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

POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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On behalf of the Staff of
The Public Utilities Commission of Ohio

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INTRODUCTION

Cobra *is* Rick Osborne. Tr. at 144. And therein lies the problem.

While the pipeline is admittedly in financial trouble, the evidence in the original rate increase case, and in this emergency proceeding, show that its troubles are largely the result of mounting tax liabilities. Because Staff believes that the Commission should not permit the Company to recover those liabilities from ratepayers, Staff also believes that temporary emergency relief cannot possibly extricate Cobra from its present situation.

And if there was ever a case that highlighted the perils of throwing good money after bad, it is this one. In its Post-Hearing Brief in the original rate increase case, the Commission Staff demonstrated Mr. Osborne's inability to reasonably and responsibly

manage a regulated public utility. The evidence in this case shows that Mr. Osborne has continued to subsidize unregulated, bankrupt affiliates with utility funds. He has continued to transfer property, presumably to avoid further tax liability, to unregulated affiliates, unbeknownst to Company employees. And he has made no effort to begin paying even his current tax obligations. If Cobra is in financial distress, it is a distress of its own making. Its difficulties are the result of Mr. Osborne's unabated misconduct. Emergency relief will not correct this problem.

BACKGROUND

On October 15, 2018, Cobra filed its application in this case ("Emergency Rate Case") seeking an emergency increase in its rates and charges for natural gas transportation service. Application, NEO Ex. A. Cobra's application was filed pursuant to R.C. 4909.16. That section provides that:

> 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.

Cobra seeks authority to establish a temporary surcharge that would be applicable to the demand charge on firm service, the unauthorized daily overrun charge on firm service, and the commodity charge on interruptible service. Cobra proposes that the

surcharge would be applied to all of Its transportation customers' bills until either: (A) the Commission issues an order in the Rate Case that reflects the Company's current status and disregards the 2015 test year that was established two years ago or (B) the Commission directs Cobra to file a new rate case that reflects the Company's current status and the Commission issues an order in the new rate case.

On October 15, 2018, Cobra also filed a motion requesting consolidation of the Rate Case and the Emergency Rate Case. The motion was granted on December 7, 2018.

ARGUMENT

I. Cobra has not demonstrated that it is experiencing an emergency.

The Supreme Court of Ohio has consistently construed R.C. 4909.16 as vesting the Commission with broad discretionary powers in determining when an emergency exists, and in tailoring a remedy that will enable the public utility involved to meet that emergency. *Cambridge v. Pub. Util Comm*. (1953), 159 Ohio St. 88; *Jackson v. Pub. Util Comm*. (1953), 159 Ohio St. 123; *Manufacturer's Light and Heat Co. v. Pub. Util Comm*. (1955), 163 Ohio St. 78. The Supreme Court has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature. *Cincinnati v. Pub. Util Comm*. (1948), 149 Ohio St. 570.

The Commission has set out several standards by which it has guided the exercise of its statutory discretion. First, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the applicant's supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine

emergency situation. Next, emergency relief will not be granted if the emergency request is filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18, Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in it Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, et al. (Opinion and Order) (Sep. 2, 2009) at 6.

The threshold question is whether an emergency exists that imperils the public utility. If the applicant fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end. *In the Matter of the Application of The Toledo Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Services*, Case No. 84-1286-EL-AEM (Order) (Feb. 19, 1985).

"It is Staff's opinion that the Company is not experiencing a statutory emergency." Review and Recommendations of the Staff of the Public Utilities Commission of Ohio (Staff Letter) (Jan. 7, 2019) at 2. In its Review and Recommendation, Staff stated that it believed that the Company's current financial condition is, in large part, a result of the Company's failure to manage its funds properly. Staff Letter (Jan. 7, 2019) at 2. Much of the evidence of this mismanagement was adduced in the consolidated mandatory rate case, and Staff incorporates its arguments there by reference.

A. Personal Property Tax Liability

The Company's major problem is the accrued personal property tax liability, in excess of $4.7 million at the end of 2018. At no time in its history has the Company paid personal property taxes:

> Q: [Mr. Margard]: Now, you've indicated that Cobra has not paid 2018 personal property taxes, correct?
> A: [Ms. Coatoam]: That is correct.
>
> Q: Or 2017 personal property taxes?
> A: That is correct.
>
> Q: Or any personal property taxes, correct?
> A: That is correct.

Tr. at 150. There are several reasons why this is problematic from an emergency standpoint.

The first most obvious issue is that this is an issue of long-standing. The Company has paid no personal property taxes since its inception in 2008. This is not an emergency problem, it is a chronic problem. It is "a pattern of failure by the Company to meet its financial obligation." Staff Letter (Jan. 7, 2019) at 3.

Second, Staff found that the Company's income statement reflected a $700,000 payment in 2017, and a $658,235 payment in 2016. "If these payments are found to have not actually occurred, then the Company's income statement would be inaccurate and misleading." *Id*. No such payments were made.

Finally, the Company has not demonstrated that the property on which the personal property tax was assessed is utility property used and useful in providing utility service. Company witness Coatoam testified that "Cobra operates in multiple counties

and each county collects personal property taxes." Direct Testimony of Carolyn Coatoam, Company Ex. B at 7. While true, Cobra incurs personal property taxes in a number of counties where it does *not* operate.

In the schedule of Personal Property Tax Bills attached to Ms. Coatoam's Direct Testimony in the mandatory rate case (Cobra Ex. 2) as Exhibit G, tax assessments are listed by county and parcel. Taxes are assessed on parcels in counties including Crawford, Franklin, Huron, Union, Wood and Wyandot, all of which are far removed from Cobra's service territory.

> Q: [Mr. Margard]: But at least in the information that you provide to the Department of Taxation, you don't specifically identify what the property is in each one of these districts, do you?
> A: [Ms. Coatoam]: Don't necessarily identify what?
>
> Q: What the property is in each district.
> A: Right.
>
> Q: You just provide a valuation?
> A: Yes.
>
> Q: So the only place we would know what this property is is somewhere in the company's books?
> A: Yes. I believe I can find it.
>
> Q: Okay. So if I were to ask you the same question, if you were able to identify what personal property the company has in Franklin County, you don't know that?
> A: No, I don't.
>
> Q: The company doesn't provide transportation services in Franklin County, does it?
> A: I don't know.
>
> Q: Or in Huron County?
> A: No, I just -- I don't know what that actually involves.

Q: You're the individual who prepares the recap for the Department of Transportation, but without -- I want to make sure I'm understanding. Without specifically looking at the books, you couldn't tell me what this property is?
A: No, I can't. I can't.

Q: Do you review those property records at the time that you prepare your recap, or do you just rely on what you've done in years past?
A: Yes, I think the original designations were taken from, you know, the purchase date or the completion date, if it was pipeline.

Q: I'm sorry?
A: If it was something we added. But the property schedule, itself, is not broken down by county or township. So I'd have to do some translation to get that back to the actual --

Q: Have you ever done that translation process?
A: Well, no.

Tr. at 156-157. The Company is claiming tax liability on property that it cannot even identify as property used and useful in providing utility service.

It is true that Company witness Carothers identified these parcels as direct taps off of another pipeline system[1] to serve grain drying facilities. Tr. at 58. But there is no evidence that Cobra is serving these entities as utility customers.

[1] Reference was made to "Columbia," but it is not clear whether this is to Columbia Transmission, "TCO," or Columbia Gas of Ohio's distribution system. There is no evidence in the record of either case that these grain dryer customers receive transportation service from Cobra, or pay transportation rates. All that is certain is that the Company has included the plant associated with these dryers in its rate base, as well as the associated personal property tax liabilities.

Staff has previously argued that the Company should not be permitted to recover these accrued, past-due personal property taxes through base rates. As Staff argued in its Post-Hearing Brief in the underlying rate case,

> The Commission should also not authorize the recovery of past due tax liabilities because the Company's actions, or inactions, constitute mismanagement. . . . If the Company is in a precarious financial position, which Staff does not dispute, it is largely because of the Company's own nonfeasance and misfeasance, not its looming tax liability.

Staff Post-Hearing Brief at 49, 53. The Company's misconduct does not, and should not, constitute an emergency for which ratepayers should be responsible.

B. Improper Subsidies and Self-Dealing

The Commission has previously recognized issues with Mr. Osborne's misconduct and mismanagement.[2] Indeed, even counsel for the Company recognized that Mr. Osborne "was continually taking money out of the company, and that is one of the reasons why the company is not able to meet its obligations." Tr. at 13.

In the mandatory rate case, Company personnel were surprised to learn that Mr. Osborne had transferred real property in Washington County belonging to the utility to an unregulated affiliate that he controlled, and at no cost. In this hearing, Company witness Carothers acknowledged that Mr. Osborne had transferred another parcel in Trumbull County to yet another unregulated affiliate controlled by Mr. Osborne, again for no

[2] *In the Matter of the Regulation of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Northeast Ohio Natural Gas Corporation and Orwell Natural Gas Company*, Case Nos. 12-0209, et al. (Opinion and Order) (Nov. 13, 2013) at 54-57.

consideration. Tr. at 42. Ms. Carothers learned during the hearing that there was yet another parcel in Washington County transferred by Mr. Osborne to himself, a parcel that she was unaware that Cobra had owned. Tr. at 62.

Cobra has continued to provide insurance for these properties that it no longer owns. Tr. at 39. It has continued to pay real estate taxes on these properties. Tr. at 65. Property valuation aside, utility funds that might otherwise be used to pay other expenses and liabilities were instead used to subsidize Mr. Osborne's personal business interests.

This was also the case with the purported "management fee" paid by Cobra to OsAir. Cobra paid $20,000 per month to, essentially, Mr. Osborne, but received neither services nor benefit from these payments.

> Q: [Mr. Alexander]: Okay. Turning your attention to OS-AIR. Mr. Osborne instructed you to write checks to OS-AIR and label them as management, correct?
> A: [Ms. Carothers]: Correct.
>
> Q: And Mr. Osborne dictated how and to whom the checks would be written?
> A: Correct.
>
> Q.: Mr. Osborne dictated the amounts of the checks?
> A: Correct.
>
> Q: And Mr. Osborne dictated the timing under which the management fees would be paid?
> A: Correct.
>
> Q: And you're unaware of any services that OS-AIR provided to Cobra in 2018?
> A: That's a true statement.

Tr. at 50-51. These fees exceeded the Company's monthly salary and wage expense, yet the Company continues to claim that it needs additional employees. Direct Testimony of Jessica Carothers, Company Ex. A at 13.

Staff is troubled that Mr. Osborne apparently sees such fees as a draw that he is "entitled" to receive. In her direct testimony, Company witness Coatoam recommended that all of the various transactions funneling money to Mr. Osborne, including these management fees, be "reconciled as distributions made to Mr. Osborne." Company Ex. B at 19, 21. Moreover, Ms. Coatoam expressed the Company's belief that these were sums that Mr. Osborne had been "entitled to receive over 11 years." Company Ex. B at 19, 21. Utility ratemaking, of course, *guarantees* utility owners nothing but an *opportunity* to earn a return on their investment. Company witness Coatoam ultimately agreed. Tr. at 164. Staff's concern is succinctly articulated in its Review and Recommendation:

> Given its review of the bank statements, Staff is concerned that, if an emergency surcharge is authorized, Cobra will not allocate the additional revenues effectively; rather than using the additional revenues for operating and maintaining the Company's system, Cobra may continue to allow owner withdrawals and support unregulated affiliates.

Staff Letter (Jan. 7, 2019) at 2-3.

Again, the Company's misconduct does not, and should not, constitute an emergency for which ratepayers should be responsible.

C. Revenue and Expense Analysis

Staff is aware that the Company's revenues are highly dependent on its throughput, and that its volumes have decreased. The diminution is due to a number of market conditions, including competition and customer migration, and the Company's inability to process local production gas to satisfy interstate quality standards. While Staff agrees that the Company has lost volumes, it does not agree that all of the precipitating market conditions are beyond the Company's control. While the Company has, for example, purchased needed equipment to bring its stripping station back on-line, it has not yet installed that equipment. Tr. at 70. Staff noted that Cobra should be able to increase volumes and revenues by making improvements to the station. Staff Letter (Jan. 7, 2019) at 2.

However, it is Staff's opinion that the Company's current financial condition is largely a result of its failure to manage its funds properly. Aside from the various distributions to Mr. Osborne, "Staff found many irregularities in the income statement, balance sheet and cash flows from the bank statement reviews." Staff Letter (Jan. 7, 2019) at 2.

Many of these irregularities were elucidated by counsel for Cobra's distribution company customers during his cross-examination of Company witness Coatoam. Revenue projections on balance sheets did not agree with comparable projections on the income statement. Tr. at 96. Wage expenses included sums for employees not yet hired. Tr. at 98. Witnesses could not account for differences in management fees across years, sometimes of a magnitude of multiples. Tr. at 101-102. Income statements reported

interest income from Osborne associated companies that Cobra never received. Tr. at 108. Accounts receivable owed from some Osborne associated companies were included, even though Cobra has no expectation of payment, while other comparable accounts receivable were written off. Tr. at 125. Accounts receivable from Mr. Osborne continued to grow, although Company employees did not know why. Tr. at 128. The various property transfers describe above continue to be included on the balance sheet. Tr. at 133.

Based on Staff's review of the Company's application, it is unable to conclude that an emergency exists.

II. Relief to be granted.

In its application for emergency relief, Cobra requested that the Commission "approve emergency rate relief in the form of a surcharge." Application, NEO Ex. A at 6. Cobra asked that the surcharge be $.55 per Dth, for a total rate of $1.05 per Dth, to be applied to: "(a) the demand charge on firm service; (b) the unauthorized daily overrun charge on firm service; and (c) the commodity charge on interruptible service." Application, NEO Ex. A at 6. It further requested that this temporary surcharge remain in effect:

> until either: (a) the Commission issues an Order in the Mandated Rate Case that reflects the current status of Cobra, and ignores the 2015 test year that was established nearly two years ago; or (b) the Commission directs Cobra to file a new rate case reflecting the current status of Cobra, and the Commission has issued an Order in that case.

Id.

Cobra's supporting testimony, however, requested completely different relief. Company witness Carothers testified that she believed that Cobra's emergency rate should be "$0.87 per MCF." Company Ex. A at 9. Since this is the amount that the witness indicated would be needed for Cobra "to cover its expenses," this is presumably the total effective rate, reflecting a surcharge of $0.37 / Dth, not $0.55 / Dth. Her testimony was apparently intended to reflect a reduction from the originally requested relief. Tr. at 65.

While Company witness Carothers acknowledged that, for purposes of emergency rate relief, a utility "is only allowed to seek a rate that covers its current operating expenses," Company Ex. A at 10, Company witness Coatoam argued for additional relief. Specifically, she testified that she supported a proposed permanent rate of $1.22. Company Ex. B at 8. Ms. Coatoam then proceeded to attempt to relitigate rate base and depreciation issues already fully litigated and briefed in the mandatory rate case. She then further proceeded to propose a new "Reduction Rider," to be activated two years after permanent rates become effective, to account for possible approval of a Staff adjustment recommended in the base rate case. Company Ex. B at 11.

Ms. Coatoam's testimony also discusses riders ostensibly proposed in the rate case. Specifically, she supports a future improvements rider ("FI Rider"), to recover the costs of implementing recommendations contained in the Schumaker audit, and a "PAPPT Rider" to recover the Company's personal property tax obligations.

Staff reasserts that this testimony, with respect to all three riders, was improper in this proceeding and should have been disregarded. Staff incorporates its arguments opposing such riders previously advanced in the consolidated rate case.

In the event that the Commission would decide that Cobra was entitled to emergency relief, which Staff opposes, Staff proposed that any emergency surcharge be $0.40 for each of the Company's volumetric tariffs. Staff Letter (Jan. 7, 2019) at 3. Any such surcharge should remain in effect only until permanent rates are established by the Commission. If the Commission determines that an emergency surcharge should be approved and added to rates ultimately approved in the mandatory base rate case, then Staff respectfully submits that the Commission should also order that Cobra file a new base rate case as expeditiously as practicable. It is important to recognize that Staff's recommended surcharge rate, should one be approved, accepted the Company's filing at face value, despite its many flaws and inconsistencies.

CONCLUSION

It is Staff's opinion that the Company is not experiencing a statutory emergency. In its Review and Recommendation, Staff stated that it believed that the Company's current financial condition is, in large part, a result of the Company's failure to manage its funds properly.

Should the Commission determine that an emergency does, in fact, exist, then Staff has proposed that the Company be authorized to impose a $0.40 per Dth surcharge on all throughput. Inasmuch as Staff's review of the emergency application was necessarily not as thorough as it would have been for a base rate case, it is imperative that

temporary rates not remain in effect longer than necessary. A new rate case should be promptly filed to permit Staff to more fully investigate the Company's current condition.

Based upon the foregoing, the Staff respectfully requests that the Commission issue an order adopting the Staff recommendations herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing **Post-Hearing Brief** has been served upon all of the parties of record by electronic and/or U.S. mail, postage pre-paid mail this 22nd day of February, 2019.

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Summary: Brief Post Hearing Brief electronically filed by Ms. Tonnetta Scott on behalf of PUC