

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Application of)
Brainard Gas Corporation, Northeast Ohio)
Natural Gas Corporation, and Orwell) Case No. 12-1792-GA-AIS
Natural Gas Company for Approval of)
Long-Term Financing Arrangements.)

FINDING AND ORDER

The Commission finds:

- (1) Brainard Gas Corporation (Brainard), Northeast Ohio Natural Gas Corporation (NEONG), and Orwell Natural Gas Company (ONG) (jointly referred to as the applicants) are Ohio corporations, public utilities, and natural gas companies as defined in Sections 4905.02 and 4905.03, Revised Code, and are subject to the jurisdiction of this Commission.
- (2) On June 8, 2012, as supplemented on September 25, 2012, and amended on September 27, 2012, and October 5, 2012, the applicants filed a joint application and exhibits (Application), in accordance with the provisions of Sections 4905.40 and 4905.41, Revised Code.
- (3) By Commission orders issued on March 30, 2011, and August 24, 2011, in *In the Matter of the Joint Application of Brainard Gas Corporation, Northeast Ohio Natural Gas Corporation, and Orwell Natural Gas Company for Approval of Long-Term Financing Arrangements*, Case No. 10-2330-GA-AIS (10-2330 Case) the applicants were authorized to enter into a Note Purchase Agreement (Note Agreement) to issue Senior Secured Notes (Prior Notes) to Sun Life Assurance Company of Canada (Sun Life) in an amount of up to \$15,334,000.
- (4) In the above-captioned case, the applicants are requesting Commission approval to enter into an Omnibus Amendment to the Note Agreement (Amended Note Agreement) and issue new Senior Secured Notes (New Notes) to Sun Life in an aggregate amount up to \$2,989,552, in accordance with the

terms and conditions as set forth in the Application.
Pursuant to the Application:

- (a) The New Notes will mature in June 2017, without principal amortization, with interest, and with a balloon payment of principal due upon maturity.
- (b) The New Notes will be the joint and several obligation of the applicants. The applicants state that, by combining their debt requirements, they create larger debt issues at more attractive interest rates and lower transaction costs than otherwise would be available.
- (c) The New Notes will be guaranteed by Gas Natural, Inc. (Gas Natural, the holding company of Brainard), Great Plains Gas Company (the parent company of NEONG), Lightning Pipeline Company, Inc. (the parent company of ONG), and by any existing or future subsidiary of Gas Natural.
- (d) The proceeds from the issuance of the New Notes will be used to provide funds for the applicants' construction programs.
- (e) The applicants will not use any of the proceeds from the issuance of the New Notes for any purpose other than as stated in the Application.
- (f) The applicants will file a report with the Commission with the terms and full particulars, no later than 30 days after executing the New Notes.
- (g) The applicants will file a written report, no later than January 31, 2013, that details of the use of proceeds from the New Notes to confirm that the applicants have funded the proceeds of the

New Notes for their 2012 capital expenditures,
as specified in the Application.

- (5) Before proceeding with our consideration of the Application filed in this case, the Commission recognizes that the Note Agreement entered into between Sun Life and the applicants, and approved by the Commission in the *10-2330 Case*, included certain covenants, through which promises were made by the applicants related to financial conditions and events. Specifically, the Note Agreement, among other things, requires the applicants to maintain an interest coverage ratio (Coverage Ratio), determined quarterly, for the preceding 12 months, to be not less than 2.0 to 1.0, and the applicants' indebtedness was not to exceed 60 percent of their capitalization (Debt Ratio). In addition, the Note Agreement restricts the dividend payments by the applicants, such that the dividends payments should not be in excess of 60 percent of the applicants' net income (Dividend Covenant), and the percentage of income allowed to be distributed to the parent companies by the applicants was limited.
- (6) In accordance with the Commission's orders in the *10-2330 Case*, the applicants filed quarterly reports with the Commission to demonstrate that their Coverage Ratio and Debt Ratio complied with the requirements of the Note Agreement. On September 25, 2012, the applicants filed information of actual and projected financial covenant compliance coverage for 2012 and 2013. Upon review of this information, the Commission finds that, at the request of the applicants, Sun Life granted a waiver of the Dividend Covenant for the duration of 2012, and increased the dividend distribution to net income cap from 60 percent to 70 percent. Consequently, during the first quarter of 2012, the applicants did not comply with the Note Agreement approved by the Commission, because they paid \$1,273,999 more in dividends than they were permitted to pay pursuant to the Dividend Covenant. Furthermore, the documents reflect that the applicants project that they will continue to be in noncompliance through the end of 2012.
- (7) In the Application in this case, the applicants initially proposed to issue an aggregate principal amount of

\$4,300,000 of the New Notes to primarily fund their 2012 construction programs. However, in their amendment to the Application filed on September 27, 2012, the applicants reduced the amount of their loan request by \$1,273,999 and are now requesting authorization for the New Notes in the aggregate amount of \$2,989,552.

- (8) Upon review of the quarterly reports filed in the *10-2330 Case* and the information in this case, the Commission initially finds it necessary to remind the applicants that, if they wished to change any terms or conditions in the Note Agreement, they were to first request and obtain the Commission's approval. Thus, the applicants' decision to increase the cap on dividend distribution to net income from 60 percent to 70 percent was not authorized. The provision requiring a cap on dividend distributions to net income was an important component in our order in the *10-2330 Case*. By approving the Note Agreement in the *10-2330 Case*, the Commission allowed all of the assets to be pooled as collateral and authorized the issuance of the Prior Notes with principal payments due only in 2017. To the extent the principal payment on the Prior Notes are due in 2017, the Commission found it critical that the applicants agreed to a capped dividend payment based on their net income. The Commission is troubled by the applicants' disregard of such a key consideration in the Commission's order in the *10-2330 Case*. The Commission is particularly concerned regarding the source of the funds used to pay the dividend, given that the applicants had taken on a substantial level of new debt and had virtually no net income from which to pay a dividend.
- (9) While the Commission continues to be concerned about the applicants' failure to adhere to the necessary procedures by requesting Commission approval prior to any changes to the Note Agreement, we are aware that the applicants have appropriately amended the Application in this case and reduced the loan amount commensurate with the unauthorized dividend payment that was made in the first quarter of 2012. In the instant Application, the applicants have followed the required process by requesting that the Commission authorize an increase in the dividend

distribution to net income cap from 60 percent to 70 percent going forward. Therefore, upon review of the Application, as supplemented and amended, the Commission finds that the aggregate amount of the New Notes, and the terms thereof, and the probable cost to the applicants, within the parameters set forth in the Application, do not appear to be unjust or unreasonable. In addition, based on the information contained in the Application, the purposes to which the proceeds from the New Notes shall be applied appear to be reasonably required by the applicants to meet their present and prospective obligations to provide utility service. With regard to the Dividend Covenant, the applicants must adhere to the provision in the Dividend Covenant and may pay dividends only when they have positive income, and, on a going-forward basis, the dividends shall be no more than 70 percent of the applicants' respective positive incomes, as long as the Note Agreement is in effect.

- (10) Accordingly, the Commission finds that the applicants' request for authorization to enter into an Amended Note Agreement should be approved and the applicants should be authorized to issue \$2,989,552 of the New Notes, including the debt service reserve and the transaction fees, subject to the conditions and the reporting requirements specified in the Application, as supplemented and amended, and this order. The Commission further finds that the effect on the applicants' revenue requirements resulting from the issuance of the New Notes will be considered in the determination of required revenue in rate proceedings in which all factors affecting rates will be taken into account according to law.
- (11) As a final matter, the Commission notes that, on September 25, 2012, in accordance with Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), the applicants filed a motion for protective order of certain financial documentation, which was filed on September 25, 2012, in support of the application. According to the applicants, this documentation includes financial accountings of debt coverage and restricted dividend projection, which contain confidential and proprietary information. In support of their motion, the applicants assert that such information, if disclosed, could be used by the applicants' competitors to gain a competitive

advantage over the applicants. Furthermore, the applicants state that the information derives independent economic value by not being readily ascertainable and only certain employees of the applicants are privy to the information.

- (12) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).
- (13) Similarly, Rule 4901-1-24, O.A.C., allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."
- (14) Ohio law defines a trade secret as "information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Section 1333.61(D), Revised Code.
- (15) The Commission has examined the information covered by the applicants' motion for protective order, as well as the assertions set forth in the supporting memoranda. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio

Supreme Court,¹ the Commission finds that the information does not constitute trade secret information. While the applicants briefly reiterate that language in the statute stating that they do not share this information outside of their companies, the only supporting argument raised by the applicants is that the information could be detrimental if used by competitors to gain a competitive advantage over the applicants. The Commission finds that this argument is not persuasive, given that the applicants' service territories and the services they provide are not open to competition. Therefore, the information does not qualify as trade secret information, and, thus, does not need to remain under seal. Accordingly, the Commission finds that the applicants' motion for protective order should be denied. Therefore, the Commission's docketing division should release the documentation, which was filed under seal in this docket on September 25, 2012, into the public record on October 19, 2012.

It is, therefore,

ORDERED, That the Application is approved subject to the conditions set forth in this finding and order. It is, further,

ORDERED, That the applicants shall apply the proceeds from the New Notes for the purposes set forth in this finding and order and otherwise, pursuant to the provisions of Section 4905.40, Revised Code. It is, further,

ORDERED, That the authorization granted by this finding and order shall not be construed as limiting the Commission's determination of the appropriateness of the New Notes for future ratemaking treatment. It is, further,

ORDERED, That nothing in this finding and order shall be construed to imply any guaranty or obligation by the Commission to assure completion of any specific construction projects of the applicants. It is, further,

ORDERED, That nothing in this finding and order shall be deemed to be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

¹ See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

ORDERED, That nothing in this finding and order shall be construed to imply any guaranty or obligation as to the New Notes on the part of the state of Ohio. It is, further,

ORDERED, That the motion for protective order filed by the applicants be denied. It is, further,

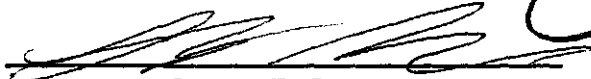
ORDERED, That the Commission's docketing division release the documentation, which was filed under seal in this docket on September 25, 2012, into the public record on October 19, 2012. It is, further,

ORDERED, That a copy of this finding and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



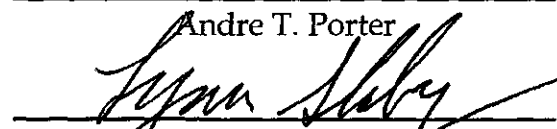
Todd A. Snitchler, Chairman




Steven D. Lesser



Cheryl L. Roberto




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CMTP/dah

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Barcy F. McNeal
Secretary