BEFORE THE
PUBLIC UTILITIES COMMITTEE
OF THE OHIO SENATE

SENATOR BILL SEITZ, CHAIRMAN

Substitute Senate Bill 58 Hearing
November 6, 2013

TESTIMONY OF THE OHIO MANUFACTURERS' ASSOCIATION BY KIM BOJKO CARPENTER LIPPS & LELAND

Chairman Seitz, Ranking Minority Member Gentile, and members of the Senate Public Utilities Committee, thank you for the opportunity to testify today on issues and concerns related to Substitute Senate Bill 58 ("Sub. SB 58" or "the Bill") and its proposed changes to Ohio's energy efficiency standards and policies. I am Kim Bojko, with Carpenter Lipps & Leland, and I am testifying today on behalf of the Ohio Manufacturers' Association. OMA appreciates some of the stated concerns surrounding the existing energy efficiency and peak demand response requirements, but, as evidenced by the OMA witnesses that have previously testified (as well as others), as currently drafted, Sub. SB 58 is not the solution, and will create problems greater than those it is intended to fix. Accordingly, OMA opposes Sub. SB 58 as currently drafted.

You have heard a great deal about circumstances changing in the past 5 years since the passage of Senate Bill 221, but you have not heard how the industry has already adapted to those changes. Since the passage of Senate Bill 221, the PUCO has drafted rules and issued decisions in several proceedings on many technical items being discussed in the Bill.[1] The PUCO has revised its decisions when circumstances have warranted or have demonstrably changed, and has further specifically stated that it will continue to revise its rules and findings prospectively as the industry evolves and new technologies are developed.[2] The numerous orders and entries on rehearing that have established the most current set of rules and regulations have addressed the technical issues raised in Sub. SB 58 several times. Issues such as the "benchmark-comparison" method for calculating rider exemption periods, the "as found" methodology for calculating energy savings, the appropriateness of incentivizing behavioral modifications, and the appropriate payback period for mercantile projects have been debated for several years and continue to be debated today. The PUCO has held technical workshops on the issues and possible alternatives, and

[1] See, e.g., *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221,* Case No. 08-888-EL-ORD, Opinion and Order (April 15, 2009); Entry on Rehearing (June 10, 2009); Entry Nunc Pro Tunc (June 17, 2009); Entry on Rehearing (August 12, 2009); Entry (October 28, 2009); Entry on Rehearing (December 9, 2009); Sixth Entry on Rehearing (July 17, 2013); *In the Matter of Protocols for the Measurement and Verification of Energy Efficiency and Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC, Entry (June 24, 2009); Entry (July 8, 2009); Entry (September 30, 2009); Finding and Order (October 15, 2009); First Entry on Rehearing (December 11, 2009); Entry (January 27, 2010); Entry (February 3, 2010); Entry (March 17, 2010); Entry (April 28, 2010); Second Entry on Rehearing (June 16, 2010); Third Entry on Rehearing (July 29, 2010); Fourth Entry on Rehearing (July 31, 2013); *In the Matter of the Application of The Lubrizol Corporation and The Cleveland Electric Illuminating Company for Approval of a Special Arrangement Agreement with a Mercantile Customer*, Case No. 09-1100-EL-EEC, Finding and Order (February 11, 2010); *In the Matter of the Adoption of a Portfolio Plan Template for Electric Utility Energy Efficiency and Peak-Demand Reduction Programs*, Case No. 09-714-EL-UNC, *Entry* (August 28, 2009); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2009 through 2011*, Case No. 09-1947-EL-POR, Proposal for Incentivizing Utility Energy Efficiency Performance (October 24, 2011); *In the Matter of the Applications of Various Mercantile Companies and Electric Utilities for Approval of Special Arrangements and Exemptions from Payment of Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-0833-EL-EEC, Finding and Order (June 23, 2010); *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-834-EL-POR, Entry (September 15, 2010); Entry on Rehearing (November 10, 2010); Second Entry on Rehearing (May 25, 2011); Third Entry on Rehearing (July 15, 2011); Fourth Entry on Rehearing (September 20, 2011); Fifth Entry on Rehearing (November 9, 2011); Sixth Entry on Rehearing (October 31, 2012); Seventh Entry on Rehearing (March 6, 2013); Entry (June 5, 2013); Finding and Order (July 17, 2013); *In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code and In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code,* Case Nos. 13-651-EL-ORD and 13-652-EL-ORD, Entry (March 15, 2013).

[2] Id.

continues to develop industry standards in its technical reference manual (TRM). The PUCO issued a Finding and Order as recently as July 17, 2013, addressing several of these issues in the context of the mercantile self-direct pilot program, and also initiated a rulemaking proceeding this year to review and evaluate Chapters 4901:1-39 and 4901:1-40, Ohio Administrative Code (O.A.C.), which are the rules associated with energy efficiency programs and alternative energy portfolio standards.[3]

A good example of how the industry has adapted to the changing environment is the mercantile self-direct program that I previously referenced. The PUCO initially established a process through the adoption of its rules in Chapter 4901:1-39, O.A.C., which included a self-direct application, Staff review and recommendation of each application, and an order issued by the PUCO on the merits of each application.[4] When the number of pending, filed applications grew too large and industry stakeholders notified the PUCO that the established process was not working effectively, the PUCO investigated the matter, ultimately agreed with the industry, and thereafter modified its process.[5] Three months later, the PUCO further refined its process by establishing a pilot program with a

[3] See *In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code and In the Matter of the Commission's Review of its Rules for the Alternative Energy Portfolio Standard Contained in Chapter 4901:1-40 of the Ohio Administrative Code* Case Nos. 13-651-EL-ORD and 13-652-EL-ORD (March 15, 2013).

[4] See, e.g., *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928.66, Revised Code, as Amended by Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD, Opinion and Order (April 15, 2009); Entry on Rehearing (June 10, 2009); Entry Nunc Pro Tunc (June 17, 2009); Entry on Rehearing (August 12, 2009); Entry (October 28, 2009); Entry on Rehearing (December 9, 2009); Sixth Entry on Rehearing (July 17, 2013); Rule 4901-1-39-05(G), O.A.C.

[5] *In the Matter of the Applications of Various Mercantile Companies and Electric Utilities for Approval of Special Arrangements and Exemptions from Payment of Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-0833-EL-EEC, Finding and Order (June 23, 2010).

standardized application and automatic approval process.[6] Now, the applications are automatically approved in 60 days, unless an issue with the application is detected that cannot be resolved within the 60-day period. A filed review and recommendation from the Staff or PUCO order approving the application are no longer required. The revised, streamlined automatic approval process seems to be working very well. To this end, in July, the PUCO permanently adopted the self-direct pilot program with its simplified application filing and approval process.[7]

Earlier today you heard more examples of how the PUCO reviews and approves programs for the utilities to meet the benchmarks, which include such things as program costs, lost distribution revenues, and incentives. The PUCO reviews and approves each utility's plan every three years. Thus, the PUCO has had, and will continue to have, under the existing law, the opportunity to review the plans in light of the circumstances that exist at the time for each individual utility. The PUCO also has the benefit of weighing the input of its technical experts on Staff and other stakeholders prior to making any decisions on these important topics. The PUCO is equipped with the technical experts to make these decisions, and it has been working on these issues or similar technical and regulatory energy issues for decades. The PUCO has the institutional knowledge to determine when circumstances warrant change and the PUCO has the ability to request or rely on stakeholder input when it believes it is necessary. The PUCO is in the best position to balance the interests of all stakeholders, including customers' interests and the utilities' interests. Is the system perfect?

---

[6] *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, Case No. 10-834-EL-POR, Entry (September 15, 2010); Entry on Rehearing (November 10, 2010); Second Entry on Rehearing (May 25, 2011); Third Entry on Rehearing (July 15, 2011); Fourth Entry on Rehearing (September 20, 2011); Fifth Entry on Rehearing (November 9, 2011); Sixth Entry on Rehearing (October 31, 2012); Seventh Entry on Rehearing (March 6, 2013); Entry (June 5, 2013); Finding and Order (July 17, 2013).

[7] Id.

Of course not, but without an independent authority to balance the interests of all, the system is at risk for parties overreaching at the expense of others. Sub. SB 58 disturbs this balance by removing the PUCO's authority to deal with these highly technical issues.

As currently drafted, the Bill enriches the utilities at the expense of all ratepayers who are unable to opt-out or otherwise avoid paying the energy efficiency rider (cost recovery mechanism for compliance). Through the cost recovery mechanism, manufacturing companies will be asked to pay for the utility companies to receive 33 percent of the after-tax net benefits associated with the programs implemented to meet compliance prior to achieving compliance. (Ln 1759-76.) This is compared to today's mechanism whereby the utility also receives full cost-recovery for any expenditures of implementing the programs, but the utility does not receive profits until the utility meets the compliance standards (for one utility, the utility does not receive any incentive payment until the utility achieves savings beyond those required by the standards). Manufacturers will be paying utilities 33% for doing what they are doing today, which will ultimately reduce the amount that may be spent on energy efficiency programs. In essence, the utility will receive profits to implement programs necessary for it to meet compliance. Utilities will be receiving full compensation for costs incurred as a result of the programs, without any attenuated risk. The concern is further exacerbated by other provisions in the Bill which will allow the utilities to receive this same profit for doing less than what they do today. For instance, as noted by previous witnesses, if energy efficiency projects dating back to 2006 are now counted, utilities will earn 33% of the after-tax net benefits associated with the savings already realized, without any additional action necessary on their behalf.

The programs currently approved or pending approval, afford utilities an opportunity to earn a profit on the savings achieved when the benchmark is achieved or when the benchmark has been exceeded. (See attached chart.) However, those profits range from 5 percent to 13 percent, depending on the level of savings achieved. In no case are manufacturers asked to pay an amount greater than 13 percent on the savings achieved—let alone 33 percent. An increase in the amount of profit conferred to the utilities under the Bill (regardless of whether the utility achieves the benchmarks) will result in an unreasonable windfall to the utilities.

The level of shared savings currently afforded to the utilities has been accomplished through PUCO proceedings. The level of shared incentives and profits afforded to utilities which meet and/or exceed the statutory benchmarks has been negotiated and/or litigated by stakeholders and the PUCO's staff, and ultimately approved by the PUCO. For all but one utility, these incentives include a cost cap on the amount that can be paid to the utility. Each utility, with one exception, has agreed to this structure in its respective PUCO proceeding. Nonetheless, the Bill questions the expertise of the industry stakeholder process and supplants its wisdom for that of the Commission and those in the industry.

Similarly, the Bill awards the utilities another means of compensation to be recovered from ratepayers through the cost recovery mechanism, and allows the utility to choose, for each rate class, the form of that additional compensation. (Ln 1756-58.) The utility may choose, for each rate class, whether it will receive compensation in the form of a lost revenue mechanism or a revenue decoupling mechanism. These types of compensation have historically been awarded to utilities on a case-by-case basis in proceedings that have resulted in settlements or that have been fully vetted and litigated by all parties. (See attached chart.)

As currently drafted, the Bill establishes a cost cap on compliance costs. While a cost cap would presumably function as a protection for customers, a closer look reveals otherwise. The cost cap provision does not afford the PUCO the ability to establish the appropriate methodology to implement the cost cap. Rather, the Bill allows the utility to choose which methodology is more advantageous to it, not customers. (Ln 1806-20.) Additionally, the Bill affords the utilities, in their sole discretion, the opportunity to "not be subject to a cost cap" under certain circumstances. (Ln 1797-1800.) The Bill also provides exceptions to the cost cap for items such as compliance costs, shared savings incentives, temporary over compliance, and compensation for lost revenue or revenue decoupling. (Ln 1797-1800, 1847-52, 1853-60, 1861-63, 1866-68, 1869-72.) One of the most notable exceptions appears in Section 4928.6621, wherein the *effects* of lost revenue recovery or revenue decoupling are not included. (Ln 1861-63.) The Bill seemingly eliminates all PUCO oversight of a mechanism that was intended to be a benefit to consumers. As drafted, the cost cap created by the Bill is not a true cost cap and is not a real protection for consumers.

Furthermore, the proposed Bill explicitly removes the PUCO's oversight and the discretionary authority that is typically afforded to an agency with the subject matter expertise that it possesses. For example, the Bill requires the PUCO to liberally construe the energy efficiency/peak demand requirements in the law in favor of counting the savings achieved by customers or through the utility programs. (Ln 2094-2100.) The Bill prohibits the PUCO from requiring the utilities to exceed the benchmarks, without exception. (Ln 2090-93.) The Bill restricts the energy efficiency resources that the PUCO can require a utility to bid into a regional transmission organization's capacity markets. (Ln 2173-93.) The Bill also specifically mandates what the PUCO shall recognize and count with regard to energy savings and peak demand reductions achieved without regard to current circumstances and without any regulatory flexibility. (Ln 2008-75.)

As currently drafted, other problematic provisions exist in the Bill. The Bill eliminates the mandatory penalty for non-compliance with the benchmarks. (Ln 2153-54.). The Bill affords the utility an option to select which measurements should be included in the determination of compliance with the benchmarks (currently, this is done in collaboration with customers through a stakeholder collaborative). (Ln 2076-80). The Bill further ties the discretionary penalty for failure to meet the energy efficiency and peak demand reduction benchmarks to the value of a renewable energy credit. (Ln 2153-63.) The Bill sunsets the energy efficiency and peak demand reduction requirements. (Ln 2194-2200.)

In light of the several pieces of testimony that you have heard here today and over the past few weeks, OMA is deeply concerned with Sub. SB 58 as currently drafted. Although manufacturers need protections, Sub. SB 58 is not the solution.

Chairman Seitz, Ranking Minority Member Gentile, and members of the Senate Public Utilities Committee, thank you for your kind attention. I am happy to answer any of your questions.

POR Cases and Decoupling/Lost Distribution Programs

Ohio Electric Distribution Utilities

EDU	Shared Savings Percentage	Shared Savings Cap?	Program Cost Allocation	Decoupling or Lost Dist. Rev Considered?
DP&L (Pending in Case No. 13-833-EL-POR)	Incremental Energy Savings Achievement %: / Shared Savings Incentive: <100% 0.0% 100-105% 5.0% >105-110% 7.5% >110-115 10.0% >115% 13.0%	Yes, $13.5 million total; $4.5 million annually	• Non-residential customers: 30% of non-residential EER costs allocated to non-residential tariff classes based on the most recent 12 months of distribution revenue • 70% of non-residential EER costs allocated to non-residential tariff classes based on the most recent 12 months of billed sales (kWh)	▪Lost distribution revenues recovered (Case No. 08-1094-EL-SSO)
Duke (Pending in Case No. 13-431-EL-POR; adopted previously in 11-4393-EL-RDR)	Achievement of Annual Target: / After-Tax Shared Savings: ≤100% 0.0% >100-105% 5.0% ≥105-110% 7.5% ≥110-115 10.0% ≥115% 13.0%	No	• Program costs are assigned to rate classes where customers are directly participating	▪Decoupling rider approved (Case No. 11-5905-EL-RDR) ▪Lost distribution revenue recovery may be requested from customers not subject to decoupling rider (Case No. 11-4393-EL-RDR)
FirstEnergy (Approved in Case No. 12-2190-EL-POR, et al.)	Achievement of Annual Target: / Shared Savings (after tax) Percentage: <100% 0.0% 100-105% 5.0% >105-110% 7.5% >110-115 10.0% >115% 13.0%	Yes, $10 million per year	• Assigned on the basis of rate class, according to general rate design • Classes included are: RS GT GS STL GP TRF GSU POL	▪Decoupling rider approved for residential and small commercial customers (Case No. 11-351-EL-AIR)

AEP (Approved in Case No. 11-5568-EL-POR)	Achievement of Annual <u>Target</u>: <u>Percentage</u>: — Shared Savings <100% — 0.0% 100-105% — 5.0% >105-110% — 7.5% >110-115 — 10.0% >115% — 13.0%	Yes, $20 million per year, after tax	• Program costs assigned to respective rate classes whose customers are eligible for the program • Distribution costs by tariff used to allocate program costs, net lost distribution revenue and shared savings	▪Decoupling pilot program established (Case No. 11-351-EL-RDR)