BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

ORWELL NATURAL GAS COMPANY, Complainant, v. ORWELL-TRUMBULL PIPELINE COMPANY, LLC, Respondent.	: : : : : : : : : :	CASE NO. 15-637-GA-CSS

ORWELL-TRUMBULL PIPELINE, LLC'S REPLY TO ORWELL NATURAL GAS COMPANY'S AND OHIO CONSUMERS' COUNSELS' POST-HEARING BRIEFS

I. INTRODUCTION

The attempts by Orwell Natural Gas Company ("ONG") and the Ohio Consumers' Counsel ("OCC") to void the contract between ONG and Orwell Trumbull Pipeline Company ("OTPC") are so lacking in merit that in their initial briefs, both were forced to rely upon a series of positions that can only be characterized by unfortunately derogatory terms such as smoke screens, red herrings, and straw man arguments. Incredibly, neither entity even suggested that it is cognizant of the legal standard applicable to the demands they make in this case. It is not sufficient to simply assert (as both do) that this Commission has the *power* to change, alter, modify, and (perhaps) even nullify contracts by means of the authority created by Ohio Revised Code ("R.C.") §4905.31. It is instead incumbent upon OCC and ONG to show that this Commission would be justified in *exercising* that power based upon the facts of the case. Neither entity came anywhere close to making any such showing.

This Commission plainly recognized and endorsed the *Sierra Mobile* standard in its Opinion and Order dated August 4, 1976, filed *In The Matter Of The Application Of Ohio Power Company To Cancel Certain Special Power Agreements And For Other Relief,* Case No. 75-161-EL-SLF. Once again, on p. 4 the Commission expressly held:

> [E]ven the power to <u>modify</u> existing contracts between a utility and its customers as conferred by Section 4905.31 must be viewed as an extraordinary power in light of constitutional restraints against impairment of the obligations of contract and constitutional guarantees of due process. See: U.S. Const. Art I §10; U.S. Const. Amend. XIV, §1; Ohio Const. Art. I §16; and Ohio Const. Art II, § 28. Yet the Courts have repeatedly upheld the validity of such statutes and sustained actions of regulatory bodies exercising the authority derived therefrom.
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> (Citations Omitted.)
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> The controlling standard which has emerged from the case law, at least at the federal level, has come to be known as the *Sierra Mobile* doctrine. Essentially, the view embodied by that doctrine is that a contract between a utility and its customer may not be disturbed by a regulatory agency simply upon a showing that the arrangement is unprofitable or yields the company less than a fair rate of return. The condition precedent to an exercise of the power to modify existing contract is a showing that the contract adversely affects the public interest to the extent that it impairs the financial ability of the utility to continue to render service, creates an excessive burden on other customers of the company, or results in unjust discrimination. . . . ***This Commission is of the opinion that it is proper to apply this "public interest" test*** *i*n this case.
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> . . . [B]ecause the authority to modify contracts is an extraordinary power, a party seeking to invoke it is subject to a burden of proof of the highest order.

Unlike ONG and OCC, OTPC addressed the *Ohio Power/Sierra Mobile* doctrine at great length in its merit brief. Most importantly, OTPC pointed out that in order to satisfy their "burden of the highest order" ONG/OCC must demonstrate at least two things: First, an unambiguous adverse effect on the public interest must be demonstrated, and second, an unequivocal public necessity mandating the modification, amendment or nullification of the

Contract must exist. Incredibly, ONG and OCC never fail to even hint at the concept of the *Ohio Power/Mobile Sierra* doctrine in their Post-Hearing Briefs, let alone breathe the words "unambiguous public necessity."

Instead, OCC and ONG focus on legally unsupportable positions and upon issues entirely irrelevant to the true nature of the issue they raise – the ultimate fairness of the contract terms that allow ONG to obtain transportation services from OTPC.

II. ARGUMENT

A. THE MANY IMMATERIAL ARGUMENTS.

1. RED HERRING No. 1: CLAIMS THAT OTPC LIED TO THIS COMMISSION WHEN IT SOUGHT APPROVAL OF THE CONTRACT.

ONG and OCC both contend that OTPC was somehow dishonest to this Commission when it submitted the Contract at issue for approval. Both argue that OTPC failed to advise the Commission of the intersections between ONG's and OTPC's corporate structures when OTPC sought approval of the Contract.

Their claims are not only offensive, they are also blatantly untrue. OTPC plainly disclosed to the Commission that ONG and OTPC operated as affiliates under common ownership on multiple occasions. First and foremost, in its application for approval of the Contract, OTPC defines itself as the "Applicant" and ONG was defined as one of the "Shippers." *See* OCC Exhibit 2, Attachment GS 13 (OTPC's Application for Approval of the Contract in Case No. 08-1244, p. 1). OTPC expressly defined the corporate relationship between OTPC and ONG in paragraph 6 of the application in that case by stating that "[t]he Applicant and each of the Shippers currently are affiliates under common ownership." *Id*. at p. 2.

The plain statement within paragraph 6 of the application in Case No. 08-1244 was accompanied by a footnote. In that footnote, OTPC specifically referred the Commission to still another case pending on its docket, Case No. 08-1196-GA-UNC. That case involved a request for approval of a stock transfer and a change in ownership of ONG. The Commission undoubtedly understood the full significance of that business transaction, as it expressly noted the fact that Mr. Osborne would continue to control ONG, together with a number of other companies, as the chief executive officer and chairman of the board of Gas Natural, Inc. ("GNI") in paragraph 3 of its Order dated December, 3, 2008 in Case No. 08-1196-GA-UNC.[1]

Furthermore, OTPC further explained the relationship between ONG and OTPC to this Commission in its very first application to this Commission. In OTPC's application for pipeline authority and for approval of an operating tariff, it not only disclosed the relationship between the companies, it expressly identieifed OTPC's key personnel as including Mr. Steve Rigo and Mr. Tom Smith. Exhibit B to that Tariff Application plainly identifies Mr. Rigo as Vice President of OTPC *and* President and Chief Operating Officer of ONG, while Mr. Smith is identified as Secretary and Treasurer of *both* ONG and OTPC.[2]

When you consider OTPC's filing history with the Commission, OCC's and ONG's claim that OTPC was somehow disingenuous with the Commission regarding the relationship between OTPC and ONG is not merely incorrect, it is frivolous. Further, it is indicative of the lack of substance supporting the demands for relief raised by ONG and OCC.

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[1] Case No. 08-11-96-GA-UNC involved the acquisition of multiple companies owned by Mr. Osborne by Energy West, Incorporated ("EWI"). The Commission recognized Mr. Osborne as the chief executive officer and chairman of the board for EWI. EWI eventually changed its name to GNI.

[2] P. 1-2 of Exhibit B of OTPC's Tariff Application.

2. RED HERRING ARGUMENT No. 2: CLAIMS THAT MR. SMITH AND MR. RIGO IGNORED THEIR FIDUCIARY DUTIES TO THE ENTITIES THAT EACH RESPRESENTED WHEN THEY EXECUTIED THE CONTRACT.

Next, OCC and ONG contend – and urge this Commission to find – that Mr. Smith and Mr. Rigo somehow ignored the fiduciary obligations each owed to the organization he represented when he signed the Contract. They go so far as to assert that both men – executive officers in companies that were about to "go public" by means of the transaction described in Case No. 08-1196-GA-UNC – were mere pawns who served no other function but to serve as the puppets of the principal owner of OTPC and (at the time) the sole owner of ONG.

Again, such claims are inflammatory and offensive, and they are all the more outrageous given that neither party made any serious effort to gather evidence from which support for the allegation might fairly be drawn. Worse still, the allegation is actually belied by the only evidence in the case that even arguably addresses the allegations.

It isn't surprising that ONG and OCC failed to produce evidence supporting their allegations at the hearing. No such evidence exists.

Both complaining entities had access to the individuals involved in, and to documents related to, the formation of the Contract. As to the individuals involved, neither OCC nor ONG even bothered to subpoena Mr. Rigo or Mr. Smith to testify regarding any instructions either received regarding the negotiations of the Contract. As to documentation supporting their allegations, despite the production of numerous documents plainly bearing upon the relationship between ONG, OTPC and Dominion East Ohio ("DEO") neither introduced any communications between Mr. Rigo and Mr. Smith suggesting improper behavior of any sort; or any communications between one or both the two executives and OTPC's principle owner, Mr. Osborne, that even suggest Mr. Osborne was directly involved in the Contract negotiations.

Further, both complaining entities fail to address the fact that the Contract was formed at a time that DEO had unilaterally cancelled its own contract with ONG in order to increase ONG's transportation costs on DEO to $1.60 per MCF. OTPC could therefore easily have charged as much as $.50 *more* per Mcf and *still* have allowed ONG to remain competitive with DEO. The fact that it did not do so plainly demonstrates that ONG was able to obtain concessions of its own from OTPC.

Instead, of providing evidence that bears upon the formation of the contract, OCC and ONG abused their witnesses, Mr. Slone and Mr. Zappitello, in order to introduce uninformed speculation that the 2008 Contract resulted from improper influences.[3] The weak "evidence" these witnesses relied upon to "support" the innuendo of impropriety – ONG's and OTCP's shared physical addresses, phone numbers, email addresses, employees, and common owner – should embarrass both entities. This Commission's own docket, of course, contains innumerable cases involving entities, owned by holding companies, in which similar commonalities between ownership, officers, addresses, phone numbers, etc. are found. Further, whether considered alone or in conjunction with each other, not one of these "commonalities" suggest anything about the manner in which OTPC and ONG transacted business, or about Mr. Smith's and Mr. Rigo's abilities, or lack thereof, to properly negotiate the terms of a Contract between related entities.

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[3] Direct testimony of Mr. Slone ("OCC Exhibit 2") pp.9-10, 14-15. Direct testimony of Mr. Zappitello ("OCC Exhibit 1") pp.17.

Mr. Zapitello's own discomfort with the position taken by ONG and OCC concerning Mr. Rigo's and Mr. Smith's abilities to negotiate with each other at arm's length was suggeseted on cross examination. Mr. Zapitello regularly performs the duties of job on behalf of the Complainant, ONG and Brainard Gas Corp. ("Brainard"), which share: (1) common ownership by GNI; (2) a common location, 95 East Main Street Orwell, Ohio 44076; (3) a website[4]; and (4) employees.[5]

Mr. Zappitello reveled that he currently operates in a position no less compromised than that ONG/OCC complain Mr. Rigo and Mr. Smith held at the time the Contract was formed. Mr. Zappitello works for multiple different affiliates that share facility and infrastructure. He also reports directly to one person, Marty Whelan, regarding his responsibilities to purchase natural gas for Brainard, ONG, and Northeast Ohio Natural Gas. Transcript Vol. I. pp. 41. Mr. Zappitello nonetheless testified that he did not believe he was conflicted when performing his duties of purchasing natural gas for competing marketers at the same time that he was an employee of a utility, on the basis that he is honest, honorable, and has integrity. Mr. Zappitello plainly believes he performs his duties to the different entities despite the obvious conflicts involved in acting for both a marketer and a utility. Transcript Vol. I. pp. 44-48.

Furthermore, Mr. Zappitello conceded that he personally knows both Mr. Smith and Mr. Rigo, after working with Mr. Rigo for two years and Mr. Smith for six or seven years; that he did not believe either had demonstrated themselves to be dishonest, dishonorable or lacking in integrity to him. Transcript Vol. I. pp. 48-50.

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[4] Going to http://brainardgas.com directly links you to http://orwellgas.com.

[5] Mr. Zappitello testified that he is the Director of Gas Procurement for Northeast Ohio Natural Gas, Brainard, and ONG. He reports to Mr. Martin Whelan, whom Mr. Zappitello "believes" is president of all three of those entities. Transcript Vol. I. pp. 40-41.

Most significantly, of course, ONG and OCC chose to ignore the only evidence bearing directly on the issue – the testimony of Mr. Osborne, himself. Mr. Osborne specifically testified, under oath, that he was not called upon to approve many decisions made by Mr. Smith or Mr. Rigo, including the terms of the Contract. OCC Exhibit No. 4, Osborne Depo. Testimony, p. 50-51, 80.

ONG's and OCC's position that Mr. Smith and Mr. Rigo failed to negotiate the Contract at arm's length and in good faith cannot be taken seriously, when neither party offered any evidence actually bearing on the issue; when ONG and its officers and employees continue to operate in a fashion virtually identical to that in which ONG and OTPC operated in 2008; when ONG's own witness, Mr. Zappitello denies finding any conflict between his multiple positions and the same time he complains of Mr. Rigo and Mr. Smith; and when Mr. Osborne has denied under oath that he exercised any authority over the terms of the Contract.

In any event, it is *entirely* irrelevant on the facts of this case whether the formalities of a corporate separation policy existed, or whether such formalities were or were not observed. Such policies exist simply to ensure meaningful and fair *independent* review. It is useful, therefore, to consider Ohio Revised Code section §1701.60, which addresses corporate conflicts of interest, and to recognize the undeniable analogy to this case. In relevant part, that statute provides:

> (1) No contract, action, or transaction shall be void or voidable with respect to a corporation for the reason that it is between or affects the corporation and one or more of its directors or officers, or between or affects the corporation and any other person in which one or more of its directors or officers are directors, trustees, or officers, or have a financial or personal interest, or for the reason that one or more interested directors or officers participate in or vote at the meeting of the directors or a committee of the directors that authorizes such contract, action, or transaction, if in any such case any of the following apply:

(a) The material facts as to his or their relationship or interest and as to the contract, action, or transaction are disclosed or are known to the directors or the committee and the directors or committee, in good faith reasonably justified by such facts, authorizes the contract, action, or transaction by the affirmative vote of a majority of the disinterested directors . . .

(b) The material facts as to his or their relationship or interest and as to the contract, action, or transaction are disclosed or are known to the shareholders entitled to vote thereon and the contract, action, or transaction is specifically approved at a meeting of the shareholders held for such purpose . . .

Quite obviously, the material facts of the relationship between the entities, and the material terms of the agreement ***were*** disclosed in this case, albeit to an independent body that happened to be expressly clothed with the legal authority to review and approve or disapprove the proposed contract. Thus, any concerns that the "interested transaction" is unfair to one of the parties has been assuaged, and the Contract is not void or voidable on the grounds that it was between parties that were not entirely independent.

In this case, the entity that performed that function, of course, was *this Commission*. This Commission chose to approve the transaction, concluding that its terms were "just and reasonable" following its review. Thus, at least as a matter of corporate law, the public policy espoused within R.C. §1701.60 – even interested-party contracts are valid provided that independent review of the material facts and terms occurs – was undeniably satisfied.

3. RED HERRING ARGUMENT NO. 3: THE LAME ATTEMPTS TO EXCUSE AND EXPLAIN THIS COMMISION'S EXPRESS APPROVAL OF THE CONTRACT IN CASE NO. 08-1244.

Naturally, ONG and OCC are incredibly concerned that this Commission has already approved the Contract after conducting an independent review of that Contract. It is for that reason alone that they stoop to accusing OTPC of lying to this Commission, and it is for that reason alone that they attempt to impugn the integrity of Mr. Smith and Mr. Rigo.

Unhappily, the complaining parties show they are even prepared to shamelessly attack this Commission and its staff, as well, via thinly-veiled insinuations that the procedures of this Commission were somehow inadequate in 2008, or that members of the Commission staff were somehow deficient in discharging *their* duties to this Commission and the public. Transcript Vol. I, pp. 183-192. This repeated tactic of litigation-through-innuendo is no less offensive to OPTC when applied to the Commission and its staff than when applied to Messrs. Rigo, Smith and Osborne.

First, any assertion, even a veiled one, that the Commission's process is inadequate is ridiculous. Literally thousands of contracts exist that were submitted as proposed "reasonable arrangements" to this Commission following the exact same processes. Upon approval, those proposed "arrangements" become binding contracts. Parties do not insist that this Commission revisit its determinations each and every time that a market shifts and some specific term becomes less favorable, or even unfavorable, to one of the parties to those contracts. Such contracts are nonetheless all honored in the commercial world, as a matter of course. It is nigh incredible that ONG and OCC demand in this case that this Commission second guess the process in order to allow ONG to avoid the burden of this single Contract, after it plainly benefited from the terms of that of deal for many years.

Second, and more importantly, it is equally true that whether the process employed by staff was adequate or not has no ultimate legal significance, whatsoever. The only action that does have legal significance is the decision issued by this Commission – regardless of the process. R.C. §4905.31 authorizes the Commission to approve, or to change, modify or amend the terms of special contracts as a pre-condition to approval – not staff.

This Commission approved the Contract in Case No. 08-1244-PL-AEC as submitted. Upon approval by this Commission, OTPC and ONG became bound by their Contract, and neither OTPC nor ONG was able to operate in any manner other than that prescribed in the Contract without violating Ohio law.

4. RED HERRING ARGUMENT NO. 4: DEMANDS THAT OPTC REFUND A PORTION OF ITS COMMISSION-APPROVED RATE TO ONG.

Both ONG and OTPC demand that this Commission order OTPC to refund some $1,524,586 to ONG. OCC Brief, pp. 14-16, ONG Brief pp25-26. Again demonstrating the frivolous nature of their demands, ONG cites to no legal authority in support of the demand, and OCC's only citation to authority concerns an easily distinguishable decision by this Commission involving an electric utility's apparently willful refusal to allow its customers to take advantage of a rural line extension program that this Commission had mandated by rule, and which was contained in the utility's Commission-approved tariff. *In the Matter of the Complaint of the Office of the Consumers' Counsel on behalf of Jim and Helen Heaton et al. v. Columbus and Southern Ohio Electric Co.,* Opinion and Order dated April 16, 1985, Case No. 83-1279-EL-CSS. Obviously, that case has no application to a situation in which a utility has simply imposed the Commission-approved rates for its services – and in which there is no allegation otherwise.

R.C. § 4905.32.states:

> No public utility shall charge … a different rate … than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate … except such as are specified in such schedule [.]

In *Keco Insdustries, Inc. v. Cincinnati & Suburban Bell Tel. Co* (1957), 166 Ohio St. 254, 141 N.E.2.d 465, the Ohio Supreme Court held that R.C. § 4905.32 means "a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected." *Id.* At 257, 141 N.E.2d 468. The Ohio Supreme Court again admonished against refunds and retroactive ratemaking on at least two occasions within the past five years. See *In re Application of Cols. S. Power Company*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655 ¶¶16-17. *See also In re Application of Cols. S. Power Company*, 138 Ohio St. 3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶¶7-8. It is certainly worth noting – when considering whether "reasonable grounds" have been shown to exist for this particular complaint – that the OCC was an appellant in both those cases – and thus plainly aware that its demands are meritless.

In short, the demands by OCC and ONG are not merely unsupportable, the relief they seek has been determined to be illegal under Ohio law. Any order by this Commission which might grant them the relief of a "refund" would in reality impose a completely new rate throughout the term of the contract. As the Ohio Supreme Court clearly stated in its 2011 opinion in *Cols. S. Power Company*: "[Our] precedents remain good law and still apply to these facts, thus prohibiting the granting of a refund." *Cols. S. Power Company*, 128 Ohio St. 3d 512, 2011-Ohio-1788, 947 N.E.2d 655 ¶16.

5. RED HERRING ARGUMENT No. 5: ONG'S AND OCC'S PROPOSED "REASONABLE" TRANSPORT RATES.

Next, ONG and OCC propose rates of their own liking, yet failed to provide any relevant evidence that could be used by the Commission to determine whether the rates they propose are just and reasonable for the transportation of natural gas through OTPC's system. On behalf of ONG, Mr. Zappitello recommended a new rate of $0.60 per MCF, based principally upon his failed attempt to negotiate a different price with OTPC. Transcript Vol. II pp. 37.

Mr. Zappitello's calculations, and the rationale for those calculations, were intended to make the "all-in" cost of natural gas service equal without regard to whether service is provided through OTPC's system or through Dominion East Ohio's ("DEO's") system. ONG Ex. 1 at pp. 14-15.

Mr. Zappitello's proposed rate has three significant errors in its logic. The first error involves the different duties of OTPC and ONG. It is ONG's job, as a utility, to provide its end use customers with "all in" natural gas services at "just and reasonable" rates. In contrast, OTPC's responsibility is simply to transport natural gas for its customers at a just and reasonable rate. OTPC's responsibilities are completely unrelated to the cost of the commodity.

OTPC's Contract, of course, provides a just and reasonable rate. In fact, when you compare the transport rates of OTPC to that of its sole competitor in the area, DEO, OTPC's rate of $0.95 (now $1.01) per MCF is $0.67 (now $0.61) cheaper per MCF than the rate of its only competitor. Mr. Zappitello acknowledges this rate difference in his testimony. OCC Exhibit 1, pp. 14.

The second and third errors in logic are directly related. The second is Mr. Zappitello's assumption that a rate is only reasonable and just if ONG's customers pay the same "all-in" rate regardless whether the natural gas flows from Chigago's City-Gate ("City-Gate") or Dominion South Point ("South Point"). The third error in logic presumes that it is OTPC, for some reason, that is obligated to provide the balancing function. By Mr. Zappitello's "logic" OTPC would be required to its revise its rate each month so that ONG's "all in" cost of service equaled the cost of service through DEO at all times. Logically, this approach must be applied during the period between 2006 and mid-2013 when in which ONG's "all in" price should have been considerably higher, because the "all in" price from DEO was higher than the "all in" price through OTPC. Such "logic" of course, is simple nonsense.

Quite simply, from, the beginning of OTPC's operations in 2006 until now, ONG's end use customers have received the benefit of a lower transport rate via OTPC than the transport rate available through DEO. Further, from the beginning of OTPC's operations in 2006 until mid-2013, ONG's end use customers received, *in addition*, the benefit of commodity natural gas at a price that was, on average, some $0.55 per MCF lower[6] than the price they would have been paying if ONG was purchasing that gas at South Point during that period. In short, the fact that the market price for commodity gas has recently fallen – to the benefit of the consumer from *both* City-Gate and South Point, but more so at South Point – signifies absolutely nothing regarding any changes in the market for transport of commodity gas.

Similarly, OCC's Mr. Slone recommends the Commission impose a new rate of $0.50 per MCF in place of the rate set by the Contract. Mr. Slone's comparison, at least, focuses on the relevant market – transportation. OCC Exhibit 2, pp. 16. Even so, his approach also has no validity, because like Mr. Zappitello, Mr. Slone also compares "apples" to "oranges."

First, Mr. Slone fails to show OTPC is similarly situated to the pipelines he used in his comparison. Mr. Slone simply selected OTPC for comparison to North Coast Pipeline ("North Coast"), Cobra Pipeline, ("Cobra"), and Spelman Pipeline ("Spelman") simply *because he likes the prices charged by those pipelines*. He excluded DEO from his "comparison", even though

[6] A random selection of price points comparing South Point prices to Chicago prices during the years 2008, 2009 and 2010 suggests a price difference of approximately $.0284444 in favor of Chicago during this period, somehat lower than the $.324 estimated for the years prior to 2008. See Attachment B hereto. This figure reflects an estimate based upon a comparison of total gas plus transport costs from Chicago via North Coast and OTPC against the total cost of natural gas at South point, plus DEO's GTS tariff rate for transportation.

the evidence in the case plainly shows that OTPC (and even ONG) deem DEO to be OTPC's one and only true competitor.

Further, when asked to explain how the three pipelines he selected were similarly situated to OTPC, he admitted that he was unaware of the capital investments made by any of the pipeline (including OTPC), unware of the financial situation of any of the companies, and even unaware of and the number of end users served by each pipeline. He was also unsure how long each pipeline has been in service. He could offer no commentary on their capital structures, their depreciation rates, or their ability to raise debt or equity financing. Transcript Vol. II, p. 248-252.

With no knowledge of any of this information, it is of course impossible for Mr. Slone to determine whether any of these pipelines provided service on just and reasonable terms, let alone whether OTPC does so, for the simple reason that he has no way to project anything about the capital and operational costs each company incurs to ship natural gas through its pipelines. In fact, neither OCC nor ONG introduced any evidence of OTPC's capital investment, working capital, operational costs, or the depreciation rate of its assets in support of their claims that OTPC is charging an unreasonable rate to ONG. Again, it hardly appears that the complainants are attempting to prevail in their case. Instead, it appears that the complainants actually are satisfied if they succeed in besmirching OTPC and its owner.

Further, Mr. Slone's comparison of "similarly situated" pipelines was obviously biased, in any event. The one pipeline that he deliberately did not compare OTPC's rate against was DEO, the **one** pipeline that is actually competition to OTPC. DEO's GTS tariff rate to ONG is currently $1.62 per MCF.

6. RED HERRING ARGUMENT No. 6: COMPLAINTS THAT THE CONTRACT PROVIDES ONG SERVICE OF A LESSER QUALITY.

The complaining entities' expressed concern over the "quality" of service is still another red herring. The truth is that the Contract would likely be *more* favorable to OTPC if the Contract provided for a specific level of "firm" service. The Contract provides instead for fully interruptible service simply because ***ONG*** prefers contracts for interruptible service rather than firm service, for the reason that interruptible service is less expensive. Transcript Vol. I p. 139 – 143. See also OCC exhibit 2, attachments GS-4, GS-5, GS-6, GS-7 and GS-8. This is true for ONG's contracts with related entities, and it is true for its contracts with entities having no relationship of any kind to it. *Id.*

More importantly to this Commission, the "interruptible" nature of the service is a practical irrelevancy, for purposes of the Contract between ONG and OTPC, because the issue of firm v. interruptible transport is significant only when a pipeline is constrained and therefore unable to accept a nominated quantity. There is no constraint on the OTPC pipeline that will impact ONG. This is because OTPC's pipeline was constructed for the specific purpose of serving ONG. As a result, in the ten years that OTPC has been in service, OTPC has never – not once – rejected any ONG nomination of natural gas for transport, no matter the amount nominated. Of course, neither complainant introduced any evidence that reasonably suggests that any constraints are likely during the term of the Contract.

Again, the evidence actually belies the allegation. For example, Mr. Zapitello complained that ONG required transport for 3,750 dekatherms per day in March, 2014 (during the sole called "polar vortex"). He acknowledged, however, that OTPC is certainly capable of transporting that amount. ONG exhibit 1, p. 10. See also Transcript Vol. 1, pp. 143-144. The source of Mr. Zapitello's complaint, as it turns out, was that ONG had been unable to find a sufficient quantity of natural gas for March, 2014 delivery when it went seeking it. This, however, is explained by the fact that ***ONG didn't seek natural gas for March 2014 delivery until February 24, 2014.*** Thus, the true "impediment" surrounding Mr. Zappitello's complaints was actually an operational issue caused solely by ONG itself, and had nothing to do with OTPC.

In actual fact, the evidence demonstrates that OTPC has accepted nominations averaging well above 5,000 Mcf per day from ONG. (See OCC Exhibit 2, attachment GS-2, p. 2, identifying 148,745 Mcf as the total monthly quantity ONG transported during February, 2015 for ONG. (148,745 / 28 days = 5,312.31.) Because ONG knows it need not fear constraints on the OTPC system, it was not unreasonable for it to pay lowest price for transport it could by seeking "mere" interruptible service.

7. THE ONLY TWO FACTS THAT ARE <u>***LEGITIMATELY***</u> MATERIAL TO THIS COMMISSION'S DECISION.

1. Fact 1. This Litigation Was Not Inspired By Any Legitimate Purpose, But Was Instead Inspired By The Desire Of Certain Persons Associated with ONG To Harm Mr. Osborne's Interests In Any Way Possible, And To Further Damage His Reputation Before This Commission.

Both ONG and OTPC acknowledge that the relationship between the two companies is seriously strained. Those strains, alone, explain ONG's pursuit of this case. Certainly the "evidence" discussed above fails to explain this case.

ONG (and its parent entity) are engaged in a campaign intended to severely injure Mr. Osborne's interests in any way possible. This specific litigation was intended to be nothing but another skirmish within that war.

2. **Fact 2: The Contract Contains Provisions That Constrain The Parties – As Do ALL Contracts Between ANY Parties. Those Provisions, However, Were Not Unjust Nor Unreasonable in 2006. They are Not Unjust Nor Unreasonable Today.**

It is undeniably true that together, the “sole” source, “preferred source”, or “exclusive” provision of the Contract, and the fifteen year term of the Contract, provide a significant benefit to OTPC and impose a significant constraint upon ONG.

Such constraints/benefits, however, are the very reasons that commercial entities enter into contracts in the first place. These two provisions were not created on a whim. They exist for sound business reasons. Mr. Osborne made it very clear in his testimony that OTPC would never have been built in the first place if he were not confident that he would recover the $15,000,000 he personally invested in the pipeline, and that these two terms exist to ensure that he does recover that investment following the pending sale to GNI. OCC Exhibit 4, pp. 51-53.

Second, as OTPC explained in its merit brief, these provisions are not the result of any lack of bargaining power held by ONG. At the time it agreed to the terms, OTPC could easily have significantly raised its price for transport and still have allowed ONG to remain competitive with DEO. Thus, these terms were negotiated at a period in time in which ONG was exposed to the potential of significant price increases. It was to ONG’s benefit to obtain the lowest possible price, however, to increase its competitive advantage vis a vis DEO. In exchange for the terms ultimately agreed upon, the contracting parties each gained what each needed most.

Those provisions were commercially reasonable at the time – as evidenced by this Commission’s approval of the Contract containing those terms after its independent review of the Contract. Separate and apart from this Commission’s review, however, the existence and reasonableness of those terms were, without doubt, further weighed, measured and factored into the price that GNI paid for ONG, at the time Mr. Osborne sold it his ownership in ONG. Changing those expectations now, after the fact, unfairly benefits ONG at the expense of OTPC and its principle.

Even so, IF this Commission concludes that these terms are unjust and unreasonable to the public at large today, it has the authority to protect the public yet leave the Contract undisturbed, thereby requiring ONG and OTPC to each bear the consequences of the business choices each made. It need only Order ONG to absorb any unwarranted higher costs for natural gas.

The passage of time has not made the reasons those terms were included in the Contract any less valid today, however. Mr. Osborne is still legally entitled to recover his investment. This Commission is *not* justified in setting aside commercially reasonable terms in a transportation contract merely because a lower priced source of the commodity to be transported has recently become available. As the United States Supreme Court stated in *Morgan Stanley v. Snohomish County, et al.* 554 U.S. 527, at 547: "It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market." Furthermore, this Commission certainly must eschew exercising its "extraordinary power" when the complainant, ONG, has plainly revealed that there are operational changes available to it that would secure to ONG an ability to access that lower-priced commodity without disturbing the underlying contract.

In short, *Ohio Power/Sierra Mobile* sets a very high standard for a reason: Article 1, Section 9 of the Constitution of the United States, and Article II, Section 28 of the Ohio Constitution of 1851 expressly prohibit the State of Ohio – including even this Commission –

from impairing the obligation of contracts. Any material change, alteration, or modification of the Contract would impair obligations owed OTPC.

III. CONCLUSION

For the foregoing reasons, and for the reasons discussed in OTPC's Initial Post Hearing Brief, the tawdry effort of the complainants in this case fall far short of the mark established by *Ohio Power/Sierra Mobile.* As a result, this Commission should:

1) Order the Parties to arbitrate their disputes concerning the Contract.
2) If it does not Order the Parties to arbitration, this Commission should dismiss ONG's complaint on the basis that ONG has failed to show reasonable grounds for its complaint.
3) If it does not Order the Parties to arbitration or Dismiss the Complaint, this Commission must deny ONG and OCC's requests for relief.
4) No matter which course this Commission takes, it should encourage ONG to seek any operational changes it may find useful through negotiation with OTPC and/or DEO – notwithstanding the fact that OTPC (and thus Mr. Osborne) and DEO will likely insist upon reasonable compensation for those operational changes.

Respectfully submitted,

/s/ Michael D. Dortch

Michael D. Dortch (0043897)
Justin M. Dortch (00900048)
KRAVITZ, BROWN, & DORTCH, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215
Phone (614) 464-2000
Fax: (614) 464-2002
E-mail: mdortch@kravitzllc.com
jdortch@kravitzllc.com

Attorneys for Respondent
ORWELL TRUMBULL
PIPELINE COMPANY, LLC

CERTIFICATE OF SERVICE

The PUCO's e-filing system will serve notice of this filing upon counsel for the Complainant, the Ohio Consumers' Council, and the Staff of the Public Utilities Commission of Ohio.

Further, I hereby certify that a true and accurate copy of the foregoing was served upon counsel for the Complainant, the Ohio Consumers' Council, and the Staff of the Public Utilities Commission this January 8, 2016, by electronic mail:

Gina M. Piacentino, Esq.
Weldele & Piacentino Law Group
88 East Broad Street, Suite 1560
Columbus, OH 43215
gpiacentino@wp-lawgroup.com

Mark S. Yurick, Esq.
Devin D. Parram, Esq.
Taft, Stettinius, Hollister, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
myurick@taftlaw.com
dparram@taftlaw.com

Ajay Kumar, Esq.
The Ohio Consumers' Counsel
10 West Broad Street
Suite 1800
Columbus, Ohio 43215
Ajay.Kumar@occ.ohio.gov

Werner Margard, Esq.
The Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
Werner.margard@puc.state.oh.us

/s/ Michael D. Dortch