

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

ORWELL NATURAL GAS	)	
COMPANY,	)	
	)	
	)	Case No.: 16-2419-GA-CSS
Complainant,	)	
	)	
vs.	)	
	)	
ORWELL-TRUMBULL PIPELINE	)	
COMPANY, LLC,	)	
	)	
	)	
Respondent.	)	

**ORWELL-TRUMBULL PIPELINE, LLC’S REPLY TO ORWELLNATURAL GAS  
COMPANY’S MEMORANDUM CONTRA**

**I. INTRODUCTION**

Orwell-Trumbull Pipeline Company (“OTPC”) herein replies to Orwell Natural Gas Company’s (“ONG’s”) Memorandum Contra (“Memo Contra”) to OTPC’s Motion to Dismiss (“Motion”). OTPC seeks to dismiss ONG’s Complaint based on the following grounds: (1) the Commission’s lack of subject matter jurisdiction; (2) the primary jurisdiction rule; (3) ONG’s failure to state a claim upon which relief can be granted; and (4) the doctrine of res judicata. ONG’s Memo Contra fails to demonstrate any legitimate basis why OTPC’s Motion should not be granted.

**II. BACKGROUND FACTS**

By Entry dated July 8, 2008 in Case No. 08-1244-PL-AEC (“2008 Entry”), this Commission approved a “reasonable arrangement” (the “Contract”) between ONG and OTPC. In 2015, ONG filed a complaint with this Commission, alleging that many of the terms of the Commission-approved Contract were unreasonable. After a two (2) day hearing addressing

ONG's complaints regarding the Contract and post-hearing briefs by all interested parties, the Commission issued an Order in Case No. 15-637-GA-CSS, dated June 15, 2016, that re-affirmed certain terms, and modified other terms of the Contract ("2016 Order").

Beginning in July, 2016, OTPC's invoices to ONG reflect the firm transport requirement mandated by this Commission and the \$1.01 per Dth transportation rate that was left unchanged by this Commission. ONG refuses to pay these invoices. Instead ONG continues to tender payment for interruptible, rather than firm, transport service since the 2016 Order. After several months in which OTPC was unable to secure ONG's voluntary compliance with the 2016 Order, OTPC filed a breach of contract claim against ONG in the Court of Common Pleas in Lake County, Ohio, docketed as Case No. 16-CV-001776 ("Lake County Lawsuit"). Service in the Lake County Lawsuit was completed via U.S. Mail, pursuant to 4.6(C) of the Ohio Rules of Civil Procedure, on December 22, 2016. ONG filed its Complaint in this case on December 20, 2016. Service was completed in this case on February 21, 2017.

### III. **LAW & ARGUMENT**

#### **A. ONG's Conclusion That "ALL" Disputes Involving "Reasonable Relationships" Are Within The Sole Jurisdiction of This Commission Is Incorrect.**

ONG's Memo Contra asserts, multiple times, that this Commission has jurisdiction over "any" and "all" disputes involving "reasonable arrangements." Amazingly, ONG makes these assertions while expressly acknowledging that its assertions are not correct. Specifically, ONG's Memo Contra clearly acknowledges that this Commission is divested of jurisdiction over matters of "pure" contract.<sup>1</sup> ONG then continues to contradict itself by providing the Commission with

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<sup>1</sup> Actually, ONG's Memo Contra asserts that "the Commission is divested of jurisdiction *only* over matters of "pure" contract[.]" This assertion is also not correct. This Commission is also divested of jurisdiction in matters involving tort. See *Allstate Insur. Co. v. Cleve. Electric Illuminating Co.* (2008), 119 Ohio St. 3d 301, 2008-Ohio-3917.

the test in which the Ohio Supreme Court uses to determine if a matter should be heard before this Commission or the Court System (the “Allstate Test”). *Id.*

However, while ONG’s Memo Contra correctly cites the Allstate Test, it completely ignores the standard set by the Allstate Test and the rationale for that standard. In fact, ONG’s interpretation is directly counter to the Allstate Test. Specifically, the Allstate Test is a two part test that asks: (1) Is the PUCO’s administrative expertise required to resolve the issue in dispute; and (2) Does the act complained of constitute a practice normally authorized by a utility? *Id.* at ¶12. “If the answer to either question is in the negative, the claim is not within PUCO’s exclusive jurisdiction.” *Id.* at ¶13. ONG has failed to show why the answer to either question is affirmative.

1. This Commission’s Expertise Is Not Required to Adjudicate A Claim for Breach of Contract.

Pursuant to Ohio Revised Code (“O.R.C.”) §4905.05 and §4905.26, this Commission possesses exclusive jurisdiction and plenary authority to determine whether the rates charged and the terms of service imposed by any of the entities it regulates, including both pipeline companies and natural gas companies, is in any way unjust, unreasonable, discriminatory or otherwise in violation of law. Despite the broad jurisdiction and authority granted this Commission, the Ohio Supreme Court has repeatedly held that this Commission has no jurisdiction to determine claims involving solely “legal rights and liabilities” even among and between regulated entities. *See, New Bremen v. PUCO* (1921), 103 Ohio St. 23, at p. 30- 31, and *Allstate Insurance Co.*, 119 Ohio St. 3d 301. In other words, cases to determine rates and terms of service are subject to the unique and exclusive jurisdiction of this Commission. Cases to enforce the rates and terms of service established by this Commission are matters heard by

Courts with appropriate jurisdiction. Thus, cases seeking damages arising out of “pure” contract and “pure tort” claims are entirely beyond the jurisdiction of this Commission. *Id.*

In this case, this Commission set the rates and terms of service to the Contract. Specifically, there was a Contract between OTPC and ONG. The Contract was initially approved by this Commission by the 2008 Entry. Years later, in response to ONG’s Complaint in Case No. 15-637-GA-CSS, this Commission chose to amend parts of the Contract while leaving other parts of the Contract in place. See *2016 Order*. Like judgments, this Commission’s Orders are in effect when issued, unless stayed, even pending appeal.

OTPC can provide service to ONG only upon the rates and terms, established by this Commission, of the amended Contract. This is exactly what did in response to the 2016 Order. Specifically, OTPC began charging ONG for Firm service based upon the existing rate and the existing MDQ of the Contact – neither of which was changed by the 2016 Order. Because these charges represent a price increase to ONG, ONG refuses to pay OTPC for the service mandated by this Commission in the 2016 Order.

ONG’s failure to pay does not require this Commission’s expertise involving utilities. This case is simply a matter of a provider of a service not being paid for the service that it is providing.

2. This Matter Does Not Constitute A Practice Normally Authorized By A Utility.

First, as stated earlier, the Contract and its terms have already been amended and approved by the Commission in the 2016 Order. Second, ONG’s Memo Contra argues that only the PUCO may interpret the terms of the Contract. ONG’s Memo Contra provides no support

for ONG's claim.<sup>2</sup> That is because ONG's claim is simply not true. In fact, the Ohio Supreme Court has expressly stated that this Commission does not have the authority to interpret contracts. Specifically, the Ohio Supreme Court stated:

The public utilities commission is in no sense a court. It has ***no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights*** or property rights.

(Emphasis Added.) *State ex rel. Dayton Power & Light Cop. V. Riley* (1978), 53 Ohio St.2d 168, 169-170, citing *New Bremen*, 103 Ohio St. at 30.

**B. The Judicial Priority Rule Applies To This Commission If The Commission Determines that it has Jurisdiction In This Matter.**

ONG's Memo Contra states that judicial priority rule does not apply in this case because the Commission has exclusive jurisdiction in determining the rates of a reasonable arrangement and "any disputes" over the terms of that reasonable arrangement. As stated above, OTPC does not dispute the Commission's exclusive jurisdiction regarding the Commission's authority to **determine** rates. However, OTPC does dispute the Commission's authority to determine the legal rights of the parties under that Contract. Should the Commission nonetheless decide that it does have jurisdiction to determine the legal rights of the parties under the Contract, then its jurisdiction would merely be concurrent with that of the Lake County Court of Common Pleas. The Commission should then not hear this matter due to the jurisdictional priority rule because, as stated in ONG's Memo Contra, the jurisdictional priority rule grants jurisdiction to the adjudicatory body that first obtained service on all parties. See *Memo Contra* at p. 8, citing *Triton Service, Inc. v. Grady Reed, et al.*, 2016-Ohio-7838, ¶9. In this case, service was made in

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<sup>2</sup> ONG's Memo Contra states that "[t]he alleged breach of contract and damages also fall under the commission's supervision pursuant to the Ohio Revised Code[.]" but does not cite the portion of the O.R.C. that grants this Commission this authority. See *Memo Contra* at p. 5.

the Lake County Lawsuit (on December, 22, 2016) before service was made in this case (on February 21, 2017).

**C. ONG Failure To State A Claim Upon Which Relief Can Be Granted Is Based Upon ONG's Desire to Ignore Or Understand The 2016 Order.**

ONG states, in its Memo Contra, that ONG's claim is based upon "OTPC [C ] is attempting to enforce charges on ONG that are neither part of the opinion and Order issued by the Commission or part of any tariff on which ONG must comply..." (see *Memo Contra* at p. 7, citing ONG's *Complaint* at ¶19-20). In addition, ONG also states that "OTPC does not have a Commission approved tariff or reasonable arrangement that justifies the \$1.01 for firm service; ONG is not obligated to pay these charges." See *Memo Contra* at p. 7.

Again, ONG's assertions are incorrect. This Commission approved the Contract has been approved, as a reasonable arrangement, through the 2008 Entry. This Commission then modified the Contract in the 2016 Order. The Contract's current rate is \$1.01 per Dth and was not modified by the 2016 Order. Next, the MDQ of 2,000 MCF was approved within the 2008 Entry and was not amended by the 2016 Order. The 2016 Order did expressly change the Contract from interruptible service to firm service. Specifically, the 2016 Order states "Section 1.1 of the Agreement should be modified to direct that OTP provide firm, rather than interruptible service." See *2016 Order* at ¶46. Therefore, as stated in OTPC's Motion, the Contract, after being amended by the 2016 Order, is a contract for firm service with a MDQ of 2,000 MCF at a rate of \$1.01 per Dth.

O.R.C. §4905.32 mandates that OTPC has no option except to provide service upon Commission-approved terms, at the Commission approved rate, and that ONG has no option but to pay the Commission approved rate for service, upon Commission-approved terms. OTPC did

exactly this after the Contract was amended by the 2016 Order. ONG failed to fulfill its obligations after the Contract was amended by the 2016 Order. ONG's Complaint tried to obfuscate this in its "prayer for relief." ONG's "prayer for relief" asks for: (1) Commission jurisdiction over the charges and invoices issued; (2) a hearing to address "clarification" of the 2016 Order; and (3) any other relief that the Commission finds "just and reasonable." The Commission has already exercised jurisdiction in this matter. The 2016 Order is the result of that exercise. ONG attempts to use the word "clarification" as a feeble attempt to request what it really wants from the Commission. The real reason that ONG filed its Complaint with this Commission, when it was aware that the Lake County Lawsuit already existed, is because ONG wants the Commission to modify the Contract yet again. In fact, ONG expressly states this desire in its Memo Contra. Specifically, ONG's Memo Contra states that "[t]he contract at issue and the rates in dispute are those that require Commission review **and modification.**" (Emphasis added.) See *Memo Contra* at p. 6.

Such relief, however, cannot benefit ONG at this time. The Filed-Rate Doctrine states that this Commission's powers do not include the power to engage in retroactive rate-making and this Commission's ratemaking authority is prospective only. See *Kecko Indus. v. Cincinnati & Suburban Tel. Co.* (1957), 166 Ohio St. 254, 257. See, also, *Lucas County Commissioners v. Public Utilities Commission*, 80 Ohio St.3d 348, 885 N.E.2d 501, 347 (1997); *Industrial Energy Users-Ohio v. Public Utilities Commission of Ohio*, 117 Ohio St.3d 486, 885 N.E.2d 195 (2008); *In re Application of Columbus Southern Power Co. v. Public Utilities Commission of Ohio*, 138 Ohio St.3d 863, 8 N.E.3d 863 (2014); and *In re Complaint of Pilkington N. Am., Inc.* 145 Ohio St.3d 125, 47 N.E.3d 786 (2015). In other words, the rates filed with and approved by the Commission are the only lawful rates and the only rates that a utility can charge its customers

under O.R.C. §4905.32, even if those rates are subsequently determined to be unjust, unreasonable, or unlawful. *In re Pilkington*, 145 Ohio St.3 at 131, 47 N.E.3d at 793. OTPC is therefore obligated to charge ONG, and ONG is obligated to pay OTPC, for the transportation of natural gas per the Contract as amended by the 2016 Order. For this reason, ONG's Complaint states a claim upon which relief cannot be granted by this Commission.

**D. ONG's Complaint Is Barred By Res Judicata.**

Finally, ONG's arguments for why Res Judicata does not apply in this case are: (1) the 2016 Order created a new contract; and (2) the Commission still needs to issue a final Opinion and Order in Case No. 16-637-GA-CSS. First, the 2016 Order expressly modifies the Contract; it does not create a new contract. Black's Law Dictionary defines "modify" as: "To alter; to change in incidental or subordinate features." This definition does not call for something new, but rather a change in the existing item. Therefore ONG's argument is incorrect.

Second, ONG's argument that this Commission's need to issue a final Opinion and Order after it granted OTPC's Application for Rehearing is irrelevant as it relates to ONG. Like all judgments, this Commission's Orders are in effect when issued, unless stayed, even pending appeal. Furthermore, while OR.C. §4903.10 permits a party to file an application for rehearing with the PUCO within thirty (30) days after an Order has been issued, ONG did not file an application for rehearing and therefore the 2016 Order is a final, un-appealable order as it relates to ONG's concerns. *Office of Consumers' Counsel v. Public Utils. Comm'n* (1994), 70 Ohio St.3d 244, 248, citing *Cincinnati v. Public Utilities Com.* (1949), 151 Ohio St. 353, 378.



IV. **CONCLUSION**

For these reasons, and the reasons stated in OTPC's Motion, ONG's Complaint should be  
DISMISSED.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The PUCO's e-filing system will serve notice of this filing upon counsel for the Complainant 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 this August 10, 2017, by electronic mail:

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Summary: Reply OTPC's Reply to ONG's Memorandum Contra to OTPC's Motion to Dismiss in Case No. 16-2419-GA-CSS. electronically filed by Mr. Justin M Dortch on behalf of Orwell-Trumbull Pipeline Company, LLC