BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Joint Application of Utility Pipeline, Ltd., Cobra Pipeline Company, Ltd., and Knox Energy Cooperative Association, Inc. to Substitute Natural Gas Service and Transfer Assets to Customers	)))))	Case No. 21-0803-GA-ATR

NORTHEAST OHIO NATURAL GAS CORP.'S MEMORANDUM IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

NEO[1] made extensive efforts to obtain information about the Transaction[2] before filing its Initial Comments. Knox and UPL refused to respond to many of those requests, primarily because Knox/UPL claimed such information was not relevant. Knox/UPL asserted this objection despite the fact these exact issues had been expressly raised in the Application.

In its Initial Comments NEO addressed the information which had not been provided in discovery or in the Application and provided the Commission with copies of Knox/UPL refusal to provide the information requested. Knox/UPL then decided to provide a small portion of the information sought by NEO in their Reply Comments. It is inappropriate for Knox/UPL to include in their briefs the very same information which they claimed in discovery was not reasonably likely to lead to the discovery of admissible evidence.[3]

When the UPL/Knox Reply Comments were filed NEO requested a copy of the confidential copy of the UPL/Knox brief and offered to enter into a protective agreement.

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[1] Northeast Ohio Natural Gas Corp. ("NEO")

[2] Cobra Pipeline Company, Ltd. ("Cobra") is seeking to sell its natural gas pipeline systems and natural gas taps, along with substantially all of its assets used in the operation of its business ("Assets") to Utility Pipeline, Ltd. ("UPL") who, in turn, is seeking approval from the Commission to assign its interest in the Assets to Knox Energy Cooperative Association Inc. ("Knox"). Knox and UPL are referred to collectively as "Knox/UPL."

[3] The parties are still in the "meet and confer" process on those discovery requests and those issues will be further described if those discussions do not resolve the issues.

UPL/Knox have refused to enter into a protective agreement which would provide NEO with copies of the unredacted Reply Comments. UPL/Knox have also failed to provide NEO with copies (redacted or unredacted) of the exhibits filed with the Reply Comments. Thus, NEO is forced to file this memorandum in opposition without the benefit of even understanding exactly what information has been provided to the Commission and withheld from public view.

Quite simply, this is not how the process is supposed to work. The Commission is to operate as openly as possible while still protecting trade secrets. Only truly confidential information should be redacted from briefs and exhibits filed with the Commission. When confidential information exists the parties are expected to enter into protective agreements to allow it to be appropriately protected. However, Knox/UPL have refused to participate in any protective agreement which would allow NEO to have access to the information included in the Reply Brief.

Knox/UPL have failed to show that the information which has been redacted from their Reply Comments should be removed from public view. The Motion for Protective Order ("Motion") should be denied as to the rate impacts to customers so that the impact to customer rates can be publicly known. This is similar to the public notice process often used in Commission rate cases.[4]

While Knox/UPL have not met their burden of proof in the Motion, there is a chance that there is information in Exhibits A-E which actually does qualify for protective treatment. In order to protect that potentially confidential information NEO is not asking that it be made publicly available at this time. Instead NEO requests that the Commission require properly redacted exhibits to be included in the public version of the file and a briefing process established to evaluate any trade secret claims that Knox/UPL may make at that time.

[4] OAC 4901-7-01.

II. Factual Background

As discussed at length in NEO's Initial Comments, Knox and UPL have consistently refused to provide basic information that would help the Commission and intervenors understand the nature and mechanics of the proposed Transaction. NEO specifically objected because the Knox/UPL have refused to provide copies (redacted or unredacted) of information extensively discussed in the Application. That information includes: (1) the Management Agreement between UPL and Knox by which UPL operates Knox's assets; (2) the Assignment Agreement(s) by which UPL will transfer Cobra to Knox; (3) proposed rate schedules for Cobra customers; (4) substantive information or documentation evincing the managerial, technical, and financial capability of Knox and UPL; (5) details regarding how, when, and under what conditions Knox will pay UPL for the assignment of the Assets and customers to Knox; (6) what "financing" will be provided to Knox as indicated on page 12 of the Application; (7) the circumstances under Cobra customers could be responsible for paying for the acquisition of Cobra by Knox; (8) information about the plans to upgrade Cobra's systems to address the issues identified in the Application; (9) the rates which will be charged to Cobra customers immediately after the Transaction is approved; (10) the manner by which rates for Cobra customers can change in the future; (11) the transition plan to be provided to Cobra; (12) information about how Knox has fueled its growth through acquisitions of utilities formerly subject to PUCO jurisdiction; (13) Knox financial statements; and (14) the amounts owed by Knox to UPL.

In response to these objections in the Reply Comments UPL/Knox provided significant "supplemental information" about their proposal for the first time. Some of that information is confidential but NEO has not been provided with copies of these documents and redacted versions were not included in the public version of the file. In the Motion itself, Knox/UPL state that in the interests of "transparency" they will represent a maximum rate they anticipate charging to resellers

of gas like NEO. However, rather than being transparent UPL/Knox have refused to make that information available to the public.[5]

NEO requested to receive an unredacted copy of the filing and offered to enter into a protective agreement, but UPL/Knox has indicated that it would refuse to provide the exhibits even subject to protective order. UPL/Knox did offer to provide what UPL/Knox claim is the maximum charge pursuant to protective order but to date has not provided a protective agreement which would actually provide this information to NEO.

III. Legal Standard

The Commission traditionally only provides confidential treatment of information which qualifies as a trade secret under Ohio law. R.C. § 4905.07 requires that all facts and information in the possession of the Commission shall be public, except as provided in R.C. § 149.43, and as consistent with the purposes of Title 49 of the Revised Code. OAC 4901-1-24(D) provides clear guidance that trade secrets should be protected "where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." The Rule further makes clear that protective orders "shall minimize the amount of information protected from public disclosure."[6] The redactions "should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information."[7]

[5] See Reply Comments p. 7.
[6] OAC 4901-1-24(D).
[7] OAC 4901-1-24(D)(1).

IV. Analysis

A. Exhibits A-C

As discussed above and in the NEO Initial Comments at pp. 6-7, the Application made extensive reference to the Assignment Agreement. NEO requested this document in discovery and in response the Knox/UPL claimed they were "still negotiating the parameters of the assignment."[8]

Despite refusing to produce these documents in response to NEO's discovery requests Knox/UPL have apparently included them with their Reply Comments. Those exhibits purportedly contain Knox/UPL's proposed per meter and volumetric charges for the Churchtown, Homesville, and North Trumbull territories, along with a "one time membership charge." This is inappropriate for several reasons.

First, it is inappropriate for Knox/UPL to object to even providing this information in discovery, where the standard is "reasonably likely to lead to the discovery of admissible evidence," and then use that information offensively only a few days later.

Second, Knox/UPL have refused to provide these agreements to NEO even pursuant to a protective agreement. Knox/UPL have failed to explain how providing the assignment agreement between Knox and UPL could possibly impact their competitive position so much that providing the information even pursuant to protective agreement would not be sufficient protection.

Third, NEO anticipates the Assignment Agreement contains key terms about this transaction which may not be confidential. However, no redacted version of the Assignment Agreement was provided. This prevents the parties, and the general public, from knowing whether the redactions are all necessary or appropriate.

[8] Knox response to Interrogatory 1-5, UPL response to Interrogatory 1-4, Request for Production 2 (copies of the UPL and Knox responses to discovery were provided with NEO's Initial Comments).

Fourth, as acknowledged in the Joint Motion Knox is a member-owned cooperative. If the Transaction is approved NEO may have the right to review these agreements, as would every other member of Knox. As Knox acknowledged in the Motion "most Knox members do not possess the agreements or their contents, though as part-owners of a cooperative association they may request them."[9] NEO is unable to conclusively state that it will have this right because Knox/UPL have failed to provide NEO with the terms and conditions which would govern NEO's membership in Knox and ability to participate in Knox management. However, clearly it would be inappropriate to deny NEO access to these agreements when the Commission is considering this Transaction if NEO would have access to them as a member/owner of Knox as soon as the Transaction was approved.

Fifth, and finally, the Assignment Agreements are cited by Knox/UPL to show the purported per meter and volumetric charges associated with this transaction which will be billed to customers.[10] The Motion fails to explain how informing the general public of the rates which will be charged to them is somehow a trade secret. Instead the Commission has a long history of requiring notice to customers for rate changes by requiring notice of rate increases as part of the public notice process.[11] This information is also not a trade secret under R.C. § 1333.61 because it will be disclosed to each customer on a monthly basis once the transaction is approved.

NEO respectfully requests that the charges at page 6 of Knox/UPL Initial Comments be made publicly available. It is only fair for customers to be notified of the rates to be charged to them and this information is directly relevant to the Commission's determination in this proceeding.

[9] Joint Motion p. 4.
[10] Reply Comments p. 6.
[11] OAC 4901-7-01.

As for these exhibits and the rate claims made from them, NEO is unable to comment because Knox/UPL failed to provide redacted versions of those agreements in the public file. As such, it is entirely possible that none of those agreements should be redacted because the agreements are not confidential. It is also possible that certain information in those agreements could be redacted while other information can be publicly disclosed.

NEO accordingly requests that Knox/UPL be ordered to file properly redacted versions of these contracts in the public file. NEO also requests that Knox/UPL be directed to disclose any information which Knox/UPL claim is a trade secret after that transaction to NEO pursuant to protective agreement. Finally, a reasonable period of time should be established for NEO and other members of the public to comment as to whether the redactions proposed by Knox/UPL are reasonable after the properly redacted documents have been provided to NEO.

B. Exhibit D

Exhibit D purports to be contracts between Knox and certain grain dryer customers. Knox/UPL claim that these agreements show that those customers will pay a lower rate if the transaction is approved than they currently do.

As a preliminary matter, it is unclear what contracts Knox/UPL are comparing because the customers at issue, and the rates being charged to them, have not been disclosed. It is unclear whether Knox is serving these customers today or wishes to serve them in the cooperative if this Transaction is approved. It is also unclear if these agreements are final and the circumstances under which those contracts were negotiated. Finally, there did not seem to be any grain dryers on the list of customers who Cobra notified of this proceeding which raises questions about whether Cobra properly noticed all customers as required by the Entry issued in this proceeding.

Leaving aside these factual questions, there is a significant difference between regulated ratemaking where customers are guaranteed a reasonable Commission approved maximum rate and the unilateral discretion that Knox is claiming for itself. Indeed, one could easily imagine a situation where Knox negotiated preferred rates for these customers and is reserving the right to charge other customers higher prices at Knox's sole discretion. Thus, the relevance of these contracts to whether the Transaction should be approved is still unclear.

NEO accordingly requests that a properly redacted version of Exhibit D be provided and treated in the same manner as Exhibits A-C.

C. Exhibit E

Knox/UPL attach an old agreement between Knox and Orwell Trumbull Pipeline, an entity which is no longer in business, as Exhibit E. The years in which that old agreement was in place are unknown, but Orwell Trumbull Pipeline operated in receivership for years before ultimately selling its assets to NEO. It is therefore extremely doubtful that an agreement this old, between Knox and an entity which has not been in business for quite some time, could possibly qualify as a trade secret under Ohio law. Once again it is unclear how that old contract rate is relevant to this proceeding as even redacted versions of those documents were not provided to the public for review.

Despite the likely age of this agreement making it extremely unlikely Exhibit E qualifies as a trade secret, NEO requests that Exhibit E be treated in the same manner as Exhibits A-D.

D. Maximum Rate

Knox/UPL claim there is a "maximum rate that they anticipate charging to utilities and other resellers of natural gas, such as NEO."[12] If the Knox/UPL intend for the Commission to be

[12] Initial Comments, p. 7.

able to rely on this "maximum rate" for the protection of customers then that rate must be publicly disclosed. If the rate is not publicly disclosed then customers like NEO will have no ability to determine if the rate to be charged at inception is reasonable and protects customer interests. That is a particular concern here when that rate will be passed along to thousands of NEO's end use customers via the Gas Cost Recovery rider.

This argument by the Knox/UPL also does not address how long that "maximum rate" will remain in effect. If the Commission were to approve the Transaction then Knox would have the unilateral ability to raise customer rates going forward. That includes potential increases above the "maximum rate." As such, there are significant concerns that the "maximum rate" could in reality be only a short-term rate which Knox changes at its discretion as soon as the Transaction is approved.

The "maximum rate" should be publicly disclosed, including how long that rate will remain in effect, so that the Commission and the general public can properly evaluate the impact of the Transaction.

V. CONCLUSION

As discussed above, NEO requests that the Commission order the rates to be charged to customers if the Transaction be approved and the "maximum rate" be immediately made public.

With regard to Exhibits A-E, those may or may not contain trade secret information. NEO accordingly requests that Knox/UPL be ordered to file properly redacted versions of these contracts in the public file. NEO also requests that Knox/UPL be directed to disclose any information which Knox/UPL claim is a trade secret to NEO pursuant to protective agreement. Finally, a reasonable period of time should be established for NEO and other members of the public to comment as to whether the redactions proposed by Knox/UPL are reasonable after those documents have been produced.

Respectfully submitted,

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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 13th day of September, 2021. The PUCO's e-filing system will electronically service notice of the filing of this document on counsel for all parties.

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Summary: Memorandum in Opposition to Motion for Protective Order electronically filed by Mr. N. Trevor Alexander on behalf of Northeast Ohio Natural Gas Corp.