

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
ORWELL NATURAL GAS COMPANY,

COMPLAINANT,

CASE NO. 16-2419-GA-CSS

v.

ORWELL-TRUMBULL PIPELINE
COMPANY, LLC,

RESPONDENT.

ENTRY

Entered in the Journal on November 21, 2017

I. SUMMARY

{¶ 1} The Commission denies Orwell-Trumbull Pipeline Company, LLC's motion to dismiss the complaint filed by Orwell Natural Gas Company as the Commission has exclusive jurisdiction to hear this complaint pursuant to R.C. 4905.26 and the two-part test established by the Supreme Court of Ohio in *Allstate Insur. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824.

II. PROCEDURAL BACKGROUND

{¶ 2} Orwell-Trumbull Pipeline Company, LLC (OTP) is a pipeline company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} Orwell Natural Gas Company (Orwell) is a natural gas company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 4} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate,

service, regulation, or practice furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 5} On December 20, 2016, Orwell filed a complaint against OTP. Orwell states that, on July 8, 2008, Orwell entered into a 15-year, natural gas transportation service agreement with OTP. The agreement was a reasonable arrangement as defined by R.C. 4905.31 and approved by the Commission on December 19, 2008, in Case No. 08-1244-PL-AEC. Orwell avers that, according to the terms of the agreement, the rates would adjust every five years to reflect current market conditions. Orwell contends that, after the parties were unable to successfully negotiate a rate adjustment, in March 2015, OTP unilaterally raised Orwell's rates. At that time, Orwell filed a complaint with the Commission in Case No. 15-637-GA-CSS. Thereafter, on June 15, 2016, the Commission issued an Opinion and Order modifying the reasonable arrangement and resolving the contract dispute.¹ *In re Complaint of Orwell Natural Gas Co. v. Orwell-Trumbull Pipeline Co., LLC*, Case No. 14-1654-GA-CSS, et al. (*First Complaint Case*), Opinion and Order (June 15, 2016). Since that time, according to Orwell, OTP has been charging Orwell at a rate that does not comply with the Commission's Order. Orwell maintains that it continues to pay OTP on a monthly basis at an amount that is in line with the Commission's directives. Since then, according to Orwell, on October 20, 2016, OTP filed a complaint against Orwell in Lake County Common Pleas Court seeking payment for the disputed amount.

{¶ 6} On March 8, 2017, OTP filed its answer to the complaint. In its answer, OTP denies many of the allegations and asserts several affirmative defenses, including that the Commission lacks jurisdiction to hear the case. OTP elaborated further in a July 7, 2017 motion to dismiss. In its motion, OTP affirms that it filed a complaint in Lake County Court of Common Pleas and argues that is the proper venue to hear the dispute. Accordingly, OTP states the pending case before the Commission should be dismissed. As discussed

¹ An application for rehearing was filed by OTP in the *First Complaint Case* on July 15, 2016. On August 3, 2016, the Commission issued an Entry on Rehearing granting the application for rehearing for the limited purpose of further consideration of the matters specified in the application.

below, OTP claims the complaint should be dismissed for four reasons: (1) the Commission lacks subject matter jurisdiction; (2) Orwell's complaint fails to state a claim upon which relief can be granted; (3) even if the Commission could have jurisdiction, it is superseded by the earlier filing in Lake County; and (4) the Commission already issued a final judgment regarding these same issues in the *First Complaint Case* and Orwell is precluded from re-litigating the same complaint. In response, Orwell filed a memorandum contra OTP's motion to dismiss on July 24, 2017.

{¶ 7} According to OTP, the Commission has authority to set rates and terms of service, as well as to determine if rates and terms are unjust, unreasonable, or discriminatory. However, OTP avers that cases to enforce rates and terms of service are judicial matters reserved for the appropriate court. Here, in its motion to dismiss, OTP contends that Orwell's complaint seeks enforcement of already-established rates and terms of service, which is a judicial determination and outside of the scope of the Commission's jurisdiction. This is why, according to OTP, it is seeking relief in Lake County Court of Common Pleas.

{¶ 8} Orwell replies that the Commission has exclusive jurisdiction over reasonable arrangements and the issues in Orwell's complaint. Orwell avers that the reasonable arrangement between Orwell and OTP was approved pursuant to R.C. 4905.31, which provides that any such agreement "shall be under the supervision and regulation of the [C]ommission, and is subject to change, alteration, or modification by the [C]ommission." Accordingly, Orwell avers this vests the Commission with the exclusive jurisdiction to hear the complaint.

{¶ 9} Orwell further submits that the Supreme Court of Ohio grants the Commission with exclusive jurisdiction to oversee this dispute. Orwell states that the Supreme Court adopted a two-part test to determine whether jurisdiction lies with the Commission or the Ohio courts. *Allstate Insur. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824 (*Allstate*). According to Orwell, the test examines

whether the act complained of is a practice normally authorized by the utility and whether the Commission's expertise is needed to resolve the dispute. Orwell maintains that the complaint meets both prongs of the test. First, Orwell states the contract at issue and the rates in dispute are unique to the Commission and require the Commission's review and modification. Further, Orwell argues the Commission's expertise is necessary to analyze rates, reasonable arrangements, and compliance with utility regulations. Thus, Orwell contends the complaint meets the Court's two-part test and the Commission, therefore, has exclusive jurisdiction.

{¶ 10} OTP additionally asserts the case should be dismissed because Orwell fails to state a claim upon which relief can be granted. OTP states the rates charged by OTP to transport natural gas for Orwell were previously established in a Commission-approved reasonable arrangement, as defined by R.C. 4905.31. According to OTP, the Commission's ratemaking authority is prospective, and the Commission is prohibited from engaging in retroactive ratemaking. OTP avers that, because the rates have already been established, the Commission is unable to go back and alter the agreed-upon rates. Because the Commission is unable to grant Orwell the relief it seeks, OTP requests that the complaint be dismissed.

{¶ 11} Orwell disagrees, stating that OTP is wrongly interpreting the order in the *First Complaint Case*. Orwell asserts there is not an approved tariff or reasonable arrangement that justifies what OTP is charging Orwell. Orwell argues it is not requesting to alter any rates; rather, Orwell maintains it is seeking to have the order from the *First Complaint Case* properly enforced. Therefore, Orwell avers it is submitting a claim for which relief can be granted.

{¶ 12} Even if the Commission could have jurisdiction to hear the complaint, OTP submits that the Commission is precluded from hearing the matter because OTP already initiated a similar action with the Lake County Court of Common Pleas. OTP explains that, if two or more tribunals have concurrent jurisdiction, the "jurisdictional priority rule"

applies and the tribunal where proceedings are first initiated has exclusive jurisdiction. Because OTP filed its complaint with the Lake County Court before Orwell filed with the Commission, OTP states the Lake County Court has exclusive jurisdiction over the matters and the Commission should dismiss Orwell's complaint.

{¶ 13} Orwell counters that the "jurisdictional priority rule" is not applicable in this proceeding, as the Commission has exclusive jurisdiction. According to Orwell, the rule only applies when there are two or more tribunals with concurrent jurisdiction. Orwell maintains that, because the Commission has exclusive jurisdiction, as discussed above, the rule is not applicable in this situation and OTP's motion to dismiss should be denied.

{¶ 14} Finally, despite earlier arguing that the Commission lacks subject matter jurisdiction to hear the complaint, OTP submits that the Commission already issued a final judgment regarding the same issues and the same parties in the *First Complaint Case* and that the doctrine of res judicata prevents these claims from being heard again. According to OTP, Orwell's pending complaint is essentially the same as the *First Complaint Case*. Thus, OTP argues the doctrines of claim preclusion and issue preclusion prevent Orwell from re-litigating this complaint.

{¶ 15} In its memorandum contra, Orwell contends that OTP's argument lacks merit. Orwell asserts that, in the *First Complaint Case*, the Commission modified the original reasonable arrangement after a complaint from Orwell. According to Orwell, it filed the pending complaint case after OTP failed to comply with those modifications. Thus, Orwell asserts the issues in this case are different from the issues in the *First Complaint Case*. Accordingly, Orwell requests that the Commission deny OTP's motion to dismiss.

III. CONCLUSION

{¶ 16} The Commission finds that OTP's motion to dismiss should be denied. First, OTP's argument that res judicata prevents the Commission from hearing this complaint is without merit. In the *First Complaint Case*, Orwell filed a complaint regarding the original

reasonable arrangement between the parties. After a contested hearing, the Commission issued an Opinion and Order that, among other things, modified the arrangement. Orwell's current complaint case is regarding OTP's compliance with the Commission's Order in the *First Complaint Case* and the resulting modified reasonable arrangement. Thus, while the parties are the same and the cases are interconnected, the issues in this proceeding are unique. OTP's assertion that Orwell's complaint fails to state a claim upon which relief can be granted also lacks merit. OTP incorrectly maintains that Orwell's complaint seeks to have the Commission retroactively change the approved rates. Instead, what Orwell alleges in its complaint is that OTP is improperly charging Orwell for the transportation of natural gas in violation of the Commission's orders and the modified reasonable arrangement. Pursuant to R.C. 4905.26, any person may file a complaint against a public utility contending that a rate is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. Under R.C. 4905.26, the Commission is given broad authority to investigate the reasonableness of any rates or charges. *Allnet Communications Serv., Inc. v. Pub. Util. Comm.* 32 Ohio St.3d 115, 117, 512 N.E.2d 350 (1987) ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO.") Further, 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. Accordingly, the Commission finds that Orwell's complaint sufficiently states a claim upon which relief could be granted.

{¶ 17} Finally, OTP's additional arguments that the Commission does not have exclusive jurisdiction to hear this complaint are also unconvincing. As noted above, R.C. 4905.26 gives the Commission exclusive jurisdiction to hear any complaint against a public utility regarding whether a charge is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. Additionally, the rates were originally established pursuant to a reasonable arrangement under R.C. 4905.31, which 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. To definitively

determine when the Commission has exclusive jurisdiction over an action concerning a public utility, the Supreme Court of Ohio, in *Allstate*, set forth a two-part test. Under the test, it must first be determined whether the Commission's administrative expertise is required to resolve the dispute. Second, the act complained of must constitute a practice normally authorized by the utility. *Allstate* at ¶ 12. The Commission applied this same test in the *First Complaint Case* to determine whether the Commission or an independent arbitrator had exclusive jurisdiction to hear the complaints. In that case, the Commission found the complaints satisfied both parts of the test and that the Commission, therefore, had exclusive jurisdiction. *First Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 22.

{¶ 18} Unsurprisingly, the results here do not differ. As to the first part of the *Allstate* test, the Commission's administrative expertise is necessary to resolve this dispute. In the *First Complaint Case*, the Commission stated that "(t)he expertise of the Commission is necessary to interpret the regulations and statutes governing these public utility services and systems, the rates charged for the delivery of natural gas under R.C. Chapter 4909, the appropriateness of OTP's tariff approved by the Commission, the manner in which gas transportation service is provided by OTP, and the reasonableness of the arrangement between Orwell and OTP under R.C. 4905.31." *First Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 21. Similarly, as this proceeding revolves around the same two public utilities and a dispute regarding natural gas transportation, natural gas pipeline systems, and the appropriateness of the rates charged for gas transportation services, those same expert interpretations are also necessary in this proceeding. Additionally, this case also requires an understanding of the Commission's Order in the *First Complaint Case* and the Commission is best suited to interpret its own order. Specifically, under R.C. 4905.54, the Commission has explicit jurisdiction to enforce compliance with Commission orders and directives. Thus, to the extent that this dispute involves interpreting the Commission's prior decisions, we clearly have the statutory duty and expertise for this matter. Accordingly, the issues in this case meet the first prong of the *Allstate* test. Regarding the second prong of the test, the complaints in both this case and the *First Complaint Case* involve the

transportation of natural gas by OTP and the rates charged by OTP for that transportation. As the Commission found in the *First Complaint Case*, these are practices normally provided by regulated pipeline companies according to rates established in tariffs approved by the Commission. *First Complaint Case*, Opinion and Order (June 15, 2016) at ¶ 22. Thus, the second prong of the *Allstate* test is also met.

{¶ 19} In meeting both parts of the *Allstate* test, it is established that the Commission has exclusive jurisdiction to hear this complaint. This is consistent with Supreme Court precedent, which has consistently held that “the [C]ommission’s jurisdiction over rates and rate-related matters is unquestionable and exclusive.” *In re Complaint of Pilkington N. Am., Inc.*, 145 Ohio St.3d 125, 2015-Ohio-4797, 47 N.E.3d 786, ¶ 23. Therefore, this complaint is properly before the Commission and OTP’s motion to dismiss should be denied.

IV. ORDER

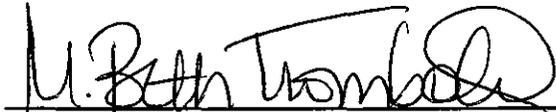
{¶ 20} It is, therefore,

{¶ 21} ORDERED, That OTP’s motion to dismiss be denied. It is, further,

{¶ 22} ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

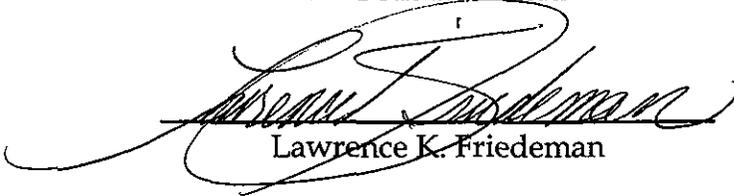
Asim Z. Haque, Chairman



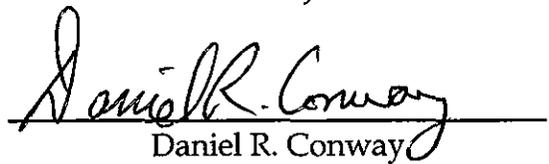
M. Beth Trombold



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Secretary