BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

ORWELL NATURAL GAS COMPANY,	)	
	)	Case No. 16-2419-GA-CSS
Complainant,	)	
	)	
v.	)	
	)	
ORWELL-TRUMBELL PIPELINE COMPANY, LLC,	)	
	)	
	)	
Respondent.	)	

ORWELL NATURAL GAS COMPANY'S REPLY IN SUPPORT OF MOTION TO COMPEL ENFORCEMENT OF A REASONABLE ARRANGEMENT

I. INTRODUCTION

Orwell-Trumbull Pipeline Company, LLC's ("OTPC") Memorandum Contra to Orwell Natural Gas Company's Motion to Compel Enforcement of Commission-Approved Reasonable Arrangement ("Memo Contra")[1] noticeably fails to rebut the indisputable facts that support the relief requested in Orwell Natural Gas Company's ("Orwell") Motion to Compel Enforcement of Commission-Approved Reasonable Arrangement ("Motion to Compel"). Instead, OTPC's Memo Contra merely rehashes the same jurisdictional arguments that the Commission has already considered and rejected. Despite OTPC's claims to the contrary, the Commission retains exclusive jurisdiction over the supervision and regulation of Commission-approved reasonable

[1] In the alternative, OTPC requests that the Commission treat its Memo Contra as a Motion to Strike Orwell's Motion to Compel. However, OTPC fails to explain why the Motion to Compel should be stricken other than repeating its previously rejected arguments that the Commission lacks jurisdiction to adjudicate this dispute. As OTPC never developed any significant arguments suggesting the Motion to Compel should be stricken rather than denied, Orwell is treating OTPC's latest filing as a Memo Contra, not a Motion to Strike. Moreover, the Commission rules do not permit this kind Motion to Strike "in the alternative" to effectively create the right to file a sur-reply. Orwell will therefore oppose any effort by OTPC to file a sur-reply regarding the Motion to Compel.

arrangements like the Agreement[2] at issue in this proceeding, and the Commission is uniquely empowered to enforce the rate, terms, and conditions of those reasonable arrangements.

When the Commission approved and later modified the parties' Agreement, the Commission **never** authorized OTPC to impose reservation or capacity charges on Orwell. OTPC's references to "industry standard" and its unfounded, speculative claims divining the "true" intent of the Commission do not change that undeniable fact. Accordingly, the Commission should order OTPC to refrain from imposing a reservation charge or any other unlawful charges on Orwell under the Commission-approved Agreement.

II. BACKGROUND

On September 13, 2017, Orwell filed a Motion to Compel to stop OTPC from continuing to bill an unlawful rate under the Agreement. On September 28, 2017, OTPC filed the Memo Contra, alleging, among other things, (1) the Commission does not retain the authority to award the relief requested in the Motion to Compel, (2) the jurisdictional priority rule bars Orwell's complaint in this case, and (3) the Motion to Compel is nothing more than an improperly disguised motion for summary judgment that cannot be granted without a hearing.

As explained in greater detail below, OTPC's arguments are groundless. The Agreement, as approved and modified by the Commission, has **never** authorized OTPC to assess a reservation or capacity charge. Given that the Commission undoubtedly possesses the statutory authority to award the relief requested herein, namely to compel OTPC to enforce the terms, conditions, and rates set forth in a Commission-approved reasonable arrangement, the Commission should grant Orwell's Motion to Compel.

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[2] The Natural Gas Transportation Agreement ("Agreement") is attached as Exhibit 1 to Orwell's Motion to Compel.

III. ARGUMENT

A. The Commission's Modifications to the Agreement Do Not Authorize the Imposition of a Capacity or Reservation Charge.

OTPC does not and cannot dispute that the actual terms of the Agreement, as modified by the Commission in Case No. 15-637-GA-CSS ("June 15, 2016 Order"), do not *explicitly* authorize the imposition of any capacity or reservation charge. Recognizing this, OTPC justifies the imposition of these unlawful charges by citing to a purported "industry standard" that firm service requires a capacity charge to reserve the space upon the pipeline.[3] OTPC is wrong. The relationship between Orwell and OTPC is governed entirely by the Agreement, not OTPC's unsupported claims about some ill-defined "industry standard." The Agreement specifically states that it constitutes the entire agreement between the parties.[4] The Agreement does not reference a capacity charge, nor does it reference any general "industry standard" which would apply to create a reservation charge. As such, OTPC's position lacks support in the only relevant document—the Agreement.

OTPC's position is also refuted by the June 15, 2016 Order. In that proceeding, the Commission heard extensive evidence about the four modifications it made to the Agreement, as well as additional changes requested by Orwell. Among other things, the Commission heard testimony from Staff and Orwell that interruptible service was not appropriate for service to residential customers,[5] and that the rate being charged for interruptible service was well in excess of the market price. Specifically, Orwell testified that the proposed OTPC price of $1.01/Mcf was inappropriate because similar utilities charged approximately $0.50/Mcf for similar service,

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[3] Memo Contra, at 13.

[4] *See* Exhibit 1, § 7.4 .

[5] June 15, 2016 Order, ¶¶ 44-46.

and Orwell was charged more than similar customers on OTPC's system.[6] The Commission ordered OTPC to file a rate case, but did not adjust the $1.01/Mcf rate being charged by OTPC.[7] The Commission recognized that the rates being charged for interruptible service were inappropriately high, so the Commission ordered that firm service be supplied. In light of the increased quality of service to be provided, the Commission chose not to change the price which would be provided for fixed service going forward, in essence recognizing that a higher price was justified since OTPC would be providing firm service instead of interruptible service.

Not only are the terms of the Agreement unavailing to OTPC, but also the terms of the tariff are equally unhelpful. During the relevant period, OTPC has provided service to Orwell pursuant to the Agreement rather than under tariff rates. Therefore, the OTPC tariff is irrelevant to this dispute. Even if the tariff did apply, it does not authorize a demand or reservation charge. In fact, the OTPC tariff does not contain any rate for firm service.[8] Instead, the OTPC tariff says that "rates and charges for transportation services will be established pursuant to contracts submitted to the Commission for approval under Section 4905.21, Revised Code."[9] As discussed above, the Agreement contains no rate establishing a "reservation charge." Accordingly, the tariff does not provide any support for OTPC's position.

Without any support from the terms of the tariff or the Agreement, OTPC defends these unlawful reservation charges by making sweeping, speculative claims about what it believes the

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[6] June 15, 2016 Order, ¶ 66.

[7] June 15, 2016 Order, ¶ 77.

[8] OTPC Tariff, Case No. 09-259-PL-ATA, Sheet 7.

[9] *Id*.

Commission intended in its June 15, 2016 Order.[10] While OTPC may claim it can divine the "true" intent behind the Commission's 2016 Order, the actual language from the June 15, 2016 Order is controlling, not OTPC's self-serving interpretation of that order.

The July 15, 2016 Order made four amendments to the Agreement. First, the Commission found that it retained exclusive jurisdiction over the Agreement as it was a reasonable arrangement under R.C. 4905.31; accordingly, the Commission amended the Agreement by suspending the arbitration provision until further order of the Commission.[11] Second, the Commission amended Section 1.1 of the Agreement so that natural gas service would be provided on a firm, rather than an interruptible, basis for all volumes transported (even above 2,000 Mcf).[12] Third, the Commission eliminated the sole-source provision in Section 1.2 of the Agreement that required Orwell to use only OTPC to transport gas to its customers.[13] The Commission found that eliminating this provision was necessary and in the public interest to allow Orwell access to alternative suppliers and to ensure OTPC provided transportation services at a more competitive level.[14] Fourth, the June 15, 2016 Order modified the Agreement to include a rate for shrinkage to provide transparency with respect to the amounts OTPC charges for shrinkage.[15]

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[10] Memo Contra, at 12-14

[11] June 15, 2016 Order, ¶ 17.

[12] *Id*. at ¶ 46. OTPC has also incorrectly interpreted the Agreement (as modified by the July 15, 2016 Order) to say that OTPC is only required to provide firm service up to 2,000 Mcf per day. Again, OTPC is wrong. The Agreement (as modified by the July 15, 2016 Order) does not impose any maximum threshold – 2,000 Mcf or otherwise – on the delivery of firm service. Instead, the Agreement requires OTPC to provide firm service for *all* volumes transported.

[13] *Id*. at ¶ 57.

[14] *Id*.

[15] *Id*. at ¶ 77.

None of these modifications authorized a reservation or capacity charge. To the contrary, the Agreement, even as modified, requires that Orwell pay only a Commodity Charge plus Shrinkage for each Mcf *delivered.*[16] And OTPC may only bill for the total volume of gas *delivered.*[17] The Agreement approved by the Commission, as modified by the June 15, 2016 Order, does **not** include any additional charge for any amount of gas nominated or reserved. Accordingly, OTPC's imposition of reservation or capacity charges is patently unlawful and contrary to the explicit terms of the Agreement.

Moreover, OTPC's unsupported claims about "industry practice" are not even consistent with OTPC's own contracts. The OTPC contract for Lake Hospital was signed only 15 months after the Orwell contract. That contract required service for 12 years (similar to the 15-year term of this agreement) at firm service for only $0.31/Mcf. Not only is this price roughly a third of what Orwell pays, it also shows there is no standard practice to require a reservation charge. The Lake Hospital contract includes no such charge.[18] As OTPC's own contracts do not include these charges in all circumstances, there is certainly no "industry practice" to require them.

B. The Motion to Compel is Not an Improper, Disguised Motion for Summary Judgment, But Is Merely a Request to Enforce a Commission-Approved Reasonable Arrangement.

OTPC alleges that the Motion to Compel is "nothing but a disguised Motion for Summary Judgment", which is apparently "evident because [Orwell] is asking the Commission to determine the merits of this case without holding a hearing."[19] OTPC is wrong again. The

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[16] *See* Ex. 1, § 2.1.

[17] *Id*. at § 5.1

[18] *See* January 30, 2009 Transportation Firm Service Agreement between OTPC and Lake Hospital, Case No. 09-0232-PL-AEC.

[19] Memo Contra, at 11.

Commission already held a hearing and determined the merits of this case when it modified the Agreement in its 2016 Order. As stated previously, the Commission never added or modified any contractual provision that would enable OTPC to assess capacity reservation charges on Orwell.[20] OTPC's arguments to the contrary do not change the undeniable fact that the Commission never modified the Agreement to authorize the imposition of any capacity reservation charges. Accordingly, there is no need to hold a hearing before granting the Motion to Compel as Orwell is only asking the Commission to enforce a prior order, not to adjudicate a new claim on the merits via a "disguised Motion for Summary Judgment" as OTPC argues.

C. The Commission Retains Exclusive Jurisdiction Over the Supervision, Regulation, and Enforcement of Reasonable Arrangements.

Throughout the Memo Contra, OTPC repeatedly attacks the Commission's authority to adjudicate the claims in this case. OTPC insists that "cases to **enforce** the rates and terms of service established by the Commission are matter properly heard by Courts with appropriate jurisdiction", not the Commission.[21] OTPC further argues that "this Commission has no power to issue declaratory judgments" and that "it is fundamental Ohio law that **even this Commission's hands are tied at this point**" where there is a dispute over the meaning or interpretation of terms in a Commission-approved reasonable arrangement.[22] OTPC is wrong.

First, the Commission retains the authority to regulate and enforce compliance with its orders and directives, especially orders approving or modifying reasonable arrangements under R.C. 4905.31. Section 4905.31(E) provides that every reasonable arrangement "shall be under the supervision and regulation of the commission, and is subject to change, alteration, or

[20] *See* Motion to Compel, at 5-9.

[21] Memo Contra, at 7 (emphasis in original).

[22] *Id*. at 9 (emphasis in original).

modification by the commission." Moreover, Section 4905.26 grants the Commission exclusive authority over service-related issues regarding public utilities.[23] And, more generally, Section 4905.54, titled "Compliance with Orders", requires all public utilities in Ohio "to comply with every order, direction, and requirement of the public utilities commission made under the authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force." Finally, the Commission is even empowered to impose potent remedies for non-compliance such as ordering forfeiture, rescission of contracts, or "any other corrective action necessary to protect the public safety, reliability, and customer service."[24]

OTPC's claims to the contrary are not new. In Case No. 15-637-GA-CSS, OTPC advanced similar arguments to divest the Commission of jurisdiction over the parties' prior dispute about the terms, conditions, and rates in the Agreement.[25] The Commission considered OTPC's jurisdictional argument and unequivocally rejected it:

> There is no dispute that R.C 4905.31 vests jurisdiction over reasonable arrangements with the Commission. R.C 4905.31 provides that every reasonable arrangement shall be under the supervision and regulation of the Commission and is subject to change, alteration, or modification by the Commission . . . Further, as provided by *Corrigan*, the issues in these complaints are rate-related and service-related issues for which the Commission, and not an arbitrator, is in the best position to determine appropriate responsibilities, rights, and remedies.[26]

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[23] *Corrigan v. Illum. Co*., 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 8.

[24] *See* O.A.C. 4901:1-34-08.

[25] *In the Matter of the Complaint of Orwell Natural Gas Company v. Orwell-Trumbull Pipeline Company, LLC,* Case No. 15-637-GA-CSS, Opinion and Order (June 15, 2016), at ¶ 14.

[26] *Id*. at ¶ 17.

As the Commission found in Case No. 15-637-GA-CSS, a dispute over the meaning and scope of terms, conditions, and/or rates in a reasonable arrangement falls under the exclusive jurisdiction of the Commission, not the Lake County Court of Common Pleas.[27]

The Commission routinely enforces and directs parties to comply with its orders. For example, the Commission recently issued an order directing Ohio Rural Natural Gas Co-op ("ORNG") to cease all operations until it could demonstrate compliance with certain rules and regulations.[28] In that case, the Commission demonstrated its authority to order the pipeline company to cease doing business, an extraordinary power that OTPC now refuses to recognize. According to OTPC, the Commission is prohibited from awarding that kind of relief (i.e., directing or ordering parties to comply with its orders, rules, or statutory requirements). Such a narrow and restrictive view of the Commission's authority is unsupported by the law, facts, and routine Commission practice.

Next, OTPC contends that Orwell's Motion to Compel is nothing short of an improper, disguised application for rehearing of the Commission's order in Case No. 15-637-GA-CSS ("2016 Order").[29] Again, OTPC is mistaken. Orwell is not requesting nor even suggesting that the Commission erred in the 2016 Order. To the contrary, Orwell is asking the Commission to enforce the 2016 Order, not reverse or modify it.

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[27] OTPC appears to concede that both lawsuits (i.e., PUCO complaint and Lake County action) "disput[e] the meaning of the Contract after it was amended by 2016 Order." *See* Memo Contra, at 12. Thus, the parties agree that the instant case concerns a dispute over the meaning and scope of a Commission order. Curiously, however, OTPC contends that a civil court must interpret the meaning of a Commission order, not the Commission itself.

[28] *See In the Matter of the Commission's Investigation into Ohio Rural Natural Gas Co-Op and Related Matters,* Case No. 16-1578-GA-COI, Opinion and Order (January 18, 2017), ¶ 63.

[29] Memo Contra, at 8.

Similarly, OTPC claims that the Filed Rate Doctrine precludes Orwell's requested relief.[30] But the relief requested in the Motion to Compel is entirely consistent with the Filed Rate Doctrine. Orwell is seeking an order compelling OTPC to apply the rate in the Agreement that was approved and later modified by the Commission in the 2016 Order. If anything, OTPC is violating Commission orders by not billing the filed rate and attempting to impose reservation charges on Orwell contrary to the express terms of the Agreement.

Broken down into its simplest terms, OTPC essentially contends that if a public utility bills the wrong rate and if the customer refuses to pay that unlawful rate, that customer has no redress at the Commission. Such an outcome is contrary to and unsupported by law and basic Commission practice. Section 4905.26 affords customers the right to file a complaint for any "rate, fare, charge, toll, rental, schedule, classification, or service . . . [that] is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law." OTPC's myopic view of Commission authority runs contrary to the explicit text of R.C. 4905.26 and routine Commission practice. Customers regularly file PUCO complaints against a utility for failure to abide by Commission rules and orders, and the Commission is unquestionably empowered to adjudicate and resolve those complaints, especially when the dispute concerns the meaning and scope of a Commission-approved reasonable arrangement under R.C. 4905.31.

In sum, the Commission has the authority to regulate and enforce its orders, including enforcing the terms and conditions of Commission-approved reasonable arrangements like the Agreement at issue in this case. Accordingly, the Commission can award the relief requested herein, namely to compel OTPC to comply with the Agreement and to refrain from imposing a

[30] *Id.* at 8, 9.

reservation charge or any other unlawful charge on Orwell that is inconsistent with Commission-approved terms and conditions in the Agreement.

D. The Jurisdictional Priority Rule Is Inapplicable Where, As Here, a Regulatory Administrative Agency Retains Exclusive Jurisdiction Over the Dispute.

OTPC also argues that the "jurisdictional priority rule" precludes the Commission from adjudicating this dispute since OTPC served process on Orwell in the Lake County Court of Common Pleas before service of process was completed in this proceeding.[31] OTPC's reliance on the jurisdictional priority rule is misplaced. First, it is noteworthy that OTPC failed to provide the full quote from a case cited in support of its claim that the jurisdictional priority rule bars Orwell's PUCO complaint.[32] The full citation, stated below, is important to understand the applicability of the jurisdictional priority rule under Ohio law:

> The jurisdictional priority rule provides that as between **state courts of concurrent jurisdiction**, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals.[33]

Most obvious, the jurisdictional priority rule applies when two or more **state courts** are seeking concurrent jurisdiction over a dispute. The jurisdictional priority rule does **not** apply to an administrative agency because administrative agencies like the PUCO are not "courts".[34] Accordingly, the jurisdictional priority rule does not apply here.

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[31] Memo Contra, at 10.

[32] Memo Contra, at 10 ("In such cases, '. . . the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals.'").

[33] *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 1999 Ohio App. LEXIS 4175, at *4 (emphasis added) (partially affirming dismissal of a sufficiently similar claim pending in both the Franklin and Cuyahoga County Courts of Common Pleas).

[34] *See, e.g., Galluzzo v. Galluzzo*, 2d Dist. Champaign No. 2011-CA-11, 2012-Ohio-502 (finding that the jurisdictional priority rule did not apply where the Child Support Enforcement Agency or CSEA is involved because "CSEA is not another 'court'"); *State ex rel. Republic Servs. of Ohio II v. Bd. of Twp. Trustees* ("*Republic Servs. of*

However, even if the jurisdictional priority rule applied here (which it does not), it only applies when "a court of competent jurisdiction acquires jurisdiction of the subject matter of an action".[35] Here, the Commission retains exclusive jurisdiction over the supervision, regulation, and enforcement of reasonable arrangements per R.C. 4905.31.[36] Consequently, the jurisdictional priority rule does not divest the Commission of jurisdiction because R.C. 4905.31 requires the Commission to exclusively oversee, regulate, and enforce Commission-approved reasonable arrangements. In other words, the jurisdictional priority rule does not supersede the explicit language of a statute granting the Commission exclusive jurisdiction over the central dispute in this case. As such, the jurisdictional priority rule is inapplicable to this case and unavailing to OTPC.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the Motion to Compel OTPC to enforce the Agreement, and order OTPC to refrain from imposing a reservation/capacity charge or any other unlawful charges on Orwell that are unsupported by and inconsistent with the terms of the Commission-approved Agreement.

Ohio II"), 5th Dist. Stark Nos. 2006 CA 00153, 2006 CA 00172, 2007-Ohio-2086, ¶ 48 (holding that the jurisdictional priority rule did not apply where an administrative agency was presiding over the same dispute).

[35] *Republic Servs. of Ohio II*, 2007-Ohio-2086, at ¶ 43.

[36] *See supra* Section III(C).

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 5th day of October, 2017. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ *Mark T. Keaney*
One of Attorneys for Orwell Natural Gas Company

Summary: Reply Reply in Support of Motion to Compel Enforcement of a Reasonable Arrangement electronically filed by Mr. Mark T Keaney on behalf of Orwell Natural Gas Company