FILE

IN THE SUPREME COURT OF OHIO

In The Matter of Cobra Pipeline Company, LTD,	:	Case No. 19-1544
Appellant,	:	Appeal from the Public Utilities
v.	:	Commission of Ohio
The Public Utilities Commission of Ohio,	:	PUCO Case No. 16-1725-PL-AIR
Appellee.	:	

NOTICE OF APPEAL BY
COBRA PIPELINE COMPANY, LTD

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APPELLANT
COBRA PIPELINE COMPANY, LTD'S
NOTICE OF APPEAL

Pursuant to Ohio Revised Code ("R.C.") §4903.11, §4903.13, Ohio Administrative Code ("O.A.C.) §4901-1-36, and The Supreme Court of Ohio Rules of Practice ("S. Ct. Prac. R.") 10.02, Appellant, Cobra Pipeline Company, LTD ("Cobra"), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Commission") of this appeal to the Supreme Court of Ohio. Cobra appeals from the Commission's Entry dated April 11, 2018 ("April Entry"), in the above-captioned case (attached as Exhibit A hereto), and from the Commission's Second Entry on Rehearing entered September 11, 2019, in the same case (attached as Exhibit B hereto).

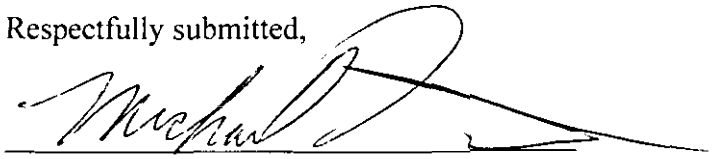
On May 10, 2018, Cobra timely filed an Application for Rehearing ("Application") of the April Entry pursuant to R.C. §4903.10 (attached as Exhibit C hereto). The Commission granted Cobra's Application on June 6, 2018, but for the sole purpose of allowing the Commission additional time to consider further the matters specified in Cobra's Application. The Commission then denied Cobra's Application with respect to each of the issues being raised in this appeal within its Second Entry on Rehearing, dated September 11, 2019 ("Second Entry on Rehearing").

Cobra files this Notice of Appeal, complaining and alleging that both the April Entry and the Second Entry on Rehearing are unlawful and unreasonable, and that the Commission erred as a matter of law in the following respects. As directed by S. Ct. Prac. R. 10.02(A)(2)(b), Cobra identifies the specific pages within its Application wherein each of the errors has been preserved, as follows:

Errors	Preserved at Application Page Nos.
The Commission Erred In Its Description and Application Of The Exemptions That Result From R.C. §4909.17.	1-5
The Commission Erred When It Ordered Cobra To Refund Of 100% Of The Delta Between The Rate Cobra Placed In Effect On July 1, 2018 And The Rate Which Existed Prior To That Date.	5
The Commission Erred When It Asserted It Intends To Apply The Procedures Of R.C. §§4909.18 and 4909.19 To Cobra, After Having Just Declared Those Same Procedures Inapplicable To Cobra.	5-7
The Commission Erred When It Concluded Cobra's Bond Would Satisfied R.C. §4909.42, Assuming That R.C. §4909.42 Might Be Applicable.	7-11

WHEREFORE: Cobra respectfully submits that the Commission's April Entry and Second Entry on Rehearing are both unreasonable or unlawful and should be reversed. This case should be remanded to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,



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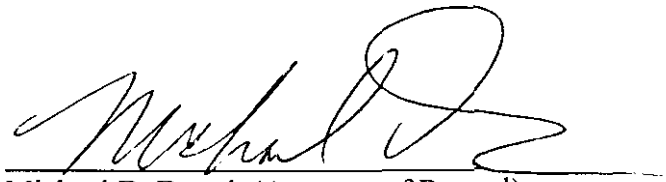
CERTIFICATE OF FILING

I hereby certify that the foregoing Notice of Appeal was filed with the Docketing Division of the Public Utilities Commission of Ohio this **November 8, 2019**, in accordance with S. Ct. Prac. R. 3.11(D)(2) and Ohio Administrative Code Section 4901-1-02(A) and 4901-1-36.



Michael D. Dortch (Attorney of Record)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the Public Utilities Commission of Ohio this **8th of November 2019**, pursuant to S. Ct. Prac. R. 3.11(b)(2) and R.C. Section 4903.13, by hand delivering a true and accurate copy thereof to the offices of the Commission and to the Chairman of the Commission, addressed as follows:

The Hon. Sam Randazzo, Chairman
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

I further state that, in addition, a courtesy copy of the foregoing was provided to the attorneys for the Public Utilities Commission, by electronic mail service, addressed as follows:

werner.margard@ohioattorneygeneral.gov

I further state that, in addition, a courtesy copy of the foregoing was provided to the attorneys for the intervening parties, by electronic mail service, addressed as follows:

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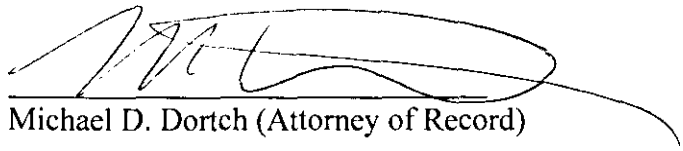

Michael D. Dortch (Attorney of Record)

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF COBRA PIPELINE COMPANY, LTD FOR AN INCREASE IN ITS RATES AND CHARGES.

CASE NO. 16-1725-PL-AIR

ENTRY

Entered in the Journal on April 11, 2018

I. SUMMARY

{¶ 1} The Commission finds that the time frames set forth in R.C. 4909.42 for the fixation of rates are not applicable with respect to pipeline companies and, thus, Cobra Pipeline Company, LTD was not authorized under the statute to implement its proposed rates. Accordingly, the Commission directs Cobra Pipeline Company, LTD to reinstate its Commission-approved rates and refund to customers any amounts collected in excess of those rates.

II. DISCUSSION

{¶ 2} Cobra Pipeline Company, LTD (Cobra) is a pipeline company under R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} On August 15, 2016, Cobra filed its application in the above-captioned case, in response to the Commission's Opinion and Order in Case No. 14-1654-GA-CSS, et al. In its Opinion and Order, the Commission directed Cobra and any other pipeline companies owned or controlled by Richard M. Osborne to file applications, pursuant to R.C. Chapter 4909, to determine just and reasonable rates that include charges for firm and interruptible transportation services and rates for shrinkage. *In re Complaint of Orwell Natural Gas Co. v. Orwell-Trumbull Pipeline Co., LLC*, Case No. 14-1654-GA-CSS, et al. (*Complaint Case*), Opinion and Order (June 15, 2016) at ¶ 77.

{¶ 4} On August 25, 2016, Staff sent Cobra a letter stating that its application did not comply with the Standard Filing Requirements for Rate Increases covered in Ohio Adm.Code 4901-7-01 and that Staff did not receive enough information to begin its review of the application. Staff's letter detailed the information needed to complete the application and stated that the information should be provided not later than 30 days from the date of the letter.

{¶ 5} An amended abbreviated application was filed by Cobra on September 26, 2016.

{¶ 6} By Entry dated November 9, 2016, the Commission approved Cobra's proposed test year and date certain, and accepted the amended application as of its filing date of September 26, 2016. The Commission also directed Cobra to publish legal notice of the application in a newspaper of general circulation throughout its territory.

{¶ 7} On July 7, 2017, Cobra filed correspondence indicating that, in compliance with R.C. 4909.42, it was submitting a bond, in order to institute its proposed rates. Staff filed a letter in response on August 11, 2017. Cobra filed a reply to Staff on August 18, 2017.

{¶ 8} On September 13, 2017, Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. (collectively, Gas Companies) filed a motion to intervene in this case. The Gas Companies state that, as large customers with extensive operations in Cobra's service territory, they have a real and substantial interest in this case and that the Commission's disposition of this proceeding may impair or impede their ability to protect that interest. No memoranda contra the motion to intervene were filed.

{¶ 9} On September 19, 2017, the Gas Companies filed a motion seeking to compel Cobra to cease charging unlawful rates. On October 4, 2017, Cobra filed a

memorandum contra the Gas Companies' motion. The Gas Companies filed a reply in support of their motion on October 11, 2017.

A. Summary of the Parties' Positions

{¶ 10} As noted above, Cobra filed correspondence stating that it was submitting a bond in compliance with R.C. 4909.42. Attached to its letter, Cobra provided a document purporting to be the bond, as well as an affidavit from two of Cobra's officers.

{¶ 11} In its response to Cobra's correspondence, Staff notes that R.C. 4909.42 permits a public utility requesting an increase in rates to place the proposed rates into effect if the Commission has not issued an order within 275 days from the date that the utility's application was filed. Staff further notes that, in order for the proposed rates to become effective, the statute requires that a "bond or letter of credit" be filed by the utility. Staff submits that Cobra's filing does not constitute a bond and instead is little more than a promissory note. Staff concludes that Cobra's filing is insufficient to satisfy the requirements of R.C. 4909.42.

{¶ 12} In its reply, Cobra notes that it anticipated that the Commission would issue a decision in this case on or before June 28, 2017, which was 275 days from the date on which its complete application was filed. Cobra further notes that, to date, Staff has not filed its report of investigation and no hearing has been scheduled to consider Cobra's application. Noting that R.C. 4909.42 is intended to protect utilities from under-recovery resulting from excessive delay, Cobra states that, in order to avoid losing all opportunity to collect revenue to which it is entitled, Cobra implemented the proposed rate increase after the 275-day period expired, consistent with the statute. With respect to its implementation, Cobra explains that it first informed its customers in June 2017 that their rates would increase effective July 1, 2017, with a subsequent true-up under R.C. 4909.42, including potential refunds, following the Commission's determination of the rates. Cobra notes that it then filed its bond with the Commission on July 7, 2017, and, subsequently, invoiced customers for the increased rates.

{¶ 13} Addressing Staff's letter, Cobra asserts that Staff appears to have taken the position that R.C. 4909.42 is satisfied only by means of a third-party surety's undertaking to pay any refund, if Cobra does not. Cobra disagrees with this position, arguing that a bond is any binding writing to pay a sum of money, subject to the performance of defined duties or rendered void by certain express conditions. Cobra contends that R.C. 4909.42 uses the term "bond" in a generic sense requiring the utility's promise to pay subject to the conditions described in the statute. Cobra, therefore, disputes Staff's characterization of Cobra's filing as a promissory note, which, according to Cobra, is merely an unconditional promise to pay. Finally, Cobra argues that Staff's interpretation is inconsistent with the language used in R.C. 4909.42, because the statute plainly contemplates the filing of a bond issued by the utility rather than a third-party surety. Cobra notes that the statute specifically directs the utility to file its bond, while two officers of the utility must expressly vouch under oath on behalf of the utility to refund any excess recovery. Cobra adds that, unlike R.C. 4909.42, there are numerous sections in the Revised Code that explicitly require bonds issued by a third-party surety. In any event, Cobra concludes that it is not opposed to meeting with Staff to discuss voluntary means, beyond those imposed by R.C. 4909.42, through which Cobra might secure its legal obligations.

{¶ 14} In their motion to compel, the Gas Companies seek an order from the Commission that compels Cobra to refrain from charging its proposed rates, at least until Cobra files a proper bond or letter of credit as required by R.C. 4909.42, and that declares void and invalid all charges Cobra has assessed since July 2017. The Gas Companies note that, although they have refused to pay the new rates assessed by Cobra since July 2017 due to the lack of a proper bond or letter of credit, they have tendered timely payments for all services rendered in accordance with the current Commission-approved rates.

{¶ 15} In support of their motion, the Gas Companies argue that the Commission has previously rejected an instrument similar to Cobra's. *In re Columbia Gas of Ohio, Inc.*,

Case No. 89-616-GA-AIR, et al. (*Columbia Rate Case*), Entry (Feb. 20, 1990). The Gas Companies note that, in the *Columbia Rate Case*, the Commission specified that R.C. 4909.42 requires an undertaking that not only contains a promise to refund any amounts collected by the utility over the rates determined by the Commission in its final order, but also an undertaking that is payable to the state of Ohio for the use and benefit of the affected customers. The Gas Companies argue that R.C. 4909.42, as applied by the Commission, requires both a promise by the utility to pay by way of an affidavit signed by two officers of the utility and a financial instrument from a bank or surety that supports that promise. The Gas Companies conclude that, as in the *Columbia Rate Case*, the Commission should find that Cobra's proposed rates are not in effect and that Cobra should not be charging its customers pursuant to its proposed rate schedules.

{¶ 16} The Gas Companies argue that, in addition to protecting utilities from under-recovery, R.C. 4909.42 is intended to protect the public from an overextended or financially unstable utility that is unable to refund overcharges to customers. The Gas Companies assert that, based on Cobra's financial filings and balance sheets included in its application, Cobra may not be able to issue any required refunds due to low cash on hand and affiliated receivables from entities controlled by Richard Osborne accounting for more than 99 percent of current assets, while Cobra also reported significant current liabilities, including amounts owed to affiliated companies and delinquent tax obligations. Concluding that Cobra's ongoing operations do not indicate sufficient income to provide customer refunds, the Gas Companies assert that the Commission should strictly enforce the financial security requirements of R.C. 4909.42.

{¶ 17} In its memorandum contra the motion to compel, Cobra emphasizes that its bond meets every requirement set forth in R.C. 4909.42. With respect to its financial situation, Cobra states that, in the absence of any criticism that its operating expenses are unreasonable, the Gas Companies' argument on this point appears to justify the requested rate increase. Cobra adds that the Gas Companies ignore the fact that the

General Assembly has the power to determine the forms of security that utilities are to provide when seeking a rate increase and has, in fact, specified that a utility's bond or letter of credit is sufficient assurance. According to Cobra, the Gas Companies can point to nothing within the language in R.C. 4909.42 that remains to be done. Finally, Cobra notes that, if a refund is imposed at some point, the Gas Companies would receive that refund through a temporary reduction in the new rates approved by the Commission, as the statute provides.

{¶ 18} In reply, the Gas Companies note that Cobra does not dispute that the Commission already rejected, in the *Columbia Rate Case*, the position that a utility's written promise alone is sufficient to satisfy R.C. 4909.42. The Gas Companies reiterate that, without a financial instrument from a surety or bank, Cobra's purported bond is deficient, thereby rendering its imposition of new rates unlawful. The Gas Companies further note that Cobra also does not dispute its bleak financial situation. According to the Gas Companies, Cobra's recent public financial filings call into question whether Cobra could actually pay refunds or whether Cobra could even continue operations if refunds are ordered to be issued through a reduction in future rates. The Gas Companies conclude that Cobra failed to provide any assurance that it can, in fact, issue customer refunds, if necessary.

B. Commission Conclusion

{¶ 19} R.C. 4909.42 provides, in pertinent part, that, if the proceeding on an application filed with the Commission under R.C. 4909.18 by any public utility requesting an increase on any rate or charge has not been concluded and an order entered pursuant to R.C. 4909.19 at the expiration of 275 days from the date of filing the application, an increase not to exceed the proposed increase shall go into effect upon the filing of a bond or a letter of credit by the public utility. R.C. 4909.42 further provides that the bond or letter of credit shall be filed with the Commission and shall be payable to the state for the use and benefit of the customers affected by the proposed increase. The statute also

requires that an affidavit attached to the bond or letter of credit be signed by two of the officers of the utility, under oath. The affidavit must contain a promise on behalf of the utility to refund any amounts collected by the utility over the rate or charge, as determined in the final order of the Commission. Finally, R.C. 4909.42 provides that, if the Commission has not entered a final order within 545 days from the date of the filing of an application for an increase in rates under R.C. 4909.18, a public utility shall have no obligation to refund amounts collected after that date that exceed the amounts authorized by the Commission's final order.

{¶ 20} Initially, the Commission finds that the Gas Companies' motion for intervention in this proceeding is reasonable and should be granted. Further, for the reasons set forth below, we find that the Gas Companies' motion to compel Cobra to cease charging unlawful rates should be granted, as set forth in this Entry. Specifically, we find that the statutory time frames set forth in R.C. 4909.42 are not applicable with respect to pipeline companies and, therefore, Cobra was not authorized to implement its proposed rates pursuant to the statute.

{¶ 21} We begin our statutory analysis with R.C. 4909.17, which provides in its entirety:

> No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18, 4909.19, and 4909.191 of the Revised Code. *Such sections do not apply to any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of* railroads, street and electric railways, for-hire motor carriers, and *pipe line companies.*

Accordingly, the rates and charges of pipeline companies, including Cobra, are not subject to R.C. 4909.18 or 4909.19, which govern the process and procedural requirements for an application seeking to establish or change rates and charges.

{¶ 22} Turning to R.C. 4909.42, we note that the statute pertains solely to a "proceeding on an application filed with the public utilities commission *under section 4909.18 of the Revised Code* by any public utility requesting an increase on any rate, joint rate, toll, classification, charge, or rental or requesting a change in a regulation or practice affecting the same." The statute also specifies that, where the proceeding has not been concluded and an order entered *pursuant to R.C. 4909.19* at the expiration of 275 days from the date of filing the application, the public utility's proposed increase shall go into effect upon the filing of a bond or letter of credit by the public utility. Additionally, the statute provides that the public utility has no refund obligation where the Commission has not entered a final order within 545 days "from the date of the filing of an application for an increase in rates *under section 4909.18 of the Revised Code.*"

{¶ 23} In sum, R.C. 4909.17 excludes pipeline companies from the procedural requirements of R.C. 4909.18 and 4909.19. R.C. 4909.42, in turn, pertains solely to a proceeding on an application for an increase in rates that is filed under R.C. 4909.18 and only under circumstances where an order has not been timely entered pursuant to R.C. 4909.19. The Commission, therefore, concludes that the statutory timing requirements in R.C. 4909.42 do not govern an application for an increase in rates filed by a pipeline company and that Cobra, as a pipeline company, was not permitted under the statute to implement its proposed rates.

{¶ 24} Even if we were to assume for the sake of argument that Cobra was authorized under R.C. 4909.42 to implement its proposed rates, Cobra has not filed a sufficient bond or letter of credit payable to the state for the use and benefit of the customers affected by the proposed increase, as Staff and the Gas Companies assert. As the Commission determined in the *Columbia Rate Case*, R.C. 4909.42 "provides that the

undertaking must not only contain a promise to refund any amounts collected by the utility over the rates determined by the Commission in its final order, but also that the undertaking must be payable to the state of Ohio for the use and benefit of the affected customers."[1] *Columbia Rate Case*, Entry (Feb. 20, 1990). Much like Cobra's purported bond, Columbia's undertaking stated that Columbia was "held and firmly bound unto the State of Ohio, for the use and benefit of Columbia's customers affected by the Application for an Increase in Rates in the amount of" the requested increase. The Commission noted, however, that Columbia appropriately recognized the necessity of providing additional security for any potential refunds, as evidenced by Columbia's procurement of a Bond for Security of Refunds in the amount of $10 million that had not yet been filed with the Commission. The Commission concluded that, in the absence of the filing of the $10 million bond, Columbia had not provided an undertaking payable to the state for the use and benefit of the affected customers. Consistent with the Commission's decision in the *Columbia Rate Case*, we find that Cobra's purported bond fails to provide any financial security for potential customer refunds.[2]

{¶ 25} For these reasons, Cobra should reinstate its Commission-approved rates and promptly refund to customers any amounts collected in excess of those rates. Cobra is directed to file, in this docket, a complete accounting of its refunds to customers, within 30 days of this Entry. Cobra's report should include, by individual customer, a list of the amount of the refund and the date on which the refund was provided. If Cobra's

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1 Sub. H.B. 379 changed "undertaking" to "bond or letter of credit," effective March 2013. Pursuant to R.C. 1.02, as used in the Revised Code, "bond" includes an undertaking and an "undertaking" includes a bond.

2 Neither can Cobra's filing be construed as a letter of credit. R.C. Chapter 1305 governs letters of credit, which are defined in R.C. 1305.01(A)(10) to be a definite undertaking that satisfies the requirements of R.C. 1305.03 by an issuer to a beneficiary at the request or for the account of an applicant to honor a documentary presentation by payment or delivery of an item of value. The Ohio Supreme Court has stated that, with the issuance of a letter of credit, "a bank substitutes its financial integrity as a stable credit source for that of its customer, and because of the issuing bank's primary commitment, the bank's obligation to pay is independent of the underlying transaction between the beneficiary and the bank's customer." *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St.3d 536, 541, 660 N.E.2d 458 (1996).

customers experience delay or any other difficulty in obtaining a prompt refund, customers should contact Staff for assistance.

{¶ 26} As a final matter, we acknowledge Cobra's concern regarding the length of time required for the review of its application, and note that the Commission endeavors to provide applicants a timely and efficient process. This case, however, is unique. Cobra's application was filed in compliance with the Commission's Opinion and Order in the *Complaint Case*. Following an evidentiary hearing in that prior case, the Commission found that it was necessary to direct that Cobra and its affiliate, Orwell-Trumbull Pipeline Company, LLC (OTP), file applications under R.C. Chapter 4909 to establish just and reasonable rates, including a standard transportation rate for both firm and interruptible service, as well as a rate for shrinkage. *Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 77. The Commission also noted that there were serious concerns with Richard M. Osborne's management and control of Cobra and OTP, including the impact that Mr. Osborne's management has on the customers of Cobra and OTP and the services that they provide, as well as the impact to the health and safety of the residential customers served by the Gas Companies.[3] *Complaint Case* at ¶ 96.

{¶ 27} Consistent with the Commission's directive in the *Complaint Case*, Cobra filed its application in this case to initiate the review of its rates on August 15, 2016. OTP filed its application on that same date in Case No. 16-1726-PL-AIR. Following its preliminary review, Staff determined that both applications failed to provide sufficient information to enable Staff to conduct an investigation. As a result, Cobra and OTP supplemented their applications on September 26, 2016, and the Commission accepted, on November 9, 2016, both applications for filing as of September 26, 2016. At that time,

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[3] The Commission has also previously identified concerns with the lack of corporate separation among public utilities owned or controlled by Mr. Osborne. *In re Northeast Ohio Natural Gas Corp. and Orwell Natural Gas Co.*, Case No. 12-209-GA-GCR, et al., Opinion and Order (Nov. 13, 2013) at 48-49.

Staff began its review of Cobra's proposed rates and charges in conjunction with the review of OTP's application, as Cobra acknowledges in its letter dated August 18, 2017.

{¶ 28} Unfortunately, the Commission and Staff have faced a number of critical issues that have impeded an efficient review of the applications. On June 7, 2017, the Commission determined that it was necessary to issue a request for proposal to retain an auditor to construct OTP's historical plant records for inclusion in its plant schedules and rate base calculation or, alternatively, to determine plant valuation in the absence of reliable plant records. Schumaker & Company was selected to conduct this task on July 12, 2017. However, on December 4, 2017, Staff filed a motion requesting that the deadline for the filing of the audit report be suspended indefinitely, in light of the fact that the Cuyahoga County Court of Common Pleas had appointed a receiver to take over OTP's assets and conduct its day-to-day operations, as discussed further below.

{¶ 29} On November 21, 2017, in Case No. CV14 822810, the Cuyahoga County Court of Common Pleas granted a motion filed by Park View Federal Savings Bank n/k/a First National Bank of Pennsylvania to appoint a receiver, effective October 30, 2017, over all property, both real and personal, owned by Richard M. Osborne, the Richard M. Osborne Trust, OTP, and certain other affiliated entities (collectively, Counterclaim Defendants), as well as any legal or beneficial interest owned, possessed, or held by any of the Counterclaim Defendants in or to Cobra. Under the terms of the Court's order, the appointed receiver is authorized, among other things, to take and have complete and exclusive possession, control, and custody of the receivership property, as well as to sell the receivership property free and clear of all liens and encumbrances by private sale, private auction, public auction, or by any other method deemed appropriate by the receiver, subject to the Court's approval. By Entry dated November 29, 2017, the Commission initiated an investigation of OTP and Cobra and directed the Ohio Attorney General's office to take any appropriate steps in the receivership proceeding to protect the customers of OTP and Cobra.

{¶ 30} On December 5, 2017, OTP filed a notice to stay the proceeding before the Cuyahoga County Court of Common Pleas, in light of OTP's filing of a Chapter 11 Petition in Voluntary Bankruptcy in Case No. 17-17135 in the United States Bankruptcy Court, Northern District of Ohio.[4] In an Entry issued on December 6, 2017, the Commission directed the Ohio Attorney General's office to intervene or take any other appropriate steps in OTP's bankruptcy proceeding and to seek any appropriate legal and equitable remedies necessary to maintain operations of OTP's pipeline system and ensure that service to customers is not interrupted or terminated. Subsequently, on February 9, 2018, OTP's bankruptcy case was dismissed, thus returning control of OTP to the receiver. On March 1, 2018, OTP's receiver filed a motion before the Commission, seeking to stay the review of OTP's rates and charges, in light of the fact that the receiver is in the process of assessing OTP's financial viability with the expectation of a potential sale.

{¶ 31} This complex history makes clear that the operations and management of Cobra and OTP continue to be in a state of flux, which has certainly impacted the review of their proposed rates and charges. Again, the Commission strives to complete a timely review of applications seeking to establish rates and charges. We also find, however, that it is necessary to ensure that a thorough review of such applications is conducted, one that accounts for all of the pertinent facts and circumstances that become known to the Commission or Staff during the course of the rate investigation. We, therefore, direct Staff to continue to conduct a thorough evaluation of Cobra's proposed rates and charges and, following completion of the review, to promptly file the report of investigation in this docket. The Commission will, at that time, determine proper rates for Cobra, based on the ratemaking formula in R.C. 4909.15.

{¶ 32} With respect to the procedures to be adopted in this case, the Commission has previously recognized that no section of the Revised Code dictates the manner in

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[4] On December 17, 2017, Richard M. Osborne also filed a Chapter 11 Petition in Voluntary Bankruptcy in Case No. 17-17361 in the United States Bankruptcy Court, Northern District of Ohio.

which the proposed rates of a pipeline company must be filed. While noting that R.C. 4909.18 is not directly applicable, the Commission found that it was not improper to proceed in a manner that is consistent with the procedures in R.C. 4909.18. *In re Natural Gas Transmission Co. of Ohio*, Case No. 81-1404-PL-ATA, et al., Entry (Dec. 23, 1981). We make the same determination here. In the *Complaint Case*, Cobra was directed to file an application to initiate a review of its rates and charges under R.C. Chapter 4909, which governs the fixation of rates for public utilities. *Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 77. Although the process and procedural requirements set forth in R.C. 4909.18 and 4909.19 do not apply to pipeline companies, no other provision in R.C. Chapter 4909 addresses the procedures to be used by the Commission in determining the rates and charges for a pipeline company. In order to ensure that Cobra is afforded due process, we will, therefore, proceed with our review and consideration of Cobra's application in a manner that is consistent with the process followed under those statutes, including issuance of a written report of investigation, publication of notice of the application, and adherence to the Commission's standard filing requirements, which are necessary to determine proper rates under R.C. 4909.15.

III. ORDER

{¶ 33} It is, therefore,

{¶ 34} ORDERED, That the motion for intervention filed by the Gas Companies on September 13, 2017, be granted. It is, further,

{¶ 35} ORDERED, That the motion to compel filed by the Gas Companies on September 19, 2017, be granted, consistent with this Entry. It is, further,

{¶ 36} ORDERED, That Cobra reinstate its Commission-approved rates and promptly refund to customers any amounts collected in excess of those rates. It is, further,

{¶ 37} ORDERED, That Cobra file, in this docket, a complete accounting of its refunds to customers, within 30 days of this Entry. It is, further,

{¶ 38} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

SJP/sc

Entered in the Journal
APR 11 2018

Barcy F. McNeal
Secretary

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF COBRA PIPELINE COMPANY, LTD FOR AN INCREASE IN ITS RATES AND CHARGES.	CASE NO. 16-1725-PL-AIR

SECOND ENTRY ON REHEARING

Entered in the Journal on September 11, 2019

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing of the April 11, 2018 Entry filed by Cobra Pipeline Company, LTD and directs that customers receive a refund of any amounts paid in excess of Commission-approved rates.

II. DISCUSSION

A. *Procedural History*

{¶ 2} Cobra Pipeline Company, LTD (Cobra) is a pipeline company under R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} On August 15, 2016, Cobra filed its application in the above-captioned case, in response to the Commission's Opinion and Order in Case No. 14-1654-GA-CSS, et al. In its Opinion and Order, the Commission directed Cobra and any other pipeline companies owned or controlled by Richard M. Osborne to file applications, pursuant to R.C. Chapter 4909, to determine just and reasonable rates that include charges for firm and interruptible transportation services and rates for shrinkage. *In re Complaint of Orwell Natural Gas Co. v. Orwell-Trumbull Pipeline Co., LLC*, Case No. 14-1654-GA-CSS, et al., Opinion and Order (June 15, 2016) at ¶ 77.

{¶ 4} An amended abbreviated application was filed by Cobra on September 26, 2016.

{¶ 5} On July 7, 2017, Cobra filed correspondence indicating that, in compliance with R.C. 4909.42, it was submitting a bond, in order to institute its proposed rates. Staff filed a letter in response on August 11, 2017. Cobra filed a reply to Staff on August 18, 2017.

{¶ 6} By Entry dated April 11, 2018, the Commission determined that the time frames set forth in R.C. 4909.42 for the fixation of rates are not applicable with respect to pipeline companies and, thus, Cobra was not authorized under the statute to implement its proposed rates. Accordingly, the Commission directed Cobra to reinstate its Commission-approved rates and refund to customers any amounts collected in excess of those rates.

{¶ 7} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 8} On May 10, 2018, Cobra filed an application for rehearing of the April 11, 2018 Entry. Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. (collectively, NEO)[1] filed a joint memorandum contra Cobra's application for rehearing on May 21, 2018.

{¶ 9} By Entry on Rehearing dated June 6, 2018, the Commission granted rehearing for further consideration of the matters specified in Cobra's application for rehearing.

{¶ 10} The Commission has reviewed and considered all of the arguments raised in Cobra's application for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Commission and should be denied.

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1 NEO is a natural gas company and public utility as defined in R.C. 4905.03 and 4905.02, respectively. On January 3, 2019, in Case No. 18-1484-GA-UNC, et al., the Commission approved a merger of Orwell Natural Gas Company, Brainard Gas Corp., and Spelman Pipeline Holdings, LLC into Northeast Ohio Natural Gas Corp.

B. Consideration of the Application for Rehearing

{¶ 11} Cobra raises four grounds for rehearing. First, Cobra argues that the Commission erred in Paragraphs 22 through 24 of the April 11, 2018 Entry in its description and application of the exemptions that result from R.C. 4909.17. Cobra states that the Commission failed to recognize the full import of R.C. 4909.17. According to Cobra, R.C. 4909.17 exempts pipeline companies from R.C. 4909.17 itself, as well as from R.C. 4909.18, 4909.19, and 4909.191. Cobra asserts that its reading of R.C. 4909.17 is confirmed by the original statute, G.C. 614-20, as well as the only decision by any court in which R.C. 4909.17 is cited for anything other than the generally applicable proposition that public utility rates do not become effective until they are approved by the Commission. Cobra notes that, in that case, the Cuyahoga County Court of Appeals determined that R.C. 4909.17 authorized a for-hire motor carrier to establish rates and terms of service ex parte, or unilaterally, without Commission approval, merely by filing its rates and terms with the Commission. *Federal Reserve Bank of Cleveland v. Purolator Courier Corp.*, 13 Ohio App.3d 296, 299-300, 469 N.E.2d 542 (8th Dist. 1983). Cobra concludes that, because R.C. 4909.17 is inapplicable to pipeline companies, changes in the rates or service terms of a pipeline company are effective when the company informs its customers and the Commission that the new rates or service terms are being placed in effect.

{¶ 12} In its memorandum contra, NEO responds that Ohio law does not permit pipeline companies like Cobra to unilaterally establish their own rates. Initially, NEO asserts that it is not persuasive for Cobra, now that its unilateral and improper attempt to increase its rates has been rejected by the Commission, to claim that the statutes earlier relied upon by Cobra are inapplicable. Further, NEO disputes Cobra's claim that pipeline companies are regulated like motor transportation companies and railroads, which, pursuant to R.C. 4909.27, have rate schedules that take effect upon filing unless suspended by the Commission. According to NEO, pipeline companies are public utilities for purposes of R.C. Chapter 4909 and their rates are established and governed by R.C. 4909.15. NEO contends that R.C. 4909.15(E) prohibits pipeline companies from modifying their rates

absent an order of the Commission. NEO adds that its interpretation does not render the reference to pipeline companies in R.C. 4909.17 meaningless, given that the definition of pipeline company in R.C. 4905.03 includes both intrastate pipelines and interstate pipelines with rates that are regulated by the Federal Energy Regulatory Commission. NEO concludes, therefore, that R.C. 4909.17 properly exempts some pipeline companies from the identified provisions of Ohio law.

{¶ 13} Second, Cobra asserts that the Commission erred in Paragraphs 25, 35, 36, and 37 of the April 11, 2018 Entry, which ordered Cobra to provide an immediate refund of 100 percent of the difference between the rate that Cobra placed into effect on July 1, 2017, and the rate that existed prior to that date. Cobra reiterates that R.C. 4909.17 exempts pipeline companies from the general requirement that utility rates must be approved by the Commission before taking effect. Cobra, therefore, argues that any directive by the Commission to refund any portion of the lawfully effective rate that Cobra began collecting on July 1, 2017, constitutes unlawful retroactive ratemaking. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

{¶ 14} NEO responds that the Commission was authorized to order a refund, because Cobra was not billing the Commission-approved rate and, therefore, *Keco* does not apply by its plain language. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). NEO also notes that Cobra has failed to explain how its position comports with R.C. 4905.32, which forms the basis for the Court's decision in *Keco*. Additionally, NEO contends that Cobra's argument is improper, in light of the fact that Cobra has repeatedly assured its customers and the Commission that it would refund any over-collections. NEO asserts that Cobra invited customers to pay an improper rate by promising future refunds but now refuses to pay those refunds following the Commission's rejection of the rate.

{¶ 15} The Commission finds no merit in Cobra's first and second grounds for rehearing. The April 11, 2018 Entry was issued in response to Cobra's correspondence dated

July 7, 2017, indicating that Cobra was submitting a bond, in compliance with R.C. 4909.42, in order to institute its proposed rates. In response to Cobra's correspondence, the Commission specifically concluded that the statutory timing requirements in R.C. 4909.42 do not govern an application for an increase in rates filed by a pipeline company and that Cobra, as a pipeline company, was not permitted under that statute to implement its proposed rates. Entry at ¶ 23. At no point in its July 7, 2017 correspondence or in any other filing did Cobra state that it intended to implement its proposed rates pursuant to R.C. 4909.17. Therefore, there was no basis for the Commission to address the question of whether Cobra is permitted, under R.C. 4909.17, to implement its proposed rates prior to the Commission's determination in this proceeding that the rates are just and reasonable. Cobra relied on R.C. 4909.42 as the purported statutory basis for its implementation of its proposed rates. The Commission merely determined, for the reasons set forth in the Entry, that R.C. 4909.42 was inapplicable to Cobra. The Commission fully addressed the arguments raised by the parties regarding R.C. 4909.42 and was under no obligation, sua sponte, to address any other statute that may have permitted the implementation of Cobra's proposed rates.

{¶ 16} We also find Cobra's argument regarding retroactive ratemaking misguided, as *Keco* specifically pertains to rates that have been established by the Commission. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 254, 141 N.E.2d 465 (1957) ("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."). The Commission has not approved Cobra's proposed rates. For these reasons, Cobra's first and second grounds for rehearing should be denied.

{¶ 17} As its third ground for rehearing, Cobra contends that the Commission erred in Paragraph 32 of the April 11, 2018 Entry, in stating that the Commission intends to apply the procedures of R.C. 4909.18 and 4909.19 to Cobra, despite the fact that the Commission also declared that those same procedures are inapplicable to Cobra. Cobra asserts that, although the Commission has previously applied R.C. 4909.18 and 4909.19 to pipeline companies, the Commission acted without lawful authority and, in any event, those prior cases did not involve a rate increase. According to Cobra, no party can have any confidence in a determination by the Commission that employs processes and procedures that are expressly inapplicable by legislative fiat. Noting that the Commission is a creature of statute, Cobra adds that the Commission may find itself subject to a writ of prohibition, if it elects to proceed under R.C. 4909.18 and 4909.19. Cobra claims that the Commission incomprehensibly and unlawfully elected to proceed in an ad hoc fashion in which the Commission first recognized that R.C. 4909.18 and 4909.19 are inapplicable to pipeline companies, thereby depriving Cobra of the protections afforded by R.C. 4909.42, but then declared that the Commission will nevertheless employ the process set forth in R.C. 4909.18 and 4909.19, despite the legislative prohibition against doing so.

{¶ 18} NEO asserts that the Commission has wide discretion to use the statutory rate case procedures for the remainder of this case even though they are not statutorily mandated. As an initial matter, NEO notes that the issue of whether a refund is required is separate from the issue of which procedural mechanisms should be used to process this case. With respect to the first issue, NEO argues that the Commission's decision not to apply R.C. 4909.42 has no impact on Cobra's obligation to provide a refund. Addressing Cobra's claim that it was denied the protections of R.C. 4909.42, NEO emphasizes that Cobra failed to file a proper bond. Regarding the procedures to be used in this case, NEO asserts that the Commission's decision to follow the well-established rate case procedures, in order to ensure that Cobra is afforded due process, is well within the Commission's discretion to manage its docket. *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). NEO also questions how Cobra is prejudiced by the Commission's

decision, particularly given that Cobra admits that the Commission has authority to regulate its rates and its earlier filings assumed that the Commission would utilize the rate case process set forth in R.C. 4909.18 and 4909.19.

{¶ 19} The Commission finds that Cobra's third ground for rehearing should be denied. The Supreme Court of Ohio has found that the Commission is vested with considerable 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." *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982); *see also Sanders Transfer, Inc. v. Pub. Util. Comm.*, 58 Ohio St.2d 21, 23, 387 N.E.2d 1370 (1979) ("The public utilities commission is invested with a discretion as to its order of business, and there is such a wide latitude of that discretion that this court may not lawfully interfere with it, except in extreme cases."). Here, the Commission concluded that no provision in R.C. Chapter 4909 addresses the procedures to be used by the Commission in determining the rates and charges for a pipeline company. In light of that fact, and in order to ensure that Cobra is afforded due process in this case, we clarified that Cobra's application should be reviewed in a manner that is consistent with the process followed under R.C. 4909.18 and 4909.19, including issuance of a written report of investigation, publication of notice of the application, and adherence to the Commission's standard filing requirements, which are necessary to determine proper rates under R.C. 4909.15. Entry at ¶ 32. We find that this determination is both consistent with our discretion to manage this docket, as well as our prior precedent in cases establishing rates for pipeline companies. *In re Natural Gas Transmission Co. of Ohio*, Case No. 81-1404-PL-ATA, et al., Entry (Dec. 23, 1981); *In re TOPICO*, Case No. 81-489-PL-ATA, Entry (May 19, 1981). Contrary to Cobra's claim, the Commission did not determine that these statutes should be applied to Cobra in this case. Rather, we found that a similar type of process should be followed to facilitate a full and fair review of Cobra's application. In the absence of statutory guidance on this specific issue, we find that our decision to proceed in this manner is a reasonable course of action to

determine proper rates for Cobra under our extensive ratemaking authority in R.C. 4909.15. *See, e.g., Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 25; *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154, 555 N.E.2d 288 (1990).

{¶ 20} In addition, R.C. 4905.26 provides the Commission with substantial authority to initiate proceedings to investigate the reasonableness of any rate or charge rendered or proposed to be rendered by a public utility. The statute permits the Commission, following notice and a hearing, to change a rate or charge, without compelling the public utility to apply for a rate increase pursuant to R.C. 4909.18. *Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶¶ 29-32; *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 402, 575 N.E.2d 157 (1991); *Allnet Communications Services, Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 512 N.E.2d 350 (1987); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158, 389 N.E.2d 483 (1979). Without question, Cobra has been afforded notice and a hearing in this proceeding.

{¶ 21} Finally, Cobra asserts that the Commission erred in Paragraph 24 of the April 11, 2018 Entry, in concluding that Cobra's bond would not have satisfied R.C. 4909.42. Initially, Cobra states that R.C. 4909.42 is likely inapplicable and irrelevant, based on its position that pipeline companies can impose new rates at any time. Cobra asserts that it is nevertheless possible that the Ohio Supreme Court could conclude that, notwithstanding the reference to R.C. 4909.18 within the statute, R.C. 4909.42 must also be applied in these unique circumstances, where Cobra was ordered to initiate a ratemaking process to which it may be statutorily exempt. For this reason, Cobra argues that the Commission's view of a bond is artificially narrow and fails to comport with plain English definitions of the term, legal definitions of the term, and the General Assembly's use of the term in the Revised Code. Cobra asserts that the term encompasses any binding writing to pay a sum of money, subject to the performance of defined duties or rendered void by certain express conditions. Noting that many other sections of the Revised Code expressly require a third-party surety,

Cobra contends that R.C. 4909.42 contemplates the filing of a bond issued by the public utility rather than a third-party surety. Finally, Cobra claims that the Commission misconstrued the sole authority upon which it relied. *In re Columbia Gas of Ohio, Inc.*, Case No. 89-616-GA-AIR, et al. (*Columbia Rate Case*), Entry (Feb. 20, 1990). Cobra asserts that, in the *Columbia Rate Case*, the Commission objected to the fact that the bond provided by Columbia Gas of Ohio, Inc. (Columbia) did not contain an express promise to pay any refund by means of a future rate reduction in the manner in which the Commission might later direct. Cobra claims that it is not clear from the Entry in the *Columbia Rate Case* whether the Commission was concerned by the fact that Columbia initially offered its own bond rather than the bond of a third-party surety. Cobra notes that Columbia had indicated its intention to submit a third-party bond before the Commission issued the Entry. Cobra argues that, although the third-party bond appears to have assuaged the Commission's concerns regarding the language used in Columbia's bond, the third-party bond, nonetheless, exceeded the requirements of the statute. Cobra concludes that the Commission has no legitimate basis upon which to find that Cobra's bond does not comply with R.C. 4909.42.

{¶ 22} NEO argues that Cobra's purported bond was inappropriate for several reasons. First, according to NEO, the so-called bond was illusory and insufficient to protect customers, given that Cobra has admitted that it is unable to pay its tax obligations or to issue the Commission-ordered refunds to customers. NEO asserts that the bond does not protect Cobra's customers, which are now at risk of not receiving the refunds to which they are entitled. NEO also reiterates that the bond was insufficient as a matter of law, as already thoroughly addressed by the Commission in the Entry.

{¶ 23} In the April 11, 2018 Entry, the Commission found that, even if we were to assume that R.C. 4909.42 provides a proper basis for Cobra to implement its proposed rates, Cobra has nevertheless failed to file a sufficient bond or letter of credit payable to the state for the use and benefit of the customers affected by the proposed increase. In its application

for rehearing, Cobra argues that its bond fully complies with the requirements set forth in R.C. 4909.42, as a third-party surety is not required, and that the Commission misconstrued its decision in the *Columbia Rate Case.*

{¶ 24} Cobra claims that, in the *Columbia Rate Case,* the Commission objected to Columbia's undertaking on the basis that it did not contain an express promise to pay any refund ordered by the Commission. Cobra is mistaken in its interpretation of the *Columbia Rate Case,* as Columbia's initial undertaking did include the necessary promise to refund any amounts collected in excess of the rate determined by the Commission. The Commission indicated, however, that Columbia's undertaking did not adequately comply with the requirement that it must be payable to the state for the use and benefit of the affected customers. The Commission stated:

> The statute provides that the undertaking must not only contain a promise to refund any amounts collected by the utility over the rates determined by the Commission in its final order, but also that the undertaking must be payable to the state of Ohio for the use and benefit of the affected customers. It is apparent from Columbia's letter that it recognized the existence of the two conditions precedent. However, as of the date of this Entry, it appears that Columbia has complied with the former condition precedent, but not the latter.

The latter condition precedent, as referenced by the Commission, is the requirement that the undertaking be payable to the state for the use and benefit of the affected customers. In its Entry, the Commission specifically noted that, despite its stated intention, Columbia had not filed additional security in the form of a Bond for Security of Refunds in the amount of $10 million. The Commission concluded that Columbia had not complied with R.C. 4909.42. *Columbia Rate Case,* Entry (Feb. 20, 1990). The bond was filed by Columbia and its third-party surety later that same day, with language nearly identical to the original undertaking. At that point, the Commission was satisfied that Columbia, consistent with R.C. 4909.42,

had taken the necessary steps to implement its proposed rates, although the Commission noted that, in doing so, Columbia had acted in an unprecedented manner. *Columbia Rate Case*, Entry (Mar. 6, 1990), Opinion and Order (Apr. 5, 1990).

{¶ 25} In the present case, we determined that, like Columbia's initial undertaking, Cobra's bond failed to provide any financial security for potential customer refunds. Entry at ¶ 24. Although we agree with Cobra that R.C. 4909.42 does not explicitly reference a third-party surety, the statute requires that the bond be payable to the state for the use and benefit of the customers affected by the proposed increase. As in the *Columbia Rate Case*, we have appropriately concluded that the additional security provided by a third-party surety is necessary to comply with this statutory requirement. The Commission must be certain that sufficient financial security is provided to ensure that customers will benefit from the bond, if a refund is subsequently ordered by the Commission. Absent the financial backing of a third party, a bond provides no assurance that customers will receive a refund of any amounts collected in excess of the rate ultimately approved by the Commission. As NEO emphasizes, this is particularly evident in this proceeding, given Cobra's claim that it is financially incapable of complying with the refund directive in the April 11, 2018 Entry. Accordingly, Cobra's fourth ground for rehearing should be denied.

{¶ 26} As a final matter, the Commission notes that Cobra has not fully complied with the April 11, 2018 Entry. Specifically, Cobra was directed to promptly refund to customers any amounts collected in excess of its Commission-approved rate. Entry at ¶ 25. R.C. 4903.15 provides that, unless a different time is specified in the order or by law, every Commission order shall become effective immediately upon journalization. In this case, the Entry took effect on April 11, 2018. Further, the filing of Cobra's application for rehearing did not excuse Cobra from its legal obligation to comply with the Commission's Entry. R.C. 4903.10. We, therefore, direct Cobra to provide the Commission-ordered refund to its customers. Specifically, Cobra should provide the refund in the form of a monthly bill credit that begins immediately and continues over the same number of months that the excess

rates were collected from customers. Cobra should also provide notice of the bill credit via a bill message or bill insert to all affected customers, as well as file notice in this docket upon completion of the refund. If Cobra fails to comply with these directives, the Commission may assess civil forfeitures or pursue other appropriate civil remedies pursuant to R.C. 4905.54 and 4905.60.

III. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That Cobra's application for rehearing be denied. It is, further,

{¶ 29} ORDERED, That Cobra refund to customers any amounts collected in excess of its Commission-approved rates. It is, further,

{¶ 30} ORDERED, That a copy of this Second Entry on Rehearing be served upon all interested persons and parties of record.

COMMISSIONERS:
Approving:
Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

SJP/hac

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Case No(s). 16-1725-PL-AIR

Summary: Entry that the Commission denies the application for rehearing of the April 11, 2018 Entry filed by Cobra Pipeline Company, LTD and directs that customers receive a refund of any amounts paid in excess of Commission-approved rates. electronically filed by Docketing Staff on behalf of Docketing

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	
Cobra Pipeline Company, Ltd.	:	Case No.16-1725-PL-AIR
For an Increase in its Rates and Charges	:	

COBRA PIPELINE COMPANY, LTD'S
APPLICATION FOR REHEARING
OF THIS COMMISSION'S ENTRY DATED APRIL 11, 2018

Pursuant to Ohio Revised Code §4903.10 and Ohio Administrative Code §4901-1-35(A), Cobra Pipeline Company, Ltd., ("Cobra"), respectfully applies for rehearing of the Entry and Orders issued by the Public Utilities Commission of Ohio (the "Commission") on April 11, 2018 in the above captioned case (the "Entry"). Cobra submits that the Commission's Entry is unreasonable and unlawful in the following particulars:

(A) Assignment Of Error No. 1: This Commission Erred In Paragraphs 22 Through 24 of Its April 11, 2018 Entry In Its Description and Application Of The Exemptions That Result From R.C. §4909.17.

(B) Assignment Of Error No. 2: The Commission Erred In Paragraphs 25, and 35 Through 37 Of Its April 11, 2018 Entry When It Ordered Cobra To Provide An Immediate Refund Of 100% Of The Delta Between The Rate Cobra Placed In Effect On July 1, 2017 And The Rate Which Existed Prior To That Date.

(C) Assignment of Error No. 3: The Commission Erred In Paragraph 32 Of Its April 11, 2018 Entry When It Asserted It Intends To Apply the Procedures of §§4909.18 and 4909.19 to Cobra, After Having Just Declared Those Same Procedures Inapplicable to Cobra.

(D) Assignment of Error No. 4: This Commission Erred in Paragraph 24 When It Concluded Cobra's Bond Would Not Have Satisfied The Statute, Assuming That §4909.42 Might Be Applicable.

Exhibit C

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum In Support, which is incorporated by reference herein.

Respectfully submitted,

/s/ Michael D. Dortch
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COBRA PIPELINE COMPANY, LTD

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	:	
Cobra Pipeline Company, Ltd.	:	Case No.16–1725–PL-AIR
For an Increase in its Rates and Charges	:	

COBRA PIPELINE COMPANY, LTD'S MEMORANDUM IN SUPPORT OF ITS APPLICATION FOR REHEARING OF THIS COMMISSION'S ENTRY DATED APRIL 11, 2018

I. INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") began its analysis of the legal issues that are the subject of its April 11, 2018, Entry (the "Entry") by concluding – correctly – that pursuant to Ohio Revised Code ("R.C.") Section 4909.17, pipeline companies are exempt from the rate–making processes described within R.C. §§4909.18 and 4909.19 to which virtually every other form of "public utility" in Ohio is subject. This Commission erred as a matter of law, however, when it then attempted to apply the consequences of its initial conclusion to Cobra Pipeline Company, LLC ("Cobra"), in this case.

II. THE APPLICABLE LAW

ASSIGNMENT OF ERROR NO. 1: This Commission Erred In Paragraphs 22 Through 24 of Its April 11, 2018 Entry In Its Description and Application Of The Exemptions That Result From R.C. §4909.17.

The Commission erred fundamentally by failing to recognize the full import of R.C. §4909.17. That statute does not merely exempt Cobra from R.C. §§4909.18, 4909.19, and 4909.191 (and, as the Commission has concluded, from R.C. §4909.42). The provisions of R.C.

§4909.17 contain an exemption from R.C. §4909.17 *itself* that is (or at least once was)[1] uniquely available to only three types of public utilities:[2] Street railways, for-hire motor carriers, and pipeline companies.

R.C. §4907.17 provides in relevant part as follows:

> No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, ***except as provided in this section and sections*** 4909.18, 4909.19, and 4909.191 of the Revised Code. ***Such sections do not apply to any rate***, joint rate, toll, classification, charge or rental or any ***regulation or practice affecting the same, of*** railroads, street and electric railways, for-hire motor carriers, and ***pipe line companies.***

R.C. 4909.17. (Emphasis supplied.)

It is somewhat tempting to read this language and immediately conclude that §4907.17 contains a rule of general application, but identifies exceptions to that rule that are to be found elsewhere, in the other identified provisions of the code. That conclusion would be incorrect, however, as it ignores the "except as provided in ***this*** section" language within the section. To correctly construe the statute, it is necessary to consider and understand its history. Together, R.C. §§4907.17, 4909.18 and 4909.19, are a recodification of a much lengthier law,[3] which was originally codified in relevant part at Ohio General Code ("G.C.") §614-20. Current R.C. §4907.17 and the first paragraph of

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[1] The rates of for-hire motor carriers have since been deregulated, of course, and Cobra confesses it is unaware of any remaining street railways in Ohio subject to regulation by this Commission.

[2] Cobra notes that railroads, which also enjoy this exemption, are not public utilities by statutory definition. R.C. 4905.02(A)(4).

[3] 88th Ohio General Assembly, S.B. 66 (1929), was known generally as "The Carpenter Act" and through that portion that became G.C. §614-20, it contains the inception of this Commission's authority to approve utility rates before they go into effect. For reasons unknown to undersigned counsel, pipelines were exempt from that authority at the outset. Nor was such authority later provided to this Commission, where pipelines are concerned.

G.C. §614-20 are compared below, via blackline, to show every difference between the language of the first paragraph of G.C. §614-20[4] and §4909.17, as it exists today[5]:

> No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, ~~and no~~ or any regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the ~~public utilities~~ commission, by order, determines it to be just and reasonable, except as hereinafter provided, ~~in this section and sections 4909.18, 4909.19, and 4909.191 of the Revised Code. Such~~ providing, however, that this sections ~~do~~ shall not not apply to any rate, joint rate, toll, classification, charge or rental or any regulation or practice affecting the same, of railroads, street and electric railways, for-hire motor carriers, and pipe line companies.

Unlike R.C. §4909.17, former G.C. §614-20 then continued at great length to set forth additional matters that are the obvious precursors to the procedures and the additional exceptions now found within R.C. §§4909.18 and 4909.19, as later amended and re-codified therein.

Reviewing these two versions of the General Assembly's statutory directive side-by-side eliminates any legitimate argument to the effect that R.C. §4909.17 can be applied to a pipeline company while at the same time R.C. §§4909.18 and 4909.19 are not applicable. Instead, any comparison of the two iterations of the same language makes it plain that Cobra is exempt from R.C. §4909.17 to the same extent that it is exempt from R.C. §§ 4909.18 and 4909.19 (which were once part of G.C. §640-20).

Cobra's reading of these statutes is further confirmed by the only decision by any court (and – with only two exceptions known to Cobra's counsel[6] – by this Commission) in which R.C. §4909.17 is cited for anything other than the generally applicable proposition that public

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[4] G.C. 614-20, Baldwin's General Code (1936).
[5] The blackline edits have been applied to reflect changes to R.C. §4909.17 at it exists today so that, if accepted, G.C 614-20 would result.
[6] The exceptions to which Cobra refers are discussed in Assignment of Error No. 3, below.

utility rates do not become effective until approved by this Commission. In *Federal Reserve Bank v. Purolator Courier Corp.*, 13 Ohio App. 3d 296 (8th Dist. Ct. App. 1974), the Cuyahoga County Court of Appeals stated unequivocally that because of R.C. §4909.17 the for-hire motor carrier defendant in that case possessed the power to establish rates and terms of service *"ex parte"*, meaning unilaterally, without Commission approval, by simply docketing those rates and terms with this Commission.

To be clear, Cobra does not contend that R.C. §4909.17 means that the rates of pipeline companies may not be regulated by this Commission. Nor does Cobra contend that its rates and service terms need not be just, reasonable, and non-discriminatory. Cobra merely points out that R.C. §4909.17 is the ***only*** provision of Ohio statutory law that requires public utilities to obtain this Commission's approval *prior to* implementing a change in rates or terms of service, and that this provision is inapplicable to pipelines such as Cobra. Because the section has no application to pipeline companies, changes 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.

In this case, Cobra filed proposed rates on August 15, 2016. This Commission later accepted Cobra's filing effective as of September 26, 2016. Still later – attempting to conform to a statutory scheme to which it now recognizes it is exempt – Cobra expressly informed this Commission and its customers that its proposed rate would become effective for all transportation beginning July 1, 2017. Cobra's newly effective rate then remained in place until

April 11, 2018, at which time this Commission Ordered Cobra to reduce its rates pending the outcome of this proceeding.[7]

ASSIGNMENT OF ERROR NO. 2: The Commission Erred In Paragraphs 25, and 35 Through 37 Of Its April 11, 2018 Entry When It Ordered Cobra To Provide An Immediate Refund Of 100% Of The Delta Between The Rate Cobra Placed In Effect On July 1, 2017 And The Rate Which Existed Prior To That Date.

This Commission erred a second time when it Ordered Cobra to refund the entire increase in the rate paid to it by its customers after June 30, 2017. The Commission's April 11, 2018 Entry presumes that, since R.C. §4909.42 is inapplicable, the default rule in which the Commission possesses authority to approve pipeline company rates in advance instead applies. For the reasons discussed in Assignment of Error No. 1, any such presumption is incorrect.

In the absence of the default rule within R.C. §4909.17, any Order to refund any portion of the lawfully effective rate which Cobra began to collect starting July 1, 2017, engages this Commission in retro-active rate making – a power which it also does not possess. *Keco Industries, Inc. v. Cin. Bell Tel. Co.*, 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 465, paragraph two of the syllabus (R.C. Title 49 "affords no right of action for restitution of the increase in charges collected during the pendency of the appeal"). "[A]ny refund order would be contrary to our precedent declining to engage in retroactive ratemaking." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009 Ohio 604, 904 N.E.2d 853, ¶ 21; *See also, e.g., Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004 Ohio 4774, 814 N.E.2d 829, ¶ 27.

[7] It can be debated whether that portion of this Commission's April 11, 2018, which Orders Cobra to "reinstate" "Commission-approved rates" actually conforms to Ohio law. Notwithstanding, Cobra acknowledges this Commission's intention, and it immediately reduced its transportation rate accordingly.

ASSIGNMENT OF ERROR NO. 3: The Commission Erred In Paragraph 32 Of Its April 11, 2018 Entry When It Asserted It Intends To Apply the Procedures of §§4909.18 and 4909.19 to Cobra, After Having Just Declared Those Same Procedures Inapplicable to Cobra.

This Commission next erred when it denied Cobra the protections afforded by R.C. §4909.42 on the basis that R.C. §§4909.18 and 4909.19 are inapplicable to pipeline companies, and then expressed its determination to proceed under §§4909.18 and 4909.19, notwithstanding the inapplicability of those sections.

Within its Order, this Commission correctly states that it has applied §§4909.18 and 4909.19 to pipeline companies in the past. That fact alone, of course, does not mean that the Commission did so correctly, or that it possessed the lawful authority to do so. Furthermore, it is at least noteworthy that neither of the two prior occasions in which the Commission applied §§4909.18 and 4909.19 to pipeline companies involved a rate increase. Instead, the Commission applied these statutes on those two occasions to matters that were certain not to be appealed, as one of them was resolved by stipulation, and the other was not contested. *In the Matter of Natural Gas Transmission Company of Ohio*, Case No. 81-1401-PL-ATA, Entry Dec. 28, 1981, and *In the Matter of the Application of Ohio Intrastate Gas Transmission Company*,[8] Case No. 95-758-PL-ATA, Entry, May 30, 1996,1996 Ohio PUC LEXIS 32, 1996 Ohio PUC LEXIS 32. In this case, of course, Cobra has proposed a rate increase, contested issues already abound, and many more are likely to become known in the future. Neither this Commission, Cobra, nor any intervening party can have any confidence in a determination by this Commission that employs processes and procedures that are expressly inapplicable, by legislative fiat.

[8] Interestingly, in the *Ohio Intrastate Gas* case, the applicant recognized the inapplicability of former G.C. 614-20 and therefore urged this Commission's review under those statutes expressly applicable to railroads. Curiously, this Commission *sua sponte* chose nonetheless to employ procedures that it was aware were expressly inapplicable to pipeline companies. While the applicant's position may not necessarily have been correct, either, it at least had the virtue of not directly flouting the will of the legislature.

In fact, this Commission would likely find itself subject to a writ of prohibition initiated by one party or another should it insist upon such a course. The Commission is a creature of statute, and it has no authority to act beyond the statutory powers expressly granted to it by the Ohio General Assembly. *In Re Application Of Ohio Power Company*, 2015-Ohio-2056 (citing *Discount Cellular, Inc. v. Pub. Util. Comm.*), 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51. If the Commission's decision to invoke R.C. §§4909.18 and 4909.19 notwithstanding the Commission's own acknowledgment that they are inapplicable is the result of a concern that the existing statutory scheme is inadequate, it should present its case for amendment to the General Assembly. On the other hand, if the Commission believes that its possesses powers sufficient to its purposes, then it should promulgate proper rules which recognize and give effect to those powers.

It is bewildering, however, that the Commission would choose to proceed in an *ad hoc* fashion in which it first recognizes that R.C. §§4909.18 and 4909.19 are inapplicable to pipeline companies in order to deprive Cobra of the protections offered by R.C. 4909.42, but then turn immediately about and declare that it will employ the process set forth in R.C. §§4909.18 and 4909.19 after all, despite the legislative prohibition against doing so. Furthermore, and much more importantly, it is patently error for this Commission to do so.

ASSIGNMENT OF ERROR NO. 4: This Commission Erred in Paragraph 24 When It Concluded Cobra's Bond Would Not Have Satisfied The Statute, Assuming That §4909.42 Might Be Applicable.

Cobra concedes that R.C. §4909.42 is probably inapplicable. In fact, given that it could have imposed its proposed rate at any time, the statute is probably irrelevant.

Still, R.C. §4909.42 was enacted to provide a specific remedy to a specific problem. That remedy was designed to protect utilities against the problem of prolonged delay in the regulatory

process, without also disadvantaging utility customers. Given that R.C. §4909.42 was not enacted until 1969[9] – some forty years after the Carpenter Act, at a time when it is simply unknown whether anyone considered, or was even aware of, the existing "pipeline exemption" to R.C. §4909.17, it is at least possible that the Ohio Supreme Court could conclude that notwithstanding the reference to R.C. §4909.18 within the statute, R.C. §4909.42 must also be applied in the unique circumstances of this case, in which a utility was subject to a prolonged proceeding that began only because the utility was Ordered to initiate a rate making process to which it is statutorily exempt in the first place.

Should such be the case, this Commission plainly erred within paragraph 24 of its April 11, 2018 Entry when it found that Cobra's bond would not satisfy the statutory requirement for a "bond" even if R.C. §4909.42 applies to Cobra. The Commission's definition is artificially narrow, and comports with neither plain English definitions of the term, legal definitions of the term, and is inconsistent with the language used by the General Assembly. Ballentine's Law Dictionary defines the word "bond" as follows:

> Noun: The obligation secured by a mortgage or deed of trust; a corporate obligation. 19 Am J2d Corp § 1059; at common law, a sealed instrument or specialty. 34 Am J1st Lim Ac § 82; **an obligation in writing which binds a signatory to pay a sum certain upon the happening of an event and carries a seal, except where controlled by a statute which dispenses with the necessity of a seal.** 12 Am J2d Bonds § 1. So defined, the term is generic, embracing investment bonds, penal bonds, indemnity, fidelity, and surety bonds. 12 Am J2d Bonds § 1. Less frequently, the term is used for a bail or a surety. Verb: To give a bond as security.

Ballentine's Law Dictionary © 2010, Lexis Nexis, a division of Reed Elsevier, plc. (Emphasis supplied).

Similarly, Black's Law Dictionary defines the term "bond", in part, using the following terms:

[9] 108th General Assembly, Sub. S.B. 94 (1969).

> . . . **The word "bond" shall embrace every written undertaking for the payment of money or acknowledgment of being bound for money, conditioned to be void on the performance of any duty, or the occurrence of anything therein expressed, and subscribed and delivered by the party making it, to take effect as his obligation,** whether it be sealed or unsealed; and, when a bond is required by law, an undertaking in writing without seal shall be sufficient.

Black's Law Dictionary, Free Online Legal Dictionary, 2nd Ed. (Emphasis supplied.)

The Ohio Revised Code plainly incorporates these common law definitions of the term "bond." Section 1.02 of the Revised Code defines the term in the most basic language, stating only that: "As used in the Revised Code, unless the context otherwise requires. . . (D) 'Bond' includes an undertaking." (In a bit of circular reasoning, section 1.02 also goes on to further provide that: "(E) 'Undertaking' includes a bond.")

The term "bond," used as it is in isolation within the statute, therefore encompasses ***any*** binding writing to pay a sum of money, subject to the performance of defined duties or rendered void by certain express conditions. Moreover, the statute plainly contemplates the filing of a bond issued by the *utility*, rather than the bond of a third party surety. Indeed, it is the utility that is directed to file its bond, and it is two officers of the utility who must expressly vouch "under oath" on behalf of "the utility" to refund any excess recovery through a temporary decrease in rates, as determined by the Commission.

Moreover, R.C. §4909.42 contains remarkably different language than other sections of the Ohio Revised Code. When those sections are reviewed, it is plain that when the General Assembly intended to require the bond of a third party surety, it certainly understood how to say so. R.C. §§122.90 (Minority Business Enterprises); 1315.07 (Check Cashing Services); 1322.022 (Mortgage Brokers); 1503.05 (Timber Sales); 1509.01 (Oil and Gas Developers); 1513.01 (Mining Permits); 2933.75 (Medicaid Fraud liens); 3332.08 (Private Career Colleges); 3706.02 (Air Quality Development Authority Board Members); 3714.02 (Construction and

Demolition Debris Landfill Operators); 4719.04 (Telephone Solicitors) are each an example of the General Assembly prescribing a third party surety. Innumerable additional examples exist within the Ohio Revised Code. When such statutes are compared to R.C. §4909.42, the difference in meaning is inescapable.

Finally, this Commission has misconstrued its brief entry of February 20, 1990 from the *Columbia Rate Case* (the sole authority upon which it relies) in the first place. The Commission may (or may not) have been concerned in 1990 when Columbia tendered its own bond rather than that of a third party surety. Whatever the Commission's true concerns, the only criticism actually expressed by the Commission regarding the form of Columbia's 1990 bond involves only the language of that bond, not the fact that it was Columbia's bond, rather than the bond of a third party surety. Specifically, the Commission took issue with Columbia's failure to satisfy the second of two "conditions precedent" that it stated were necessary to its acceptance of Columbia's bond. The Commission recognized that Columbia had indeed "bound" itself to the State and its customers. It objected to the fact that Columbia's bond did not contain the second condition precedent – an express promise to pay that refund by means of a future rate reduction in the manner in which the Commission might later direct.

It is true, of course, that Columbia submitted a third party bond as additional security almost immediately after the Commission issued its entry. Still, it is clear that the third party bond Columbia cause to be filed was not a response to this Commission's entry. Indeed, Columbia had indicated its intention to submit a third party bond even before the Commission issued the entry upon which it now relies (Suggesting, incidentally, at least one reason why the Commission's 1990 Order does not address the third party issue.) While it appears that the third party bond assuaged the Commission's concerns regarding the language of the bond of

Columbia itself, the submission of third party bond was, nonetheless, something over and above that which is required by the statute itself. Cobra takes small comfort in noting that its own bond, unlike Columbia's, does at least fully satisfy the language of the statute. This Commission has no legitimate basis upon which to assert that it does not -- assuming of course that 4909.42 can have any application in this case.

III. CONCLUSION

For the foregoing reasons, this Commission should GRANT Cobra's Application for Rehearing, and it should vacate paragraphs 22-25, 32, and 35 - 37 of that Entry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The PUCO's e-filing system will serve notice of this filing upon counsel for any party that has entered any form of appearance in this matter, and the Staff of the Public Utilities Commission of Ohio.

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