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

REPLY 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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Table of Contents

Page(s)

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INTRODUCTION

It is Staff's opinion that the Company is not experiencing a statutory emergency. The Company's current financial condition is, in large part, a result of the Company's failure to manage its funds properly. The Commission has historically hesitated to increase rates unless the utility's ability to provide adequate service was in imminent jeopardy. While Cobra cannot pay some of its bills, most notably its tax liabilities, the record does not clearly and convincingly demonstrate that its obligations must be paid immediately. Indeed, the Company has operated without having paid its tax bills for more than a decade. Its financial condition does not jeopardize its ability to provide adequate service, and it does not need a temporary or permanent rate increase at this time.

ARGUMENT

I. Staff's Responsibility in an Emergency Rate Case

The Staff's role in an emergency rate case is different than in a permanent rate case. In an emergency rate case, Staff's review of the accuracy and the reasonableness of the data submitted by the Company is necessarily limited, not merely by time constraints alone. Staff does not perform a cost of service analysis or make recommendations as to rate design. Its review does not include rate base determinations or a rate of return analysis. Staff typically examines an applicant's cash deficiency during a test year, and provides the Commission and other interested parties with pertinent financial and other data sufficient to permit an appropriate determination of the nature and extent of an alleged emergency, and recommends actions appropriate to alleviate it. In Staff's opinion, no emergency has been demonstrated in this case.

The record supporting Cobra's present "emergency" appears clouded, at best. On the one hand, the Company argues that it faces an emergency "because its revenues have significantly decreased . . . due to a dramatic loss of volume." Post Hearing Brief of Cobra Pipeline Company, Ltd. ("Cobra Brief") at 3. On another, it claims that "unending years of investigation "coupled with the unending years of hostility of the EDUs toward these pipelines" has "severely compromised" Cobra's ability to "*profitably* provide service to the public." *Id*. at 4 (emphasis in original). It also appears to argue that the Commission's "measured" handling of its 2016 Rate Case has somehow contributed to its financial condition. *Id*. at 5.

Staff recognizes that the Company has lost volumes, and that it is experiencing financial difficulties. But those difficulties, as Staff has repeatedly demonstrated, is almost exclusively of its own making.

Significant among the Company's difficulties is its looming tax liability. The Company attempts to revive (initially propose?) a PAPPT Rider to recover its past-accrued personal property tax obligations in this case. Staff considered the Company's current tax liability in analyzing this emergency application, as it did in the 2016 Rate Case. Tr. at 182. It did so because it wants the company "to pay their property taxes, . . . an expense that [Staff] would like to see the company pay." *Id.* Staff did so aware that the Commission has previously found no emergency to exist where a utility claimed significant assessed but unpaid taxes. "It is clear that the company cannot pay many of its large bills, such as taxes, but these have not been paid in over a year in some instances, and, it, therefore, appears that it is not imperative that they be paid immediately." *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*, Case No. 86-799-WS-AEM (Opinion and Order) (Aug. 26, 1986) at 16.

Staff's review expressed concern about "irregularities" found in the Company's financial statements. Review and Recommendations of the Staff of the Public Utilities Commission of Ohio ("Staff letter") (Jan. 7, 2019) at 2. Many of these irregularities were succinctly summarized in the Initial Post-Hearing Brief of Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. ("Ohio Utilities Brief"). There were numerous loans to and accounts receivable from Osborne-affiliated entities

with no prospect of payment, and write-offs with no effort at collection. Tr. at 109. Management fees were paid to Osborne-affiliated entities with no services received. Tr. at 51. Utility assets were transferred to Osborne-affiliated entities, unbeknownst to Company employees and for no consideration. Tr. at 34, 42, 61. Meanwhile, Cobra continued to pay the real property taxes on, and insurance for, parcels it no longer owns. Tr. at 39, 163.

Cobra suggests that its demonstration of an emergency "far exceeds" that shown in any previous emergency case decided by the Commission. To the contrary, the record demonstrates that Cobra's situation is more akin to those cases where the Commission has refused to find an emergency, than those stipulated cases where it provided temporary relief.

None of the cases relied upon by the Company involved the level of mismanagement or the extent to which ownership has indulged in self-dealing that the Commission has repeatedly observed in Mr. Osborne's operations. The *Southeastern* case involved the acquisition of a troubled system, nearly doubling its customer base. The acquired system had itself acquired a municipal system that had incurred significant unrecovered expenses in ameliorating violations raised in a gas pipeline safety proceeding initiated by the Commission. *In the Matter of the Application of Southeastern Natural Gas Company for an Emergency Rate Increase in its Rates and Charges for Natural Gas Service*, Case No. 01-140-GA-AEM (Opinion and Order) (Mar. 15, 2001) at 2. Lakeland Utilities faced a similar situation. Its then current rates had gone into effect as ownership changed, and as the Commission had ordered the company to make

immediate and substantial repairs. Lakeland's request for relief was granted after filing a rate case for permanent rate relief. *In the Matter of the Application of Lakeland Utilities Company, Inc. for an Emergency Increase in its Rates and Charges*, Case No. 90-1613-WS-AEM (Opinion and Order) (Jan. 9, 1992) at 10. Akron Thermal was obliged to charge rates established by the City of Akron without recourse. The company "greatly reduced" its operating expenses and "vastly improved the energy efficiency" of its operations, but was still unable to generate sufficient revenues under the city's fiscal control. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM (Opinion and Order) (Jan. 25, 2001) at 3. In none of these instances was the companies' difficulties mismanagement a contributing factor in their financial distress.

By contrast, the Commission has refused to find a genuine emergency situation where, in view of the totality of circumstances, an applicant has not established the presence of extraordinary circumstances clearly and convincingly. *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*, Case No. 86-799-WS-AEM (Opinion and Order) (Aug. 26, 1986) at 2. This case bears some similarity to the Lake Erie Utilities case. Significantly, both cases involved increasing tax obligations, including arrearages more than a year old, and uncollectible indebtedness from affiliated entities. As it should here, the Commission found that, "[a]lthough the record does show that applicant is confronted with a cash flow problem, the company has not shown that is cannot weather that problem until its pending permanent rate application is decided." *Id*. at 19.

Staff's recommendation is not predicated on its "dislike" of Mr. Osborne. Rather, it is based on Staff's opinion that Mr. Osborne is neither competent to manage this utility, nor is he to be trusted with the revenues that a surcharge would generate. While the Company believes that Staff's reasoning is "both irrelevant and illogical," Cobra Brief at 17, the Commission's experience with Mr. Osborne clearly demonstrates that neither his judgment nor his actions are to be trusted.

II. Commission's Authority in an Emergency Rate Case

Cobra correctly notes that the General Assembly has granted the Commission a "broad scope of authority" in R.C. 4909.16. Cobra Brief at 17. It is, however, an authorization, and not a mandate. The authority exists when the Commission "deems it necessary" to exercise it. It does not guarantee a utility protection from all injury, or every business downturn. The Commission is neither obliged to save every failing enterprise, nor empowered to halt every death spiral. Not all such circumstances constitute an emergency, and not all emergencies must be redressed.

As former Commissioner Sally Bloomfield wrote on a discussion of the topic of emergency rate relief under R.C. 4909.16 in 1976, "[t]he central issue in an emergency case . . . is not rate of return, but how to protect the applicant from the injurious effects of its particular financial circumstances, so that its ability to provide adequate service will not be impaired." Bloomfield, *Emergency Rate Making for Ohio Public Utilities*, 37 OhioSt.L.J. 108, 117 (1976). Cobra, however, is not arguing for relief to ensure *adequate service*; it just wants a cash infusion to use as it pleases.

The Company baldly proclaims that "[b]y denying Cobra the opportunity to recover the money necessary to pay its obligations, Staff is demanding that this Commission commit a government taking of Mr. Osborne's property." Cobra Brief at 17. The argument strains credulity. Staff is *denying* nothing, it has *demanded* nothing. The Commission would engage in no "taking" by denying a rate increase in the 2016 Rate Case, based on the record before it. It would engage in no "taking" by finding that the Company's inability to pay its obligations was the result of mismanagement and self-dealing.

The Company designed and requested its original rates. In doing so, the Company surely understood that it "must meet its financial obligations in order to maintain operations," Cobra Brief at 17, and the Commission expected that Cobra had designed its rates accordingly. Notwithstanding the unreasonableness of misapprehending its tax obligations, the Company never sought relief from the Commission when its liabilities exceeded its ability to meet them. Nor did it make any effort to contest, appeal, or attempt to minimize or remediate those obligations. To date it has still, through the entire history of its existence, paid nothing toward its personal property tax arrearage.

And, yet, the Company continues to pay obligations of bankrupt affiliated companies that generate no revenues of their own, and "management fees" for which it receives no services. The Commission cannot "take" what the Company has given away. Nor should the Commission give so that the Company can give away more.

A. Appropriate Level of Relief

"Simple arithmetic indicates that the company has a cash flow problem. However, this case has some unusual aspects which must be considered before deciding what relief, if any, should be granted." *Lake Erie Utilities*, Case No. 86-799-WS-AEM (Opinion and Order) (Aug. 26, 1986) at 14.

Staff's position was, and remains, that Cobra is not experiencing an emergency, and that no surcharge should be approved. The Ohio Utilities agree. Indeed, the distribution utilities have demonstrated that there are a number of inconsistencies and unexplained financial discrepancies that undermine any finding of an emergency.

Should the Commission find, however, that an emergency does exist, it must tailor a remedy that addresses that need. Cobra, however, overstates Staff's "admission" about the Company's "need" for an emergency surcharge. Staff's analysis was intended to inform the Commission that any approved surcharge should not exceed $0.40 per Dth. Apparently amending its application through its testimony, the Company itself asked that any surcharge be limited to $0.37 per Dth. Direct Testimony of Carolyn Coatoam, Company Ex. B at 7. Staff takes no position on the adjustment recommended by the Ohio Utilities, other than to note that many of the "flaws" recited in their brief reflect the kinds of irregularities about which Staff expressed concerns.

The more appropriate avenue of relief would be through the filing of a base rate case using a more contemporaneous test year period. This is consistent with past Commission practice.

> [G]iven the nature of the challenges raised by certain of the intervenors to the legitimacy and prudence 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.

Lake Erie Utilities, Case No. 86-799-WS-AEM (Opinion and Order) (Aug. 26, 1986) at 14 at 19 (emphasis added).

If the Commission grants emergency relief, at whatever rate, it is clear that a more thorough examination of the Company's condition is essential. This should be done by applying traditional rate case analysis using a more pertinent test year period. The Company's argument that it "borders on the absurd" to insist that Cobra file for new permanent rates based on its present condition is without merit. The financial records in this case are simply not reliable. Nor should relief be predicated solely on the outcome of the 2016 Rate Case.

While the 2016 Rate Case was reviewed using a test year that most certainly reflected very different conditions than Cobra's current operations. While not wholly appropriate for permanent rates on a going forward basis, it is what the Commission has in the record to consider. Not only does that case not justify the $1.22 per Dth permanent rate that Cobra inappropriately asks for in *this* case, Staff continues to assert that that case fails to justify any increase.

Any permanent increase, if appropriate at all, can only be determined after a thorough review of current operations. This is a customary condition in emergency rate

proceedings. As the Ohio Utilities properly noted in their Post-Hearing Brief, the Ohio Supreme Court has held that an emergency rate case cannot be a substitute for a permanent rate increase. *Seneca Hills Serv. Co. v. Pub. Util. Com.*, 56 Ohio St.2d 410, 384 N.E.2d 277 (1978). In the *Lakeland Utilities* case that Cobra cited with authority, Staff noted that it had "arrived at the minimum level of relief required by Applicant to meet necessary operating costs and continue to provide water supply and sewer disposal service *until* a permanent rate case is resolved." Staff Comments and Recommendation (Nov. 23, 1990) at 10 (emphasis added). Whatever relief the Commission may grant in this case, it should only do so contingent upon the immediate filing of a new base rate case. Indeed, Staff recommends that any emergency relief authorized in this proceeding terminate if Cobra fails to file its permanent rate case application within a reasonable (prescribed) time.

B. Controlling the Conduct of Management

Contrary to Cobra's suggestion, Staff did not ignore the Commission's broad surpervisory authority by failing to make a recommendation as to how the Commission should exercise its discretion. Staff is well aware that the Commission has the requisite authority to ensure that Cobra's management conducts itself properly in light of its condition.

> The Commission is entrusted with the duty to regulate utilities under our jurisdiction, not to manage them. Sections 4905.04 and 4905.05, Revised Code. . . . [We] have an affirmative responsibility to ratepayers to ensure that they pay no more than is necessary and prudent for the provision of safe and adequate utility service. This duty to consider all aspects of a

> utility's operations, in determining just and reasonable rates, is found throughout Title 49 of the Revised Code. For example, Section 4909.15(D)(2), Revised Code, requires us to consider "all such other matters as are proper". Section 4909.16, Revised Code, grants us "emergency" powers in order "to prevent injury to the business or interests of the public". See also, Section 4905.04, Revised Code, which gives the Commission general supervisory powers over all public utilities doing business in this state.
>
> The above-cited statutes are examples of the type of discretionary authority granted by the Ohio General Assembly for maintaining oversight of the operations of public utilities. This authority is particularly relevant where a public utility has experienced ongoing financial difficulties over a number of years, despite a number of opportunities being provided to the utility to turn itself around. . . . We believe that the statutes cited above indicate the General Assembly's concern that the Commission engage in more than a mere allocation of revenue requirements in undertaking our responsibilities and give us authority, jointly and severally, to reject the companies' "business as usual" approach to addressing their problems.

In the Matter of the Application of the Toledo Company for Authority to Amend and Increase Certain of Its Rates and Charges for Electric Service, Case No. 95-299-EL-AIR (Opinion and Order) (Apr. 11, 1996) at 41-42.

The Commission has no interest in managing utilities. It is clear through numerous investigations of Mr. Osborne that there is no effective check on his misconduct. He frequently operates without the knowledge or input of his subordinates, often to the detriment of the pipeline and its customers. These issues have now been before the Commission for a number of years, including reports and recommendations from both Staff and independent consultants and auditors.

Staff agrees with the Company's proposition: that the Commission has the authority to ensure that any additional revenue provided by any surcharge be used to pay operating expenses. Staff would add that any such revenues must be used to recover costs of providing adequate and reliable service, as not all of Cobra's expenses have been for that purpose.

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.

An emergency case is a "dire situation" where the company cannot make short term payments. The Commission has historically hesitated to increase rates unless the utility's ability to provide adequate service was in imminent jeopardy, and that should be the case today as well. Cobra is not in such a dire financial condition that could jeopardize service, and does not need a temporary or permanent rate increase at this time.

Should the Commission determine that an emergency does, in fact, exist, then Staff has proposed that the Company be authorized to impose no more than 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. Cobra

should be required to file a new rate case promptly 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 **Reply Brief** has been served upon all of the parties of record by electronic and/or U.S. mail, postage pre-paid mail this 8th day of March, 2019.

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