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H.B. 156: Achieving Uniform Utility Rate Schedules for Municipalities

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H.B. 156: ACHIEVING UNIFORM UTILITY RATE SCHEDULES FOR MUNICIPALITIES

I. INTRODUCTION

Public utility rates have increased in Ohio significantly in the past five years.¹ Utility rate increase applications escalated 1,540 percent in 1975 alone when seventy-seven rate increase requests were filed with the Public Utilities Commission of Ohio (PUCO).² On January 20, 1979, Consumer Counsel William A. Spratley, from the office of the Consumers' Counsel of Ohio, expressed concern over the massive utility rate increases.³ Spratley notified Alfred E. Kahn, Chairman of the Council on Wage and Price Stability, and complained that PUCO was not holding Ohio utilities to the 9.5 percent annual maximum price increase recommended by the Council to combat inflation.⁴

The General Assembly responded to the utility rate increases by passing House Bill 156 in June of 1979.⁵ H.B. 156 amends current law and it requires gas, natural gas, and electric light utilities to negotiate uniform residential rate schedules with municipalities which so choose to negotiate.⁶ The bill permits complaints to be filed with PUCO by qualified electors from municipalities that negotiate with a utility.⁷ The public utility may also file a complaint with PUCO concerning any rate ordinances passed by municipal corporations when the utility believes such rates are unfair.⁸ The bill, therefore, provides a remedy to the utility and the consumer in that both have the opportunity to complain to PUCO. Thus, the underlying principle of House Bill 156 is to make area-wide uniformity in rate-making agreements accessible to municipal corporations that elect for uniform rates with the hope that group negotiations will yield more equitable rate schedules.⁹ It is an-

1. Goodman, *The Role of Consumer Advocacy Before the Public Utilities Commission of Ohio*, 8 CAP. U.L. REV. 213, 215 (1978).

2. *Id.*

3. Letter from William A. Spratley to Alfred E. Kahn (Jan. 20, 1979) (on file at Ohio Consumers' Counsel).

4. *Id.*

5. Am. H.B. 156, codified in OHIO REV. CODE ANN. §§ 743.28, 4909.34, 4909.36, 4909.38, 4909.39 (Page Supp. 1979).

6. OHIO REV. CODE ANN. § 743.28(B) (Page Supp. 1979).

7. *Id.* § 4909.36.

8. *Id.* § 4909.34(A).

9. H.B. 156 was sponsored because a group of mayors had complained that their gas company (Columbia Gas of Ohio) negotiated a different rate schedule with each municipality. The mayors felt that if two or more municipal corporations could negotiate together they could obtain lower rates. *See generally House Comm. on*

anticipated that the bill will have an important impact on public interest and municipal attorneys throughout Ohio.

II. ANALYSIS

A. Procedure and Remedies

Current Ohio law permits a municipality and a utility company to agree in writing to set prices for residential services that will remain in effect no more than ten years.¹⁰ If the local legislative body opts to set the rates in writing and the utility agrees, then the municipality cannot reduce the rates during the contractual period.¹¹ H.B. 156 supplements current law by permitting a group of municipalities to negotiate with an electric, gas or natural gas company for uniform rate schedules.¹² The new rate schedule will become effective upon the expiration of the old schedule.¹³

The utility must begin negotiations with the municipal corporations upon written notification from the mayors of the municipalities, or within ninety days from the date of notification.¹⁴ Failure to reach an acceptable contract within the ninety day limit allows municipalities to set the rate by ordinances.¹⁵ H.B. 156, therefore, further supplements current law by allowing a group of municipal corporations to unilaterally fix a uniform rate schedule for the municipalities.

A remedy is available to a public utility when it feels the municipalities have enacted an unfair ordinance. If the public utility is not satisfied with the rate change, and it does not have a rate application pending before PUCO, then the utility can file a written complaint with PUCO.¹⁶ Upon receiving the complaint, PUCO will give the utility and the municipalities notice of the complaint within thirty days of the filing and establish a time and place for an appropriate hearing.¹⁷

Public Utilities, Minutes of Hearing on H.B. 156, 113th General Assembly (March 6, 1979).

10. OHIO REV. CODE ANN. § 743.28(A) (Page Supp. 1979). This has been the law for a single municipality before and after the enactment of H.B. 156. The bill extends the power to a group of municipalities.

11. *Id.*

12. *Id.* § 743.28(B). There is no limit to the number of municipalities who may negotiate in this manner.

13. *Id.* § 743.28(A).

14. *Id.* § 743.28(B).

15. *Id.* § 4909.34.

16. *Id.* § 4909.34(A). See generally *Ohio Fuel Gas Co. v. PUCO*, 171 Ohio St. 10, 167 N.E.2d 496 (1960); *East Ohio Gas Co. v. PUCO*, 137 Ohio St. 225, 28 N.E.2d 599 (1940).

17. OHIO REV. CODE ANN. § 4909.34(A) (Page Supp. 1979).

If a rate application is pending, the Commission loses jurisdiction over the application when the utility accepts the terms of the new rate contract.¹⁸ When the utility finds the rate schedule unacceptable PUCO will have jurisdiction to rule on the rate application. The utility must notify the Commission and the municipalities within thirty days of the passage of the ordinance by the local legislatures in order for PUCO to rule on the application.¹⁹ PUCO has plenary jurisdiction to hear complaints concerning a public utility and may alter the rates if they are deemed unfair.²⁰

Electors of the municipalities also have a remedy if they are not satisfied with the contract between the utility and the municipality. After the expiration of the old rate schedule, a rate change will automatically go into effect upon acceptance of the contract by the utility unless: (1) ten percent of the qualified electors of a municipal corporation sign a complaint; or (2) ten percent of the qualified electors of each municipality in a group sign a complaint.²¹ Either type of complaint must be filed with PUCO within sixty days of the utility's acceptance of a contract.²² Before the passage of H.B. 156, PUCO had broad discretionary power to change a municipal rate ordinance that it considered unjust or unreasonable.²³ H.B. 156 extends this power of review to include rate ordinances negotiated by a group of municipal corporations.²⁴

B. Origin and Effect

In the spring of 1979, one hundred mayors passed a resolution at a meeting of the Ohio Mayors Association that dealt specifically with the varying rates of Columbia Gas of Ohio (Columbia).²⁵ The mayors urged the General Assembly to approve H.B. 156,²⁶ which had been introduced in the legislature in January of that year. The purpose of the resolution was to protect Ohio residential consumers from unreasonable and escalating utility rates.²⁷ The mayors complained

18. *Id.* § 4909.34(B). PUCO cannot interfere with the rate schedule once the municipality and the utility have reached an agreement.

19. *Id.*

20. *Id.* § 4909.15. See also *Dayton St. Transit Co. v. Dayton Power & Light Co.*, 57 Ohio App. 299, 13 N.E.2d 923 (1937).

21. OHIO REV. CODE ANN. § 4909.36 (Page Supp. 1979).

22. *Id.*

23. See note 20 and accompanying text *supra*.

24. OHIO REV. CODE ANN. § 4909.39 (Page Supp. 1979).

25. Resolution of the Ohio Mayor's Association (May 19, 1979) (copy on file with the Ohio Legislative Service Commission Library, Columbus, Ohio).

26. The Cleveland Plain Dealer, May 20, 1979.

27. See note 25 *supra*.

that Columbia was the “only major utility company in Ohio that does not have uniform rates.”²⁸ Their rates were the “highest of the four major gas companies in Ohio,” with the average rate varying from thirty-nine dollars to sixty-one dollars depending upon the city.²⁹ City officials and city councils throughout Ohio had tried unsuccessfully in the past to negotiate for uniform rates with Columbia.³⁰ The mayors concluded that they could save money if they “banded together and negotiated collectively for a uniform rate.”³¹ Cities would be able to “fight rate increases more effectively if they combine their monetary resources and technical expertise and collectively negotiate for uniform rates.”³²

H.B. 156 was passed primarily because of Columbia’s rate making. Columbia negotiates separate rate contracts with over three hundred municipalities.³³ This procedure makes Columbia the only major utility in Ohio that does not have uniform rates.³⁴ Columbia is always involved in a number of cases before PUCO because when it cannot come to an agreement with a particular municipality, Columbia appeals to PUCO as a matter of course.³⁵ H.B. 156 may decrease the number of cases before the Commission. If smaller municipal corporations appear as a group, then the volume of appeals and administrative burden should be reduced.

Of the four major gas utilities in Ohio, three have uniform rates. Only Columbia negotiates rates individually.³⁶ By evaluating the rates at fifteen thousand cubic feet (15 Mcf) of gas, the average cost of gas from each utility can be compared:³⁷

Utilities with uniform rates:

Cincinnati Gas & Electric	\$41.52	per Mcf
Dayton Power & Light	\$40.82	per Mcf
East Ohio Gas	\$37.46	per Mcf

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. J. BABCOCK & M. STANFORD, REPORT ON OCC’S COMMUNITY ASSISTANCE ACTIVITIES (Updated report on OCC’s Community Assistance Activities) (Nov. 28, 1979) [hereinafter cited as OCC’S COMMUNITY ASSISTANCE].

34. *Id.* Some smaller utility companies, such as Swickard Gas Co. and Oxford Natural Gas Co., also negotiate individual rates.

35. *Id.*

36. OHIO CONSUMERS’ COUNCIL, OCC SPECIAL STUDY OF GENERAL SERVICE RATES (March 31, 1979) [hereinafter cited as OCC SPECIAL STUDY]. See also note 33 and accompanying text *supra*.

37. OCC SPECIAL STUDY, *supra* note 36.

Utility without uniform rates:

Columbia Gas of Ohio \$44.33 per Mcf

Columbia's average, which is based on different rates for each of its individually negotiated service areas, has the highest composite gas cost.³⁸ It is anticipated that permitting municipalities to negotiate uniform rates will reduce Columbia's rate figures to a level consistent with the others.

As a response to Columbia's individual rate setting method, the Ohio Consumers' Council formed the Community Assistance Program in April of 1978 to help local officials negotiate equitable rates.³⁹ Sixteen communities were aided in 1978 and at least forty communities were given assistance in 1979.⁴⁰ H.B. 156 may lower the number of municipalities using the Community Assistance Program and reduce its workload.

Industries are regulated, as a substitute for competition, when competition does not exist in a free market economy.⁴¹ Columbia's regulation is justified by three public policy considerations: (1) the prevention of excessive profits; (2) the prevention of price discrimination from one area to another; and (3) the assurance that utility service will remain adequate.⁴² Prices and service should not vary simply because of "political subdivision lines."⁴³

A report to the Ohio Consumers' Council Governing Board is highly contemptuous toward Columbia.

Currently, Columbia claims that rates are based on the cost of service in each city or village. However, many unincorporated and rural areas have rates which are lower than rates in urban and densely populated municipalities. It is our contention that Columbia simply attempts to negotiate with city councils for the highest possible rate and later uses the guise of 'different cost of service' to explain the varying rates statewide. The OCC as well as many local officials feel that Columbia employs a 'divide and conquer' strategy in obtaining these various rates.⁴⁴

The report also found that

[s]ince Columbia Gas is a monopoly, the company must be regulated. By negotiating rates with local councils, Columbia does not have to receive

38. *Id.*

39. *See* OCC'S COMMUNITY ASSISTANCE, *supra* note 33.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

PUCO approval for rate increases. Municipalities that force Columbia to seek PUCO approval have lower rates, on the average. Currently there exists a variance of 10% to 15% between the lower PUCO set rates and the higher ordinance set rates.⁴⁵

This leads the author of the report to ask: "Would it not present a lesser financial burden on the company, the PUCO, the OCC, Ohio's municipal governments and ultimately the residential utility consumer if rate increases were considered all at once and every two years or more, rather than separately and every few weeks?"⁴⁶

H.B. 156 could substantially affect both utility companies and municipalities in Ohio. The bill may cause Columbia to abandon its individual rate structure and switch to uniform rates if municipalities form negotiating groups large enough to bring about area-wide uniformity. This will make Columbia's rates more consistent with the three other major utilities. The bill should discourage the other utilities from switching to Columbia's method of individual negotiation because that method will be less lucrative.

H.B. 156 should have a positive impact on municipalities. Individual city councils often lack the necessary expertise to negotiate utility rates. By cooperating, it may be possible to utilize group experts and experienced negotiators. The current practice of employing utility personnel as advisors may be discontinued. Finally, since a group of municipalities will bear the expense of negotiations and appeals, individual municipalities will have a better means to resist unfair utility rates by combining economic resources. The concept of regionalized litigation was supported in hearings on H.B. 156 before the Public Utilities Committee.⁴⁷ The cost of litigation may preclude individual communities from taking a case to court.⁴⁸ But, for a group of communities, the court action would be more affordable.⁴⁹ Therefore, the bill may provide individual municipalities with a way to keep rising costs within acceptable levels.

The fiscal note on House Bill 156 confirms these effects.⁵⁰ First, lower costs may be incurred by municipalities if they can negotiate as a

45. *Id.*

46. *Id.*

47. *House Comm. on Public Utilities, Minutes of Hearing on H.B. 156*, 113th General Assembly (April 17, 1979).

48. *Id.*

49. *Id.*

50. Analysis of Fiscal Impact of H.B. 156 by Ohio Legislative Service Commission, April 23, 1979 (copy on file with Ohio Legislative Service Commission Library, Columbus, Ohio).

group with a utility.⁵¹ Secondly, administrative costs may be reduced because of a smaller caseload for PUCO.⁵²

C. *Constitutional Provision versus Statute*

The Ohio Constitution authorizes home rule municipalities to contract with utilities for services to be supplied to their community.⁵³ This article of the constitution has been interpreted to necessarily include the power to negotiate prices for utility services.⁵⁴ PUCO may regulate utility rates in a charter city unless there is a contract between the city and the public utility.⁵⁵ If such a contract exists and it is accepted by both parties, then the terms of the contract are not subject to review by PUCO.⁵⁶

There are two procedures for rate-making in effect in Ohio. The first system is based on the constitutional provision which permits municipalities to make valid contracts with utilities as a matter of right.⁵⁷ A second statutory procedure enables PUCO to authorize and regulate rates.⁵⁸ A rate ordinance promulgated under the constitution is effective when the municipality and a utility agree to a specific rate and no appeal is taken to PUCO.⁵⁹ Thus, either the constitutional provision or the statutory method may be used to establish price rates with a utility.⁶⁰ The constitutional provision does not negate the statutory method; the systems operate simultaneously.⁶¹

H.B. 156 eliminates a potential conflict between the constitutional procedure and statutory procedure. The Ohio Constitution states that a municipality may contract for services with a consenting utility and the resulting contract will be effective unless ten percent of the electors sign a petition demanding a referendum.⁶² Prior to H.B. 156, the Ohio Revised Code permitted the contract to become effective unless three percent of the electors signed a complaint and filed it with PUCO.⁶³

51. *Id.*

52. *Id.*

53. OHIO CONST. art. 18, § 4.

54. *Parks v. Cleveland R.R.*, 124 Ohio St. 79, 177 N.E. 28 (1931); *Ohio River Power Co. v. Steubenville*, 99 Ohio St. 421, 124 N.E. 246 (1919).

55. *Lima v. PUCO*, 106 Ohio St. 379, 140 N.E. 147 (1922).

56. *Link v. PUCO*, 102 Ohio St. 336, 131 N.E. 796 (1921).

57. OHIO CONST. art. 18, § 4.

58. *See note 20 supra.*

59. *East Ohio Gas Co. v. PUCO*, 137 Ohio St. 225, 28 N.E.2d 599 (1940).

60. *Link v. PUCO*, 102 Ohio St. 336, 131 N.E. 796 (1921).

61. *See, e.g., Brainard v. McConnaughery*, 137 Ohio St. 431, 30 N.E.2d 699 (1940); *Link v. PUCO*, 102 Ohio St. 336, 131 N.E. 796 (1921).

62. OHIO CONST. art. 18, § 5.

63. OHIO REV. CODE ANN. § 4909.36 (Page 1976).

Although the ten percent requirement in the Ohio Revised Code refers to a complaint, both provisions are intended to give the electorate a remedy if an unfair contract is made between the city and the utility. This created a potential conflict in the remedies available to the electorate.

*Link v. PUCO*⁶⁴ resolved this conflict in favor of the constitutional provision. In *Link*, a conflict arose between section 614-44 of the General Code,⁶⁵ which allowed three percent of the electorate to appeal a rate ordinance, and the ten percent required by the constitution.⁶⁶ The court held that the statutory section violated the constitutional provision.⁶⁷

H.B. 156 amends the Ohio Revised Code and requires that ten percent of the electors, rather than three percent, appeal a change of rate ordinance.⁶⁸ This figure reconciles the constitutional provision with the statute. In the second hearing before the Public Utilities Committee, the Committee considered and passed three amendments to the proposed bill.⁶⁹ The committee allowed the new utility contract to take effect upon the expiration of the old contract, changed a thirty day requirement to begin negotiations to ninety days, and changed the percentage of electors needed to file a complaint with PUCO from three percent to ten percent.⁷⁰ This achieves a balance between the constitutional provision⁷¹ and the authority of the legislative enactment.

III. CONCLUSION

H.B. 156 requires gas, natural gas and electric light utilities to negotiate uniform rate schedules with two or more municipalities upon request of the municipalities. The bill should level prices among municipalities and make utility rate schedules uniform. PUCO will also be more accessible to municipalities to review differences with a utility. Small municipalities will now be able to cooperate, sharing expertise and costs in a court fight against a utility. PUCO's caseload should be lessened because fewer individual municipal corporations will appeal rate increases. Finally, H.B. 156 reconciles a potential inconsistency between statutory review and the Ohio Constitution.

64. 102 Ohio St. 336, 131 N.E. 796 (1921).

65. 1919 Ohio Laws 428 (current version at OHIO REV. CODE ANN. §§ 4909.34-.36 (Page 1976 & Supp. 1979)).

66. *Link v. PUCO*, 102 Ohio St. 336, 131 N.E. 796 (1921).

67. *Id.* at 337, 131 N.E. 797.

68. OHIO REV. CODE ANN. § 4909.36 (Page Supp. 1979).

69. *See* note 47 *supra*.

70. *Id.*

71. OHIO CONST. art. 18, § 5.

H.B. 156 was necessary for individual communities in Ohio. The bill, together with the Community Assistance Program in Ohio, will enable municipalities to fight inequities in the soaring costs of utility services. Individual municipalities need an effective remedy to bargain with larger, sophisticated utilities. H.B. 156 effectively grants municipalities more leverage in rate negotiations. It should adequately deal with the necessity of leveling massive rate increases.

Douglas A. Smoot

Code Sections Affected: 743.28; 4909.34, .36, .38-.39.

Effective Date: September 28, 1979.

Sponsor: Colonna (H).

Committee: Public Utilities.

