

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MEMORANDUM CONTRA ORWELL-TRUMBULL PIPELINE COMPANY, LLC'S  
APPLICATION FOR REHEARING**

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**I.     INTRODUCTION**

Orwell-Trumbull Pipeline Company, LLC's ("OTP") Application for Rehearing presents the same arguments OTP raised in its post-hearing briefs. The Public Utilities Commission of Ohio ("Commission") previously rejected these arguments and detailed its rationale for its conclusions in the June 15, 2016 Opinion and Order ("Opinion and Order"). The Opinion and Order demonstrates that the Commission's modification of the Natural Gas Transportation Service Agreement ("Orwell-OTP Contract") was supported by the law, and OTP has not presented any new arguments that would justify rehearing in this case. As such, Orwell Natural Gas Company ("Orwell") requests that OTP's Application for Rehearing be denied.

## II. LAW AND ARGUMENT<sup>1</sup>

### A. OTP's First Assignment of Error

1. **The Federal and Ohio Contract Clauses do not apply because the Orwell-OTP Contract is not a private contract; rather, it is a statutorily created rate arrangement that can be modified by the Commission pursuant to R.C. 4905.31.**

OTP failed to cite a single case that states that the U.S. Constitution, Art. 1, § 10, cl. 1 or the Ohio Constitution, Art. 2, § 28 (the Federal and Ohio Contract Clauses) applies to reasonable arrangements. The Federal and Ohio Contract Clauses are intended to protect the expectation of parties to private contractual arrangements. Although they are sometimes referred to as “special contracts”, reasonable arrangements approved by the Commission under R.C. 4905.31 are very different from private contracts in several important ways. Reasonable arrangements are purely creatures of statute, require Commission approval, and are always under the supervision of the Commission. R.C. 4905.31. Because R.C. 4905.31 expressly states that reasonable arrangements can be modified by the Commission, parties to these arrangements are always aware that the arrangements can be modified. Private contracts, on the other hand, are governed by contract law and the terms of the parties’ agreement. While the Commission has jurisdiction to determine the rights of parties to reasonable arrangements, the Commission does not have jurisdiction to determine the rights of parties to private contracts. *Marketing Research Services, Inc. v. Pub. Utilities Com'n of Ohio*, 34 Ohio St.3d 52, 56, 517 N.E.2d 540, 544 (1987).

OTP argues that R.C. 4905.31 allows the Commission to modify an arrangement only “as a condition of approval,” and claims that the Commission’s ability to modify the reasonable arrangement is limited once the reasonable arrangement is approved. OTP Application for

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<sup>1</sup> OTP makes statements in its Application for Rehearing that are not clearly articulated as assignments of error. Orwell will only address those arguments that are addressed in the assignments of error. Orwell’s silence regarding any argument or claim of OTP does not mean Orwell agrees with these statements and should not be interpreted as an agreement with such statements.

Rehearing at pg. 8. OTP is misinterpreting R.C. 4905.31(E). The statute does not say that the Commission's ability to modify reasonable arrangements is altered or limited once a reasonable arrangement is approved. R.C. 4905.31(E) states that no "arrangement is lawful unless it is filed with and approved by the Commission." It then 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." This language demonstrates that the Commission has continuing authority to supervise, regulate, and even modify a reasonable arrangement at any time, so long as the Commission's decision is reasonable and supported by evidence. The record in this case clearly supports the Commission's decision to modify the agreement. Opinion and Order at pgs. 18 -26. The Commission correctly applied R.C. 4905.31 in a manner consistent with the plain language of the statute. *State ex rel. Burrows*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997) ("If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary."); and *State v. Lowe*, 112 Ohio St.3d 507, 508, 2007-Ohio-606, 861 N.E.2d 512, 514, ¶ 9 (2007).

Although OTP cites a number of cases in its Application for Rehearing regarding its Contract Clause argument, none of these cases address reasonable arrangements governed by R.C. 4905.31. All of these cases address private contracts, which are quite different from reasonable arrangements regulated by the Commission. *Aetna Life Ins. Co. v. Schilling*, 67 Ohio St.3d 164, 1993-Ohio-231, 616 N.E.2d 893 (1993)(life insurance agreement between life insurance company and insured individual); *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 1998-Ohio-381, 695 N.E.2d 732 (1998)(life insurance agreement between life insurance company and insured individual); *Burtner-Morgan-Stephens Co. v. Wilson*, 63 Ohio St.3d 257, 586 N.E.2d 1062 (1992)(oil and gas lease agreement between gas company and landowner); and

*Kiser v. Coleman*, 28 Ohio St.3d 259, 503 N.E.2d 753 (1986)(land installment contract between landowner and potential purchaser). These cases are clearly inapplicable to the facts and law of this case.

**2. U.S. Supreme Court and Ohio Supreme Court precedent demonstrates that neither the Federal nor the Ohio Constitutional Contract Clause precludes the Commission from impairing contractual obligations when the Commission is acting within its police powers.**

Assuming, for the sake of argument, the Federal and Ohio Contract Clauses apply to reasonable arrangements, the Commission still had authority to modify the Orwell-OTP Contract. In *Util. Serv. Partners, Inc. v. Pub. Util. Com'n of Ohio*, 124 Ohio St.3d 284, 292, 2009-Ohio-6764, 921 N.E.2d 1038, 1047, ¶ 42 (2009), the Court held that the Federal and Ohio Contract Clause prohibitions do not affect the Commission's proper exercise of its police powers. The Court held that the Commission could impair a private company's contractual interest because the Commission's actions were "driven by a significant and legitimate public purpose." *Id.* at ¶ 44. The U.S. Supreme Court has held that the Federal Contract Clause does not prevent a state from exercising its police powers to protect the legitimate interest of its citizens. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 193, 103 S.Ct. 2296, 2307, 76 L.Ed.2d 497 (1983); *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 57 S.Ct. 345, 81 L.Ed. 540 (1937)(law that required utility customers to pay rates that were higher than the amount customers contracted for did not violate the Federal Contract Clause); and *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372, 39 S.Ct. 117, 63 L.Ed. 309 (1919)(the Court rejected a Contract Clause challenge to an order of a state commission that established rates that could negatively impact pre-existing contracts).

The Commission was acting within its statutory authority when it modified the Orwell-OTP Contract because R.C. 4905.31(E) states that the Commission has the authority to modify reasonable arrangements. In addition, because R.C. 4905.31 expressly states that the Commission retains the right to modify reasonable arrangements, OTP was aware that its contract could be modified by the Commission and, thus, OTP cannot honestly claim that its rights were unexpectedly impaired by the Commission's action. *Commonwealth Edison Co. v. Illinois Commerce Com'n*, 398 Ill.App.3d 510, 530, 924 N.E.2d 1065, 1087 (Ill.App.2009)(“[W]here a contract contemplates the possibility that it will be affected by government action, it cannot be impaired by such action.”); and *Transport Workers Union of America, Local 290 v. Southeastern Pennsylvania Transportation Authority*, 145 F.3d 619, 622 (3d Cir.1998)(“The purpose of the Contract Clause is to protect the *legitimate expectations* that arise from such contractual relationships from unreasonable legislative interference”)(emphasis added). Further, the Commission thoroughly explained why modifying the Orwell-OTP Contract was necessary to protect Orwell's customers. Opinion and Order at pgs. 4-11, and pgs. 18-26. The Commission's modification of the Orwell-OTP Contract did not violate the Federal or Ohio Contract Clause because the Commission had a legitimate public interest in protecting Orwell's ratepayers.

**B. OTP's Second Assignment of Error**

- 1. The Commission correctly determined that the *Mobile-Sierra* doctrine does not apply to reasonable arrangements approved under R.C. 4905.31.**

In its Application for Rehearing, OTP makes the same arguments regarding the applicability of the *Mobile-Sierra* doctrine that OTP raised in its post-hearing briefs. OTP presented nothing new regarding this issue. The Commission considered the parties' arguments

regarding the *Mobile-Sierra* doctrine and correctly determined that the *Mobile-Sierra* doctrine does not apply in this case. Opinion and Order at pgs. 12-17. The *Mobile-Sierra* doctrine is based on interpretations of Federal statutes – the Natural Gas Act and the Federal Power Act. Opinion and Order at pgs. 15-16. Neither Federal statute is at issue in this case. The Commission determined that “[t]he Ohio Supreme Court has never considered or adopted the application of the *Mobile-Sierra* doctrine to a matter arising under R.C. 4905.31.” Opinion and Order at pg. 17. Because OTP failed to raise any new arguments regarding the *Mobile-Sierra* doctrine, OTP’s Application for Rehearing should be denied.

**2. The Commission correctly decided to overturn its decision from the *Ohio Power Case* and explained in detail why it made this decision.**

OTP claims that the Commission erred by refusing to follow its decision from *In the Matter of the Application of Ohio Power Co. to Cancel Certain Special Power Agreements & for Other Relief*, Case No. 75-161-EL-SLF, 1976 WL 408660 (August 1, 1976) (“*Ohio Power Case*”). The Ohio Supreme Court has held that the Commission is allowed to overturn its own precedent so long as the Commission explains why it is making its decision. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 523, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (2011). The Court has stated that a “few simple sentences” is enough to satisfy the Commission’s obligation to explain the basis of its decision. In this case, the Commission devoted pages of its Opinion and Order to analyzing the *Ohio Power Case*, the *Mobile-Sierra* doctrine, and R.C. 4905.31. As discussed above, the Commission correctly concluded that the *Mobile-Sierra* doctrine does not apply to reasonable arrangements, and correctly determined that the Commission has continuing authority modify reasonable arrangements pursuant to R.C. 4905.31. Therefore, the Commission satisfied its obligation to explain why it was overturning the *Ohio Power Case*.

**3. The Commission had reasonable grounds for holding a hearing in this case because Orwell alleged in its complaint that the terms of the Orwell-OTP Contract were unjust and unreasonable and the Commission had authority to modify the agreement under R.C. 4905.31.**

OTP claims that Orwell did not have reasonable grounds to file its complaint and that there were no grounds for a hearing in this case. OTP Application for Rehearing at pg. 9. OTP raised this same argument in its post-hearing briefs, OTP Initial Brief at 10-12, and it was properly rejected by the Commission. Orwell brought its complaint against OTP under 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. Util. Com'n of Ohio*, 32 Ohio St.3d 115, 117, 512 N.E.2d 350 (1987). Complaints filed under R.C. 4905.26 are a means to challenging a prior Commission order, Commission-approved rate or charge, or a Commission- approved reasonable arrangement. *Id.* See also *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Com'n of Ohio*, 129 Ohio St.3d 485, 494, 2011-Ohio-4189, 954 N.E.2d 104, ¶ 40 (2011)(“[R]easonable grounds may exist to raise issues which might strictly be viewed as ‘collateral attacks’ on previous orders.”).

In its complaint, Orwell requested that the Commission modify the terms of the Orwell-OTP Contract because the terms of the contract were unjust and unreasonable. Orwell’s Complaint at ¶¶ 7-22, Case 15-637-GA-CSS. R.C. 4905.26 states that “if it appears that reasonable grounds for complaint are stated” in the complaint, “the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.” The Attorney Examiner, based on the allegations in Orwell’s complaint, set this matter for hearing. After examining the evidence from the hearing, the Commission determined that certain provisions of the Orwell-OTP Contract were not reasonable and modified the contract pursuant to R.C.



4905.31. As the Commission's Opinion and Order thoroughly discusses, there is a substantial amount of evidence supporting Orwell's complaint and the Commission's decision to modify the Orwell-OTP Contract. Opinion and Order at pgs. 4-26.

**C. OTP's Third Assignment of Error**

In its final assignment of error, OTP claims that the Commission has created a new "justification" standard for modifying reasonable arrangements. The Commission did not create a new standard in this case. The "standard" the Commission applied is the just and reasonable standard, which is commonly applied by the Commission and consistent with Ohio law. The Commission discussed the applicable law on pages 3 and 4 of the Opinion and Order. R.C. 4905.22 states that no public utility shall charge unjust or unreasonable rates. The complaint process established under R.C. 4905.26 allows parties challenge unjust or unreasonable rates, including rates that have been previously approved by the Commission. *Allnet Communications Services, Inc. v. Pub. Util. Com'n of Ohio*, 32 Ohio St.3d 115, 117, 512 N.E.2d 350 (1987). Further, R.C. 4905.31 provides the Commission with the authority to modify reasonable arrangements. Based on this legal authority, the Commission examined the terms of the Orwell-OTP Contract to determine if they were just and reasonable. The Commission modified those provisions that it determined to be unjust or unreasonable and explained the law and facts supporting its decision in its Opinion and Order. Opinion and Order at pgs. 12-26.

While OTP may feel that the Commission created a new standard considering the Commission's decision in the *Ohio Power Case*, the Supreme Court of Ohio, as indicated above, recognizes that the Commission is not required to follow its own precedent if the Commission explains why it is changing its position. *In re Application of Columbus S. Power*, 128 Ohio St.3d 512 at ¶52. The Commission provided a detailed explanation regarding why it overturned the



*Ohio Power Case*. In addition, the Commission's Opinion and Order highlights that the public utilities at interest in the proceedings [OTP and Orwell] have an interest in maintaining commercial ties....and that it is in the best interest of OTP and Orwell and their customers to maintain a working relationship. Opinion and Order at pg. 17. Even OTP's Application for Rehearing highlights the precise portions of the Commission's Order that substantiates the Commission's decision. OTP Application for Rehearing at pg. 9.

OTP's Assignment of Error No.3 is a last ditch effort to claim, inaccurately, that the Commission's review of the evidence was improper. The Commission clearly set out the reasoning for the standard applied to these proceedings. Further, the issues presented by Orwell, which the Opinion and Order clearly address, are more than the "t'aint fair!" pound to the chest that OTP argues. OTP Application for Rehearing at pg. 9. Fortunately, as required, the Commission reviewed the unique issues in this case and analyzed the contract with a reasonable and lawful analysis, and determined that the modification of the Orwell-OTP Contract was necessary to ensure that Orwell and its customers are charged just and reasonable rates.

### **III. CONCLUSION**

OTP failed to present any new arguments that justify rehearing in this case. The Commission should deny OTP's Application for Rehearing.

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 25th day of July, 2016:

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Summary: Memorandum Orwell's memorandum contra OTP's application for rehearing electronically filed by Mr. Devin D. Parram on behalf of Orwell Natural Gas