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Ohio Consumers' Counsel says new bill would curb its advocacy

By Jeff Beattie

Buried in complex legislation to reform electricity regulation in Ohio are provisions that the state ratepayer advocate says would significantly curb its ability to advocate on behalf of customers by barring it from participating in any legal or regulatory proceedings that did not originate before the Public Utilities Commission of Ohio and politicizing appointment of the organization's governing board.

Those and other changes to the Ohio Consumers' Counsel (OCC) mission and range of permitted activities are included in HB 246, a broad bill that also imposes changes on the PUCO and the state's Power Siting Board.

The bill also would let Ohio's investor-owned utilities greatly expand the use of rate "riders" to accelerate recovery of certain expenses from ratepayers, a far quicker option than waiting for periodic true-ups, which consumer advocates generally prefer as a more transparent ratemaking approach.

Partly due to the ongoing coronavirus pandemic and racial injustice protests that hit Columbus last week, the wide-ranging bill has gotten relatively little attention since it was unveiled two weeks ago.

The legislation's sponsor—Rep. Nino Vitale (R)—presented the bill on May 28 to the Ohio House Public Utilities Committee. At the hearing, Committee Chair Jamie Callender (R) suggested the panel will hear additional testimony on the bill over the "next few weeks."

In his testimony outlining the bill, Vitale suggested that the portions of HB 246 related to the OCC are intended to provide "clarity" on the operation and function of the agency, which the legislature created to represent ratepayer interests in utility

matters. Vitale asserted that his goal was to reform and modernize operation of the OCC, and that the bill was crafted based on significant stakeholder input over the last year.

For instance, Vitale said the legislation creates a mission statement for the OCC that he suggested was overdue. He said Ohio is the only state in the 13-state grid operated by PJM Interconnection LLC where "the consumer advocate does not have a statutory mission statement."

But Vitale's proposed mission statement and associated language would appear to substantially restrict the scope of the OCC's advocacy—including in the courts, where the ratepayer advocate has had success in the past.

The bill says the OCC's mission "is to represent residential consumers before the public utilities commission..." and further says it can only participate in matters that have originated before the PUCO.

The OCC may "only institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission..." says HB 246.

That restriction would appear to prevent the OCC from pursuing legal cases where it has won significant victories—sometimes against the wishes of the state's utilities and generators. For instance, the consumers' counsel was one of several parties that in December successfully appealed a bankruptcy court decision that allowed FirstEnergy Solutions (now Energy Harbor) to abandon contracts to pay for two coal plants, which could have passed on additional costs to customers of Ohio's regulated utilities.

In June 2019, the OCC won a case at the Ohio Supreme Court, which ordered the PUCO to revoke a "distribution modernization rider" under which FirstEnergy Corp. had collected hundreds of millions of dollars from ratepayers. The court said the PUCO decision was "unlawful and unreasonable" because regulators did not require the company to pursue any specific grid modernization projects.

And in an action that could be barred by the bill, the OCC intervened on the winning side in an April 2016 ruling from the Federal Energy Regulatory Commission blocking FirstEnergy and American Electric Power (AEP) from moving some of their financially ailing Ohio merchant coal and nuclear plants under the shelter of cost-based rates, which the companies said would stabilize both power prices and the state's grid. FERC rescinded waivers previously granted to the companies, meaning the contracts were subject to FERC "affiliate abuse" tests banning self-dealing among company affiliates. Neither company subsequently approval for the contracts.

HB 246 also includes language that would give lawmakers authority to nominate a majority of the OCC's board of governors, subjecting the agency to new levels of political influence. Currently, the nine-member board is appointed entirely by the attorney general, but the bill would reduce the AG's appointments to three, while giving three appointments apiece to the Senate president and House speaker.

That is a crucial change because the head of the OCC is appointed by its board of governors, and serves at the board's pleasure.

The OCC has also lost high-profile battles that left political scars among combatants. Along with AARP Ohio, industrial energy

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users and green groups, the OCC strongly opposed “clean air” legislation passed by Ohio lawmakers last year that forced utility ratepayers to provide hundreds of millions of dollars in subsidies to prop up First-Energy Solutions’ two financially ailing merchant nuclear plants in the state—plus an undetermined amount to support two coal plants for the next decade. It was during fierce debate on that bill that a “placeholder” version of HB 246 was introduced, which described it merely as a bill to reform the PUCO and OCC.

In his first public statement on H.B. 246, Ohio Consumers’ Counsel Bruce Weston told The Energy Daily Monday that the bill represents a step backwards for the state’s ratepayers while serving the interests of utilities.

“I recall several decades ago attending a summer lecture by the late Professor Harry Trebing—one of the deans of American utility regulation—where he warned

government regulators to avoid the undue influence of utility monopolies,” Weston said. “Dr. Trebing’s words came to mind while reading newly amended Ohio Sub. H.B. 246. There, every utility sector wins something and millions of Ohio consumers lose from the bill’s politicizing of the Consumers’ Counsel board and constraints on OCC’s consumer advocacy.

“Already, Ohio has a Public Utilities Commission where three of the five appointed commissioners (a majority) have previously worked for utilities that the PUCO regulates,” Weston continued. “This year extraordinary events have highlighted social disparities that must be solved in our society, and on a smaller scale the disparity favoring influential utility special interests over the public interest of Ohio consumers needs a solution.”

Three of Ohio’s four investor-owned utilities—FirstEnergy, AEP and AES’ Dayton Power & Light—declined to comment for

this article. Duke Energy Ohio did not immediately respond to an inquiry late Wednesday.

HB 246 also stresses in various areas that the OCC may become involved at the PUCO only to represent residential customers of the state’s investor-owned utilities and in cases when the PUCO has received a complaint. The bill also would allow the PUCO to trim the participation of groups representing residential interests if it deems the advocacy to overlap.

“To the extent that a municipal corporation, the consumers’ counsel, and any other party or intervenor seek to participate in the same proceeding, and do so on behalf of residential consumers, their participation may be subject to any reasonable conditions that the commission deems necessary to avoid duplication, repetition, and delay,” says the bill.

A spokesman for the PUCO said last week that the agency is neutral on the bill.