BEFORE 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
In the Matter of the Application of Cobra Pipeline Company, Ltd. for an Emergency Increase in Its Rates and Charges.	)))	Case No. 18-1549-PL-AEM

INITIAL POST-HEARING BRIEF OF ORWELL NATURAL GAS COMPANY, NORTHEAST OHIO NATURAL GAS CORP., AND BRAINARD GAS CORP.

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I. INTRODUCTION

One month before the parties fully briefed Cobra Pipeline Company, Ltd.'s ("Cobra") application for a permanent rate increase in Case No. 16-1725-PL-AIR ("2016 Rate Case"), Cobra returned to the Commission for an emergency rate increase based on an alleged "urgent need of financial rate relief."[1] The Commission should deny the request for an emergency rate increase because Cobra has failed to clearly and convincingly demonstrate the extraordinary circumstances necessary to grant such relief. The evidence adduced in this proceeding reveals that Cobra has maintained sufficient cash flow to fund operations, yet due to a well-documented history of gross financial mismanagement and operational incompetence, Cobra now finds itself in a financial quandary. Most troublingly, the evidence reveals that Cobra, under the ownership/control of Richard M. Osborne, continues to ignore corporate formalities, commingle assets, and engage in self-dealing. Consistent with longstanding precedent, where an emergency applicant causes (or even contributes to) the emergency necessitating immediate rate relief, the Commission should deny the application and address those issues in a traditional rate case proceeding (i.e., the 2016 Rate Case).[2]

In the alternative, to the extent the Commission finds an emergency exists (which it should not), the Commission should disallow any/all expenses that are not necessary to avert the emergency, that were imprudently incurred through incompetence or mismanagement, or that are otherwise unsupported by or inconsistent with the record evidence. Here, Cobra has used a fundamentally flawed methodology to calculate its proposed emergency rate increase, which

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[1] NEO Exhibit A, Cobra Application for an Emergency Increase in Rates and Charges ("NEO Ex. A"), at 1.

[2] *In the Matter of the Application of Lake Erie Utilities Company for an Emergency Increase in Rates and Charges for Water and Sewer Utility Service* ("*Lake Erie Case*"), Case No. 86-799-WS-AEM, 1986 Ohio PUC LEXIS 36, Opinion and Order (Aug. 26, 1986), at *12, *16, *18, *19.

significantly overstates expenses and understates revenue. To make matters worse, Cobra's emergency application is replete with inconsistent and unreliable financial data, evidence of imprudent expenditures, and numerous procedural deficiencies, all of which cast serious doubt on the credibility and accuracy of the information and representations made in the emergency application.

Intervenors Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. (collectively, the "Companies") strongly oppose Cobra's application for an emergency rate increase, including the $0.40 per Dth surcharge proposed by Staff. Importantly, the Companies and Staff agree that Cobra is not entitled to *any* emergency rate relief. Nonetheless, to the extent the Commission disagrees, Staff has proposed a $0.40 per Dth surcharge based on the same fundamentally flawed methodology used by Cobra to calculate its proposed emergency rate increase. As a result, the Companies oppose the imposition of any surcharge to address Cobra's alleged "emergency."

In sum, so long as Mr. Osborne continues to use Cobra as his personal piggybank, Cobra cannot be relied upon to responsibly manage the operations and finances of a regulated public utility in Ohio. And without any procedures in place to prevent this misconduct from happening again and with no assurances whatsoever from Cobra or Mr. Osborne that it will not happen again, the Commission must deny the application.

II. LEGAL STANDARD

A. R.C. 4909.16 and the Ohio Supreme Court.

Ohio law permits public utilities to file for an emergency rate increase if the Commission deems it necessary to prevent injury to the business or the public. Specifically, R.C. 4909.16 states, in full:

> 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.

The Ohio Supreme Court has held that an emergency rate case filed pursuant to R.C. 4909.16 cannot be a substitute for permanent rate increases; rather, emergency rates shall only be effective on a temporary basis, i.e., until the emergency is abated.[3] The Ohio Supreme Court has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature.[4]

B. Commission Review of Applications for Emergency Rate Increases.

Based on these guiding principles from the Ohio Supreme Court, the Commission has established a number of considerations when reviewing an application for an emergency rate increase under R.C. 4909.16. First, the Commission must find that an emergency exists as a condition precedent to any grant of temporary rate relief.[5] Second, the Commission must examine the applicant's emergency rate case application, and all information filed in support of it, with the "strictest scrutiny."[6] As the Commission has explained: "[a]lthough the applicant must shoulder the burden of proof in every application proceeding before the Commission, this

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[3] *Seneca Hills Serv. Co. v. Pub. Util. Com.*, 56 Ohio St.2d 410, 414, 384 N.E.2d 277 (1978).

[4] *Cincinnati v. Pub. Util. Com.*, 149 Ohio St. 570, 575, 80 N.E.2d 150 (1948).

[5] *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in Its Rates and Charges for Steam and Hot Water Service, et al.* ("*Akron Thermal Case*"), Case No. 09-453-HT-AEM, *et al*., 2009 Ohio PUC LEXIS 681, Opinion and Order (Sept. 2, 2009), at *13.

[6] *Id*.

burden takes on an added dimension in the context of an emergency rate case."[7] Third, the Commission requires applicants to "clearly and convincingly" demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation.[8] If the Commission determines that the applicant filed its emergency application merely to circumvent the traditional, permanent rate increase process set forth under R.C. 4909.18, the Commission will deny the emergency rate relief request.[9] In fact, the Commission "will look askance at emergency applications which request the identical relief sought in a permanent application which is concurrently pending before the Commission."[10] As a result, the Commission treats emergency rate case applications as "a separate and distinct rate proceeding from that set forth for traditional rate applications filed under Section 4909.15, Revised Code."[11]

Even if the Commission determines an emergency exists, the Commission may only grant temporary rate relief "at the minimum necessary to avert or relieve the emergency."[12] The Commission has explained its longstanding policy to grant emergency rate increases "only when extraordinary circumstances are present which indicate that emergency rate relief is the only reasonably, practical mechanism available to prevent injury to the applicant utility's business and to the public interest."[13] Accordingly, where an emergency application includes testimony or

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[7] *In the Matter of the Application of Ottoville Mutual Telephone Company for Authority to Increase Its Rates and Charges and to Revise Its Tariffs on an Emergency and Temporary Basis Pursuant to 4909.16, Revised Code* ("*Ottoville Mutual Case*"), Case No. 73-356-Y, 1973 Ohio PUC LEXIS 3, Opinion and Order (Nov. 13, 1973), at *4.

[8] *Akron Thermal Case*, Opinion and Order (Sept. 2, 2009), at *13.

[9] *Id*.

[10] *Ottoville Mutual Case*, Opinion and Order (Nov. 13, 1973), at *6.

[11] *Akron Thermal Case*, Opinion and Order (Sept. 2, 2009), at *14.

[12] *Id.* at *13.

[13] *Ottoville Mutual Case*, Opinion and Order (Nov. 13, 1973), at *5.

evidence on topics that are "not limited to the question of what constitutes the minimum level of temporary rate relief necessary to avert the emergency," the Commission will disregard such topics and exclusively "examine the claimed expenses to determine which represent immediate cash requirements which must be satisfied if adequate service is to be maintained pending the resolution of the permanent case."[14] Applying that standard to emergency applications, the Commission has disallowed expenses incurred outside the emergency test year, as well as certain expenses for wage increases, depreciation expenses, hiring of new employees, accounting services, and legal fees.[15]

Additionally, in reviewing an emergency application, the Commission pays special attention to how the application will impact the interests of the public, particularly the impact on customers if rate relief is granted.[16] For example, the Commission has previously considered whether a proposed emergency increase, even on a temporary basis, would potentially precipitate a death spiral.[17] Similarly, the Commission will examine the underlying causes of the emergency, including whether the applicant incurred expenses as a result of imprudent management policies or administrative practices.[18] Where the Commission determined that an applicant's imprudence, burdensome long-term debt obligations, and unsustainable business

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[14] *In the Matter of the Application of Lake Buckhorn Utilities, Inc. for Authority to Increase and Adjust Its Rates and Charges and to Change Its Tariffs on an Emergency and Temporary Basis Pursuant to Section 4909.16 of the Ohio Revised Code* ("*Buckhorn Case*"), Case No. 85-519-WW-AEM, 1987 Ohio PUC LEXIS 115, Opinion and Order (Feb. 10, 1987), at *8-9.

[15] *Id*. at *9-11, *13, *15, *22, *31, *38.

[16] *Akron Thermal Case*, Opinion and Order (Sept. 2, 2009) at *34.

[17] *Id*. at *45-51. A death spiral occurs where customers leave the system because rates are too high, which then creates a need for a rate increase that causes more customers to leave, thereby driving the need for an even greater rate increase, which, in turn, drives even more customers off the system and ultimately leads to the collapse of the entire system. *Id*. at *47, *62.

[18] *Id*. at *45-64.

model caused the emergency, the Commission denied emergency rate relief as doing so would not be in the interest of the public.[19]

Similarly, the Commission has denied an emergency rate case application where the emergency giving rise to the application was attributable to imprudent expenditures, unpaid county and state tax obligations, and a failure to collect debts owed to the utility.[20] Under such a scenario, the Commission will review the rate increase request as part of a traditional rate case proceeding, not an emergency one:

> [G]iven the nature of the challenges raised by certain of the intervenors to the legitimacy and prudency of a number of the expenditures which have contributed to applicant's present financial status, the Commission believes that the decision as to the amount of rate relief to be authorized should await an analysis of the reasonableness of those expenditures of the type which can only be undertaken in the context of the permanent rate case.[21]

C. Applying the Commission's Longstanding Precedent to Cobra's Application for an Emergency Increase.

Applying the foregoing considerations to Cobra's emergency application, Cobra has failed to clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency. In fact, Cobra has undercut its entire emergency application by admitting that ***Cobra continues to provide safe and reliable service under current operating conditions*** and has not delayed or otherwise put off any safety expenditures due to its self-inflicted financial problems.[22]

Critically, Cobra's financials illustrate that it has maintained sufficient cash flow to fund operations; however, due to a legacy of financial and operational mismanagement, Cobra's

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[19] *Id*. at *59, *63.

[20] *Lake Erie Case*, Opinion and Order (Aug. 26, 1986), at *12, *16, *18, *19.

[21] *Id*. at *19.

[22] Tr. Vol. I at 52.

owner, Mr. Richard M. Osborne, has squandered millions of company dollars by incurring imprudent expenditures, commingling funds, and engaging in illicit self-dealing – leaving Cobra in the deteriorating financial condition it finds itself today. As the Commission has previously held, where there are legitimate questions concerning an emergency applicant's operational mismanagement and imprudent expenses, the Commission should address those concerns in a traditional rate case proceeding (i.e., the 2016 Rate Case), not an emergency one.[23] This is especially true where, as here, there is undeniable evidence that the applicant continues to commingle assets, engage in illicit self-dealing, execute suspicious financial and real estate transactions, and ignore basic corporate formalities.

Finally, even if Cobra clearly and convincingly demonstrated the existence of an emergency (which it did not), the Commission should disallow any expenses that are not necessary to avert the danger presented by the emergency, that were imprudently incurred through incompetence or mismanagement, or that are otherwise unsupported by or inconsistent with record evidence adduced in this proceeding. Here, Cobra inflates its expenses and understates its revenue to calculate the most generous emergency rate possible. To make matters worse, Cobra's emergency application is replete with inconsistent and unreliable financial data and other procedural deficiencies, which casts serious doubt over the credibility and accuracy of the "evidence" proffered by Cobra.

III. ARGUMENT

A. Cobra Has Failed to Clearly and Convincingly Demonstrate the Presence of Extraordinary Circumstances Necessary to Grant the Emergency Relief Requested in the Application.

[23] *Lake Erie Case*, Opinion and Order (Aug. 26, 1986), at *19.

Cobra has not satisfied the Commission's heightened standard of proof necessary to grant the temporary rate increase proposed in the emergency application. As an initial matter, Cobra confirmed that it continues to provide safe and reliable service under current operating conditions and has not delayed or otherwise put off any safety expenditures.[24] Nevertheless, Cobra dramatically portrays its financial condition as an "urgent financial emergency" since its "current rates do not provide sufficient revenues to cover the cost of its operations."[25]

Cobra (and Cobra alone) is responsible for any financial troubles it may be experiencing. Incredibly, Cobra would have the Commission believe that its financial problems were not caused by its own imprudence and recklessness, but instead were caused by a decrease in revenues due to external market conditions over which it has no control and an increase in expenses as a result of its affiliate, Orwell-Trumbull Pipeline Company, LLC ("OTP"), being placed into receivership.[26] Nothing could be further from the truth. The evidence unequivocally demonstrates that Cobra's financial woes were/are primarily caused by a decade of financial mismanagement and operational incompetence. More alarmingly, the evidence indicates that Cobra and its owner, Richard Osborne, continue to commingle assets and engage in self-dealing, all while exhibiting a blatant disregard for corporate formalities.

The most revealing evidence that underscores this unfortunate reality is the disconcerting belief echoed by Cobra's Controller, Ms. Carolyn Coatoam, that Cobra, the corporate entity, and Richard Osborne, the individual, are essentially one and the same:

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[24] Tr. Vol. I at 52.

[25] NEO Ex. A, at ¶¶ 17, 24.

[26] *Id*. at ¶¶ 14-20, 24.

Q. I'd like to explore the relationship between Cobra and Mr. Osborne. In your opinion, there's no difference between Cobra as an entity and Mr. Richard Osborne the person, correct?

A. He's the owner, yes.

Q. In fact, you believe that Cobra is Mr. Osborne, correct?

A. Apparently one of his big dreams, you know, buying pipeline.

Q. Sure. But you believe that Cobra is Mr. Osborne, correct?

A. Yes, I do, at this time. At this time.

Q. And even though you operate as controller for Cobra, because Cobra is Mr. Osborne, Mr. Osborne will dictate sometimes how to book certain accounting items?

A. How to book what?

Q. Certain accounting items.

A. Yes.[27]

Of course, Cobra's Controller is wrong. Cobra and Richard Osborne are not the same and must be treated as separate and distinct from each other under the law. Yet her candid revelation betrays an unsettling truth: Richard Osborne/Cobra continue to ignore corporate formalities, commingle assets, and engage in improper self-dealing. So long as Mr. Osborne remains at the helm of Cobra, none of the underlying problems giving rise to Cobra's so-called "emergency" will dissipate or be averted.

1. Cobra's Financial Problems Stem from the Mismanagement of Osborne-Affiliated Intercompany Loans and Imprudent Payments of Substantial Management Fees to Osborne or Osborne-Owned Affiliates.

While Cobra chalks up its financial distress to external events over which it has no control, the record evidence proves otherwise. Cobra's financial problems originate, at least in

[27] Tr. Vol. I, at 143-144.

part, from routine payments of substantial "management fees" to Osborne and/or Osborne-affiliated companies, as well as millions of dollars in "loans" to Richard Osborne and a cadre of Osborne-owned/controlled entities (some of which have already filed for bankruptcy, including Mr. Osborne himself). Given that Richard Osborne and his affiliated entities have their own urgent financial problems, Cobra now concedes it does not expect to be reimbursed for these "loans" or "management fees."[28] As a result, Cobra has written-off substantial debts owed by Mr. Osborne and his affiliated companies.[29] Instead of collecting its debts from Osborne and his affiliated companies, Cobra has turned to ratepayers and the Commission to cover its financial shortfall.

According to its 2018 balance sheet, Cobra maintains almost $4.2 million in accounts receivable from Osborne and Osborne-affiliated entities.[30] What is more, the total amount of accounts receivable from Osborne and Osborne-owned entities has actually *increased* since Cobra filed its 2016 Rate Case.[31] For instance, Cobra's accounts receivable for Lake Shore (an Osborne-owned entity that filed for bankruptcy in December of 2017) increased by $65,000 from 2015 to 2018.[32] Cobra's accounts receivable for OTP (an Osborne-entity until it entered receivership in February 2018[33]) increased by $84,624.29 during the same period, an amount Cobra intends to write-off.[34] Not only did accounts receivables increase for Osborne-controlled

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[28] Tr. Vol. I at 51-52, 102, 125-130, 165.

[29] *Id.*; Company Exhibit B, Direct Prefiled Testimony of Carolyn Coatoam ("Company Ex. B"), at 20.

[30] NEO Ex. A, at Schedule 1 of Ex. D.

[31] *Compare* NEO Ex. A, at Schedule 1 of Ex. D *to* NEO Ex. 1, at Ex. 7 (2016 Rate Case).

[32] *Id.*; Tr. Vol. I at 124-125.

[33] NEO Ex. A, at ¶ 19.

[34] *Compare* NEO Ex. A, at Schedule 1 of Ex. D *to* NEO Ex. 1, at Ex. 7 (2016 Rate Case); Tr. Vol. I at 125-126. At hearing, Cobra explained that the increase in accounts receivable to OTP was mostly

entities between 2015 and 2018, so too did Cobra's accounts receivable for Mr. Osborne. According to the balance sheet submitted with the 2016 Rate Case application, Cobra reported an accounts receivable from Osborne (i.e., "RMO") for $1.876 million; however, by 2018, Cobra's accounts receivable for Osborne jumped to $2.143 million due, at least in part, to Cobra paying for Osborne's personal expenses.[35] Given that Mr. Osborne (as an individual) filed for bankruptcy and is already showing a negative $502,887.91 paid-in-capital balance, it is unlikely that Cobra will recoup its debts any time soon.[36]

Making matters worse, over the last three years alone, Cobra has written off substantial debts owed to it by numerous Osborne-owned entities. Between 2015 and 2018, Cobra wrote off some $15,000 in accounts receivable for Sleepy Hollow (Osborne-owned), over $50,000 in accounts receivable attributable to Ohio Rural Natural Gas (Osborne-owned), over $41,000 in accounts receivable for Ohio Pipeline (Osborne-owned), and over $31,000 in accounts receivable for Big Oats (Osborne-owned).[37] Cobra also wrote off accounts receivable for associated company interest (i.e., interest Cobra should have received for issuing "loans" to Osborne-affiliates). In 2015, Cobra reported an accounts receivable for associated company interest in the

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attributable to Cobra paying an insurance premium for OTP, further underscoring the routine commingling of assets and blatant disregard for corporate formalities among Osborne-owned entities. Tr. Vol. I at 125-126.

[35] *Compare* NEO Ex. A, at Schedule 1 of Ex. D *to* NEO Ex. 1, at Ex. 7 (2016 Rate Case); Tr. Vol. I at 128-129.

[36] Tr. Vol. I at 131.

[37] *Compare* NEO Ex. A, at Schedule 1 of Ex. D *to* NEO Ex. 1, at Ex. 7 (2016 Rate Case); Tr. Vol. I at 126-128.

amount of $223,811, but by 2018, that amount dropped almost $57,000 to $166,862, which Cobra wrote off.[38]

Further underscoring its financial improprieties, Cobra has paid millions of dollars in "management fees" to Osborne and/or Osborne affiliates over the years. According to its income statement, Cobra paid administrative management fees of over $700,000 in 2010 and over $133,000 in 2011.[39] When asked to explain why these fees were paid, the General Manager, who was employed by Cobra at that time, did not know.[40] Cobra's Controller similarly testified that she did not know the purpose or intention behind these payments but confirmed that Cobra never received any services in return.[41] The Controller also testified that it was her understanding these payments were made to Osborne or Osborne-owned entities.[42] When pressed to explain how the General Manager or Controller could know so little about such substantial payments, the General Manager explained that Richard Osborne dictated how and to whom these management fees would be paid, as well as the timing under which these fees would be paid.[43] The Controller offered similar testimony, describing how Osborne not only controlled

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[38] *Id.* As will be explained later, Cobra does not even know if the associated company interest expenses identified in the balance sheets are accurate as these loans (and the terms thereof) were never memorialized or otherwise reduced to writing. Tr. Vol. I at 105-106. Without even knowing the actual interest rates on any of these loans, Cobra merely guessed at what the actual interest expense owed to it might be. *Id.*

[39] Company Ex. 5, 2008-2017 Income Statement (2016 Rate Case); Tr. Vol. I at 51-52.

[40] Tr. Vol. I at 52.

[41] Tr. Vol. I at 51, 102, 165.

[42] Tr. Vol. I at 102-104.

[43] Tr. Vol. I at 51.

the payments of management fees, he also more generally controlled how the Controller would book certain accounting items.[44]

Even more troublingly, Cobra's payment of administrative management fees to Osborne or Osborne-affiliates continued unabated through May 22, 2018 (i.e., throughout the pendency of the 2016 Rate Case).[45] Specifically, Cobra paid an additional $360,000 in administrative management fees to OsAir, Inc. (another Osborne-owned entity) as of May 22, 2018 – again for no discernable reason.[46] According to the Controller, the only reason Cobra stopped paying these management fees in May 2018 was because Cobra could no longer afford doing so.[47]

The record evidence underscores that Richard Osborne has (and will continue to) run Cobra as if it were his personal piggybank – a fact verified by the Controller of Cobra.[48] So long as Cobra continues to operate under the stewardship of Mr. Osborne, Cobra will almost certainly continue to commingle funds, ignore corporate formalities, and engage in self-dealing. If the Commission grants even temporary relief by raising customer rates, Cobra will be positioned to write-off even more Osborne and/or Osborne-affiliate debt and resume paying lucrative "management fees" to Osborne affiliates. Cobra's General Manager confirmed as much when asked, under oath, whether Cobra would commit to prohibiting distributions to its owners if the Commission were to approve a temporary, emergency increase as requested. The General Manager equivocated and ultimately refused to make any such commitment: "I'm not sure how

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[44] Tr. Vol. I at 144, 165.

[45] Tr. Vol. I at 165-166; Company Ex. A, at 21.

[46] *Id.*; Tr. Vol. I at 51, 165.

[47] Tr. Vol. I at 165-166.

[48] Tr. Vol. I at 144.

to answer that . . . I don't know . . . Yea, I don't know what the answer is."[49] The Commission simply cannot trust Mr. Osborne to own/operate a financially viable, regulated public utility in this state.

2. Cobra Continues to Secretly Transfer Valuable Utility Assets to Osborne-Owned/Operated Unregulated Affiliates for No Consideration, Further Exacerbating Cobra's Financial Difficulties.

New evidence adduced in this proceeding demonstrates that Cobra's financial improprieties were and are far more extensive than initially believed. For example, unrefuted evidence was presented in this proceeding showing Cobra had surreptitiously transferred numerous assets to unregulated Osborne affiliates for no consideration shortly before filing the 2016 Rate Case. Specifically, as recently as September of 2016, Richard Osborne transferred fifty (50) acres of land in Washington County, Ohio owned by Cobra ("Washington County Property") to an unregulated Osborne-owned/operated entity, Marietta Land Properties LLC ("Marietta") for no consideration.[50] Although that information was initially discovered in the 2016 Rate Case, the parties uncovered new evidence in this proceeding that Mr. Osborne not only transferred fifty acres in Washington County to Marietta for free, but also Mr. Osborne, by way of a separate quit claim deed, transferred additional Cobra property in Washington County to Marietta for no consideration (hereinafter, the "Mill Street Property").[51] More disturbingly, the parties also learned that Mr. Osborne secretly transferred an additional 55 acres of real estate

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[49] Tr. Vol. I at 66.

[50] Tr. Vol. I at 34, 37, 39, 131, 132, 134; *see also* Staff Ex. 2, Quit Claim Deed (2016 Rate Case).

[51] *See* Staff Exhibit A, Quit Claim Deed for Marietta Land Properties, LLC ("Staff Ex. A"); Staff Exhibit B, Washington County, Ohio Property Record Card Parcel 360093036000 ("Staff Ex. B"); Staff Exhibit C, Property Information Property Number: 51-082-0-003.00P ("Staff Ex. C"); *see also* Tr. Vol. I, at 60-61.

owned by Cobra in Mahoning County, via quit claim deed, to 2412 Newton Falls Road, LLC ("New Falls") – yet another unregulated entity owned/operated by Richard Osborne.[52]

Troublingly, Mr. Osborne effectuated all three free land transfers without telling the Controller or the General Manager, both of whom assumed that these properties were used and useful when creating and submitting the applications for rate increases.[53] As a result, Cobra's Controller confessed that certain expenses associated with the transferred properties were improperly included in the applications and should have been removed.[54] Oddly, however, despite being notified of the Washington County Property transfer as early as September 10, 2018 (i.e., during the evidentiary hearing in the 2016 Rate Case), Cobra never made any adjustments in its emergency application, which was filed over one month later on October 15, 2018. Incredibly, when pressed to explain why Cobra did not account for these adjustments in the emergency application despite being made aware of them, Cobra's Controller claimed that no one at Cobra put in the time and effort to do so.[55]

Not only did Cobra admit that certain expenses were improperly included in the emergency application, Cobra also disclosed that it continues to pay real estate taxes on property now owned by unregulated Osborne-affiliates.[56] Still further, Cobra continues to pay insurance on the Washington County Property owned by Marietta.[57] Yet, while Cobra admitted to paying

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[52] *See* NEO Exhibit C, Quit Claim Deed for 2412 Newton Falls Road, LLC ("NEO Ex. C"); Staff Exhibit D, State of Ohio Certificate ("Staff Ex. D"); NEO Exhibit D, Cobra Responses to Ohio Utilities' Discovery Responses ("NEO Ex. D"), at RFP 1-4; *see also* Tr. Vol. I at 42-44, 63.

[53] Tr. Vol. I at 34-38, 59-61.

[54] Company Ex. B at 4, 15; Tr. Vol. I at 34-35,

[55] Tr. Vol. I at 133-134.

[56] Tr. Vol. I at 64-65, 149, 163.

[57] Tr. Vol. I at 39.

taxes and insurance on real property it does not own, neither Cobra witness could offer any substantive details about the circumstances surrounding these mysterious land transfers. Indeed, Cobra witnesses were unaware if any of the transferred real property was used as collateral for any loans, nor were they aware of any easement, lease, or right-of-way permitting Cobra to keep its pipeline, stripping station, or any personal property on land now owned by Osborne's unregulated affiliates.[58]

Despite claiming ignorance over the details of Osborne's secret land transfers, the Controller submitted prefiled testimony summarily claiming, without any affidavit from Osborne or other evidence in support, that it was Richard Osborne's intent to transfer only the real property, not the personal property located on it (e.g., pipelines, stripping station, and other equipment).[59] Cobra advances this dubious claim because its request for a rate increase (in both rate cases) assumes that these assets are (and will continue to be) owned and operated by Cobra.[60]

As an initial matter, the Commission should disregard the Controller's testimony concerning Mr. Osborne's intent as it constitutes inadmissible hearsay for which no exception applies. The Controller admitted that her knowledge of Mr. Osborne's purported intent was solely based on what Mr. Osborne told her several years after having completed the property transfer.[61] In fact, the Controller confessed that she had never even read the actual quit claim deed that transferred the Washington County Property to Marietta.[62] Even worse, Cobra did not

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[58] Tr. Vol. I at 40-41, 134-135.

[59] Company Ex. B, at 14.

[60] *Id*.

[61] Tr. Vol. I at 132, 136.

[62] *Id*.

bother to submit an affidavit from Mr. Osborne verifying his intent under oath or under the penalty of perjury, which would have at least added some measure of credibility to this self-serving statement. Instead, Cobra made the strategic decision to offer an unverified, out-of-court statement to prove the truth of the matter asserted, i.e., Richard Osborne did not intend to transfer the personal property. To even consider (let alone base any decision on) inadmissible hearsay would unfairly deprive Staff and the Companies of an opportunity to cross-examine Mr. Osborne on his purported intent.[63] The Commission should decline to sanction such an inequitable and prejudicial outcome, especially considering the heightened burden of proof an applicant must carry in an emergency rate case.

In addition to proffering secondhand statements about Osborne's intent, Cobra argues that its land transfers to Marietta did not include the stripping station or any personal property because a transfer of real property does not include the transfer of the personal property on which it sits.[64] Cobra explained that the state of Ohio clearly delineates between the two types of properties as evidenced by their different tax classifications.[65] Curiously, however, Cobra agreed that personal property and real property *can* be transferred as part of one deed.[66] In fact, if the Controller actually read any of the quit claim deeds in question, she would have realized that

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[63] Staff and the Companies raised this issue during the evidentiary hearing by moving to strike the portions of Ms. Coatoam's testimony that referred to Mr. Osborne's intent on the grounds that it constituted inadmissible hearsay. Tr. Vol. I at 89-90. However, the Attorney Examiners denied the motion. Tr. Vol. I at 91.

[64] Tr. Vol. I at 162-163; Company Ex. B, at 14-15.

[65] Company Ex. B, at 14. It is ironic that Cobra cites to the different tax treatment afforded to real property and personal property under Ohio law to bolster the claim that it owns the stripping station but not the real property in Washington County on which it sits. Cobra admitted paying real estate taxes on the Washington County property which it no longer owns, but yet failed to pay personal property taxes on the equipment it claims to own. Tr. Vol. I at 163.

[66] Tr. Vol. I at 134-135.

they not only transferred the real property, but also the "appurtenances there-unto."[67] More significantly, the quit claim deed transferring the Washington County Property included "all rights, title, and interest to the oil and gas rights, including the existing well now or formerly located on the tract of land herein conveyed."[68] Nonetheless, Cobra urges the Commission to ignore this language, insisting that it was never Mr. Osborne's intent to transfer the stripping station with the real property or any of the profits derived therefrom (e.g., extracted products like oil or gas).[69]

In short, instead of reviewing the actual terms of the quit claim deed, Cobra implores the Commission to focus on the inadmissible hearsay of its Controller, which "proves" Cobra still owns the stripping station, equipment, and profits associated with the transferred real property.[70] Cobra's argument is hollow, self-serving, and inconsistent with the facts. The record evidence plainly demonstrates an alarming pattern of Osborne secretly transferring Cobra's valuable utility assets to unregulated affiliates for no consideration. The fact that these transfers occurred only a few years ago, without senior management knowing about them, underscores the serious danger a Richard Osborne-controlled Cobra presents to customers and the public interest. It also highlights the disturbing reality that Cobra and its owner continue to ignore corporate formalities, commingle assets, and engage in suspicious transactions.

3. Cobra's Operational Incompetence and Failure to Proactively Address Its Financial Problems Contributed to the Creation of Cobra's Purported "Emergency."

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[67] Staff Ex. 2 (2016 Rate Case); NEO Ex. C; Staff Ex. A.

[68] Staff Ex. 2, see attached Ex. A (2016 Rate Case).

[69] *See* NEO Ex. D, at INT 1-2, 1-3.

[70] Company Ex. B, at 14-15.

Notwithstanding Cobra's legacy of financial mismanagement, Cobra also contributed to the creation of its "purported" emergency through its own operational incompetence. As referenced previously, Cobra argues that its financial problems were caused, not by its own imprudence or mismanagement, but by a substantial decrease in revenues due to external market conditions and an increase in expenses as a result of OTP being placed into receivership.[71] In a transparent attempt to shift the blame to "external forces" instead of taking an honest account of their own behavior, Cobra/Richard Osborne refuse to accept any accountability for Cobra's current financial condition.

With respect to the decrease in revenues, Cobra explains that it "has been forced to temporarily stop operating its Churchtown ("CT") stripping station . . . because the CT has been shut in by Columbia Gas Transmission Company."[72] Cobra explains that "TCO shut in CT because the flow of production gas from CT to the TCO interconnect has a high liquid content."[73] On its face, it appears Cobra is not responsible at all for TCO's decision to shut in a stripping station that generates revenue for the company. But on closer examination, TCO's decision to shut in the stripping station suggests, at a very minimum, that Cobra's operational incompetence played a significant part.

After TCO shut in the stripping station, Cobra exchanged numerous emails with TCO, attempting to reassure TCO that the high liquid content problem had been resolved and that the shut-in should end.[74] Specifically, Cobra (via its General Manager, Jessica Carothers) pledged that it had "since worked with more producers to improve the gas quality ***and made further***

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[71] NEO Ex. A, at ¶¶ 14-20, 24.

[72] *Id*. at ¶ 16.

[73] *Id*.

[74] *See* NEO Exhibit B, TCO/Cobra Email Chain ("NEO Ex. B").

upgrades on our equipment."[75] Seeking reassurance that the high-liquid problem had actually been addressed, TCO responded by asking Cobra to send "the information on what upgrade you completed on the equipment."[76] Cobra would have the Commission believe that the TCO shut-in had nothing to do with any failure to maintain or upgrade its equipment at the stripping station, yet the emails exchanged between TCO and Cobra suggest otherwise. Staff's own independent investigation reached a similar conclusion:

> Staff does not believe that the shut in of gas volumes on TCO is solely the result of market prices. Staff believes that with minor improvements and/or repairs to the CT stripping equipment the Company could deliver gas into TCO and increase its transportation volumes and revenues.
>
> Staff agrees with the Company's assertion that it has lost a substantial amount of volumes in recent years, but Staff's view is that the volume reductions reflect more than just market forces outside of the Company's control.[77]

In short, had Cobra properly maintained and upgraded its stripping station equipment, it may very well have avoided a shut-in, as well as the "emergency" precipitating the filing of its application in this case.

Even if none of this were true, Cobra still has not explained why it has not proactively pursued the "minor" solutions available to end the TCO shut-in. Cobra disputes this, arguing that it has acted quickly by purchasing a dryer in the summer of 2018 to remove any excess liquids.[78] Nevertheless, despite having no accounting record reflecting the purchase of this utility asset, Cobra confessed that it still has not installed the dryer to this day.[79] In light of

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[75] *Id*. (*see* Jan. 12, 2018, 3:44 pm email) (emphasis added).

[76] *Id*. (*see* Feb. 1, 2018, 10:30 am email).

[77] Staff Exhibit G, Staff Review and Recommendation ("Staff Ex. G"), at 2.

[78] Tr. Vol. I at 70-71.

[79] Tr. Vol. I at 72. Cobra's failure to account for the purchase of a utility asset represents only one of many examples of Cobra failing to account for its expenses. For instance, Cobra admitted that it has been

Staff's finding that the stripping station only needs "minor improvements and/or repairs," there is simply no excuse justifying Cobra's inaction.

Cobra's lackadaisical response to the TCO shut-in belies any serious charge that Cobra is responsibly handling the "emergency" necessitating increased rates. Cobra has failed to take any cost-saving or revenue-increasing measures to proactively address its financial problems. For instance, over the last five years, Cobra never made any investments to expand service to serve additional customers despite being surrounded by numerous competitors.[80] The only cost-saving measure undertaken by Cobra was to halt its monthly payments of "management fees" to Osborne's entities – hardly laudable given that such payments should have never been made in the first place.

Further underscoring its operational incompetence, Cobra failed to pay millions of dollars in personal property taxes and excise taxes over the last ten years, not because it did not have sufficient funds, but because it did not even know these basic taxes were owed.[81] Although Cobra's proposed emergency rate increase does not include its multi-million-dollar tax delinquency, Cobra nonetheless demands that its outstanding tax bills, which include penalties and interest assessed by the Ohio Department of Taxation ("ODOT"), be recovered from customers via a previously assessed personal property tax rider ("PAPPT Rider").[82] Putting

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paying Huntington Bank legal fees in connection with the negotiation and execution of numerous forbearance agreements (which are completed every six to twelve months) but never included any of these legal expenses in the income statement attached to the emergency application. Tr. Vol. I at 17-19.

[80] Tr. Vol. I at 19-20.

[81] Tr. Vol. I at 109-120, 150-156.

[82] Company Exhibit A, Direct Prefiled Testimony of Jessica Carothers ("Company Ex. A"), at 20; Tr. Vol. I at 115-117. Tellingly, Cobra's own Controller confessed that she assumed her employer would never request cost recovery for penalties and interest charged by ODOT as a result of Cobra's operational incompetence. Tr. Vol. I at 117.

aside the procedural impropriety of seeking new rider approval in an emergency rate proceeding (as explained in more detail below), Cobra is again demanding that ratepayers be held financially responsible for its operational incompetence. As the Commission previously held, where the emergency giving rise to the application is attributable to an applicant's financial mismanagement, imprudent expenditures, unpaid taxes, and a failure to collect its debts (e.g., writing off accounts receivables), the Commission must deny the emergency application and complete its review as part of a traditional rate case.[83]

Cobra's operational incompetence is also exemplified by its continuing defiance of a legally binding Commission order.[84] Specifically, Cobra has openly flouted the Commission's April 11, 2018 Entry in the 2016 Rate Case, wherein the Commission ordered Cobra to "promptly refund to customers any amounts collected in excess of [Commission-approved] rates . . . within 30 days of this Entry" ("April Order").[85] The April Order also directed Cobra "to file, in this docket, a complete accounting of its refunds to customers, within 30 days of this Entry."[86] Almost a year later, Cobra still has not issued any refunds to customers.[87] Incredibly, Cobra insists it has no obligation to issue a refund to customers despite the unequivocal language of the April Order.[88] As a matter of law, Cobra is wrong since Commission orders are effective when

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[83] *See Lake Erie Case*, Opinion and Order (Aug. 26, 1986), at *12, *16, *18, *19.

[84] Tr. Vol. I at 15-16.

[85] *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 ("2016 Rate Case"), Entry (Apr. 11, 2018), at ¶ 25.

[86] *Id.*

[87] Tr. Vol. I at 15, 146.

[88] *Id.*

issued and are not stayed by any subsequent filing of an application for rehearing.[89] Despite being made aware of this in prior briefing, Cobra continues to defy a straightforward, legally binding order of the Commission.

Finally, Cobra continues to ignore legitimate concerns that its requests for substantial rate increases will precipitate a death spiral. As referenced earlier, the Commission will consider the potential for a death spiral if emergency rate relief is granted.[90] In fact, the Commission previously denied an emergency application, in part, because the effect of increasing rates, even on a temporary basis, could potentially facilitate a death spiral.[91] Cobra does not dispute that if rates are increased, the incentive for customers to divert gas to Cobra's competitors will be amplified.[92] Neither does Cobra dispute that under such circumstances, Cobra's volumes would decrease even more, potentially triggering the need for yet another rate increase to account for the lost revenue.[93] Nonetheless, Cobra urges the Commission to increase rates despite real concerns that doing so will create a death spiral and trigger the collapse of the entire system.

B. If the Commission Finds a Legitimate Emergency Exists, the Commission Must Disallow Any/All Expenses that Are Not Necessary to Avert the Emergency, that Were Imprudently Incurred, or that Are Unsupported by or Inconsistent with Record Evidence.

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[89] R.C. 4903.15 ("Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission"); R.C. 4903.10 ("Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission." (emphasis added)).

[90] *Akron Thermal Case*, Opinion and Order (Sept. 2, 2009) at *45-51, *62.

[91] *Id.*

[92] Tr. Vol. I at 20.

[93] Tr. Vol. I at 20-22.

In the alternative, to the extent the Commission finds an emergency exists (which it should not), the Commission must disallow any/all expenses that are not necessary to avert the danger, that were imprudently incurred through incompetence or mismanagement, or that are otherwise unsupported by or inconsistent with record evidence. As previously noted, the Commission may only grant temporary rate relief "at the minimum necessary to avert or relieve the emergency."[94] If the emergency application includes testimony or evidence on topics that are not limited to the minimum level of temporary rate relief necessary to avert the emergency, the Commission should disregard such evidence.[95] Further, where expenses are either unsupported by record evidence or were imprudently incurred, the Commission must disallow the recovery of those expenses.[96]

Here, Cobra has used a fundamentally flawed methodology to calculate its proposed emergency rate increase, which significantly overstates expenses and understates revenue. To make matters worse, Cobra's emergency application is supported by inconsistent and unreliable financial data, evidence of imprudent expenditures, and numerous procedural deficiencies, all of which cast serious doubt on the credibility and accuracy of the information and representations made in the emergency application.

1. Cobra's Calculation of Its Proposed Emergency Rate is Fundamentally Flawed Because It Inflates Expenses and Understates Revenue to Calculate the Most Generous Emergency Rate Possible.

Cobra's emergency application contains a 2018 income statement, which includes actual revenues and expenses from Jan. 1 through Aug. 31, as well as projected revenues and expenses

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[94] *Akron Thermal Case*, Opinion and Order (Sept. 2, 2009), at *13.

[95] *Buckhorn Case*, Opinion and Order (Feb. 10, 1987), at *8-9.

[96] *Id*. at *9-11, *13, *15, *22, *31, *38; *see also* R.C. 4909.154.

from Sept. 1 through Dec. 31.[97] To calculate the emergency rate, Cobra added the total expenses in 2018 (i.e., both actual and projected expenses) and divided it by the actual and projected volumes Cobra delivered in 2018.[98] The methodology Cobra used to calculate its proposed emergency rate is fundamentally flawed insofar as it drastically overstates expenses and understates revenue to hyperbolize the emergency and hoodwink the Commission into awarding a generous emergency rate increase Cobra does not need nor deserve. As the Commission has previously recognized, inflating expenses and understating revenue is particularly significant in an emergency rate case where "the emphasis is on [the applicant's] cash flow."[99]

As a preliminary matter, Cobra has offered conflicting proposals on the precise emergency rate it is requesting. In the emergency application, Cobra seeks a 110% emergency rate increase of $1.05 per Dth; however, in prefiled testimony, Cobra reduces its proposed emergency rate to $0.87 per Dth.[100] In any event, under either calculation, Cobra incorrectly assumes that all customers – i.e., firm and interruptible – pay the same rate.[101] As a result, the methodology used by Cobra to calculate its proposed emergency rate is fundamentally flawed. Therefore, the Commission must reduce Cobra's proposed emergency rate to reflect its true financial condition, taking into account Cobra's actual revenues and expenses.

One of the most glaring examples of Cobra inflating its expenses and understating its revenue is the 2018 income statement attached to the emergency application. Importantly, Cobra's 2018 income statement does not represent the actual financial position of the company

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[97] NEO Ex. A, at Ex. A.

[98] Tr. Vol. I at 55.

[99] *Buckhorn Case*, Opinion and Order (Feb. 10, 1987), at * 15.

[100] *See* NEO Ex. A, ¶ 27; Company Ex. A, at 9.

[101] Tr. Vol. I at 55-56.

as it does not reflect actual cash transactions, but merely reflects revenues/expenses on an accrual basis.[102] As a result, there are many expenses identified in the 2018 income statement ***that Cobra never actually paid***.[103] And if Cobra incurred an expense in a prior year but paid the expense in 2018, this expense would not be identified in the 2018 income statement.[104] The same applies to revenues identified in the 2018 income statement. If Cobra earned revenue in 2017 but did not receive it until 2018, the revenue received in 2018 would not be reflected in Cobra's 2018 income statement.[105] For example, the 2018 income statement indicates that Cobra projected it would incur $499,722.67 in wages and salaries even though it never incurred all of those expenses.[106] Indeed, this estimate includes $40,000 in projected expenses for three employees Cobra never hired in 2018.[107]

Similarly, the methodology Cobra used to calculate the emergency rate substantially understates revenue by incorrectly assuming Cobra's only source of revenue is from customers paying a universal volumetric rate.[108] The methodology excludes substantial revenue from firm service customers, telemetering charges, interruptible commodity charges, firm demand charges, firm overrun charges, and sales from extracted products.[109] By excluding multiple sources of revenue, Cobra has significantly understated the revenue it would receive under any given

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[102] Tr. Vol. I at 93-94.

[103] *Id.*

[104] Tr. Vol. I at 94.

[105] *Id.*

[106] NEO Ex. A, at Ex. A; Tr. Vol. I at 98.

[107] *Id.*

[108] Tr. Vol. I at 56.

[109] Tr. Vol. I at 56-57.

volume.[110] Moreover, Cobra improperly included depreciation (i.e., a non-operating expense) as an expense in the 2018 income statement, which Cobra now understands it must remove.[111]

The income statements attached to Cobra's emergency application also reveal a dramatic, if not suspicious, increase in certain expenses.[112] For instance, under the line item "Admin Supp/Exp Other Purchase" in Exhibit H to the emergency application, Cobra only identified $175,739.73 in expenses in 2016, but by 2017, those expenses skyrocketed to $397,134.36.[113] Then, in 2018, Cobra projected a total of $284,998.56 in expenses for the same line item.[114] When asked to explain why these expenses increased so dramatically in 2017 and 2018 compared to prior years, Cobra had no explanation.[115]

More generally, Cobra claims its expenses have increased due to its former affiliate, OTP, being placed in receivership as of February 2018.[116] As a result, Cobra has been forced to "(1) bear 100% of its employees' salaries and benefits; and (2) locate independent office space, resulting in an increase in Cobra's rent."[117] Cobra is wrong. As a preliminary matter, both the Controller and General Manager conceded that Cobra has ***never*** paid rent for its administrative offices (including today); thus, any claim of "an increase in Cobra's rent" as a result of the OTP

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[110] Tr. Vol. I at 57.

[111] Tr. Vol. I at 57; Company Ex. A, at 8-9; *see also Buckhorn Case*, Opinion and Order (Feb. 10, 1987), at * 15 (disallowing a depreciation expense as it was "not an appropriate expense to be considered in an emergency rate case . . .").

[112] *See* NEO Ex. A, at Ex. H.

[113] *Id.*

[114] NEO Ex. A, at Ex. A.

[115] Tr. Vol. I at 100.

[116] NEO Ex. A, at ¶¶ 18-20; Company Ex. A, at 11-12.

[117] NEO Ex. A, at ¶ 20.

receivership is demonstrably false.[118] Furthermore, although Cobra no longer shares employees with OTP, Cobra conveniently omits that its employees can now devote 100% of their time and resources exclusively to Cobra, thereby *reducing* existing workloads and casting serious doubt on Cobra's purported "need" to hire additional employees.[119]

In short, Cobra's emergency application relies on a fundamentally flawed methodology that artificially inflates expenses and understates revenue to exaggerate the emergency and mislead the Commission into awarding a generous emergency rate increase Cobra does not deserve nor need.

2. The Financial Data Supplied by Cobra Is Inconsistent, Inaccurate, Unreliable, and Should Not Be Used by the Commission to Grant an Emergency Rate Increase.

Applying the Commission's "strict scrutiny" standard, Cobra has failed to provide clear and convincing proof of an actual, impending financial emergency. Nonetheless, should the Commission determine an emergency exists, the Commission must discard any/all evidence proffered by Cobra in support of its emergency that is inconsistent, inaccurate, or otherwise unreliable. As illustrated below, Cobra's financial data is replete with material errors, discrepancies, and inconsistencies – many of which Cobra acknowledges and cannot explain.

One of the more obvious discrepancies in the financial data submitted by Cobra in this proceeding is the declining revenue associated with the sale of extracted products as a result of the TCO shut-in. Specifically, the financial data contained in Exhibit A to the emergency application (i.e., the 2018 income statement) is inconsistent with the financial data provided in

[118] Tr. Vol. I at 52, 120.

[119] Tr. Vol. I at 99.

Exhibit B to the same application (i.e., 2018 transport revenue summary).[120] For example, Cobra projected $161,675 in revenue for "CT Firm" according to the transport revenue summary, yet Cobra's income statement projected $171,462 in revenue for the same line item.[121] Similarly, Cobra projected $406,884 in revenue for "HV Firm", but the 2018 income statement projected $431,612.50.[122] Cobra has no explanation to account for these obvious discrepancies in reported revenue.[123] Further, there is even more evidence of substantial discrepancies in the revenues received from the sale of extracted products. In discovery, Cobra produced confidential spreadsheets calculating annual revenue from the sale of extracted product in 2016 and 2017.[124] Curiously, the extracted product revenues identified in these spreadsheets did not come anywhere close to the amounts identified in the 2016 and 2017 income statements attached to the emergency application.[125] When pressed to explain the "material difference" between the revenue reported in the income statement and the revenue reported in the spreadsheets, Cobra had no explanation.[126]

Also part of its emergency application, Cobra submitted its latest unaudited balance sheet, which is divided into two main columns: 1) actual financial data as of 8/31/2018; and 2)

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[120] *See* NEO Ex. A, at Ex. A-B. Note that NEO Exhibit F, 2018 Transport Revenue Summary ("NEO Ex. F") contains only the first page of Exhibit B to Cobra's emergency application, which the parties agreed was not confidential. The remaining pages of Exhibit B to the emergency application are confidential, and, thus, are not included in NEO Ex. F. *See* Tr. Vol. I at 95.

[121] *Compare* NEO Ex. A, at Ex. B *to* NEO Ex. F; *see also* Tr. Vol. I at 96.

[122] *Compare* NEO Ex. A, at Ex. B *to* NEO Ex. F; *see also* Tr. Vol. I at 96-97.

[123] Tr. Vol. I at 96-97.

[124] NEO Exhibit E, Cobra Churchtown/Markwest 1/3/2009 (CONFIDENTIAL) ("NEO Ex. E").

[125] *Compare* NEO Ex. E *to* NEO Ex. A, at Ex. H; *see also* Tr. Vol. I at 47-50.

[126] Tr. Vol. I at 47-50.

estimated financial data as of 12/31/2018.[127] But in submitting its balance sheet, the Controller (i.e., the author) admitted at the evidentiary hearing that it was created in haste and is largely based on arbitrary speculation and guesswork.[128] For instance, as of 8/31/18, Cobra had a net negative cash balance of $35,959.17, but by 12/31/18, Cobra projected it would have a positive cash balance of $20,000.[129] When asked how Cobra projected a positive cash balance of $20,000 by 12/31/18, the Controller had no factual or rational basis for the estimate; rather, "$20,000 just seemed like a good number."[130] More worryingly, when pressed to explain how the Controller arrived at the projected financial data (i.e., as of 12/31/18), the Controller admitted that in some cases she had no idea how to even properly calculate estimates.[131] Indeed, the Controller agreed that the balance sheets were created "fairly quickly, in a short amount of time."[132]

Not only is the balance sheet inaccurate and unreliable, Cobra's income statements are similarly riddled with seemingly arbitrary and inconsistent information. Specifically, when examining Cobra's income statement from 2008 through 2017, the Controller (i.e., the author) explained that some of the financial data in the income statement was based on nothing more than a "stab in the dark."[133] For instance, in the expenses column of the 2008 to 2017 income statement, the Controller simply made wild guesses about what Cobra's personal property tax

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[127] NEO Ex. A, at Ex. D; Tr. Vol. I at 122.

[128] Tr. Vol. I at 122-123.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Tr. Vol. I at 123.

[133] Tr. Vol. I at 110-112.

liabilities were in each year.[134] In 2012, Cobra identified an accrual of $140,000 for personal property taxes that year, despite never paying any personal property taxes that year (or in any years prior), based on a "stab in the dark" estimate by the Controller.[135] Cobra did the same again in 2013 and 2014, claiming $135,000 in personal property taxes each year – another "stab in the dark."[136] Incredibly, Cobra knew as early as 2012 that it owed personal property taxes, and yet, Cobra still refused to pay its taxes even though it generated more than sufficient revenue in 2012 (approximately $2.6 million), 2013 (approximately $2.8 million), and 2014 (approximately $3.2 million) to honor its tax obligations.[137] What is more, given that Cobra knew it owed personal property taxes as early as 2012, there is simply no excuse for making "stab in the dark" estimates about such substantial tax liabilities during that time.

Additionally, Cobra reported $1.84 million in personal property tax expenses in 2015 (which Cobra still has not paid).[138] In actuality, Cobra did not accrue $1.84 million in personal property taxes in 2015; rather, Cobra simply added past years' tax delinquencies for 2015.[139] In so doing, Cobra acknowledges that it overstated its expenses in 2015.[140] Also, the claimed personal property tax expenses in 2016 and 2017 do not reflect Cobra's actual personal property tax liabilities during those years (i.e., $658,235 and $700,000, respectively).[141] Instead, these

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[134] *See, e.g., id.*; Company Ex. 5 (2016 Rate Case) (*see* line item titled "Other Taxes – Personal Property Tax"). Not to mention Cobra failed to identify (or estimate) any personal property tax liabilities between 2008 through 2011. *Id.*

[135] Company Ex. 5 (2016 Rate Case); Tr. Vol. I at 110.

[136] Company Ex. 5 (2016 Rate Case); Tr. Vol. I at 110-112.

[137] *Id.*

[138] Company Ex. 5 (2016 Rate Case); Tr. Vol. I at 112-113.

[139] *Id.*

[140] *Id.*

[141] Company Ex. 5 (2016 Rate Case); Tr. Vol. I at 114-115.

amounts allegedly reflect both the personal property tax actually accrued in those years plus undetermined amounts due and owing from prior years.[142]

Cobra recorded other expenses in its income statement based on similarly questionable accounting practices. In the 2008 to 2017 income statement, Cobra identified a line item (i.e., "Interest Expense") that refers to interest expenses owed to Osborne or Osborne-affiliated entities for alleged "loans" made to Cobra.[143] But there were never any loan agreements between Cobra and Osborne or Osborne-affiliated companies; consequently, there is no documentation memorializing the terms of any loans, particularly the interest rate.[144] Without any loan agreement specifying the terms of the loan or the amount of the interest rate, the Controller confessed that she had to rely on a seemingly arbitrary rate used by the prior controller.[145] As for the interest owed to Cobra for loans made to Osborne-affiliates, Cobra identified "Interest Income" in the revenues portion of the 2008 to 2017 income statement.[146] Yet Cobra's Controller bluntly acknowledged it was "ridiculous" and "a wasted exercise" to even include interest income in any of income statements because Cobra never had any intention or plan to collect it in the first place.[147]

In short, the financial information submitted by Cobra is riddled with inconsistent, inaccurate, and/or unreliable information, much of which is undergirded by nothing more than arbitrary guesswork ("stab[s] in the dark") and/or questionable accounting methods. Therefore,

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[142] *Id.*

[143] Company Ex. 5 (2016 Rate Case); Tr. Vol. I at 105-107.

[144] Tr. Vol. I at 105.

[145] Tr. Vol. I at 105-107.

[146] Company Ex. 5 (2016 Rate Case).

[147] Tr. Vol. I at 109.

the Commission must discount any such evidence when calculating and establishing an appropriate temporary, emergency rate.

3. Cobra's Emergency Application Contains Numerous Procedural Deficiencies.

Cobra's emergency application contains numerous procedural deficiencies. For one, Cobra's prefiled testimony contains a plethora of information that has nothing to do with its request for temporary, emergency rate relief. As the Commission previously held, where an emergency application includes testimony or evidence on topics that are "not limited to the question of what constitutes the minimum level of temporary rate relief necessary to avert the emergency," the Commission will disregard such topics and exclusively "examine the claimed expenses to determine which represent immediate cash requirements which must be satisfied if adequate service is to be maintained pending the resolution of the permanent case."[148]

Cobra's prefiled testimony addresses numerous topics that are wholly inappropriate to raise in an emergency rate case proceeding. For example, Cobra not only proposes a temporary, emergency rate increase, it also proposes (and submits evidence concerning) a ***permanent*** rate increase of $1.22 per Dth.[149] It also improperly requests approval of new, ***permanent*** riders (e.g., PAPPT Rider, the Reduction Rider, and Future Improvements Rider) that have nothing to do with identifying the minimum level of temporary rate relief necessary to avert or relieve the emergency.[150] Not surprisingly, Cobra was unable to identify any prior instance where the Commission approved permanent riders in an emergency rate case proceeding.[151]

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[148] *Buckhorn Case*, Opinion and Order (Feb. 10, 1987), at *8-9.

[149] Company Ex. A, at 16-20.

[150] Company Ex. B, at 15-23.

[151] Tr. Vol. I at 140-143.

It appears Cobra included these superfluous proposals, not because any new information was recently discovered, but because Cobra wants a second bite at the apple. As of November 19, 2018, the parties fully briefed all of the issues and arguments in the 2016 Rate Case. And although the 2016 Rate Case was consolidated with this one, the record in the 2016 Rate Case has remained closed for almost three months. Consolidation does not re-open a fully litigated, closed proceeding; rather, consolidation is merely a procedural tool to designed to efficiently combine cases with the same parties concerning a similar subject matter as part of one docket. It is entirely improper to use consolidation as a mere pretext to re-litigate a closed case.

This is especially true in an emergency rate case where the Commission "will look askance at emergency applications which request the identical relief sought in a permanent application which is concurrently pending before the Commission."[152] Substantial portions of Cobra's prefiled testimony in this case request the same relief as Cobra sought in the 2016 Rate Case. Some of the more obvious examples would be Cobra seeking Commission approval of a permanent rate increase and a PAPPT Rider in both cases.[153] As a matter of law, the Commission must treat emergency rate case applications as "a separate and distinct rate proceeding from that set forth for traditional rate applications filed under Section 4909.15, Revised Code."[154] Therefore, consistent with longstanding Commission precedent, the Commission should disregard any evidence or testimony proffered in this case that seeks the identical relief in the 2016 Rate Case or that seeks to re-open or relitigate issues that have already been fully briefed for Commission decision.

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[152] *Ottoville Mutual Case*, Opinion and Order (Nov. 13, 1973), at *6.

[153] Company Ex. A, at 16-20; Company Ex. B, at 15-23; *see also* Tr. Vol. I at 143 (confirming that the proposed PAPPT Rider in both cases are the same).

[154] *Akron Thermal Case*, Opinion and Order (Sept. 2, 2009), at *14.

There are several other notable procedural deficiencies for the Commission to consider. First, Cobra failed to notify any of its customers that it was seeking emergency rate relief at the Commission.[155] Neither has Cobra posted any advertisements in local newspapers or newspapers of general circulation concerning its request for emergency rate relief.[156] To top it off, Cobra failed to notify or send letters to any mayors and/or municipal clerks advising them of Cobra's emergency application.[157] As a basic matter of due process, Cobra should have at least notified its customers (individually or through publicized notices) of their right to participate in a proceeding that will directly impact their financial interests. Similarly, Cobra should have at least advised the mayors and/or the legislative authority of each municipality impacted by the rate increase of its decision to file an emergency application in this proceeding.

C. Cobra's Methodology, as Adjusted by Staff, is Fundamentally Flawed Because It Grossly Overstates Expenses, Understates Revenue, and Fails to Accurately Reflect the Actual Financial Condition of Cobra.

After conducting its own independent investigation into Cobra's emergency application, Staff reached the same conclusions as the Companies, most notably that Cobra "is not experiencing a statutory emergency."[158] Like the Companies, Staff discovered "many irregularities in the income statement, balance sheet and cash flows from the bank statement reviews," and determined that Cobra's "current financial condition is, in large part, as a result of the Company's failure to manage its funds properly."[159] Also like the Companies, Staff criticized the "large monthly management fees" to unregulated Osborne-affiliates, "which are in

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[155] Tr. Vol. I at 54.

[156] Tr. Vol. I at 55.

[157] Tr. Vol. I at 54-55.

[158] Staff Ex. G, at 2.

[159] *Id.*

excess of the Company's salaries and wages expense."[160] Staff further recognized that the "large loan repayments to affiliated companies" had "a negative impact on the Company's cash flows and liquidity," and that Cobra "has not made a substantial effort to control costs."[161] Finally, Staff cautioned the Commission that if emergency relief was granted, "Cobra may continue to allow owner withdrawals and support unregulated affiliates."[162]

However, in the alternative, if the Commission disagreed and determined there was, in fact, a statutory emergency warranting temporary rate relief, Staff proposed a $0.40 per Dth surcharge for each of Cobra's volumetric tariffs to cover any purported revenue shortfall.[163] While the Companies agree with the overwhelming majority of Staff's conclusions as described above, the Companies respectfully disagree that a $0.40 per Dth surcharge is an appropriate temporary rate increase. The Companies' disagreement stems from Staff's use of Cobra's flawed methodology and inaccurate financial statements to calculate an emergency rate.

To determine the emergency rate, Cobra took the total expenses for 2018 (actual and projected) and divided it by the total volumes shipped in 2018 (again, actual and projected).[164] In calculating the $0.40 per Dth surcharge, Staff used the same basic methodology with some additional adjustments. Staff calculated the surcharge by using the revenue shortfall (i.e., revenues minus expenses) as reported by Cobra in its 2018 income statement divided by the actual total volumes instead of projected data.[165] To calculate the revenue shortfall, Staff took

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[160] *Id.*

[161] *Id.* at 2-3.

[162] *Id.* at 3.

[163] *Id.*

[164] Tr. Vol. I at 55.

[165] Tr. Vol. I at 179; Staff Exhibit H, Direct Prefiled Testimony of Matthew Snider ("Staff Ex. H"), at 5.

Cobra's total revenue projection for 2018 ($1,596,837.40) and subtracted it from the total expenses projected by Cobra for 2018 (i.e., $2,629,811.12) to arrive at a revenue shortfall of $1,032,973.72.[166] Staff then divided the total revenue shortfall by the total volumes shipped in 2018.[167] However, unlike Cobra, Staff used Cobra's actual volumes for 11 months (whereas Cobra used actual volumes for 8 months[168]) and one month of forecasted volumes for December 2018.[169] Staff also slightly tweaked the projected volumes to account for one customer no longer served by Cobra.[170] Yet, even with those proper changes, the basic methodology underlying the calculation of the emergency rate is still fundamentally flawed.

1. Cobra Significantly Understated 2018 Revenue.

The methodology for calculating the emergency rate relies on Cobra's fundamentally flawed financial statements. As explained previously, the Cobra methodology used by Staff incorrectly assumes that Cobra's only source of revenue comes from customers (in every rate class) paying a universal volumetric rate.[171] In so doing, the methodology excludes numerous sources of additional revenue that should be considered by the Commission when setting a reasonable rate. Specifically, the methodology does not account for the additional revenue Cobra received from telemeter charges and demand charges ($23,500[172] and $685,850[173],

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[166] Tr. Vol. I at 173; *see also* NEO Ex. A, at Ex. A.

[167] Tr. Vol. I at 179; Staff Ex. H, at 5.

[168] *See* NEO Ex. A, at Ex. G.

[169] *Id.*

[170] Tr. Vol. I at 174.

[171] Tr. Vol. I at 175.

[172] According to Cobra's 2018 income statement, Cobra received revenue from telemeter charges in the following amounts: $1,500, $13,125, and $8,875, for a total of $23,500. NEO Ex. A, at Ex. A.

respectively).[174] Thus, at a minimum, in calculating the revenue shortfall, this additional revenue should have been included (i.e., $23,500 + $685,850 = $709,350).

The methodology also ignores other revenues received by Cobra. For instance, in the revenues section of the 2018 income statement, Cobra included a line item titled "Adjust for 2018 billings paid" – in the amount of $150,576.95 – to reflect funds Cobra billed and collected from customers in 2018 but that Cobra must now refund per the April Order.[175] Importantly, although the 2018 income statement shows a reduction of $150,576.95 in the revenue section, Cobra has retained that entire amount by refusing to issue the refund as directed.[176] Not only that, Cobra's projected revenue for 2018 presumes it will receive $0 in revenue for the sale of extracted products.[177] However, as Staff noted, with "minor" repairs and improvements to the stripping station, Cobra should have the stripping station operative again, thereby generating significant revenue for the company.[178] In 2017, Cobra generated $104,455.41 from the sale of extracted product, while in 2016, it received $85,895.02.[179] Taking the average of the two, an additional $95,175.22[180] should be added. By making the foregoing adjustments to address Cobra's grossly understated revenues for 2018, Cobra's revenue shortfall drops from $1,032,973.72 to only $77,871.56.

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[173] According to Cobra's 2018 income statement, Cobra received revenue from demand charges in the following amounts: $171,462.50, $431,612.50, and $82,775, for a total of $685,850. NEO Ex. A, at Ex. A.

[174] Tr. Vol. I at 174-175.

[175] Tr. Vol. I at 145-146.

[176] Tr. Vol. I at 176.

[177] NEO Ex. A, at Ex. A.

[178] Tr. Vol. I at 176-178; Staff Ex. G, at 2.

[179] NEO Ex. A, at Ex. H.

[180] $104,455.41 + $85,895.02 = $190,350.43; $190,350.43 ÷ 2 = $95,175.22.

Revenue Adjustments

Cobra 2018 revenue projection	$1,596,837.40
Telemeter revenue	$23,500
Demand charges from firm service customers	$685,850
Customer refund not paid[181]	$150,576.95
Sale of extracted products	$95,175.22
Corrected 2018 revenue	**$2,551,939.57**

2. Cobra Significantly Overstated Expenses.

Not only does Cobra's methodology substantially understate revenues, it also significantly overstates expenses. For instance, Staff admitted that its calculation of the $0.40 per Dth surcharge could have included $100,000 in expenses Cobra paid to OsAir in 2018.[182] Staff could not definitively determine one way or the other given the rampant inconsistencies and discrepancies in Cobra's financial data.[183] If the $100,000 had been included in Cobra's 2018 expenses, Staff agrees that the Commission should further reduce expenses by $100,000.[184]

Cobra also improperly included $464,831.77 in depreciation expenses.[185] As explained previously, depreciation expense is a non-cash item, and, thus, should have been excluded from

[181] The Companies do not contest an adjustment if the refund to customers was actually paid. However, Cobra has not refunded these funds to customers; thus, these funds should be included on Cobra's financial statements until the refund has been issued to customers.

[182] Tr. Vol. I at 178-179.

[183] *Id.*

[184] Tr. Vol. I at 179.

[185] NEO Ex. A, at Ex. A.

the 2018 income statement (a fact Cobra even recognizes).[186] With Staff including depreciation expenses as part of its calculation of the $0.40 per Dth surcharge, Cobra's cash expenses are grossly inflated.

Cobra included $523,539.73 in personal property tax expenses in 2018 despite having never made a single personal property tax payment.[187] Staff also improperly included this expense in its calculation of the $0.40 per Dth surcharge.[188] What is more, the estimated $523,539.73 in personal property tax expenses improperly includes some $60,000 in late fees and/or interest assessed by the ODOT.[189] Further, $23,539.73 of the $523,539.73 was carried over and trued up from the prior tax year.[190] Thus, at a minimum, Cobra's actual personal property tax obligation for 2018, exclusive of interest and penalties, is approximately $440,000, not $523,539.73.[191]

Similarly, Cobra's calculation of expenses included $149,820.37 in legal expenses, all of which Staff included in its calculation of the $0.40 per Dth surcharge.[192] Given that Staff previously recommended, as part of the 2016 Rate Case, that Cobra's legal expenses be

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[186] Tr. Vol. I at 179-180; *see also* Tr. Vol. I at 57; Company Ex. A, at 8-9; *see also Buckhorn Case*, Opinion and Order (Feb. 10, 1987), at * 15 (disallowing a depreciation expense as it was "not an appropriate expense to be considered in an emergency rate case . . .").

[187] NEO Ex. A, at Ex. A; Tr. Vol. I at 93-94.

[188] Tr. Vol. I at 182-183.

[189] Tr. Vol. I at 116, 183.

[190] Tr. Vol. I at 116.

[191] Tr. Vol. I at 183.

[192] NEO Ex. A, at Ex. A; Tr. Vol. I at 180.

amortized over a five-year period,[193] only 20% of the $149,820.37 should have been included as an expense for legal fees in 2018 (i.e., $29,964.07).[194]

As explained previously, Cobra included an additional $40,000 to its wages and salaries expenses for 2018 to hire additional employees despite never hiring said employees or incurring said costs.[195] As such, when Staff calculated its proposed surcharge, it should have removed $40,000 from the total wages and salaries reported by Cobra for 2018.[196]

Expense Adjustments

Cobra 2018 Expenses	$2,629,811.12[197]
OsAir Management Fee	$100,000
Depreciation Expense	$464,831.77
2018 Property Tax Not Paid	$523,539.73[198]
Amortization of legal expenses over 5 years	$119,856.30[199]
Wages not actually paid	$40,000
Corrected 2018 Expenses	**$1,381,583.32**

[193] NEO Exhibit 6, Staff Report ("NEO Ex. 6") at 8 (2016 Rate Case).

[194] Tr. Vol. I at 180-181.

[195] Tr. Vol. I at 98-99, 181.

[196] Tr. Vol. I at 181-182.

[197] NEO Ex. A, at Ex. A.

[198] While the Companies believe that no emergency rate should be set based on personal property tax payments which were never made, and therefore are not causing any cash flow issue, at a minimum, this adjustment should be $83,539.73 to reflect removal of 2017 tax payments, penalties, and interest on previous failures to pay. $523,539.73 - $440,000 (actual 2018 tax obligation) = $83,539.73.

[199] As stated previously, only $29,964.07 out of $149,820.37 (i.e., one-fifth) should have been included as an expense for legal fees in 2018. As such, the Commission should make an adjustment of $119,856.30, which represents the difference between $149,820.37 and $29,964.07.

3. Cobra's Corrected Revenues Exceed Corrected Expenses.

The Companies and Staff agree that Cobra is not entitled to any emergency rate relief. However, the Companies believe that the underlying methodology used by Cobra, and as adopted by Staff, remains fundamentally flawed as it substantially overstates expenses and understates revenue. As shown through the foregoing, Cobra's corrected 2018 revenue is $2,551,939.57 and its corrected 2018 expenses are $1,381,583.32. Therefore, Cobra needs no emergency rate increase even if its unreliable financial statements are used. Consequently, the Companies oppose any temporary increase or surcharge, including the $0.40 per Dth surcharge proposed by Staff.

To the extent the Commission agrees with some of the adjustments recommended by the Companies, but not necessarily all of them such that expenses are greater than revenues, there is record evidence to allow the Commission to adopt an appropriate rate other than the emergency rates proposed by Cobra or Staff. Specifically, Staff calculated the $0.40 per Dth additional surcharge by simply taking the difference between revenue and expenses and dividing by the 2018 volumes.[200] The Commission can use that same methodology in its order to establish a rate other than $0.40 per Dth surcharge once it determines what adjustments are needed to Cobra's inaccurate financial statements.

[200] The 2018 volume used by Staff can be calculated based on the deficiency found by Staff and the $0.40 per Dth Staff proposed surcharge. As discussed above, Staff accepted Cobra's claim that it needed to recover a revenue shortfall of $1,032,973.72. Based on Staff's recommended $0.40 per Dth rate, Staff is assuming an emergency rate case 2018 volume of 2,582,434 Mcf ($1,032,973.72 ÷ .4 = 2,582,434). That volume is well below the 2015 calendar year 4.2 million Mcf volume from the 2016 Rate Case (which has been consolidated with this case); however, regardless of the volume used, the Commission has flexibility to set the emergency rate at the level necessary to address the emergency. *See* NEO Ex. 6, Staff Report, at 62 (2016 Rate Case).

IV. CONCLUSION

For the foregoing reasons, the Companies oppose Cobra's emergency application to increase rates and charges on its customers.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Initial Post-Hearing Brief of Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 22nd day of February, 2019. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ *Mark T. Keaney*
One of the Attorneys for Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp.

Summary: Brief Initial Post-Hearing Brief of Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. electronically filed by Mr. Mark T Keaney on behalf of Northeast Ohio Natural Gas Corp. and Brainard Gas Corp. and Orwell Natural Gas Company