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,	)	

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.	)	

INITIAL POST-HEARING BRIEF OF ORWELL NATURAL GAS COMPANY

I. INTRODUCTION

This case involves a purported "agreement" between Orwell Natural Gas Company ("Orwell") and Orwell-Trumbull Pipeline Company, LLC ("OTP"). The agreement at issue is the Natural Gas Transportation Service Agreement dated July 8, 2008 (the "Orwell-OTP Contract"). Although the Orwell-OTP Contract is called a "reasonable arrangement" under R.C. 4905.31, the agreement is anything but "reasonable." The evidence adduced at hearing demonstrates that the Orwell-OTP Contract is heavily biased in OTP's favor and detrimental for

Orwell and Orwell's customers. The Orwell-OTP Contract forces Orwell to rely upon OTP as Orwell's only source of transportation service. Orwell is, therefore, extremely vulnerable to any system reliability concerns that arise on OTP's system, such as OTP's inability to maintain adequate system pressures. These reliability concerns have the potential to impair Orwell's ability to provide reliable service to its human needs customers. In addition, the Orwell-OTP Contract limits Orwell's ability to obtain gas from more competitive gas supply sources, which makes it more difficult for Orwell to obtain the lowest cost gas for its gas cost recovery ("GCR") customers.

Based on this evidence, it is imperative that the Commission either terminate or modify the Orwell-OTP Contract to ensure system reliability for Orwell's customers and to guarantee that Orwell's customers receive the lowest cost gas. The Commission should also order OTP to file a new standard transportation service tariff because OTP's current tariff lacks necessary terms and conditions, such as a standard transportation service fee and a specified shrinkage rate. If these standard terms and conditions are not included in OTP's tariff, it is impossible for Orwell to determine whether selecting standard tariff service is preferable to entering into a reasonable arrangement with OTP.

In addition to voiding or modifying the Orwell-OTP Contract, the Commission should issue an Order stating that Orwell does not owe OTP $2,670,130.73 in transportation charges as was previously invoiced. OTP withdrew the two invoices it originally submitted for these charges, and counsel for OTP represented that similar invoices will not be issued to Orwell in the future. Hr'g Tr. 7-13. However, the Commission should clarify that these charges were, in fact, unlawful and inconsistent with the Orwell-OTP Contract and OTP's tariff. This would ensure that OTP does not attempt to submit similar unjustified charges for transportation services in the future.

The Commission should also order OTP to refund Orwell and Brainard Gas Corporation ("Brainard") for the excessive transportation rates it charged Orwell and Brainard since 2008. Finally, to ensure OTP provides safe and reliable service at just and reasonable rates, the Commission should order Richard M. Osborne's intrastate pipelines, including OTP, to undergo a Commission-ordered investigation.

II. BACKGROUND AND STATEMENT OF FACTS

A. Orwell and OTP filed the Orwell-OTP Contract with the Commission in 2008.

On or about July 8, 2008, Orwell and Brainard entered into the Orwell-OTP Contract with OTP. ONG Ex. 1 (Direct Testimony of Michael Zappitello) at p. 3; ONG Ex. 1 – MSZ Attachment A. When the Orwell-OTP Contract was executed, Orwell and OTP were both under the direct control of Richard M. Osborne. OCC Ex. 2 (Direct Testimony of Gregory Slone) at p. 8. At that time, Mr. Osborne was the owner of Orwell and Brainard, and the Managing Member of OTP. OCC Ex. 2 at p. 8. OTP is owned by the Richard M. Osborne Trust, of which Richard M. Osborne is the majority shareholder. OCC Ex. 2 at p. 8. Further, when the agreement was signed, both Steve Rigo and Thomas Smith, the representatives that signed on the behalf of OTP and Orwell respectively, reported directly to Mr. Osborne. OCC Ex. 2 at pp. 9-10. In addition, according to the notice provisions in the Orwell-OTP Contract, both Mr. Smith and Mr. Rigo worked out of the same offices and had the same contact phone number. ONG Ex. 1 at p. 17.

B. Disputed provisions of the Orwell-OTP Contract.

The Orwell-OTP Contract contains a number of unreasonable or unjust provisions that are in dispute in this case. First, the Orwell-OTP Contract has a 15-year term, which is significantly longer than the average term for this type of agreement. ONG Ex. 1 – MSZ Attachment A; OCC Ex. 2 at p. 7. In addition, the Orwell-OTP Contract is an interruptible agreement, which means that OTP has the ability to reject Orwell's nominations to the OTP system. The Orwell-OTP Contract states:

> 1.1 [Orwell] shall arrange with suppliers of [Orwell's] selection to have Gas in an amount not to exceed [Orwell's] MDQ adjusted for OTPC Shrinkage as specified on Exhibit B, tendered to the Receipt Points(s) as specified on Exhibit B, for delivery into the OTPC Pipeline on [Orwell's] behalf. OTPC shall then redeliver, on an interruptible basis, such quantities, less OTPC's Shrinkage, to [Orwell], or on behalf of [Orwell], at the Delivery Point(s) as specified on Exhibit B….

ONG Ex. 1 – MSZ Attachment A at Paragraph 1.1 (emphasis added).

The Orwell-OTP Contract also contains a sole-source provision, which states:

> 1.2 [Orwell] agrees that during the term of this Transportation Services Agreement it will use only OTPC's to transport gas for any of its customers; provided, however, that this exclusive use of the OTPC pipelines shall remain in effect as long as OTPC has available capacity within its pipelines. Should available capacity not exist, then during that period only Orwell may use other pipelines to transport its gas requirements.

ONG Ex. 1 – MSZ Attachment A at Paragraph 1.2 (emphasis added).

Orwell and Brainard are able to use alternative transportation sources only if nominations are rejected by OTP.

The transportation rate of the Orwell-OTP Contract is also too high, particularly for interruptible service. The initial rate charged to Orwell and Brainard under the agreement was $0.95 per Mcf. The Orwell-OTP Contract has a clause which provides for the potential adjustment of the transportation rate every five years, which states:

> Rate will adjust every five (5) years commencing on July 1, 2013 and continuing on each fifth (5th) anniversary date for the remaining term of this Agreement to reflect the higher of $0.95 per

> Thousand Cubic Feet (Mcf) or a negotiated rate to reflect the then current market conditions existing on each such rate adjustment date. If the parties cannot agree on a rate adjustment amount, OTPC shall have the option to increase the Rate by the increase in the consumer price index all items (Cleveland, Ohio) ("CPI") as calculated from July 1, 2008 to each applicable rate adjustment date.

ONG Ex. 1 – Exhibit B of MSZ Attachment A.

Another disputed provision is the 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.

C. The termination of Orwell's transportation contract with Dominion and Richard M. Osborne's decision to dismantle Orwell's interconnection with Dominion eliminated Dominion as a valuable secondary transportation source.

Prior to entering into the Orwell-OTP Contract, Orwell had a firm transportation contract with East Ohio Gas d/b/a Dominion East Ohio. OCC Ex. 2 at p. 12; ONG Ex. 1 at p. 7. Orwell paid Dominion $0.92 for firm service, while Orwell currently pays OTP $1.01 for interruptible service, which is generally less valuable than firm service. OCC Ex. 2 at p. 12. Dominion delivered gas directly into Orwell's system through a number of interconnections or "taps." Sometime after the Orwell-OTP Contract was executed, the firm transportation contract between Orwell and Dominion was terminated. Although the special contract with Dominion was terminated, Orwell could have used Dominion as an alternative source at tariff rates because Orwell's interconnections with Dominion were operational. OCC Ex. 4 (Deposition Transcript of Richard M. Osborne) at p. 118. However, Richard M. Osborne, who controlled both Orwell and

OTP at the time, ordered an employee to dismantle approximately eight (8) of Orwell's interconnections with Dominion. OCC Ex. 4 at p. 16-117. These dismantled taps were also located in areas where OTP's pipelines were located and, therefore, served as a valuable alternative to OTP's system. Mr. Osborne admitted that Dominion was "a competitor" with OTP, and that the relationship between OTP and Dominion was "unpleasant." OCC Ex. 4 at p. 56-58. Mr. Osborne also admitted that he wanted to eliminate any service from Dominion so that Orwell could obtain service from related pipelines, such as Cobra Pipeline Co. LTD ("Cobra") or OTP. OCC. Ex. 4 at p. 121.

Because these interconnections with Dominion were dismantled, Orwell is currently able to receive supplies from Dominion in only a few isolated areas on Orwell's system where OTP cannot serve Orwell's customers. ONG Ex. 1 at p. 8. Dominion is no longer a true secondary source or alternative transporter for Orwell, which eliminates Orwell's ability to obtain gas at competitive prices from multiple suppliers that do not feed gas into OTP's system. ONG Ex. at p. 8.

D. OTP refused to negotiate a rate that reflects current market conditions and, instead, decided to unilaterally charge Orwell $1.01 per Mcf for transportation.

In September 2014, OTP sent Orwell an invoice that increased the transportation rate from $0.95 to $1.08. ONG Ex. 1 at p. 13. OTP did not provide Orwell any prior notice regarding the proposed rate increase and did not attempt to negotiate the rate with Orwell prior to unilaterally increasing the rate. ONG Ex. 1 at p. 13. OTP claimed that the new rate of $1.08 was calculated based upon the consumer price index ("CPI") for Cleveland, Ohio. ONG Ex. 1 at p. 13. On October 20, 2014, Orwell witness Zappitello met with Jessica Carothers to discuss a negotiated transportation rate for Orwell. He explained that OTP's calculation of the new rate of

$1.08 per Mcf was incorrect based on the Cleveland CPI. Using the Cleveland CPI, the accurate amount would be $1.01 per Mcf. ONG Ex. 1 at p. 14. Mr. Zappitello also proposed a new transportation rate of $0.60 per Mcf which was reflective of the current market conditions at the time. ONG Ex. 1 at p. 4.

Mr. Zappitello determined that $0.60 was a reasonable market rate by comparing the total cost Orwell incurs to obtain gas supplies via OTP to the total cost Orwell would incur by obtaining gas via Dominion. ONG Ex. 1 at p. 14-15. Mr. Zappitello's analysis considered both transportation cost and gas supply cost. ONG Ex. at p. 14-15. His analysis demonstrates that Orwell would save approximately $0.35 per Mcf if it could obtain gas supplies through Dominion. ONG Ex. 1 at p. 15. Therefore, he proposed a transportation rate of $0.60 ($0.95-$0.35). OTP did not accept Mr. Zappitello's offer. Rather, OTP has charged Orwell $1.01, which is not a true "negotiated rate" and does not reflect "current market conditions." ONG Ex. 1 at p. 15.

E. OTP submitted two unjustified invoices to Orwell for transportation services that totaled $2,670,130.73.

On September 12, 2014, OTP submitted two invoices to Orwell for volumes transported on OTP's system from 2010 through 2014. ONG Ex. 1 at p. 5. These two invoices total $2,670,130.73. ONG Ex. 1 at p. 5. The two invoices indicate that they are from "Orwell Trumbull Pipeline Company/Great Plains." ONG Ex. 1 at p. 5. The invoices are allegedly for "metered volumes delivered on 2" gathering lines." ONG Ex. 1 at p. 5. However, there is no contract, tariff, or Commission order that segregates Orwell's system into separate portions. ONG Ex. 1 at p. 5.

The only Commission-approved authority governing the relationship between Orwell and OTP is the Orwell-OTP Contract. ONG Ex. 1 at p. 5. According to the Orwell-OTP Contract, OTP charges Orwell for volumes transported on any portion of OTP's system and Orwell pays for this transportation. ONG Ex. 1 at p. 6. Orwell paid OTP for all volumes transported on any portion of OTP's system from 2010 through 2014 in accordance with the Orwell-OTP Contract. ONG Ex. 1 at p. 6; OCC Ex. 3 (Deposition Transcript of Jessica Carothers) at pp. 39- 40. The two invoices at issue in Case No. 14-1654-GA-CSS represent additional charges above and beyond the charges Orwell has paid OTP from 2010 to 2014. ONG Ex. 1 at p. 6; OCC Ex. 3 at p. 43-44. These unjustified charges would effectively double the $0.95 transportation charge set forth in the Orwell-OTP Contract. ONG Ex. 1 and p. 6; OCC Ex. 3 at p. 43-44.

F. Orwell filed two complaints against OTP with the Commission: one regarding OTP's unlawful transportation charges and another seeking a termination of or modification to the Orwell-OTP Contract.

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. Orwell Compl.at ¶¶ 12-17 (Case No 14-1654-GA-CSS. In paragraph 6 of the complaint from Case No. 14-1654-GA-CSS, Orwell alleged that "the PUCO has jurisdiction over this matter." Orwell Compl.at ¶ 6 (Case No 14-1654-GA-CSS). In its answer to Paragraph 6 of the complaint, OTP admitted that ***the Commission has "jurisdiction over the matters raised by [Orwell].***" OTP Answer at ¶ 6 (Case No 14-1654-GA-CSS)(emphasis added). Further, OTP failed to raise an affirmative defense regarding arbitration in its answer in Case No. 14-1654-GA-CSS.

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. Orwell requested that the arbitration proceeding be dismissed due to lack of jurisdiction because the Commission has exclusive jurisdiction over disputes related to the Orwell-OTP Contract. The arbitrator refused to dismiss the arbitration proceeding and has continued to exercise jurisdiction over the claims between OTP and Orwell. 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 complaint in Case No. 15-637-GA-CSS, Orwell requested the Commission to re-evaluate the terms of the Orwell-OTP Contract and order OTP to file a new standard service tariff.

On October 28, 2015, less that one week before the hearing in this case, OTP sent Orwell a letter withdrawing the invoices. OTP Ex. 1. At the hearing, OTP's counsel represented that similar invoices will not be issued to Orwell in the future. Hr'g Tr. 7-13.

III. LAW AND ARGUMENT

A. The Commission has legal authority to modify or terminate the Orwell-OTP Contract.

Orwell brought its complaints against OTP pursuant to R.C. 4905.26. R.C. 4905.26 is "broad in scope as to what kinds of matters may be raised by complaint before the PUCO." *Allnet Communications Services, Inc. v. Pub. Utilities Com'n of Ohio*, 32 Ohio St.3d 115, 117, 512 N.E.2d 350 (1987). A complaint filed under R.C. 4905.26 is a proper method of challenging a prior Commission order, Commission-approved rate or charge, or a Commission-approved reasonable arrangement. *Allnet*; See also *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 494, 2011-Ohio-4189, 954 N.E.2d 104, ¶ 40. ("[R]easonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders."). Orwell's complaint in Case No. 15-637-GA-CSS addresses whether the Orwell-OTP Contract is just and reasonable. Although the Commission previously approved the terms of the Orwell-OTP Contract in Case No. 08-1244-GA-PL-AEC, the Commission has the authority to determine whether the Orwell-OTP Contract is currently just and reasonable under R.C. 4905.26.

Further, Ohio law is clear that the Commission always maintains the authority to modify or terminate 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." *Martin Marietta* at ¶ 32 ("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.*, 129 Ohio St.3d 397, 410, 2011 -Ohio- 2720, 953 N.E.2d 285, ¶ 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).

In this case, Orwell requests that the Commission modify or terminate the Orwell-OTP Contract because the terms of the agreement are unjust, unreasonable, and have a detrimental effect on Orwell's customers.

B. The Commission should terminate the Orwell-OTP Contract or modify the provisions of the Orwell-OTP Contract that are unjust or unreasonable.

i. The sole-source provision of the Orwell-OTP Contract is unjust and unreasonable.

There are two reasons why the sole-source provision of the Orwell-OTP Contract is unjust and unreasonable: (1) it prevents Orwell from ensuring system reliability for Orwell's human needs customers and (2) it limits Orwell's ability to access competitive supply options.

a. Elimination of the sole-source provision will enhance the reliability of Orwell's system.

The sole-source provision hinders Orwell's ability to provide reliable service to all of its customers. The primary reason the sole-source provision presents a reliability problem is because it forces Orwell to rely solely on OTP for transportation service. The evidence demonstrates that a number of problems with system reliability have arisen due to Orwell's overreliance on OTP.

Mr. Zappitello testified that during the winter, OTP relies upon Orwell to keep OTP's system pressures up in order to serve many of Orwell's customers, especially customers on the northern end of OTP's system. ONG Ex. 1 at p. 11-12. These are primarily human needs customers. ONG Ex. 1 at p. 11. To maintain adequate pressure levels on OTP's system, Orwell has to purchase more gas than it needs during the winter, which results in a large positive imbalance for Orwell on OTP's system. ONG Ex. 1 at p. 11. Orwell witness Zappitello explained that these pressure problems on OTP are caused because the gas flowing from North Coast Gas

Transmission ("North Coast") to OTP must travel from the southern portion of OTP's system in Mantua to the northern portion of OTP's system to serve all of Orwell's customers. ONG Ex. 2 (map of Orwell's system). OTP's pipeline flows as far north as East Lake, Ohio. ONG Ex. 1 at p. 11; ONG Ex. 2. When it is very cold, there are situations when there is insufficient pressure to push the gas to the far northern portions of the system, which results in some of Orwell's customers getting little gas pressure, or no gas at all. For example, on February 17, 2015, customers located in Willoughby, Ohio complained that they were experiencing low or no gas pressure. ONG Ex. 1 at p. 12. To remedy this situation, Orwell had to purchase more gas than it burned in February and March to maintain adequate gas pressures on OTP to serve Orwell's customers. ONG Ex. 1 at p. 11-12. Orwell is credited for this positive volumes imbalance during the summer months. Because gas purchased during the winter is typically more expensive than volumes purchased in the summer, Orwell's customers ultimately pay more for gas to maintain OTP's pressures. ONG Ex. 1 at p. 11-12.

Mr. Zappitello testified that the problems with OTP's pressures could be remedied if Orwell had the ability to reestablish taps on its system with Dominion. ONG Ex. 1 at p. 12. Reestablishing interconnections between OTP and Orwell will help alleviate the problem by adding additional supply sources in the north. Hr'g Tr. 169. In addition to increasing system reliability, reestablishing interconnections with Dominion should reduce Orwell's need to over-purchase gas on OTP during the winter months, which would reduce rates for Orwell's customers. ONG Ex. 1 at p. 12. If the Commission terminates or modifies the Orwell-OTP Contract as recommended by Orwell, Orwell would have the ability reinstall interconnections with Dominion on its system, which would allow Orwell to bypass OTP. ONG Ex. 1 at p. 12.

Orwell witness Zappitello also testified how the sole-source provision caused reliability concerns during the Polar Vortex of 2014. ONG Ex. 1 at p. 10-11. The extremely cold temperatures of the Polar Vortex resulted in a substantial increase in expected gas usage and depletion of Orwell's available gas supply. ONG Ex. 1 at p. 10. On February 24, 2014, Orwell sought bids for its March 2014 gas requirements for delivery into North Coast for redelivery into OTP. ONG Ex. 1 at p. 10. Orwell would typically have both BP Canada and North Coast as supply options. However, North Coast's supplies were exhausted due to extreme weather. Although BP gas was available, the amount available was not enough to meet Orwell's requirements for March 2014. ONG Ex. 1 at p. 10.

Because Orwell still had to obtain the remaining volumes needed to supply customers for March, Orwell decided to tap Spelman Pipeline Holdings, LLC's ("Spelman") line into Cobra Pipeline Co. LTD's ("Cobra") line. ONG Ex. 1 at p. 10-11. This allowed Orwell to increase pressures on Cobra to feed OTP. Although the installation of the tap between Spelman and Cobra ensured that Orwell was able to supply gas to all of its customers during this emergency, Orwell was forced to acquire abnormally expensive gas from BP while installing an emergency tap. ONG Ex. 1 at p. 11. This purchase was found to be imprudent by Commission Staff, even though it was the only option available to Orwell's customers. Orwell could have avoided this situation and avoided paying the extremely high prices for gas during the Polar Vortex if Dominion was available as a secondary transportation option. ONG Ex. 1 at p. 11.

b. <u>Elimination of the sole-source provision will increase Orwell's ability to obtain competitive prices from a wider variety gas supply sources.</u>

The sole-source provision of the Orwell-OTP Contract limits Orwell's ability to consider alternative supply sources because Orwell must rely primarily on supply sources that can be accessed through OTP. ONG Ex. 1 at p. 7. Staff witness Sarver testified that competition between alternative supply sources is good for customers because it reduces gas cost. Hr'g Tr. 203. He testified that Orwell's customers would benefit if Orwell were to reestablish interconnections with Dominion because this would increase the number of gas marketers capable of serving Orwell, which would provide more competitive gas prices for Orwell's customers. Hr'g Tr. 208.

The sole-source provision forces Orwell to rely on supply sources that deliver gas from the west of Orwell's system. These are gas supplies that OTP obtains primarily through North Coast, which flow west to east from Chicago. Because the sole-source provision forces Orwell to transport gas on OTP, Orwell cannot take advantage of eastern supply sources that flow through Dominion. Staff witness Sarver explained that gas delivered through Dominion became substantially cheaper than gas transported on OTP in 2013. Hr'g Tr. 206. This substantial decrease in the price of gas transported on Dominion was caused by the Marcellus and Utica shale gas plays. Hr'g Tr. 205-206. Staff witness Sarver testified that the sole-source provision limits Orwell's ability to respond to changes in the conditions in the gas market, especially considering that the Orwell-OTP contract binds Orwell to a 15-year term agreement. Hr'g Tr. 210.

Orwell witness Zappitello testified further regarding the substantially lower gas supply cost that Orwell could pay if it could transport gas on Dominion to serve Orwell's system. ONG Ex. 1 at p. 14-15. Mr. Zappitello testified regarding the commodity prices Orwell paid for gas transported on OTP compared to gas prices Orwell would have paid gas suppliers on Dominion's system instead. ONG Ex. 1 at p. 14-15. Mr. Zappitello determined that the average gas commodity cost for gas purchased from OTP was $0.63 per Mcf, while the average gas commodity cost for supplies obtained via Dominion was substantially lower at -$0.756 per Mcf. ONG Ex. 1 at p. 14. He determined that Orwell would have saved $230,065.52 over a 12 month period if it would have purchased supplies transported by Dominion. ONG Ex. 1 at p. 15. This is evidence that Orwell could obtain more competitive gas commodity prices if Orwell could use Dominion as a true alternative transportation source. Orwell's system previously had approximately eight (8) interconnections with Dominion that were dismantled when Richard M. Osborne ordered the taps dismantled. ONG Ex. 1 at p. 8; OCC Ex. 4 at p. 116-117. Orwell wishes to reestablish these interconnections with Dominion, but is understandably concerned that the sole-source language of the Orwell-OTP Contract legally prevents Orwell from reestablishing Dominion as a true secondary transportation source. ONG Ex. 1 at p. 8.

ii) The interruptible service provision is unjust and unreasonable.

The Orwell-OTP Contract is unjust and unreasonable because it is an interruptible agreement. The evidence demonstrates that it is critical for Orwell to have firm service and that the rate Orwell currently pays for interruptible service is unreasonable. Firm service is necessary because it ensures gas will be available for customers 24 hours a day, 365 days a year. ONG Ex. 1 at p. 7-8; OCC Ex. 2 at p. 12. Interruptible service, on the other hand, can be interrupted and may be unavailable in the coldest part of the winter heating season when pipeline capacity is in high demand. ONG Ex. 1 at p. 7-8; OCC Ex. 2 at p. 12. Staff witness Sarver testified that it is not appropriate for a local distribution company to rely solely upon interruptible service for human needs customers during the winter or peak heating season. Hr'g Tr. 188. OCC witness Slone testified that firm transportation service is essential for GCR customers, who are primarily human needs customers. OCC Ex. 2 at p. 12. He testified that firm transportation service is necessary on the coldest days of the winter. OCC Ex. 2 at p. 12. He explained that interruptible service can be interrupted and may be unavailable on the coldest days on the winter when pipeline capacity is in high demand. OCC Ex. 2 at p. 12. Orwell witness Zappitello testified that when he purchases gas for human needs customers, he relies on firm transportation if possible. Hr'g Tr. at 31.

OCC witness Slone and Orwell witness Zappitello testified that Orwell had previously entered into a firm transportation agreement with Dominion. OCC Ex. 2 at p. 12; ONG Ex. 1 at p. 7. Orwell paid Dominion $0.92 per Mcf pursuant to this firm transportation agreement with Dominion. OCC Ex. 2 at p. 12; ONG Ex. 1 at p. 7. Although firm service is more valuable than interruptible service, Orwell's prior management decided to enter into an interruptible transportation contract with OTP for $0.95 per Mcf. OCC Ex. 2 at p. 12; ONG Ex. 1 at p. 7. While Orwell is paying $0.95 per Mcf for interruptible service, smaller customers are paying OTP less than $0.95 for firm service. Gas Natural Resources (f/k/a John D. Oil and Gas) is charged $0.50 per Mcf by OTP for firm transportation service. Likewise, Newbury Local Schools is charged $0.90 per Mcf by OTP for firm service. ONG Ex. 1 at p. 13; OCC Ex. 2 at pp. 20-21. OTP presented no evidence to rationally explain why it charges Orwell, its largest customer, more for less valuable interruptible service.

iii) The transportation rate in the Orwell-OTP Contract is unjust and unreasonable.

OTP currently charges Orwell $1.01 per Mcf for interruptible transportation service under the Orwell-OTP Contract. ONG Ex. 1 at p. 15. OCC witness Slone and Orwell witness Zappitello testified that a number of factors demonstrate that the amount OTP is charging Orwell for transportation is unjust and unreasonable. Mr. Slone testified that Orwell previously paid Dominion $0.92 for firm transportation, which is more valuable than interruptible service. OCC Ex. 2 at 12. Mr. Slone and Mr. Zappitello testified that other similar intrastate pipelines charge substantially lower transportation rates than OTP. OCC Ex. 2 at p. 16; ONG Ex. 1 at p. 16. For example, both Spelman and Cobra charge $0.50 per Dth for interruptible transportation service, which is approximately $0.50 per Mcf. OCC Ex. 2 at p. 16; ONG Ex. 1 at p. 16. OTP charges Orwell almost twice as much for transportation service than Cobra and Spelman charge for interruptible transportation service under their tariffs.

Further, Orwell and Brainard are being charged more than any other customer taking transportation service on OTP. Great Plains Exploration, LLC ("Great Plains") is charged $0.95 per Mcf for interruptible service. Gas Natural Resources is charged $0.50 per Mcf for firm transportation service and Newbury Local Schools is charged $0.90 per Mcf for firm service. ONG Ex. 1 at p. 13; OCC Ex. 2 at pp. 20-21.

Orwell witness Zappitello and OCC witness Slone proposed alternative transportation rates. Mr. Zappitello proposed a rate of $0.60 per Mcf. He developed this rate by comparing the total cost Orwell incurred to purchase and transport gas on OTP to the total cost Orwell would incur to purchase and transport gas on Dominion. ONG Ex. 1 at p. 14. By including gas commodity cost, Mr. Zappitello determined the "all-in" cost of purchasing gas via OTP vs. purchasing gas via Dominion, which is more representative of the true market cost for gas. He determined that the total cost Orwell incurs when transporting gas via OTP is approximately $2.02 per Mcf (($0.63 in commodity costs and $1.39 in transportation fees). ONG Ex. 1 at pp. 14-15. Orwell pays two separate transportation fees when it transports gas via OTP: $0.38 per Mcf for North Coast transportation costs and $1.01 per Mcf for OTP. ONG Ex. 1 at pp. 14-15. Mr. Zappitello then determined that Orwell's total cost of transporting gas on Dominion is $0.864 per Mcf, which is the total of the Dominion winter basis (-$0.756) and Dominion's transportation tariff rate ($1.62). ONG Ex. 1 at pp. 14-15. Although the Dominion transportation tariff rate is higher than the combined transportation rates of North Coast and OTP, the Dominion winter basis is so much lower than the OTP winter basis that Orwell's customers would have saved approximately $0.35 per Mcf total if Orwell would have transported gas via Dominion rather the transporting gas via OTP. ONG Ex. 1 at p. 15. Orwell would have saved $230,065.52 over a 12 month period if it would have purchased supplies transported by Dominion. ONG Ex. 1 at p. 15. Therefore, Mr. Zappitello proposed $0.60 per Mcf as a just and reasonable rate for transportation based on current market conditions.

OCC witness Slone recommended a transportation rate of $0.50 per Mcf. OCC Ex. 2 at p. 32. Mr. Slone determined that this rate is reasonable because it is comparable to the amount similar pipelines charged for transportation service. OCC Ex. 2 at p. 32. Although Mr. Zappitello and Mr. Slone used different methodologies, both recommendations are in a reasonable range and are supported by the record. Further, either rate is substantially more reasonable and just than the current rate of $1.01 per Mcf charged by OTP. OTP presented no evidence to support its current charge of $1.01.

iv) The Orwell-OTP Contract is unjust and unreasonable because it is a 15-year agreement.

A 15-year sole-source commitment is extremely burdensome and unreasonable from Orwell's perspective. Orwell witness Zappitello testified that he has never entered into a 15-year transportation contract while he has purchased gas for the Utilities. Hr'g Tr. 33. He is not aware of any other contracts executed by Orwell that are 15 years long. Hr'g Tr. 33. Mr. Zappitello testified that year-to-year transportation contracts are superior to longer term agreements because shorter term contracts allow the utility to adapt to changing market conditions. Hr'g Tr. 33.

Mr. Zappitello testified that gas supply options can change dramatically from year to year based upon on market conditions, and gas utilities require flexibility in order to consider and choose from various options to provide the lowest cost gas to its customers. ONG Ex. 1 at p. 9. The Orwell-OTP Contract removes this necessary ability to adapt from Orwell. Instead, it locks Orwell into one transportation source for 15 years. Staff witness Sarver testified that the 15-year term limits Orwell's ability to respond to market conditions Hr'g Tr. 210. Mr. Slone testified that Orwell was forced to select gas transported through OTP for 15 years even if less expensive options from other sources arose during the term of the Orwell-OTP Contract. OCC Ex. 2 at p. 17.

OTP failed to present any evidence supporting the reasonability of a 15-year transportation contract. Further, based on statements made by Richard M. Osborne, it appears the only rationale for the 15-year term was to ensure that Mr. Osborne received a guaranteed return on his $15 million investment in OTP. OCC Ex. 4 at pp. 48-50. The 15-year term, however, did not benefit Orwell or its customers.

C. The Commission should require OTP to file a new standard transportation tariff.

Orwell requests that the Commission order OTP to file a new tariff. OTP's tariff currently lacks essential terms and conditions. ONG Ex. 1 at pp. 18-19. OTP's tariff does not include a standard transportation service rate. Rather, it indicates that "the rates and charges for transportation services will be established pursuant to contracts submitted to the Commission for approval under Section 4905.31 of the Revised Code." ONG Ex. 1 at pp. 18-19. Since some OTP transportation is required to serve Orwell's customers, Orwell has no option but to enter into a new transportation contract with OTP under the tariff, even if the Commission terminates the Orwell-OTP Contract. ONG Ex. 1 at p. 19. However, Orwell's good-faith attempts to negotiate a new transportation rate with OTP have failed. If OTP were required to include a standard transportation rate in its tariff, Orwell would have the ability to take general transportation service at a standard tariff rate as an alternative to negotiating a special contract with OTP. ONG Ex. 1 at p. 19.

The Commission, therefore, should order to OTP to file a new tariff that contains a standard transportation rate. The Commission should also require OTP to provide evidentiary support for its proposed standard rate, and allow parties to challenge the proposed rate if the parties believe the amount of the proposed rate is unreasonable. ONG Ex. 1 at p. 22.

The Commission should also require OTP to indicate a specific shrinkage rate in its tariff. OTP's tariff states that "[u]nless otherwise agreed, the Customer shall have the right to retain, pursuant to this Tariff, 100% of the gas delivered to the Receipt Point(s), less the Shrinkage."[1] ONG Ex. 1 at p. 19. The Orwell-OTP Contract does not have a specified shrinkage rate; rather, it states "Shrinkage: TBD." ONG. Ex. 1 at p. 19. Because there is no defined amount of shrinkage, Orwell is unable to determine whether the amounts OTP charges for shrink are justified. ONG Ex. 1 at 19. Defining a specific amount for shrinkage in the OTP tariff would help provide transparency with respect to the amounts OTP is charging Orwell for shrink. ONG Ex. 1 at 19. This would potentially limit disputes between Orwell and OTP regarding shrinkage.

Disputes between OTP and Orwell have occurred recently regarding the appropriate amount of shrinkage. ONG Ex. 1 at p. 20. Before September 2014, OTP never charged Orwell for shrink. In September 2014, OTP sent Orwell an invoice that included retroactive charges for shrink of 5% dating back to July 1, 2013. ONG Ex. 1 at p. 20. In September 2014, Orwell informed OTP that OTP did not have authority to retroactively charge Orwell for shrinkage and informed OTP that it had no basis for charging 5% for shrinkage considering that its US DOT Pipeline and Hazardous Material Safety report indicates that its shrinkage is 3.7%. ONG Ex. 1 at

[1] OTP Tariff, Section 6, First Revised Sheet No. 7.

p. 20. OCC witness Slone expressed concerns regarding the amount OTP is charging Orwell for shrink. Mr. Slone testified that OTP's shrink rate is significantly higher than the Unaccounted-for-Gas ("UFG") reported by local distribution companies ("LDC") in Ohio. OCC Ex. 2 at p. 24. Mr. Slone testified that this is troubling because OTP, an intrastate pipeline constructed within the last ten years, should have a shrink rate ***lower*** than LDCs' UFG rates. OCC Ex. 2 at p. 25.

The Commission should require OTP to include a specific shrinkage rate in its tariff and allow parties to challenge this proposed rate when OTP files its tariff. Once OTP has a specified shrinkage rate in its tariff, Orwell will have a basis to challenge any shrinkage charge that appears to inconsistent with the rate specified in the tariff.

D. The Commission should issue an Order that states that the two invoices OTP submitted to Orwell were unjustified and that OTP is precluded from subjecting Orwell to similar charges in the future.

Although OTP withdrew the unjustified invoices that are at issues in Case No. 14-1654-GA-CSS, the Commission should issue an order that states that $2,670,130.73 charge was unjust and unreasonable. R.C. 4905.22 states:

> All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

Orwell spent over a year litigating the unjust invoices. Orwell expended a substantial amount of time and money challenging invoices that OTP admits were "improvidently" issued. OTP Ex. 1. The evidence demonstrates that OTP should have known or did know that these invoices were unjustified before the invoices were issued. Orwell witness Zappitello testified that Orwell paid OTP for all volumes transported on any portion of OTP's system from 2010 through 2014. ONG Ex. 1 at pp. 5-6. He testified that Orwell paid OTP in accordance with the terms of the Orwell-OTP Contract. ONG Ex. 1 at pp. 5-6. Jessica Carothers, the Accounting Manager for OTP, admitted that Orwell paid all invoices submitted by OTP from 2010 to 2014 in accordance with the Orwell-OTP Contract. ONG Ex. 1 at p. 6; OCC Ex. 3 at pp. 39- 40. Ms. Carothers admits that the two invoices at issue in Case No. 14-1654-GA-CSS represent additional charges above and beyond the charges Orwell has paid OTP from 2010 to 2014. OCC Ex. 3 at pp. 43-44. Ms. Carothers admits these additional charges would effectively double the $0.95 transportation charge set forth in the Orwell-OTP Contract. ONG Ex. 1 at p. 6; OCC Ex. 3 at pp. 43-44. Further, OCC witness Slone and Orwell witness Zappitello testified that there is no tariff, Commission order, or contract that supports the issuance of these charges. ONG Ex. 1 at 5-6; OCC Ex. 2 at 25-30.

OTP charged Orwell **$2,670,130.73** in transportation fees when it was apparent that there was no legal basis for these charges. The Commission should not allow such unwarranted conduct, and should address OTP's actions in its order. The Commission should state that the charges were unjust and unreasonable, and order OTP not to issue similar invoices to Orwell in the future.

E. The Commission should suspend the arbitration provision until an Opinion and Order is issued in this case.

On November 12, 2015, Orwell filed a motion for an Order suspending the arbitration provision on an interim basis and a request for declaratory ruling with the Commission. Orwell renews its request. The Commission should take immediate action to prevent the arbitrator from continuing to exercise jurisdiction over issues that are exclusively within the jurisdiction of the Commission. The General Assembly vested exclusive jurisdiction over reasonable arrangements in the Commission. R.C. 4905.06 and R.C. 4905.31(E). Despite the Commission's exclusive jurisdiction over reasonable arrangements, the arbitrator is attempting to exercise authority over the terms of the Orwell-OTP Contract. Unless the Commission immediately intervenes, Orwell is at risk of the arbitrator issuing a decision which may be inconsistent with the goals of the Commission.

For example, unless barred, the arbitrator will be determining the parties' rights under the sole-source provision and whether OTP has been adequately maintaining system pressures. The evidence demonstrates that OTP's inability to maintain adequate system pressures negatively affects Orwell's ability to serve its human needs customers. If the sole-source provision is eliminated, Orwell would have the ability to reestablish interconnections with Dominion, which would alleviate problems caused by OTP's inability to maintain adequate system pressure. The record herein demonstrates how the sole-source provision caused an overreliance on OTP during the Polar Vortex. This overreliance contributed heavily to the emergency situation in early 2014 where Orwell was forced to purchase abnormally expensive gas to serve its human needs customers. Because these system reliability issues and the sole-source provision are intertwined, any decision regarding the applicability or enforceability of the sole-source provision will impact Orwell's ability to serve human needs customers. Therefore, it is imperative that the Commission ensure that it is final arbiter regarding issues involving the sole-source provision, not the arbitrator.

If the Commission determines that the Orwell-OTP contract has a detrimental effect on Orwell or Orwell's regulated customers, the Commission has authority, under R.C. 4905.31, to modify or change the terms of the Orwell-OTP Contract without the consent of the OTP. *Ormet*, 29 Ohio St. 3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶¶ 36-38. OTP claims the Commission's jurisdiction is limited because the case relates to a "contract" between Orwell and OTP. Ohio Supreme Court precedent, however, demonstrates that there is a clear distinction between a purely contractual claim against a utility and complaints filed against a utility under R.C. 4905.26 that question whether a rate or service is reasonable. On the one hand, the Court has held that the Commission does not have jurisdiction to "adjudicate controversies between parties as to contract" even if one party to the contract is a utility, when the controversy is simply a breach of contract claim. *State ex rel. Dayton Power & Light Co. v. Riley*, 53 Ohio St.2d 168, 170, 373 N.E.2d 385, 386 (1978) citing *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 132 N.E. 162. On the other hand, where a party's contract claim or tort claim against a utility overlaps with issues addressing the reasonableness of a rate or service provided by the utility, the Court has held that the Commission has exclusive jurisdiction over these claims. *DiFranco*, 134 Ohio St.3d 144, 2012-Ohio-5445, 980 N.E.2d 996, ¶ 38.

Orwell's complaint in Case No. 15-637 is not purely a breach of contract case. Rather, this complaint was filed under R.C. 4905.26 to challenge the reasonableness of the Orwell-OTP Contract. Ohio Supreme Court precedent demonstrates that this is a proper way to challenge the Orwell-OTP Contract. *Ohio Utilities Co. v. Pub. Utilities Commission*, 58 Ohio St.2d 153, 156-57, 389 N.E.2d 483, 486 (1979); and *Marietta*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104, ¶ 41 (complainant allowed to file complaint under R.C. 4905.26 as "collateral attack" on prior Commission order which approved special contract). Because the Commission has authority to modify or terminate the Orwell-OTP Contract under R.C. 4905.31, and this case was initiated under R.C. 4905.26, the Commission should suspend the arbitration provision to prevent the arbitrator from making any rulings that would ultimately affect Orwell's regulated ratepayers.

F. The Commission should order OTP to refund $1,524,586 to Orwell and $12,714 to Brainard for excessive charges for natural gas transportation services.

OCC witness Slone determined that from July 2008 through May 2015, OTP has charged Orwell and Brainard unjust and unreasonable transportation rates. OCC Ex. 2 at pp. 22-23. OCC witness Slone determined that Orwell and Brainard would have paid a more reasonable transportation rate of $.050 per Mcf if Orwell and OTP had not executed the Orwell-OTP Contract. OCC Ex. 2 at pp. 22-23. OCC witness Slone determined that the Orwell-OTP Contract was not an arm's length transaction, and that Orwell's prior management's bias toward OTP resulted in years of excessive transportation costs. OCC Ex. 2 at p. 32. Orwell supports OCC's position and recommends that OTP be ordered to refund $1,524,586 to Orwell and $12,714 to Brainard for excessive charges for natural gas transportation services.

Although OTP may claim that the Commission should not order a refund because the Commission previously approved the Orwell-OTP Contract, the record demonstrates that the Commission was not aware of certain facts demonstrating that the agreement was not an arm's length transaction. When the Orwell-OTP Contract was executed, Orwell and OTP were both under the direct control of Richard M. Osborne. OCC Ex. 2 at p. 8. Mr. Osborne was the owner of Orwell and Brainard and the Managing Member of OTP. OCC Ex. 2 at p. 8. Further, when the agreement was signed, both Steve Rigo and Thomas Smith, the representatives that signed on the behalf of OTP and Orwell, reported directly to Mr. Osborne. OCC Ex. 2 at p. 8.

The record indicates that the lack of an arm's length transaction did not come to light until years after the Commission approved the Orwell-OTP Contract. Staff witness Sarver testified that Commission Staff does not regularly conduct extensive investigations into the fairness of the terms of proposed reasonable arrangements. Hr'g Tr. 181. Commission Staff would not typically investigate the terms of such a transportation agreement until it is being reviewed in the context of GCR audit. Hr'g Tr. 182. When Staff reviewed the Orwell-OTP Contract, Staff was not fully aware of the relationships between Orwell and OTP. Staff was not aware that both Mr. Smith and Mr. Rigo, who signed the Orwell-OTP Contract on behalf of Orwell and OTP respectively, reported directly to Richard M. Osborne. Staff was not aware that Richard M. Osborne eliminated Dominion as an alternative transportation source by dismantling interconnections with Dominion until mid-2015. Hr'g Tr. 211.

The record demonstrates that Orwell has paid excessive amounts in transportation fees since the Orwell-OTP Contract was executed due to actions taken by Orwell's prior management. These excessive amounts benefited OTP, harmed Orwell and its customers, and were the result of a contractual arrangement that shows a clear bias in OTP's favor. Therefore, the Commission should order OTP to refund Orwell and Brainard for payment of these excessive transportation fees.

G. Orwell supports OCC's proposal for an investigation into the management practices and policies of all of Richard M. Osborne's intrastate pipelines.

One of Orwell's primary concerns is ensuring that OTP can provide safe and reliable service, and charge just and reasonable rates for those services. Although Orwell wishes to have viable alternatives to OTP's transportation service, Orwell is *not* seeking to end its relationship with OTP. To the contrary, Orwell must rely on OTP, and will continue to rely on OTP in the foreseeable future. Thus, a working relationship between Orwell and OTP is optimal. Unfortunately, Orwell's and OTP's relationship has been contentious recently, and Orwell has legitimate concerns regarding OTP's ability provide reliable services. Orwell also has concerns regarding OTP's willingness to charge reasonable rates. Therefore, Orwell supports OCC witness Slone's recommendation for a Commission-ordered investigation into all of Richard M.

Osborne's intrastate pipelines. The evidence in this case demonstrates that OTP's operations and interactions with Orwell may have a detrimental impact on Orwell's customers unless the Commission intervenes.

IV. CONCLUSION

Based on the foregoing, Orwell requests the following: (1) the Commission terminate or modify the terms of the Orwell-OTP Contract; (2) the Commission order OTP to file a new standard transportation tariff; (3) the Commission immediately suspend the arbitration provision of the Orwell-OTP Contract until a final order is issued in this case; (4) the Commission issue an Order that states that the charges OTP attempted to invoice Orwell for were unjust and OTP is precluded from issuing similar invoices to Orwell in the future; (5) OTP is ordered to refund Orwell and Brainard for excessive transportation charges from July 2008 through May 2015; and (6) the Commission order a Commission-ordered investigation into all of Richard M. Osborne's intrastate pipelines.

[SIGNATURES ON THE FOLLOWING PAGE]

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 December, 2015:

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