BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Cobra Pipeline Company, Ltd. to Amend Its Rates and Charges	)))))	Case No. 16-1725-PL-AIR

MEMORANDUM CONTRA TO COBRA PIPELINE COMPANY APPLICATION FOR REHEARING BY ORWELL NATURAL GAS COMPANY, NORTHEAST OHIO NATURAL GAS CORP., AND BRAINARD GAS CORP.

I. INTRODUCTION

Cobra Pipeline Company ("Cobra") unilaterally and improperly raised rates on customers over the objections of Staff and the Companies.[1] Cobra did so without the statutorily required bond, thereby exposing customers to significant risk. The Commission's Order has now required Cobra to live up to its promises and refund the overcharges to customers.[2] Cobra has refused to do so, and instead has raised filed-rate objections to providing refunds to customers. As discussed in detail below, Cobra cannot credibly claim that *Keco* protects it from providing refunds since the Commission never approved the rates Cobra charged customers. Cobra's other assignments of error equally lack merit, and the Application for Rehearing ("Application") should be denied.

II. ARGUMENT

A. Cobra required commission approval before changing rates (Assignment #1)

Cobra admits the Commission may regulate pipeline rates, and those rates must be just, reasonable, and non-discriminatory.[3] Despite those admissions, Cobra claims that it did not need

[1] Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. (collectively, the "Companies")
[2] Opinion and Order dated April 11, 2018 (the "Order"). ¶ 25.
[3] Application, p. 4.

Commission approval before changing rates. "[C]hanges in rates or service terms by pipeline companies are effective at the time the pipeline company informs its customers and this Commission that new rates are being placed in effect."[4] While Cobra's argument is certainly novel, it is not supported by Ohio law.

As a preliminary matter, not even Cobra believed this theory until after the Commission rejected its attempt to increase rates. Cobra did not put its new rates into effect under this supposed statutory authority. Instead, Cobra waited more than 275 days after filing its application to increase rates and then increased the rates.[5] At the time of that increase, Cobra once again did not increase rates under this supposed authority, but instead repeatedly claimed that its "bond" was what allowed that increase pursuant to R.C. § 4909.42.[6] In that filing Cobra also claimed that the new rate would end when the Commission established a rate under R.C. § 4909.19.[7] Cobra also did not raise this argument when Staff and the Companies contested the alleged bond.[8] It is not persuasive for Cobra, only now that its attempt to unilaterally and improperly increase rates has been rejected, to claim that the very statutes it relied on are not applicable.

Leaving aside Cobra's inconsistency, the Commission's analysis is correct as a matter of Ohio law. Cobra claims that since R.C. § 4909.17 states that R.C. §§ 4909.18, 4909.19, and 4909.191 do not apply to pipeline companies, then as a result pipeline companies must be regulated like motor transportation companies and railroads.[9] However, Cobra fails to understand that motor transportation companies and railroads always had the ability to file rate schedules that would go

[4] Application p. 4.
[5] Correspondence and Bond filed July 7, 2017.
[6] Correspondence and Bond filed July 7, 2017.
[7] Id., p. 2.
[8] *See* Correspondence filed August 18, 2017.
[9] Application, p. 4.

into effect unless suspended by the Commission under R.C. § 4909.27. Motor transportation company and railroad rates were historically set under a statutory scheme specifically designed for railroads.[10] Railroads were exempt from R.C. § 4909.15 and other related provisions applicable only to "public utilities" because railroads are not "public utilities" for purposes of Chapter 4909.[11] Pipeline companies are not railroads, and their rates do not automatically go into effect under R.C. § 4909.27.

To the contrary, pipeline companies are public utilities for purposes of Chapter 4909, and their rate setting is governed by R.C. § 4909.15.[12] Under R.C. 4909.15(E), the Commission shall set just and reasonable rates for public utilities if it believes rates are unjust and unreasonable. And after "such determination and order **no change in the rate**, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility **without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited**." (emphasis added). As shown through this language, pipeline companies like Cobra are prohibited from modifying rates absent an additional order of the Commission. There is no analogous language for railroads and motor carriers since their rates were set under R.C. § 4909.27. Accordingly, pipeline companies are treated separately from the other two types of companies identified in R.C. § 4909.17.

This interpretation does not render the reference to "pipe line companies" in R.C. § 4909.17 meaningless. A pipeline company is defined in R.C. § 4905.03(F) to include companies "engaged

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[10] *See* R.C. §§ 4905.20-.33. *See also* old § RC 4921.23 (effective from 1953 until repealed as a result of 1994 Interstate Commerce Act. 49 U.S.C. § 14501(c)(1)); F.R.B. v. Purolator Courier Corp., 13 Ohio App. 3d 296, 297 469 N.E.2d 542 (8th Dist. 1983)("Motor transportation companies seek rate increases in the same way as railroads in that they have the power to change established rates ex parte.")

[11] *See* R.C. § 4909.01(A) and R.C. § 4905.02(A)(4) (exempting railroads from the definition of "public utility" in Chapter 4909).

[12] *See* R.C. § 4909.01(A) and R.C. § 4905.03(F).

in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state. . .” That definition would capture both interstate and intrastate pipelines. Some of those pipelines are rate regulated by FERC under the Natural Gas Act, and are therefore outside the Commission’s jurisdiction.[13] Accordingly, R.C. § 4909.17 properly exempted some pipeline companies from the identified provisions of Ohio law.

Ohio law does not permit pipeline companies to unilaterally establish their own rates. Cobra has been unable to find any case supporting its interpretation, and so therefore its Application should be denied.

B. The Commission was authorized to order a refund since Cobra was not billing the approved commission filed rate. (Assignment #2)

Cobra argues that any order to refund any portion of the lawfully approved rate would constitute retroactive ratemaking. It is improper for Cobra to even make this argument after repeatedly promising customers and the Commission that it would refund any overpayment ultimately determined by the Commission. It is also legally incorrect since *Keco* does not apply in this circumstance.

When Cobra unilaterally raised rates in this case, it did so after repeatedly promising both its customers and the Commission that it was willing to refund any over-collections. Cobra claimed it “hereby firmly binds itself . . . to refund for the benefit of all customers of the Company . . . any amounts collected by the Company in excess of that amount that would otherwise have been due to the Company . . .” though it attempted to limit those refunds to future rate adjustments.[14] In a letter a month later Cobra again repeatedly agreed to provide refunds to

[13] 15 U.S. Code Chapter 15B
[14] Correspondence and Bond filed July 7, 2017, p. 2.

customers if the Commission rejected the rate increase.[15] Then, when the Companies filed a motion to force Cobra to cease charging unlawful rates, Cobra once again promised to refund customers.[16]

It is inappropriate for Cobra to repeatedly promise customers and the Commissions that it would refund any overcollection and then rely on *Keco*. Leaving aside for the moment that *Keco* does not apply to this proceeding, if customers and the Commission had notice that Cobra was taking the position that these amounts were non-refundable they would have likely refused to pay the improper rates or challenged Cobra's lack of authority to impose them. It is improper for Cobra to invite customers to pay an improper rate by promising future refunds, only to refuse to pay those refunds when the Commission rejects its position.

Finally, Cobra's position is legally flawed. *Keco* only applies in circumstances where the utility is collecting a rate approved by the Commission.

> Where the charges collected by a public utility **are based upon rates which have been established by an order of the Public Utilities Commission of Ohio**, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal.[17]

Here, the rates at issue were never approved by the Commission, and so *Keco* does not apply by its plain language. Cobra has also failed to explain how its position possibly comports with R.C. 4905.32, the statute which forms the basis for the *Keco* decision. In light of these clear distinctions, this argument lacks merit.

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[15] *See* Correspondence filed August 18, 2017.
[16] Memorandum Contra Motion to Compel dated October 14, 2017, p. 3.
[17] *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957), Syl. 2 (emphasis added).

C. The Commission has discretion to use statutory rate case procedures for the remainder of this case even though they are not statutorily mandated (Assignment #3).

Cobra's third assignment of error addresses the procedures to be utilized by the Commission in the reminder of Cobra's rate case. It is important to distinguish this procedural objection from the requirement that Cobra issue refunds. To be clear, Cobra is obligated to refund the amounts over-collected because the Commission did not approve the rates and because Cobra failed to file a proper bond. The issue of whether a refund is required is separate from the issue of what procedural mechanisms should be used to litigate the remainder of the case.

1. The Commission's decision not to apply R.C. § 4909.42 has no impact on the obligation to provide a refund.

Cobra claims that the Commission "denied Cobra the protections afforded by R.C. § 4909.42."[18] Looking first at the bonding requirement, R.C. § 4909.42 addresses what happens if the Commission fails to issue a decision within 275 days. If so, the utility can put in place the proposed new rate "upon the filing of a bond or a letter of credit by the public utility."[19] Here, Cobra never filed a proper bond and so never obtained the authority to charge the new rate. Any customers charged the new rate were therefore being charged a rate approved by neither statute nor the Commission.

R.C. § 4909.42 also provides that if the Commission does not rule within 545 days then the utility "shall have no obligation to make a refund of amounts collected **after** the five hundred forty-fifth day which exceed the amounts authorized by the commission's final order." (emphasis added). Here, the Application was accepted for filing as of September 26, 2016, so the 545th day would have been March 25, 2018. Therefore, Cobra claims the statute allows collection of

[18] Application, p. 6.
[19] R.C. § 4909.42.

amounts collected between March 25, 2018 and April 11, 2018, the date of the Commission order. Even if Cobra is correct in its argument that this statute applies, Cobra would only be permitted to keep over-collections during this 17-day period, not the entire period of over-collection.

This analysis is moot because Cobra's position is not correct. R.C. § 4909.42 does not permit Cobra to increase rates unilaterally. Instead, this increase is dependent on the filing of the bond. Specifically, the statute states that the increase in rates is only permitted after "the filing of a bond or a letter of credit by the public utility." Until a valid bond is filed, Cobra is still obligated to charge the previously approved lower rate. There is no exception at day 545 which allows the utility to impose the higher rate without the filing of the required bond. Accordingly, the statute anticipates that (1) if the utility has filed a valid bond and is collecting the higher rates; then (2) the utility can continue to do so after day 545 without the need to issue a refund. There is a good reason for this statutory design. For an impacted utility, providing a bond to address a rate increase could be expensive. Therefore, the statutory scheme was designed to impose only 180 days possible liability on the utility to make a refund (between days 275 and 545). That limitation allows the utility to purchase a bond covering only this 180-day period, rather than a potentially unlimited bond if the Commission fails to rule indefinitely.

The Commission recognized all of this in its analysis, though its discussion did not delve into the myriad of problems with Cobra's claims regarding the operation of R.C. § 4909.42.[20] While the Order also addressed other arguments, Cobra is incorrect that the Commission denied it the protections of R.C. 4909.42 in a way material to this dispute.

2. The Commission has wide discretion over its docket and procedural mechanisms it may use to examine Cobra's rates.

[20] Order ¶ 24.

The Commission has jurisdiction to examine all rates to ensure they are not "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law."[21] The Commission also has wide discretion over the procedures to be used by the Commission in evaluating Cobra's rates. The Commission "has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort."[22] Accordingly, the Commission's decision to utilize well established rate-case procedures to ensure that Cobra is afforded due process is well within the Commission's discretion.

On a more practical level, Cobra's position on this point is somewhat curious. Cobra's Application admits that the Commission has authority to regulate its rates. As discussed above, all of Cobra's prior filings anticipate that the Commission will utilize the process for reviewing rate applications set out in R.C. § 4909.18 *et seq.* Therefore, it is difficult to see any prejudice to Cobra from the Commission adopting rate case procedures designed to ensure all parties are adequately protected.

D. The purported "bond" filed by Cobra was inappropriate (Assignment #4)

1. The "bond" was obviously insufficient to protect customers because Cobra has admitted that it does not have the funds to pay its tax obligations and/or issue the required refunds to customers which were ordered by the Commission.

Cobra claims that its bond should have been accepted by the Commission since it complies with the statutory definition of the word "bond." However, Cobra's analysis completely ignores reality. The Commission has rejected Cobra's attempt to raise rates and customers are now entitled to a refund by Commission order. Despite that Order, Cobra has refused to make refunds to

[21] R.C. § 4905.26.
[22] *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 560 (1982).

customers. In fact, Cobra has indicated in another recent filing that "the Company's financial health has deteriorated markedly and that as things stand, the Company should be expected to find it increasingly difficult to provide safe and reliable utility service to its customers in the absence of additional personnel and revenues."[23] Cobra also admitted that its affiliate entity's offices have been taken by a court-appointed receiver.[24] As shown through these admissions, Cobra's purported "bond" is illusory. It does not protect customers, and there are severe risks that customers will never receive the refunds of the improper charges they are entitled to. Accordingly, Cobra's bond claims are illusory. The illusory nature of these promises is precisely why the purported bond was not sufficient.

2. The "bond" was insufficient as a matter of law.

Cobra has offered no new arguments in its Application which were not already briefed extensively. It is well settled that the Commission will deny applications for rehearing that "simply reiterate[] arguments that were considered and rejected by the Commission."[25] Rather than repeating the prior arguments which expressly address this point verbatim, the Companies hereby incorporate their prior briefs refuting Cobra's legal arguments.[26]

[23] Cobra Objection to Staff Report, p. 4.
[24] *Id*.
[25] *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, *6-7 (Nov. 29, 2011).
[26] Motion to Compel dated September 19, 2017 and Reply In Support of Motion to Compel dated October 11, 2017.

III. CONCLUSION

For the foregoing reasons, Cobra's Application should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 21st day of May, 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. A courtesy copy was also served on all parties via electronic mail.

/s/ *Mark T. Keaney*
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Summary: Memorandum Contra Cobra Pipeline Co. Application for Rehearing electronically filed by Mr. Trevor Alexander on behalf of Northeast Ohio Natural Gas Corp. and Brainard Gas Corp. and Orwell Natural Gas Company