TESTIMONY BEFORE THE HOUSE PUBLIC UTILITIES COMMITTEE
OPPOSING 134-HOUSE BILL 351
BY AMY SPILLER, PRESIDENT OF DUKE ENERGY OHIO
& DUKE ENERGY KENTUCKY

October 27, 2021

Introduction

Chair Hoops, Vice Chair Ray, Ranking Member Smith, and members of the House Public Utilities Committee, my name is Amy Spiller and I am President of Duke Energy Ohio and Duke Energy Kentucky. I lead the Company's business, regulatory, and legislative functions that facilitate the provision of safe and reliable energy solutions for our 700,000 electric and 490,000 natural gas customers in southwest Ohio and northern Kentucky, just as Duke Energy Ohio and its predecessor companies have been doing for over 180 years.

Thank you for the opportunity today to provide testimony in opposition to House Bill 351 of the 134th Ohio General Assembly (H.B. 351). The issues being dealt with herein are complex, yet not unsolvable. Many parties, including Public Utilities Commission of Ohio (PUCO) Staff, came together and, recognizing both of these realities, artfully constructed a solution in the form of a customer-utility mechanism (mechanism) that provides value to both customers and the affected utility; a mechanism that has been repeatedly approved by the PUCO. On appeal of one such mechanism, the Ohio Supreme Court affirmed that the PUCO acted appropriately and within the scope of its authority in approving it. The Revised Code now contains common parameters for such mechanisms for all affected utilities. It also codifies certain customer protections previously not included in the PUCO-approved mechanisms.

In my prepared remarks, I intend to address misperceptions about two separate and distinct relationships Duke Energy Ohio enjoys; one, with its customers, and the other with the Ohio Valley Electric Corporation (OVEC). I will explain why the current law regulating Legacy Generation Resources (LGRs), as enacted with the passage of H.B. 6 of the 133rd Ohio General Assembly (H.B. 6), should not be interpreted as an unlawful or uncompetitive subsidy for old coal plants. I will explain how Duke Energy Ohio unsuccessfully attempted to extricate the Company from the Inter-Company Power Agreement (ICPA). I will discuss why certain sections of H.B. 351 go far beyond the four corners of H.B. 6 and seek to retroactively regulate utilities and their customers. Finally, I will point out the enhancements to the PUCO-approved mechanisms that are now a part of current law; enhancements made largely at the request of customer groups. Following my remarks, I will be available to answer questions about the substance of my testimony and the history of how we arrived here today.

Duke Energy Ohio's customer-utility mechanism is not a subsidy for OVEC.

I would first emphasize that OVEC receives no money collected from Duke Energy Ohio's retail electric customers. The LGR-related law, and the prior mechanism approved by the PUCO, made provision for net revenues associated with Duke Energy Ohio's contractual entitlement in the OVEC-owned generating units to pass to retail electric customers. Today, Duke Energy Ohio's entitlements to OVEC capacity and energy are bid into wholesale markets. If the revenues produced through these transactions are insufficient to cover the cost of the entitlements, the resulting net costs are collected from retail electric customers. Correspondingly, where revenues exceed costs, the entire difference would be credited to customers. As recognized by the PUCO, this mechanism provides customers with a stabilizing effect, or hedge, on the price of electricity when the market prices rise significantly. Put differently, when wholesale market prices rise, customers benefit from Duke Energy Ohio's entitlements and that benefit serves to offset a portion of the corresponding increase in customers' energy costs.

It is important to note that, under any scenario, the law does not authorize Duke Energy Ohio to earn a profit on its entitlements or otherwise receive more than its associated net costs. The law only addresses costs and does not seek to provide an investment or equity component for the Company.

I wish to make clear again that <u>the law does not direct or otherwise authorize any funds to flow to OVEC</u>. Duke Energy Ohio is under a contractual obligation to pay OVEC the Company's proportionate costs, per the ICPA. The Company has and will always meet this obligation. This is separate and distinct from the hedging mechanism confirmed by PUCO order and, subsequently, placed into law by H.B. 6. Since no retail customer dollars ever flow back to OVEC, the mechanism between Duke Energy Ohio and its customers cannot be considered a subsidy for OVEC.

There is not now, nor was there ever, an opportunity for Duke Energy Ohio to merely walk away from the ICPA.

Duke Energy Ohio cannot simply end its contractual obligations under the ICPA prematurely or unilaterally transfer those obligations to another entity. The transfer terms approved by the Federal Energy Regulatory Commission (FERC) include rights of refusal, unanimity, demonstrations of creditworthiness, and, where an affiliate transferee is involved, probable unlimited and unconditional guarantees. Consequently, one opposing vote cast by one party to the ICPA, or its agent, functions to prevent any transfer. These rigid contractual terms have precluded Duke Energy Ohio from transferring its interest in the ICPA to another entity.

The customer-utility mechanisms enhanced and codified by H.B. 6 were previously supported by several knowledgeable intervenors and PUCO staff.

In 2014, Duke Energy Ohio advanced, and the PUCO later approved, a placeholder retail mechanism for the Company's entitlement in the OVEC-owned generating units – a mechanism that would provide a hedge for retail electric customers who were, at that time, fully exposed to the competitive wholesale markets for generation supply. In a subsequent filing, the mechanism was adjusted, pursuant to a settlement agreement supported by PUCO Staff and several capable, sophisticated intervenors that regularly participate in the regulatory process. This was also the case for a similar AEP Ohio mechanism, which the Ohio Supreme Court found to be lawful.[1]

H.B. 351 is not merely a "Repeal H.B. 6" bill and, in fact, would violate the Ohio Constitution.

I highlight the extensive work that was conducted establishing and refining the hedging mechanism because H.B. 351 does not merely seek to undo the related provisions enacted through H.B. 6, including the additional customer benefits contained only in current law. H.B. 351 goes beyond the four corners of H.B. 6 and seeks to enact retroactive law in violation of Article II, Section 28, of the Ohio Constitution, which states:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.[2]

If H.B. 351 were to become law, Section 4, Division (B), of the bill would prohibit the PUCO from re-establishing components of a litigated and final order issued on April 2, 2015, which had established the rider for Duke Energy Ohio's mechanism.[3] However, the Ohio Supreme Court has repeatedly held that ratemaking is inherently a legislative function, regardless even of whether a hearing was held.[4] This means that PUCO orders carry the full force and weight of law. As such, a law passed after the issuance by the PUCO of a legal order cannot alter the conditions of the

---

[1] *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698.
[2] Ohio Const., Article II, Section 28.
[3] *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Opinion and Order (April 2, 2015).
[4] *State of Ohio, ex rel. Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on Behalf of Respondents, The Public Utilities Commission of Ohio, *et al*., at pp. 5-6 (September 25, 2012). *See also*, cases cited therein.

order and, absent an error or defect, the new law cannot alter an agreement upon which the order relies. This would violate Article II, Section 28.

Section 5 of H.B. 351 further violates the prohibition against retroactive lawmaking by requiring a refund of charges collected pursuant to current law. Through statute[5] and case law that established what is known as the Filed Rate Doctrine, Ohio prevents retroactive ratemaking just as it prevents retroactive lawmaking. The wisdom supporting this law and doctrine is soundly rooted in an understanding of the long-term benefits to utility customers of providing a low-risk environment in which the utility may operate.

The customer-utility mechanism placed into law by H.B. 6 maintained PUCO oversight and incorporated enhancements requested by customers, to customers' direct benefit.

Current law contains customer protections relating to Duke Energy Ohio's mechanism, some of which were not included in the PUCO order that pre-dated H.B. 6. These protections arise in several ways. First, the FERC evaluated and approved the ICPA, which includes a formula pursuant to which costs are allocated to the sponsoring companies. The FERC would have approved the ICPA consistent with the common regulatory standard requiring contracts to be fair, just, and reasonable.

Second, the law enacted as part of H.B. 6 did not reduce or alter the PUCO's role or scope of authority. Current law declares that the PUCO has purview over jurisdictional utilities' reasonable and prudent handling of revenues. The PUCO uses this authority and standard in evaluating the utility's conduct regarding the mechanism, specifically in the offering of its contractual entitlements of capacity and energy into the respective wholesale markets. The PUCO is directed to conduct these evaluations every three years until the expiration of the mechanism. The PUCO can disallow the recovery of costs it deems were imprudently or unreasonably incurred, or if the utility is found to have mishandled its monetization of its capacity and energy entitlements.

Third, the mechanism, under current law, is trued up on a regular basis, thereby helping to guard against and correct for any over- or under-collection.

Fourth, current law contains caps on monthly mechanism charges, which ensures greater customer affordability and bill management. Authorized charges in excess of the statutory caps are deferred for future collection, pursuant to the established cap structure.

[5] R.C. 4905.32.

Fifth, absent additional legislative action, the law requires that the mechanism must end after 2030. At that time, any deferred charges or credits will be reconciled, again, pursuant to the cap structure.

It is important to note that these expanded customer protections that are now in law were included largely due to requests for them from some of the industrial energy user groups.

Conclusion

In summary, current law recognizes that Ohio utilities answered a request by the federal government to commit significant resources in support of national security. It provides Ohio's retail electric utility customers with a hedge against volatile wholesale markets and expands protections related to monthly charges. It provides Ohio utilities only with relief sufficient to match costs, excluding any return on investment and any costs imprudently or unreasonably incurred, and it provides customers with credits where applicable. It is consistent with state policy as customers retain the ability to shop for the retail supplier of their choice and it does not impact wholesale markets or competition. Finally, it contains customer protections including appropriate regulatory oversight by the FERC and the PUCO.

H.B. 351 seeks to undo important and valuable customer-utility mechanisms that the PUCO established, the Ohio Supreme Court affirmed, and the Legislature and Governor enacted, and that include expanded customer protections. H.B. 351 also takes an extraordinary leap and attempts to enact retroactive law by preventing the enforcement of a lawfully issued order by the PUCO and violating the Filed Rate Doctrine. For these reasons, Duke Energy Ohio opposes H.B. 351, and asks that this committee and the House refrain from passing this legislation.

Chair Hoops, Vice Chair Ray, Ranking Member Smith, and members of the House Public Utilities Committee, thank you again for allowing me to testify about this very important policy. I will now welcome any questions.