

# **Senate Bill 221**

House Public Utilities Committee

Alan R. Schriber, Chairman  
Public Utilities Commission of Ohio

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Good morning, Chairman Hagan and members of the committee, thank you for giving me the opportunity to serve on today's panel on side deals, special contracts and transparency.

These are interesting and important issues that are critical to ensuring that Senate Bill 221 (SB 221) is a comprehensive energy bill. As I have stated before to this committee, these topics will probably "drive you nuts." That is because depending on the stakeholder you discuss these issues with; you will receive varying rationale and opinions on these issues.

So that you might be armed with a solid foundation to form your own educated opinion and to ensure that we are on the same page in our discussion today, I am going to define side deals, special contracts and transparency as they relate to and are applied by the Public Utilities Commission of Ohio (PUCO). In the course of defining these issues, I will also mention and discuss other important concepts that are related to the issues we are discussing today.

### **Side Deals**

A side deal can be defined as an agreement among parties to a case that takes place during the course of a litigated process. A party may enter into an agreement with the applicant of the case for the purpose of satisfying an interest thereby causing the party to withdrawal objections or lend support to the stipulation or application pending before the PUCO.

The PUCO is often not made aware nor has any record of side deals reached in pending cases. Therefore, the PUCO obviously does not and cannot enforce side deals. One can argue that this leads to a disadvantage in the proceeding, especially since some of the parties are not privy to the side deal or offered a side deal. I will examine this more when I discuss transparency and provide an example of such an instance.

## **Stipulations**

A stipulation is a negotiated arrangement that is the result of bargaining among the parties to a case. Stipulations are filed in the case record and are then reviewed by the PUCO commissioners for approval, modification or denial.

I would note that while you may often hear that the *staff* of the PUCO is a signatory party to a stipulation, this in no way implies that the PUCO commissioners will automatically approve the stipulation. PUCO staff is a separate party from that of the PUCO commissioners in proceedings and any negotiations. PUCO staff participates in cases but are not representing the PUCO commissioners. All stipulations, regardless of the signatory parties, go through the same rigorous review and three part test. That three part test includes the following criteria:

- Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- Does the settlement, as a package, benefit ratepayers and the public interest?
- Does the settlement package violate any important regulatory principle or practice?

Ultimately, the PUCO commissioners consider whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. Based on this, the PUCO commissioners may modify, deny or approve the stipulation. A stipulation may also include various agreements and contracts among the parties that are subject to review by PUCO commissioners.

## **Special Contracts**

Special contracts are financial arrangements between a utility (electric, natural gas or telephone) and a customer entered into either for the purpose of facilitating business expansion or supporting efforts to retain jobs in the face of economic hardship.

The PUCO approves special contracts that are filed with the agency, except those that are entered into with a municipality or government entity. There have been limited electric

special contracts filed with our agency since the passage of Senate Bill 3 (SB 3) in 1999 because electric distribution utilities do not or cannot contract with customers; rather contracting is done by the marketer side of the utility. As you know, with the deregulation of electric generation by the enactment of SB 3, the PUCO does not have regulatory authority over this transaction.

Special contracts can be beneficial for economic development and we believe that the PUCO needs to retain its authority to review and approve special contracts. Also critical to examining special contracts is evaluating the objective or criteria for the contract, which may include load factor, the percentage of the customer's expenses attributed to electricity and any revenue deficiencies and the compensation for those deficiencies by other customer classes.

It is important that special contracts continue to be reviewed and that SB 221 provide clarity to the PUCO's role as the Commission is in the unique position of being able to equally balance the interest of all parties.

### **Transparency**

Transparency is an element of the regulatory process that ensures accountability and equal treatment for all stakeholders. Transparency can be viewed in the procedural requirements that allow all parties to have equal access to information within proceedings. It also ensures that all market participants from the consumer to the supplier are making informed decisions as to their purchases of power.

Attached to my testimony is a one-pager that illustrates the procedures that govern the review of utility cases at the PUCO. In addition, it is important to note that the PUCO opened a bill format case as part of the implementation of Senate Bill 3. As a result, the electric distribution utilities (EDUs) are required to itemize their customer bills to show separate line items for generation, transmission, distribution, a transition charge and the fixed monthly customer charge. EDUs are also required to provide a "price to compare" which indicates what price an alternative generation supplier would have to "beat" to be

lower than the utility. The EDUs must also provide the 12-month prior usage history for the customer and must report periodically, with the customer's bill, the utilities' fuel mix. Any changes to the bill format require Commission approval. The Commission also has the ability to order a bill format change if deemed necessary to provide additional information for the customer. These changes made to the electric bill formats ensure transparency to the electric customers as they know what they are paying for each component of their electric bill.

Another example of transparency occurred recently during a pending PUCO case when the Ohio Consumers' Counsel (OCC) challenged the Duke Energy Ohio rate stabilization plan before the Ohio Supreme Court. OCC requested the Commission to compel discovery of side agreements between Duke and parties that signed the stipulation. When the request was denied on the grounds that matters relating to settlement are privileged and that side agreements are irrelevant to consideration of stipulations, OCC appealed the issue to the Court.

The Ohio Supreme Court found that settlement discussions are not privileged and might be relevant to determining whether a stipulation is the product of serious bargaining among capable, knowledgeable parties (stipulation approval standard). The Court ordered the Commission to compel disclosure of side agreements between Duke and the signatory parties and, subsequently, to decide any issues pertaining to admissibility of that information. Therefore, side agreements between Duke and signatory parties and between signatory parties and Duke's affiliates were ordered to be released. Later, testimony was allowed relating to those side agreements.

Afterwards, the Commission found that the existence of the side agreements, in which several signatory parties agreed to support the stipulation, raised serious doubt about the integrity and openness of the negotiation process. Therefore, the Commission found that there was sufficient basis to question whether the parties engaged in serious bargaining. The stipulation was rejected on that ground.

The Duke rate stabilization plan remand is significant because the Court applied the three part test used for the review of stipulations and applied it to side deals. The Court has now given the Commission a reason to compel discovery of side deals as these side agreements might be relevant to determining whether a stipulation or agreement is the product of serious bargaining among capable, knowledgeable parties. This is significant because to up to this point, the Commission did not have a statutory reason for compelling this discovery.

### **Conclusion**

As I mentioned at the start of my testimony, side deals, special contracts and transparency are important issues that need to be addressed to ensure that SB 221 is a comprehensive energy bill. However, there will be varying rationale and opinions on these issues, depending on the stakeholder's point of view.

I hope that I have been able to provide you with a comprehensive overview of these issues as they are defined by and applied by the PUCO.

Chairman Hagan, if you or members of the committee have questions, I would be happy to answer them at the appropriate time.

## Procedures for PUCO cases

- 1) Rate increase applications:
  - a.) Utility files notice of intent to file an application 30 days prior to filing application. Notice given to affected mayors and legislative authority of each municipality. (Section 4909.43(B) R.C)
  - b.) Notice of the filing of the application published in newspapers of general circulation and on Commission web site. (Section 4909.19, R.C.)
  - c.) Staff investigation and report filed.
  - d.) Interested parties may intervene and file objections to the Staff Report.
  - e.) All parties may conduct discovery.
  - f.) Local public hearings held to afford public opportunity to express views. Newspaper notice provided pursuant to Section 4903.083, R.C.
  - g.) Adjudicatory hearings held at the Commission offices.
  
- 2) Tariff change applications (to establish new service offering or to amend tariffs that are not for an increase in rates):
  - a.) Application to amend tariffs filed by utility.
  - b.) If Commission determines that application may be unjust or unreasonable, the matter is set for hearing and notice of the hearing published in newspapers in the affected areas (Section 4909.18, R.C.).
  - c.) If the application is determined to be just and reasonable, application may be approved by the Commission without a hearing.
  
- 3) Complaint cases:
  - a.) Complaint filed with the Commission pursuant to Section 4905.26, R.C.
  - b.) Settlement conference scheduled to see if dispute can be resolved.
  - c.) If matter is not resolved and if complaint sets forth reasonable grounds, the matter is set for hearing.
  
- 4) Rate Stabilization Plan applications:
  - a.) Application filed by utility to establish generation rates upon the end of market development periods (filed pursuant to 4928.14, R.C.).
  - b.) Interested parties granted intervention and discovery permitted.
  - c.) Adjudicatory and local public hearings held, newspaper notice given.
  
- 5) Applications to approve special contracts:
  - a.) Utility enters into special contract with customer and files an application/copy of contract with the Commission requesting approval of the contract pursuant to Section 4905.31, R.C.
  - b.) Commission's staff reviews contract to determine if contract is in the public interest. i.e. promotes economic development or helps the utility maintain load.
  - c.) Commission issues order, no hearing required.