

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Orwell)
Natural Gas Company,) Case No.: 14-1654-GA-CSS
Complainant,)
vs.)
Orwell-Trumbull Pipeline Company, LLC)
Respondent,)

PUCO

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In the Matter of the Complaint of Orwell)
Natural Gas Company,) Case No.: 15-637-GA-CSS
Complainant,)
vs.)
Orwell-Trumbull Pipeline Company, LLC)
Respondent.)

**ORWELL NATURAL GAS COMPANY'S MEMORANDUM CONTRA ORWELL-
TRUMBULL PIPELINE COMPANY, LLC'S REQUEST FOR CERTIFICATION AND
APPLICATION FOR INTERLOCUTORY APPEAL**

I. INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") should deny Orwell-Trumbull Pipeline Company, LLC's ("OTP") request for certification of an interlocutory appeal ("Request for Certification"). OTP has not presented the Commission with a new or novel question of law or policy. The question OTP presents –jurisdiction over disputes regarding reasonable arrangements - has been answered by the General Assembly and the Ohio Supreme Court. The Commission has *exclusive* jurisdiction over reasonable arrangements, and can modify a

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reasonable arrangement without the consent of the parties. In fact, OTP admitted in its answers to Orwell Natural Gas Company's ("Orwell") complaints in the above captioned cases that the Commission has jurisdiction over Orwell's claims. Because the Commission has broad power to regulate reasonable arrangements, and it is undisputed that the Commission has jurisdiction over Orwell's claims, it was entirely appropriate for the Attorney Examiner to deny OTP's motion to stay. This is especially true considering the fact that OTP did not move to stay the hearing until the day of hearing. Further, in the event the Commission considers the arbitration clause in the Natural Gas Transportation Service Agreement ("Orwell-OTP Contract") between OTP and Orwell to be valid, OTP waived its right to arbitrate claims related to the Orwell-OTP Contract. OTP's failure to raise an affirmative defense regarding arbitration in Case No. 14-1654-GA-CSS, the case that initiated these disputes, constitutes a waiver of OTP's alleged arbitration right.

In addition, OTP's Request for Certification should be denied because OTP will not suffer any "undue" prejudice or expense if the Request for Certification is denied. OTP did not move for stay until the day of the hearing, which was over a year after the initial complaint was filed in Case No. 14-1654-GA-CSS. Further, because OTP acknowledged in its answers to Orwell's complaints that the Commission has jurisdiction over Orwell's claims, OTP should not be heard to complain about the cost of litigating these cases before the Commission. The Attorney Examiner properly decided to proceed forward with the hearing so that the Commission can consider and, hopefully, resolve the various problems presented by the Orwell-OTP Contract; problems that affect the amount Orwell's regulated customers pay for gas and the reliability of Orwell's system.

II. BACKGROUND

On November 20, 2008, OTP filed an application seeking approval of the Orwell-OTP Contract pursuant to R.C. 4905.31. The Orwell-OTP Contract contains an arbitration provision, which states:

The parties agree that any dispute arising hereunder or related to this Agreement shall be resolved by binding arbitration under the auspices of the American Arbitration Association. Prehearing discovery shall be permitted in accordance with the procedures of the Ohio Rules of Civil Procedure. The arbitrator or arbitrators shall have authority to impose any remedy at law or in equity, including injunctive relief. The Parties agree that any hearing will be conducted in Lake County, Ohio.¹

On December 19, 2008, the Commission approved the Orwell-OTP Contract.²

On September 19, 2014, Orwell filed a complaint in Case No. 14-1654-GA-CSS regarding duplicate invoices it received from OTP for gas transported on OTP's pipelines.³ These unjustified transportation charges relate to the Orwell-OTP Contract.⁴ In paragraph 6 of the complaint from Case No. 14-1654-GA-CSS, Orwell alleged that "the PUCO has jurisdiction over this matter."⁵ In its answer to Paragraph 6 of the complaint, OTP admitted that *the Commission has "jurisdiction over the matters raised by [Orwell]."*⁶ Further, OTP failed to raise an affirmative defense regarding arbitration in its answer in Case No. 14-1654-GA-CSS.

¹ Orwell-OTP Contract at Paragraph 7.6.

² During the hearing, witnesses for Orwell and the Office of Ohio Consumers' Counsel ("OCC") testified regarding why the Orwell-OTP Contract does not appear to be an arms-length transaction, and why the Commission should reconsider its approval of this contract. Orwell will more fully address this issue in its post-hearing briefs. However, for purposes of this memorandum contra, Orwell will not address whether or not the Orwell-OTP Contract was the result of good faith negotiations between two independent parties.

³ Orwell Compl.at ¶¶ 12-17 (Case No 14-1654-GA-CSS).

⁴ Orwell Compl.at ¶¶ 8 & 19-23 (Case No 14-1654-GA-CSS).

⁵ Orwell Compl.at ¶ 6 (Case No 14-1654-GA-CSS).

⁶ OTP Answer at ¶ 6 (Case No 14-1654-GA-CSS)(emphasis added).

On March 12, 2015, OTP filed a demand for arbitration with the American Arbitration Association (“AAA”) which claimed that Orwell breached the Orwell-OTP Contract. On March 31, 2015, Orwell filed a complaint against OTP with the Commission which alleges that the Orwell-OTP Contract, as currently drafted, negatively affects Orwell’s ratepayers and is unreasonable. In its answer to Orwell’s complaint in Case No. 15-637-GA-CSS, OTP raised an affirmative defense regarding arbitration. However, OTP did not immediately seek to stay the proceedings.

While the above captioned cases were pending before the Commission, the Office of Ohio Consumers’ Counsel (“OCC”) and Orwell issued a number discovery requests to OTP and conducted depositions of two of OTP’s potential witnesses. Before the hearing, OCC prepared and filed the direct testimony of its witness, Gregory Slone, which consisted of 199 pages of testimony and exhibits addressing the reasons why the Orwell-OTP Contract is unjust and unreasonable. Orwell prepared and filed the direct testimony of its witness, Michael Zappitello, which consisted of 94 pages of testimony and exhibits also addressing the reasons why the Orwell-OTP Contract is unjust and unreasonable.

On the day of the hearing, for the first time and over a year after the initial complaint was filed in Case No. 14-1654-GA-CSS, OTP formally moved the Commission to stay the proceeding to enforce the arbitration provision in the Orwell-OTP-Contract.

III. LAW AND ARGUMENT

A. Standard of review.

Under O.A.C. 4901-1-15(B), an attorney examiner may certify an appeal if (1) the appeal presents a new or novel question of interpretation, law, or policy, or (2) the appeal is taken from a ruling which represents a departure from past precedent. In addition to proving one

of the two above factors, the appellant must show that “an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.” In its Request for Certification, OTP claims that its appeal presents a novel question of law and policy. In addition, OTP claims that an immediate determination is necessary to prevent the likelihood of undue prejudice and expense to OTP.

B. OTP has not presented the Commission with a new or novel question of law or policy.

1. Almost 100 years of Ohio law indicates that the Commission has exclusive jurisdiction over reasonable arrangements.

OTP’s Request for Certification should be denied because OTP has not presented the Commission with a new or novel question of law or policy. The question OTP presents to the Commission is simple – does the Commission or an arbitrator have jurisdiction over disputes regarding reasonable arrangements? It is well settled Ohio law that the Commission has exclusive jurisdiction over reasonable arrangements. R.C. 4905.31(E) explicitly states 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.” The Ohio Supreme Court has repeatedly held that reasonable arrangements fall under the exclusive jurisdiction of the Commission. *Martin Marietta Magnesite Specialties, L.L.C. v. Pub. Util. Comm.*, 954 N.E.2d 104, 111, 129 Ohio St.3d 485, 492, 2011 -Ohio- 4189, ¶ 32 (2011)(“There is no dispute that pursuant to R.C. 4905.31, the commission has authority to regulate, supervise, and modify special contracts.”); and *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 953 N.E.2d 285, 297, 129 Ohio St.3d 397, 410, 2011 -Ohio- 2720, ¶ 64 (2011).

The Commission's authority to regulate reasonable arrangements is quite expansive. For example, the Ohio Supreme Court has stated that under R.C. 4905.31, the Commission can modify or change the terms of a reasonable arrangement *without the consent of the utility*. *In re Application of Ormet Primary Aluminum Corp.*, 29 Ohio St. 3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶¶ 36-38. Further, the Ohio Supreme Court has determined that claims regarding the "reasonableness and lawfulness" of any special arrangement offered by a public utility should be adjudicated by the Commission. *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144, 2012-Ohio-5445, 980 N.E.2d 996, ¶ 37.

The Commission's exclusive jurisdiction over reasonable arrangements is well established. As far back as 1919, the Ohio Supreme Court recognized the Commission's exclusive jurisdiction over reasonable arrangements or "special contracts." *Patterson Foundry & Machine Co. v. Ohio River Power Co.*, 99 Ohio St. 429 (1919)("[A]ny contract for service entered into by a public utility and its patron ... is subject to the supervision of the Public Utilities Commission."); *Sparks v. Public Utilities Commission of Ohio*, 69 Ohio St.2d 47, 49, 430 N.E.2d 924 (1982)("[T]he contractual obligation to provide water service, as well as the actual delivery of the water service, directly affects the utility's ability to function as a utility, and, hence, are subject to the commission's jurisdiction."); and *Cleveland & Eastern Traction Co. v. Public Utilities Commission*, 106 Ohio St. 210, 218, 140 N.E. 139 (1922).

Although OTP cites a number of cases involving arbitration provisions contained within contracts between private parties, none of these cases involve public utilities and none these cases address the Commission's authority under R.C. 4905.31. OTP failed to present any law to counter the express terms of R.C. 4905.31(E) and nearly 100 years of Ohio Supreme Court

precedent, which hold that issues involving reasonable arrangements are within the exclusive jurisdiction of the Commission.

2. It is entirely within the Commission's broad discretion to proceed with a hearing on issues clearly within its jurisdiction.

The Commission has very broad discretion in conducting its own proceedings. It was completely within the Commission's discretion to proceed forward with a hearing. OTP admits that the Commission has jurisdiction over the claims raised by Orwell in these cases.⁷ The Commission had before it two complaints, one of which had been pending for over a year. Orwell's complaint in Case No. 15-637-GA-CSS alleged that the terms of the Orwell-OTP Contract were unreasonable. The prefiled testimony of Orwell's and OTP's witnesses addressed the various reasons why the Orwell-OTP Contract is unjust, unreasonable, and detrimental to Orwell's regulated ratepayers. In addition, issues regarding Orwell's lack of diversity of supply and concerns with system reliability due to the Orwell-OTP Contract were issues that arose in Orwell's 2014 GCR case.⁸ Thus, the Commission had a legitimate interest in proceeding forward with the hearing in a timely fashion so that it may address the reasonableness (or lack thereof) of the Orwell-OTP Contract. Staying the proceeding to allow an arbitrator (whom has no jurisdiction over the Orwell-OTP Contract) to decide issues that affect regulated ratepayers would have been contrary to the General Assembly's intent to delegate exclusive authority over reasonable arrangements to the Commission.

OTP states that the parties failed to raise a legal basis to set aside the arbitration clause. OTP primarily relies upon two cases for the principle that the parties' objection to the Orwell-

⁷ OTP Answer at ¶ 6 (Case No. 15-637-GA-CSS) and OTP Answer at ¶6 (Case No. 14-1654-GA-CSS).

⁸ *In the Matter of the Purchased Gas Adjustment Clauses Contained Within the Rate Schedules of Orwell Natural Gas Company*, Case No. 14-212-GA-GCR, Staff Report at 15-16. During the hearing Case Nos. 14-1654-GA-CSS and 15-637-GA-CSS, the Commission took administrative notice of Case No. 14-212-GA-GCR.

OTP Contract as a whole was an insufficient basis for denying the motion to stay. *Kraftcik v. USA Energy Consultants, Inc.*, 107 Ohio App.3d 59, 62, 667 N.E.2d 1027, 1028 (8th Dist.1995) and *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 500, 1998-Ohio-612, 692 N.E.2d 574 (1998). This argument fails for two reasons.

First, as already mentioned, *ABM Farms* and *Kraftcik* are inapplicable because reasonable arrangements are not a “contracts” between private parties, but creations of statute subject to exclusive supervision by the Commission. This is why the Commission has the ability to modify a reasonable arrangement *without the consent of the parties* – it is not “contract” in the classical sense of the word. *In re Ormet.*, 29 Ohio St. 3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶¶ 36-38 (2011). Second, Orwell witness Michael Zappitello *did* address the arbitration provision in his testimony. He stated that “the various flaws in the Orwell-OTP Contract have a detrimental effect on Orwell’s regulated ratepayers” and, thus, disputes regarding the Orwell-OTP Contract should be determined solely by the Commission.⁹ This is arguably the best reason to suspend the arbitration provision until the Commission issues a decision in this case.¹⁰ Any final decision that may affect the rates paid by Orwell’s customers and the service Orwell may provide customers must lie with the Commission, not an arbitrator.

C. OTP waived its alleged right to arbitrate claims arising out of the Orwell-OTP Contract.

⁹ ONG Exhibit 1 at pg. 18.

¹⁰ On November 12, 2015, Orwell filed a motion to suspend the arbitration provision on an interim basis until a final Opinion and Order is issued in Case Nos. 15-637-GA-CSS and 14-1654-GA-CSS. As explained in the memorandum in support of this motion, there is a substantial likelihood the arbitrator will rule on issues regarding the same terms of the Orwell-OTP Contract that are being disputed in Case Nos. 15-637-GA-CSS and 14-1654-GA-CSS. These rulings may directly impact the cost of gas paid by Orwell’s customers and Orwell’s ability to provide reliable service for its customers. As such, the Commission should suspend the arbitration provision to prevent the arbitrator from unlawfully encroaching upon the exclusive authority of the Commission to supervise and regulate reasonable arrangements.

Assuming OTP had the right to arbitrate claims arising from the Orwell-OTP Contract (which Orwell denies), OTP waived this right. “An application to stay the proceedings may be made under R.C. 2711.02 as long as ‘the applicant for the stay is not in default in proceeding with arbitration.’” *Ciriello v. Phelps*, Summit 9th Dist. No. 17261, 1996 WL 12653, *2 (Jan. 10, 1996). A delay in asserting a contractual right to arbitration can constitute “default” within the meaning of the statute, and can result in loss of the relief. *Standard Roofing Co. v. Construction Co.*, 54 Ohio App.2d 153, 158, 376 N.E.2d 610 (8th Dist. 1977). “Failure to raise the arbitration clause of a contract in an answer ... constitutes a waiver of the clause.” *Ciriello*, Summit 9th Dist. No. 17261, 1996 WL 12653, *2 citing *Jones v. Honchell*, 14 Ohio App.3d 120, 122, 470 N.E.2d 219 (12th Dist. 1984).

On September 19, 2014, Orwell filed a complaint against OTP in Case No. 14-1654-GA-CSS. The complaint alleges that Orwell received unjustified invoices for gas transported on OTP’s pipelines. These alleged transportation charges relate to the Orwell-OTP Contract. OTP *admitted* that the Commission has jurisdiction over Orwell’s claims.¹¹ In addition, OTP failed to raise an affirmative defense regarding the arbitration provision in its answer. OTP clearly waived its right to arbitration regarding claims related to the Orwell-OTP Contract. On this basis alone, the Commission should deny OTP’s Request for Certification.

D. If OTP suffers expense or prejudice, it is not “undue” because OTP admits the Commission has jurisdiction to hear Orwell’s complaints.

OTP claims that it will suffer undue prejudice or expense because it “will be denied its contractual right to arbitration.” Any alleged prejudice or expense OTP may suffer is not “undue.” OTP admitted that the Commission has jurisdiction to hear Orwell’s claims.¹² Thus, it

¹¹ OTP Answer at ¶ 6 (Case No. 15-637-GA-CSS) and OTP Answer at ¶6 (Case No. 14-1654-GA-CSS).

¹² OTP Answer at ¶ 6 (Case No. 15-637-GA-CSS) and OTP Answer at ¶6 (Case No. 14-1654-GA-CSS).

was completely within the Commission's authority to proceed with the hearing on Orwell's claims. Further, OTP waived its right to arbitration by failing to affirmatively assert its right to arbitration in its answer in Case No. 14-1654-GA-CSS.

While OTP complains of the costs it will incur during briefing, it does not explain the delay in seeking a stay of the proceeding until the day of the hearing. OTP sought a stay only after Orwell and OTP had expended a substantial amount of time and money preparing for hearing. It would have been manifestly unfair to Orwell and OCC if the Commission stayed the proceeding at the last minute – especially considering that it is undisputed by OTP that the Commission has jurisdiction over Orwell's claims.

IV. CONCLUSION

Based on the foregoing, Orwell-Trumbull Pipeline Company, LLC's request for certification of an interlocutory appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following via electronic mail this 16th day of November, 2015:

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