FILE

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Cobra Pipeline Company, LTD. for Approval of a Tariff to Become a Pipeline Company and Regulated Public Utility.	)))))	Case No. 05-1558-PL-ATA

Reply in Opposition to Protest and Notice of Discovery of the Ohio Oil and Gas Association

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I. INTRODUCTION

Cobra Pipeline Company, LTD. (hereinafter, "Cobra") hereby submits its Reply in Opposition to the Protest and Notice of Discovery filed on December 8, 2006 by the Ohio Oil & Gas Association (hereinafter, "OOGA") in this docket. The Application in this docket was filed on December 17, 2005, and OOGA sought leave to intervene on March 17, 2006. After discussions with OOGA, on August 21, 2006 Applicant submitted its Substituted Exhibit D, reflecting maximum transportation rates in place of the negotiated rate special arrangements Applicant had earlier proposed to be submitted to the Commission pursuant to Ohio Rev. Code §4905.31. This was an effort accommodate the concerns raised by OOGA in its filing of March 17. For the reasons set forth herein, OOGA's Protest should be rejected.

II. Legal Argument

Applicant does not agree with OOGA's contention that it has ignored the original cost of the facilities it is proposing to acquire from Columbia Gas Transmission Corporation. However, the factual issues associated with that interstate pipeline's costs are irrelevant as a matter of law. Here, prior to Cobra's acquisition of these facilities, some portion or all of them may have been dedicated to the interstate market for transportation and sale for resale of natural gas in interstate commerce,

but the facilities have never been dedicated to public use in the State of Ohio. Hence, the original cost of the facilities for purposes of valuation is their cost to the Applicant, which is for the first time dedicating these facilities to public utility service in Ohio.

OOGA contends that the rates Applicant has proposed are "wholly unrelated to the original costs of the facilities it wishes to acquire when first dedicated to public service." (Protest, p. 2, 3). It states that the proposed rates "appear to be based on the purchase price paid by Cobra rather than the original cost of the facilities when first dedicated to public service". (Id., p. 2). OOGA quotes selectively from Ohio Rev. Code §4909.05 as establishing the criteria for ascertaining the valuation of property of a public utility in order to determine the reasonableness of utility rates based on original cost of real and other kinds and classes of property.

However, OOGA ignores the following critical provision of §4909.05(E): "Such original costs of property, other than land owned in fee, shall be the cost, as determined to be reasonable by the Commission, *to the person that first dedicated the property to the public use....*"[1] OOGA simply begs the only pertinent question, which is, when and by whom the facilities being acquired here are dedicated to the public use for the first time under Ohio law.

It is a longstanding rule of law in Ohio that to constitute a business a public utility, the devotion of its facilities to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that the service

[1] OOGA places exclusive reliance on a 9th Circuit decision interpreting the Federal Power Act in *Montana Power Company v. FERC,* 599 F.2d 295, 1979 U.S. App. LEXIS 13758 (9th Cir. 1979). Even as to the issue in FERC proceedings, the facts in that case make it scant authority for the proposition suggested. First, the majority noted that the appellant power company had not preserved on appeal its challenge to the FPC's jurisdiction under section 203 of the Federal Power Act which gives the FPC [later FERC] jurisdiction over the acquisition by one jurisdictional utility from another jurisdictional utility; the majority noted that "it is not entirely clear that the transaction between Montana Power and the railroad was covered by this section". 599 F.2d at 298. Moreover, in that case the appellant had been using the acquired transmission line prior to the acquisition free of charge by the railroad to provide electricity to its retail customers in western Montana. Finally, consider the spirited dissent of Circuit Judge Goodwin, 599 F.2d at 301 et. seq. Regardless, this is not a FERC proceeding; OOGA ignores applicable precedent of the Ohio Supreme Court and this Commission relating to dedication of facilities to public use as described herein.

continue to be conducted; public use in this context means that the use by the public and by every individual member of it is a legal right.

> To constitute a "public utility," the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.

Southern Ohio Power Co. v. PUCO, (1924) 110 Ohio St. 246, 1924 Ohio LEXIS 351, syllabus 2. See also *Marano v. Gibbs*, (1989) 45 Ohio St.3d 310, 331, 1989 Ohio LEXIS 239; *A&B Refuse Disposers v. Board of Ravenna Twp. Trustees*, (1992) 64 Ohio St.3d 385, 389, 1992 Ohio LEXIS 1731:

> It is obvious from a review of that case law that the determination of public utility status requires a flexible rule, a rule which often intertwines the factors considered in relation to the concepts of "public service" and "public concern'.

The point is, an interstate pipeline such as Columbia Gas Transmission Corporation is not a public utility under Ohio law and its facilities have not been dedicated to public use under our law. See the definitions of a public utility at Ohio Rev. Code §4905.02 and at Ohio Rev. Code §4905.03(A) (6) and (7) for natural gas company and pipe-line company, respectively. Ohio Rev. Code §4905.05 explicitly excludes interstate pipelines from the reach of this Commission's jurisdiction:

> Nothing in this section, or section 4905.06 or 4905.46 of the Revised Code pertaining to regulation of holding companies, grants the public utilities commission authority to regulate a holding company or its subsidiaries which are organized under the laws of another state, render no public utility service in the state of Ohio, and are regulated as a public utility by the public utilities commission of another state or primarily by a federal regulatory commission, nor do these grants of authority apply to public utilities that are excepted from the definition of "public utility" under divisions (A) to (C) of section 4905.02 of the Revised Code.

This Commission has dealt with the specific question of whether dedication of facilities to the interstate transportation or sale for resale of natural gas constitutes dedication of property to the public use for purposes of its exercise of jurisdiction pursuant to Title 49, Ohio Rev. Code. See *In*

the Matter of the Complaint of Steve Bowman, et al. v. Columbia Gas of Ohio, Inc. and Columbia Gas Transmission Corporation Relative to the Allegations of Improper Maintenance of Gas Pipelines and Improper Termination of Service, 1988 Ohio PUC LEXIS 211 (Case No. 83-1328-GA-CSS; Opinion and Order entered Feb. 17, 1988). In that proceeding the Office of Consumers Counsel brought a complaint against Columbia Gas of Ohio and Columbia Gas Transmission Corporation ("TCO") on behalf of 14 residential customers served directly from TCO's pipeline D-75 near Harpster, Ohio.

The Commission held the complaint against TCO in abeyance and participated in the FERC proceeding where TCO sought approval pursuant to the Natural Gas Act to abandon 4.67 miles of pipeline D-75. FERC found that it had exclusive jurisdiction over the interstate transportation of gas and over abandonment of facilities or service by TCO. It ordered TCO to pay the cost of converting the 14 customers to propane service.[2] Upon further proceedings in the complaint proceeding, this Commission dismissed TCO as a party based on the FERC's exclusive jurisdiction over the interstate pipeline facilities, service and abandonment. The case proceeded against Columbia of Ohio, to determine whether its abandonment of service to the residential customers was reasonable. Ultimately, the Commission held that abandonment was reasonable. However, Columbia of Ohio contested the Commission's jurisdiction over abandonment of service to so-called "right of way" customers served directly from an interstate pipeline. In rejection the utility's jurisdictional argument, the Commission considered the issue of dedication to public use:

> COH argues on brief as it did in its motion to dismiss this complaint that the Commission lacks jurisdiction because the service provided to right-of-way and other rural tap customers is not public utility service. COH cites Southern Ohio Power Co. V. Public Utilities Commission [citation omitted]; Paramount Gas Utilities Co. v. Public Utilities Commission, 125 Ohio St. 211, ... and several other cases to support the proposition that a company selling goods or services is not a public utility, and is not providing a public utility service, if it has not dedicated its property to public use by holding itself out to serve the general public and only serves selected customers under individual contracts. We find that these cases

[2] *Bowman v. Columbia Gas Transmission Corp.*, Opinion No. 232, 31 F.E.R.C. (CCH) ¶61,185.

> cited by the company are not analogous to the present case. This proceeding involves a public utility gas company already subject to the Commission's jurisdiction unlike several of the cases cited by COH.[3] *Further, the focus of this proceeding is not on the dedication of property to public use because the pipeline in question is owned by TCO.*

(Opinion and Order, p. 23; emphasis added). In short, the Commission explicitly recognized in *Bowman* that interstate pipeline facilities are *not* dedicated to public use for purposes of the exercise of its jurisdiction to value property used and useful in providing public utility service under the Ohio Revised Code.[4]

III. CONCLUSION

As earlier noted, Applicant does not accept OOGA's contention that Applicant's proposed rates set forth in Substituted Exhibit D are wholly unrelated to the original cost of the facilities to Columbia Gas Transmission Corporation. Nevertheless, as a matter of law Columbia Transmission's original cost for the facilities offered for sale is not relevant to the application before the Commission. These facilities are proposed to be dedicated to public utility service in Ohio for the first time once the tariff submitted in this application is approved.

And this result makes logical sense. First, the rational underpinning for the statutory application of original cost less depreciation springs from the concern that public utilities might increase the value of utility facilities previously dedicated to public use by selling them to other public utilities. To meet this fear, a public utility may only include in its rate base the depreciated value of the plant when first dedicated to utility service.

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[3] Note that prior to this application, Cobra Pipeline has never been a jurisdictional pipe-line company.

[4] See also, *Pichowski, as Successor Trustee et al., v. Florida Gas Transmission Company* (Fla. Ct. App. 9th Dist 2003), 857 So.2d 219, 2003 Fla. App. LEXIS 11792. In that case, Florida Gas Transmission, a private, out of state natural gas transmission company was held not to be a public utility. It noted that it was following the definition of "public utility" employed by the Ohio Supreme Court in *Southern Ohio Power v. PUCO.* Using the *Southern Ohio Power* definition previously discussed, the Florida court found that "FGTC does not qualify as a public utility corporation because it does not supply the public with natural gas; it is not devoted to a public use; it transports natural gas to industrial customers and makes no retail sales to the public; its product and services are not available to the public generally and indiscriminately; and it has not accepted any public franchises." 857 So.2d at 222. The same could be said of TCO's use of its facilities offered for sale to Applicant.

But this Application does not involve a transfer of utility facilities from one jurisdictional utility to another. No public utility ratepayers in Ohio have paid a regulated return on the delivery of a public utility service through these facilities heretofore. A brand new jurisdictional public utility, the Applicant herein, is buying facilities from an interstate pipeline and proposes to dedicate them for the first time to the public use. It would be poor public policy, and bad law, to artificially limit a new public utility's jurisdictional rate base to an original cost figure unrelated to its arms-length, negotiated cost to acquire and maintain of these facilities that have never before been dedicated to the public use.

For all of these reasons, Applicant requests that the "Protest" submitted by OOGA by accorded no weight and rejected out of hand because of its fundamental errors in applying the laws of Ohio to this Application. Finally, Applicant requests the prompt approval of its proposed tariff, Substituted Exhibit D.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this Reply in Opposition to Protest by the Ohio Oil and Gas Association was served by regular mail, postage prepaid on the following on this 21st day of December 2006:

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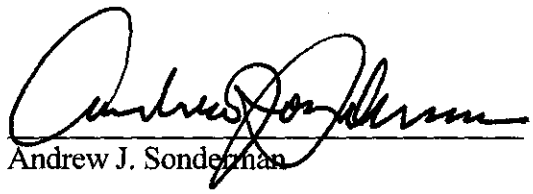

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