Allows cost recovery from customers for infrastructure development to prospective sites without customers and regardless of whether the facilities are ever used;
- Expands the costs natural gas utilities can recover from customers for infrastructure development for economic development projects; and
- Allows utilities to own customer-sited renewable generation and energy storage systems.

First and foremost, SB 102 significantly alters the traditional ratemaking process for *all* regulated utilities, including electric, natural gas, and water and sewer utilities.

Important ratemaking sections in SB 102 apply to all regulated utilities, significantly altering how rate cases are processed and heard, including limiting parties' rights to due process. More specifically, for all regulated utilities, SB 102 modifies utilities' property valuation in ratemaking, eliminates or reduces notice requirements, and revises the application process. It limits the scope of the review and investigation, discovery, and parties' participation in rate cases. SB 102 also eliminates the requirement for the PUCO to make a decision on the application that seems just and reasonable to the PUCO, and it authorizes the approval of deferrals outside of the rate case process. Moreover, SB 102 allows rates to go into effect temporarily, subject to refund, and remain in effect until modified by the PUCO if a PUCO decision has not been issued within 275 days, and allows the PUCO-approved rates to apply retroactively. If no PUCO order is issued within 365 days, the utility does not have to refund amounts collected after the 365 days even if it is in excess of what is authorized by the PUCO.

In addition to these significant ratemaking modifications, SB 102 provides additional goodies for electric utilities. It authorizes an electric utility to fully forecast its test year in a rate case and project whether facilities will be used and useful by the date certain and receive cost recovery for those facilities regardless of whether they are actually used and useful. It also creates, on an expedited basis, new interim distribution mechanisms (IDM) that authorize an electric utility to collect the revenue requirement associated with distribution infrastructure investments, plus a rate of return. Contrary to what proponents have stated, only certain expenditures collected from customers are limited.

A second reason for manufacturers' opposition to SB 102: It does not effectively repeal ESPs or ESP riders thwarting a fully deregulated competitive market envisioned by Senate Bill 3 that restructured the energy industry.

The Electric Security Plan or ESP process was originally established via legislation in 2008 as a temporary measure to prevent rate shock on generation charges as utilities continued the transition to a mature deregulated market. Since its creation, however, the ESP process has turned into a mechanism that regulated utilities use to increase costs through numerous above-market charges added to customers' bills.

Unfortunately, SB 102 folds ESPs into the electric utility's standard service offer plan; authorizes distribution riders to be created and implemented through rate cases for all utilities; and authorizes interim riders to be implemented outside of rate cases for electric utilities. The new ratemaking formulas and mechanisms are neither competitive nor capable of deterring the abuses of the ESPs. SB 102 would continue to allow utilities to layer costs on top of a customer's traditional distribution charges, including potentially new distribution riders, interim distribution riders, and unlimited and undefined transmission and transmission-related costs. The standard service offer plan, coupled with the modified ratemaking mechanism, would allow unfettered utility infrastructure and capital investments in products and services that may not be useful to maintaining distribution systems – and that allow the monopoly utilities to undermine competitive markets. SB 102 also allows deferrals and carrying costs to be recovered from customers and costs for compliance programs and future projects.

One of several important lessons from HB 6 is that it is critical to ask the electric monopolies questions – questions such as: "How much will distribution system upgrades cost? Where are upgrades needed? Why weren't the hundreds of millions of dollars in smart grid funds sufficient for these upgrades? If distributed energy resources, such as batteries, can lower electric system costs and improve reliability, shouldn't SB 102 utilize these resources to decrease customer costs, instead of add new customer costs?"

While economic development is good for Ohio, new customer charges on customers' electric bills for undefined and unlimited economic development programs (that are in addition to those in the Budget Bill) are not. Customers will be left holding the bag for these utility programs that are not related to delivering power. Additionally, existing Ohio law specifically allows for economic development and job retention programs and a defined process exists.

A third reason for our opposition: It fails to place Ohio on a path to long-term market-based competition by unnecessarily eliminating the current construct of the Market Rate Offer (MRO).

Eliminating existing ESPs and replacing them with a market-rate offer is sound energy policy. Now that a robust competitive market has fully developed in Ohio, it is time to eliminate the temporary measure and move to a fully competitive market to bring the competitive benefits of free markets to customers.

A fourth reason for our opposition: This bill does not effectively protect customers by requiring the PUCO to issue timely decisions and refunds to customers when a utility has been found to have improperly charged captive customers.

SB 102 deceptively purports to create a customer refund provision. In truth, the new section is not a true refund provision and fails to correct the caselaw established by the Keco decision. It does little to protect customers.

The new language only applies to riders or rate mechanisms, not base rates, that are later deemed unlawful, and is simply codifying existing practice. The PUCO typically requires charges that are later deemed unlawful to be refunded from the date of the issuance of the Supreme Court of Ohio's decision finding the rider to be unlawful.

SB 102 also allows the PUCO to not issue a final appealable order for 180 days after an application for rehearing is filed. Currently, the PUCO is required to grant or deny the rehearing request within 30 days from the date of the filing. R.C. 4903.10. SB 102 affords the PUCO 150 more additional days to issue a final order after it grants rehearing. Although this section may be intended to address the issue of a utility collecting unlawful charges for years until the PUCO issues a final appealable decision and the Court issues a decision, SB 102's solution is not adequate. The point of a refund provision is to protect customers from the PUCO not issuing immediate decisions that can be appealed within a reasonable period of time and then allowing the utility to keep the money that it collected during that period even when the Court overturned the initial decision as unlawful.

When a PUCO decision is finally overturned, customers will still not be able to receive refunds of the money collected that has been deemed unlawful because of *Keco*. Allowing the PUCO 150 days to rule on the merits of an application for rehearing does not adequately remedy the issue. Modifying R.C. 4903.10 to eliminate the loophole in the law and the PUCO's current practice of granting itself more time would be a better approach.

A fifth reason for our opposition: SB 102 doubles down on HB 6 provisions, codifying subsidies paid by customers to Ohio's electric monopolies, including subsidies for aging coal plants, one of which is in Indiana.

The bribery-fueled HB 6 aimed to force customers to pay utilities hundreds of millions of dollars for nothing in return, including unnecessary handouts to nuclear power plant owners, profit padding decoupling charges, and anti-market subsidies for OVEC. The

utilities have testified at the General Assembly that OVEC does not even receive the handout – they do. And the handout has no impact on whether OVEC stays open or closes. (Previously, the House and the Senate wisely acted to repeal two of the three HB 6 subsidies. However, two other subsidies remain under SB 102 for two aging coal plants and a few select solar generating facilities.)

A study commissioned by the OMA found that Ohioans have paid nearly $400 million in subsidies for the OVEC plants, despite recent credits from the plants. Based on historical and predicted future electricity prices, Ohioans are expected to subsidize OVEC's utility owners in the magnitude of $850 million by 2030, directly profiting utility shareholders. To make matters worse, the aging coal plants are at risk of major environmental upgrades, which could further increase the costs to Ohioans.

Even when Ohioans were providing $150 million annually, OVEC's utility owners testified that the plants were "economic." Taking the utilities at their word, this means that the OVEC plants struggle to pay their debts even when the plants make money in the market. High electric prices last fall did not cover the many hundreds of millions of dollars Ohioans have poured into OVEC and will continue to pay for years to come. And with OVEC's Indiana plant threatened with closure this year, Ohioans could soon be paying even greater costs for a shuttered power plant and possible clean-up costs– in Indiana. A closed power plant makes no money, no matter how high energy prices go. Ohio's utility owners of OVEC should be sophisticated enough to make decisions on their power plant investments, and bear the consequences, without seeking subsidies from customers. Continuing subsidies to protect the OVEC owners should not be included in legislation intended to protect customers.

Remember, customers in FirstEnergy service territories were roped into also paying for the OVEC subsidies as a provision of HB 6. Why do I raise this issue today? Because SB 102 provides a safe haven for utility owners to continue getting the subsidies from customers.

Repealing the subsidies to OVEC is important as Ohio seeks to position itself as a place that is open for business to innovation and businesses with aggressive sustainability goals. Until OVEC is repealed, the Ohio legislature has decreed that all businesses (and residences) connected to the four investor-owned electric utilities will be required to subsidize these two dirty power plants.

At this time I'd like to address some points made by proponents that fall flat based on our analysis.

Although the bill purports to subject any annual increases to a 4% cost cap, that cost cap is limited to the distribution riders identified in one provision of the bill and applies to the prior year's distribution revenue. Only those expenditures included in 4909.173(C)(2)(a) are capped. Costs collected by these new, undefined riders would be allowed to increase each year– by another 4% of distribution revenue. All other distribution and transmission riders are undefined and unlimited and are not subject to a cost cap. Therefore, the protections of the cost cap are understated and, in some cases non-existent.

The OMA supports cost-effective economic development and a strong, competitive Ohio, which can attract businesses, projects, and investments in Ohio. But what role a utility should play and utility-administered economic development programs is a hotly debated subject. These programs are not to be confused with economic development programs administered by state and local governments. The question facing utility economic development programs is what, if anything, is appropriate activity for a utility to redistribute customer dollars in the name of economic development? A secondary question is how much customers should be made to pay and how much measurable benefit should the customer be owed? The issue is compounded by decades of economic development programs harkening back to the era of integrated utilities before deregulations.

Any utility-administered economic development program needs to be reasonable, cost-effective, non-discriminatory, and fair to all customers or potential customers. It also needs to be narrowly tailored as to not be anti-competitive or hurt existing customers who have already invested in the state of Ohio. The economic development program should also be well defined. OMA has some concerns with the vague, undefined language in SB 102 regarding economic development programs.

Additionally, programs that encourage competition, innovation, and create electric system benefits, such as transmission programs and allowing customers to take transmission service directly from their retail electric suppliers, should be expanded, not arbitrarily limited, as SB 102 appears to do. In other states, such as Pennsylvania, all customers have access to transmission services and billing through competitive suppliers. Ohio already lags behind on this important issue.

Bottom line, this bill would be a bad deal for Ohio manufacturers and unwise policy for the state. To create sound energy policy, Ohio should reject the proposed standard service offer plan, modifications to traditional ratemaking for all utilities, and the creation

of new distribution and transmission riders. Instead, Ohio should repeal existing ESPs and replace them with a market-rate offer model. Now that a competitive market has fully developed in Ohio, it is time to move to a fully competitive market to bring the benefits to customers.

If lawmakers are interested in cleaning up the corruption, then the cleansing agent is readily available. Look no farther than HB 247 from the 132nd General Assembly. That bill correctly accomplishes the aspiration expressed by the sponsor to eliminate ESPs and make Ohio more competitive.

Mr. Chairman and members of the committee, that concludes my testimony. I would be happy to elaborate on the specific deficiencies of this legislation or answer any questions. Thank you for considering these perspectives.