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**

FOURTH ENTRY ON REHEARING

Entered in the Journal on April 8, 2020

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Cobra Pipeline Company, LTD on October 11, 2019.

II. DISCUSSION

A. Procedural Background

{¶ 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} On August 15, 2016, Cobra filed its application in Case No. 16-1725-PL-AIR (*Rate Case*), 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, Orwell-Trumbull Pipeline Company, LLC (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., Opinion and Order (June 15, 2016) at ¶ 77.

{¶ 4} An amended abbreviated application was filed by Cobra on September 26, 2016.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} On April 13, 2018, Staff filed a written report of its investigation (Staff Report) in the *Rate Case*.

{¶ 8} 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.

{¶ 9} On May 10, 2018, Cobra filed an application for rehearing of the April 11, 2018 Entry.

{¶ 10} By Entry on Rehearing dated June 6, 2018, the Commission granted Cobra's application for rehearing for the purpose of further consideration of the matters specified in the application for rehearing.

{¶ 11} On June 22, 2018, the evidentiary hearing in the *Rate Case* was continued at Cobra's request and rescheduled to commence on September 5, 2018.

{¶ 12} By Entry dated August 24, 2018, the attorney examiner granted a motion for continuance of the evidentiary hearing filed by Orwell Natural Gas Company, Northeast Ohio Natural Gas Corp., and Brainard Gas Corp. (collectively, NEO). The hearing was rescheduled to begin on September 10, 2018.

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

{¶ 14} 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.

{¶ 15} By Entry dated December 7, 2018, the attorney examiner established a procedural schedule to assist the Commission in its review of Cobra's application for an emergency rate increase. The attorney examiner also granted Cobra's unopposed motion for consolidation of the above-captioned cases.

{¶ 16} On January 7, 2019, Staff filed its review and recommendations regarding Cobra's request for an emergency rate increase.

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

{¶ 18} On September 11, 2019, the Commission issued an Opinion and Order, finding that Cobra 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. The Commission also determined that Cobra failed to sustain its burden of proof to demonstrate that emergency rate relief should be granted. On that same date, the Commission also issued a Second Entry on Rehearing, denying Cobra's application for rehearing of the April 11, 2018 Entry and directing that customers receive a refund of any amounts paid in excess of Commission-approved rates.

{¶ 19} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 20} On October 11, 2019, Cobra filed an application for rehearing. Cobra states that it "applies for rehearing of the Entry and Orders," as issued by the Commission on September 11, 2019. NEO filed a memorandum contra Cobra's application for rehearing on October 21, 2019.

{¶ 21} On November 6, 2019, the Commission granted rehearing for further consideration of the matters specified in Cobra's application for rehearing.

{¶ 22} The Commission has reviewed and considered all of the arguments raised in Cobra's application for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Commission and should be denied.

B. Consideration of the Application for Rehearing

{¶ 23} In its first ground for rehearing, Cobra argues that the Commission erred by allegedly permitting biases against the Company's principal owner, Richard M. Osborne, to infect the proceedings designed to determine a just and reasonable rate. Specifically, Cobra claims that the Commission erred by failing to strike portions of Staff's initial brief in the *Rate Case* that addressed the history of other companies owned by Mr. Osborne and past incidents involving Mr. Osborne and did not address Cobra itself. Asserting that many of the statements and facts in Staff's brief are irrelevant, inflammatory, prejudicial, and unrelated to ratemaking, Cobra argues that the history provided in the brief shows that the purpose of the *Rate Case* is to punish Cobra for being owned by Mr. Osborne rather than to establish a just and reasonable rate. Cobra contends that the Commission also erred by failing to permit Cobra to question Staff regarding potential bias against the Company and Mr. Osborne during the hearing in the *Emergency Rate Case*. Cobra notes that Rule 616(A) of the Ohio Rules of Evidence states that bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

{¶ 24} In its memorandum contra Cobra's application for rehearing, NEO responds that the Commission properly denied Cobra's motion to strike portions of Staff's initial brief. NEO argues that the Commission thoroughly considered and rejected Cobra's position on this issue and that, in any event, Mr. Osborne's background was not a factor in the Commission's decision regarding the Company's requested rate adjustments. NEO adds that, given Mr. Osborne's status as Cobra's principal owner and managing officer, Mr. Osborne's history of management of several of Cobra's former affiliates is not only relevant to the Company's current operations but also well within the scope of the issues before the Commission. NEO emphasizes that there is extensive record evidence that documents the improper self-dealing and commingling of funds between Mr. Osborne's various companies, which occurred without the knowledge of Cobra's employees.

{¶ 25} In the Opinion and Order, the Commission thoroughly addressed Cobra's motion to strike the "Background" section of Staff's initial brief in the *Rate Case*. The Commission found that, consistent with its authority in R.C. 4905.05 over persons owning or operating public utilities in this state, the history provided by Staff is relevant and within the scope of the consolidated proceedings. September 11, 2019 Opinion and Order at ¶ 35. Although Cobra claims that Staff's brief improperly focuses on Mr. Osborne, does not provide any information about Cobra itself, and distracts from the relevant issues in the *Rate Case*, the Company has not denied that Mr. Osborne is its principal owner and managing officer and that, as such, Mr. Osborne is ultimately responsible for Cobra's operations and financial condition. More importantly, Cobra has not shown that any statement in the "Background" section of Staff's brief was relied upon by the Commission in resolving the *Rate Case*. The Commission's decision was based solely on the testimony, Staff Report, and other exhibits in the record. With respect to Cobra's contention that the attorney examiner did not permit the Company, during the hearing in the *Emergency Rate Case*, to question Staff regarding its purported biases, Cobra failed to raise the propriety of the ruling as a distinct issue for the Commission's consideration in its initial brief, as required by Ohio Adm.Code 4901-1-15(F). In any event, we find no merit in Cobra's argument, as the attorney examiner

allowed the Company's counsel to freely question Staff witness Snider about Staff's position as a collective body. The attorney examiner merely directed that questions regarding the personal views of individual Staff members be rephrased, which counsel agreed was "fair enough" (Tr. at 196-202). Cobra's first ground for rehearing should, therefore, be denied.

{¶ 26} In its second ground for rehearing, Cobra asserts that the Commission erred by striking statements purporting to show Mr. Osborne's capital contributions to the Company during 2018. Cobra maintains that the Commission incorrectly found that the Company's reply brief in the *Emergency Rate Case* included non-record information. Cobra notes that its general ledger up until December 2018 was included as part of Exhibits JC-1 and JC-2, while Company witness Coatoam provided testimony during the hearing in the *Emergency Rate Case* that addressed Mr. Osborne's contributions in December 2018.

{¶ 27} In response, NEO asserts that the Commission properly rejected Cobra's attempt to include information in its reply brief that is not part of the record. According to NEO, the exhibit attached to Cobra's reply brief identifies a number of alleged transactions from December 2018 that do not have any evidentiary support in the record. NEO points out that Exhibits JC-1 and JC-2 only included information through November 30, 2018, while Ms. Coatoam's testimony generally referenced alleged accounting entries to be made in the future but did not actually address the accounting entries attached to Cobra's reply brief.

{¶ 28} The Commission granted, in the Opinion and Order, NEO's motion to strike a sentence and corresponding footnote in Cobra's reply brief in the *Emergency Rate Case*, along with attached Exhibit 1, which is not an exhibit admitted into the record. The Commission thoroughly explained the basis for the ruling. September 11, 2019 Opinion and Order at ¶ 39. As Cobra acknowledges, Exhibits JC-1 and JC-2, which were attached to the direct testimony of Company witness Carothers, included information through November 30, 2018. Nothing precluded Cobra from basing its argument regarding Mr. Osborne's capital contributions on these exhibits or on Ms. Coatoam's testimony during the hearing in the

Emergency Rate Case, which generally referenced future accounting entries expected to be made for payments from OsAir, Inc. (OsAir) to Cobra at an unspecified time in 2018. However, nothing in the record supports all of the alleged capital contributions listed on Exhibit 1 or the total amount referenced on page 15 of Cobra's reply brief. Rather than rely upon the information in Exhibits JC-1 and JC-2 and the testimony of Ms. Coatoam provided during the hearing, Cobra elected, in its reply brief, to offer an amount of alleged capital contributions that is not reflected anywhere in the record and to attach a non-record exhibit. Accordingly, the Commission did not err in granting the motion to strike and Cobra's request for rehearing on this issue should be denied.

{¶ 29} In its third ground for rehearing, Cobra contends that the Commission erred by failing to recognize that the Company does not need the Commission's permission to schedule its rates. Cobra argues that, although the Commission correctly found that the traditional ratemaking process does not apply to pipeline companies, the Commission nonetheless applied that process to the Company. Cobra asserts that the Commission failed to recognize that R.C. 4909.17 does not apply to pipeline companies, which, according to Cobra, means that the Company's rates take effect upon filing, without the Commission's approval, and remain in effect unless they are set aside by the Commission. Cobra notes that its proposed rates took effect on July 1, 2017, and remained in effect until April 11, 2018, when the Commission exercised its authority and suspended the rates.

{¶ 30} NEO responds that the Commission has considerable authority to determine proper rates for Cobra under R.C. 4909.15 and that the Company ignores the larger statutory scheme under R.C. Chapter 4909. NEO notes that other industries exempt from R.C. 4909.17, such as railroads, have always maintained the ability to file rate schedules that would go into effect unless suspended by the Commission pursuant to R.C. 4909.27, whereas the ratemaking process for pipeline companies like Cobra is subject to R.C. 4909.15, which permits the Commission to set just and reasonable rates if it believes that the rates are unjust and unreasonable. NEO contends that Cobra and other pipeline companies are prohibited

from modifying their rates, absent an order from the Commission. NEO adds that the Commission has thoroughly addressed this issue and found that its consideration of Cobra's current and proposed rates was consistent with its statutory authority under R.C. Chapter 4909, its considerable discretion to manage its dockets, and its prior precedent in cases establishing rates for pipeline companies.

{¶ 31} The Commission fully considered and rejected Cobra's position on this issue in the Opinion and Order, as well as in the April 11, 2018 Entry and the related Second Entry on Rehearing. We have also fully explained our view of the Commission's considerable statutory authority with respect to ratemaking for all public utilities, including pipeline companies, under R.C. Chapter 4909 and R.C. 4905.26, as recognized by the Ohio Supreme Court. September 11, 2019 Opinion and Order at ¶¶ 50-53; Second Entry on Rehearing at ¶¶ 15, 19-20; April 11, 2018 Entry at ¶ 32. Cobra has raised no new argument for the Commission's consideration and the Company's request for rehearing should, therefore, be denied.

{¶ 32} In its fourth ground for rehearing, Cobra asserts that, even if R.C. 4909.17, 4909.18, and 4909.19 should be applied in rate cases involving pipeline companies, the Commission erred when it failed to provide all of the due process protections provided to public utilities by the General Assembly. Cobra argues that it was subjected to regulatory delay for over three years, during which time its financial position deteriorated. According to Cobra, this is the antithesis of due process, as well as contrary to the General Assembly's intentions in exempting pipeline companies from R.C. 4909.17 and in creating R.C. 4909.42 to protect all other utilities.

{¶ 33} NEO counters that Cobra failed to identify, with the specificity required for an application for rehearing under R.C. 4903.10, any alleged due process protection that it was purportedly denied.

{¶ 34} The Commission finds that Cobra's fourth ground for rehearing should be denied. R.C. 4903.10 requires an applicant for rehearing to set forth specifically the ground or grounds on which the applicant considers the Commission's order to be unreasonable or unlawful. Although Cobra contends that it has been denied due process in these proceedings, the Company has not explained, with any specificity, which due process protections have allegedly been withheld. Instead, Cobra offers the general claim that it has been subjected to regulatory delay. We have twice noted that the length of these proceedings has been dictated by several factors that have hindered the Commission and Staff throughout the process of reviewing Cobra's application in the *Rate Case*, including a lack of sufficient financial records and other information, as well as OTP's receivership and bankruptcy proceedings. September 11, 2019 Opinion and Order at ¶ 57; April 11, 2018 Entry at ¶¶ 26-31. Cobra has been afforded ample due process in both the *Rate Case* and the *Emergency Rate Case*. Among other things, Cobra has been provided the opportunity to offer the testimony of its witnesses and other evidence, to cross-examine Staff's witnesses, and to file initial and reply briefs. Cobra has failed to identify any way in which it was deprived of due process or afforded less protection than any other public utility.

{¶ 35} In its fifth ground for rehearing, Cobra argues that, even if the Commission appropriately employed processes similar to those applied under R.C. 4909.17, 4909.18, and 4909.19, the Commission erred when it refused to consider information outside of the test year. Cobra notes that R.C. 4909.15(C)(1) and (D) enable the Commission to consider revenues and expenses beyond the prescribed test year. Cobra asserts that the alleged delay in these cases is reason to change the test year to reflect the Company's current financial situation. Additionally, Cobra emphasizes that Staff requested information from the Company that is outside of the test year, while the Commission accepted Staff's non-test-year adjustments to rate case expenses, professional service fees, and salaries. Cobra adds that the Commission also erred when it declined to adjust the Company's expenses to reflect the fact that Cobra could no longer allocate operating expenses to its former affiliate, OTP.

{¶ 36} NEO replies that the Commission properly refused to consider information outside of the test year. NEO asserts that R.C. 4909.15(C) expressly prohibits the Commission from considering information outside of the test year, unless certain criteria that are inapplicable here are met. NEO adds that Cobra's arguments regarding its deteriorating financial condition were expressly considered and rejected by the Commission in the *Emergency Rate Case*.

{¶ 37} The Commission thoroughly addressed, in the Opinion and Order, the basis for its conclusions regarding the test year established in the *Rate Case*. Initially, we rejected Cobra's contention that the Commission is not bound by the test year. As we noted, the test-year concept is a key component of the mandatory ratemaking formula set forth in R.C. 4909.15. Cobra proposed, in its amended application, a test year ending December 31, 2015, which the Commission approved in its November 9, 2016 Entry. We further noted that, at no point, did Cobra attempt to modify its approved test period by filing a new application reflecting its changed financial position. September 11, 2019 Opinion and Order at ¶¶ 72-73. The Commission also rejected Cobra's arguments regarding Staff's allocation of salaries and benefits between Cobra and OTP, which was based on the Company's own proposed allocation of expenses to account for the fact that certain employees worked for both pipeline companies during the test year. We also noted that, although OTP is now operated by a receiver, the record reflects that Cobra's employees continue to divide their time between the Company and its affiliates. September 11, 2019 Opinion and Order at ¶ 95. Although Cobra argues that Staff made adjustments beyond the test period for items like rate case expenses, our adoption of Staff's adjustments is consistent with both our precedent and the Ohio Supreme Court's determination that R.C. 4909.15(E)(2) permits the Commission to "make minor adjustments to rates ascertained by the statutory formula" and that, with respect to rate case expenses, "[t]he appropriate inquiry is whether legal fees are ordinary and necessary expenses in obtaining rate relief as provided by law." *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 538-539, 547, 620 N.E.2d 835 (1993); *In re Ohio Suburban Water Co.*, Case No. 81-657-WS-AIR, Opinion and Order (May 5, 1982) (noting that "the

rationale for including such [rate case] expenses in test year operating expenses is to establish a reasonable allowance for a normal and necessary utility function"). Finally, as we emphasized, Cobra's application for emergency rate relief provided a proper means to address post-test-year changes in the Company's financial situation. September 11, 2019 Opinion and Order at ¶¶ 73, 95. For these reasons, Cobra's fifth ground for rehearing should be denied.

{¶ 38} In its sixth ground for rehearing, Cobra contends that the Commission erred when it denied the Company's application for a temporary surcharge in the *Emergency Rate Case*. Cobra argues that, despite the Commission's vast discretion under R.C. 4909.16, and evidence indicating that the Company cannot meet its financial obligations due to a reduction in shipped volumes, the Commission refused to approve a temporary surcharge due to its bias toward Mr. Osborne.

{¶ 39} NEO replies that the Commission properly denied Cobra's application for a temporary surcharge in the *Emergency Rate Case*, because the Company failed to meet its burden under R.C. 4909.16 to clearly and convincingly demonstrate the presence of a genuine emergency situation justifying the extraordinary measure of emergency rate relief. NEO emphasizes that Cobra's financial information lacks the consistency, reliability, and accuracy necessary to support an emergency rate increase, particularly given that the author and sponsor of the financial records admitted that they were created in haste and are largely based on arbitrary speculation and questionable accounting practices.

{¶ 40} In the Opinion and Order, the Commission, upon careful consideration of the appropriate legal standard and its precedent with respect to emergency rate applications, found that Cobra had 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. September 11, 2019 Opinion and Order at ¶¶ 139-151. The Commission thoroughly considered Cobra's assertion that emergency relief was warranted

due to a decrease in volumes shipped on its system and a corresponding decline in revenues. Upon review of the evidence, the Commission concluded that Cobra offered insufficient evidence of its efforts to bring its stripping station back into operation and to end the shut in of the Churchtown system or to increase its transportation volumes and revenues through any other means. September 11, 2019 Opinion and Order at ¶¶ 147-148. We also noted that Mr. Osborne, on Cobra's behalf, transferred to an unregulated affiliate, for consideration of $10, the real property on which the stripping station is located, as well as "appurtenances there-unto," which is evidence that the Company's financial situation has worsened due to the actions of its managing member and principal owner, Mr. Osborne. September 11, 2019 Opinion and Order at ¶ 148. Contrary to Cobra's claim that the Commission denied emergency rate relief in light of a purported bias toward Mr. Osborne, the Commission's decision to deny the Company's emergency rate application was based on the testimony and supporting exhibits of the Company's own witnesses, as well as the other evidence of record in the *Emergency Rate Case*, which, as we noted, included no reliable financial records on which to determine the Company's cash requirements. September 11, 2019 Opinion and Order at ¶¶ 146-150. Therefore, Cobra's sixth ground for rehearing should be denied.

{¶ 41} Finally, in its seventh ground for rehearing, Cobra maintains that the Commission erred when it refused to allow the Company to collect its previously assessed personal property taxes as a regulatory asset in the *Rate Case*. Cobra asserts that, contrary to Staff's position, the Company's customers have not paid personal property taxes as part of their rates, because Cobra was not seeking recovery of personal property taxes when the Commission first approved its tariff in 2005. Cobra notes that it instead paid commercial activity taxes under a group filing in the name of OsAir, which did not offset the amount of personal property taxes now owed. Cobra claims that it merely seeks to recover the outstanding tax balance from its customers, given that they benefited from paying lower rates to Cobra than they would have been charged had the proper tax been paid.

{¶ 42} NEO responds that the Commission properly refused to allow Cobra to collect its previously assessed personal property taxes as a regulatory asset. According to NEO, the record is clear that Cobra has failed, over many years, to pay any of its personal property taxes, incurring substantial penalties and interest, which its own witness admitted is a result of the Company's mismanagement. NEO emphasizes that, because Cobra's outstanding previously assessed personal property taxes were caused by imprudent management practices, they are barred from recovery by R.C. 4909.154, as the Commission properly determined.

{¶ 43} In the Opinion and Order, the Commission fully considered Cobra's arguments on this issue. We also explained the basis for our conclusion that Staff properly excluded Cobra's out-of-period property tax expense, which accrued from 2008 through 2014, and that such expense, including the associated penalties and interest, is imprudent and barred from recovery pursuant to R.C. 4909.154. As we noted, nothing in the record supports Cobra's argument that it was unable to pay its tax obligations during the test year or prior years, while Cobra's own witness acknowledged that the Company's failure to pay its taxes is a result of its mismanagement. September 11, 2019 Opinion and Order at ¶¶ 101-109. In its application for rehearing, Cobra has raised no new argument on this issue and, accordingly, the Commission finds that the Company's seventh ground for rehearing should be denied.

III. ORDER

{¶ 44} It is, therefore,

{¶ 45} ORDERED, That the application for rehearing filed by Cobra on October 11, 2019, be denied. It is, further,

{¶ 46} ORDERED, That a copy of this Fourth Entry on Rehearing be served upon all interested persons and parties of record.

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

SJP/mef

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

Summary: Entry Cobra's application for re-hearing filed on 10.11.19 is denied. electronically filed by Mrs. Kelli C King on behalf of Sarah J. Parrot, Attorney Examiner, Public Utilities Commission of Ohio