BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Cobra Pipeline Company, Ltd. for an Increase In Its Rates and Charges	)))	Case No. 16-1725-PL-AIR
In the Matter of the Application of Cobra Pipeline Company, Ltd. for an Emergency Increase In Its Rates and Charges	)))	Case No. 18-1549-PL-AEM

MEMORANDUM CONTRA TO COBRA PIPELINE COMPANY, LTD.'S APPLICATION FOR REHEARING BY NORTHEAST OHIO NATURAL GAS CORP.

I. INTRODUCTION

Northeast Ohio Natural Gas Corp. ("NEO") opposes Cobra Pipeline Company, Ltd.'s ("Cobra") Application for Rehearing of the Commission's September 11, 2019 Opinion and Order. Cobra's Application adds nothing new; it simply misconstrues the record evidence in its thinly-veiled attempt to deflect from the glaring issues of improper self-dealing, commingling of funds, and years of overt mismanagement spearheaded by Mr. Osborne. Because Cobra fails to present any arguments that the Commission has not already considered, addressed, and properly rejected, Cobra's Application for Rehearing must be denied.

II. ARGUMENT

A. The Commission properly denied Cobra's motion to strike portions of Staff's initial brief that was offered to provide a historical perspective. (Assignment of Error No. 1).

In Cobra's First Assignment of Error, Cobra contends that the Commission erred when it failed to strike portions of Staff's initial brief that, according to Cobra, refer to actions or incidents involving Mr. Osborne as an individual or as the owner of other companies, improperly focus on

Mr. Osborne, and distract from the relevant issues in the 2016 Rate Case.[1] First, because this issue has already been thoroughly considered, addressed, and properly rejected by the Commission, Cobra's assignment of error is without merit.[2] Also, because Mr. Osborne's background was not a factor in the Commission's decision regarding Cobra's requested rate adjustments, this assignment of error is irrelevant.

Further, given that Mr. Osborne is Cobra's principal owner and managing officer, the history provided in Staff's brief—which describes Mr. Osborne's mismanagement of several of Cobra's former affiliates—is not only relevant to Cobra's current operations but also well within the scope of the issues before the Commission. For example, there is extensive record evidence documenting the improper self-dealing and commingling of funds between the various Osborne-related entities which was done without consulting Cobra's employees.[3]

The uncontested evidence in this proceeding reveals a disconcerting pattern of widespread financial mismanagement and operational incompetence at Cobra. Among other things, the record evidence reveals the following:

- Cobra has paid over a million dollars (at least) in "management fees" to Osborne and/or Osborne owned/operated entities despite receiving no services in return;[4]
- Cobra has disbursed millions of dollars in "loans" (almost all of which remain unpaid and/or written off) to Osborne and Osborne owned/operated entities;[5]
- Cobra has secretly transferred at least three valuable real estate properties to unregulated Osborne-affiliates for no consideration during the last three years alone;[6]
- Cobra continues to pay real estate taxes and insurance on real property owned by Osborne's unregulated affiliates;[7]

[1] Cobra Application for Rehearing at 1–3.
[2] Opinion and Order at ¶¶ 33–35.
[3] *See* NEO Br. at 17–21; NEO Reply Br. at 3–4.
[4] *See* NEO Initial Brief at 12–14.
[5] *Id*. at 9–12.
[6] *Id*. at 18.
[7] *Id*. at 15–16.

- Cobra has over $5 million (at least) in outstanding personal property tax and excise tax obligations due and owing to the Ohio Department of Taxation;[8]

- Cobra continues to openly disobey the Commission's April 11, 2018 Entry ordering Cobra to issue refunds to customers it unlawfully overcharged;[9]

- Cobra's Controller testified that there is no difference between Cobra, as a corporate entity, and Richard Osborne, the individual;[10]

- Cobra failed to adequately maintain a critical utility asset (i.e., the stripping station), resulting in the loss of significant revenue for the company;[11]

- Cobra has failed to even make the "minor improvements and/or repairs" necessary to fix the stripping station[12] or institute any other proactive measures to address its loss of revenue;[13] and

- Cobra claims it lacks the funds to install the mechanism needed to make the stripping station operative again (i.e., a dryer it already purchased), but still managed to pay $100,000 in "management fees" to Osborne's unregulated affiliate in 2018.[14]

The Commission properly followed its previous precedent refusing to strike a portion of an initial brief that was offered to provide a historical perspective.[15] As Mr. Osborne is still actively involved with Cobra, his previous actions and improper self-dealing are undoubtedly relevant to whether Cobra actually needs emergency rate relief.

[8] *Id*. at 21–22; NEO Ex. G; Tr. Vol. I at 117–118.
[9] *See* NEO Initial Brief at 22–23.
[10] *See* Tr. Vol. I at 133–144.
[11] *See* NEO Initial Brief, at 19–20.
[12] As explained in NEO's Initial Brief, there are serious questions surrounding who currently owns the stripping station now that Richard Osborne, on behalf of Cobra, transferred the real property on which the stripping station sits, including "all appurtenances there-unto", to an unregulated Osborne affiliate for no consideration. NEO Initial Brief, at 17–18. Further, Cobra transferred, by way of the same quit claim deed, its "rights, title, and interest to the oil and gas rights, including the existing well now or formerly located on the tract of land herein conveyed." *See* Staff Ex. 2, see attached Ex. A (2016 Rate Case). In response, Cobra provided inadmissible hearsay to show Osborne never intended to transfer any personal property (i.e., the stripping station and other utility equipment), only the real property on which it sits. *See* Company Ex. B, at 14–15. But the Commission must reject this self-serving, secondhand "evidence" as it is immune from cross-examination and is unduly prejudicial to NEO and Staff. *See* NEO Initial Brief, at 16–18.
[13] NEO Initial Brief at 19–21; Staff Ex. G, at 2.
[14] Cobra Initial Brief, at 13.
[15] *See* Opinion and Order at ¶ 35 (citing *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).

B. The Commission properly rejected Cobra's attempt to include information in its post-hearing brief that was not part of the record. (Assignment of Error No. 2).

In Cobra's Second Assignment of Error, Cobra argues it was error for the Commission to strike portions of Cobra's reply brief that allegedly referenced capital contributions made by Mr. Osborne in December 2018.[16] Cobra misstates the record. As detailed in NEO's Motion to Strike, Exhibit 1 to the Reply contains a summary of the alleged contributions and distributions made by Mr. Osborne and his affiliated business entities in 2018.[17] Exhibit 1 also includes a general ledger for the period January 1, 2018 through December 31, 2018, to reflect those purported withdrawals and distributions in greater detail.[18] However, Exhibit 1 identifies numerous alleged transactions from December 2018 that do not have any evidentiary support in the record. Exhibits JC-1 and JC-2 included information only through November 30, 2018.[19] Neither exhibit included *any* December 2018 transactions. Given that these alleged financial transactions from December 2018 were never included in the record, the Commission was correct in striking the non-record evidence.[20]

Likewise, the new argument Cobra presents is similarly flawed. Cobra claims that its exhibit containing entries from December 2018 is justified under Ms. Coatoam's testimony from the January 2019 hearing.[21] Once again, Cobra misunderstands what constitutes record evidence. Cobra is undoubtedly free to cite to the written testimony of Ms. Caruthers, or the hearing testimony of any witness, including the testimony of Ms. Coatoam cited in Cobra's brief. However, Cobra may not cite general testimony about alleged "future" entries that were not

[16] Cobra Application for Rehearing at 4–6.
[17] Cobra Post-Hearing Reply Brief, at 11, fn 25.
[18] *Id*.
[19] *See* Company Exhibit A, Direct Testimony of Jessica Carothers ("Company Ex. A"), at Exhibits JC-1 and JC-2.
[20] Opinion and Order at ¶ 39.
[21] Cobra Application for Rehearing at 5–6.

actually addressed by Ms. Coatoam and include such accounting entries in its post-hearing brief. Cobra could have offered that testimony at the hearing but did not. Cobra may not supplement the record after the hearing in the manner Cobra attempts here just because the non-record evidence arguably "relates" to Ms. Coatoam's testimony. On multiple occasions, the Commission has rejected a party's attempts to include information in a post-hearing brief that is not part of the record.[22]

Simply put, because this issue has already been thoroughly considered, addressed, and properly rejected by the Commission, Cobra's assignment of error is without merit. The Commission did not err when it struck the portions of Cobra's reply brief because Cobra—like it does in its Application for Rehearing—improperly relied on non-record evidence of questionable veracity.[23]

C. The Commission has considerable authority to determine proper rates for Cobra under R.C. 4909.15. (Assignment of Error No. 3).

In Cobra's Third Assignment of Error, Cobra alleges that despite the Commission's acknowledgment that R.C. 4909.18 and 4909.19 do not apply to Cobra, the Commission erred in failing to recognize that R.C. 4909.17 also does not apply to pipeline companies.[24] This argument is without merit. First, this issue been thoroughly considered, addressed, and properly rejected by the Commission, and therefore must be rejected.[25] Additionally, Cobra conveniently ignores that in addressing this issue, the Commission found that there was no basis here for the Commission to

[22] *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.
[23] Opinion and Order at ¶¶ 36–39.
[24] Cobra Application for Rehearing at 6–8.
[25] Opinion and Order at ¶¶ 46–53.

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.[26]

In advancing its argument, Cobra ignores and misconstrues the larger statutory scheme set forth in R.C. Chapter 4909. Specifically, Cobra fails to understand that several of the public utility industries exempted by R.C. 4909.17—i.e., motor transportation companies and railroads—*always* maintained the ability to file rate schedules that would go into effect unless suspended by the Commission pursuant to R.C. 4909.27. Motor transportation company and railroad rates were historically set under a separate statutory scheme specifically designed for railroads. Railroads were exempt from R.C. 4909.15 and other related provisions applicable only to "public utilities" because railroads are not "public utilities" for purposes of Chapter 4909. Pipeline companies like Cobra are obviously not railroads and, as such, their rates do *not* automatically go into effect under R.C. 4909.27.

To the contrary, pipeline companies are public utilities for purposes of Chapter 4909,[27] and their rate setting is governed by R.C. 4909.15. Under R.C. 4909.15(E), the Commission shall set just and reasonable rates for public utilities if it believes rates are unjust and unreasonable. Thus, pipeline companies like Cobra are prohibited from modifying rates absent an order from the Commission. There is no analogous language for railroads and motor carriers since their rates were set under R.C 4909.27. Accordingly, pipeline companies are treated separately from the other "exempt" public utilities identified in R.C. 4909.17.

[26] Opinion and Order at ¶ 52.

[27] *See* R.C. 4905.03(F) ("A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state, but not when engaged in the business of the transport associated with gathering lines, raw natural gas liquids, or finished product natural gas liquids.")

The Commission has already rejected Cobra's contention that pipeline companies can charge whatever rate they want, whenever they want, without any prior regulatory oversight.[28] As the Commission recently recognized in this proceeding,[29] the Commission historically deemed it proper to conduct intrastate pipeline rate cases in a manner consistent with the statutory processes and procedures set forth in R.C. Chapter 4909.[30] Consistent with this statutory authority, the Commission also has wide discretion over the procedures and processes it employs in its proceedings, a fact which the Ohio Supreme Court has consistently recognized.[31] Couple this with the Commission's well-established authority to manage its own dockets, and it becomes clear that the Commission did not err. Because the Commission concluded that its consideration of Cobra's current and proposed rates was consistent with the statutory authority under R.C. 4909, its considerable discretion to manage its dockets, and its prior precedent in cases establishing rates for pipeline companies, Cobra's assignment of error lacks merit.[32]

D. Cobra's Fourth Assignment of Error fails to identify any alleged due process protection Cobra was purportedly denied with the requisite specificity. (Assignment of Error No. 4).

In Cobra's Fourth Assignment of Error, Cobra boldly states that the Commission erred when it "failed to provide all of the due process protections provided to public utilities by the Ohio General Assembly."[33] Cobra, however, fails to identify or elaborate on any alleged due process protection it was purportedly denied. In its assignments of error, Cobra must "set forth specifically

[28] Cobra Application for Rehearing at 8.
[29] *See* Entry (Apr. 11, 2018), at ¶ 32.
[30] *See In re Natural Gas Transmission Co. of Ohio*, Case No. 81-1404-PL-ATA, et al., Entry (Dec. 23, 1981).
[31] *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 560 (1982) (finding it is well-settled that Commission is vested with "the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort."); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (1990), 51 Ohio St.3d 150, 154 ("[U]nder 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.").
[32] Opinion and Order at ¶ 53.
[33] Cobra Application for Rehearing at 8–9.

the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[34] Because Cobra has failed to meet this burden, this assignment of error lacks merit.

E. The Commission properly refused to consider information outside of the Test Year. (Assignment of Error No. 5).

In Cobra's Fifth Assignment of Error, Cobra claims the Commission erred by failing to consider information outside of the test year.[35] Curiously, Cobra bases this argument on R.C. 4909.15(C), which expressly prohibits the Commission from considering information outside the test year unless certain specific criteria are met. Specifically, post-test year adjustments to revenues and expenses are only permitted for the twelve-month period immediately following the test period. As Cobra is seeking adjustments for periods well beyond the twelve-month period authorized by statute, Cobra's assignment of error lacks merit.

Moreover, Cobra's assignment of error is factually incorrect. Cobra's emergency rate case presented evidence addressing the period after the test year. Cobra's arguments regarding its "deteriorating" financial condition were expressly considered and rejected by the Commission.[36] Among other things, the Commission found that Cobra's financial woes were caused by its poor management and improper transfers to affiliates. Additionally, Mr. Osborne's negative paid-in-capital balance of $502,887.91[37] shows that his self-dealing was the primary cause of Cobra's difficulties. As this is not grounds for emergency rate relief, the Commission did not err in failing to make the improper post-test period adjustments sought by Cobra.

[34] R.C. 4903.10.
[35] Cobra Application for Rehearing at 9–12.
[36] *See* Opinion and Order at ¶¶ 125–151.
[37] NEO Br. at 11 (Emergency Rate Case).

F. The Commission properly denied Cobra's Application for a temporary surcharge in the Emergency Rate Case. (Assignment of Error No. 6).

In Cobra's Sixth Assignment of Error, Cobra argues that the Commission erred "when it denied Cobra the authority to charge a temporary surcharge of at least $0.40 until a permanent rate could be set."[38] Cobra further claims that despite R.C. 4909.16 granting the Commission broad discretionary powers to determine whether an emergency exists, the Commission refused to utilize that discretion due to its alleged bias towards Mr. Osborne.[39] This issue has already been exhaustively addressed—and properly rejected—by the Commission, and the reasons for such denial are well-documented in the Opinion and Order and the record.[40]

As the Commission properly held, Cobra 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, as required by R.C. 4909.16.[41] During the emergency hearing, Cobra confirmed that it continues to provide safe and reliable service under current operating conditions, with no delay in any necessary safety-related expenditures.[42] And Cobra offered no testimony or other evidence to address what efforts, if any, it had taken to control its costs or to begin to comply with its tax obligations.[43]

Moreover, Cobra's position that emergency rate relief is justified by the financial information in the evidentiary record is simply incorrect.[44] As succinctly explained in NEO's Post-Hearing Reply Brief, the undisputed record evidence established the following:

[38] Cobra Application for Rehearing at 13–14.
[39] Cobra Application for Rehearing at 13.
[40] Opinion and Order at ¶¶ 139–151.
[41] Opinion and Order at ¶¶ 146, 151.
[42] Opinion and Order at ¶ 146.
[43] *Id.*
[44] Cobra Application for Rehearing at 13–14.

- Cobra's emergency application contains inconsistent financial data that Cobra is unable to explain (e.g., 2018 income statement is inconsistent with the 2018 transport revenue summary);[45]

- Cobra's emergency application reports revenues from extracted product that are inconsistent with and materially different from those identified in confidential financial records produced in discovery;[46]

- Cobra admits that its balance sheet attached to the emergency application does not reflect the effects of its actual revenue and expenses;[47] and

- Cobra's income statements are riddled with arbitrary and inconsistent information (with the author of said statements admitting that the information reported was based on nothing more than "stab[s] in the dark").[48]

Not surprisingly, the author/sponsor of Cobra's financial records admitted that they were created in haste and are largely based on arbitrary speculation and questionable accounting practices.[49] The financial information submitted by Cobra lacks the consistency, reliability, and accuracy necessary to support an emergency rate increase.

Put simply, because Cobra had not endeavored to "show that it has attempted to relieve the emergency using all other measures available to it," the Commission was correct to deny Cobra's request for immediate rate relief under R.C. 4909.16.[50]

G. The Commission properly refused to allow Cobra to collect its previously assessed personal property taxes as a regulatory asset in the 2016 Rate Case. (Assignment of Error No. 7).

Finally, Cobra's Seventh Assignment of Error addresses Cobra's misguided contention that it should be permitted to recover from its customers the balance of the property taxes it now owes due to Cobra's own failure to pay its taxes—yet another example of Cobra's financial

[45] NEO Initial Brief, at 28-29.
[46] *Id*. at 29-32.
[47] *Id*.
[48] *Id*. at 30-32.
[49] *Id*. at 30.
[50] *Id*.

mismanagement and imprudence.[51] This issue has been thoroughly considered, addressed, and properly rejected by the Commission, and Cobra brings no new arguments that would require the Commission to deviate from its earlier decision.[52] Importantly, as properly found by the Commission, R.C. 4909.154 requires that when setting rates, the Commission must consider the management policies, practices, and organization of the utility charging the rates in question.[53] If the Commission determines that any operating or maintenance expenses were incurred through mismanagement or imprudence, the Commission must deny cost recovery for those expenses.[54]

Here, the record is clear that Cobra has failed, over many years, to pay any of its personal property taxes, incurring substantial penalties and interest.[55] And, as readily acknowledged by Cobra's own witness, this failure to pay taxes is a result of Cobra's mismanagement.[56] Because Cobra's outstanding previously assessed personal property taxes are the results of previous imprudent management practice they are barred from recovery by R.C. 4909.154, as the Commission properly determined.[57]

[51] Cobra Application for Rehearing at 14–16.
[52] Opinion and Order at ¶¶ 101–109.
[53] *Id.* at ¶¶ 105, 109.
[54] Opinion and Order at ¶¶ 105, 109.
[55] *Id.* at ¶ 109.
[56] *Id.*
[57] *Id.*

III. CONCLUSION

For the foregoing reasons, Cobra's Application should be denied.

Respectfully submitted,

/s/ N. Trevor Alexander
N. Trevor Alexander (0080713)
Mark T. Keaney (0095318)
CALFEE, HALTER & GRISWOLD LLP
1200 Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 621-1500
Fax: (614) 621-0010
talexander@calfee.com
mkeaney@calfee.com

Attorneys for Northeast Ohio Natural Gas Corp.

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 21st day of October 2019. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. A courtesy copy was also served on all parties via electronic mail.

/s/ N. Trevor Alexander
One of the Attorneys for Northeast Ohio Natural Gas Corp.

Summary: Memorandum Contra to Cobra Pipeline Company, Ltd.'s Application for Rehearing by Northeast Ohio Natural Gas Corp. electronically filed by Mr. Trevor Alexander on behalf of Northeast Ohio Natural Gas Corp.