BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY MEMORANDUM OF UTILITY PIPELINE, LTD., AND KNOX ENERGY COOPERATIVE ASSOCIATION, INC., IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

Utility Pipeline, Ltd. ("UPL") and Knox Energy Cooperative Association, Inc. ("Knox") filed their motion for protective order to protect all confidential information from public disclosure while ensuring that the Commission would have the benefit of reviewing the terms of the assignment agreements that UPL and Knox will enter into if and when this transaction is approved by the Commission, as well as the other materials identified in the motion. (*See* Mot. at 1.) In response, Northeast Ohio Natural Gas Corp. ("NEO") filed a memorandum in opposition that failed to even cite the Ohio Supreme Court's factors governing claims for trade secret protection. Instead, NEO focuses much of its attention on alleged deficiencies with UPL and Knox's discovery responses, confuses its own proper role in this case with that of Staff, and attempts to conflate this proceeding with a rate case.

NEO is mistaken on all of those points. But more fundamentally, NEO has not rebutted the factual and legal showing made by UPL and Knox about the confidential and protected nature of these documents. As UPL and Knox have already pointed out, and NEO does not deny, "As a competitor of UPL's affiliates, NEO is a quintessential example of a person 'who can obtain economic value from [the] disclosure or use' of UPL and/or Knox's confidential

information." (Mem. at 3 n.1 (citing R.C. 1333.61(B).) For that reason, the motion for protective order should be granted.

II. LAW AND ARGUMENT

A. NEO fails to overcome the showing that UPL and Knox made as to all confidential exhibits and information referenced in the reply comments.

NEO's memorandum in opposition to the motion for protective order spends nearly as much time discussing its discovery disputes with UPL and Knox as it does addressing the confidentiality of the exhibits and information at issue. Critically, NEO's opposition does not even cite, much less analyze, the relevant legal factors identified by the Ohio Supreme Court and referenced extensively by UPL and Knox. *See State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-25 (1997). It is very important that these two issues not be confused. Whether or not a piece of information qualifies for confidential treatment is a separate question from whether NEO's discovery requests are unduly burdensome and totally out of proportion to NEO's needs in this case, among many other objections that Knox and UPL have raised. The parties' discovery disputes can—and likely will—be litigated another day.

What *is* at issue here is the confidentiality of the protected information in the non-public version of UPL and Knox's reply comments. And on that front, NEO simply does not have an argument that the rates charged by a not-for-profit cooperative to its members—rates which do not fall within the jurisdiction of the Commission—should be disclosed to the public. *See* R.C. 4905.02, 4905.04. That is doubly true where NEO is not even going to pay the rates set for residential members of Knox, but will instead, as a reseller of natural gas, pay a rate for transportation services. It is also true where—as NEO does not dispute—NEO is a competitor of UPL's affiliates, and Knox, and therefore precisely the type of party that explains why R.C. 1336.61 and Rule 4901-1-24 exist—to prevent competitors from accessing competitively

sensitive information like rates and private contractual terms. Nowhere in its opposition does NEO meaningfully contest this point. Instead, it merely states in conclusory fashion that "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." (Opp. at 5.) But providing a detailed breakdown of the rates that Knox charges—which is the bulk of what is in the protected documents—inevitably hands damaging information to a competitor. UPL and Knox explained this problem in their motion for protective order, and UPL's president expanded on this point in an affidavit that NEO does not even cite in its opposition. (Mem. at 4; Duckworth Aff. ¶ 5.) In particular, UPL and Knox explained, "UPL faces potential competition from *other companies that can provide the same services that UPL offers*." (Mem. at 4 (emphasis added).)

A brief review of each category of documents and information that UPL and Knox sought to protect confirms that UPL and Knox's motion for protective order is well-founded:

- Exhibits A, B, and C are the assignment agreements that UPL and Knox intend to enter into upon approval of this transaction by the Commission. These agreements consist almost exclusively of the rates and charges to which Knox members will be subject in the systems corresponding to each agreement. This fact is especially significant because "while Knox will, where appropriate, enter into transportation arrangements at reasonable rates, it is not seeking to operate Cobra's systems as an intrastate transmission pipeline system, but as part of its *distribution* system." (Reply Comments at 11 (emphasis added).) NEO's self-identification as a provider of "safe, reliable, and affordable natural gas service to more than 32,000 customers in 30 Ohio counties, primarily in the northeast

section of the state"[1] shows that it is very much a competitor of UPL and Knox in the natural gas distribution space. Thus, it is entirely appropriate to protect Exhibits A, B, and C from public disclosure to NEO and "other companies that can provide the services that UPL offers." (Duckworth Aff. ¶ 5.)

- Exhibit D consists of "the contractual rates and terms of service of the farm and grain dryer customers, which are similarly sensitive." (Mem. at 1.) NEO incorrectly suggests that "the customers at issue, and the rates being charged to them, have not been disclosed," (Opp. at 7), when in reality NEO knows the identity of these customers. And consistent with the Commission's prior Entry, notice was sent to all of Cobra's customers, including NEO, which UPL believes is the current utility that serves the grain dryer customers. (Aug. 17 Notice at 1-2.) NEO's other objections related to this exhibit are nonsensical. The whole purpose of this case is permit Knox to serve these customers, yet NEO asks whether Knox is serving these customers today. (Opp. at 7.) NEO also claims that Knox is asserting "unilateral discretion" over rates, when the dozens of pages of briefing and testimony in this case clearly establish that Knox's rates are set by contract, and the growth of those rates is capped.
- Exhibit E reveals the contract between Orwell-Trumbull Pipeline ("OTP") and Knox, executed in 2017. NEO fails to explain why this four-year-old contract is "old," (Opp. at 8), or why the age of this contract is relevant to why it should or should not remain confidential. The purpose of presenting this contract to the Commission is to demonstrate to the Commission that there is nothing unusual or irregular about the transportation agreements that Knox has entered into with entities like NEO in the recent

[1] https://www.neogas.com/.

past, so NEO is clearly wrong to suggest that it is irrelevant to this proceeding or that it cannot qualify as a trade secret. (Opp. at 8.)

Because NEO failed to even address how the *Plain Dealer* factors relate to these exhibits, it cannot overcome the factual and legal showing made by UPL and Knox in support of the motion for protective order. (*See* Mem. at 3-4.) As explained at length in UPL and Knox's motion, the *Plain Dealer* factors, which control this analysis, support UPL and Knox's request for protection, and NEO has failed to even attempt to argue otherwise.

B. The Commission has not yet ruled on UPL and Knox's request that NEO's intervention be limited to issues relevant to NEO, which could moot almost all of the issues raised in NEO's opposition brief.

In addition to failing to overcome the showing made by UPL and Knox regarding the confidential nature of the exhibits, NEO repeats the mistake it made in its briefing on its motion to intervene—namely, insisting that it is entitled to discovery on every potentially relevant issue in this case. (*See* Opp. at 3.) That is not consistent with Commission rules, and the scant case law that NEO cites in support of this proposition does not support NEO's position, either.

For purposes of negotiating new transportation agreements, UPL and Knox have provided to NEO and other gas resellers proposed transportation rates that Knox intends to charge at this time. (*See* Reply Comments, 2, 7.) It is important to note that these transportation rates are a private contractual matter that are outside the Commission's jurisdiction, not publicly available, and are competitively sensitive information. Releasing this information publicly and the rate in the Reply Comments would harm Knox, as the transportation rates will invariably change in the future due to the market and operational conditions.

This non-public information about private contractual negotiations and arrangements is being offered even though Knox's rates are not subject to the Commission's jurisdiction. That, together with the many dozens of pages of briefing and testimony in this case, is more than

ample information for NEO to assess the impact of this transaction on NEO and its customers, which was the stated basis for its intervention in this case. (*See* NEO Mot. Intervene, 3-4.) Yet NEO inaccurately claims that "Knox/UPL have refused to participate in any protective agreement which would allow NEO to have access to the information" in the reply comments. (Opp. at 2.) NEO knows this is a misleading claim, because NEO states a few pages later that "UPL/Knox did offer to provide what UPL/Knox claim is the maximum charge pursuant to protective order." (*Id.* at 4.) NEO has received from UPL and Knox a proposed transportation rate, and that rate does not have to be publicly disclosed. Therefore, NEO has already received the information that is central to its intervention in this case. That disposes of NEO's argument that "[i]f 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." (*Id.* at 9.)

Despite the fact that NEO has the information it needs to understand this transaction's effects on its business, NEO insists that it needs more—and it unfairly conflates those demands for more discovery with the merits of this motion for protective order. These are two separate issues, and the Commission should not allow NEO to blend them together. Whether a document is discoverable is separate and distinct from whether it is confidential, and by confusing those two questions, NEO is making it harder to proceed in this case in an orderly and fair manner.

In any event, NEO's attempted intervention in this case is disputed. It claims an essentially unlimited right to weigh in on "whether this transaction could harm Ohio customers." (NEO Interven. Reply at 3.) Meanwhile, UPL and Knox have argued from the start that the Commission should only grant, at most, limited intervention under Ohio Adm.Code 4901-1-11(D). (Opp. to Mot. Intervene 4, 6.) Any interest that NEO has in the general public good, or

in the application of Commission precedent, is more than adequately represented in this case by Staff. *See Toledo Coal. for Safe Energy v. Pub. Utilities Comm'n of Ohio*, 69 Ohio St. 2d 559, 562, 433 N.E.2d 212, 215 (1982) (finding limited intervention appropriate when a party failed to make "any showing that its interests were not adequately represented by the expertise and experience of Consumers' Counsel"). NEO has used vague appeals to broad policy concerns to try to secure intervention in the past, and the Commission has rightly rejected those efforts. *In the Matter of the Application of E. Nat. Gas Co., Pike Nat. Gas Co., & Se. Nat. Gas Co. for Approval of a Transfer of Common Stock Ownership*, Case No. 12-2792-GA-UNC, ¶ 11 ("Northeast's concern about unfair competition arising from the possible conversion of the utilities to cooperatives, at some later undetermined time, lacks any relation, direct or otherwise, to the transfer of stock proposed in this case. That Northeast bases its argument on suspicion and belief further undermines any claim that it has a real and substantial interest in the subject matter of this proceeding. Even if there were a nexus between the proposed stock transfer and the conversion of the public utilities to cooperatives, Northeast has failed to explain how cooperatives could adversely affect competition. We agree that, to allow intervention to a party expressing an unrelated interest, would unduly delay the proceeding. Consequently, the Commission finds that Northeast's motion to intervene should be denied.").

Because the extent of NEO's role in this case has still not been the subject of a ruling by the Commission, UPL and Knox do not concede that NEO can simply demand access to every confidential document it decides is relevant to the case. In the past, NEO has accused UPL and Knox of attempting to "unilaterally determine the scope and relevancy of the issues before the Commission." (NEO Interven. Reply at 3.) But that is a distortion of what is clearly stated in the Commission's rules, which permit the Commission to grant limited intervention where a

party "has no real and substantial interest with respect to the remaining issues or the person's interest with respect to the remaining issues is adequately represented by existing parties." Ohio Adm.Code 4901-1-11(D). NEO has now repeatedly distorted UPL and Knox's position on this issue by claiming that UPL and Knox are effectively seeking a ruling on the admissibility of evidence before the factual record can be developed. (Opp. at 1-2; NEO Interven. Reply at 3.) But NEO is simply mistaken about UPL and Knox's position on limited intervention. Unlike in the Ohio Power Siting Board case *In re Application of Republic Wind, LLC*, Case No. 17-2295-EL-BGN (Aug. 21, 2018), cited previously by NEO in its reply regarding intervention, the issue is not whether a given type of evidence—in that case, the price of electricity—is admissible or potentially relevant to the case. The question is whether NEO "has no real and substantial interest with respect to the remaining issues or the person's interest with respect to the remaining issues is adequately represented by existing parties." Ohio Adm.Code 4901-1-11(D). These are clearly separate issues. And even if they were related, they would have nothing to do with whether Exhibits A through E are worthy of protection under Ohio trade secret law.

NEO's motion to intervene did little more than say that it wanted to assert and defend its existing contractual interests in this case. That should not automatically entitle NEO to practically unlimited discovery in this case, and it certainly does not entitle NEO to obtain UPL and Knox's trade secrets, especially when NEO did not even attempt to apply the controlling legal factors. At this time, UPL and Knox are simply asking the Commission to apply the *Plain Dealer* factors and the other relevant considerations to the motion for protective order. However, if the Commission were to rule—now or in the future—that NEO's intervention should be limited, as UPL and Knox initially requested, it might render moot the rest of NEO's arguments about this issue and prevent NEO from further weaponizing the discovery process.

C. NEO's opposition ignores the role of Staff in evaluating the Joint Application.

NEO uses much of its opposition to complain that UPL and Knox have objected to most of NEO's discovery requests. But NEO's discovery requests are excessive, are unduly burdensome, and are totally out of proportion to NEO's needs in this case, not just because NEO's interests in this case are limited, but also because NEO seems to be trying to assume Staff's role in evaluating the transaction on behalf of the public interest. In that vein, NEO has asked for, among other things:

- Information on every single acquisition ever made by UPL or Knox. (*See* UPL INT-1-08; Knox INT-1-12.)
- A list of every single natural gas system or utility that UPL has an ownership interest in. (*See* UPL RPD-1-03.)
- Any agreements "between Knox and UPL which govern capital expenditures made by UPL." (*See* UPL RPD-01-08; Knox RPD-01-08)
- "Knox's most recent balance sheet, income statement, and statement of cash flows." (*See* Knox RPD-1-14.)
- Every study, model, or workpaper related to the Joint Application. (*See* UPL RPD-1-13, 14; Knox RPD-1-16, 17.)
- Every email or other communication between UPL and Knox relating to the Cobra systems. (*See* UPL RPD-1-17; Knox RPD-1-20.)
- An "exhaustive list of all natural gas pipeline facilities (including transportation and gathering facilities) in which Knox has an ownership interest," as well as "any and all" records reflecting such facilities. (Knox INT-2-02; Knox RPD-2-01.)

- Identification of "any market outside of Ohio served by any of Knox's members." (Knox INT-2-05.)

(*See* First Set of NEO Discovery Requests to UPL, Jul. 28, 2021; First Set of NEO Discovery Requests to Knox, Jul. 28, 2021 Second Set of NEO Discovery Requests to Knox, Aug. 26, 2021.)

The list above is but a small sample of the requests that NEO has made. This attempt by NEO to seek wide-ranging discovery into the financial, operational, and managerial affairs of competitors, in the guise of looking out for the public interest, should not be permitted. Far from seeking the "thorough and adequate preparation for participation in commission proceedings" that is provided for by Commission discovery rules, Ohio Adm.Code 4901-1-16(A), NEO is effectively weaponizing the discovery process for its own purposes—although whether it is doing so to gain leverage in negotiations with UPL and Knox, to delay approval of the transaction, or to scupper it altogether is not clear. What is clear that NEO is trying to assume the role of Staff in evaluating this transaction instead of protecting the narrow contractual interests that it originally identified in its motion to intervene. (NEO Mot. Intervene at 3-4.) But NEO is a public utility—it is not Staff, and it should not be treated as such. Staff has already issued three sets of data requests to UPL and Knox with respect to the proposed transaction. Many of those data requests overlap with the kinds of information NEO is seeking. Undoubtedly, NEO will take that as further proof that its discovery requests are well-founded. But that misses the point. Staff, which has a much broader set of interests and responsibilities than NEO, has or will have more than ample information to evaluate the proposed transaction and whether it is reasonable and in the public interest.

Regardless, it is not clear what NEO's dissatisfaction with UPL and Knox's discovery responses have to do with the merits of the motion for protective order. In reality, even if NEO is entitled to the discovery it is seeking—and it is not—that has nothing to do with whether Exhibits A through E are worthy of trade secret protection under Ohio law. NEO utterly failed to engage in the relevant legal analysis on that question (in the form of the *Plain Dealer* factors), so the Commission should grant the motion for protective order and reserve judgment on NEO's unduly burdensome and overbroad discovery requests until that dispute has been fully briefed.

D. NEO's opposition improperly conflates this proceeding with a rate case.

Throughout its memorandum in opposition, NEO repeatedly draws comparisons between this case and a ratemaking case filed by a public utility. (Opp. at 2, 6.) But NEO's attempt to conflate this case—a transfer of assets to a not-for-profit, member-owned cooperative—with a traditional ratemaking application filed by a public utility should be firmly rejected by the Commission.

While UPL and Knox are attempting in good faith to cooperate with the Commission's assessment of whether this transaction is reasonable and in the public interest—a bar typically cleared when it is shown that there will be adequate and uninterrupted service—the fact remains that the Commission does not have jurisdiction over the rates charged by a not-for-profit, member-owned cooperative. *See* R.C. 4905.02, 4905.04. NEO's scaremongering on that point should not distract from its basic failure to rebut UPL and Knox's motion for protective order. NEO did not address the *Plain Dealer* factors at all, and it did not even cite or meaningfully address the affidavit of UPL's president with respect to why UPL and Knox are seeking confidential treatment of the materials at issue in the motion. This failure on NEO's part should be dispositive by itself. However, it also points to the basic flaw at the heart of NEO's

intervention in this case. NEO is trying to use its involvement to ask the Commission to effectively hold a mini-ratemaking case for a not-for-profit cooperative and its members. Even more puzzlingly, NEO is using the briefing on a straightforward motion for protective order to try to advance that unprecedented and unwarranted agenda. The Commission should focus on the controlling legal standard and the showing that UPL and Knox made in the motion for protective order, not the irrelevant issues that NEO is injecting into these proceedings.

In any event, UPL and Knox are hardly engaged in a "refusal" to provide information about this transaction. (Opp. at 1.) UPL and Knox have provided dozens of pages of testimony and comments in support of the Joint Application and have provided responses to three sets of data requests by Staff. In their reply comments, UPL and Knox cited numerous examples of similar transactions being approved with a much less developed factual record than exists here. (Reply Comments, 12-13 (collecting cases).) UPL and Knox also explained how the kinds of information they have provided thus far in this case is comparable to that provided in past cases involving assignments of customers and assets to not-for-profit cooperatives. *See In the Matter of the Joint Application of Utility Pipeline Ltd., Ludlow Natural Gas Company, LLC and Knox Energy Cooperative Association for Approval of the Transfer of Assets and Substitution of Service*, Case No. 17-1785-GA-ATR, Joint Application (Aug. 15, 2017); *In the Matter of the Application of Southeastern Natural Gas Company and Madison Energy Cooperative Association, Inc. to Substitute Natural Gas Service and Transfer Assets and Customers*, Case No. 15-1508-GA-ATR, Joint Application (Aug. 26, 2015). Indeed, it was precisely out of an attempt to provide transparency that UPL, Knox, and Cobra filed witness testimony and a substantial Joint Application. Thus, it is disingenuous for NEO to continue suggesting that UPL and Knox are not providing enough information about this transaction. When comparing this case to

similar cases—as opposed to rate cases involving a vastly larger number of stakeholders and much more complicated policy issues—UPL and Knox have more than cleared the bar. NEO's attempts to hold UPL and Knox to a non-existent standard should be rejected, not least because those attempts have nothing to do with the prevailing standard on this motion for protective order, which NEO did not even meaningfully address.

III. CONCLUSION

For the foregoing reasons, UPL and Knox respectfully request that the Commission grant the motion for protective order.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served via email on the following parties on September 20, 2021:

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Summary: Reply Memorandum in Support of Motion for Protective Order electronically filed by Mr. David F. Proano on behalf of Utility Pipeline, Ltd. and Knox Energy Cooperative Association, Inc.