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**

OPINION AND ORDER

Entered in the Journal on September 11, 2019

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I. SUMMARY

{¶ 1} The Commission finds that Cobra Pipeline Company, LTD failed to demonstrate that its existing rates and charges are insufficient to provide adequate net annual compensation and return on its property used and useful in the provision of its services; that it failed to sustain its burden of proof to demonstrate that emergency rate relief should be granted; and that a hearing should be scheduled for the purposes of determining whether a receiver should be appointed for Cobra Pipeline Company, LTD and reviewing the status of its compliance with gas pipeline safety requirements.

II. DISCUSSION

A. Procedural History

{¶ 2} Cobra Pipeline Company, LTD (Cobra or the Company) is a pipeline company under R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} Orwell-Trumbull Pipeline Company, LLC (OTP) is also a pipeline company and public utility that is subject to the jurisdiction of the Commission.

{¶ 4} On June 27, 2007, in Case No. 05-1558-PL-ATA, the Commission authorized Cobra to operate as an intrastate pipeline company and, pursuant to a stipulation and recommendation, approved the Company's proposed tariff, as modified by the stipulation. *In re Cobra Pipeline Co., LTD*, Case No. 05-1558-PL-ATA (*Tariff Case*), Finding and Order (June 27, 2007).

{¶ 5} On August 15, 2016, Cobra and OTP filed applications in Case No. 16-1725-PL-AIR (*Rate Case*) and Case No. 16-1726-PL-AIR, respectively, in response to the Commission's Opinion and Order in Case No. 14-1654-GA-CSS, et al. In its Opinion and Order, the Commission directed Cobra, OTP, and any other pipeline companies owned or controlled by Richard M. Osborne to file applications, pursuant to R.C. Chapter 4909, to

determine just and reasonable rates that include charges for firm and interruptible transportation services and rates for shrinkage. *In re Complaint of Orwell Natural Gas Co. v. Orwell-Trumbull Pipeline Co., LLC*, Case No. 14-1654-GA-CSS, et al. (*Complaint Case*), Opinion and Order (June 15, 2016) at ¶ 77. The Commission also ordered that the subject matter of Case No. 14-1709-GA-COI be expanded to include an investigation of all pipeline companies owned or controlled by Richard Osborne. *Complaint Case* at ¶ 97. In that case, the Commission selected Schumaker & Company (Schumaker) to conduct an investigative audit of the structure, functions, affiliates, related party transactions, and operating procedures of Cobra and OTP. *In re Cobra Pipeline Co., LTD*, Case No. 14-1709-GA-COI (*Investigative Audit Case*), Entry (Sept. 14, 2016), Entry (Oct. 26, 2016).

{¶ 6} On August 25, 2016, Staff sent letters to Cobra and OTP stating that their rate case applications did not comply with the standard filing requirements (SFR) in Ohio Adm.Code 4901-7-01 and that Staff did not receive enough information to begin its review of the applications. Staff's letters enumerated the information that was required in order to complete the applications and stated that the information should be provided by Cobra and OTP not later than 30 days from the date of the letters.

{¶ 7} Cobra and OTP filed amended abbreviated applications on September 26, 2016. Both Cobra and OTP proposed a test year ending December 31, 2015, and a date certain of December 31, 2015. Cobra filed corrections to its amended application on November 4, 2016, and July 28, 2017. By Entries dated November 9, 2016, the Commission accepted for filing as of September 26, 2016, the applications of Cobra and OTP.

{¶ 8} On July 7, 2017, Cobra filed correspondence indicating that, in compliance with R.C. 4909.42, it was submitting a bond, in order to institute its proposed rates. Staff filed a letter in response on August 11, 2017. Cobra filed a reply to Staff on August 18, 2017.

{¶ 9} On September 13, 2017, Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. (collectively, NEO) filed a motion to intervene in the *Rate Case*.[1]

{¶ 10} On September 19, 2017, NEO filed a motion seeking to compel Cobra to cease charging unlawful rates. On October 4, 2017, Cobra filed a memorandum contra NEO's motion. NEO filed a reply in support of its motion on October 11, 2017.

{¶ 11} On November 21, 2017, in Case No. CV 14 822810, the Cuyahoga County Court of Common Pleas granted a motion filed by Park View Federal Savings Bank n/k/a First National Bank of Pennsylvania to appoint a receiver, effective October 30, 2017, over all property, both real and personal, owned by Richard M. Osborne, the Richard M. Osborne Trust, OTP, and certain other affiliated entities, as well as any legal or beneficial interest owned, possessed, or held by any such entities in or to Cobra. Under the terms of the court's order, the appointed receiver is authorized, among other things, to take and have complete and exclusive possession, control, and custody of the receivership property, as well as to sell the receivership property free and clear of all liens and encumbrances by private sale, private auction, public auction, or by any other method deemed appropriate by the receiver, subject to court approval, after notice and opportunity for a hearing.

{¶ 12} On November 29, 2017, in Case No. 17-2424-PL-COI, the Commission initiated an investigation of OTP and directed the Ohio Attorney General's office to take any appropriate steps to protect the customers of OTP in the receivership proceeding before the Cuyahoga County Court of Common Pleas.

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1 NEO is a natural gas company and public utility as defined in R.C. 4905.03 and 4905.02, respectively. On January 3, 2019, in Case No. 18-1484-GA-UNC, et al., the Commission approved a merger of Orwell Natural Gas Company, Brainard Gas Corp., and Spelman Pipeline Holdings, LLC into Northeast Ohio Natural Gas Corp.

{¶ 13} On December 5, 2017, OTP filed a notice to stay the proceeding before the Cuyahoga County Court of Common Pleas, in light of OTP's filing of a Chapter 11 Petition in Voluntary Bankruptcy in Case No. 17-17135 in the United States Bankruptcy Court, Northern District of Ohio.[2] In an Entry issued on December 6, 2017, the Commission directed the Ohio Attorney General's office to intervene or take any other appropriate steps in OTP's bankruptcy proceeding and to seek any appropriate legal and equitable remedies necessary to maintain operations of OTP's pipeline system and ensure that service to customers is not interrupted or terminated. Subsequently, on February 9, 2018, OTP's bankruptcy case was dismissed, thus returning control of OTP to the receiver. On March 1, 2018, Zachary Burkons of Rent Due, LLC, OTP's court-appointed receiver, filed a motion seeking to stay the review of OTP's application in Case No. 16-1726-PL-AIR, which was granted by the attorney examiner on May 10, 2018.

{¶ 14} On March 1, 2018, Stand Energy Corporation (Stand) filed a motion to intervene in the *Rate Case*.

{¶ 15} By Entry dated April 11, 2018, the Commission determined that the time frames set forth in R.C. 4909.42 for the fixation of rates are not applicable with respect to pipeline companies and, thus, Cobra was not authorized under the statute to implement its proposed rates. Accordingly, the Commission directed Cobra to reinstate its Commission-approved rates and refund to customers any amounts collected in excess of those rates. In the Entry, the Commission also granted NEO's motion to intervene in the *Rate Case*.

{¶ 16} On April 13, 2018, Staff filed a written report of its investigation (Staff Report) in the *Rate Case* (Co. Ex. 2 at Ex. B).

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2 On December 17, 2017, Richard M. Osborne also filed a Chapter 11 Petition in Voluntary Bankruptcy in Case No. 17-17361 in the United States Bankruptcy Court, Northern District of Ohio.

{¶ 17} By Entry dated May 1, 2018, the attorney examiner established a procedural schedule to assist the Commission in its review of Cobra's application, as amended. The procedural schedule specified that objections to the Staff Report should be filed by May 14, 2018. The Entry also scheduled an evidentiary hearing to commence on June 6, 2018.

{¶ 18} On May 11, 2018, at Cobra's request, the evidentiary hearing was continued, with the new hearing date to be set by future entry.

{¶ 19} Consistent with the established procedural schedule, Cobra filed objections to the Staff Report on May 14, 2018. Subsequently, on June 21, 2018, Cobra filed amended objections to the Staff Report.

{¶ 20} On June 22, 2018, the evidentiary hearing was rescheduled to commence on September 5, 2018, and Stand's motion to intervene in the *Rate Case* was granted.

{¶ 21} On July 3, 2018, NEO filed a motion to strike Cobra's amended objections to the Staff Report. On July 18, 2018, Cobra filed a memorandum contra NEO's motion to strike. On July 25, 2018, NEO filed a reply in support of its motion to strike Cobra's amended objections to the Staff Report.

{¶ 22} On August 3, 2018, Cobra filed the direct testimony of Carolyn Coatoam (Co. Ex. 2), Jessica Carothers (Co. Ex. 3), and J. Edward Hess (Co. Ex. 4).[3]

{¶ 23} On August 31, 2018, Staff filed the direct testimony of the following witnesses: Joseph P. Buckley (Staff Ex. 5), Peter A. Chace (Staff Ex. 6), Carla Swami (Staff Ex. 7), Stephanie Gonya (Staff Ex. 8), John L. Berringer (Staff Ex. 9), Jonathan J. Borer (Staff Ex. 10), and Matthew Snider (Staff Ex. 11).

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[3] According to their direct testimony, Ms. Coatoam and Ms. Carothers are employed as Cobra's controller and accounting/general manager, respectively (Co. Ex. 2 at 2; Co. Ex. 3 at 2). The direct testimony of Mr. Hess indicates that it is offered on Cobra's behalf in the capacity of a self-employed consultant (Co. Ex. 4 at 2).

{¶ 24} By Entry issued on August 24, 2018, the attorney examiner denied NEO's motion to strike Cobra's amended objections. The attorney examiner also granted a motion for continuance of the evidentiary hearing filed by NEO. The hearing was rescheduled to begin on September 10, 2018.

{¶ 25} The evidentiary hearing in the *Rate Case* began on September 10, 2018, and concluded on September 11, 2018.

{¶ 26} On October 15, 2018, Cobra filed an application, in Case No. 18-1549-PL-AEM (*Emergency Rate Case*), seeking an emergency increase in its rates and charges for natural gas transportation service, pursuant to R.C. 4909.16. On that same date, Cobra also filed a motion requesting consolidation of the *Rate Case* and the *Emergency Rate Case*, as well as a motion seeking to stay the *Rate Case*. On October 22, 2018, NEO filed a memorandum contra the motion to stay.

{¶ 27} On October 23, 2018, the attorney examiner denied Cobra's motion to stay the *Rate Case* and directed the parties to adhere to the briefing schedule established at the conclusion of the evidentiary hearing.[4]

{¶ 28} Initial briefs were filed in the *Rate Case* by Cobra, Staff, and NEO on October 26, 2018. The parties filed reply briefs on November 19, 2018.

{¶ 29} By Entry dated December 7, 2018, the attorney examiner granted Cobra's unopposed motion for consolidation of the above-captioned cases. The attorney examiner also determined that NEO and Stand, as parties to the *Rate Case*, should also be granted party status in the *Emergency Rate Case*. Finally, the attorney examiner established a

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[4] Cobra complains that it was not afforded an opportunity to respond to NEO's memorandum contra the motion to stay (Co. Br. at 6; Co. Reply Br. at 6). However, Cobra specifically requested expedited treatment of the motion. Ohio Adm.Code 4901-1-12(C) provides that, when a movant seeks an expedited ruling, no reply memorandum may be filed unless requested by the Commission or the attorney examiner.

procedural schedule to assist the Commission in its review of Cobra's application for an emergency rate increase.

{¶ 30} On December 24, 2018, Cobra filed the direct testimony of Jessica Carothers (Co. Ex. A) and Carolyn Coatoam (Co. Ex. B) with respect to the application for an emergency rate increase.

{¶ 31} On January 7, 2019, Staff filed its review and recommendations (Emergency Staff Report) regarding Cobra's request for an emergency rate increase (Staff Ex. G). On that same date, Staff filed the direct testimony of Matthew Snider (Staff Ex. H).

{¶ 32} The evidentiary hearing on Cobra's application for an emergency rate increase was held, as scheduled, on January 10, 2019. Initial and reply briefs were filed by Cobra, Staff, and NEO on February 22, 2019, and March 8, 2019, respectively.

1. COBRA'S MOTION TO STRIKE

{¶ 33} On November 19, 2018, as part of its reply brief, Cobra filed a motion to strike a portion of Staff's initial brief, as filed on October 26, 2018, in the *Rate Case*. Specifically, Cobra seeks to strike the section entitled "Background"; the subsection entitled "The Distribution Utilities"; the portions of the subsection entitled "The Pipelines" that pertain to OTP's formation and management, as well as lawsuits and complaints involving OTP; and the subsection entitled "Ohio Rural Natural Gas." With respect to the "Background," Cobra notes that this section refers to actions or incidents involving Mr. Osborne as an individual or as the owner of other companies, which, according to Cobra, serves to improperly focus on Mr. Osborne and distract from the relevant issues in the *Rate Case*. Cobra asserts that none of the allegations in this section are part of the evidence in the *Rate Case* or relevant to Cobra as a pipeline company. Similarly, addressing the section called "The Distribution Utilities," Cobra contends that this section of Staff's brief is irrelevant and prejudicial to the process of determining just and reasonable rates and was offered by Staff "for the purpose

of repeatedly berating Cobra's owner for his freewheeling business practices and his failure to observe corporate separation policies" (Co. Reply Br. at 8-9). Cobra maintains that references to OTP in the section entitled "The Pipelines," as well as the entire section addressing "Ohio Rural Natural Gas," should be stricken for the same reason.

{¶ 34} On November 30, 2018, Staff filed a memorandum contra Cobra's motion to strike. With respect to the "Background" section, including the subsections titled "The Distribution Utilities, "The Pipelines," and "Ohio Rural Natural Gas," Staff asserts that the statements in that portion of its brief are factual rather than argumentative in nature and were taken from public filings with the Commission, state agencies, and federal courts. Staff also notes that all of its statements are directly related either to Cobra or its owner, Mr. Osborne, and that Company witness Carothers introduced Mr. Osborne's misconduct in the *Rate Case* by providing Schumaker's investigative audit report as part of her direct testimony. Staff adds that the statements in the "Background" section are necessary for placing the *Rate Case* into context, as the case was ordered by the Commission as a result of its stated concern, in the *Complaint Case*, regarding the management of Mr. Osborne's pipeline companies. Further, Staff maintains that Cobra is not improperly prejudiced by the statements in Staff's brief, given that the Commission itself set forth much of the same information in a January 30, 2018 filing in OTP's bankruptcy proceeding. Finally, Staff contends that the statements in the "Background" section are relevant in supporting Staff's recommendations in the *Rate Case*, because Mr. Osborne's lengthy pattern of misconduct bears directly on Cobra's requested rates. Staff concludes that Cobra's motion to strike fails to demonstrate good cause and should be denied.

{¶ 35} Although Cobra argues that Staff's "Background" section pertains to actions or incidents involving Mr. Osborne in an individual capacity or as the owner of companies other than Cobra, R.C. 4905.05 provides, in part, that the Commission's jurisdiction extends to the persons or companies owning, leasing, or operating public utilities and railroads with plant or property wholly within this state. Given that Mr. Osborne is Cobra's principal

owner and managing officer, we find that the history provided in Staff's brief, which describes, among other matters, Mr. Osborne's alleged mismanagement of several of Cobra's former affiliates, is relevant and within the scope of the issues to be considered by the Commission in these consolidated proceedings. Additionally, the Commission has previously refused to strike a portion of an initial brief that was offered to provide a historical perspective. *In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2376-EL-UNC, et al., Opinion and Order (Dec. 14, 2011) at 16. As the Commission noted in that case, it is not necessary that a party request administrative notice of a Commission order, in order to refer to the order in its brief, as Staff has done here. The same principle applies to court decisions and orders, which Staff has also properly cited. Accordingly, the Commission finds that Cobra's motion to strike a portion of Staff's initial brief should be denied.

2. NEO'S MOTION TO STRIKE

{¶ 36} On March 15, 2019, NEO filed a motion to strike a portion of Cobra's reply brief, as filed on March 8, 2019, in the *Emergency Rate Case*. NEO notes that, on page 15 of Cobra's reply brief, the Company included a sentence and corresponding footnote, as well as an attached exhibit (Exhibit 1), that rely on information of questionable veracity that is not part of the record in these proceedings and that is inconsistent with the evidence of record on a point of major contention. NEO notes that Exhibit 1 includes a summary of alleged contributions and distributions between Cobra and Mr. Osborne or affiliates in 2018, as well as a general ledger for the period of January 1, 2018, through December 31, 2018, and was offered by Cobra to support its claim that Mr. Osborne contributed a net total of $111,663.71 to the Company during 2018, both personally and through various business entities. According to NEO, Exhibit 1 identifies numerous alleged transactions for the month of December 2018 that do not have any evidentiary support in the record. NEO argues that the inclusion of Cobra's non-record evidence at this late stage in the proceedings would unfairly deprive NEO and Staff of the opportunity to present the Commission with

contrary arguments or evidence or to cross-examine the Company's witnesses regarding the non-record evidence. Accordingly, NEO seeks to strike Cobra's unsupported claim, as well as Exhibit 1.

{¶ 37} Cobra filed a memorandum contra on April 1, 2019. Cobra argues that NEO's position is meritless, as the Company provided evidence of Mr. Osborne's contributions during the evidentiary hearing in the *Emergency Rate Case*. Cobra does concede, however, that the contested footnote should have stated that the information contained in Exhibit 1 was a summarization of the evidence attached to the direct testimony of Company witness Carothers (Exhibits JC-1 and JC-2), as well as testimony provided by Company witness Coatoam during cross-examination. According to Cobra, NEO and Staff had the opportunity to question the Company's witnesses with respect to the transactions in question. Cobra concludes that NEO's motion to strike should be denied.

{¶ 38} On April 8, 2019, NEO filed a reply in support of its motion. NEO contends that the specific amounts associated with the contributions in question are not found anywhere within the record in these proceedings. NEO notes that Exhibits JC-1 and JC-2 are limited to information dating before December 1, 2018, and, therefore, could not have addressed the transactions in question. With respect to Ms. Coatoam's cross-examination, NEO responds that Ms. Coatoam testified as to only two transactions and did not otherwise address the non-record evidence at issue. NEO adds that Ms. Coatoam testified to different numbers than those stated in the non-record evidence provided with Cobra's reply brief. NEO asserts that Cobra was free to cite Exhibits JC-1 and JC-2 and Ms. Coatoam's responses on cross-examination but instead chose to rely on the improper non-record evidence.

{¶ 39} As NEO notes, the Commission has, on a number of prior occasions, rejected parties' attempts to include information in a post-hearing brief that is not part of the record. *See, e.g.*, *In re Ohio American Water Co.*, Case No. 09-391-WS-AIR, Opinion and Order (May 5, 2010) at 9; *In re Columbus Southern Power Co.*, Case No. 08-917-EL-SSO, et al., Order on

Remand (Oct. 3, 2011) at 9-10; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 10-268–EL-FAC, et al., Opinion and Order (May 14, 2014) at 8. Although Cobra asserts that the information in Exhibit 1 was provided as part of Exhibits JC-1 and JC-2, those exhibits do not include transactions from December 2018. Neither did Ms. Coatoam address the transactions reflected in Exhibit 1 during her cross-examination. We agree that, because NEO and Staff were not afforded an opportunity to contest the transactions in question during the evidentiary hearing, it would be improper and unduly prejudicial to allow the Company to provide and rely on the information at this point in the proceedings. Therefore, NEO's motion to strike portions of Cobra's reply brief should be granted, such that the sentence on page 15 beginning with "Cobra's general ledgers actually show," as well as the associated footnote and Exhibit 1, should be stricken.

B. Applicable Law

{¶ 40} The Ohio Supreme Court has noted that R.C. 4909.15 "charges the [C]ommission with setting 'just and reasonable rates' and provides a mandatory ratemaking formula that requires the [C]ommission to make a series of determinations when fixing rates." *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 16. In summarizing this detailed and comprehensive ratemaking formula, the Court stated:

> R.C. 4909.15(A) requires the [Commission] to make a series of determinations—the valuation of the utility's property in service as of date certain (R.C. 4909.15[A][1]), a fair and reasonable rate of return on that investment (R.C. 4909.15[A][2]), and the expenses incurred in providing service during the test year (R.C. 4909.15[A][4]). Once those determinations are made, the [Commission] is required to "compute the gross annual revenues to which the utility is entitled" * * * under division (B) by adding the dollar return on the company's investment (R.C. 4909.15[A][3]) to the utility's test year expenses. If the charges under the utility's existing tariff are insufficient

> to generate those revenues, the [Commission] is required to fix new rates that will raise the necessary revenue.

Columbus Southern Power Co. v. Pub. Util. Comm., 67 Ohio St.3d 535, 620 N.E.2d 835, 838-839 (1993) (emphasis omitted).

{¶ 41} The Commission also has ratemaking authority pursuant to R.C. 4909.16, which provides in its entirety:

> When the [P]ublic [U]tilities [C]ommission 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 [C]ommission, 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 [C]ommission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the [C]ommission, and shall take effect at such time and remain in force for such length of time as the [C]ommission prescribes.

The Court has found that R.C. 4909.16 grants the Commission "extraordinary and special powers in the event it determines that an emergency exists." *City of Amherst v. Pub. Util. Comm.*, 46 Ohio St.2d 256, 257, 348 N.E.2d 330 (1976) (quoting *City of Cincinnati v. Pub. Util. Comm.*, 149 Ohio St. 570, 575, 80 N.E.2d 150 (1948)).

C. Summary of the Application and the Staff Report in the Rate Case

{¶ 42} In its application, as amended and corrected, Cobra proposes a test year ending December 31, 2015, and a date certain of December 31, 2015, for the *Rate Case*. Cobra notes that it provides transportation service to 17 customers (local distribution companies, natural gas marketers, and industrial and commercial consumers) on three geographically

separate systems: the Churchtown system in Noble and Washington counties; the Holmesville system in Holmes and Wayne counties; and the North Trumbull system in Ashtabula, Columbiana, Geauga, Mahoning, and Trumbull counties. The application indicates that Cobra is largely owned by the Richard M. Osborne Trust, which is managed by Mr. Richard M. Osborne as Trustee, and has an ownership share of 85.93 percent. Mr. Osborne is also the managing member of Cobra. FCCC Co. II, LLC (FCCC) owns the remaining minority interest at 14.07 percent. In 2015, Cobra had 15 full-time employees. (NEO Ex. 1 at Ex. 1, Ex. 2, Ex. 3, Ex. 4; NEO Ex. 2 at 1.)

{¶ 43} With its application, Cobra provided proposed tariffs, which, for the most part, would remain unchanged. Consistent with the Commission's directive in the *Complaint Case*, Cobra does propose to set a shrinkage rate of 3.5 percent in the tariff, which would be adjusted on an annual basis. In its amended application dated September 26, 2016, Cobra also proposed the following modifications to its existing firm and interruptible transportation service rates:

	Current Rate	Proposed Rate	Proposed Increase
Firm Transportation Service			
Demand	$0.50 x MDQ x number of days in the month[5]	$0.95 x MDQ x number of days in the month[6]	$0.45
Commodity	$0.10 per Dth[7]	$0.10 per Dth	No change
Unauthorized Daily Overrun	$0.50 per Dth	$0.75 per Dth	$0.25

5 "MDQ" is an abbreviation for maximum daily quantity. Cobra's tariff provides that the MDQ is the maximum daily natural gas quantity that the customer is entitled to nominate during any 24-hour period. A customer's MDQ is negotiated between Cobra and the customer and incorporated in the customer's service agreement with the Company.

6 In its correspondence dated November 4, 2016, Cobra stated that its proposed demand rate should be changed from $1.01, as stated in the amended application, to $0.95.

7 "Dth" is an abbreviation for dekatherm.

Interruptible Transportation Service			
Commodity	$0.50 per Dth	$0.75 per Dth	$0.25

(NEO Ex. 2 at Ex. Supp. No. 1.)

{¶ 44} In its initial application filed on August 15, 2016, Cobra proposed a different rate structure: $0.95 per thousand cubic feet (Mcf) for firm transportation service, $0.95 per Mcf for interruptible transportation service, and $0.25 per Mcf for processing and compression (NEO Ex. 1 at Ex. 15). On July 28, 2017, Cobra filed correspondence indicating that, upon discovering the inconsistency in its proposed rates, the Company wished to clarify that it is requesting approval of the rates set forth in its initial application. Cobra also provided a proposed tariff sheet, which reflects a rate of $0.95 per Mcf for both firm and interruptible transportation service.[8]

{¶ 45} In the Staff Report, Staff recommended a revenue adjustment ranging from a decrease of $29,371 to an increase of $30,641, which would be a decrease of 0.98 percent to an increase of 1.02 percent over test year operating revenue.[9] Staff notes that its determination is based on an examination of Cobra's accounts and records for the 12 months ending December 31, 2015, as summarized in the Staff Report, including schedules that incorporate Staff's recommended rate of return, rate base, and adjusted operating income. Staff recommends a rate of return in the range of 8.59 percent to 9.59 percent, with a midpoint of 9.09 percent. (Co. Ex. 2 at Ex. B at 2, 9.)

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8 In its brief in the *Rate Case*, Cobra again revised its proposed rates, requesting that the Commission authorize the Company to increase its rates to equal those proposed in the *Emergency Rate Case* (Co. Br. at 23).

9 Subsequently, in its direct testimony, Staff revised its recommended revenue adjustment (Staff Ex. 10 at Sched. A-1).

D. ***Summary of the Arguments and Objections to the Staff Report in the*** **Rate Case**

1. ESTABLISHMENT OF RATES FOR PIPELINE COMPANIES

{¶ 46} Initially, Cobra argues that, pursuant to R.C. 4909.17, the Commission is expressly prohibited from applying R.C. 4909.17, 4909.18, and 4909.19 to pipeline companies such as Cobra. Cobra asserts that, although the Commission acknowledged this statutory restriction in its April 11, 2018 Entry, the Commission nevertheless proceeded to apply the provisions in R.C. 4909.18 and 4909.19 to the Company. Cobra adds that, because pipeline companies are exempt from R.C. 4909.17, changes in the rates or service terms for pipeline companies take effect upon notice to the Commission and customers that the new rates or service terms are being implemented. Cobra contends that, at that point, it is incumbent upon the Commission to invoke, if necessary, its authority under R.C. 4905.26 to suspend or modify the rates or service terms. Cobra notes that the Company filed its proposed rates on August 15, 2016, and subsequently informed the Commission and customers that the proposed rates would take effect on July 1, 2017. Cobra further notes that the new rates remained in place until the Company was directed, in the April 11, 2018 Entry, to reduce its rates pending the outcome of the *Rate Case*. Cobra concludes that the amount and manner of any refund to customers are controlled by the terms of the Company's bond rather than by statute. (Co. Br. at 6-8.)

{¶ 47} Staff asserts that the processes employed by the Commission to consider Cobra's current rates, and the procedures followed that may establish new rates in the *Rate Case*, were reasonable, lawful, and consistent with Commission practice and precedent. Staff notes that, although R.C. 4909.18 and 4909.19 do not apply to pipeline companies, the remaining provisions in R.C. Chapter 4909, including how Staff must conduct its investigation and on what basis the Commission must determine a rate to be reasonable, apply to public utilities, including pipeline companies. Staff contends that, to the extent that the statutory ratemaking scheme does not specifically describe the procedures to be followed in rate proceedings involving pipeline companies, the General Assembly left that

determination to the discretion of the Commission. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154, 555 N.E.2d 288 (1990) (noting that, under R.C. 4909.15, the Commission "has considerable discretion in setting rate schedules and may approve such schedules based on the evidence before it in the exercise of its sound discretion"). Staff adds that the Ohio Supreme Court has consistently recognized the Commission's broad discretion to conduct and manage its hearings and the orderly flow of its business. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). Staff also points out that the *Rate Case* was ordered in response to a complaint filed pursuant to R.C. 4905.26 and a finding by the Commission that it was necessary to determine the reasonableness of the rates of Mr. Osborne's pipeline companies through a process in line with R.C. Chapter 4909. *Complaint Case*, Opinion and Order (June 15, 2016) at ¶¶ 76-77. Staff concludes that the Commission reasonably adopted procedures consistent with the due process specified in R.C. 4909.18 and 4909.19 to evaluate Cobra's application and to determine just and reasonable rates. (Staff Br. at 24-28; Staff Reply Br. at 2-5.)

{¶ 48} In its reply brief, Cobra argues that Staff's position ignores the legislative prohibition against the Commission's exercise of authority pursuant to R.C. 4909.18 and 4909.19 and, therefore, denies the Company the legal process that the Ohio General Assembly determined should apply to pipeline companies. Cobra further argues that it would be blatant error for the Commission, as a creature of statute, to invoke R.C. 4909.18 and 4909.19, notwithstanding the Commission's acknowledgement that they are inapplicable. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 32. (Co. Reply Br. at 10-12.)

{¶ 49} NEO, for its part, asserts that the Commission is empowered to determine proper rates for Cobra based on the processes and procedures set forth in R.C. Chapter 4909. NEO notes that pipeline companies are public utilities for purposes of R.C. Chapter 4909 and their rate setting is governed by R.C. 4909.15. According to NEO, R.C. 4909.15(E)

prohibits Cobra and other pipeline companies from modifying their rates absent an order from the Commission. NEO adds that there is no support for Cobra's claim that a pipeline company may unilaterally set its rates without prior Commission approval. Noting that the Commission has wide discretion in the management of its dockets, NEO also contends that adhering to the procedures set forth in R.C. Chapter 4909 ensures that due process is afforded to Cobra and all other entities affected by a rate increase before it is instituted. With respect to Cobra's contention that any refund is limited by the terms of its bond, NEO replies that Cobra offers no support for its position and, in any event, the Company's promise to refund improper charges is hollow and untrustworthy, particularly in light of the fact that the Company has openly disobeyed the Commission's April 11, 2018 Entry by refusing to provide a refund to customers. (NEO Br. at 7-10; NEO Reply Br. at 2-8, 9-10.)

{¶ 50} In the April 11, 2018 Entry issued by the Commission in the *Rate Case*, the Commission determined that, pursuant to R.C. 4909.17, pipeline companies such as Cobra are not subject R.C. 4909.18 or 4909.19. R.C. 4909.17 provides in is entirety:

> No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the [P]ublic [U]tilities [C]ommission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18, 4909.19, and 4909.191 of the Revised Code. Such sections do not apply to any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of railroads, street and electric railways, for-hire motor carriers, and pipe line companies.

Although we recognized that pipeline companies are exempt from R.C. 4909.18 and 4909.19, the Commission found, consistent with prior precedent, that the *Rate Case* should proceed

in a manner that is similar to the process set forth in those statutory provisions. Specifically, we stated:

> With respect to the procedures to be adopted in this case, the Commission has previously recognized that no section of the Revised Code dictates the manner in which the proposed rates of a pipeline company must be filed. While noting that R.C. 4909.18 is not directly applicable, the Commission found that it was not improper to proceed in a manner that is consistent with the procedures in R.C. 4909.18. *In re Natural Gas Transmission Co. of Ohio*, Case No. 81-1404-PL-ATA, et al., Entry (Dec. 23, 1981). We make the same determination here. In the *Complaint Case*, Cobra was directed to file an application to initiate a review of its rates and charges under R.C. Chapter 4909, which governs the fixation of rates for public utilities. *Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 77. Although the process and procedural requirements set forth in R.C. 4909.18 and 4909.19 do not apply to pipeline companies, no other provision in R.C. Chapter 4909 addresses the procedures to be used by the Commission in determining the rates and charges for a pipeline company. In order to ensure that Cobra is afforded due process, we will, therefore, proceed with our review and consideration of Cobra's application in a manner that is consistent with the process followed under those statutes, including issuance of a written report of investigation, publication of notice of the application, and adherence to the Commission's standard filing requirements, which are necessary to determine proper rates under R.C. 4909.15.

April 11, 2018 Entry at ¶ 32. On May 10, 2018, Cobra filed an application for rehearing of the April 11, 2018 Entry, which the Commission granted on June 6, 2018, for the purpose of further consideration of the matters specified in the application.

{¶ 51} In its brief, Cobra reiterates arguments raised in its application for rehearing, in which the Company likewise asserts that the process adopted by the Commission in the *Rate Case* is counter to R.C. 4909.17. Upon thorough consideration of Cobra's position, we find no merit in its claim that the Commission has acted contrary to R.C. 4909.17. Although R.C. 4909.18 and 4909.19 do not apply to pipeline companies, the Commission has considerable authority to determine proper rates for Cobra under R.C. 4909.15, as the Company admits. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154, 555 N.E.2d 288 (1990); *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 25. As Cobra also recognizes, R.C. 4905.26 provides the Commission with extensive authority to initiate proceedings to investigate the reasonableness of any rate or charge rendered or proposed to be rendered by a public utility, which the Ohio Supreme Court has affirmed on several occasions. The Court has found that the Commission has authority to investigate an existing rate and, following a hearing, to order a new rate. The Court has also determined that R.C. 4905.26 enables the Commission to change a rate or charge, without compelling the public utility to apply for a rate increase pursuant to R.C. 4909.18. *Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶¶ 29-32; *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 402, 575 N.E.2d 157 (1991); *Allnet Communications Services, Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 512 N.E.2d 350 (1987); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158, 389 N.E.2d 483 (1979). In this context, R.C. 4905.26 requires only that the Commission hold a hearing and provide notice to the applicable parties. The Commission's process in the *Rate Case* has fully complied with the requirements of the statute and afforded Cobra ample due process, while the Company has failed to explain how it has been prejudiced by the Commission's decision to proceed with a written report of investigation by Staff, publication of notice of the application, and adherence to the SFR.

{¶ 52} Consistent with the arguments raised in its application for rehearing, Cobra's brief also sets forth the position that R.C. 4909.17 exempts pipeline companies from

R.C. 4909.17 itself. Specifically, Cobra contends that R.C. 4909.17 authorizes pipeline companies to impose new rates upon notice to their customers and the Commission. We note, however, that Cobra has not, at any point in its July 7, 2017 correspondence or in any other filing, stated that it intended to implement its proposed rates pursuant to R.C. 4909.17. Thus, there is no basis here for the Commission to address the question of whether R.C. 4909.17 enables a pipeline company to implement its proposed rates prior to a determination by the Commission that the rates are just and reasonable. Further, Cobra ignores the history leading up to the *Rate Case*, which was initiated in response to the Commission's directive, in the *Complaint Case*, that Cobra, OTP, and any other pipeline companies owned or controlled by Richard M. Osborne file applications, pursuant to R.C. Chapter 4909, to determine just and reasonable rates that include charges for firm and interruptible transportation services and rates for shrinkage. *Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 77. Cobra clearly acknowledged that its initial application in the *Rate Case* was filed for the purpose of complying with the Commission's directive in the *Complaint Case*, and not as a unilateral attempt to increase the Company's rates. Cobra expressly requested in the application that the Commission determine that the Company's proposed rates are reasonable or, in the alternative, set rates to be charged by Cobra that will provide a reasonable level of compensation for its utility service. (NEO Ex. 1 at 1, 3.) Finally, to the extent that Cobra's arguments are raised in support of its contention that the amount and manner of any refund to customers are controlled by the terms of the Company's so-called bond, we note that this issue has also been raised in the Company's request for rehearing of the April 11, 2018 Entry and should be addressed in that context, as it is beyond the scope of our review of the Company's application in the *Rate Case*.

{¶ 53} Accordingly, we conclude that our consideration of Cobra's current and proposed rates in the *Rate Case* is consistent with our statutory authority and considerable discretion to manage our dockets, as well as our prior precedent in cases establishing rates for pipeline companies. *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559,

560, 433 N.E.2d 212 (1982); *Sanders Transfer, Inc. v. Pub. Util. Comm.*, 58 Ohio St.2d 21, 23, 387 N.E.2d 1370 (1979); *In re Natural Gas Transmission Co. of Ohio*, Case No. 81-1404-PL-ATA, et al., Entry (Dec. 23, 1981); *In re TOPICO*, Case No. 81-489-PL-ATA, Entry (May 19, 1981).

2. RATEMAKING PROCESS AND PROCEDURES

{¶ 54} Cobra also asserts that the Commission failed to employ correctly the abbreviated ratemaking procedures in the SFR. Cobra notes that it elected to file an abbreviated application under Chapter IV of the SFR, which is intended to provide a simplified and less expensive procedure for a rate case that may minimize the necessity for a formal hearing, reduce filing requirements, and shorten the length of the rate case. According to Cobra, Chapter IV's stated purpose has not been fulfilled in the *Rate Case*, particularly given that the case has taken more than two years. Cobra contends that the delay has resulted in the evaluation of outdated data and other information for the Company, which has changed significantly since 2015. Cobra adds that nothing in the Revised Code compels pipeline companies to submit to rate-of-return regulation and, therefore, it is not clear as to how the Company's rates should be determined. Cobra notes that pipeline companies in Ohio have largely been permitted to consider the market for their service when assessing their rates. Cobra concludes that Staff should have considered the rates of Cobra's competitors as a basis for comparison. (Co. Br. at 8-10.)

{¶ 55} As an initial matter, Staff notes that, with respect to the *Rate Case*, Staff proceeded as it would with any rate case filing, meaning that Staff considered requests made by Cobra and evaluated the information provided by and obtained from the Company. Staff also notes that Cobra made no request that its rates be established on any basis other than traditional cost-based, rate-of-return regulation. Staff adds that, at no time prior to the filing of Cobra's testimony, did the Company propose any alternative regulatory treatment or mechanism for the recovery of extraordinary expenses. With respect to Cobra's contention that a rate comparison should have been conducted, Staff responds that Staff does not, as a matter of general practice, perform an evaluation of comparable rates. Additionally, Staff

notes that Cobra itself did not offer any evidence showing that its proposed rates would be just and reasonable in a competitive market or that the Company's transportation services are even provided in a competitive market. Staff concludes that it properly evaluated Cobra's application. In its reply brief, Staff asserts that any delay or resulting staleness of information is the result of Cobra's actions and inactions. (Staff. Br. at 28-30; Staff Reply Br. at 5-6.)

{¶ 56} Cobra responds that it does not disagree that many portions of R.C. Chapter 4909 apply to it. According to Cobra, the Commission has historically exercised its discretion by allowing pipeline companies to base their rates on criteria selected by the companies, which simply submit those rates for review by the Commission, and has never before employed a rate-of-return analysis to a pipeline company. Cobra contends that there is no reason to perform a rate-of-return analysis with respect to the Company and that the Commission should instead follow other property valuation procedures in R.C. Chapter 4909, which, according to Cobra, are applicable to public utilities generally and require the Commission to regularly inform itself of the condition and value of the property of all public utilities, prepare valuation reports from time to time, provide notice of any such report by registered letter to the public utility, and hold a hearing in which the utility may object to the report.[10] Cobra adds that, arguably, the Commission might have proceeded under R.C. 4909.27, 4909.28, or 4909.33. (Co. Reply Br. at 12-13.)

{¶ 57} Throughout the course of the *Rate Case* and the *Emergency Rate Case*, the Commission has been mindful of affording Cobra due process and, upon consideration of the Company's arguments, we find that proper ratemaking procedures, in accordance with the Commission's ratemaking authority, have been followed by Staff and the Commission in these proceedings. With regard to Cobra's contention that the Commission has not

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[10] Although Cobra cites R.C. 4909.07, the property valuation procedures that it describes are set forth in R.C. 4909.04 et seq.

correctly implemented the abbreviated ratemaking procedures in the SFR, we note that the Company acknowledges that it elected to file an abbreviated application under Chapter IV of the SFR. Although the abbreviated process is indeed intended to minimize the necessity for hearings, reduce filing requirements, and shorten the time period between the filing of the application and a Commission order, the general instructions for the abbreviated process clearly indicate that these objectives may not be achievable in every case. As one example, the general instructions note that the abbreviated process assumes that the applicant is able to provide adequate financial records. Ohio Adm.Code 4901-7-01, App. A, Ch. IV(A)(1). Here, as we fully explained in the April 11, 2018 Entry, the Commission and Staff have faced a number of critical issues that have impeded an efficient review of Cobra's application, including a lack of sufficient financial records and other information, as well as OTP's receivership and bankruptcy proceedings. April 11, 2018 Entry at ¶¶ 26-31.

{¶ 58} As we concluded in the April 11, 2018 Entry, the Commission must ensure, in accordance with R.C. 4909.15, that a thorough review of Cobra's application is conducted, including consideration of the pertinent facts and circumstances that become known to the Commission or Staff during the course of the investigation. April 11, 2018 Entry at ¶ 31. Further, although a hearing on an abbreviated application may be unwarranted in many cases, a hearing in the *Rate Case*, aside from being consistent with the due process afforded by R.C. 4905.26, was also necessitated by the fact that Cobra filed objections to the Staff Report. Ohio Adm.Code 4901-7-01, App. A, Ch. IV(A)(2) (instructing that a hearing will not be required for an abbreviated application unless a motion for a hearing is filed by the applicant or an intervening party or objections to Staff's written report of investigation are filed).

{¶ 59} Regarding Cobra's claim that Staff should have considered the rates of the Company's competitors as a basis for comparison, we find that the Company offered no evidence or precedent in support of its position. Neither did Cobra back its claim that the Commission should limit the scope of its review to a property valuation under R.C. 4909.04

et seq. In the *Complaint Case*, the Commission directed Cobra, OTP, and any other pipeline companies owned or controlled by Richard M. Osborne to file applications, pursuant to R.C. Chapter 4909, for the purpose of determining just and reasonable rates. *Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 77. R.C. 4909.15 sets forth the formula prescribed by the General Assembly for the fixation of reasonable rates for a public utility, including a valuation of the utility's property as determined under R.C. 4909.05(C)(8) and 4909.15(A)(1), as well as a fair and reasonable rate of return in accordance with R.C. 4909.15(A)(2). As the Ohio Supreme Court has often noted, the ratemaking formula is mandatory. *See, e.g.*, *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835, 838 (1993) ("While the General Assembly has delegated authority to the [Commission] to set just and reasonable rates for public utilities under its jurisdiction, it has done so by providing a detailed, comprehensive and, as construed by this court, mandatory ratemaking formula under R.C. 4909.15."). As noted in the "Scope of Investigation" section of the Staff Report, Staff evaluated Cobra's abbreviated application with due regard for the statutory ratemaking formula (Co. Ex. 2 at Ex. B at 2). Finally, R.C. 4909.20 through 4909.33 pertain to railroad rates and regulation and, therefore, we find no merit in Cobra's secondary claim that the Commission should have proceeded under R.C. 4909.27, 4909.28, or 4909.33.

3. GAS PIPELINE SAFETY

{¶ 60} As its third objection, Cobra maintains that, although Staff noted its concern that the Company has not implemented a distribution integrity management program or a public awareness program, Staff did not include the expenses associated with such programs in the Company's rates, because they did not exist during the test year. Cobra contends that Staff also failed to address the costs associated with replacing and updating systems necessary to its operation following OTP's receivership, including improvements and repairs to the pipelines and control systems on a going-forward basis. Cobra adds that Schumaker recommended in the *Investigative Audit Case* that the Company implement a number of safety-related measures, such as hiring additional employees to ensure the

provision of safe and reliable service and improving the Company's system to better confirm supply in and out of the system. Noting that Cobra does not have the resources to implement these recommendations and any other improvements and repairs that may become necessary in the future, the Company asserts that it should be authorized to establish a Pipeline Safety Rider (PSR), as recommended by Cobra witness Hess. Cobra recommends that the initial rate of the PSR be set at zero, until such time as the Company receives the Commission's approval for specific improvements or repairs. (Co. Br. at 10-12.)

{¶ 61} Staff notes that it issued notices of probable noncompliance to Cobra in 2015, 2016, and 2018 for various gas pipeline safety violations, including failure to maintain or follow certain procedures, perform leak surveys, maintain an adequate corrosion control program, maintain an adequate public awareness program, and maintain an adequate integrity management program. During the hearing, Staff witness Chace testified that, although Cobra has taken steps to work with a third party to address the violations, the Company remains out of compliance with respect to implementation of adequate public awareness and integrity management programs. Staff emphasizes that the violations have remained outstanding since a field inspection in 2015 and that Cobra witness Hess was unaware of any efforts by the Company to remedy the violations. With respect to the proposed PSR, Staff asserts that the rider is neither necessary nor appropriate, given that gas pipeline safety compliance is an obligation of every operator and a cost of doing business that should be recovered through base rates. Noting that Mr. Hess did not provide an estimate of any additional compliance costs, Staff asserts that Cobra's test year operating expenses should have included costs for gas pipeline safety compliance if they were incurred by the Company. (Staff Br. at 60-63; Staff Reply Br. at 6-7.)

{¶ 62} Cobra responds that it has no issue with gas pipeline safety compliance. According to Cobra, Staff witness Chace agreed that nearly all of Staff's concerns have been addressed by the Company, any remaining concerns are in the process of being addressed through the Company's retention of an outside contractor, and any costs associated with

addressing Staff's concerns should be recovered through the Company's rates, even if they are outside of the test year. (Co. Reply Br. at 17-18.)

{¶ 63} Regarding the *Investigative Audit Case*, Staff notes that, as an initial matter, Schumaker's 16 recommendations have not been ordered by the Commission to be implemented by Cobra and are not addressed in the Staff Report. Staff adds, however, that, to the extent that Cobra has elected to implement Schumaker's recommendations, the associated costs may be recoverable in a rate proceeding. According to Staff, Cobra witness Carothers testified that the Company has incurred no cost in implementing the 13 recommendations that it has adopted to date. With respect to the other three recommendations, Staff argues that Cobra has either failed to implement recommendations that would not impose additional costs, such as the recommendation to implement formal policies and procedures for properly handling personal property tax and excise tax filings, or disagrees with, but has not yet contested, recommendations that would impose costs. (Staff Br. at 30-33.)

{¶ 64} NEO, for its part, contends that Cobra's objection should be stricken, because Schumaker's audit report was filed on May 22, 2017, which is well beyond the time period permitted by R.C. 4909.15(D) for adjustments to test-year expenses. NEO adds that, in any event, Cobra acknowledged that it already completed most of Schumaker's recommendations at no cost to customers, while the Company failed to quantify the cost of implementing the remaining recommendations. NEO also notes that customers should not bear the cost of an investigative audit precipitated by the Commission's legitimate concern over Cobra's operational mismanagement. (NEO Br. at 4, 26-27.)

{¶ 65} The Commission finds no merit in Cobra's position that Staff should have included expenses incurred beyond the test year to facilitate the Company's implementation of the necessary distribution integrity management and public awareness programs. As Staff witness Chace addressed, Cobra is unquestionably required to comply with the gas

pipeline safety regulations,[11] and the associated costs are part of the usual course of operating a pipeline company and should, therefore, be recovered through base rates rather than a rider (Staff Ex. 6 at 3, 6). To the extent that Cobra incurred expenses during the test year for gas pipeline safety compliance, such expenses have already been accounted for in Staff's determination of the Company's operating income; Staff made no adjustments related to gas pipeline safety compliance (Co. Ex. 2 at Ex. B at 7-8). With respect to Cobra's claim that Staff should consider any safety-related costs incurred following the conclusion of the test year, the test year concept is a key component of the mandatory ratemaking formula set forth in R.C. 4909.15. Specifically, R.C. 4909.15(A)(4) requires the Commission to determine the cost to the public utility of rendering its service for the test period. R.C. 4909.15(C)(1) provides that the revenues and expenses of the public utility shall be determined during a test period, which shall be the test period proposed by the utility, unless otherwise ordered by the Commission. As addressed further below, although there may be instances where it is appropriate to recognize expenses outside of the test year, such exceptions do not apply here. Further, Cobra's position regarding its safety obligations is falsely premised, in part, on Schumaker's recommendations in the *Investigative Audit Case*, which are both outside the scope of the present proceedings and beyond the test period.

{¶ 66} We note that the record reflects that Cobra's lack of full compliance with the gas pipeline safety regulations at issue, which require the Company to implement distribution integrity management and public awareness programs, dates back to 2015 (Staff Ex. 6 at 4; Co. Ex. 2 at Ex. B at 13-15; Tr. II at 312-314). As addressed below, the Commission finds that a gas pipeline safety investigation into Cobra's compliance with the gas pipeline

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[11] Cobra is required to comply with the gas pipeline safety rules contained in Ohio Adm.Code Chapter 4901:1-16. This chapter sets forth the safety standards and requirements for intrastate gas pipeline facilities subject to the Commission's jurisdiction. Pursuant to Ohio Adm.Code 4901:1-16-03(A), the Commission's gas pipeline safety rules adopt the United States Department of Transportation's gas pipeline safety regulations, as contained in 49 C.F.R. Parts 40, 191, 192, and 199.

safety regulations should be initiated pursuant to R.C. 4905.95 and Ohio Adm.Code 4901:1-16-12.

4. COBRA'S CURRENT FINANCIAL POSITION

{¶ 67} Next, Cobra claims that, if the *Rate Case* proceeds despite the Company's objections to the process utilized by the Commission, Cobra's current financial position should not be ignored. Cobra asserts that the *Rate Case* should concern the current financial status of the Company, including consideration of the fundamental and significant structural changes, decreased revenues, and increased expenses that have occurred since the test year. Cobra urges the Commission to reject Staff's adherence to the test year, given that R.C. 4909.17, 4909.18, and 4909.19 are inapplicable to the Company. Cobra adds that Staff has used certain financial information related to wages, salaries, and legal services that falls outside of the test year. (Co. Br. at 12-13.)

{¶ 68} Although Staff acknowledges that Cobra's financial condition is worsening, Staff notes that the Commission's April 11, 2018 Entry indicated that the Company's rates are to be determined under R.C. 4909.15, which requires that the Company's revenues and expenses be determined for the Company's proposed test year ending December 31, 2015. Staff points out that Cobra could have, but did not, file a new application for an increase in rates reflecting its changed position, or file a request for emergency rate relief, as the Company eventually did after the conclusion of the hearing in the *Rate Case*. Staff concludes that Cobra's financial condition is largely of its own making, resulting from mismanagement by its owner and operator. (Staff Br. at 33-34; Staff Reply Br. at 7-8.)

{¶ 69} Cobra responds that the Commission is not restricted by the test year, as Staff contends. Noting that Staff itself has recommended post-test-year adjustments, Cobra argues that nothing in R.C. 4909.15(C) prohibits the Company from proposing a different test period than the one originally selected, particularly given the duration of these proceedings. Cobra adds that R.C. 4909.15(C)(1) expressly permits the Commission to

employ a different test period, while R.C. 4909.15(E) directs the Commission to give due regard to all other matters that are proper, according to the facts in each case. Alternatively, Cobra submits that comparative ratemaking is an option available to the Commission. Cobra concludes that it would be an abuse of discretion for the Commission to proceed based on stale information, given the prolonged nature of the *Rate Case*, as well as the Company's dire need. (Co. Reply Br. at 13-14, 15-16.)

{¶ 70} According to NEO, Cobra's objection on this issue should be stricken in accordance with R.C. 4909.15(D), as the Company's revenue loss did not occur until 2017. Further, NEO contends that the underlying financial information on which Cobra witness Hess relied is full of material errors and obvious inconsistencies, particularly with respect to the Company's personal property tax liabilities. NEO emphasizes that the financial information reflected in Exhibit G to Ms. Coatoam's testimony is entirely inconsistent with the income statements admitted as Company Exhibit 5, which Mr. Hess relied upon to support the conclusions in his testimony. NEO adds that the personal property tax numbers for 2017 in both Exhibit G and Exhibit 5 are inaccurate, because they do not account for Mr. Osborne's transfer of 50 acres of Cobra's real property and stripping station to another entity owned by Mr. Osborne. NEO concludes that, because Mr. Hess's expert opinion is based on information that is demonstrably inaccurate, his conclusions concerning Cobra's financial viability, in the absence of a personal property tax funding mechanism, are likewise inaccurate. (NEO Br. at 7, 28-31.) In response, Cobra states that NEO's position is biased, given that NEO is a competitor of the Company, and seeks to deny the Company a proper rate (Co. Reply Br. at 14-15).

{¶ 71} In its reply brief, NEO asserts that, to the extent that the Commission considers Cobra's current financial situation, the Commission must also recognize the Company's gross financial mismanagement, widespread commingling of affiliate funds, and blatant self-dealing, which, according to NEO, caused the Company's financial distress. NEO emphasizes that Cobra conceded that its financial problems have been caused, at least

in part, by its own financial mismanagement. NEO argues that, despite Cobra's position that it should nevertheless be permitted to recover imprudent expenditures, R.C. 4909.154 requires the Commission to deny recovery of any operating or maintenance expenses that were incurred through a public utility's mismanagement or imprudence. NEO maintains that Cobra has the burden to affirmatively prove that its expenses were prudently incurred and that, even where the evidence of prudence is inconclusive or questionable, the Commission must disallow cost recovery. *In re Application of Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶ 8. (NEO Reply Br. at 10-12.)

{¶ 72} The Commission finds that Cobra's objection is not consistent with the mandatory ratemaking formula set forth in R.C. 4909.15. Cobra essentially takes issue with Staff's approach in the *Rate Case* and argues that the Company's current financial position should not be ignored through strict adherence to the test year. As noted above, R.C. 4909.15(A)(4) requires the Commission to determine the cost to the public utility of rendering its service for the test period used to determine the utility's revenues and expenses under R.C. 4909.15(C)(1). That statute, in turn, provides that the revenues and expenses of the public utility shall be determined during a 12-month test period, which shall be the test period proposed by the utility, unless otherwise ordered by the Commission. Cobra proposed, in its amended application, a test year ending December 31, 2015, which the Commission approved in its November 9, 2016 Entry. Cobra, at no point, sought leave to modify its approved test period by filing a new application reflecting its changed position.

{¶ 73} The Ohio Supreme Court has recognized the importance of the test year concept, noting that "[r]ate increases are based on costs of rendering utility service during the test period" under the "unequivocal" language of the ratemaking statute. *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 372, 374, 424 N.E.2d 300 (1981); *see also City of Columbus v. Pub. Util. Comm.*, 10 Ohio St.3d 23, 25, 460 N.E.2d 1117 (1984) ("This court has consistently recognized the strong presumption that only expenses incurred during the test period may be included in awarding a rate increase."). With respect to Cobra's argument

that R.C. 4909.15(E)(2) directs the Commission to give "due regard to all such other matters as are proper, according to the facts in each case," the Court has construed this language narrowly, finding that it permits the Commission to "make minor adjustments to rates ascertained by the statutory formula" and to "smooth out anomalies in the ratemaking equation." *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 538-539, 620 N.E.2d 835 (1993) (quoting *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166, 423 N.E.2d 820 (1981)). Therefore, consistent with R.C. 4909.15 and Ohio Supreme Court precedent, we find that Staff's investigation of Cobra's amended application was properly based on the test period approved by the Commission.[12] Further, to the extent that Cobra argues that its current financial situation must be considered by Staff and the Commission, we note that the Company's application for emergency rate relief, which was filed following the hearing in the *Rate Case*, is an appropriate means of bringing the Company's present financial circumstances to the attention of the Commission. Accordingly, Cobra's arguments regarding its post-test-year financial condition will be addressed in that context below.

5. ALLOCATION OF GENERAL PLANT TO OTP

{¶ 74} Cobra next objects to Staff's allocation of any portion of Cobra's general plant in service to OTP. Cobra states that, following OTP's receivership, plant items are no longer shared between Cobra and OTP and Cobra is no longer housed in offices accounted for in the general plant accounts. Cobra, therefore, asserts that Staff's allocation has no relevance to the Company as it currently exists. According to Cobra, Staff's reliance on the state of the Company as it existed during the test year is inappropriate. (Co. Br. at 13-14.)

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12 The Commission notes that, at various points in their briefs, NEO and Staff claim that R.C. 4909.15(D) limits post-test-year adjustments to any changes that are, during the test period or the 12-month period immediately following the test period, reasonably expected to occur. As R.C. 4909.15(D) is specifically applicable to adjustments proposed by a natural gas, water-works, or sewage disposal system company, and makes no mention of pipeline companies such as Cobra, the Commission gives no weight to the arguments of NEO or Staff on this point.

{¶ 75} Staff responds that R.C. 4909.15(C) provides that the revenues and expenses of the public utility must be determined during a test period of 12 months, as proposed by the utility. Staff notes that R.C. 4909.15(D) provides that a public utility may propose adjustments for any changes that are, during the test period or the 12-month period immediately following the test period, reasonably expected to occur. However, Staff emphasizes that the Ohio Supreme Court has determined that exceptions to the test year, while appropriate in some cases, must remain exceptions. *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 96, 447 N.E.2d 733 (1983). With respect to the allocation of expenses between Cobra and OTP, Staff notes that it accepted the Company's own methodology for allocating general plant between Mr. Osborne's two intermingled pipeline companies. Staff contends that it would be inappropriate to eliminate the allocation without completely reevaluating the Company's accounts to determine which assets remain used and useful in providing service or establishing whether the Company even continues to own the assets included in general plant, particularly in light of evidence showing that Mr. Osborne has transferred some of Cobra's assets to unregulated affiliates at no cost. (Staff Br. at 36-39; Staff Reply Br. at 9.)

{¶ 76} NEO asserts that the Commission should strike Cobra's objection on this issue pursuant to R.C. 4909.15(D). Further, NEO contends that the evidence suggests that Cobra is inflating its need for additional revenue and post-test-year adjustments, particularly in light of the fact that the Company's employees have diminished workloads and no longer spend time working on OTP-related matters. According to NEO, Cobra overlooks the cost savings arising from the fact that OTP and Cobra are no longer operating as shared service providers. (NEO Br. at 5-6, 23-26; NEO Reply Br. at 25-27.)

{¶ 77} In its reply brief, Cobra acknowledges that it originally requested that part of its general plant be allocated to OTP. Given that circumstances changed in December 2017, Cobra reiterates that its general plant should no longer be split with OTP. Cobra also argues that, pursuant to R.C. 4909.15(C)(1), the Commission should use its discretion to

modify the test period to reflect the Company's current financial status. (Co. Reply Br. at 23.)

{¶ 78} As noted above, Staff's investigation in the *Rate Case* reflects a proper adherence to the ratemaking formula's test year and date certain requirements and is consistent with R.C. 4909.15 and Ohio Supreme Court precedent. R.C. 4909.15(C); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 538-539, 620 N.E.2d 835 (1993); *City of Columbus v. Pub. Util. Comm.*, 10 Ohio St.3d 23, 25, 460 N.E.2d 1117 (1984); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 372, 374, 424 N.E.2d 300 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166, 423 N.E.2d 820 (1981). As the record in the *Rate Case* shows, Staff accepted Cobra's proposed allocation of general plant between the Company and OTP based on the affiliate relationship that existed between the two pipeline companies as of the date certain and that continued to exist at the time of Staff's investigation in the *Rate Case* (Co. Ex. 2 at Ex. B at 3, 5; Staff Ex. 8 at 3; Co. Ex. 2 at 10; Co. Ex. 4 at 4). We agree with Staff that, in any event, it would be inappropriate to eliminate the allocation in the absence of information in the record establishing which assets remain under Cobra's ownership and used and useful in providing utility service. Additionally, Cobra's post-test-year financial condition is more properly addressed below as part of our consideration of the Company's application for emergency rate relief.

6. DEPRECIATION

{¶ 79} Cobra asserts that Staff's reduction in the depreciation reserve has no valid justification. According to Cobra, Staff believes that the Company has over-accrued depreciation by 8.22 percent and recommends that the imbalance of $1,980,014.72 be amortized over a ten-year period. With respect to the alleged over-accrual, Cobra argues that it has followed the same depreciation schedule that it was provided when it purchased its pipelines from Columbia Gas Transmission (TCO) in 2005 and that TCO had used for the prior 30 years. Noting that it has continued to depreciate the assets in the same manner as TCO, Cobra asserts that it is unreasonable and unjust for Staff to now claim that the

Company has over-accrued depreciation on its assets, given that it has been more than 40 years after that depreciation began to occur and more than a decade after the Commission implicitly authorized the depreciation by approving the Company's rates in the *Tariff Case*. Further, Cobra contends that Staff has not shown that the Company received any benefit from the alleged over-accrual, as TCO owned the assets for a much longer period and depreciated them in the same manner as Cobra. Cobra maintains that it should not have to bear the financial burden of an over-accrual that likely occurred, if at all, when TCO owned the assets. Cobra also contends that Staff's proposed ten-year amortization period would unduly burden the Company when it already faces financial difficulty. Cobra notes that Staff's recommendation would have a material impact on the Company's revenues, by reducing the annual depreciation expense by $198,001 and reducing the recommended revenue requirement by approximately the same amount. Cobra concludes that Staff's adjustment to revenues would cause additional financial strain for the Company, when it is already facing dire circumstances, and threaten its ability to provide safe and reliable service. (Co. Br. at 14-16.)

{¶ 80} With respect to Staff's calculation of the depreciation reserve and its theoretical reserve calculation, Staff asserts that Cobra failed to support its objections through its testimony, while Cobra witness Hess, in fact, accepted Staff's calculations in his analysis recommending a 45-year amortization period. According to Staff, a ten-year amortization period is reasonable and consistent with the Commission's practice. Staff notes that Staff witness Swami testified that a ten-year amortization period has been standard treatment for both over- and under-accruals. In its reply brief, Staff asserts that Cobra points to no evidence showing how its initial rates were developed or demonstrating that the Commission reviewed and approved any depreciation schedule in the *Tariff Case*. (Staff Br. at 39-42, 57; Staff Reply Br. at 9-11.)

{¶ 81} In response to Staff, Cobra reiterates that it simply continued the same depreciation rate that was used by TCO. Cobra also asserts that it cannot afford to be

deprived of approximately $200,000 per year, which is a large percentage of its operating income, and that Staff should have raised its concerns with the rate of depreciation long ago in the *Tariff Case* or in a rate case involving TCO. With respect to the ten-year amortization period recommended by Staff, Cobra argues that it is unfair to demand that the Company assume the burden of 40-plus years of alleged over-depreciation during the most financially challenging moment of its existence, particularly where any benefit accrued to a different entity. Cobra concludes that the 45-year amortization period recommended by Mr. Hess would afford the Company roughly the same period of time to pay the over-accrual back as it took for the over-accrual to build. (Co. Reply Br. at 20-22.)

{¶ 82} The Commission finds that Cobra has failed to sustain its burden of proof on this issue. Cobra offered no testimony or other evidence to support its claim that it has adopted and followed TCO's depreciation schedule for the assets in question or to show that such an approach would be reasonable and appropriate. Neither has Cobra supported its claim that the Commission implicitly approved the Company's depreciation schedule in the *Tariff Case*. In the *Tariff Case*, the Commission approved a proposed tariff for Cobra pursuant to a stipulation and recommendation between the Company and the Ohio Oil and Gas Association. Although the Commission noted in the Finding and Order that an affiliate of Cobra intended to purchase pipe and related appurtenances from TCO, which would be owned by the Company, the Commission specifically indicated that it was not approving any purchase of pipeline by the Company or any of its affiliates. *Tariff Case*, Finding and Order (June 27, 2007) at 1, 2. Nothing in Cobra's application or in the Commission's Finding and Order suggests that the Company provided a depreciation schedule or any other information about the TCO assets, other than a map depicting their location, for review by the Commission.

{¶ 83} Although Cobra witness Hess addressed Staff's treatment of the depreciation reserve imbalance, his testimony on this issue is limited to a recommendation that the depreciation reserve imbalance be amortized over a 45-year period, in order to avoid

a material impact on the Company's revenues and overall financial situation (Co. Ex. 4 at 4-5). However, as Staff witness Swami testified, a ten-year amortization period is consistent with the Staff's practice in prior cases (Staff Ex. 7 at 3). The Commission has typically approved amortization periods of ten years or less for depreciation reserve imbalances. *See, e.g.*, *In re Columbia Gas of Ohio, Inc.*, Case No. 88-716-GA-AIR, et al., Opinion and Order (Oct. 17, 1989) (directing that depreciation reserve imbalance be amortized over ten years and rejecting 30-year amortization period proposed by Ohio Consumers' Counsel); *In re Century Telephone of Ohio, Inc.*, Case No. 92-2298-TP-AAM, Entry (Jan. 7, 1993) (approving six-year amortization period); *In re Cincinnati Bell Telephone Co.*, Case No. 91-2173-TP-AAM, Entry (Dec. 19, 1991) (approving five-year amortization period); *In re Ohio Bell Telephone Co.*, Case No. 90-1852-TP-AAM, Entry (Dec. 20, 1990) (approving three-year amortization period). With respect to Cobra's depreciation reserve imbalance, we find that Staff's recommended ten-year amortization period is reasonable and appropriate (Staff Ex. 7 at 3).

7. OPERATING EXPENSES

{¶ 84} Cobra objects to Staff's treatment of several categories of operating expenses, including rate case expenses, professional legal service expenses, wages and employee benefit expenses, and expenses associated with the *Investigative Audit Case*.

a. Rate Case Expenses

{¶ 85} With respect to rate case expenses, Cobra notes that, although Staff agrees that the Company should be permitted to recover all such expenses, Staff and the Company do not agree on the amortization period. Cobra contends that, given the lengthy duration of the *Rate Case*, which the Company was directed to file, a one-year period should be used rather than the four- or five-year period recommended in the Staff Report. (Co. Br. at 16-17.)

{¶ 86} Staff submits that the amortization period for Cobra's rate case expense is not properly before the Commission, as the Company failed to raise this issue in its initial

or amended objections, waiting instead to address the issue in the direct testimony of Company witness Carothers. Noting that Cobra witness Hess acknowledged that Staff's proposed five-year amortization period is legitimate and should remain unmodified, Staff asserts that its recommendation should be adopted by the Commission. In response to Cobra's claim that Staff's workpaper appears to apply a four-year amortization period for rate case expense, Staff asserts that the Company is clearly mistaken, as the workpaper in question reflects an amortization of rate case expense over five years. (Staff Br. at 45; Staff Reply Br. at 11-12.)

{¶ 87} Acknowledging that a five-year amortization period may be standard in a typical rate proceeding, Cobra asserts that the *Rate Case* has not been typical and that delaying its ability to recover its expenses for Commission-ordered proceedings will jeopardize its existence. Cobra adds that, given its current financial situation and the filing of the application in the *Emergency Rate Case*, any rate approved in the *Rate Case* will likely not be in place for five years. (Co. Reply Br. at 16-17.)

{¶ 88} The Commission finds that Cobra's rate case expenses should be amortized over five years, as recommended by Staff and accepted by Company witness Hess (Co. Ex. 2 at Ex. B at 8; Co. Ex. 4 at 7-8; Tr. II at 268-269). A five-year amortization period is reasonable and consistent with the Commission's general practice. *See, e.g.*, *In re Columbia Gas of Ohio, Inc.*, Case No. 71-461-GA-AIR, et al., Opinion and Order (Dec. 28, 1973) (noting "the long-standing Commission practice of amortizing rate case expenses over a five year period" unless a different period is warranted by the applicant's actual rate case history). To determine a proper amortization period for rate case expenses, the Commission considers, based on past actual experience, the number of years for which the newly established rates are likely to remain in effect. The Commission has noted that an applicant's "recent history of rate case filings provides a reasonable basis for establishing the period over which rate case expenses should be amortized, especially in the absence of any compelling evidence that a shorter period is appropriate." *In re Ohio Suburban Water Co.*, Case No. 81-657-WS-

AIR, Opinion and Order (May 5, 1982). Cobra offers no support for its position that its rate case expenses should be amortized over a one-year period. Although Cobra argues that its financial condition is at risk, there is no evidence that Cobra's rates will remain in effect for just one year following the Commission's resolution of these proceedings. Under Cobra's proposal, the Company's customers would continue, year after year, to pay rates that reflect the full amount of the Company's rate case expenses, despite the fact that the Company would have already recovered such expenses in the first year. Such a result would be unreasonable.

{¶ 89} Staff witness Berringer testified that, before a final determination is made with respect to Cobra's rate case expenses, the Commission should review the most up-to-date information, which the Company should submit as a late-filed exhibit (Staff Ex. 9 at 8). Cobra witness Hess also recommended that the Company be permitted to file documentation of its updated rate case expenses within ten days of the close of the hearing (Co. Ex. 4 at 6). Cobra, however, has not complied with the recommendations of Staff and its own witness. Given that Cobra has not submitted a late-filed exhibit reflecting its updated rate case expenses, and in light of the fact that the Commission must base its decision on the record, we adopt Staff's position on this issue as set forth in the Staff Report (Co. Ex. 2 at Ex. B at 8).

b. Professional Legal Service Expenses

{¶ 90} Additionally, Cobra argues that the Commission should accept Company witness Hess's calculation of professional legal service expenses, which consists of an average of such expenses incurred from 2012 through 2014, to obtain a more accurate figure. Cobra notes that, although the Staff Report recommended a decrease to Cobra's professional legal service expenses, Staff witness Berringer later agreed with the Company's proposal to use an average of expenses. (Co. Br. at 17-18.)

{¶ 91} Staff responds that Mr. Hess's approach is another example of the Company preferring to rely on numbers outside of the test period, given that Mr. Hess recommended that the test-year expenses be excluded from the calculation of the average. Staff contends that it already accounted for the low test-year expense by performing a four-year averaging. Staff notes that Staff witness Berringer agreed that certain excluded expenses should have been included and, accordingly, Staff corrected the test-year expenses and adjusted its averaging to reflect that correction. Staff concludes that the Commission should adopt its recommended allowance for recovery of legal professional services and that any averaging to derive a more appropriate annual level should include the test-year expenses. (Staff Br. at 44-45; Staff Reply Br. at 12.)

{¶ 92} The Commission adopts Staff's recommendations on this issue, as set forth in the Staff Report and as subsequently revised in the direct testimony of Staff witness Berringer. In the Staff Report, Staff noted that it adjusted Cobra's Professional Services – Legal account by removing certain expenses and then further adjusting the test-year expenses to reflect a more appropriate historical average (Co. Ex. 2 at Ex. B at 7). In his direct testimony, Staff witness Berringer agreed with Cobra witness Hess that the 2015 balance in the account should be $678.22. As a result, Mr. Berringer stated that Staff's average for the 2012-2015 period would increase test-year expenses from $21,571.25 to $26,907.55. Mr. Berringer, however, did not agree with Mr. Hess's position that the average for the 2012-2014 period, which is $35,650.65, should be adopted as a more representative amount of Cobra's ongoing expenses. (Staff Ex. 9 at 7, App. 1; Co. Ex. 4 at 5-6; Tr. II at 265-266, 336-337.) Although Cobra's professional legal service expenses for 2015 may have been uncharacteristically low as Mr. Hess believes, we find that it would be inappropriate to ignore entirely the Company's actual expenses for the test year. We agree with Staff that it is reasonable to account for the low test-year expense by calculating the average for a four-year period that includes the test year (Co. Ex. 2 at Ex. B at 7; Staff Ex. 9 at 7, App. 1; Tr. II at 336-337).

c. Salaries and Benefits

{¶ 93} Cobra also notes that the Staff Report adopted the Company's allocation of salaries and benefits between Cobra and OTP, as set forth in the Company's application. Given that Cobra and OTP are no longer affiliates, Cobra asserts that the Commission should acknowledge the Company's current financial situation and adjust its expenses for salaries and employee benefits accordingly. Cobra notes that, although Staff adjusted wages and salaries to the latest known figures, Staff is unwilling to forgo the allocation of such expenses between Cobra and OTP. Cobra reiterates that Staff's over-reliance on the test year is unnecessary and unfairly deprives the Company of the opportunity to earn a reasonable rate. (Co. Br. at 18.)

{¶ 94} Staff notes that it accepted Cobra's methodology for allocating expenses between Mr. Osborne's two intermingled pipeline companies. According to Staff, the allocation reflects the costs of rendering utility service during the test period prescribed by the General Assembly. Staff reiterates that the Commission should not reallocate expenses outside of the test year. In its reply brief, Staff asserts that it would not be appropriate to eliminate the very allocation that Cobra itself proposed, simply to offset unanticipated changes in operations, particularly in light of Ohio Supreme Court precedent upholding the test year concept. *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 372, 376, 424 N.E.2d 300 (1981); *Ohio Water Service Co. v. Pub. Util. Comm.*, 3 Ohio St.3d 1, 3, 444 N.E.2d 1025 (1983). Staff adds that there is no regulatory principle of "annualizing to the most current costs," as Cobra contends. (Staff Br. at 42-43; Staff Reply Br. at 12-14.) NEO asserts that, pursuant to R.C. 4909.15(D), the Commission should strike Cobra's objections related to OTP's receivership, as it did not occur until November 2017. NEO further asserts that, in any event, Cobra appears to have overstated its need for post-test-year adjustments. (NEO Br. at 6-7, 23-26.)

{¶ 95} As Staff witness Berringer testified, individuals employed by Cobra performed work for both the Company and OTP during the test year. Staff, therefore,

incorporated the Company's proposed allocation into its adjustment for wages and salaries. (Staff Ex. 9 at 2.) Consistent with our determinations above, we find that Staff's approach is proper and consistent with R.C. 4909.15 and the Ohio Supreme Court's application of the statute. R.C. 4909.15(C); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 538-539, 620 N.E.2d 835 (1993); *City of Columbus v. Pub. Util. Comm.*, 10 Ohio St.3d 23, 25, 460 N.E.2d 1117 (1984); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 372, 374, 424 N.E.2d 300 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166, 423 N.E.2d 820 (1981). In any event, Cobra has failed to sustain its burden of proof on this issue. Although Ms. Coatoam emphasized that OTP is now operated by a receiver (Co. Ex. 2 at 10), the record indicates that the work responsibilities of Cobra's employees remain divided between the Company and its affiliates. Ms. Coatoam testified that, from 2013 to 2017, she performed work for both Cobra and John D. Oil and Gas Company, an affiliate of the Company (Tr. I at 22-26), while Ms. Carothers acknowledged that she has, since 2008, performed services for numerous affiliates of the Company (Tr. I at 116-118). Further, as noted above, post-test-year changes in Cobra's financial situation should be addressed in the context of the Company's application for emergency rate relief.

d. Investigative Audit Expenses

{¶ 96} Finally, Cobra asserts that it should be permitted to recover, as part of its rate case expenses, the costs associated with the audit conducted in the *Investigative Audit Case*. Cobra notes that the costs associated with the investigative audit were incurred by the Company at the direction of the Commission and, therefore, are properly included in the Company's rate case expenses. (Co. Br. at 18-19.)

{¶ 97} Staff responds that Schumaker's audit was not conducted as part of the *Rate Case* and that, in any event, the costs of the audit were not incurred during the test year and were to be borne by the Company. *Investigative Audit Case*, Entry (Sept. 14, 2016) at ¶ 8. Staff maintains that Cobra has offered no explanation for its position that the investigative audit costs should be recovered in the *Rate Case*. Because the cost of Schumaker's audit does not

involve legal fees or relate to Cobra's request for rate relief, Staff concludes that it should be excluded from rate case expense. *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 547, 620 N.E.2d 835 (1993). (Staff Br. at 46-48; Staff Reply Br. at 14.)

{¶ 98} NEO argues that Cobra's objection on this issue should be stricken pursuant to R.C. 4909.15(D), as the objection relates to costs incurred by the Company beyond the immediate 12-month period following the test year. Noting that the investigative audit was conducted in a separate proceeding, NEO states that the Commission explicitly required that the cost of the audit be borne by Cobra. (NEO Br. at 4, 27.)

{¶ 99} Cobra responds that the *Rate Case* and the *Investigative Audit Case*, which both stem from the Commission's orders in the *Complaint Case*, are inextricably linked in order to permit the Commission to exhaustively examine the Company's operations. Cobra also claims that it has rapidly addressed the weaknesses identified in Schumaker's audit report, where it possessed the financial means of doing so. Finally, Cobra asserts that, although the Commission directed the Company to bear the cost of the investigative audit, the Company is not precluded from seeking recovery of a legitimate cost. (Co. Reply Br. at 17.)

{¶ 100} The Commission finds that Cobra's position lacks merit. The costs associated with the audit at issue in the *Investigative Audit Case*, which is a separate proceeding from the *Rate Case*, were incurred after the test period. *Investigative Audit Case*, Entry (Sept. 14, 2016) (directing that the investigative audit be conducted from October 2016 to April 2017). Further, as Staff notes, any costs attributable to Schumaker's investigative audit are unrelated to Cobra's application for an increase in its rates and charges and, therefore, should not be included in the Company's rate case expense. *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 547, 620 N.E.2d 835 (1993) (finding that "[t]he appropriate inquiry is whether legal fees are ordinary and necessary expenses in obtaining rate relief as provided by law").

8. PERSONAL PROPERTY TAXES

{¶ 101} Cobra asserts that its previously assessed personal property taxes should be accounted for and recovered as a regulatory asset. Cobra notes that, back in 2007 when its tariff was approved in the *Tariff Case*, the Company operated in partnership with OsAir, Inc. (OsAir), an affiliate company also owned by Mr. Osborne. Cobra further notes that, at that time, the Company paid commercial activity taxes as part of a group filing in the name of OsAir. According to Cobra, the Ohio Department of Taxation notified the Company in 2014 that the Company was required to pay personal property taxes rather than commercial activity taxes. (Co. Br. at 20.)

{¶ 102} Noting that its current financial situation does not permit payment of the previously assessed personal property taxes, Cobra requests that it be authorized to create a regulatory asset and establish a rider for this purpose. In support of its request, Cobra states that it has not at any point collected from its customers the difference between the commercial activity taxes and the personal property taxes. Cobra also asserts that its customers have benefited by paying lower rates to the Company than they would have been charged if the proper tax had been paid. (Co. Br. at 20, 21-22.)

{¶ 103} Staff responds that only those taxes that were incurred during the test year are eligible for recovery in the *Rate Case* and, therefore, Staff removed personal property taxes assessed in prior years from Cobra's test-year expenses. Staff also argues that, as acknowledged by Cobra witness Coatoam, the Company's past due tax liabilities are the result of its mismanagement and not a lack of knowledge about the tax obligations of public utilities, given that Mr. Osborne owned and operated other public utilities in the state as far back as 2003. Staff notes that Cobra witness Hess agreed that customers should not subsidize the Company's mismanagement. With respect to Cobra's contention that it should also be permitted to recover unpaid personal property taxes that it owes for the period after the test year, including penalties and interest, Staff asserts that the Company made no such request until it filed its direct testimony and, in any event, the record contains

conflicting information provided by the Company as to the amount of its accrued personal property taxes. Staff adds that Cobra witness Hess agreed that the Company should not be entitled to recover penalties for its failure to pay its personal property taxes. Addressing Cobra's current financial position, Staff responds that it is largely the result of the Company's own nonfeasance and misfeasance rather than its tax liability. Staff concludes that the purpose of a rate proceeding is not to save a public utility from itself, but rather is to establish just and reasonable rates as prescribed by R.C. 4909.15. (Staff Br. at 48-54; Staff Reply Br. at 16.)

{¶ 104} Additionally, Staff notes that Cobra did not object to Staff's refusal to allow recovery of the Company's outstanding excise tax liability, which the Company has not quantified or documented for the Commission. According to Staff, Cobra has paid its excise tax assessment in only one year since its founding, instead paying, until 2014, the substantially lower commercial activity tax that is inapplicable to pipeline companies and other public utilities. Staff concludes that, as with its personal property taxes, Cobra has mismanaged its excise tax obligations. In its reply brief, Staff adds that Cobra still does not understand its tax obligations, given the Company's representation that it was informed by the Ohio Department of Taxation that it should pay personal property taxes rather than commercial activity taxes. Staff notes that Cobra was assessed excise taxes by the Ohio Department of Taxation, not personal property taxes. (Staff Br. at 54-57; Staff Reply Br. at 15.)

{¶ 105} As a general matter, NEO argues that, consistent with R.C. 4909.154 and long-established precedent of the Commission and the Ohio Supreme Court, the Commission should not permit Cobra to recover any expenses that were incurred through the Company's financial mismanagement and imprudence. NEO contends that Cobra's failure to timely pay its personal property tax liabilities over a period of several years constitutes gross financial mismanagement and imprudence for which customers should not be held financially responsible. NEO also notes that most of Cobra's accrued personal

property taxes were booked outside of the test year and that the Company seeks to recover interest and penalties as well, despite the fact that Company witnesses Hess and Coatoam agreed that such costs are not recoverable. NEO maintains that Cobra has not met its burden to demonstrate that the expenses in question were prudently incurred or offered any evidence to justify its failure to pay millions of dollars in personal property taxes. Emphasizing that Cobra's unaudited financial statements reflect approximately $4.2 million in accounts receivable from various related parties and associated companies as of December 31, 2015, as well as $1.8 million withdrawn by Mr. Osborne that remains outstanding, NEO asserts that the Commission must disallow recovery of the $4,165,371.13 million or more in personal property tax delinquencies, including penalties and interest, that the Company now owes. According to NEO, Cobra should have and could have paid its taxes had it not commingled funds and engaged in self-dealing transactions. Additionally, NEO asserts that, as with the personal property taxes, Cobra has offered no evidence to demonstrate that its outstanding excise tax liability was prudently incurred or even to document the precise amount of the delinquent excise taxes, which the record reflects is at least $208,221.58. (NEO Br. at 11-17; NEO Reply Br. at 12-17.)

{¶ 106} In its reply brief, Cobra argues that the evidence demonstrates that it is making those efforts of which it is capable to rectify its failure to pay its personal property taxes. Cobra asserts that its request to recover the previously assessed personal property taxes through a rider is merely a request to pass a legitimate and unavoidable cost through to customers that should have been paying a rate sufficient to allow the tax to be paid in the first place. Cobra also concedes that interest and penalties on that amount were not prudently incurred and must be borne by the Company's members. Cobra adds that, by authorizing recovery through a rider, the Commission will be able to monitor the recovery and ensure that the state receives the tax revenues that it is owed. (Co. Reply Br. at 19-20.)

{¶ 107} In the Staff Report, Staff noted that the expense associated with personal property taxes assessed Cobra in years prior to 2015 is not appropriate to include in test-

year expenses. Staff, therefore, decreased Cobra's expenses by $1,229,574, in accordance with the amount shown on the Company's income statement for 2015. (Co. Ex. 2 at Ex. B at 8; NEO Ex. 1 at Ex. 8 at 2.) Staff witness Snider testified that Cobra's customers have already paid for these taxes through the rates that the Company has historically charged and that it was the Company's responsibility to use the funds collected through its rates to meet its financial obligations (Staff Ex. 11 at 6). Agreeing with Staff that an adjustment is necessary, Cobra witness Hess recommended that the previously assessed personal property taxes be deferred and either recovered through an amortization of the expense in the test year or recovered through a rider mechanism created for this specific purpose. According to Mr. Hess, Cobra's previously assessed personal property taxes should be deemed verifiable and legitimate costs that are directly assignable to the Company's customers and related to the Company's rendering of its public utility service. (Co. Ex. 4 at 7.)

{¶ 108} The Commission generally agrees that, for the purpose of ratemaking, validly imposed taxes of any kind should be considered as an operating expense of the public utility. *See City of Cincinnati v. Pub. Util. Comm.*, 153 Ohio St. 56, 90 N.E.2d 681 (1950). However, as discussed above, the mandatory ratemaking formula set forth in R.C. 4909.15 requires that a public utility's expenses be determined during a test year. R.C. 4909.15(C); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 538-539, 620 N.E.2d 835 (1993); *City of Columbus v. Pub. Util. Comm.*, 10 Ohio St.3d 23, 25, 460 N.E.2d 1117 (1984); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 372, 374, 424 N.E.2d 300 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166, 423 N.E.2d 820 (1981). Cobra's personal property tax obligations for the years prior to the test year are not a mere anomaly that renders the test year unrepresentative for ratemaking purposes. *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d at 166, 423 N.E.2d 820. Staff, therefore, properly excluded Cobra's out-of-period property tax expense, which accrued from 2008 through 2014 (Co. Ex. 2 at 11-13, Ex. B at 8, Ex. G; NEO Ex. 1 at Ex. 8 at 2; Staff Ex. 1 at 1).

{¶ 109} Further, as Staff and NEO note, R.C. 4909.154 provides that the Commission shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the Commission considers imprudent. Here, the record reflects that Cobra has failed, over many years, to pay any of its personal property taxes, incurring substantial penalties and interest (Co. Ex. 2 at 11-13, Ex. G; NEO Ex. 1 at Ex. 8 at 2). The Commission is not persuaded by Cobra witness Coatoam's assertion that "Cobra has been unable to pay any of the previously owed personal property or excise taxes to date due to the financial situation of the [C]ompany" (Co. Ex. 2 at 12-13). Although Cobra witness Carothers argues that the Company's financial situation has changed since the test year (Co. Ex. 3 at 14-15), nothing in the record substantiates the claim that the Company was unable to pay its tax obligations during the test year or prior years. Rather, Cobra's failure to pay its taxes is a result of the Company's mismanagement, as Ms. Coatoam readily acknowledged (Tr. I at 39-40, 46). Accordingly, Cobra's outstanding previously assessed personal property taxes for years prior to the test period, along with the associated penalties and interest, are, at this point in time, imprudently incurred expenses that are barred from recovery by R.C. 4909.154.

9. FEDERAL INCOME TAXES

{¶ 110} Finally, Cobra contends that Staff's recommendation to reduce the corporate federal income tax rate to 21 percent, in light of the Tax Cuts and Jobs Act of 2017 (TCJA), is both inconsistent and improper as applied to the Company. Initially, Cobra notes that this recommendation is another example of Staff's use of information outside of the test year. Further, Cobra asserts that Staff's adjustment ignores the fact that, as a limited liability company, Cobra is not taxed at the rate applicable to corporations, but instead is taxed at the much higher individual tax rate of its owners, Mr. Osborne and FCCC. According to Cobra, Staff has taken the unreasonable position that, with regard to Mr. Osborne's ownership share, the 21 percent corporate federal income tax rate should apply regardless of the actual tax rate that may be applicable, while FCCC's tax rate should be treated as zero,

given that Staff was unable to determine the ownership makeup of FCCC. (Co. Br. at 22-23.)

{¶ 111} Staff responds that its recommendation is consistent with past practice and should be adopted. Staff notes that Staff witness Borer testified that, in accordance with Commission precedent, all regulated public utilities should be taxed at the corporate federal income tax rate, in order to ensure a uniform and consistent approach to ratemaking. Staff also notes that, during the test year, Cobra was owned by the Richard M. Osborne Trust, and not by Mr. Osborne in an individual capacity. In the event that the Commission determines that Cobra's federal income tax expense should be based on Mr. Osborne's individual rate, Staff advises that a number of adjustments would be required, including a deduction for qualified business income and an allocation of taxable income between the Company and FCCC, which would reduce the Company's federal income tax expense. Finally, regardless of which tax rate is applied, Staff submits that its correction to the computation of Cobra's federal taxable income, as addressed by Staff witness Borer, should be implemented. In its reply brief, Staff asserts that, because Mr. Osborne's ownership interest was through a trust, and because FCCC refused to disclose its owners or ownership structure, Staff was unable to determine exactly which entities are taxed, and in what fashion, for Cobra's income. For this reason, Staff recommends that the corporate federal income tax rate be applied for uniformity and consistency. (Staff Br. at 57-59; Staff Reply Br. at 16-17.)

{¶ 112} NEO asserts that Cobra witness Hess failed to incorporate changes to depreciation rules that may apply if the individual tax rate is used in place of the corporate tax rate. NEO adds that Mr. Hess was unaware that, during the test year, Cobra was owned by the Richard M. Osborne Trust rather than by Mr. Osborne personally. (NEO Br. at 32; NEO Reply Br. at 27-28.)

{¶ 113} Cobra responds that Staff has placed more importance on uniformity than actual fact when considering what federal income tax rate should apply to the Company. Cobra reiterates that, as a limited liability company, it is taxed as a pass-through entity, meaning that the taxes are passed through to its members, Mr. Osborne and FCCC. Cobra concludes that Staff's position is inconsistent and intended to provide the Company with the lowest possible amount of recovery, while disregarding the actual tax rate applied to the Company by the federal government. (Co. Reply Br. at 22-23.)

{¶ 114} The Commission has previously found that known changes in tax laws, including those that will take effect subsequent to the test year, must be recognized in determining allowable expenses. *In re Ohio Edison Co.*, Case No. 83-1130-EL-AIR, Opinion and Order (July 27, 1984) (citing *East Ohio Gas Co. v. Pub. Util. Comm.*, 133 Ohio St. 212, 226-227, 12 N.E.2d 765 (1938) (finding that "[i]t was the duty of the [C]ommission to consider not only the taxes actually assessed during the test period, but to compute what they would be after the test period in view of the change in laws")). We, therefore, find no merit in Cobra's argument that Staff erred in reducing the corporate federal income tax rate based on the TCJA. However, Cobra also contends that the corporate federal income tax is inapplicable to Cobra as a limited liability company. Cobra witness Hess testified that the Company files its federal income taxes as a limited liability company partnership based on a pro-rata share of each of its owners, which report their pro-rata income on their individual income tax returns. Because Cobra's majority owner is single, Mr. Hess recommended that the tax rate schedules for a single taxpayer be used to determine the Company's federal income taxes. (Co. Ex. 4 at 9.)

{¶ 115} Acknowledging that the Commission may disagree with its recommendation to apply the corporate rate, Staff proposes two modifications to Cobra's approach. Specifically, Staff asserts that the calculation of Cobra's federal income tax expense should include the deduction for qualified business income, which was created under the TCJA. Staff further asserts that Cobra's taxes should be determined

proportionally based on the tax liabilities of its owners, Mr. Osborne and FCCC. However, because FCCC is itself a limited liability company, and no information was provided in response to Staff's data request seeking information regarding the owners of FCCC, Staff was unable to reasonably determine the income tax liability associated with FCCC's interest in Cobra or even whether any such income tax liability exists. Staff, therefore, recommends that FCCC's share of Cobra's taxable income be excluded from the calculation. (Staff Ex. 10 at 4-6; Tr. II at 340-341.)

{¶ 116} The Commission is required to allow, as an item of expense, the amount of federal income tax that is required to be paid under federal income tax law. *City of Dayton v. Pub. Util. Comm.*, 174 Ohio St. 604, 190 N.E.2d 913 (1963); *Ohio Fuel Gas Co. v. Pub. Util. Comm.*, 174 Ohio St. 585, 191 N.E.2d 347 (1963). We, therefore, reject Staff's recommendation that the corporate tax rate be used to determine Cobra's income tax expense, as the Company's income is not taxed by the federal government at the corporate tax rate (NEO Ex. 1 at Ex. 6).[13] As Cobra witness Hess testified, the owners of a limited liability company are generally required to pay taxes on their respective share of the company's profits through the filing of their personal income tax returns (Co. Ex. 4 at 9). We adopt Staff's modifications to Mr. Hess's recommendation that an individual tax rate be used to determine Cobra's income tax expense. As noted above, the Commission, in setting rates, recognizes changes in the federal tax law. We, therefore, find that it is appropriate to account for the TCJA's qualified business income deduction, which, according to Staff, enables a domestic pass-through entity such as Cobra to deduct up to 20 percent of its qualified business income (Staff Ex. 10 at 5). We further find, based on the record, that FCCC's share should be excluded from the calculation of Cobra's taxable income. Cobra has the burden of proof in these proceedings and, in the absence of any record evidence addressing FCCC's ownership, the Commission adopts Staff's proposal to determine

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[13] The Commission notes that Cobra's Form 1065 for 2015 was filed under seal, as part of the Company's application in the *Rate Case* (NEO Ex. 1 at Ex. 6).

Cobra's taxable income based on Mr. Osborne's 85.93 percent ownership share, as reflected in Staff's revised Schedule C-4. (Staff Ex. 10 at 5-6; NEO Ex. 1 at Ex. 2.)

E. Conclusion on the Rate Case

{¶ 117} The Commission adopts the schedules in the Staff Report, as modified by the revised schedules attached to the direct testimony of Staff witness Borer, which contain the appropriate information to determine the gross revenue and the revenue increase, if any, that Cobra should have the opportunity to collect as a result of these proceedings (Co. Ex. 2 at Ex. B; Staff Ex. 10).[14]

{¶ 118} The Commission finds that the jurisdictional rate base summary as of December 31, 2015, is as follows:

Plant in Service	$23,754,352
Depreciation Reserve	$19,447,888
Net Plant in Service	$4,306,465
Construction Work in Progress	$0
Working Capital Allowance	$140,355
Other Rate Base Items	$0
Rate Base	**$4,446,820**

(Staff Ex. 10 at Sched. B-1).

[14] The Commission notes that some of the figures in this section of the Opinion and Order may reflect the results of rounding.

{¶ 119} The Commission finds that the following information reflects Cobra's adjusted operating revenues, adjusted operating expenses, and adjusted net operating income for the 12 months ended December 31, 2015:

Operating Revenues	
Revenues	$2,974,291
Other Revenues	$19,219
Total Operating Revenues	**$2,993,510**
Operating Expenses	
Operation and Maintenance	$1,816,768
Depreciation	$332,775
Taxes Other than Income Taxes	$238,706
Income Taxes	$108,256
Total Operating Expenses	**$2,496,505**
Net Operating Income	**$497,005**

(Staff Ex. 10 at Sched. C-2).

{¶ 120} A comparison of Cobra's adjusted test-year operating revenues of $2,993,510, with allowable adjusted test-year expenses of $2,496,505, indicates that the Company, under its present rates, would have realized net operating income of $497,005. Applying this figure to the rate base, Cobra would have earned a rate of return of 11.18 percent during the test year. A rate of return of 11.18 percent is above Staff's recommended rate of return range of 8.59 percent to 9.59 percent and would provide Cobra with excess

compensation for its services. The Commission finds that the midpoint of Staff's recommended rate of return range should be adopted. Accordingly, we find that a rate of return of 9.09 percent should be authorized for Cobra for purposes of the *Rate Case*. (Staff Ex. 10 at Sched. A-1.)

{¶ 121} By applying the authorized rate of return of 9.09 percent on the rate base of $4,446,820, Cobra's required operating income is $404,216. When compared with Cobra's test-year adjusted operating income of $497,005, the Company has excess income in the amount of $92,789. After applying a gross revenue conversion factor, the result is a decrease in revenues of $128,540, or a decrease of 4.30 percent. The revenue decrease of $128,540, when subtracted from the adjusted test-year operating revenues of $2,993,510, produces a revenue requirement of $2,864,971. (Staff Ex. 10 at Sched. A-1.)

{¶ 122} In the Staff Report, Staff's analysis resulted in a revenue decrease of 0.98 percent at the lower bound or a revenue increase of 1.02 percent at the upper bound. As a result, Staff recommended that Cobra's current rates not be increased, as the Company's revenue requirement essentially had not increased. (Co. Ex. 2 at Ex. B at 11, Sched. A-1.) Following incorporation of the adjustments addressed in Staff's testimony, Staff revised the outcome of its revenue analysis to a decrease of 5.29 percent at the lower bound or a decrease of 3.30 percent at the upper bound (Staff Ex. 10 at Sched. A-1). As noted above, the midpoint of Staff's range, as revised, is a revenue decrease of 4.30 percent. Given that Cobra's revenue requirement has still largely remained unchanged, the Commission finds that Cobra's current rates are sufficient to provide the Company with reasonable compensation for the services rendered to its customers and that Cobra has failed to demonstrate otherwise, consistent with the resolution of the Company's objections as addressed above. We, therefore, find that Cobra's current rates should not be changed.

{¶ 123} The Staff Report notes that Cobra proposed no textual changes to its tariffs (Co. Ex. 2 at Ex. B at 11). However, consistent with the Commission's directive in the

Complaint Case, Cobra proposed, in its amended application, to establish a shrinkage rate of 3.5 percent to be adjusted on an annual basis. The Commission finds that Cobra's proposal is reasonable and should be adopted.

{¶ 124} Cobra is hereby ordered to file revised tariff schedules in accordance with the terms of this Opinion and Order. The revised tariffs shall take effect beginning on a date not earlier than the date of this Opinion and Order and the date upon which the final tariff pages are filed with the Commission.

F. Summary of the Application and the Emergency Staff Report in the Emergency Rate Case

{¶ 125} In the application filed in the *Emergency Rate Case*, Cobra states that it is in urgent need of rate relief. Cobra asserts that its financial status has deteriorated dramatically during the two years since the *Rate Case* was filed and that the Company has experienced both a decrease in revenues and an increase in expenses. Noting that its current rates do not provide sufficient revenue to cover the cost of its operations, 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 be applied to all of its transportation customers' bills until the Commission either 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 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. Cobra submits that the current status of the Company will demonstrate that a much larger increase than the requested surcharge is warranted. (NEO Ex. A at 6-7, Ex. E.)

{¶ 126} In the Emergency Staff Report, Staff concludes that Cobra's current financial condition is, in large part, a result of the Company's failure to manage its funds properly. Staff, therefore, recommends that Cobra's proposed surcharge be rejected. Staff further

recommends that, if the Commission finds that a surcharge is necessary, a $0.40 surcharge be applied to each of Cobra's volumetric rates until such time as permanent rates are established by the Commission. (Staff Ex. G at 4.)

{¶ 127} The proposed emergency rates are shown below:[15]

	Current Rate	Cobra's Proposed Rate	Staff's Proposed Rate
Firm Transportation Service			
Demand	$0.50 x MDQ x number of days in the month	$1.05 x MDQ x number of days in the month	$0.50 x MDQ x number of days in the month
Commodity	$0.10 per Dth	$0.10 per Dth	$0.50 per Dth
Unauthorized Daily Overrun	$0.50 per Dth	$1.05 per Dth	$0.90 per Dth
Interruptible Transportation Service			
Commodity	$0.50 per Dth	$1.05 per Dth	$0.90 per Dth

G. *Summary of the Parties' Positions in the* Emergency Rate Case

{¶ 128} In its brief, Cobra asserts that it is suffering a financial emergency due to a dramatic loss in shipped volumes since 2015, which has caused the Company to experience a significant decrease in transportation revenues. Cobra further asserts that, with the decrease in volumes, it has become economically inefficient to operate its stripping station, which has eliminated the Company's sales of extracted products. Cobra adds that, because the stripping station is unavailable, the gas in the Company's system remains "wet" and fails to meet TCO's quality standards, resulting in a shut in of part of the system by TCO.

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15 In their direct testimony, Cobra witnesses Carothers and Coatoam proposed an emergency rate of $0.87 per Dth (Co. Ex. A at 9; Co. Ex. B at 3). However, in its application and initial brief, Cobra advocates for a surcharge of $0.55 per Dth, with a resulting emergency rate of $1.05 per Dth (NEO Ex. A at Ex. E; Co. Br. at 18).

According to Cobra, the shut in of the Churchtown system, which operates at a different pressure than TCO's system, has resulted in the loss of most of the Company's revenues for compression services. Cobra concludes that it has lost $1,307,945.78, or 41.2 percent, of its total annual revenues as a result of the loss in volumes, when compared to 2015, which has compelled the Company to seek emergency relief. (Co. Br. at 10-14.)

{¶ 129} Additionally, Cobra contends that it has provided clear and convincing evidence, in both the *Rate Case* and the *Emergency Rate Case*, showing that the loss of volumes has created a financial emergency for the Company. Cobra emphasizes that all of its financial records have been made available for review by Staff. Further, Cobra claims that the Commission will not be circumventing or substituting a permanent rate by granting emergency relief to the Company, because the requested surcharge would only remain in place until a permanent just and reasonable rate is lawfully determined. Finally, Cobra argues that it seeks only the relief necessary to pay its anticipated obligations as they are incurred and has, therefore, proposed a surcharge that would cover all of its actual and projected expenses for 2018, excluding depreciation and any expenses to which Staff objected in the *Rate Case*. With respect to the implementation of any surcharge approved by the Commission, Cobra notes that the Commission has broad authority to ensure that the additional revenues provided by the surcharge are used to pay the Company's operating expenses. (Co. Br. at 14-18.)

{¶ 130} Staff takes the position that Cobra has not demonstrated that it is experiencing an emergency. Initially, Staff points out that Cobra's major problem is its accrued personal property tax liability. Noting that Cobra has paid no personal property taxes since its inception in 2008, Staff asserts that the Company's failure to pay its taxes constitutes a chronic problem rather than an emergency for which the Company's customers should be responsible. Further, Staff asserts that the record reflects that utility funds that might otherwise be used to pay other expenses and liabilities were instead used to subsidize Mr. Osborne's personal business interests. According to Staff, misconduct and

mismanagement on the part of Mr. Osborne should not be considered an emergency. With respect to Cobra's claimed need for emergency rate relief, Staff agrees that the Company has lost volumes, but does not agree that the precipitating market conditions are beyond the Company's control. Staff concludes that Cobra's financial situation is largely a result of its failure to manage its funds properly, as evidenced by the significant irregularities in the Company's financial records. In its reply brief, Staff reiterates that, while Cobra cannot pay some of its bills, the record does not clearly and convincingly demonstrate that the Company's obligations must be paid immediately or that the Company's financial condition jeopardizes its ability to provide adequate service. (Staff Br. at 3-12; Staff Reply Br. at 1.)

{¶ 131} NEO asserts that Cobra has failed to provide clear and convincing evidence of extraordinary circumstances necessary to grant the emergency relief requested in the application. NEO emphasizes that Cobra confirmed that it continues to provide safe and reliable service under current operating conditions and has not delayed any safety-related expenditures. Further, NEO argues that Cobra, as a result of a decade of financial mismanagement and operational incompetence, is solely responsible for its current financial situation. More specifically, NEO claims that Cobra's financial problems stem from the mismanagement of intercompany loans among affiliates and imprudent payments of substantial management fees to Mr. Osborne's affiliated companies. NEO adds that Mr. Osborne continues to transfer valuable utility assets to unregulated affiliates for no consideration, which has exacerbated the Company's financial situation. Additionally, NEO believes that Cobra's operational incompetence and failure to proactively address its financial problems have contributed to the creation of the Company's purported emergency. NEO asserts that the shut in of the Churchtown system by TCO was the result of Cobra's failure to maintain or update its stripping station equipment and that the Company has not taken steps to remedy the situation. Further, NEO claims that Cobra has failed to take any cost-saving or revenue-increasing measures to proactively address its financial problems. Finally, NEO contends that Cobra continues to ignore legitimate concerns that its requests

for substantial rate increases will precipitate a death spiral. In its reply brief, NEO argues that Cobra wrongly blames the Commission and the other parties to these proceedings for the Company's current financial woes, misrepresents the record evidence to buttress its purported emergency, and concedes that there is no true emergency warranting an immediate rate increase, as evidenced by its testimony and the fact that the Company has asserted hollow threats of imminent catastrophe for more than six months. (NEO Br. at 7-23; NEO Reply Br. at 2-9.)

{¶ 132} Alternatively, NEO argues that, if the Commission finds that a legitimate emergency exists, the Commission must disallow any expenses that are not necessary to avert the emergency, were imprudently incurred through mismanagement or incompetence, or are unsupported or inconsistent with the record. According to NEO, Cobra's calculation of its proposed emergency rate is fundamentally flawed, as the Company inflated expenses and understated revenues to calculate the most generous emergency rate possible. In addition, NEO argues that the financial data supplied by Cobra is inconsistent, inaccurate, and unreliable and that the Company is unable to explain the discrepancies. As one example, NEO notes that the financial data in the 2018 income statement provided with Cobra's emergency application (Exhibit A) is not consistent with the 2018 transport revenue summary provided with the same application (Exhibit B). NEO concludes that Cobra's financial records are supported by nothing more than arbitrary guesswork and questionable accounting methods, as acknowledged by its controller. In its reply brief, NEO argues that, while Cobra highlights the quantity of information that it has provided, the Company completely ignores the quality of its financial records. NEO notes that Cobra witness Coatoam admitted that she created the Company's records in haste based on financial information that is nothing more than a stab in the dark. Additionally, NEO points out that the income statement for 2018 provided with the emergency application does not reflect cash transactions and shows dramatic and suspicious increases in certain expenses, while the application substantially understates revenues by incorrectly

assuming that the Company's only source of revenue is from customers paying a universal volumetric rate, thereby disregarding substantial revenues from firm service customers, telemetering charges, interruptible commodity charges, firm demand charges, and firm overrun charges. (NEO Br. at 23-33; NEO Reply Br. at 9-14.)

{¶ 133} Finally, NEO maintains that Cobra's emergency application contains several procedural deficiencies. NEO notes that Cobra's direct testimony addresses topics that are wholly inappropriate for an emergency rate proceeding, such as testimony proposing a permanent rate increase and several permanent riders, as well as testimony seeking to relitigate the *Rate Case*. Additionally, NEO notes that Cobra failed to notify any of its customers or the impacted municipalities that it was seeking emergency rate relief. (NEO Br. at 33-35.)

{¶ 134} In its reply brief, Cobra responds that arguments regarding the Company's mismanagement by Mr. Osborne are irrelevant to the Company's request for emergency rate relief. Cobra adds that Staff and NEO could have recommended that no disbursements to ownership occur without Commission approval, while the emergency rate is being charged, or proposed any other restriction believed necessary to ensure that the Company benefits from the revenue increase. In addition, Cobra asserts that it has met the Commission's standards for emergency rate relief. Specifically, Cobra reiterates that its current rates do not provide sufficient revenues to permit the Company to pay its financial obligations as they are incurred. In response to Staff's claim that Cobra should repair the stripping station equipment to increase its revenues, the Company notes that it has purchased a dryer intended to remove excess liquid and allow for the delivery of gas to TCO's system, but the Company does not have the funds to pay for installation of the dryer. Cobra also argues that the alleged irregularities within its financial records are merely the result of differences between accrual basis and cash basis accounting, as well as the inability to forecast the future with complete accuracy. Cobra concludes that it has demonstrated the existence of an emergency with clear and convincing evidence, shown that its emergency

request is not a substitute for a permanent rate proceeding, and sought only the minimum amount necessary to pay its expenses for 2018. (Co. Reply Br. at 7-12, 16.)

{¶ 135} With respect to the amount of the emergency relief requested, Cobra requests that the Commission approve a temporary surcharge of $0.55 per Dth. Cobra further requests, in the alternative, that the Commission authorize a temporary surcharge of no less than $0.40 per Dth, as Staff recommended. Finally, Cobra requests that the Commission approve a permanent rate of $1.22 per Dth for both firm and interruptible service. (Co. Br. at 18; Co. Reply Br. at 16-17.)

{¶ 136} Staff notes that, although it opposes any emergency rate relief, it recommends that a surcharge of $0.40 be applied to each of Cobra's volumetric tariffs, in the event that the Commission finds that emergency rate relief is warranted. Emphasizing that Staff's recommended surcharge is based on Cobra's emergency rate filing, despite its flaws and inconsistencies, Staff further recommends that the Company be directed to file a new base rate case as expeditiously as possible, in order to permit Staff to more fully investigate the Company's current financial condition. (Staff Br. at 14-15.)

{¶ 137} NEO opposes Staff's alternative recommendation. NEO contends that Staff's surcharge of $0.40 per Dth is derived from Cobra's fundamentally flawed methodology and inaccurate financial statements. According to NEO, with proper corrections to Cobra's understated revenues and overstated expenses, the Company's 2018 revenues are $2,551,939.57 and its 2018 expenses are $1,381,583.32, which demonstrates that the Company does not need an emergency rate increase, even if its unreliable financial statements are used. In its reply brief, NEO reiterates that the emergency surcharge, as calculated by Staff, is deeply flawed and fails to accurately capture Cobra's current financial condition, because it is based on the Company's faulty methodology that understates revenues and overstates expenses. (NEO Br. at 35-42; NEO Reply Br. at 14-18.)

{¶ 138} Staff responds that it takes no position on the adjustments recommended by NEO, but notes that many of the flaws identified by NEO reflect the kinds of irregularities mentioned in the Staff Report. Staff reiterates its position that Cobra is not experiencing an emergency; however, if the Commission finds that emergency relief is justified, Staff believes that any approved surcharge should not exceed $0.40 per Dth and should be contingent upon the filing of a new base rate case to establish permanent rates. Staff also recommends that any authorized emergency relief terminate if Cobra fails to file a rate case application within a reasonable and prescribed period of time. Staff emphasizes that, in light of the unreliability of Cobra's financial records, the more appropriate avenue of relief is for the Company to file a base rate case using a more contemporaneous test year period, which would facilitate a thorough examination of the Company's current condition. (Staff Reply Br. at 9-11.)

H. Conclusion on the Emergency Rate Case

{¶ 139} The Commission's authority to approve modifications of existing rates on a temporary basis is found in R.C. 4909.16. The statute provides in pertinent part:

> When the [P]ublic [U]tilities [C]ommission 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 [C]ommission, 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.

{¶ 140} The Ohio Supreme Court has consistently construed R.C. 4909.16 as vesting the Commission with broad discretionary powers to determine whether an emergency exists and to tailor a remedy that will enable the public utility concerned to meet an emergency. *Manufacturers Light & Heat Co. v. Pub. Util. Comm.*, 163 Ohio St. 78, 125 N.E.2d 183 (1955) ("Under the provisions of [R.C. 4909.16] the determination of whether an

emergency exists, warranting a temporary alteration of rates, and the length of time such altered rates shall remain in effect are within the judgment and sound discretion of the Public Utilities Commission."); *City of Cambridge v. Pub. Util. Comm.*, 159 Ohio St. 88, 111 N.E.2d 1 (1953). The Court has also noted that the Commission's power to grant emergency relief is extraordinary in nature. *City of Cincinnati v. Pub. Util. Comm.*, 149 Ohio St. 570, 574-575, 80 N.E.2d 150 (1948).

{¶ 141} In many prior cases, the Commission has been guided by the following considerations when faced with a public utility's request for emergency rate relief:

> (1) Emergency rate relief is extraordinary in nature.
>
> (2) The existence of an emergency is a condition precedent to any grant of temporary rate relief.
>
> (3) The applicant's evidence will be reviewed with the strictest scrutiny and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation.
>
> (4) Emergency rate relief will not be granted if the emergency request was filed merely to circumvent, and as a substitute for, permanent rate relief.
>
> (5) Temporary rate relief will be granted only at the minimum level necessary to avert or relieve the emergency.

See, e.g., *In re Toledo Edison Co.*, Case No. 76-439-EL-AEM, Opinion and Order (Sept. 8, 1976); *In re Ohio Edison Co.*, Case No. 79-44-EL-AEM, Opinion and Order (May 2, 1979). The ultimate question for consideration by the Commission is whether, absent emergency relief, the public utility's ability to render service will be impaired or the utility will be financially impaired. If the public utility fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end. *See, e.g.*, *In re Akron Thermal, Limited Partnership*, Case

No. 09-453-HT-AEM, et al., Opinion and Order (Sept. 2, 2009) at 6-7; *In re Lake Erie Utilities Co.*, Case No. 86-799-WS-AEM (*Lake Erie*), Opinion and Order (Aug. 26, 1986) at 4; *In re Lakeside Utilities Corp.*, Case No. 82-433-WS-AEM, Opinion and Order (Dec. 1, 1982) at 3.

{¶ 142} The Commission has also previously found that the public utility concerned must bear some responsibility in attempting to alleviate the professed emergency. Specifically, the Commission stated:

> The public utility statutes and case law in Ohio clearly indicate that emergency rate relief should only be granted as a last resort measure to avoid injury to the business or interest of the public or the public utility involved. The public utility must show that it has attempted to relieve the emergency using all other measures available to it and the vehicle of emergency rate relief should not be used to circumvent the permanent rate case application standards or procedures.

In re Ohio Power Co., Case No. 74-580-EL-AEM (*Ohio Power*), Opinion and Order (Jan. 13, 1975) at 3; *see also In re Ohio Water Service Co.*, Case No. 75-405-WW-AEM, Opinion and Order (Sept. 11, 1975) at 9 (finding that a financial emergency exists and that "applicant is making every reasonable effort to alleviate that emergency"); *Lake Erie* at 4-7 (denying emergency application in circumstances involving public utility's financial mismanagement, imprudent expenditures, unpaid taxes, and failure to collect debts).

{¶ 143} Turning to Cobra's application, the Commission must consider whether the Company has shown that an emergency exists for which emergency rate relief should be granted at this time. Again, an applicant for emergency rate relief must demonstrate, with clear and convincing evidence, the presence of extraordinary circumstances that constitute a genuine emergency situation. *Lake Erie* at 3. In support of Cobra's claim that a genuine emergency exists, the Company offered as evidence the testimony of Ms. Coatoam and Ms. Carothers. Ms. Coatoam's testimony was solely focused on attempting to refute anticipated

objections from Staff and NEO regarding some of the Company's expenses for 2018, based on the positions taken by Staff and NEO in the *Rate Case* (Co. Ex. B at 3-8).[16] For her part, Ms. Carothers testified that, as reflected on Cobra's income statement, the Company projected that it would earn $1,596,837.40 in revenues during 2018, with projected expenses in the amount of $2,164,979.35. Based on Cobra's projected volumes for 2018, Ms. Carothers concluded that the Company must charge $0.87 per Dth to cover its expenses. (Co. Ex. A at 4-5, 9).[17] Like Ms. Coatoam, Ms. Carothers also attempted to refute anticipated objections from Staff and NEO regarding some of the Company's expenses (Co. Ex. A at 10-16). However, Ms. Carothers offered no other testimony addressing Cobra's projected revenue shortfall or the circumstances prompting the Company's emergency application.[18]

{¶ 144} In its briefs, Cobra claims that it is currently suffering a financial emergency due to a significant loss in volumes shipped on its system, resulting in a decrease in transportation revenues since the test year in the *Rate Case*. Cobra acknowledges that the loss in volumes is, in no small part, attributable to the fact that NEO has sought to avoid shipping on the Company's system, when possible. Cobra also claims that, due to the unavailability of its stripping station and the shut in of part of its system by TCO, the Company has lost all revenues associated with the sale of extracted products, as well as most of the revenues received through charges related to the compression of natural gas. (Co. Ex. 3 at 8-13; Co. Ex. A at 4-5, NEO Ex. A at Ex. G; Tr. at 69-70.)

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16 Ms. Coatoam also addressed Cobra's request for a permanent rate of $1.22 per Dth, including three riders that the Company proposes to establish to address its depreciation, previously assessed personal property taxes, and future improvements. The Commission notes that these issues are beyond the scope of a proper request for emergency rate relief, which, as noted above, must be temporary in nature.

17 Cobra's income statement includes actual figures for January through August 2018 and projected numbers for September through December 2018.

18 In the *Rate Case*, Ms. Carothers did address a post-test-year decline in volumes shipped by Cobra and a corresponding decrease in revenues, which Ms. Carothers attributed to several factors, including the loss of a large customer, NEO's use of alternative sources of supply, the shut in of the Churchtown system by TCO, and the idle stripping station (Co. Ex. 3 at 7-15).

{¶ 145} Staff and NEO, on the other hand, assert that Cobra is not experiencing an emergency as contemplated in R.C. 4909.16. Staff witness Snider testified that a financial emergency does not exist and that Cobra's current financial condition is largely a result of its failure to manage its funds properly. Mr. Snider also testified that Cobra's financial records indicate that the Company continues to allow large owner withdrawals and to loan funds to unregulated affiliates. As further described in the Emergency Staff Report, Staff reviewed Cobra's recent bank statements for an 18-month period and investigated many of the larger withdrawals and checks issued by the Company. Staff reported that its review of the bank statements revealed numerous irregularities in Cobra's income statement, balance sheet, and cash flow. Staff highlighted its concerns regarding Cobra's large monthly management fees, which exceeded the Company's salary and wage expense, and large loan repayments to affiliated companies. Staff further reported that Cobra has not made a substantial effort to control its costs, as evidenced by drastic increases in expenses since the *Rate Case*. Finally, Staff noted that Cobra's personal property tax obligations continue to grow, standing at an estimated $4,723,539.73 as of the end of 2018, while the Company maintains its practice of making no tax payments. Staff expressed the view that, if the Commission were to grant emergency rate relief, Cobra may use the additional revenues for owner withdrawals and support of unregulated affiliates rather than the operation and maintenance of its system. Following its review, Staff concluded that Cobra should be granted no temporary rate relief. (Staff Ex. G at 2-3; Staff Ex. H at 4.)

{¶ 146} Upon review of the record, the Commission finds that Cobra has failed to demonstrate, by clear and convincing evidence, the existence of extraordinary circumstances that constitute a genuine emergency warranting immediate rate relief under R.C. 4909.16. During the hearing on the emergency application, Cobra confirmed that it continues to provide safe and reliable service under current operating conditions, with no delay in any necessary safety-related expenditures (Tr. at 52). Further, the Emergency Staff Report indicates that some of Cobra's expenses have increased drastically since the *Rate*

Case, while the Company's outstanding taxes continue to grow (Staff Ex. G at 3). Cobra offered no testimony or other evidence to address what efforts, if any, it has taken to control its costs or to begin to comply with its tax obligations. Quite simply, Cobra has not endeavored to "show that it has attempted to relieve the emergency using all other measures available to it." *Ohio Power*, Opinion and Order (Jan. 13, 1975) at 3.

{¶ 147} Cobra's sole basis for its emergency rate application is a decrease in volumes shipped on its system and a corresponding decline in revenues experienced beginning in 2016 and continuing through 2018. In its emergency application, as well as in testimony offered during the *Rate Case*, Cobra asserted that the decrease was due mainly to its largest transportation customers' reliance upon local production rather than transporting natural gas from Chicago Citygate; the Company's largest transportation customer's construction of its own delivery system to transport natural gas; and the loss of a large wholesale customer. Cobra also asserted that it was no longer able to operate its stripping station, in light of the fact that TCO had shut in the Churchtown system because of high-liquid content in the gas flowing from Churchtown to TCO. (NEO Ex. A at 3-4; Co. Ex. 3 at 7-15.)

{¶ 148} In claiming that it has made the requisite showing for emergency relief, Cobra emphasized, in its briefs, the decrease in volumes resulting from the shut in of the Churchtown system by TCO (Co. Br. at 11-14; Co. Reply Br. at 7). On this issue, Ms. Carothers noted, in her direct testimony, that Ms. Coatoam would address TCO's shut in of the Churchtown system (Co. Ex. A at 5). Ms. Coatoam, however, did not offer any direct testimony regarding the shut in.[19] For its part, NEO offered evidence indicating that, although Cobra had purportedly made "mechanical adjustments" and sequestered more wet producers, the Company ultimately canceled TCO's required testing of the gas content (NEO Ex. B). NEO concluded that, if Cobra had properly maintained and upgraded its

[19] In the *Rate Case*, Ms. Carothers testified that, in November 2017, TCO shut in the flow of gas from Churchtown to TCO due to high liquid content (Co. Ex. 3 at 11).

stripping station equipment, the Company may have avoided the shut in and the alleged emergency situation (NEO Br. at 20). In its Emergency Staff Report, Staff acknowledged Cobra's volume reductions, but noted its belief that, with minor improvements or repairs to the stripping station equipment, Cobra would be able to transport gas to TCO and increase its transportation volumes and revenues (Staff Ex. G at 2). Although the Commission does not disagree that Cobra has experienced decreasing transportation volumes and revenues since the test year in the *Rate Case*, we find that the Company offered insufficient evidence of its efforts to end the shut in of the stripping station and the Churchtown system or to increase its transportation volumes and revenues through any other means. During the emergency hearing, Ms. Carothers merely testified that Cobra had purchased a dryer in the summer of 2018 to remove excess liquids, but had not installed the dryer because the Company was unable to locate a qualified contractor (Tr. at 70-73).[20] To further complicate matters, the record reflects that, for consideration of $10, Mr. Osborne, on behalf of Cobra, transferred to an unregulated affiliate the real property on which the stripping station is located, as well as "appurtenances there-unto" (Staff Ex. 2; Staff Ex. 3; Staff Ex. 4).[21] Again, Cobra "must show that it has attempted to relieve the emergency using all other measures available to it." *Ohio Power*, Opinion and Order (Jan. 13, 1975) at 3. Cobra has instead taken steps to worsen its financial situation through the actions of its managing member and owner.

{¶ 149} In the face of such efforts to sabotage its current financial state, Cobra innocently claims that, as a result of the shut in of the Churchtown system, its revenues have declined to the point that the Company is unable to meet its expenses (Co. Ex. A at 4-5, 9). Although Cobra emphasizes that it has provided a large volume of financial information to

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20 At an earlier point in these proceedings, Ms. Carothers testified that the stripping station requires a certain volume of gas to operate. Ms. Carothers asserted the belief that, due to the shut in of the Churchtown system by TCO and the availability of lower priced supply from the Utica shale region, the stripping station would be unable to operate for the foreseeable future. (Co. Ex. 3 at 12.)

21 Despite the language in the quit claim deed (Staff Ex. 2), Cobra disputes that Mr. Osborne intended to transfer the stripping station itself (Co. Ex. B at 4-5, 14-15).

Staff, including bank statements, Cobra did not submit, as part of the record, a statement of cash flows or its bank statements for consideration by the Commission. As Cobra acknowledged in its brief (Co. Br. at 10), the Commission's emphasis, in an emergency rate case involving a smaller public utility like the Company, is on the utility's cash flow. *Lake Erie*, Opinion and Order (Aug. 26, 1986) at 4. The Commission examines the public utility's claimed expenses to determine which represent immediate cash requirements that must be satisfied if adequate service is to be maintained pending the resolution of the permanent rate case. *In re Lake Buckhorn Utilities, Inc.*, Case No. 86-519-WW-AEM (*Lake Buckhorn*), Opinion and Order (Feb. 10, 1987) at 3.

{¶ 150} As the Commission emphasized in *Lake Buckhorn*, the public utility's presentation of its emergency case should be limited to the question of what constitutes the minimum level of temporary rate relief. *Lake Buckhorn* at 3. Here, in the absence of a statement of cash flows, bank statements, or other evidence indicative of Cobra's cash flow, the Commission has no basis for evaluating the Company's immediate cash requirements or determining whether the Company is able to meet current expenses necessary to the provision of adequate service. As NEO notes, Cobra's income statement for 2018 does not show cash transactions or reflect the Company's actual financial position, as it is intended to document the Company's revenues and expenses on an accrual basis (Tr. at 93). Additionally, as further addressed below, the financial data that Cobra has provided with its emergency application does not afford the Commission a reliable basis on which to attempt to determine the Company's cash requirements. We agree with Staff and NEO that Cobra's financial records contain numerous material errors and inconsistencies that the Company's witnesses were unable to explain (Staff Ex. G at 2; Staff Ex. H at 4; Tr. at 47-50). Ms. Coatoam admitted that Cobra's financial records for 2018 were prepared quickly and based on uncertainty and conjecture (Tr. at 122-123).

{¶ 151} In sum, Cobra has failed to meet its burden to clearly and convincingly demonstrate the presence of a genuine emergency situation justifying the extraordinary

measure of emergency rate relief. Although the Commission does not disagree that Cobra has experienced a number of changes since the test year in the *Rate Case*, the Company has failed to provide sufficient reliable evidence to conclude that emergency relief is an appropriate response at this time. Neither has Cobra offered any evidence demonstrating what, if any, positive steps the Company is taking to alleviate its current financial circumstances, as the Commission expects from a public utility in the context of an emergency rate application. *Ohio Power Co.*, Opinion and Order (Jan. 13, 1975) at 3; *In re Ohio Water Service Co.*, Case No. 75-405-WW-AEM, Opinion and Order (Sept. 11, 1975) at 9. Rather, the record reflects that Cobra's present situation is largely a result of its own making and that Mr. Osborne continues to actively threaten the Company's financial well-being.

I. Overall Conclusion

{¶ 152} In the *Tariff Case*, the Commission concluded that Cobra had provided documentation demonstrating the requisite technical, financial, and managerial capability necessary to operate as a pipeline company. *Tariff Case*, Finding and Order (June 27, 2007) at 2. Since that time, Cobra has suffered from a longstanding history of extensive financial mismanagement and operational shortcomings, as both Staff and NEO have emphasized throughout these proceedings. For example, as succinctly described by NEO, the record reflects the following troubling practices, among others:

- Cobra has paid more than $1 million in so-called management fees to Mr. Osborne's various corporate entities, including $360,000 to OsAir from January 2017 to May 2018, without receiving any services in return;[22]

22 Co. Ex. 5; Co. Ex. B at 21; Tr. at 50-52, 101-104, 165-167.

- Cobra has paid millions of dollars in so-called loans to Mr. Osborne or his various corporate entities, most of which remain unpaid or have been written off;[23]

- Mr. Osborne, acting on behalf of Cobra and without informing Ms. Coatoam or Ms. Carothers, transferred at least three real estate properties to unregulated Osborne-affiliates for no consideration during the last several years;[24]

- Cobra continues to pay real estate taxes and insurance on the real properties now owned by Mr. Osborne's unregulated affiliates;[25]

- Cobra owes more than $5 million in outstanding personal property and excise tax obligations;[26]

- Cobra has not complied with the Commission's April 11, 2018 Entry, which directed the Company to issue refunds to customers;[27]

- Cobra operates on the basis that there is no difference between Cobra, as a corporate entity, and Mr. Osborne, as an individual;[28]

- Cobra has been unable to maintain the critical operation of its stripping station, resulting in the loss of revenue for the Company;[29]

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23 NEO Ex. A at Ex. D; NEO Ex. 1 at Ex. 7; Tr. at 108-109, 124-129.

24 Staff Ex. A; Staff Ex. B; Staff Ex. C; Staff Ex. D; Staff Ex. 2; Staff Ex. 3; Staff Ex. 4; NEO Ex. C; NEO Ex. D; Tr. at 34-45, 59-65, 131-136, 148-150, 162-163; Co. Ex. B at 4-5, 14-15.

25 Tr. at 39, 64-65, 149, 163.

26 NEO Ex. G; Tr. at 109-120, 150-157.

27 Tr. at 15-16, 145-146.

28 Tr. at 143-144.

29 NEO Ex. B; Tr. at 70-72. As noted above, Mr. Osborne, on behalf of Cobra, transferred the real property on which the stripping station is located, as well as the "appurtenances there-unto," to an unregulated affiliate for no consideration (Staff Ex. 2.)

- Cobra has failed to install the purchased dryer or make other improvements or repairs to the stripping station and has not instituted any other proactive measures to address its loss of revenue.[30]

{¶ 153} As noted above, Staff and NEO also identified significant deficiencies in Cobra's financial records. The following examples highlighted by NEO reveal that Cobra's financial records are routinely inconsistent, unreliable, and inaccurate:

- Cobra's emergency application contains inconsistent financial data that the Company is unable to explain (e.g., the 2018 income statement is inconsistent with the 2018 transport revenue summary);[31]

- Cobra's emergency application reports revenues from extracted products that are inconsistent with and materially different from those identified in confidential financial records produced in discovery;[32]

- Cobra's balance sheet provided with the emergency application does not reflect its actual revenues and expenses and is based on guesswork and uncertainty;[33] and

- Cobra's income statements in these proceedings are based on arbitrary and inconsistent information, with Ms. Coatoam admitting that some of the information reported, such as the tax accruals, is based on nothing more than a "stab in the dark."[34]

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30 Staff Ex. G at 2; Tr. at 19, 70-72.
31 NEO Ex. A at Ex. A, Ex. B; NEO Ex. F; Tr. at 95-97.
32 NEO Ex. E; NEO Ex. A at Ex. H; Tr. at 47-50.
33 NEO Ex. A at Ex. D; Tr. at 122-123.
34 Co. Ex. 5; Tr. at 110-112.

{¶ 154} The Commission agrees with Staff and NEO that the evidence in these proceedings reflects a pattern of mismanagement and self-dealing by Cobra. The record reflects that Cobra, as operated under Mr. Osborne's control, has ignored corporate formalities and legal obligations for more than a decade, to the detriment of the Company's customers. Further, Cobra's practices have clearly impacted its recordkeeping abilities, as the evidence in these proceedings is replete with financial records that are erroneous and unreliable. In summarizing Cobra's "accounting difficulties," Ms. Coatoam testified that Mr. Osborne "has (1) taken draws/distributions from Cobra; (2) loaned Cobra money; (3) had Cobra loan him money; (4) had Cobra loan affiliated companies money; (5) had affiliated companies loan Cobra money; and (6) had Cobra pay management fees to affiliated companies" (Co. Ex. B at 18-19). NEO more aptly described Cobra as a "personal piggybank" for Mr. Osborne and stressed that the Company will continue to operate in this fashion, as long as it remains in Mr. Osborne's control (NEO Br. at 13). Staff agreed with NEO's position and emphasized, in the *Rate Case*, that "Cobra has a demonstrated history of ignoring its tax obligations, bankrolling its owner and unregulated affiliates, and mismanaging its assets" (Staff Br. at 2). In the *Emergency Rate Case*, Staff amplified its concerns, asserting the belief that "Mr. Osborne is neither competent to manage this utility, nor is he to be trusted with the revenues that a surcharge would generate" (Staff Reply Br. at 7).

{¶ 155} The Commission shares the concerns of NEO and Staff, and it is clear that Cobra's own decisions over many years have been the primary cause of its financial problems. If Cobra's pattern of mismanagement continues, the Company's decreasing revenues and overall financial condition will only decline further and the Company may reach the point of insolvency. R.C. 4905.22 provides that every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. The statute also requires that all charges made or

demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the Commission. Consistent with R.C. 4905.22, the Commission has previously recognized that it has "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" and a "duty to consider all aspects of a utility's operations." *In re The Toledo Edison Co.*, Case No. 95-299-EL-AIR, et al., Opinion and Order (Apr. 11, 1996) at 42.

{¶ 156} Additionally, pursuant to R.C. 4905.60, the Commission has authority to direct the Ohio Attorney General to seek appropriate civil remedies in the name of the state whenever the Commission is of the opinion that any public utility has failed or is about to fail to obey any order made with respect to it, or is permitting anything or is about to permit anything contrary to or in violation of law, or of an order of the Commission. Under R.C. 2735.01(A)(6), receivership is a special remedy available when a limited liability company is insolvent or is in imminent danger of insolvency. Therefore, where a public utility operating as a limited liability company is insolvent or is in imminent danger of insolvency, the appointment of a receiver is among the appropriate civil remedies that the Commission may direct the Ohio Attorney General to pursue, if it appears that the utility has failed or is about to fail to comply with its obligations under R.C. 4905.22. *In re Youngstown Thermal, LLC and Youngstown Thermal Cooling, LLC*, Case No. 17-1534-HC-UNC, Finding and Order (June 30, 2017) at ¶¶ 17-18; *In re Rutland Fuel Co.*, Case No. 86-2013-GA-COI, Opinion and Order (Apr. 7, 1987) at 10; *In re Lake Buckhorn Utilities, Inc.*, Case No. 83-1059-WW-COI, et al., Opinion and Order (Dec. 27, 1984).

{¶ 157} Pursuant to R.C. 4905.60, the Commission finds it necessary to determine whether the Ohio Attorney General should be directed, at this time, to seek a receiver for Cobra. Accordingly, a hearing should be held at which Cobra shall show cause as to why a receiver should not be appointed to ensure that the Company's customers continue to receive necessary and adequate service. The Commission directs the attorney examiner to

establish a procedural schedule for this purpose. At the hearing, Cobra should, among other matters, be prepared to address in detail how it intends to reduce its outstanding tax obligations, increase its transportation volumes and revenues, control its costs, eliminate management fees and other payments to affiliates, improve its financial recordkeeping, and manage itself in a manner consistent with Ohio law, including the rules and regulations of the Commission. If Cobra is unable to demonstrate that it remains capable of operating as a public utility in this state, the Commission will direct the Ohio Attorney General to seek a receiver to operate and manage the Company.

{¶ 158} Additionally, as discussed above, the record reflects that, since 2015, Cobra has remained out of compliance with certain gas pipeline safety regulations, specifically those which require the Company to implement distribution integrity management and public awareness programs (Staff Ex. 6 at 4; Co. Ex. 2 at Ex. B at 13-15; Tr. II at 312-314). The Commission, therefore, finds that a gas pipeline safety investigation should be initiated pursuant to R.C. 4905.95 and Ohio Adm.Code 4901:1-16-12. The Commission will consider the current status of Cobra's compliance with the gas pipeline safety regulations in conjunction with the hearing to consider whether a receiver should be appointed for the Company.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 159} Cobra is a pipeline company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of the Commission.

{¶ 160} On August 15, 2016, Cobra filed an application for an increase in its rates and charges. Cobra amended its application on September 26, 2016. Cobra proposed a test year of January 1, 2015, to December 31, 2015, and a date certain of December 31, 2015. By Entry issued on November 9, 2016, Cobra's proposed test year and date certain were approved by the Commission.

{¶ 161} On April 13, 2018, Staff filed its written report of investigation in the *Rate Case*.

{¶ 162} The evidentiary hearing in the *Rate Case* began on September 10, 2018, and concluded on September 11, 2018.

{¶ 163} On October 15, 2018, Cobra filed an application seeking an emergency increase in its rates and charges, as well as a motion requesting consolidation of the *Rate Case* and the *Emergency Rate Case*. The cases were consolidated at Cobra's request by Entry dated December 7, 2018.

{¶ 164} Staff filed its written report of investigation in the *Emergency Rate Case* on January 7, 2019.

{¶ 165} The evidentiary hearing in the *Emergency Rate Case* was held on January 10, 2019.

{¶ 166} The value of Cobra's property used and useful for the rendition of service to customers affected by the application in the *Rate Case*, as determined in accordance with R.C. 4909.15, is not less than $4,446,820.

{¶ 167} The current net annual compensation of $497,005 represents a rate of return of 11.18 percent on the jurisdictional rate base of $4,446,820.

{¶ 168} A rate of return of 11.18 percent provides Cobra with excess compensation for the services rendered to its customers.

{¶ 169} A rate of return of not more than 9.09 percent is fair and reasonable under the circumstances and is sufficient to provide Cobra just compensation and return on its property used and useful in the provision of services to its customers.

{¶ 170} A revenue decrease of $128,540 will result in a return of $404,216, which, when applied to the rate base of $4,446,820, yields a rate of return of approximately 9.09 percent.

{¶ 171} The allowable gross annual revenue to which Cobra is entitled for purposes of these proceedings is $2,864,971.

{¶ 172} Cobra's existing rates and charges are sufficient to provide the Company with adequate net annual compensation and return on its property used and useful in the provision of its services.

{¶ 173} Cobra is authorized to file final tariffs, consistent with this Opinion and Order.

{¶ 174} Cobra has failed to sustain its burden of proof to demonstrate that emergency rate relief should be granted to prevent injury to the business or interests of the public or the Company.

IV. ORDER

{¶ 175} It is, therefore,

{¶ 176} ORDERED, That Cobra's amended application in the *Rate Case* be granted to the extent provided in this Opinion and Order. It is, further,

{¶ 177} ORDERED, That Cobra be authorized to file tariffs, in final form, consistent with this Opinion and Order. Cobra shall file one copy in these case dockets and one copy in its TRF docket. It is, further,

{¶ 178} ORDERED, That the effective date of the new tariffs shall be a date not earlier than the date upon which the final tariff pages are filed with the Commission. It is, further,

{¶ 179} ORDERED, That Cobra's application in the *Emergency Rate Case* be denied. It is, further,

{¶ 180} ORDERED, That Cobra's motion to strike a portion of Staff's initial brief in the *Rate Case* be denied. It is, further,

{¶ 181} ORDERED, That NEO's motion to strike a portion of Cobra's reply brief in the *Emergency Rate Case* be granted. It is, further,

{¶ 182} ORDERED, That a hearing be scheduled for the purposes of determining whether a receiver for Cobra should be appointed and whether the Company is in compliance with gas pipeline safety regulations. It is, further,

{¶ 183} ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 184} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

COMMISSIONERS:
Approving:
Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

SJP/mef

Case No(s). 16-1725-PL-AIR, 18-1549-PL-AEM

Summary: Opinion & Order that the Commission finds that Cobra Pipeline Company, LTD failed to demonstrate that its existing rates and charges are insufficient to provide adequate net annual compensation and return on its property used and useful in the provision of its services; that it failed to sustain its burden of proof to demonstrate that emergency rate relief should be granted; and that a hearing should be scheduled for the purposes of determining whether a receiver should be appointed for Cobra Pipeline Company, LTD and reviewing the status of its compliance with gas pipeline safety requirements. electronically filed by Docketing Staff on behalf of Docketing