

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF  
YOUNGSTOWN THERMAL, LLC AND  
YOUNGSTOWN THERMAL COOLING,  
LLC

CASE NO. 17-1534-HC-UNC

## THIRD FINDING AND ORDER

Entered in the Journal on August 2, 2017

### I. SUMMARY

{¶ 1} In this Third Finding and Order, the Commission adopts the recommendation for an emergency rate surcharge contained in the Staff Report filed on July 28, 2017.

### II. HISTORY

{¶ 2} Youngstown Thermal, LLC and Youngstown Thermal Cooling, LLC (Youngstown Thermal) are “engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes.” R.C. 4905.03(H). Therefore, Youngstown Thermal is a “heating and cooling company” as defined in R.C. 4905.03(H) and a “public utility” under R.C. 4905.02, rendering it subject to the Commission’s jurisdiction.

{¶ 3} Youngstown Thermal provides steam and chilled water service for heating and cooling purposes to approximately 40 customers, mainly commercial and governmental, in the central business district of Youngstown. Most of these customers’ rates have been established by special contract or municipal ordinance rather than by the Commission.

{¶ 4} By letter received June 14, 2017, Youngstown Thermal informed the Commission that it is experiencing acute financial distress. The letter summarized Youngstown Thermal’s self-identified collection problem and touched on its hopes for

restructuring to allow the system to survive and grow. The letter further professed a cash flow problem prompted by the alleged unpaid accounts and loss of its largest customer. While the letter expressed optimism that fiscal circumstances would self-correct, Youngstown Thermal admitted that the immediate situation is dire: the company faced disconnection of electric, gas, and water utility services due to nonpayment. Thus, given its current inability to finance its day-to-day operations, Youngstown Thermal requested the Commission's assistance in maintaining utility service such that it, in turn, can continue to provide its customers with uninterrupted service and avert an energy supply crisis.

{¶ 5} On June 15, 2017, Staff conducted an on-site review to investigate the issues raised in Youngstown Thermal's letter, and on June 29, 2017, Staff filed its report of this review. Staff reported that Youngstown Thermal's recent electric and water bills included disconnection notices, but the company made minimum payments to avoid imminent loss of service. No disconnection notice was included in Youngstown Thermal's natural gas bills, but those bills revealed that the company continues to consume upwards of \$100,000 of natural gas while paying approximately \$30,000 per month. Subsequently, on June 20, 2017, Youngstown Thermal did receive a disconnection notice from its natural gas provider.

{¶ 6} Staff noted that combined, Youngstown Thermal owes more than \$200,000 in past-due amounts to its natural gas, electric and water service providers. Its utility debt continues to grow as it pays for only a fraction of its continued use. Staff also noted that EDF Energy Services, LLC (EDF) has sued Youngstown Thermal based on its alleged failure to pay for natural gas it received from EDF. In addition to its debts to its utility service providers, Youngstown Thermal is in arrears in its statutory annual assessments to the Commission.

{¶ 7} Staff further reported that, during a June 22, 2017 meeting with management, Youngstown Thermal disclosed that it was unable to process payment

for its most current payroll period. Without the skilled, knowledgeable workers required to run its complicated systems, Youngstown Thermal would be unable to fulfill its duty to furnish adequate service under R.C. 4905.22.

{¶ 8} Staff also reported concerns regarding Youngstown Thermal's unpaid corporate debt. In 2011, Youngstown Thermal became a guarantor for a secured term loan in the principal amount of \$5 million. The pertinent loan instruments called for a maturity date within four years of closing. Youngstown Thermal has produced no documentation of renegotiated terms or replacement financing. Moreover, Youngstown Thermal has not made consistent debt service payments, resulting in assessed penalties, accrued interest, and other administrative charges. Consequently, as of December 31, 2016, the total debt ballooned to an amount in excess of \$7 million. Based on current projections, continued nonpayment will result in a total debt amount of approximately \$9 million by December 31, 2017.

{¶ 9} Staff indicated that Youngstown Thermal's financial woes are compounded by its poor record keeping. Staff attempted to compare annual reports filed with the Commission to Youngstown Thermal's source documents, i.e., general ledger, invoices, billing statements, some of which were unavailable. What records Staff was able to review, however, exposed worrisome accounting discrepancies and misaligned data.

{¶ 10} Ultimately, based on the worsening financial conditions described above, Staff concluded that Youngstown Thermal is permitting or about to permit a breach of its duty to furnish adequate service to its customers pursuant to R.C. 4905.22. In reaching this conclusion, Staff determined that Youngstown Thermal "is unable to pay its obligations as they become due in the usual course of affairs" — as is evidenced by their inability to timely or fully pay utility suppliers, debt service, and employee payroll—and, therefore, is insolvent (or in imminent danger of becoming so). R.C. 1701.01(O). As such, Staff recommended that the Commission consider placing

Youngstown Thermal into receivership to facilitate a new direction for a critical utility service provider that is insolvent or in imminent danger of insolvency.

{¶ 11} On June 30, 2017, the Commission issued a Finding and Order in this proceeding, concluding that Youngstown Thermal cannot ensure adequate service to their customers in violation of R.C. 4905.22. The Commission further found that, due to its inability to timely pay utility suppliers, debt service, and employee payroll and the magnitude by which its outstanding debt servicing requirements exceed currently projected revenue, Youngstown Thermal was in imminent danger of insolvency. Thus, pursuant to the authority granted by R.C. 4905.60, the Commission directed the Attorney General to seek the appointment of a receiver and pursue any other appropriate civil remedy.

{¶ 12} Subsequently, on July 7, 2017, the Attorney General filed a complaint in the Mahoning County Court of Common Pleas. Along with the complaint, the Attorney General filed a motion for the appointment of a receiver. In response to this motion, the Magistrate for the Common Pleas Court directed that the Commission and Youngstown Thermal submit the name of a proposed receiver.

{¶ 13} Moreover, on July 21, 2017, the Commission issued a Second Finding and Order in this proceeding. In the Second Finding and Order, the Commission noted that, based upon the Staff investigation discussed above, Youngstown Thermal was in imminent danger of insolvency and that an emergency surcharge was necessary to not only maintain heating and cooling service to downtown Youngstown, but to protect public health and safety and to prevent unnecessary or avoidable damage to property. Amongst other measures to ensure that sufficient funds are available to provide necessary and adequate service to customers, we directed Youngstown Thermal and Staff to work together on a plan for an emergency surcharge on customer rates, pursuant to our emergency ratemaking authority under R.C. 4909.16. This surcharge would be levied on all customers, including customers currently served by contract.

The Commission directed Staff to file a recommendation for the emergency surcharge, including rate design and a revenue requirement sufficient, at a minimum, to compensate the skilled employees necessary for the operation of the system, within seven days.

{¶ 14} Accordingly, on July 28, 2017, the Staff filed its Report and Recommendation, as revised on July 31, 2017, for an emergency surcharge on all Youngstown Thermal customers. Additionally, on August 1, 2017, Staff filed a motion for protective order, requesting that the Commission protect certain confidential information contained in the July 28, 2017 Staff Report.

{¶ 15} On August 1, 2017, Staff filed additional correspondence in the docket demonstrating that the presiding judge of the Mahoning County Court of Common Pleas proceeding appointed a receiver of all the businesses and assets of Youngstown Thermal, pursuant to R.C. 2735.01.

### III. DISCUSSION

{¶ 16} R.C. Chapter 4905 enumerates the general powers of this Commission over public utilities. Specifically, R.C. 4905.04 states, in relevant part:

The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, *to require all public utilities to furnish their products and render all services exacted by the commission or by law* \* \* \*.

R.C. 4905.04 (emphasis added). Additionally, R.C. 4905.06 grants the Commission general supervision over all public utilities within its statutory jurisdiction. This supervisory power encompasses the ability to examine a public utility and keep informed as to its general condition, capitalization, operation and management with respect to the adequacy of its service and compliance with all laws and orders of the

commission. Further, R.C. 4905.06, states that the Commission and Staff “may enter in or upon, *for purposes of inspection*, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. *The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety.*” R.C. 4905.06 (emphasis added).

{¶ 17} R.C. Chapter 4905 also sets forth certain statutory obligations of public utilities within the state. R.C. 4905.22 states that:

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

R.C. 4905.22.

{¶ 18} The Commission’s authority to approve emergency rates is provided by R.C. 4909.16, which states:

When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility

or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.

{¶ 19} The Supreme Court of Ohio has consistently construed this statute as vesting the Commission with broad discretionary powers in determining when an emergency exists and in tailoring a remedy which will enable the implicated public utility to meet that emergency. *Cambridge v. Pub. Util. Comm.*, 159 Ohio St. 88 (1953); *Jackson v. Pub. Util. Comm.*, 159 Ohio St. 123 (1953); *Manufacturer's Light and Heat Co. v. Pub. Util. Comm.*, 163 Ohio St. 78 (1955). The Court has held that the statute confers broad authority to the Commission to insure the health, safety, and welfare of the public:

The powers thus conferred upon the Public Utilities Commission are very broad and comprehend authority for the supervision, regulation and, in a large measure, control of the operation of public utilities; and, therefore, in order to protect and safeguard the interests of the public, particularly in respect to health, safety and welfare, the Public Utilities Commission may adopt and promulgate such orders as are essential to accomplish such purpose.

*City of Akron v. Pub. Util. Comm.*, 149 Ohio St. 347, 359 (1948).

{¶ 20} The Commission has set out four factors that guide our exercise of the discretion conferred by R.C. 4909.16. First, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the public utility's supporting evidence must be reviewed with strict scrutiny, and that evidence must clearly and

convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation. Next, emergency relief will not be granted pursuant to R.C. 4909.16 if the emergency request was filed merely to circumvent, and as a substitute for, permanent rate relief under R.C. 4909.18. Finally, the Commission will authorize emergency rates only at the minimum level necessary to avert or relieve the emergency. The ultimate question for the Commission is whether, absent emergency relief, the public utility will be financially imperiled or its ability to render service will be impaired. See *In re The Toledo Edison Co.*, Case No. 84-1286-EL-AEM, Supplemental Opinion and Order (May 12, 1987); *In re The Cleveland Elec. Illum. Co.*, Case No. 88-171-EL-AIR, et al., Opinion and Order (Aug. 23, 1988).

{¶ 21} In the event that the Commission does find that an emergency exists and interim relief should be granted, the Commission has the discretion to tailor the remedy to fit the emergency. *In re Ohio Edison*, Case No. 79-44-EL-AEM (May 2, 1979); *In re The Dayton Power and Light Co.*, Case No. 78-284-EL-AEM (June 9, 1978); *In re Columbus & S. Ohio Elec. Co.*, Case No. 78-1439-EL-AEM (Feb. 28, 1979).

{¶ 22} Here, the facts and circumstances related by the June 29, 2017 Staff Report, the Commission's Finding and Orders issued June 30, 2017 and July 21, 2017, and the July 28, 2017 Staff Report demonstrate that the requisite emergency exists. Youngstown Thermal is the sole provider of steam and chilled water service for heating and cooling purposes to 40 customers in downtown Youngstown. The company's financial situation is dire and, absent intervening action on behalf of the Commission, will result in severe consequences: it is in arrears to its own utilities providers and is unable to timely satisfy its payroll obligations. Without a steady supply of natural gas, water, and electricity or the skilled, licensed boiler operators necessary to conduct its own business, Youngstown Thermal cannot furnish reasonable and adequate service to its customers. As noted in the Second Finding and Order, the Commission has found that immediate action is necessary to protect public



health and safety and to prevent unnecessary or avoidable damage to property. Thus, the emergency situation faced by Youngstown Thermal's customers and surrounding community satisfies the first factor of the Commission's four-part test to implement rates under R.C. 4909.16.

{¶ 23} This emergency rate proceeding arrives before the Commission on its own motion instead of upon application. We must still, however, ensure that the supporting evidence clearly and convincingly demonstrates the presence of extraordinary circumstances. The information contained in the Staff Reports thoroughly illustrates the nature of this genuine emergency situation. Despite previous efforts, Youngstown Thermal is in imminent danger of disconnection from basic utility services and lacks the sustainable financial resources to assure continued compensation of essential employees. As such, Youngstown Thermal is in imminent and continuing danger of breaching its statutory duty to furnish necessary and adequate service under R.C. 4905.22, potentially leaving the business district of downtown Youngstown without steam and chilled water service necessary for its day-to-day operations. Thus, the second factor of the Commission's test for implementing rates under R.C. 4909.16 is satisfied.

{¶ 24} It is equally clear that the emergency surcharge contemplated by the July 28, 2017 Staff Report is not an attempt to circumvent permanent rate relief. The stated purpose of the emergency surcharge is to compensate the skilled employees necessary for the operation of the system to avoid an imminent loss of service to Youngstown Thermal's customers. Furthermore, the Commission fully expects that, once placed in receivership, Youngstown Thermal will pursue permanent rate relief. As such, we find that the third factor has been satisfied.

{¶ 25} Ultimately, the Commission concludes that it is abundantly clear that Youngstown Thermal is already financially imperiled, leading to an impairment of its ability to render service. Absent emergency relief, Youngstown Thermal's financial

distress will result in closure of its facilities and failure of service. See *In re The Toledo Edison Co.*, Case No. 84-1286-EL-AEM, Supplemental Opinion and Order (May 12, 1987); *In re The Cleveland Elec. Illum. Co.*, Case No. 88-171-EL-AIR, et al., Opinion and Order (Aug. 23, 1988). Thus, the only issue remaining for consideration is determining the minimum level of emergency rates necessary to avert or relieve this emergency.

{¶ 26} In the Staff Report filed on July 28, 2017, as revised on July 31, 2017, Staff proposes a monthly revenue requirement of \$93,303 for the emergency surcharge. This revenue requirement is based upon 120 percent of the monthly cost of employee payroll and healthcare insurance. Staff notes that it considered a monthly revenue requirement of \$171,209, based upon Youngstown Thermal's estimate of its monthly essential expenses, including employee payroll. However, Staff concluded that the impact on customer bills of a monthly revenue requirement of \$171,209 would be unduly burdensome for customers over the near term. Therefore, Staff recommends the lower monthly revenue requirement of \$93,303 as the minimum necessary to avert or relieve the emergency.

{¶ 27} Further, Staff determined that the revenue requirement should be allocated between heating and cooling customers based upon the share of total 2016 revenue generated by each respective customer type. Thus, Staff allocated 90 percent of the revenue requirement to heating customers and 10 percent to cooling customers.

{¶ 28} With respect to rate design, Staff recommends a fixed monthly emergency surcharge for each customer. To determine the amount of the emergency surcharge for each customer, Staff proposes a minimum monthly customer charge of \$100.00 with the remainder of the revenue requirement being charged according to each customer's contribution to the system peak demands for heating and cooling. In the Report, Staff has calculated the fixed monthly charge for each customer but has redacted the name of each customer.

{¶ 29} As an initial matter, the Commission finds that, due to the exigent circumstances in this case, it is not possible to hold a hearing prior to imposing the emergency surcharge. Staff's June 29, 2017 Report demonstrated that Youngstown Thermal was either insolvent or in imminent danger of insolvency. There is insufficient time to hold even a limited hearing on an expedited schedule if service to Youngstown Thermal's customers is to be maintained.

{¶ 30} The Commission finds that Staff's recommended emergency surcharge should be approved. We agree that 120 percent of monthly employee payroll and healthcare costs is an appropriate proxy for the minimum fixed costs of the system necessary to keep the system operating. Therefore, we find that the proposed monthly revenue requirement of \$93,303 represents the minimum amount necessary to avert or relieve the emergency and, thus, the fourth and final factor of the Commission's four-part test to implement rates under R.C. 4909.16 has been satisfied.

{¶ 31} Further, the Commission finds that Staff's recommendation to allocate the revenue requirement between heating and cooling customers based upon the share of total 2016 revenue generated by heating and cooling customers is reasonable and should be adopted. Accordingly, \$84,260 should be allocated to heating customers each month and \$9,043 should be allocated to cooling customer each month.

{¶ 32} In addition, the Commission agrees with Staff recommendations for a fixed monthly emergency surcharge for each customer. We will also adopt Staff's recommendation that the revenue requirement be recovered from customers through a minimum monthly customer charge of \$100.00 with the remainder of the revenue requirement being charged according to each customer's contribution to the system peak demands for heating and cooling.

{¶ 33} The Commission emphasizes that the revenue requirement is based upon the monthly fixed costs of operating the heating and cooling system and that a

fixed monthly customer charge is necessary to keep the system operating even during months which are not experiencing heavy heating demand. We would also note that the emergency surcharge is in addition to each customer's tariff or contract rates. These existing rates are necessary to recover additional expenses of operating the system such as fuel and variable operations and maintenance expenses.

{¶ 34} Finally, the Commission notes that the emergency surcharge is a temporary surcharge on customer bills. It is possible that the receiver will seek additional emergency rate relief as necessary to continue to provide heating and cooling service to customers, and we expect the receiver to propose new permanent rates to replace existing contract and tariff rates as well as the emergency surcharge.

{¶ 35} As to Staff's motion for a protective order, the Commission notes that R.C. 4905.07 provides "all facts and information in the possession of the [Commission] shall be public \* \* \* [and] open to inspection by interested parties or their attorneys," except as provided in R.C. 149.43. In turn, R.C. 149.43 specifies that a record prohibited from release under state or federal law is not a "public record." R.C. 149.43(A)(1)(v). Similarly, Ohio Adm.Code 4901-1-24 allows a party to request, and the Commission to issue, any order necessary to protect the confidentiality of any information contained within a document to the extent that state or federal law prohibits the release of information and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. The rule also provides that any order granting such protective treatment should minimize the amount of information protected from public disclosure.

{¶ 36} By its motion submitted under Ohio Adm.Code 4901-1-24, Staff seeks to protect from public view sensitive customer name and usage data, the disclosure of which Staff asserts would be highly prejudicial to the continued operation of Youngstown Thermal by its newly appointed receiver and to the heating and cooling customers themselves.

{¶ 37} Upon review of Staff's motion for a protective order, the Commission finds that it is necessary to protect this information from public disclosure, as we have determined, consistent with past Commission precedent, that these customer names coupled with usage data constitutes trade secret information. R.C. 1333.61(D); *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-25, 687 N.E.2d 661 (1997); *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000). Its release, therefore, is prohibited under state law. We also find that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, we note that the Staff Report has been redacted to remove only confidential information and a public version has been docketed in this proceeding, which includes the proposed total revenue requirement and the applicable emergency surcharge for each individual customer account. Accordingly, we find that the motion for a protective order is reasonable and should be granted.

{¶ 38} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. Until that time, the Docketing Division shall maintain, under seal, the information filed confidentially. Further, Ohio Adm.Code 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If a party wishes to extend its confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend the confidential treatment is filed, the Commission may release the information without prior notice.

#### IV. CONCLUSION

{¶ 39} The Commission concludes that an emergency exists and the evidence before us clearly and convincingly demonstrates the presence of extraordinary circumstances which constitute a genuine emergency situation. We also conclude that this emergency relief is not an attempt to circumvent or substitute permanent rate

relief under R.C. 4909.18. Finally, we find that Staff's recommendation constitutes the minimal level of relief necessary to avert Youngstown Thermal's financial crisis. Accordingly, as the Commission's four factor test for implementing rates under R.C. 4909.16 has been satisfied, Staff's recommendation should be adopted by the Commission.

{¶ 40} Furthermore, the Commission finds that Youngstown Thermal should file final tariffs consistent with this Third Finding and Order. In light of the exigent circumstances, these tariffs by necessity must go into effect immediately, and the Commission finds that the final tariffs shall be approved upon filing, subject to final review by the Commission.

#### V. ORDER

{¶ 41} It is, therefore,

{¶ 42} ORDERED, That Staff's July 28, 2017 Report be adopted. It is, further,

{¶ 43} ORDERED, That Staff's motion for protective order be granted. It is, further,

{¶ 44} ORDERED, That Youngstown Thermal carry out all steps necessary to comply with this Third Finding and Order. It is, further,

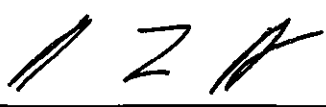
{¶ 45} ORDERED, That the Youngstown Thermal shall file final tariffs consistent with this Third Finding and Order, and that the final tariffs shall be approved effective upon filing, subject to final review by the Commission. The new tariffs shall be effective for services rendered on or after such effective date. It is, further,

{¶ 46} ORDERED, That the Youngstown Thermal file in final form two complete copies of tariffs consistent with this Third Finding and Order. One copy shall be filed with this case docket, and one shall be filed with the TRF docket. It is, further,

{¶ 47} ORDERED, That Youngstown Thermal shall notify their customers of the changes to the tariff via bill message or bill insert within 30 days of the effective date. A copy of this notice shall be submitted to the Commission's Service Monitoring and Enforcement Department at least 10 days prior to its distribution to customers. It is, further,

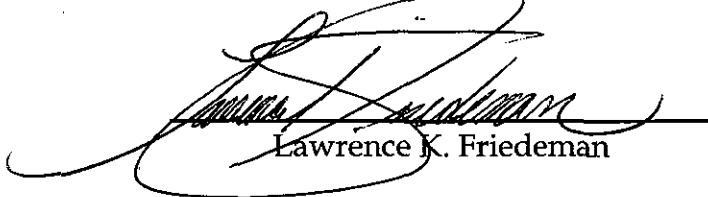
{¶ 48} ORDERED, That a copy of this Third Finding and Order be served upon all parties of record.

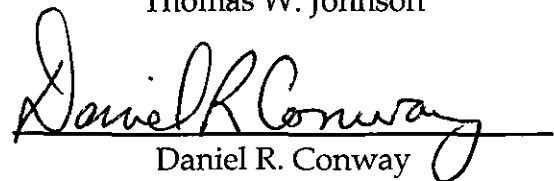
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Asim Z. Haque, Chairman

  
M. Beth Trombold

  
Thomas W. Johnson

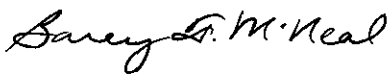
  
Lawrence K. Friedeman

  
Daniel R. Conway

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**AUG 02 2017**



Barcy F. McNeal  
Secretary