

## JURISDICTION

3. OTP is engaged in the transportation of natural gas in Ohio, and, as such, is a pipe-line company under ORC §4905.03.

4. As a pipe-line company under ORC §4905.03, OTP is also a public utility as defined in ORC §4905.02.

5. ONG is a gas company and is therefore a public utility pursuant to ORC §4905.02.

6. The PUCO has exclusive jurisdiction over this matter due to the nature of these two entities.

### **GENERAL ALLEGATIONS**

7. The allegations contained in Paragraphs 1 through 6 of this Complaint are re-alleged and incorporated as if fully set forth herein.

8. On July 8, 2008, OTP and ONG entered in to a Natural Gas Transportation Service Agreement (hereinafter referred to as "Agreement")..

9. The PUCO's approval of this Agreement was set forth in an Entry dated December 19, 2008.

10. The Agreement had a term of fifteen (15) years, with rates adjusting every five (5) years to reflect the then-current market conditions, and continuing month to month after the fifteen (15) year term.

11. The Agreement further indicates:

*\*Rates will adjust every (5) years commencing on July 1, 2013 and continuing on each fifth (5<sup>th</sup>) 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. (emphasis added)*

12. On or about March 1, 2015, after failed attempts at negotiations over a rate adjustment, OTP unilaterally increased the rate charged to ONG to \$1.01 per DTH.

13. Based on this increase, ONG sought relief at the PUCO and filed a Complaint on March 31, 2015, docketed as Case No.: 15-637-GA-CSS.

14. A two-day hearing took place before the PUCO on November 3 and November 4, 2015.

15. On June 15, 2016, the PUCO issued an Opinion and Order addressing the contract at issue in Case No.: 15-637-GA-CSS.

16. Since the Opinion and Order issued on June 15, 2016, OTP has been incorrectly invoicing ONG at an amount that does not accurately reflect the PUCO's Order.

17. On October 20, 2016, OTP filed a Complaint against ONG in Lake County, Ohio Common Pleas Court, Case No.: 16CV001776, incorrectly alleging the Commons Pleas Court holds jurisdiction over the dispute and demanding payment on the invoices. *See attached Exhibit A.*

### **COUNT ONE**

18. The allegations contained in Paragraphs 1 through 17 of this Complaint are re-alleged and incorporated as if fully set forth herein.

19. OTP is incorrectly invoicing ONG based on the Opinion and Order issued on June 15, 2016.

20. OTP is attempting to enforce charges on ONG that are neither part of the Opinion and Order issued by the Commission or part of any tariff on which ONG must comply.

21. ONG continues to pay the amount on each invoice to OTP, on a monthly basis, based

on calculations that comply with the Opinion and Order issued by the PUCO.

22. ONG will continue to pay the amount on each invoice based on the Opinion and Order, yet has sustained, now, a lawsuit that incorrectly alleges lack of payment and improper jurisdiction.

**PRAYER FOR RELIEF**

WHEREFORE, Complainant ONG requests that the PUCO determine the following:

1. The PUCO has exclusive jurisdiction with respect to charges and the invoices at issue herein;
2. A hearing be set to address clarification of the Opinion and Order with respect to, solely, the invoices at issue;
3. Order any other relief that the Commission deems appropriate, just and reasonable.

Respectfully submitted,

**THE WELDELE & PIACENTINO  
LAW GROUP CO., LPA**

/s/ Gina M. Piacentino

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*Counsel for Orwell Natural Gas Company*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Complaint and Request for Relief* was served via regular U.S. Mail on the 20th day of December, 2016, on the following:

Kravitz, Brown & Dortch, LLC  
65 E. State Street, Suite 200  
Columbus, Ohio 43215

Orwell-Trumbull Pipeline Co., LLC  
3511 Lost Nation Rd., Suite 213  
Willoughby, OH 44094

/s/ Gina M. Piacentino

GINA M. PIACENTINO-0086225

*Counsel for Orwell Natural Gas Company*

# EXHIBIT A

IN THE COURT OF COMMON PLEAS,  
LAKE COUNTY, OHIO

ORWELL-TRUMBULL PIPELINE  
COMPANY, LLC,  
3511 Lost Nation Road  
Suite No. 213  
Willoughby OH 44094

16CV001776  
RICHARD L COLLINS JR

Plaintiff,

v.

ORWELL NATURAL GAS COMPANY  
8470 Station Street  
Mentor, OH 44060

Defendant.

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COMPLAINT

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For its complaint against defendant Orwell Natural Gas Company ("ONG"), plaintiff  
Orwell-Trumbull Pipeline Company, LLC ("OTP") states as follows:

**The Parties To This Dispute**

- 1) Defendant ONG is an Ohio corporation, headquartered in Mentor (Lake County) Ohio,  
and engaged in the business of distributing natural gas to end use customers in several  
counties in Northeast Ohio, including Lake County.
- 2) ONG is a "natural gas company" as defined by Ohio Rev. Code section 4905.03(E).
- 3) Plaintiff OTP is an Ohio limited liability corporation, headquartered in Willoughby (Lake  
County) Ohio, and engaged in the business of transporting natural gas by intrastate  
pipeline.
- 4) OTP is a "pipe-line company" as defined by Ohio Rev. Code section 4905.03(F).

- 5) As a pipeline company OTP is further defined to be a public utility by operation of Ohio Rev. Code section 4905.02.
- 6) As a natural gas company, ONG is further defined to be a public utility by operation of Ohio Rev. Code section 4905.02.

#### **Jurisdiction Is Proper In This Court**

- 7) Pursuant to Ohio Rev. Code sections 4905.05 and 4905.26, the Public Utilities Commission of Ohio (“PUCO”) possesses exclusive jurisdiction and plenary authority to determine whether the rates charged and the terms of service imposed by any of the entities it regulates, including both pipeline companies and natural gas companies, is in any way unjust, unreasonable, discriminatory or otherwise in violation of law.
- 8) Despite the broad jurisdiction and authority granted the PUCO, the Ohio Supreme Court has repeatedly held that the PUCO has *no* jurisdiction to determine claims involving solely “legal rights and liabilities” even among and between regulated entities. *See, New Bremen v. PUCO* (1921), 103 Ohio St. 23, at pages 30- 31, *Allstate Insurance Co. v. Cleve. Electric Illuminating Co.* (2008), 119 Ohio St. 3d 301. Claims seeking damages arising out of “pure” contract or “pure tort” claims are therefore beyond the jurisdiction of the PUCO.
- 9) Jurisdiction is proper in this Court because this case involves solely an issue of damages resulting from the refusal of one party to an agreement to perform that agreement as it was expressly and unambiguously approved (as modified) by Order of the PUCO.

#### **Venue Is Proper In This Court**

- 10) Venue is proper in this Court pursuant to Rule 3(B)(2) of the Ohio Rules of Civil Procedure because defendant has its principal place of business in this county.



**The Original PUCO-Approved Contract Between ONG and OTP**

- 11) On December 19, 2008, in Case No. 08-1244-PL-AEC, the PUCO approved a  
“reasonable arrangement” (the “Contract”) between OTP and ONG, pursuant to the  
authority granted it by Ohio Revised Code section 4905.31.
- 12) A copy of the Contract is attached hereto as Exhibit A.
- 13) The PUCO Order approving the Contract is attached hereto as Exhibit B.
- 14) R.C. Section 4905.31 provides that, upon approval of any “reasonable arrangement,” the  
affected “. . . public utility is required to conform its schedules of rates, tolls, and charges  
to such arrangement, sliding scale, classification, or other device. . . .”
- 15) The PUCO-approved Contract provides that OTP agreed to transport natural gas tendered  
to it by ONG, for a period of 15 years, until the year 2023.
- 16) The PUCO-approved Contract further provides that ONG agreed to pay OTP a  
transportation rate of \$0.95 per Dekatherm (DTH) of natural gas transported on its behalf.
- 17) The PUCO-approved Contract further provides that the transportation rate could be  
adjusted every five years during the fifteen year term by agreement of the parties; and in  
the event the parties were unable to agree upon an adjusted rate, the Contract provided for  
a default adjustment equal to the increase in the Consumer Price Index for the Cleveland  
area (the “CPI”).
- 18) On or about March 1, 2015, after negotiations over a rate adjustment had failed, OTP  
increased the rate charged to ONG to \$1.01 per DTH, reflecting the default CPI increase,  
pursuant to the terms of the PUCO-approved Contract.

### **Litigation Before The PUCO Regarding the Contract**

- 19) Defendant ONG responded to OTP's price increase on March 31, 2015, when ONG filed a complaint against OTP with the PUCO, docketed by that body as Case No. 15-637-GA-CSS.
- 20) OTP attacked the validity of the Contract on numerous grounds.
- 21) For relief, ONG demanded that the PUCO set aside the Contract in its entirety.
- 22) As the complaining party, ONG bore the burden of proving that any provisions of the Contract it disliked were unjust, unreasonable, or unreasonably discriminatory.
- 23) The PUCO's technical staff is, by regulation, treated as a party to all cases filed with the Commission.
- 24) The Office of the Ohio Consumers' Counsel intervened in the action, in support of ONG.
- 25) ONG's complaint was the subject of a two-day long evidentiary hearing before a PUCO hearing examiner held November 3, and November 4, 2015.
- 26) Extensive post-hearing briefing took place during the weeks following the evidentiary hearing.

### **The PUCO's June 15, 2016 Opinion and Order**

- 27) On June 15, 2016, the PUCO issued an Opinion and Order addressing the issues ONG had raised in its complaint.
- 28) The PUCO's June 15, 2016 Opinion and Order is attached hereto as Exhibit C.
- 29) The PUCO expressly declined to set aside the Contract as demanded by ONG. See Opinion and Order, paragraph 39.
- 30) The PUCO, however, did Order certain terms of the Contract to be modified. As material hereto, the PUCO chose to

- a. Suspend an arbitration provision contained within the Contract, until such time as the Commission Orders otherwise. *See* Opinion and Order, paragraphs 17, 110;<sup>1</sup>
- b. Terminate a “sole source” clause, and compel OTP to establish additional interconnections with Dominion East Ohio, (another entity providing pipeline service). Opinion and Order, paragraph 112; and
- c. Compel ONG to purchase, and OTP to provide, transportation service on a “firm” rather than “interruptible” basis. *See* Opinion and Order, paragraphs 46, 109.

31) “Interruptible” transport is a transportation offering that allows the transporting pipeline company to limit (or even to refuse, completely) any volumes tendered by a shipper for transportation on the pipeline system. *See* Contract Definitions, Exhibit A

32) “Firm” transport is a transportation offering in which the transporting pipeline company must accept all volumes (up to a predetermined amount) tendered by a shipper for transportation, except when conditions justify the declaration of “force majeure.” *See* Contract Definitions, Exhibit A

33) “Maximum Daily Quantity” or “MDQ” is the maximum daily quantity of natural gas that a shipper is contractually entitled to deliver for firm transport to a transporting entity during any 24 hour period. *See* Contract Definitions, Exhibit A

34) “Firm” transport is typically more expensive than interruptible transport, because the shipper must pay the transporting entity for system capacity reserved for the shipper’s use, whether the shipper actually uses that capacity or not.

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<sup>1</sup> Because of this suspension, OTP is presently unable to invoke its right to seek arbitration of its claims in this matter, even though they arise out of the contract, which contains an express arbitration provision. OTP has asked the PUCO to reconsider its ruling, (as well as all other contract modifications made within the PUCO’s Order of June 15, 2016). Because no one sought a stay of the PUCO’s Orders, however, the PUCO’s Order is effective until modified or vacated by the PUCO, or until overturned on appeal.

- 35) In addition to the modifications Ordered by the PUCO, the PUCO also Ordered OTP to file a rate case in which the PUCO will consider what rates should, in the future, be included in OTP's tariff. *See* Opinion and Order, paragraph 115.
- 36) The establishment of rates sometime in the future for inclusion in OTP's tariff, however, can not modify the current rate contained in the Contract between ONG and OTP.
- 37) The current Contract rate can be modified, (if at all), only by operation of the terms of the Contract, by mutual agreement of the parties, or by express Order of the Commission.
- 38) Among the Contract provisions that were NOT modified by the PUCO in its Order of June 15, 2016, therefore, include the provisions concerning:
- a. the fifteen year term of the Contract; and
  - b. the \$1.01 rate currently imposed by the Contract.
- 39) It is fundamental Ohio law that the PUCO is a creature of statute that may exercise only those powers granted it by the Ohio General Assembly.
- 40) The Ohio Supreme Court has repeatedly held that the PUCO's powers do not include the power to engage in retroactive rate-making. *See Kecko Indus. v. Cincinnati & Suburban Tel. Co.* (1957), 166 Ohio St. 254, 257. Thus, no rate determined in the future can lawfully be applied retroactively to supplant rates currently in effect.
- 41) Once the PUCO approves terms and conditions upon which service is to be offered, the regulated entity *must* offer service pursuant to the terms and conditions approved by the PUCO. *See* Ohio Rev. Code sections 4905.31 and 4905.32.
- 42) Once the PUCO approves a rate, the regulated entity *must* impose the PUCO-approved rate until such time as some other rate is approved. *See* Ohio Rev. Code sections 4905.31 and 4905.32.

### **COUNT ONE – BREACH OF CONTRACT**

- 43) OTP repeats each and every allegation set forth above as though restated entirely herein.
- 44) As a result of the PUCO's Order of June 15, 2016, OTP must provide firm transportation service rather than interruptible transportation service to ONG.
- 45) As a result of the PUCO Ordered Contract modifications, OTP must purchase firm transportation service rather than interruptible transportation service from ONG.
- 46) The presently existing Contract, as modified by the PUCO, provides for an MDQ of 2000 DTH, and a rate of \$1.01 per DTH.
- 47) Beginning in July, 2016 with the first invoice it issued to ONG following entry of the PUCO's June 16, 2016, Order, OTP invoiced ONG for capacity charges for firm transport, as it was ordered to do by the PUCO.
- 48) OTP's invoice accurately reflects the MDQ of 2000 DTH, and the existing rate of \$1.01 per DTH.
- 49) Despite repeated demands by OTP, and despite the PUCO Order of June 15, 2016, ONG has repeatedly refused to pay any OTP invoices containing the PUCO-approved rate for the PUCO-approved firm transportation service.
- 50) As of the date this Complaint was filed in this Court, OTP had issued invoices for July, August, September and October, 2016 to ONG.
- 51) OTP's invoices for July, August, September, and October, 2016 are attached hereto (collectively) as Exhibit D.
- 52) By refusing to pay capacity charges as Ordered by the PUCO, ONG is in breach of its contract with OTP.

53) The actual damages OTP has incurred due to ONG's breach of contract equal \$221,809.74, as of the date this Complaint was filed.

#### **COUNT TWO – TREBLE DAMAGES**

54) OTP repeats each and every allegation set forth above as though restated entirely herein.

55) Ohio Revised Code section 4905.61 expressly provides that "If any public utility . . . does . . . or omits to do any act or thing required . . . by order of the public utilities commission, the public utility . . . is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission."

56) ONG is therefore statutorily liable to OTP for treble damages pursuant to Ohio Revised Code section 4905.61 due to its refusal to pay for firm transportation service, as Ordered by the PUCO.

#### **COUNT THREE – CONTINUING DAMAGES**

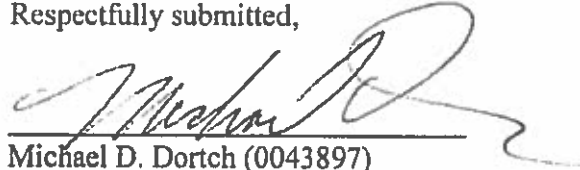
57) OTP repeats each and every allegation set forth above as though restated entirely herein.

58) As each month passes during the pendency of this dispute, OTP must invoice ONG for firm transport, and additional damages will accrue to OTP from ONG's continued breach of contract, and additional treble damages will accrue as a result of ONG's continued violation of the PUCO's June 15, 2016 Opinion and Order.

WHEREFORE: OTP demands the Entry of Judgment against Orwell Natural Gas Company on Counts One and Three of its Complaint in an amount equal to the contractual damages it will have incurred as of the time judgment is entered, but in no case less than \$206,060.00; together

with Judgment on Counts Two and Three against Orwell Natural Gas Company in an amount equal to the treble damages to be imposed as of the time judgment is entered, but in no case less than the amount of \$665,429.22; together with all such additional relief, costs, and attorneys' fees to which OTP may be legally or equitably entitled.

Respectfully submitted,



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Attorneys for Plaintiff  
ORWELL-TRUMBULL  
PIPELINE COMPANY, LLC

# Exhibit A

## NATURAL GAS TRANSPORTATION SERVICE AGREEMENT

BY THIS AGREEMENT, executed this 1st day of July, 2008 Orwell-Trumbull Pipeline Co., LLC ("OTPC"), Orwell Natural Gas Company ("ONG") and Brainard Gas Corp. ("BGC") (hereinafter ONG and BGC shall collectively be referred to as "Shipper"), OTPC and Shipper are hereinafter sometimes referred to collectively as the Parties and individually as a Party) for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, do hereby recite and agree as follows:

### RECITALS

WHEREAS, OTPC owns a natural gas transmission pipeline system described on Exhibit A to this Agreement (Pipeline); and

WHEREAS, OTPC is an Ohio Intrastate pipeline operating natural gas pipelines and related facilities located within the State of Ohio under authority of the Public Utility Commission of Ohio; and

WHEREAS, Shipper desires to utilize OTPC's Pipeline for the transportation of natural gas within the State of Ohio; and

WHEREAS, OTPC has agreed to provide such transportation to Shipper subject to the terms and conditions hereof,

WITNESSETH: In consideration of the mutual covenants herein contained, the Parties hereto agree that OTPC will transport for Shipper, on an interruptible basis, and Shipper will furnish, or cause to be furnished, to OTPC natural gas for such transportation during the term hereof, at prices and on the terms and conditions hereinafter provided:

### AGREEMENTS

#### DEFINITIONS

Except where the context otherwise indicates another or different meaning or intent, the following terms are intended and used herein and shall be construed to have the meaning as follows:

A. "Btu" shall mean the British thermal unit as defined by international standards.

B. "Business Day" shall mean any weekday, excluding federal banking holidays.



- C. "Central Clock Time" (C.T.) shall mean Central Standard Time adjusted for Daylight Savings Time.
- D. "Company" means OTPC, its successors and assigns.
- E. "Customer" means any individual, governmental, or corporate entity taking transportation service hereunder.
- F. "Dekatherm" or "Dth" means the Company's billing unit measured by its thermal value. A dekatherm is 1,000,000 Btus. Dekatherm shall be the standard unit for purposes of nominations, scheduling, invoicing, and balancing.
- G. "Delivery Point(s)" shall mean the specific measurement location(s) listed on Exhibit B at which OTPC delivers Shipper-owned Gas to Shipper and Shipper receives such Gas from OTPC. Exhibit B is hereby incorporated into this Agreement.
- H. "Delivery Volume" shall mean the volume of Gas actually taken at the Delivery Point(s) by or on behalf of Shipper.
- I. "Firm" shall mean that each Dth Shipper tenders at the Receipt Point will be delivered to Shipper's Delivery Point(s) minus OTPC's Shrinkage without interruption except under Force Majeure conditions or an energy emergency declared by the Commission.
- J. "Gas" shall mean natural gas of interstate pipeline quality.
- K. "Gas Day" or "Day" shall mean a period of 24 consecutive hours, beginning at 9:00 a.m. Central Clock Time, as adjusted for Daylight Savings Time, and the date of the Day shall be that of its beginning.
- L. "Heating Value" shall mean the gross heating value on a dry basis, which is the number of British thermal units produced by the complete combustion at constant pressure of the amount of dry gas (gas containing no water vapor) that would occupy a volume of one Cubic Foot at 14.73 psia and 60° F with combustion air at the same temperature and pressure as the gas, the products of combustion being cooled to the initial temperature of the gas and air, and the water formed by combustion condensed to the liquid state.
- M. "Imbalance" shall mean the daily difference between the Dths tendered by or for Customer's account at the Receipt Point minus OTPC's Shrinkage and the metered volumes allocated to Shipper at the Delivery Point(s).

- N. "Interruptible" shall mean that each Dth Shipper tenders at the Receipt Point Will be delivered to Shipper's Delivery Point(s) less OTPC's Shrinkage if OTPC, using reasonable judgment, determines that capacity exists after all the Firm transport needs are accounted for to permit redelivery of tendered gas.
- O. "Maximum Daily Quantity" or "(MDQ)" shall mean the maximum daily firm natural gas quantity which Shipper shall be entitled to nominate during any 24-hour period. Shipper's MDQ shall be negotiated between Shipper and OTPC and incorporated into Shipper's Service Agreement with OTPC.
- P. "Month" shall mean a calendar month beginning at 9:00 a.m. Central clock time on the first day of the calendar month and ending at 9:00 a.m. Central clock time the first day of the following calendar month.
- Q. "OTPC System" shall mean the intrastate pipeline system owned by OTPC.
- R. "Nomination" shall mean the confirmed Quantity of Gas which Shipper shall arrange to have delivered to the Receipt Point(s) for redelivery by OTPC to the Delivery Point(s). The Nomination shall include sufficient gas to account for OTPC's Shrinkage.
- S. "Operational Flow Order" or "OFO" shall mean a declaration made by OTPC that conditions are such that OTPC can only safely transport an amount of Gas during a calendar day equal to the amount of Gas which Shipper will actually receive at the Receipt Point on that calendar day. OTPC shall only declare an Operational Flow Order if an upstream pipeline declares an operational flow order or otherwise restricts the flow of Gas which normally would be delivered to OTPC at the Receipt Point.
- T. "Overrun" shall mean any volume of Gas actually transported which, as measured on a daily basis, exceeds the maximum daily quantity (MDQ) established by this Agreement.
- U. "PUCO" or "Commission" means the Public Utilities Commission of Ohio or any successor governmental authority.
- V. "Quantity of Gas" shall mean the number of units of gas expressed in Dth or MMBtu unless otherwise specified.
- W. "Receipt Point(s)" shall mean those measurement locations where Shipper-owned gas enters OTPC's system.
- X. "Service Agreement" Each Customer shall sign an Individual Agreement with OTPC prior to commencement of service that identifies the Receipt Point and Delivery Point(s), the MDQ, declares whether the transportation is Firm or Interruptible and establishes the cost

for the transportation. The Service Agreements shall be filed with the Commission pursuant to Section 4905.31, Revised Code for approval.

Y. "Shrinkage" shall mean the quantity of Gas required by OTPC to replace the estimated quantity of Gas which is required for compressor fuel, and lost-or-unaccounted-for Gas when transporting the tendered quantities. This percentage is set forth in Exhibit B.

Z. "Written Notice" shall mean a legible communication received by the intended recipient of the communication by United States mail, express courier, or confirmed facsimile. Written Notice may also be provided by Email, but shall not be effective until such time as (a) the Email is acknowledged by the intended recipient; (b) or a copy of such Email is received by the intended recipient by US mail, express courier, or facsimile.

#### I. DELIVERY AND TRANSPORTATION

1.1 Shipper shall arrange with suppliers of Shipper's selection to have Gas in an amount not to exceed Shipper's MDQ adjusted for OTPC's Shrinkage as specified on Exhibit B, tendered to the Receipt Point(s) as specified on Exhibit B, for delivery into the OTPC Pipeline on Shipper's behalf. OTPC shall then redeliver, on an interruptible basis, such quantities, less OTPC's Shrinkage, to Shipper, or on behalf of Shipper, at the Delivery Point(s) as specified on Exhibit B. All transportation by OTPC for Shipper shall be governed by OTPC's then current transportation tariff on file with the PUCO, except as expressly modified hereby.

1.2 ONG agrees that during the term of this Transportation Service Agreement it will use only OTPC's pipelines 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 ONG may use other pipelines to transport its gas requirements. This Transportation Service Agreement will only be utilized by BGC for back up purposes only and on an as needed basis.

1.3 For planning purposes, Shipper shall provide Written Notice, at least three (3) business days prior to the start of each calendar Month, to OTPC of the amount of Gas it intends to transport each day of the upcoming Month. Shipper shall submit its Nomination to OTPC by no later than 10:00 a.m. Central Clock Time for Gas flow the following day. This nomination should correspond to scheduled deliveries Shipper makes on the upstream Interstate pipeline and downstream local distribution company operating the applicable Delivery Point(s). Should the Shipper desire to modify its Nomination either on the current Day or after the Nomination deadline for Gas flow the following day, OTPC shall make every attempt to accommodate Shipper's request provided OTPC can confirm such quantities with the upstream pipeline at the Receipt Point(s) and downstream entity at the Delivery Point(s).

1.4 Shipper shall be permitted to have delivered into and removed from OTPC's Pipeline its nominated Gas volume, adjusted for OTPC's Shrinkage, up to the MDQ previously agreed to and found on Exhibit B.

1.5 If any of the Interstate pipelines interconnected with OTPC issues an operational flow order then OTPC may issue its own matching OFO on its Pipeline that will apply to Shippers. The OFO may restrict Shippers to nominate into the OTPC Pipeline only that volume of Gas which Shipper will have redelivered the same day adjusted for Shrinkage. OTPC will use its best efforts to limit such OFO to just the time necessary to comply with applicable upstream Interstate OFOs. OTPC will only assess OFO penalties on a pro-rata basis if OTPC is actually assessed penalties by an applicable upstream pipeline.

1.6 Imbalances caused by Shipper at the Delivery Point(s) shall be resolved by OTPC and Shipper within thirty (30) days. Imbalances at the Receipt Point are governed by the terms and conditions of the upstream pipeline(s) delivering into OTPC. Any imbalance charges or penalties or costs of any kind incurred by OTPC as a result of Shipper's over or under delivery of natural gas into OTPC's system, either on a daily or monthly basis, will be reimbursed by Shipper within ten (10) days of receipt thereof. If Shipper fails to make any payments under this Agreement when due, OTPC has the right to terminate this Agreement upon two (2) days notice, unless such payment is made by the date specified in the termination notice.

1.7 Shipper warrants that it has title to all Gas delivered to OTPC, free and clear of all claims, liens, and other encumbrances, and further covenants and agrees to indemnify and hold harmless from all claims, demands, obligations, suits, actions, debts, accounts, damages, costs, losses, liens, judgments, orders, attorneys fees, expenses and liabilities of any kind or nature arising from or attributable to the adverse claims of any and all other persons or parties relating to such Gas tendered by Shipper at the Receipt Point.

## II. QUANTITY AND PRICE

2.1 Shipper shall pay OTPC a Commodity Rate plus Shrinkage, as stated on Exhibit B, for each volume of Gas delivered to the Delivery Point(s).

## III. TERM

3.1 The Agreement shall be effective as of 1st day of July, 2008 and shall continue in full force and effect, terminating 15 years thereafter and shall continue from year to year thereafter, unless cancelled by either party upon 90 days written notice.

#### IV. MEASUREMENT AND QUALITY OF GAS -

4.1 Measurement of the Gas delivered and billed to Shipper shall be based upon an allocation conducted by the operator of the Delivery Point(s). Disputes regarding allocated throughput shall be handled in accordance with the tariff of the Delivery Point(s) operator. Billings for all receipts and deliveries hereunder shall be made on a thermal basis in Dth. OTPC shall provide to Shipper at Shipper's request, pertinent tariff information pertaining to method of allocating deliveries at Delivery Point(s).

4.2 All Gas delivered under this Agreement shall be commercially free from solid and liquid impurities and shall satisfy all pipeline quality standards reasonably established from time to time by OTPC and upstream or downstream pipelines.

#### V. BILLING AND PAYMENT

5.1 On or about the tenth (10th) day of each calendar month, OTPC will render to Shipper a statement setting forth the total volume of Gas delivered hereunder for Shipper during the immediately preceding Month. In the event OTPC was not able to take actual meter readings at any meter, or if OTPC has not received the necessary meter statements from the owner or operator of any applicable meter in time for preparation of the monthly statement, OTPC may use an estimated Gas delivery volume based upon confirmed nominations. Any such estimated delivery volume shall be corrected in the first statement after the actual meter readings become available.

5.2 In the event of a meter failure a reconstructed bill using the best information available shall be used.

5.3 Shipper agrees to pay OTPC the amount payable according to such statement on or before the twenty-fifth (25th) day of the month or within ten (10) days of receipt of the invoice whichever is later.

5.4 Failure to tender payment within the above specified time limit shall result in a monthly interest charge of one and one half percent (1-1/2%) per month on the unpaid balance. In addition, should Shipper's payment be delinquent by more than thirty (30) days, OTPC shall have the right, at its sole discretion, to terminate this Agreement and to terminate Gas transportation in addition to its seeking other legal redress. OTPC will first contact Shipper about any payment issues and try to resolve those issues in a reasonable manner.

5.5 Any notice, request, demand, statement, or other correspondence shall be given by Written Notice to the Parties hereto, as set forth below.

**Shipper:** Orwell Natural Gas Company or Brainerd Gas Company, as applicable  
8500 Station Street, Suite 100  
Mentor, Ohio 44080  
**EMAIL:** [tsmith13@orwellgas.com](mailto:tsmith13@orwellgas.com)  
**PHONE:** (440) 974-3770  
**FAX:** (440) 974-0844  
**ATTN:** Thomas J. Smith

**OTPC:** OTPC Gas Transmission Company, LLC  
8500 Station Street  
Suite 100  
Mentor, OH 44080  
**EMAIL:** [srigo@orwellgas.com](mailto:srigo@orwellgas.com)  
**PHONE:** (440) 974-3770  
**FAX:** (440) 205-8680  
**ATTN:** Stephen G. Riggo

## VI. FORCE MAJEURE

6.1 Except with regards to a party's obligation to make payment due under Section 5 and Imbalance Charges under Section 2, neither party shall be liable to the other for failure to perform a firm obligation; to the extent such failure was caused by Force Majeure. The term "Force Majeure" as employed herein means any cause not reasonably within the control of the party claiming suspension, as further defined in Section 6.2.

6.2 Force Majeure shall include but not be limited to the following (i) physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident to machinery or equipment or lines of pipe; (ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe; (iii); (iv) acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, terrorism, insurrections or wars; and (v) governmental actions such as necessity for compliance with any court order, law statute, ordinance, or regulations promulgated by a governmental authority having jurisdiction. The Parties shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event of occurrence once it has occurred in order to resume performance.

6.3 Neither party shall be entitled to the benefit of the provision of Force Majeure to the extent performance is affected by any or all of the following circumstances: (i) the curtailment of interruptible or secondary firm transportation unless primary, in-path, firm transportation is also curtailed; (ii) the party claiming Force Majeure failed to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch; or (iii) economic hardship. The claiming of Force Majeure shall not relieve either party from meeting all payment obligations.

6.4 Notwithstanding anything to the contrary herein, the parties agree that the settlement of strikes, lockouts or other industrial disturbances shall be entirely within the sole discretion of the party experiencing such disturbances.

6.5 The party whose performance is prevented by Force Majeure must provide notice to the other party. Initial notice may be given orally; however, written notification with reasonably full particulars of the event or occurrence is required as soon as reasonably possible. Upon providing written notification of Force Majeure to the other party, the affected party will be relieved of its obligation to make or accept delivery of Gas as applicable to the extent and for the duration of Force Majeure, and neither party shall be deemed to have failed in such obligation to the other during such occurrences or event.

## VII. ADDITIONAL TERMS

7.1 Shipper shall join with OTPC in support of the application to the PUCO for approval of this Agreement pursuant to Section 4905.31, Revised Code.

7.2 In the event of an energy emergency declared by the Governor or any other lawful official or body, it is understood that OTPC shall and will follow the dictates of any energy emergency rule, or order. OTPC shall not be liable for any loss or damage suffered by Shipper as a result thereof.

7.3 This Agreement shall be construed under the laws of the State of Ohio.

7.4 This Agreement, together with all schedules and exhibits hereto, constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties. No supplement, modification or waiver of this Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision hereof (regardless of whether similar), nor shall any such waiver constitute a continuing waiver unless otherwise expressly provided.

7.5 This Agreement shall be binding upon and inure to the benefit of the Parties and their respective permitted successors and assigns. Neither this Agreement nor any of the rights, benefits or obligations hereunder shall be assigned, by operation of law or otherwise, by any Party hereto without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Except as expressly provided herein, nothing in this Agreement is intended to confer upon any person other than the Parties and their respective permitted successors and assigns, any rights, benefits or obligations hereunder.





**Exhibit A**

**OTPC Gas Transmission, LLC**

**ALL PIPELINES OWNED BY OTPC LOCATED IN NORTHEASTERN OHIO.**

**Exhibit B**

**OTPC Gas Transmission, LLC**

**Primary Receipt Point**

Interconnection between QTPC and North Coast Gas Transmission, LLC's Pipeline in Mantua, Ohio

**Primary Delivery Point(s)**

For BGC: Various interconnections between OTPC and BGC, as required for back-up services only.

For ONG: Various interconnections between OTPC and ONG.

**Shrinkage**

TBD

2000 Dth/day

**\*RATES**

Commodity Charge (paid only on quantity transported)

November-March \$ per Thousand Cubic Feet (Mcf)

April-October \$ per Thousand Cubic Feet (Mcf)

\*Rates will adjust every five (5) years commencing on July 1, 2013 and continuing on each fifth (5<sup>th</sup>) 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.

Exhibit  
B

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Orwell )  
Trumbull Pipeline Company, LLC for Approval ) Case No. 08-1244-PL-ABC  
of Two New Transportation Service Contracts. )

ENTRY

The Commission finds:

- (1) On March 21, 2006, the Public Utilities Commission of Ohio ("Commission") approved tariffs authorizing Orwell - Trumbull Pipeline Company, LLC, ("Orwell - Trumbull") to operate as an intrastate pipeline company in Ohio, subject to the Commission's jurisdiction. Recognizing the wholesale nature of its transportation business, the approved tariffs provide for the rates and terms for transportation services to be individually approved by the Commission pursuant to Section 4905.31, Revised Code.
- (2) On November 20, 2008, Orwell - Trumbull filed an application, consistent with those tariffs, for approval of two new transportation service agreements. The first agreement is with Brainard Gas Corporation (Brainard) and Orwell Natural Gas Company (Orwell), both companies being natural gas companies and public utilities subject to the Commission's jurisdiction. This agreement has a term of 15 years, with the rates adjusting every five years to reflect the then-current market conditions, and continuing month to month after the 15-year term. The second agreement is with Great Plains Exploration, LLC (Great Plains), which is an Ohio limited liability company that engages in natural gas exploration and production. This agreement has a one-year term and continues month-to-month thereafter. A motion for a protective order, seeking protection of the price, volume, and shrinkage information for both contracts, was also filed. The confidential information has been filed under seal.
- (3) The Commission has reviewed the proposed contracts and finds that they are reasonable and in the public interest and that they should be approved.
- (4) Regarding the motion for protective order, we understand that negotiated price and quantity terms can be sensitive information in a competitive environment. In accordance with Rule 4901-1-24,

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.  
Technician TM Date Processed 12/14/2008

Ohio Administrative Code, a protective order prohibiting disclosure of the confidential information provided under seal is granted. This protective order will automatically expire 18 months after the date of this Entry. Any party wishing to extend this confidential treatment should file an appropriate motion at least 45 days in advance of the expiration date.


It is, therefore,

ORDERED, That the new contract between Orwell - Trumbull, Brainard and Orwell and the new contract between Orwell - Trumbull and Great Plains are approved. It is, further,

ORDERED, That, for 18 months from the date of this Entry, the Docketing Division of the Commission should maintain, under seal, the confidential information filed on this docket on November 20, 2008. It is, further,

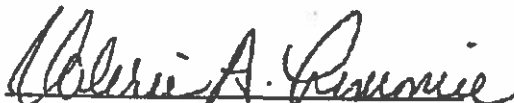
ORDERED, That a copy of this Entry be served upon Orwell - Trumbull.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Paul A. Centolella

  
Ronda Hartman Fergus

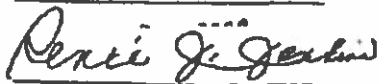
  
Valerie A. Lemmie

  
Cheryl L. Roberto

JR:sm

Entered in the Journal

DEC 19 2008



Renee J. Jenkins  
Secretary

Exhibit C

PUBLIC UTILITIES COMMISSION OF OHIO

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

CASE No. 14-1654-GA-CSS

COMPLAINANT,

v.

ORWELL-TRUMBULL PIPELINE  
COMPANY, LLC,

CASE No. 15-637-GA-CSS

RESPONDENT.

OPINION AND ORDER

Entered in the Journal on June 15, 2016

I. SUMMARY

{¶ 1} The Commission finds that the complaint against Orwell-Trumbull Pipeline Company, LLC filed by Orwell Natural Gas Company regarding two invoices in Case No. 14-1654-GA-CSS should be dismissed. In Case No. 15-637-GA-CSS, the Commission finds that the arbitration provision of the reasonable arrangement should be suspended until further ordered by the Commission, that Orwell Natural Gas Company's request for refunds should be denied, that the reasonable arrangement should be modified as set forth in this Opinion and Order, that Orwell-Trumbull Pipeline Company, LLC should file an application pursuant to R.C. Chapter 4909 to establish just and reasonable rates for service, and that the subject matter of Case No. 14-1709-GA-COI should be expanded to include an investigation of all pipeline companies owned or controlled by Richard Osborne.

II. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} On December 19, 2008, the Commission approved a reasonable arrangement, pursuant to R.C. 4905.31, between Orwell-Trumbull Pipeline Company, LLC (OTP or OTPC) and Brainard Gas Corporation (Brainard) and Orwell Natural Gas

Company (Orwell or ONG) (Agreement).<sup>1</sup> *In re Orwell-Trumbull Pipeline Co., LLC*, Case No. 08-1244-PL-AEC (08-1244), Entry (Dec. 19, 2008). At the time the Agreement was approved, Orwell and OTP were both owned and controlled by Richard Osborne, with officers of the companies, under Richard Osborne's direction, who signed the Agreement. Since the approval of the Agreement, there have been legitimate concerns as to whether the Agreement was an arm's-length transaction. Under the Agreement, OTP provides gas transportation service through its pipeline system to Orwell, on an interruptible basis, for a period of 15 years, with rates adjusting every five years, and using OTP as the required pipeline source for gas transmission (sole source). The Agreement also provides that all disputes arising under the Agreement will be resolved through binding arbitration.

{¶ 3} On September 19, 2014, and March 31, 2015, Orwell filed complaints in Case No. 14-1654-GA-CSS (14-1654) and Case No. 15-637-GA-CSS (15-637), respectively, against OTP pursuant to R.C. 4905.26 and 4929.24. Both complaints relate to the Agreement.

{¶ 4} In 14-1654, Orwell alleged that OTP was threatening to shut off the transportation of gas to Orwell because OTP claimed Orwell had failed to pay two invoices for service.

{¶ 5} In 15-637, Orwell states that the Agreement is currently detrimental to ratepayers within its system and Orwell should be under a standard tariff rate for transportation services. Orwell claims that it has attempted, without success, negotiations with OTP to set a new rate. OTP filed answers to both complaints, denying the material allegations.

---

<sup>1</sup> While the Agreement included Brainard, the complaints do not include Brainard as a party.

{¶ 6} By Entries of December 11, 2014, and June 18, 2015, the attorney examiner granted the Ohio Consumers' Counsel's (OCC) motions to intervene in 14-1654 and 15-637, respectively, and consolidated both cases for hearing.

{¶ 7} The parties participated in a settlement conference on March 10, 2015, and July 9, 2015, and the hearing was held on November 3 and 4, 2015.

{¶ 8} At the commencement of the hearing, OTP moved to stay the hearing pending the conclusion of an arbitration proceeding it had commenced involving claims that Orwell breached the Agreement and a demand for damages (OTP Ex. 2 at 1-3). The attorney examiner denied OTP's motion and the hearing proceeded. On November 9, 2015, OTP filed a request for certification of an interlocutory appeal of the attorney examiner's denial of the motion to stay the hearing. On November 12, 2015, Orwell moved for an order suspending the arbitration provision of the Agreement and filed, on November 16, 2015, a memorandum contra OTP's motion for certification of the interlocutory appeal. On November 19, 2015, OTP filed a memorandum contra Orwell's motion to suspend the arbitration provision of the Agreement.

### III. DISCUSSION

#### A. *Applicable Law*

{¶ 9} Orwell is a natural gas company as defined by R.C. 4905.03(E), and OTP is a pipeline company as defined by R.C. 4905.03(F). Both Orwell and OTP are public utilities as defined by R.C. 4905.02. As such, Orwell and OTP are both subject to the jurisdiction of the Commission pursuant to R.C. 4905.04 and 4905.05.

{¶ 10} R.C. 4905.22 provides that every public utility shall furnish service and facilities that are adequate, just, and reasonable and that all charges made or demanded for any service be just, reasonable, and not more than allowed by law or by order of the Commission. R.C. 4905.26 requires, among other things, that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that

any rate, charge, or service rendered is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.

{¶ 11} R.C. 4905.31 provides that a public utility may establish a reasonable arrangement with another public utility over the rates and terms for transportation services that are subject to the approval of the Commission. R.C. 4905.31 also provides that every "such schedule or reasonable arrangement shall be under the supervision and regulation of the [C]ommission, and is subject to change, alteration, or modification by the [C]ommission."

{¶ 12} In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, in cases such as these, it is the responsibility of the complainant to present evidence in support of the allegations made in the complaint.

**B. *Orwell's Motion for an Order Suspending the Arbitration Provision***

{¶ 13} After the hearing, on November 12, 2015, Orwell moved for an order suspending the arbitration provision of the Agreement, which provides that: "the parties agree that any dispute arising hereunder or related to this [A]greement shall be resolved by binding arbitration under the auspices of the American Arbitration Association" (Orwell Ex. 1, Attachment A). In its motion, Orwell argues that the Commission should suspend the arbitration provision until the Commission issues an order in the complaint cases. Orwell asserts that R.C. 4905.06 and 4905.31 vest exclusive jurisdiction over reasonable arrangements in the Commission; however, the arbitrator is attempting to exercise jurisdiction over the Agreement and matters within the exclusive jurisdiction of the Commission. Additionally, Orwell notes that the Commission is granted broad and plenary power to supervise, regulate, and monitor almost every aspect of the operations and charges of public utilities. *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St.3d 340, 2008-Ohio-849, 884 N.E.2d 1, ¶ 19 ("The [C]ommission



has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except this court) any jurisdiction over such matters.”). Orwell also argues that, although the Commission approved the Agreement, which contains the arbitration provision, the Commission cannot divest itself of its statutory authority. (Orwell Motion for Suspension at 2-4; Orwell Brief at 22-23.) Orwell asserts that, because the Commission has authority to modify or terminate any agreement under R.C. 4905.31, and R.C. 4905.26 governs these cases, the Commission should suspend the arbitration provision to prevent the arbitrator from making any rulings that would ultimately affect Orwell’s regulated ratepayers (Orwell Motion for Suspension at 3-5; Orwell Brief at 24).

{¶ 14} OTP contends that the arbitration proceeding is the proper forum for determining the issues in these cases. According to OTP, the Commission has no authority to enjoin another tribunal, no authority to issue declaratory judgments, and no authority to suspend the operation of provisions of a valid contract. (OTP Memo Contra at 2-3.) OTP claims that the language in the arbitration provision defines the powers of the arbitrator. OTP contends that, in these cases, the jurisdiction of the arbitrator is defined by the contract and the contract permits the arbitrator to exercise the same authority that this Commission possesses to modify, change, or alter the Agreement. (OTP Memo Contra at 5-6.) OTP further argues that R.C. 2711.02(B) provides that a court “shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement.” OTP claims that the arbitration provision is severable from the Agreement, and that, even if the Commission voids the Agreement, the arbitration provision would not be set aside. OTP further contends that the public policy of Ohio encourages the use of arbitration to settle disputes and failing to enforce an arbitration provision in the Agreement, threatens to undermine public confidence in contracts approved by the Commission. (OTP Memo Contra at 12-15.)

{¶ 15} In its brief, OCC contends that the Agreement was approved by the Commission under R.C. 4905.31, and there is no dispute that the Commission has authority to regulate, supervise, and modify the Agreement under R.C. 4905.31. OCC claims that these cases meet the Ohio Supreme Court's two-pronged test for a determination of whether the Commission has jurisdiction over an issue. *Allstate Insur. Co. v. The Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824. This test requires that the act being complained of is typically authorized by the utility and that the Commission's expertise must be necessary to resolve the issue. According to OCC, these cases deal with the transportation of natural gas and the terms and conditions of a special arrangement, which are matters under the authority of the Commission. Resolving these complaints requires the interpretation of statutes, regulations, and tariffs that are wholly under the jurisdiction of the Commission and its expertise regarding complex natural gas issues arising between a natural gas distribution company and a natural gas pipeline company. (OCC Brief at 5-6.) OCC noted that the Commission has recently determined that when contractual issues involve service quality and utility regulations, the matters fall within the Commission's jurisdiction. *In re Ohio Schools Council d.b.a. Power4Schools v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS (*Power4Schools Case*), Entry (Nov. 18, 2015) at 5. Therefore, OCC asserts that arbitration is not the proper forum to resolve these complaints, as the *Allstate* test requires that the Commission's expertise is necessary to resolve the complaints. (OCC Brief at 5-6.)

{¶ 16} Staff agrees with Orwell and OCC that arbitration is not the proper forum to resolve the issues in these complaints. In its brief, Staff contends that 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. Staff notes that, in *In re Complaint of Pilkington N. Am., Inc.*, 145 Ohio St.3d 125, 2015-Ohio-4797, 47 N.E.3d 786, the Ohio Supreme Court reaffirmed this view when it held that R.C. 4905.26 confers

exclusive jurisdiction on the Commission to adjudicate complaints filed against public utilities challenging any rate or charge as unjust, unreasonable, or in violation of law. Staff asserts that, in *Corrigan v. The Cleveland Elec. Illuminating Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 8-10, the Ohio Supreme Court held that the Commission is the proper forum to resolve service-related issues regarding public utilities. Staff believes that mandatory arbitration may be appropriate under certain circumstances. Staff notes that the Commission's rules provide for mediation and arbitration. However, Staff notes that the Commission explicitly retains the right to proceed with a formal complaint pending before it and parties retain the same rights of rehearing and appeal as with any other Commission order. (Staff Reply Brief at 30.)

{¶ 17} Upon review, the Commission finds that the arbitration provision of the Agreement should be suspended until further ordered by the Commission. There is no dispute that R.C. 4905.31 vests jurisdiction over reasonable arrangements with the Commission. R.C. 4905.31 provides that every reasonable arrangement shall be under the supervision and regulation of the Commission and is subject to change, alteration, or modification by the Commission. While OTP is correct that the powers of the arbitrator are defined by the parties through the language contained in the arbitration provision of the Agreement, the arbitration provision is one clause of the Agreement that was approved by the Commission and over which the Commission retains jurisdiction. Further, as provided by *Corrigan*, the issues in these complaints are rate-related and service-related issues for which the Commission, and not an arbitrator, is in the best position to determine appropriate responsibilities, rights, and remedies.

{¶ 18} In addition, as noted by OCC, the Ohio Supreme Court adopted, in *Allstate*, a two-part test to determine whether the Commission has exclusive jurisdiction over a claim. Under *Allstate*, the Commission must determine: "First, is [the Commission's] administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the

utility?" *Allstate*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, at ¶ 12. "If the answer to either question is in the negative, the claim is not within [the Commission's] exclusive jurisdiction." *Allstate* at ¶ 13.

{¶ 19} Recently, the Commission applied the *Allstate* two-part test in a case in which one of the parties moved to dismiss the complaint, asserting the Commission was the improper forum. *Power4Schools Case*, Entry (Nov. 18, 2015). In that case, the Commission examined a nearly identical issue. In the *Power4Schools Case*, the Ohio Schools Council claimed that FirstEnergy Solutions (FES) failed to disclose charges in a contract they had entered into and that the charges were unfair, misleading, and deceptive. FES moved to dismiss the complaint and argued that the issue in the complaint was a pure contract claim and within the jurisdiction of the courts, not the Commission. The Commission initially noted that "[i]t is the responsibility of the Commission to ensure the state's policy of protecting customers against unreasonable sales practices from retail electric service is effectuated," citing R.C. 4928.02(I) and 4928.06(A). *Power4Schools Case* at 4. The Commission denied FES's motion to dismiss, finding that, under the *Allstate* two-part test, the administrative expertise of the Commission was required to resolve the issue in dispute and that the act complained of constituted a practice normally authorized by the utility. *Power4Schools Case* at 5-7. The Commission also noted that the Commission has jurisdiction to hear any complaint regarding a violation of R.C. 4928.10 and any rules under that section, citing R.C. 4928.16(A)(2) and R.C. 4905.26. *Power4Schools Case* at 4.

{¶ 20} In the instant cases, Orwell filed two complaints against OTP. In its request for relief in 14-1654, Orwell requests, in Count 3, that the Commission find that the two invoices OTP sent to it were not in compliance with OTP's tariff and/or the Agreement; and, in Count 4, Orwell requests that a stay be enforced to prevent the shutoff of gas service to residential and commercial customers of Orwell. In 15-637, Orwell requests, in Count 1, that the Commission determine that it has exclusive

jurisdiction with respect to the Agreement and all provisions; in Count 2, Orwell requests that the Agreement, as approved by the Commission, be reevaluated and/or readdressed to determine more suitable arrangements for both parties and consumers, including termination of the Agreement; and, in Count 3, Orwell requests that the Commission require OTP to file new tariff rates for transportation services.

{¶ 21} Applying the first part of the two-part test in *Allstate*, the Commission's administrative expertise is necessary to resolve the issues. Orwell is a natural gas company under R.C. 4905.03 and OTP is a pipeline company under R.C. 4905.03, and both are public utilities pursuant to R.C. 4905.02. As such, Orwell and OTP are subject to the jurisdiction of the Commission. In addition, R.C. 4905.26 gives the Commission exclusive jurisdiction over service-related issues regarding public utilities. *Corrigan*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, at ¶ 8-10. Further, the issues in dispute in these cases include the transportation of natural gas, natural gas pipeline systems, the appropriateness of the rates charged for natural gas transportation service, whether transportation service should be provided on a firm or interruptible basis, and whether gas service should only be provided by one party. The 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.

{¶ 22} Applying the second part of the two-part test in *Allstate*, the acts complained of constitute practices normally authorized by a utility. The matter of service falls under the Commission's jurisdiction. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953. The issues in the complaints involve the transportation of natural gas by OTP, which is subject to the Commission's jurisdiction in accordance with R.C. 4905.06 and 4905.90 through 4905.96;

whether the transportation service should be firm or interruptible; whether OTP should be the sole source for such service; and whether the rates charged by OTP for the transportation of natural gas to Orwell are reasonable. These are practices normally provided by regulated pipeline companies according to rates established in tariffs approved by the Commission. Thus, the acts complained of by Orwell are practices that OTP is normally authorized to do.

{¶ 23} Therefore, both prongs of the *Allstate* test are met and these complaints are properly within the Commission's exclusive jurisdiction. Accordingly, the Commission, and not an independent arbitrator, has exclusive jurisdiction to render a decision on the complaints.

C. *OTP's Interlocutory Appeal*

{¶ 24} As noted previously, OTP filed an interlocutory appeal of the attorney examiner's ruling denying its motion to stay the hearing on the complaints until the conclusion of an arbitration proceeding. OTP claimed that the interlocutory appeal should be certified because the issue of whether the Commission should enforce an arbitration provision in an agreement approved by the Commission, rather than proceed to hearing, is a new and novel issue. OTP argued that the attorney examiner's ruling threatens to contravene the public policy of Ohio by failing to encourage the use of arbitration to settle disputes, failing to enforce an arbitration provision contained within a contract, and failing to enforce the terms of a contract as written. In addition, OTP claimed that the ruling threatens to undermine public confidence in Commission-approved contracts.

{¶ 25} Upon review of the interlocutory appeal filed by OTP, we find insufficient basis to reverse the ruling of the attorney examiner denying OTP's motion to stay the hearing. Notwithstanding the fact that the Commission approved the Agreement with a provision requiring disputes to be resolved through binding

arbitration as a dispute resolution mechanism, R.C. 4905.31 provides that the Commission retains jurisdiction over all agreements approved under that section. That jurisdiction includes issues of whether the Agreement and the terms of the Agreement are reasonable and in the best interests of Orwell and OTP and their ratepayers. Our approval of the Agreement, which contains an arbitration clause, does not relieve the Commission from its statutory jurisdiction over these two public utilities or transfer our jurisdiction over the Agreement to a third-party arbitrator, outside the jurisdiction of the Commission. In any event, as discussed above, the Commission finds that the arbitration provision of the Agreement should be suspended until further ordered by the Commission.

*D. Discussion of 14-1654-GA-CSS - Complaint on Two Unpaid Invoices*

{¶ 26} The complaint in 14-1654 involves two unpaid invoices for \$2,670,130.73, issued by OTP to Orwell on September 8, 2014, relating to transportation service through OTP's two-inch gathering lines. At the hearing, OTP advised the Commission that the two invoices "were improvidently sent and were withdrawn" (Tr. at 7-8; OTP Ex. 1). OTP also indicated that it no longer was requesting payment for the two invoices and it confirmed that it no longer would attempt to invoice Orwell for similar services or charges in the future. As such, OTP believed the complaint in 14-1654 was resolved. (Tr. at 7-13.) Orwell explained that, while it was satisfied that the issues raised in 14-1654 had been resolved, it requested the Commission declare that the charges were unjust and unreasonable and order OTP not to issue similar invoices to Orwell in the future. Orwell also requested compensation for legal fees incurred in preparation for the hearing (Tr. at 8). OCC recommended that the Commission not dismiss the complaint, but rather issue an order requiring that OTP not bill Orwell for the two-inch gathering lines in any future proceeding.

{¶ 27} As OTP has withdrawn the two invoices that constituted the basis for the complaint in 14-1654, and OTP confirmed that it will no longer invoice Orwell for

similar services or charges in the future, the complaint in 14-1654 should be dismissed. We note that, historically, the Commission has not awarded legal fees to any party to a complaint case and we find insufficient basis to do so here. Therefore, Orwell's request for compensation for legal fees associated with 14-1654 should be denied.

E. *Discussion of 15-637-GA-CSS - Commission's Authority to Modify or Terminate the Agreement*

{¶ 28} As noted in 15-637, Orwell is requesting the Commission to re-evaluate the Agreement to determine a more suitable arrangement for both parties and consumers, including termination of the Agreement, as it claims it is currently detrimental to ratepayers within its system and Orwell should be under a standard tariff rate for transportation service. OTP claims that the Commission lacks jurisdiction to modify the Agreement. OTP also argues that the Commission has itself questioned whether R.C. 4905.31 allows it to vacate contracts that it previously approved. OTP cites to Case No. 75-161-EL-SLF, where it argues the Commission questioned whether the power to "change, alter, or modify" found within R.C. 4905.31 actually grants this Commission the power to vacate a contract. *In re Ohio Power Co.*, Case No. 75-161-EL-SLF (*Ohio Power Case*), Entry (Aug. 25, 1975), Opinion and Order (Aug. 4, 1976). OTP argues that, in the *Ohio Power Case*, the Commission dismissed a complaint to cancel a contract between Ohio Power Company and Ormet Primary Aluminum Corporation and Kaiser Aluminum and Chemical Corporation. (OTP Brief at 7-8, 11-14.) OTP notes that, in the *Ohio Power Case*, the Commission referenced an earlier finding that "the remedy of cancellation was not specifically contemplated by Section 4905.31" (OTP Brief at 7).

{¶ 29} OTP also notes that the Commission relied, in part, upon the *Mobile-Sierra* doctrine in the *Ohio Power Case* (OTP Brief at 7-8). See also *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Federal Power Comm. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The *Mobile-Sierra* doctrine is a federal doctrine that provides



that a rate that is a result of a freely negotiated contact is presumed to be "just and reasonable" and may only be upset if that presumption is rebutted by evidence demonstrating that it is contrary to the public interest (Staff Reply Brief at 12). OTP argues that Orwell is subject to a high burden, in requesting that the Commission modify a contract, and that it must be in the public interest, pursuant to the *Mobile-Sierra* doctrine as applied in the *Ohio Power Case* (OTP Brief at 8). OTP contends that neither Orwell nor OCC has demonstrated that the Agreement impairs Orwell's ability to provide service, creates an excessive burden on customers, or creates unjust discrimination (OTP Brief at 7-8, 11-14). Therefore, OTP contends neither Orwell nor OCC has introduced sufficient evidence to meet the standards set forth in the *Ohio Power Case* or *Mobile-Sierra* and there are not reasonable grounds for this complaint (OTP Brief at 9, 12).

{¶ 30} Orwell argues that the *Mobile-Sierra* doctrine is not the law in Ohio, the Ohio Supreme Court has never adopted the *Mobile-Sierra* doctrine, and the doctrine is inapplicable in this case (Orwell Reply Brief at 2-3). Orwell maintains that the facts and law from *Sierra* and *Mobile* are inconsistent with the instant case because *Mobile* and *Sierra* involved interpretations of federal statutes, which are not involved in this case, neither case involved a state statute, and there was no complaint filed in either *Mobile* or *Sierra* challenging the reasonableness of a special arrangement (Orwell Reply Brief at 3-4).

{¶ 31} In addition, Orwell argues that the *Ohio Power Case* is the only case where the Commission applied the *Mobile-Sierra* doctrine. Orwell maintains that the facts of the *Ohio Power Case* are distinguishable from the instant case because there was no evidence in the *Ohio Power Case* that the contracts would potentially cause system reliability problems, that the contracts were not the result of an arm's-length transaction, or that the contracts were detrimentally affecting the rates paid by other customers. (Orwell Reply Brief at 5-7.) Additionally, Orwell notes that OTP's

references to constitutional concerns are not founded in the *Mobile-Sierra* doctrine (Orwell Reply Brief at 12, citing *Mobile*, 350 U.S. 332, 337-338). In fact, as further noted by Orwell, the Ohio Supreme Court has held that the U.S. and Ohio Constitution Contract Clause prohibitions do not affect the Commission's proper exercise of its police powers (Orwell Reply Brief at 12, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038; *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).

{¶ 32} According to Orwell, the Ohio Supreme Court recently addressed the Commission's broad authority to modify reasonable arrangements pursuant to R.C. 4905.31. *In re Ormet Primary Aluminum Corp.*, 129 Ohio St.3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶36 (holding that R.C. 4905.31 gives the Commission, and not utilities, final say over these types of arrangements). Orwell notes that the Ohio Supreme Court also addressed the Commission's authority under R.C. 4905.31 in *In re Martin Marietta Magnesia Specialties v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104. Orwell notes that the primary dispute in *Martin Marietta* was the Commission's determination of a termination date in customers' reasonable arrangements with The Toledo Edison Company. Orwell explained that, although the Court found the Commission did not invoke its authority to modify the reasonable arrangements under R.C. 4905.31, the Court specifically held that "[t]here is no dispute that pursuant to R.C. 4905.31, the [C]ommission has authority to regulate, supervise, and modify special contracts." *Martin Marietta* at ¶ 32. (Orwell Reply Brief at 7-8.)

{¶ 33} OCC recommends the Commission set aside the Agreement, which it believes would not be a violation of the *Mobile-Sierra* doctrine. OCC notes that the *Mobile-Sierra* doctrine is a federal constitutional doctrine that allows the Federal Energy Regulatory Commission (FERC) to change or adjust independently bargained rate setting contracts only when "the rate is so low as to adversely affect the public interest -

as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.” (OCC Reply Brief at 2-3, citing *Federal Power Comm. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956)). In addition, OCC asserts that the *Mobile-Sierra* doctrine rests on the premise that the contract was a fair, arm’s-length negotiation, which it believes did not exist in this case (OCC Ex. 2 at 11). OCC contends that, even if the doctrine was applied, there is sufficient evidence to show that the Agreement violates the public interest standard because of the harm that it has caused to Orwell’s residential consumers from higher rates (OCC Brief at 2-3). OCC argues that the Agreement was not a result of an arm’s-length transaction, for several reasons, including both signatories to the contract reported to Richard Osborne; Mr. Tom Smith, who signed the Agreement on behalf of Orwell, had signed a contract on behalf of OTP six months prior; and OTP employee depositions demonstrated that both Mr. Rigo (signatory for OTP) and Mr. Smith (signatory for Orwell) did work for each company and did not make distinctions between the companies (OCC Brief at 7-8).

{¶ 34} Staff argues that R.C. 4905.31 grants the Commission broad authority over the approval and supervision of reasonable arrangements between utilities and customers. Staff contends that, pursuant to R.C. 4905.31, every reasonable arrangement shall be under the supervision and regulation of the Commission and is subject to change, alteration, or modification by the Commission. Staff points out that the Ohio Supreme Court has held in *Martin Marietta* that, pursuant to R.C. 4905.31, the Commission has authority to regulate, supervise, and modify special contracts, while *Ormet* authorizes the Commission to modify or change the terms of a reasonable arrangement without the consent of the utilities. *Martin Marietta* at ¶ 32; *Ormet* at ¶ 36. (Staff Reply Brief at 10-11.)

{¶ 35} Staff also argues that OTP’s reliance on *Mobile-Sierra* is misplaced. Staff notes that the *Mobile-Sierra* doctrine depends on interpretations of the Natural Gas Act

and Federal Power Act, not Commission precedent or Ohio law, and that the statutory authority granted to the Commission is fundamentally different than that granted to either FERC or its predecessor, the Federal Power Commission (FPC). Staff also notes that the statute that authorizes the creation of reasonable arrangements specifies that they are subject to change or modification by the Commission, a power not granted to FERC or FPC. (Staff Reply Brief at 13-14.)

{¶ 36} As noted by Orwell, OCC, and Staff, the Ohio General Assembly granted the Commission broad authority, through R.C. 4905.31, over the approval and supervision of reasonable arrangements between a public utility and another public utility or one or more of its customers. 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. This Agreement is no different. OTP and Orwell filed the application in 08-1244 for approval of the Agreement under R.C. 4905.31 and the Commission approved the application under its jurisdiction pursuant to R.C. 4905.31. Furthermore, the Ohio Supreme Court has stated in *Ormet* and *Martin Marietta* that R.C. 4905.31 authorizes the Commission to regulate, supervise, and modify a reasonable arrangement and change the terms of the arrangement without the consent of the public utility. *Martin Marietta* at ¶ 32; *Ormet* at ¶ 36.

{¶ 37} In addition, as noted by Staff, while OTP cited to *Mobile-Sierra*, that doctrine is inapplicable to the present case. *Mobile-Sierra* involves interpretations of the Natural Gas Act and Federal Power Act, not Commission precedent or Ohio law. This distinction is important because the power granted to the Commission is fundamentally different than that granted to either FERC or FPC.

{¶ 38} The federal statutes at issue in the *Mobile-Sierra* doctrine, as noted by Staff, are quite different than the authority given to the Commission under R.C. 4905.31, as the Ohio statute explicitly provides for the Commission's authority to change, alter, or

modify schedules or reasonable arrangements under our supervision. Further, the Ohio Supreme Court has clearly affirmed this interpretation when it found that “[t]here is no dispute that pursuant to R.C. 4905.31, the [C]ommission has authority to regulate, supervise, and modify special contracts.” *Martin Marietta* at ¶ 32. The Ohio Supreme Court has never considered or adopted the application of the *Mobile-Sierra* doctrine to a matter arising under R.C. 4905.31. Therefore, this Commission finds that the *Mobile-Sierra* doctrine is not applicable to reasonable arrangements approved under R.C. 4905.31, and further the Commission’s application of the *Mobile-Sierra* precedent in *Ohio Power Case*, Entry (Aug. 25, 1975), Opinion and Order (Aug. 4, 1976) was misplaced and is overturned explicitly by this Commission’s decision today. While in the *Ohio Power Case* it appeared the Commission adopted the *Mobile-Sierra* doctrine’s public-interest test for modification of the contract, no such finding is required under Ohio law or contemplated by Ohio statute.

{¶ 39} We believe that our responsibility to the parties is to examine the evidence related to the Agreement and examine whether the modifications sought by Orwell are justified. While OCC recommended the Agreement be set aside, we do not believe that terminating the Agreement is in the best interests of the parties. These two public utilities have an interest in maintaining commercial ties and we believe that it is in the best interests of OTP and Orwell and their customers that they maintain a working relationship. The more prudent approach is to examine the portions of the Agreement that are in dispute and determine, based on the evidence, whether those provisions should be changed, altered, or modified.

**F. Modification of the Agreement in 15-637-GA-CSS**

{¶ 40} In its complaint in 15-637, Orwell argues there are four provisions of the Agreement that are no longer reasonable. These include interruptible service, the sole-source provision, the 15-year term of the Agreement, and the rates charged by OTP. We will also consider Orwell’s request that the Commission direct OTP to file a new

standard transportation tariff, order a refund for excessive charges for natural gas transportation services during the term of the Agreement, and conduct an investigation into the management practices and policies of all of the pipeline companies owned and/or controlled by Richard Osborne, who owns and/or controls OTP's intrastate pipelines. We first address the portion of the Agreement related to interruptible service.

1. INTERRUPTIBLE SERVICE

{¶ 41} Section 1.1 of the Agreement provides that: "OTP shall then redeliver, on an interruptible basis such quantities, less OTP's shrinkage, to shipper" (Orwell Ex. 1, Attachment A).

{¶ 42} Orwell argues that the Agreement is unjust and unreasonable because it provides for interruptible service, rather than firm service.<sup>2</sup> Orwell maintains that firm service is necessary because it ensures gas will be available for its customers 24 hours a day, 365 days a year; whereas, interruptible service may be unavailable at any time including during the coldest part of the winter heating season when pipeline capacity is in high demand. (Orwell Ex. 1 at 7-8; OCC Ex. 2 at 12.) Orwell asserts that it is not appropriate for a local distribution company (LDC) to rely solely upon interruptible service for residential customers during the winter or peak-heating season. It claims that both Staff and OCC similarly agree that firm transportation service is essential for gas cost recovery (GCR) customers, who are primarily residential customers. (Tr. at 188.) Orwell witness Zappitello testified that he is responsible for all gas procurement for Orwell, Northeast, and Brainard; that he is responsible for system balancing for the Ohio utilities; and that, when he purchases gas for residential customers, he relies on firm transportation if possible (Orwell Ex. 1 at 2-3; Tr. at 31).

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<sup>2</sup> As noted by Orwell witness Zappitello, "[i]nterruptible your supply could be cut. Firm contract guarantees the deliverability outside of a force majeure" (Tr. at 31).

{¶ 43} Orwell maintains that OTP is charging Orwell for interruptible service at rates that are unjust and unreasonable and far in excess of what it charges for firm service to other customers. Orwell notes that OTP charges Orwell \$1.01 per thousand cubic feet (Mcf) for interruptible transportation service, which is more than any other entity taking transportation service from OTP. According to Orwell, other similar intrastate pipelines charge substantially lower transportation rates than OTP. (Orwell Ex. 1 at 15.) For example, Orwell notes that both Spelman Pipeline Holdings, LLC (Spelman) and Cobra Pipeline Co. LTD (Cobra) both charge \$0.50 per dekatherm (Dth) for interruptible transportation service (OCC Ex. 2 at 16; Orwell Ex. 1 at 16). Further, Orwell notes that Great Plains Exploration, LLC (Great Plains) is charged \$0.95 per Mcf for 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 (Orwell Ex. 1 at 13; OCC Ex. 2 at 20-21; Orwell Brief at 11-12).

{¶ 44} Staff argues that interruptible service is an inferior service to firm service (Tr. at 30-31). Staff believes that using interruptible transportation to serve residential customers is inappropriate and that the Commission does not favor LDCs relying on interruptible service to serve residential customers, especially during the peak, winter heating season (Tr. at 188). Staff witness Sarver noted that the Commission generally reviews gas transportation contracts or agreements between LDCs and pipeline companies to confirm that the agreements are consistent with the Gas Transportation Program Guidelines that were established by the Commission in Case No. 85-800-GA-COI (Tr. at 183). According to Staff, those guidelines were the basis for all Ohio utilities' transportation tariffs and provide that residential and public welfare customers must have adequate backup or a reliable alternative supply "sufficient to maintain minimal operations" (Staff Reply Brief at 20-21). Staff argues that no LDCs, including Orwell, should be permitted to serve residential customers using interruptible transportation absent reliable, firm backup. Staff recommends the Commission modify

the Agreement to require that the transportation service provided by OTP to Orwell be firm and not interruptible (Staff Reply Brief at 19-21).

{¶ 45} OTP argues the Agreement provides for fully interruptible service because Orwell prefers contracts for interruptible service, rather than firm service, for the reason that interruptible service is less expensive (Tr. at 139-143; OTP Reply Brief at 14). OTP claims that, more importantly to the Commission, the interruptible nature of the service is a practical irrelevancy, for purposes of the Agreement, because the issue of firm versus interruptible transport is significant only when a pipeline is constrained and, therefore, unable to accept a nominated quantity. OTP contends that there is no constraint on OTP's pipeline that will impact Orwell. OTP argues that this is because OTP's pipeline was constructed for the specific purpose of serving Orwell. As a result, OTP asserts that, in the ten years that OTP has been in service, OTP has never rejected any Orwell nomination of natural gas for transport. (OTP Reply Brief at 16.)

{¶ 46} The evidence shows that Orwell's customers include residential customers, who rely upon gas service at all times throughout the year (Tr. at 188). Orwell's customers should not be placed in the position of receiving gas through a pipeline system on an interruptible basis (Orwell Ex. 1 at 2-3; Tr. at 31). We very much disagree with OTP's position that "the interruptible nature of the service is a practical irrelevancy." As Orwell's customers include residential customers, we find it inappropriate that the service provided by OTP is interruptible, as such service is inconsistent with our guidelines (Tr. at 183). No residential customer who is dependent upon gas service and who relies upon that service and who assumes such service will be forthcoming, should be placed in the same position as a customer that agrees to interruptible service. As noted by Staff, the Commission's gas transportation guidelines provide that residential and public welfare customers must have adequate backup or a reliable alternative supply. *In re Commission Ordered Investigation*, Case No. 85-800-GA-COI, Entry on Rehearing (Nov. 2, 1995). No LDCs, including Orwell, should be



permitted to serve residential customers using interruptible transportation absent reliable, firm backup. Thus, we find it is inappropriate to place Orwell in the position of providing gas service to its residential customers on an interruptible basis, where the supply could be cut. Accordingly, Section 1.1 of the Agreement should be modified to direct that OTP provide firm, rather than interruptible service. We next turn to the provision that requires OTP to be the sole source for service.

## 2. SOLE-SOURCE REQUIREMENT

{¶ 47} Section 1.2 of the Agreement provides the terms for OTP to provide gas service to Orwell. Under the Agreement, Orwell agrees that during the term of the Agreement:

It will use only OTP's pipelines to transport gas for any of its customers, provided, however, that this exclusive use of the OTP pipelines shall remain in effect as long as OTP has available capacity within its pipelines. Should available capacity not exist, then during that period only ONG may use other pipelines to transport its gas requirements. (Orwell Ex. 1, Attachment A at 4.)

{¶ 48} Orwell argues that the sole-source provision is unjust and unreasonable because it prevents Orwell from ensuring system reliability for its residential customers and it limits Orwell's ability to access competitive supply options because it forces it to rely exclusively on OTP (Orwell Brief at 14). According to Orwell, system reliability problems have arisen due to Orwell's overreliance on OTP. Orwell claims that, in order to maintain adequate pressure levels on OTP's system, it has to purchase more gas than it needs during the winter, which results in a large positive imbalance for Orwell on OTP's system. (Orwell Ex. 1 at 11.) Orwell witness Zappitello explained that OTP's pressure problems are caused because the gas flowing from North Coast Gas Transmission (North Coast) to OTP must travel a great distance. He also

indicated that, 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 or no gas pressure. (Orwell Ex. 1 at 11-12.)

{¶ 49} Orwell witness Zappitello also testified how the extremely cold temperatures of the 2014 Polar Vortex resulted in a substantial increase in expected gas usage and depletion of Orwell's available gas supply (Orwell Ex. 1 at 10-11). He explained that, on February 24, 2014, Orwell sought bids for its March 2014 gas requirements for delivery into North Coast and redelivery into OTP (Orwell Ex. 1 at 10). He noted that Orwell would typically have both BP Canada (BP) and North Coast as supply options; however, North Coast's supplies were exhausted and BP had insufficient gas supplies to meet Orwell's requirements (Orwell Ex. 1 at 10). Orwell claimed that, because it still had to obtain the remaining volumes needed to supply customers for March, Orwell decided to tap Spelman's line into Cobra's line (Orwell Ex. 1 at 10-11). According to Orwell, this allowed Orwell to increase pressures on Cobra to feed OTP; however, this forced Orwell to acquire abnormally expensive gas from BP (Orwell Ex. 1 at 11).

{¶ 50} In addition, Orwell contends that the sole-source provision of the Agreement also limits its ability to consider alternative supply sources because Orwell must rely primarily on supply sources that required access only through OTP (Orwell Ex. 1 at 7). Orwell claims that the sole-source provision forces Orwell to rely on supply sources that deliver gas from the west of Orwell's system 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 The East Ohio Gas Company d/b/a Dominion East Ohio (DEO). Orwell argues that it could obtain more competitive gas commodity prices if it could use DEO as an alternative transportation source. (Orwell Ex. 1 at 8; OCC Ex. 4 at 116-117.) Orwell also claims that it could alleviate system reliability

issues and it would have substantially lower gas supply costs if it could transport gas on DEO's system (Orwell Ex. 1 at 14-15). Orwell witness 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 DEO was substantially lower at -\$0.756 per Mcf (Orwell Ex. 1 at 14). He determined that Orwell would have saved \$230,065.52 over a 12-month period if it would have purchased supplies transported by DEO (Orwell Ex. 1 at 15).

{¶ 51} Staff contends that the record evidence justifies a finding that the sole-source provision negatively affects Orwell's ability to serve its customers. Staff notes that Orwell previously had a firm transportation agreement with DEO that was not only both of better quality and more economical, but also allowed Orwell to pursue additional transportation options. According to Staff, the DEO agreement was abandoned and a number of interconnections into DEO were dismantled because of the Agreement. (Orwell Ex. at 7-8.) Staff agrees Orwell's problem could be minimized, if not eliminated altogether, if Orwell was able to contract for alternative transportation services.

{¶ 52} Staff witness Sarver testified that the sole-source provision limits Orwell's ability to bring more suppliers to market, and to better competitively source their supplies and respond to changes in the market. He also testified that sole-sourcing increases the risk of credit limitations, holding the company and its customers captive. (Tr. at 209.) Staff witness Sarver explained that gas delivered through DEO became substantially cheaper than gas transported on OTP in 2013 (Tr. at 206). This substantial decrease in the price of gas transported on DEO was caused by the availability of gas from the Marcellus and Utica shale gas formations. Staff witness Sarver also noted that the sole-source provision limits Orwell's ability to respond to changes in the conditions in the gas market. (Tr. at 205-206, 210.)

{¶ 53} OTP acknowledges that it is “undeniably true that together, the ‘sole’ source, ‘preferred source’, or ‘exclusive’ provision of the Contract, and the fifteen year term of the Contract, provide a significant benefit to OTP and impose a significant constraint upon ONG” (OTP Reply Brief at 18). However, OTP notes that these constraints/benefits are the very reasons that commercial entities enter into contracts in the first place. OTP asserts that Richard Osborne claimed in his deposition that OTP would never have been built in the first place if he was not confident that he would recover the \$15,000,000 he personally invested in the pipeline, and that the sole-sourcing and 15-year term provisions ensure he recovers that investment. (OCC Ex. 4 at 51-53.) OTP also claims that, at the time it entered into the Agreement, it could have raised its price for transport and still have allowed Orwell to remain competitive with DEO, but it was to Orwell’s benefit to obtain the lowest possible price (OTP Reply Brief at 18-19).

{¶ 54} OTP claims that, if the Commission concludes that these terms are unjust and unreasonable to the public at large today, it has the authority to protect the public yet leave the Agreement undisturbed, thereby requiring Orwell and OTP to each bear the consequences of the business choices each made. OTP argues the Commission need only order Orwell to absorb any unwarranted higher costs for natural gas. OTP claims that the Commission is not justified in setting aside commercially reasonable terms in a transportation contract merely because a lower priced source of the commodity has recently become available. OTP notes that, as the United States Supreme Court stated in *Morgan Stanley Group Inc. v. Public Utility Dist. No. 1*, 554 U.S. 527, 547 (2008): “It would be a perverse rule that rendered contracts less likely to be enforced when there is volatility in the market.” (OTP Reply Brief at 18-19.)

{¶ 55} OTP also asserts that the Commission must not modify the Agreement when Orwell has plainly revealed that there are operational changes available to it that would secure to Orwell an ability to access that lower-priced commodity without

disturbing the underlying Agreement (OTP Brief at 18-19). OTP asserts that the Commission possesses the authority to insulate Orwell's ratepayers against any imprudently incurred costs associated with Orwell's decision to enter into the Agreement. OTP argues that Orwell could exclude imprudent costs from the costs it recovers in its GCR rates. OTP contends that, since neither Orwell nor OCC introduced any evidence to suggest that Orwell would be unable to absorb such disallowances, in the event they would be imposed, it is clear that neither the element of "adverse public impact" nor the element of "unequivocal necessity" have been shown to exist. (OTP Brief at 17-18.) Lastly, OTP disputes Mr. Zappitello's claim regarding Orwell's transportation requirements during the 2014 Polar Vortex and notes that he acknowledged OTP is certainly capable of transporting the required amounts (Orwell Ex. 1 at 10; Tr. at 143-144). OTP contends that Orwell's inability to find a sufficient quantity of natural gas for March 2014 delivery was caused because Orwell did not seek natural gas until February 24, 2014, and that this was an operational issue caused solely by Orwell (OTP Brief at 16-17).

{¶ 56} The record in this case demonstrates a need for Orwell to have the option of arranging for transportation service with sources other than OTP. The evidence shows that the sole-source provision limits Orwell's ability to bring more suppliers to market and to competitively source their supplies. (Orwell Ex. 1 at 7.) While there may have been business reasons why this provision may have appeared reasonable at the time the Commission approved the Agreement, there is an insufficient basis for maintaining this provision and sufficient evidence that the provision is not in the best interests of Orwell customers. The evidence shows that the increase in costs to Orwell during the 2014 Polar Vortex created conditions that were detrimental to Orwell and its customers. Further, as noted by Staff, the overreliance on OTP causes reliability problems for Orwell. In addition, the elimination of the interconnections with DEO has exacerbated the overreliance on OTP. (Orwell Ex. 1 at 10-11; Tr. at 205-206.) We also find no merit to OTP's assertion regarding the business decision to construct a pipeline,

the ability to recover the costs of that pipeline, and potential sale of investments to other entities (OCC Ex. 4 at 51-53). Richard Osborne did not testify in this proceeding; as a result, we have insufficient evidence to understand the business decisions related to the construction of the pipeline, made at a time when Richard Osborne owned and/or controlled both OTP and Orwell. Further, OTP has the ability to file a rate case application to recover the valuation of property used and useful in rendering the public utility service for which rates are to be fixed and determined, pursuant to R.C. 4909.15.

{¶ 57} When we balance the impacts to Orwell and its customers of maintaining the sole-source provision, against the economic fortunes of OTP of eliminating that provision, we find that the elimination of this provision far outweighs retaining it and is in the best interests of the parties. As to OTP's suggestion that Orwell should pass all associated costs on to its customers through the GCR mechanism, we find no merit. We do not believe that an unreasonable term should remain in the Agreement or that Orwell's GCR customers should be responsible for an unreasonable financial load so that this term may continue to Orwell's detriment and OTP's benefit. Further, we believe that providing the alternative to Orwell of access to alternative suppliers will be in the best interests of Orwell and encourage OTP to provide gas transportation services at a more competitive level.

{¶ 58} Accordingly, Section 1.2 of the Agreement should be modified to eliminate the requirement for Orwell to only use OTP to transport gas for any of its customers. Having determined that the sole-source provision should be eliminated, we now examine the term of the Agreement.

### 3. 15-YEAR TERM

{¶ 59} Section 3.1 of the Agreement provides that the Agreement "shall continue in full force and effect, terminating 15 years thereafter and shall continue from

year to year thereafter, unless cancelled by either party upon 30 days written notice” (Orwell Ex. 1, Attachment A at 5).

{¶ 60} Orwell claims that a 15-year commitment is extremely burdensome and unreasonable from Orwell’s perspective. Orwell witness Zappitello testified that he has never entered into a 15-year transportation agreement for other utilities where he has worked. In addition, he stated that he is unaware of any other agreements executed by Orwell that are 15 years in length. Mr. Zappitello testified that year-to-year contracts are superior to longer-term contracts because shorter-term contracts allow the utility to adapt to changing market conditions. (Tr. at 33.) Mr. Zappitello also testified that gas supply options can change dramatically from year to year based upon market conditions, and gas utilities require flexibility in order to consider and choose from various options to provide the lowest cost gas to their customers (Orwell Ex. 1 at 9). Orwell witness Zappitello also indicated that, in his role as purchaser of gas for Orwell, he had never signed a contract with a 15-year term and was unaware of any other contracts that OTP or Orwell had of that length (Tr. at 3-14).

{¶ 61} Orwell contends that OTP failed to present any evidence supporting the reasonableness of a 15-year transportation contract. Further, Orwell argues that, based on statements made by Richard Osborne, it appears the only rationale for the 15-year term was to ensure that Richard Osborne received a guaranteed return on his \$15 million investment in OTP. (OCC Ex. 4 at 48-50.)

{¶ 62} Staff notes that the term of the Agreement is unusually long. Staff witness Sarver testified that an agreement of 15 years, coupled with a sole-source provision, limits the ability of Orwell to respond to changes or alterations in the market structure and commodity (Tr. at 210). Staff believes that the length of the Agreement, in addition to the sole-source provision and automatic rate adjustment provisions significantly disadvantages Orwell and its customers. (Staff Reply Brief at 27-28.)

{¶ 63} OTP contends that the Agreement satisfied the needs of both Orwell and OTP because it provides for long-term price stability for Orwell and OTP received a 15-year commitment to maximize its use of its system and an opportunity to adjust the price after the first five-year price freeze (OTP Brief at 15). OTP argues that Orwell's customers are also served by the Agreement because they continue to receive the benefit of gas at a price that was on average \$0.55 per Mcf lower than what they would have been required to pay at the same point in time from DEO. OTP maintains that the Agreement also benefits Orwell's customers by assuring the same rate for five years. (OTP Brief at 15-16.) OTP acknowledges that natural gas prices have declined since the signing of the Agreement; however, it contends that no one in the 2006-2008 period could have forecasted the market shift caused by the development of the Marcellus and Utica shales. OTP asserts that there was no evidence that suggests that the recent price disadvantage has been sufficiently large to offset the year in which Orwell customers enjoyed a price advantage by receiving their gas through Chicago, nor was there any evidence introduced to suggest how long this disadvantage is likely to continue. (OTP Brief at 16.)

{¶ 64} Upon review of the evidence, we are not convinced that the 15-year term of the Agreement is unreasonable, subject to the other modifications we ordered. We acknowledge that a 15-year term is longer than what we have generally approved and longer than other agreements negotiated by Mr. Zappitello, and does limit Orwell's ability to respond to changes or alterations in the market structure and commodity (Tr. at 33). On the other hand, there is evidence that Orwell may have enjoyed price advantages during some years over the course of the Agreement, albeit those price changes were a double-edged sword, being subject to increases over the term of the Agreement. (OTP Brief at 15-16.) However, given that we have directed that the Agreement be modified to allow Orwell the ability to obtain access to DEO or any other entity by the elimination of the sole-source provision and the modification of the type of



service provided by OTP from interruptible to firm, we believe that modification of the term of the Agreement is unwarranted.

#### 4. RATES

{¶ 65} The last aspect of the Agreement in dispute relates to the rates Orwell pays to OTP. Section 2.1 of the Agreement provides:

Shipper shall pay OTPC a Commodity Rate plus Shrinkage, as stated on Exhibit B, for each volume of Gas delivered to the Delivery Point(s) (Orwell Ex. 1, Attachment A at 5).

Exhibit B indicates that:

Rates will adjust every five years commencing on July 1, 2013 and continuing on each fifth anniversary date of the remaining term of the 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. (Orwell Ex. 1, Attachment A at 11.)

{¶ 66} Orwell witness Zappitello testified that OTP did not seek to adjust the rate on July 1, 2013, but increased the rate in September 2014 from \$0.95 to \$1.08, without any prior notice. Orwell also claims that OTP would not negotiate the rate with Orwell prior to the increase (Orwell Ex. 1 at 14-15). Mr. Zappitello notes that OTP currently charges Orwell \$1.01 per Mcf for interruptible transportation service under the Agreement (Orwell Ex. 1 at 15). Orwell witness Zappitello testified that a number of factors demonstrate that the amount OTP is charging Orwell for transportation is

unjust and unreasonable (Orwell Ex. 1 at 16; OCC Ex. 2 at 12). He indicated that both Spelman and Cobra charge \$0.50 per Dth for interruptible transportation service, which is approximately \$0.50 per Mcf (OCC Ex. 2 at 16; Orwell Ex. 1 at 16). He also notes that Orwell is charged more than any other customer taking transportation service on OTP including: Great Plains which is charged \$0.95 per Mcf, Gas Natural Resources which is charged \$0.50 per Mcf for firm transportation service, and Newbury Local Schools which is charged \$0.90 per Mcf for firm service (Orwell Ex. 1 at 13; OCC Ex. 2 at 20-21).

{¶ 67} Orwell witness Zappitello proposed a rate of \$0.60 per Mcf, which he claims is a just and reasonable rate for transportation based on current market conditions. Mr. Zappitello testified that 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 DEO. (ONG Ex. 1 at 14.) He explained that, by including gas commodity cost, he was able to determine the "all in" cost of purchasing gas from OTP, compared to purchasing gas from DEO, which he believes is more representative of the true market cost for gas. He explained that 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). (Orwell Ex. 1 at 14-15.) He also notes that Orwell pays two separate transportation fees when it transports gas via OTP: \$0.38 per Mcf for North Coast's transportation costs and \$1.01 per Mcf for OTP (Orwell Ex. 1 at 14-15). Mr. Zappitello indicated that he then determined that Orwell's total cost of transporting gas on DEO is \$0.864 per Mcf, which is the total of the DEO winter basis (-\$0.756) and DEO's transportation tariff rate (\$1.62). (Orwell Ex. 1 at 14-15.) He noted that, although DEO's transportation tariff rate is higher than the combined transportation rates of North Coast and OTP, the DEO 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 through DEO rather than through OTP (Orwell Ex. 1 at 15). Mr. Zappitello calculated that Orwell would have saved \$230,065.52 over a

12-month period if it would have purchased supplies transported by DEO (Orwell Ex. 1 at 15).

{¶ 68} OCC also argues the rates charged by OTP are unreasonable. OCC witness Slone recommended a transportation rate of \$0.50 per Mcf. 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 32.) OCC claims that, under the Agreement, Orwell was paying a higher rate for a lower quality of service than it had been receiving under a previous transportation contract with DEO. OCC argues that the current rate is nearly twice what other intrastate pipelines were charging Orwell for the same type of interruptible service (OCC Ex. 2 at 12-13). For example, OCC witness Slone noted rates of other similarly situated pipelines in the area that were nearly half of OTP's rates (\$1.01/Mcf), including: Cobra (\$0.50/Dth), Spelman (\$0.50/Dth), and North Coast (\$0.25/Dth) (OCC Ex. 2 at 12-13, 16).

{¶ 69} OCC disputes OTP's claim that the rates were justified because OTP's pipeline system was built to serve Orwell (OCC Ex. 4 at 126). OCC contends that portions of OTP's pipeline system were built to serve Great Plains, Richard Osborne's gas exploration company, and John D. Oil & Gas Marketing, his gas marketing company (OCC Ex. 3 at 104-105). OCC maintains that OTP was using Orwell and its GCR customers as a guaranteed collection mechanism to obtain additional unwarranted profits. OCC argues that through the Agreement, Orwell's GCR customers have paid nearly \$1.5 million more than they otherwise should have paid (OCC Ex. 2 at 15).

{¶ 70} Staff finds troubling Orwell witness Zappitello's testimony that "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" (Orwell Ex. 1 at 13). Staff notes that, while the Agreement permits OTP to adjust the rate, its refusal to negotiate reinforces Staff's belief that the Commission must affirmatively act to modify the arrangement. (Staff Reply Brief at 24-25.) Staff believes

that the rate currently charged by OTP for the provided service is unjust and unreasonable. Staff argues that the record demonstrates that OTP charges Orwell more for interruptible transportation to serve residential customers than OTP charges other customers for firm service. Staff argues that it is unreasonable to permit OTP to charge Orwell a higher rate for a lower quality service. Nevertheless, Staff is unpersuaded that the currently charged \$1.01/Mcf rate would be unreasonable if the transportation service being provided was firm, as Staff recommends. (Staff Reply Brief at 25.)

{¶ 71} Staff agrees with Orwell that OTP should be required to file a new transportation tariff. Staff notes that OTP's tariff does not contain a standard transportation rate, but instead requires all transportation customers to enter into transportation agreements. Staff believes that this is unjust and unreasonable and recommends the Commission exercise its general authority, and that granted by R.C. 4905.26, to order that OTP file a new transportation tariff to include standard rates for firm and interruptible transportation subject to the Commission's scrutiny regarding the establishment of new rates. (Staff Reply Brief at 24-26.)

{¶ 72} OTP argues that Orwell and OCC failed to provide any relevant evidence that the rates they propose are just and reasonable for the transportation of natural gas through OTP's system. OTP asserts that the rate of \$0.60 per Mcf recommended by Mr. Zappitello is based on his failed attempt to negotiate a different price with OTP. (Tr. at 37.) OTP argues that Mr. Zappitello's calculations, and the rationale for those calculations, were intended to make the "all in" cost of natural gas service equal without regard to whether service is provided through OTP's system or through DEO's system. (Orwell Ex. 1 at 14-15; OTP Brief at 13.) According to OTP, there are three problems with Mr. Zappitello's proposed rate. The first problem, according to OTP, relates to the different duties of OTP and Orwell. It is Orwell's job, as a utility, to provide its end use customers with "all in" natural gas services at "just and reasonable" rates. In contrast, OTP's responsibility is simply to transport natural

gas for its customers at a just and reasonable rate. OTP's responsibilities are completely unrelated to the cost of the commodity. (OCC Ex. 1 at 14.) OTP also argues that Mr. Zappitello bases his calculation on the premise that Orwell's customers pay the same "all in" rate regardless of whether the natural gas flows from Chicago's City-Gate or DEO South Point (South Point). The third problem with the rates proposed by Orwell and OCC, according to OTP, are that they presume that OTP is obligated to provide the balancing function. OTP contends that, by Mr. Zappitello's "logic," OTP would be required to revise its rate each month so that Orwell's "all in" cost of service equaled the cost of service through DEO at all times. OTP contends that, applying Mr. Zappitello's proposed rate between 2006 and 2013, Orwell's "all in" price should have been considerably higher, because DEO's "all in" price was higher than the "all in" price through OTPC. (OTP Reply Brief at 13-14.)

{¶ 73} OTP argues that, from the beginning of OTP's operations in 2006 until now, Orwell's end use customers have received the benefit of a lower transport rate than through DEO. OTP also claims that the benefit was, on average, some \$0.55 per Mcf lower than the price they would have been paying if Orwell was purchasing that gas at South Point during that period. OTP contends that the fact that the market price for commodity gas has recently fallen signifies nothing regarding any changes in the market for transport of commodity gas. OTP points out that a random selection of price points comparing South Point prices to Chicago prices during the years 2008 through 2010 suggests a price difference of approximately \$0.0284444 in favor of Chicago during this period, somewhat lower than the \$0.324 estimated for the years prior to 2008. According to OTP, this figure reflects an estimate based upon a comparison of total gas plus transport costs from Chicago via North Coast and OTP against the total cost of natural gas at South Point, plus DEO's GTS tariff rate for transportation. (OTP Reply Brief at 14.)

{¶ 74} OTP also disputes OCC's calculation of a new rate of \$0.50 per Mcf (OCC Ex. 2 at 16). OTP claims that Mr. Slone selected OTP for comparison to North Coast, Cobra, and Spelman because he likes the prices charged by those pipelines, but he excluded DEO, even though the evidence in the case plainly shows that DEO is OTP's only true competitor. OTP argues that Mr. Slone's comparison of "similarly situated" pipelines failed to compare OTP's rate against DEO's rate, which is the one pipeline that is actually in competition with OTP. OTP notes that DEO's GTS tariff rate to ONG is currently \$1.62 per Mcf. (OTP Reply Brief at 14-15.)

{¶ 75} OTP further argues that Mr. Slone admitted that he was unaware of the capital investments made by any of the pipelines (including OTP), unaware of the financial situation of any of the companies, and unaware of the number of end users served by each pipeline. According to OTP, he was also unsure how long each pipeline has been in service, and he could offer no opinion on their capital structures, their depreciation rates, or their ability to raise debt or equity financing, or the operational costs each company incurs to ship natural gas through its pipelines. (Tr. at 248-252.) As a result, OTP contends that it is impossible for Mr. Slone to demonstrate whether any of these pipelines provided service on just and reasonable terms, or that what OTP is charging is unreasonable (OTP Reply Brief at 15).

{¶ 76} Upon review of the record, we find insufficient evidence on which to determine just and reasonable rates for OTP for both firm and interruptible service. While both Orwell and OCC presented evidence in support of rates they contend are just and reasonable, and those rates appear reasonable in comparison to rates charged to other entities for firm, rather than interruptible, service, we believe that there is insufficient evidence on which to determine whether the rates propounded by OCC and Orwell, or that the rate currently charged by OTP, would be appropriate on a long-term basis (Orwell Ex. 1 at 13-15; OCC Ex. 2 at 20-21, 32). The record demonstrates that OTP charges Orwell more for interruptible transportation service for residential customers

than OTP charges other customers for firm service. Further, the Agreement permits OTP to adjust upward the rates in the event "the parties cannot agree on a rate adjustment amount" (Orwell Ex. 1, Attachment A at 11). That provision and the requirement that Orwell utilize OTP solely provide too much bargaining power on the side of OTP and do not allow for fair negotiations of price adjustments. As the evidence demonstrates, while the rates did not adjust on July 1, 2013, as provided in the Agreement, OTP simply adjusted the rate upward from \$0.95/Mcf to \$1.08/Mcf (Orwell Ex. 1 at 13). In addition, we are troubled that the evidence shows OTP increased the rate to Orwell without prior notice. While this is, in part, a provision of the Agreement, Orwell has no alternative to the Agreement, such as to take service under a standard service offer in OIP's tariff.

{¶ 77} Therefore, OTP, Cobra, and any other pipeline companies owned or controlled by Richard Osborne and regulated by the Commission should file, within 60 days of this Opinion and Order, a rate case application, pursuant to R.C. Chapter 4909, to establish just and reasonable rates including a standard transportation rate for both firm and interruptible service. The establishment of rates for both firm and interruptible service will permit Orwell and any other customer the option to take general transportation service at a standard tariff rate as an alternative to negotiating a special contract with OTP. We also believe that OTP's application should include a rate for shrinkage. Currently, OTP's tariff provides "Shrinkage: TBD." Defining a specific amount for shrinkage in its rate application will help provide transparency with respect to the amounts OTP is charging for shrinkage.

*G. Dismantling of Orwell's Interconnections with DEO*

{¶ 78} Another aspect of our consideration of the Agreement involves the dismantling of interconnections with DEO. Orwell argues that, because OTP dismantled these interconnections with DEO, Orwell is currently able to receive supplies from DEO in only a few isolated areas on its system where OTP cannot

serve Orwell's customers. DEO 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. (Orwell Ex. 1 at 8.)

{¶ 79} According to Orwell, prior to entering into the Agreement, Orwell had a firm transportation contract with DEO (OCC Ex. 2 at 12; Orwell Ex. 1 at 7). Orwell notes that, at that time, it paid DEO \$0.92 for firm service, while Orwell currently pays OTP \$1.01 for interruptible service (OCC Ex. 2 at 12). In addition, DEO delivered gas directly into Orwell's system through a number of interconnections. Sometime after the execution of the Agreement, the firm transportation contract between Orwell and DEO was terminated and Richard Osborne, who owned or controlled both Orwell and OTP at the time, ordered an employee to dismantle approximately eight of Orwell's interconnections with DEO. (OCC Ex. 4 at 116-117.) Orwell maintains that these dismantled interconnections were located in areas where OTP's pipelines were located and, therefore, served as a valuable alternative to OTP's system. Orwell notes that Richard Osborne admitted that DEO was a competitor with OTP and that the relationship between OTP and DEO was "unpleasant." (OCC Ex. 4 at 56-58.) Richard Osborne also admitted that he wanted to eliminate any service from DEO so that Orwell could obtain service from related pipelines, such as Cobra or OTP (OCC Ex. 4 at 121).

{¶ 80} Orwell argues that enabling it to reinstall interconnections with DEO on its system would remedy OTP's pressures, add additional supply sources for Orwell in the north, and should reduce Orwell's need to purchase excess gas on OTP during the winter months, which would reduce rates for Orwell's customers (Orwell Ex. 1 at 12; Tr. at 169).

{¶ 81} Staff supports the reinstallation of the interconnections. In its brief, Staff notes that Orwell witness Zappitello testified that Orwell had previously had a



firm transportation agreement with DEO that was not only both of better quality and more economical, but also allowed Orwell to pursue additional transportation options. Staff claims that agreement was abandoned and a number of interconnections into DEO were dismantled. Staff notes that Mr. Zappitello testified that this overreliance on OTP does not allow Orwell to ensure gas supplies will always be available for its customers. (Staff Reply Brief at 22.)

{¶ 82} The evidence shows that interconnections between Orwell and DEO existed prior to the Agreement, but were dismantled at the direction of Richard Osborne (OCC Ex. 4 at 116-117). In addition, Richard Osborne owned or controlled both Orwell and OTP at the same time the Agreement was entered into, and as noted by Orwell, Richard Osborne indicated DEO was a competitor with OTP and he wanted to eliminate any service from DEO so that Orwell could obtain service from related pipelines, such as Cobra or OTP (OCC Ex. 4 at 121). While there may have been a variety of reasons for Richard Osborne to order the dismantling of interconnections with DEO, the absence of these interconnections created an unhealthy situation for competition. Further, we find that the *reinstallation of such interconnections should be undertaken and that the Agreement should be modified such that any dismantled interconnections through which Orwell can receive gas transportation should be reinstalled and that Orwell may receive gas through interconnection with DEO or any other gas transport mechanism.* We make no judgment, based on the evidence, as to why Richard Osborne directed the interconnections be dismantled, but now is the time to reinstall them.

#### *H. Whether the Agreement Was an Arm's-Length Transaction*

{¶ 83} OCC has asserted that the Agreement was not the result of an arm's-length negotiation between two separate entities. OCC argues that the Agreement was heavily biased in favor of OTP at the expense of Orwell's GCR customers. OCC notes that, at the commencement of the Agreement, the operations of OTP and Orwell were

not independent of each other and were both under the ownership of Richard Osborne (OCC Ex. 2 at 9). OCC notes that both Tom Smith (who signed on behalf of Orwell) and Steven Rigo (who signed on behalf of OTP) reported directly to Richard Osborne (OCC Ex. 4 at 100-101). OCC maintains that neither Mr. Smith nor Mr. Rigo acted in the sole interest of the party for whom they signed, because six months prior to signing the Agreement on behalf of Orwell, Mr. Smith had signed a contract with Lake Hospital Systems, Inc. as president of OTP (OCC Ex. 2 at 10). Further, OCC also asserts that Mr. Smith was president of OTP from 2004 to 2013, during which time he signed numerous agreements on behalf of Orwell, as its president (OCC Ex. 2 at 10).

{¶ 84} OCC contends that Mr. Rigo similarly signed agreements on behalf Orwell, as its executive vice president, while at the same time serving as executive vice president of OTP (OCC Ex. 2 at 11). OCC claims that it is also clear from the depositions of other OTP employees that both Mr. Rigo and Mr. Smith worked for both Orwell and OTP, ultimately for Richard Osborne, and made little distinction between the two companies (OCC Ex. 3 at 66). OCC maintains that, because there was never any arm's-length separation between the two entities in the Agreement, the interests of Orwell's customers were not represented. Rather, Richard Osborne and the management of both Orwell (Mr. Smith) and OTP (Mr. Rigo) viewed Orwell as a means to generate additional revenue for OTP at the expense of Orwell's customers. (OCC Brief at 8.)

{¶ 85} Orwell maintains that the evidence demonstrates that the Agreement was not the result of an arm's-length transaction. Orwell notes that Richard Osborne owned and controlled both Orwell and OTP at the execution of the Agreement. (OCC Ex. 2 at 8.) Mr. Smith and Mr. Rigo, the individuals who signed the Agreement, reported directly to Richard Osborne (OCC Ex. 2 at 8-10). Both individuals, according to Orwell, "blurred the lines of separation" between Orwell and OTP by signing contracts on behalf of both companies. Orwell cites, as an example, that Mr. Rigo

signed contracts on behalf of Orwell as the executive vice president while he was also the executive vice president of OTP and Mr. Smith signed a contract on behalf of OTP as president only six months after signing the Agreement as the president of Orwell. Orwell also notes that Mr. Smith was acting as OTP's president at the same time he executed the Agreement on Orwell's behalf. (OCC Ex. 2 at 11.)

{¶ 86} OTP disputes OCC's and Orwell's contention that the Agreement was not an arm's-length transaction. OTP contends that neither Orwell nor OCC presented any evidence regarding the circumstances relating to the formation of the Agreement. OTP notes that both Mr. Smith and Mr. Rigo complied with their fiduciary obligations each owed to the organization they represented when each signed the Agreement and it asserts that neither OCC nor Orwell produced any evidence that these individuals acted in any improper manner. Further, OTP asserts that, had either OCC or Orwell believed that Mr. Rigo or Mr. Smith acted in any nefarious manner, they would have subpoenaed them to testify regarding any instructions either received regarding the negotiations of the Agreement, but neither did. OTP also argues that neither Orwell nor OCC introduced any communications between Mr. Rigo and Mr. Smith suggesting improper behavior of any sort or any communications between one or both executives and OTP's principal owner, Richard Osborne, that even suggest Richard Osborne was directly involved in the negotiations.

{¶ 87} Further, OTP claims that Mr. Zappitello conceded that he personally knows both Mr. Smith and Mr. Rigo, after working with Mr. Rigo for two years and Mr. Smith for six or seven years, and that he did not believe either had demonstrated themselves to be dishonest, dishonorable, or lacking in integrity to him (Tr. at 48-50). OTP claims that Orwell and OCC ignored the only evidence bearing directly on the issue, which is the deposition of Richard Osborne, himself. OTP claims that Richard Osborne stated, under oath in his deposition, that he did not approve the terms of the Agreement or any decisions made by Mr. Smith or Mr. Rigo (OCC Ex. 4 at 50-51, 80).

{¶ 88} There are many questions raised by the evidence regarding the circumstances and personalities involved with the Agreement, specifically the relationship between Mr. Smith, Mr. Rigo, and Richard Osborne, their official capacities with the companies of their employ, and the companies involved in this Agreement. We are troubled by the evidence that both Mr. Smith and Mr. Rigo worked for Richard Osborne and, at times, were signatories to contracts for both entities (OCC Ex. 3 at 66, OCC Ex. 2 at 11). Yet, neither Mr. Smith nor Mr. Rigo testified in this proceeding regarding their actions with regard to the Agreement or their employment. Further, Richard Osborne did not testify at the hearing to explain his directives regarding the Agreement. Those individuals would have been the best evidence regarding the nature of the corporate relationship with respect to the Agreement. However, the relationship between the individuals who signed the Agreement and their relationship with Richard Osborne, who owned both entities, raise legitimate questions discussed throughout this Opinion and Order. Notwithstanding, there is insufficient evidence to find that the Agreement was not an arm's-length transaction.

#### *I. Misleading the Staff*

{¶ 89} OCC asserts that, when OTP filed the Agreement, it misled the Commission by failing to disclose the corporate structure of both utilities and the nature of OTP's relationship with Orwell (OCC Brief at 11). According to OCC, the application in 08-1244 indicated that Orwell and OTP were currently under common ownership, but OTP failed to indicate that relationship would be altered by the sale of Orwell to Energy West, Inc., which would later become Gas Natural, Inc. (GNI). OCC argues that OTP also failed to note in the application that very little of the corporate structure would change because Richard Osborne, who owned both Orwell and OTP, would still control Orwell as the chairman and chief executive officer of Energy West, Inc. (OCC Ex. 2 at 9.) According to OCC, this misinformed the Commission as to the true nature of the corporate structure that would govern Orwell (OCC Brief at 11). OCC contends

that Staff only became aware of the "convoluted corporate structure" of OTP and Orwell during the 2012 GCR audit of the companies, *In re Northeast Ohio Natural Gas Corporation and Orwell Natural Gas Company*, Case No. 12-209-GA-GCR, et al. (2012 GCR Case), Opinion and Order (Nov. 13, 2013) (OCC Brief at 12; Tr. at 190). OTP had not previously disclosed to the Staff that Mr. Rigo and Mr. Smith were both working for both companies and, at the same time, both individuals were directly reporting to Richard Osborne (Tr. at 192-194). OCC asserts that there was never any sort of corporate separation between Orwell and OTP (Tr. at 200).

{¶ 90} OCC also points out that Staff witness Sarver testified that the Staff was not made aware that, by approving the Agreement, Orwell would also be eliminating firm service from DEO in favor of a more expensive rate with OTP for interruptible service, as well as the elimination of the interconnect between Orwell and DEO (Tr. at 187-188, 200). OCC maintains that OTP failed to disclose certain details to the Commission, and misdirected Staff regarding the nature of its corporate structure (Tr. at 190). OCC argues that OTP's deliberate and material omissions resulted in the approval of a transportation agreement that was unjust, unreasonable, and unduly burdensome for Orwell's GCR customers (OCC Brief at 13).

{¶ 91} OTP disputes OCC's claims that OTP misled Staff and the Commission. OTP states that it plainly disclosed to the Commission that Orwell and OTP operated as affiliates under common ownership on multiple occasions. OTP notes that, in its application in 08-1244, it defined the corporate relationship between OTP and Orwell by indicating that "[t]he Applicant and each of the Shippers currently are affiliates under common ownership" (OCC Ex. 2 at 2). OTP also notes that the Agreement referenced Case No. 08-1196-GA-UNC, which involved a request for approval of a stock transfer and a change in ownership of Orwell. OTP contends that, in that case, Staff and the Commission were on notice that Richard Osborne would continue to control Orwell,

together with a number of other companies, as the chief executive officer and chairman of the board of GNI.

{¶ 92} OTP asserts that it further explained the relationship between Orwell and OTP to the Commission in its very first application to this Commission. According to OTP, in OTP's application for pipeline authority and for approval of an operating tariff, it not only disclosed the relationship between the companies, it also expressly identified Mr. Rigo as vice president of OTP and president of Orwell, and Mr. Smith as secretary and treasurer of both Orwell and OTPC. (OTP Reply Brief at 4.) OTP maintains that it disclosed to Staff and the Commission the material facts of the relationship between the entities and the material terms of the Agreement.

{¶ 93} Staff witness Sarver testified that he was familiar with the approval process for gas transportation agreements between pipeline and distribution companies (Tr. At 181). He indicated that typically, Staff does not conduct an extensive investigation into the fairness or equity of the terms of agreements but that most such arrangements would be examined in the course of an annual gas cost recovery audit (Tr. at 182). Mr. Sarver indicated that he was not personally involved in the review of the Agreement and the individual who reviewed the Agreement no longer was employed by the Commission (Tr. at 184). Mr. Sarver also testified that he and Staff were unaware of the corporate relationships of the companies owned and or controlled by Richard Osborne; however, through the 2010 and 2012 gas cost recovery audits of those companies, Staff became more enlightened as to the corporate relationships between the gas distribution and pipeline companies owned by Richard Osborne (Tr. at 191-192).

{¶ 94} We find insufficient evidence that OTP misled the Staff or the Commission with respect to the Agreement. Mr. Sarver testified that he did not review this Agreement and he was unaware if Staff investigated any of the issues raised by Orwell or OCC in this proceeding at the time of the approval of the Agreement. In

addition, the Staff person who was responsible for reviewing the Agreement did not provide testimony at the hearing. (Tr. at 184.) In addition, the evidence presented demonstrates that Staff was unaware of the intricate business relationships related to the individuals signing the Agreement as well as the entities under the corporate umbrella of Richard Osborne or the corporate structure of the Osborne companies, and in particular, Orwell and OTP (Tr. at 188-192). Further, the application for approval of the Agreement did provide information on the relationships of the individuals involved in reviewing the Agreement and that each of the shippers were affiliates under common ownership (Tr. at 190-194). We find no evidentiary basis that OTP intentionally misled the Staff in its investigation or the Commission in its approval of the Agreement. Nevertheless, the undercurrent of the formation of the Agreement, the timing of the dismantling of the Orwell interconnections with DEO, and the managerial and corporate relationships between the individuals who signed the Agreement and their business relationship to Richard Osborne are, at a minimum, disconcerting.

{¶ 95} Furthermore, since the date of our approval of the Agreement, the Commission has become aware of the corporate structure and mismanagement of the companies controlled by Richard Osborne. That corporate structure and relationships and associated concerns were noted in the 2012 GCR Case. We found that the employee and management relationships and corporate structure of the utility companies owned and controlled by Richard Osborne raised concerns that led to an investigative audit of the gas utilities that is ongoing. *In re Commission Investigative Audit*, Case No. 14-205-GA-COI, Opinion and Order (June 1, 2016). We note that that investigative audit did not include the pipeline companies owned or controlled by Richard Osborne identified in this case.

{¶ 96} Now, Orwell and OTP have indicated that the relationship between Orwell and OTP is “severely strained” at present (OTP Brief at 1) and there is a contentious relationship and legitimate concerns regarding OTP’s ability to provide

reliable services and OTP's willingness to charge reasonable rates (Orwell Brief at 6). These issues manifested in the failure of Orwell and OTP to resolve these matters informally. Serious issues remain concerning the pipeline companies that Richard Osborne owns and controls, including Cobra and OTP. We are also concerned about the impact that his management has or may have on this Agreement and other contractual agreements; the costs of services, types of services, and delivery of services provided by OTP; and the impact to the health and safety of residential customers served by Orwell and potentially customers of other utilities.

{¶ 97} Therefore, we find it appropriate to order Staff to undertake an investigative audit of all of the pipeline companies owned or controlled by Richard Osborne and their affiliates that are subject to the jurisdiction of the Commission. As an investigation was initiated in *In re Commission Ordered Investigation of Cobra*, Case No. 14-1709-GA-COI, we find it appropriate that that investigation be expanded to encompass all of the pipeline companies owned or controlled by Richard Osborne and their affiliates that are regulated by the Commission.

*J. Refund of Charges*

{¶ 98} Orwell has requested that the Commission grant it a refund of the charges imposed by OTP since the onset of the Agreement. Orwell contends that 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 22-23). Orwell contends that OCC witness Slone determine that Orwell and Brainard should have been charged a more reasonable transportation rate of \$0.50 per Mcf if Orwell and OTP had not executed the Agreement (OCC Ex. 2 at 22-23). Orwell claims that, because the Commission was unaware of certain facts demonstrating that the Agreement was not an arm's-length transaction, the Commission should order a refund \$1,524,586 to Orwell and \$12,714 to Brainard for excessive charges for natural gas transportation



services. Orwell claims that the lack of an arm's length transaction was unknown until years after the Commission approved the Agreement.

{¶ 99} OCC contends that the rates in the Agreement were established by an unlawful special contract and not by the Commission. As a result, OCC maintains that there is no restriction on the Commission ordering refunds. (OCC Reply Brief at 7-8.) OCC claims that, because of the unjust and unreasonable rates paid by Orwell's GCR customers, they were overcharged by \$1,524,586 for the period of July 2008 through May 2015. OCC maintains that the Commission has the authority to issue a refund to Orwell, and it should require OTP to issue a refund to Orwell and its customers. OCC claims that, in *In re Jim and Helen Heaton et al. v. Columbus and Southern Ohio Electric Company*, Case No. 83-1279-EL-CSS, Opinion and Order (Apr. 16, 1985), the Commission ordered refunds to consumers regarding improperly and unlawfully charged rates by public utilities. OCC asserts that, in *Heaton*, the Commission used three criteria to determine whether a case is appropriate for refund, including: whether the wronged customers are identifiable, the amount of the improper charges are readily ascertainable, and the circumstances are such as to preclude the likelihood that an individual would pursue his remedy in a court of law. OCC claims that all three criteria are present in this case. (OCC Brief at 15.)

{¶ 100} OTP argues that there is no basis on which to grant any refund in this case. OTP asserts that Orwell fails to cite to any legal authority in support of its claim for refunds. OTP also contends that OCC's sole authority is one case, *Heaton*, which is distinguishable because the case involved an electric utility's refusal to allow its customers to take advantage of a rural line extension program the Commission had mandated by rule, and was contained in the utility's tariff. According to OTP, in this case, it has charged a Commission-approved rate for its services and there is no allegation otherwise. (OTP Reply Brief at 11.) OTP notes that the Ohio Supreme Court has held that, pursuant to R.C. 4905.32, a utility is required to charge the rates set by the

Commission and cannot refund any part of the rates. *Keco Indus. v. Cincinnati & Suburban Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). OTP cites to two other cases where the Ohio Supreme Court disallowed refunds as constituting retroactive ratemaking. *In re Application of Cols. S. Power Company*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶ 16-17; *In re Application of Cols. S. Power Company*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶¶ 7-8 (OTP Reply Brief at 11-12).

{¶ 101} Staff argues that neither Orwell nor OCC provides any acceptable legal basis for ordering any refund in this case. Staff claims that *Heaton* does not apply because, unlike here, that case involved a Commission finding that a utility had failed to offer a rural line extension plan to eligible customers and imposed unwritten eligibility requirements in violation of its tariffs and the Ohio Administrative Code. (Staff Reply Brief at 15.) Staff notes that this case involves a utility that is within the filed rate doctrine, codified in R.C. 4905.22 and 4905.32. According to Staff, these sections provide that a public utility may neither charge nor collect a different rate than specified in Commission approved schedules that were in effect at the time the service was rendered. Staff notes that, in *Keco*, a consumer filed a complaint for restitution after the Court reversed a Commission order, resulting in lower rates. The Court held that restitution was not proper because the “utility must collect the rates set by the [C]ommission.” *Keco Indus. v. Cincinnati & Suburban Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465, 468 (1957). In this case, Staff states that OTP was in compliance with the filed rate doctrine and there is nothing in the record that Orwell paid any rate for any service received that had not been approved by the Commission. Staff asserts that ordering a refund would result in retroactive ratemaking, not permitted under Ohio’s regulatory scheme and under *Keco*. (Staff Reply Brief at 15-16.)

{¶ 102} In 1957, the Supreme Court of Ohio decided *Keco*, the seminal case on retroactive ratemaking. The Court examined a situation where utility rates were set by an order of the Commission and were later found to be unreasonable on appeal to the

Court. The Court found that, in the absence of a statutory provision, no cause of action existed for restitution of the increase in charges collected during the pendency of the appeal. The Court reasoned that, under the statutes of Ohio, the utility has no choice but to collect the rates set by order of the Commission, absent a stay of execution pursuant to statute, and that, consequently, the General Assembly has abrogated the common law remedy of restitution in such cases. *Keco Indus. v. Cincinnati & Suburban Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

{¶ 103} There is insufficient evidence that OTP charged rates any different than were contained in the Agreement or as permitted under the terms of the Agreement. We have also determined there is insufficient evidence to find the Agreement was not an arm's-length transaction, although the circumstances surrounding the Agreement do give us pause sufficient to order that an investigative audit be conducted on all pipelines owned or controlled by Richard Osborne. Therefore, the rates were not improper or unlawful. As such, there is no basis on which to order a refund to Orwell. Doing so would result in retroactive ratemaking, which is disallowed under *Keco*.

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 104} On September 19, 2014, and March 31, 2015, Orwell filed complaints in 14-1654 and 15-637, respectively, against OTP.

{¶ 105} OTP filed answers to both complaints denying the material allegations set forth by Orwell.

{¶ 106} By Entries of December 11, 2014, and June 18, 2015, OCC was granted intervention in these cases.

{¶ 107} A settlement conference was held on March 10, 2015, and July 9, 2015, and the hearing was held on November 3 and 4, 2015.

{¶ 108} The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 109} There is sufficient evidence to support a finding that the Agreement should be modified such that the type of service offered by OTP to Orwell should be modified from interruptible to firm.

{¶ 110} There is sufficient evidence to support a finding that the arbitration clause in Section 7.6 of the Agreement should be suspended until further ordered by the Commission.

{¶ 111} There is sufficient evidence to support a finding that the Agreement should be modified to eliminate the sole-source provision and that Orwell be permitted to utilize the transportation service of any pipeline system.

{¶ 112} There is sufficient evidence to support a finding that the interconnections with DEO should be reinstalled.

{¶ 113} There is insufficient evidence to support a finding that OTP should issue refunds to Orwell.

{¶ 114} There is insufficient evidence to support a finding that the Agreement should be modified to alter the length of the Agreement.

{¶ 115} There is sufficient evidence to direct that OTP, Cobra, and all other pipeline companies owned or controlled by Richard Osborne and subject to the jurisdiction of the Commission, file an application, pursuant to R.C. Chapter 4909, to determine just and reasonable rates that include charges for firm and interruptible services and rates for shrinkage.

{¶ 116} There is sufficient evidence to direct that Staff commence an audit of all pipeline companies owned or controlled by Richard Osborne and their affiliates that are subject to the jurisdiction of the Commission.

V. ORDER

{¶ 117} It is, therefore,

{¶ 118} ORDERED, That the complaint in Case No. 14-1654-GA-CSS be dismissed. It is, further,

{¶ 119} ORDERED, That the arbitration provision of the Agreement be suspended until further ordered by the Commission. It is, further,

{¶ 120} ORDERED, That Orwell's request for refunds be denied. It is, further,

{¶ 121} ORDERED, That the Agreement be modified as set forth above. It is, further,

{¶ 122} ORDERED, That OTP, Cobra, and any other pipeline companies owned or controlled by Richard Osborne and regulated by the Commission file an application, pursuant to R.C. Chapter 4909, to establish just and reasonable rates for service as set forth above. It is, further,

{¶ 123} ORDERED, That the subject matter of Case No. 14-1709-GA-COI be expanded to include an investigation of all pipeline companies owned or controlled by Richard Osborne and their affiliates that are subject to the jurisdiction of the Commission. It is, further,

{¶ 124} ORDERED, That a copy of this Opinion and Order be served upon all parties and interested persons of record.

**Commissioners Voting: Asim Z. Haque, Chairman; M. Beth Trombold;  
Thomas W. Johnson**

SEF/sc/dah

Exhibit D

# INVOICE

Orwell Natural Gas  
8470 Station Street  
Mentor, OH 44060

## Orwell Trumbull Pipeline Co

3511 Lost Nation Road  
Suite 213  
Willoughby, OH 44094

Invoice Date: 6/22/2016

Firm Charges Only

Production  
Month:

July

Due By: 7/1/2016

Contract Number  
1003

Net  
MCF  
62,000

INVOICE  
AMOUNT  
\$62,620.00

CONTRACT NUMBER: 1003

INVOICE NUMBER    072016Firm

### VOLUME

FIRM Contract Amount	Number of Days	Net MCF
----------------------------	----------------------	------------

### FEES

Firm Demand Fee	Total Charge
-----------------------	-----------------

TOTALS	2,000	31	62,000
--------	-------	----	--------

\$62,620.00	\$0.00	\$0.00	\$62,620.00
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**Orwell Trumbull Pipeline Company**

3511 Lost Nation Road, Suite 213

Willoughby, OH 44094

(440) 255-1945

**INVOICE****Bill To:**

Orwell Natural Gas  
5640 Lancaster-Newark Rd. NE  
Pleasantville, OH 43148

08/11/16

Invoice #: 971

Due: upon receipt

MONTH	DESCRIPTION	Rate	TOTAL
July-16	Transportation @ \$1.01 per MCF		
	8,085.9 Mcfs		
	(181.8) Less free gas		
	7,904.1 Subtotal	\$ -	\$ -
	Covered under firm transportation		\$ 62,620.00
	TOTAL		
	Telemeter Charges		
	State Route 20, East Ave	2 \$ 125.00	\$ 250.00
	West Walnut, Heisley	2 \$ 125.00	\$ 250.00
	Liberty Greens, Taylor-May	2 \$ 125.00	\$ 250.00
	Franks Rd, Auburn-Pekin Rd	2 \$ 125.00	\$ 250.00
	Thwing Rd, Chardon Shopping	2 \$ 125.00	\$ 250.00
	Nature Preserve, Crite Rd	2 \$ 125.00	\$ 250.00
	Tyler Blvd, Grand River	2 \$ 125.00	\$ 250.00
	Tri Point, Andrews Osborne	2 \$ 125.00	\$ 250.00
	Total Telemeter Charges	16	\$ 2,000.00
	Total		\$ 2,000.00
Note:	Please see next page for imbalance statement		
	GRAND TOTAL:		\$ 64,620.00

-----  
\*\*\*PLEASE SEND THIS REMITTANCE WITH PAYMENT\*\*\*

**Bill To:**

0  
5640 Lancaster-Newark Rd. NE  
Pleasantville, OH 43148

0 08/11/16

Invoice #: 971

0 \$ 64,620.00

Amount Paid: \_\_\_\_\_

# INVOICE

Orwell Natural Gas  
8470 Station Street  
Mentor, OH 44060

## Orwell Trumbull Pipeline Co

3511 Lost Nation Road  
Suite 213  
Willoughby, OH 44094

Invoice Date: 7/22/2016

Firm Charges Only

Production  
Month: August

Due By: 8/1/2016

Contract Number  
1003

Net  
MCF  
62,000

INVOICE  
AMOUNT  
\$62,620.00

CONTRACT NUMBER: 1003

INVOICE NUMBER 082016Firm

### VOLUME

FIRM Contract Amount	Number of Days	Net MCF
----------------------------	----------------------	------------

### FEES

Firm Demand Fee	Total Charge
-----------------------	-----------------

TOTALS	2,000	31	62,000	\$62,620.00	\$0.00	\$0.00	\$62,620.00
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# Orwell Trumbull Pipeline Company

3511 Lost Nation Road, Suite 213  
Willoughby, OH 44094  
(440) 255-1945

## INVOICE

**Bill To:**

Orwell Natural Gas  
5640 Lancaster-Newark Rd. NE  
Pleasantville, OH 43148

10/12/16

Invoice #: 987

Due: upon receipt

MONTH	DESCRIPTION	Rate	TOTAL
September-16	Transportation @ \$1.01 per MCF		
	8,991.7 Mcfs		
	(121.4) Less free gas		
	8,870.3 Subtotal	\$ -	\$ -
	Covered under firm transportation		\$ 62,620.00
	TOTAL		
	Telemeter Charges		
	State Route 20, East Ave	2 \$ 125.00	\$ 250.00
	West Walnut, Haisley	2 \$ 125.00	\$ 250.00
	Liberty Greens, Taylor-May	2 \$ 125.00	\$ 250.00
	Franks Rd, Auburn-Pekin Rd	2 \$ 125.00	\$ 250.00
	Thwing Rd, Chardon Shopping	2 \$ 125.00	\$ 250.00
	Nature Preserve, Crile Rd	2 \$ 125.00	\$ 250.00
	Tyler Blvd, Grand River	2 \$ 125.00	\$ 250.00
	Tri Point, Andrews Osborne	2 \$ 125.00	\$ 250.00
	Total Telemeter Charges	16	\$ 2,000.00
	Total		\$ 2,000.00
Note:	Please see next page for imbalance statement		
	GRAND TOTAL:		\$ 64,620.00

\*\*\*PLEASE SEND THIS REMITTANCE WITH PAYMENT\*\*\*

**Bill To:**

0  
5640 Lancaster-Newark Rd. NE  
Pleasantville, OH 43148

0 10/12/16

Invoice #: 987

0 \$ 64,620.00

Amount Paid: \_\_\_\_\_

# INVOICE

Orwell Natural Gas  
8470 Station Street  
Mentor, OH 44060

## Orwell Trumbull Pipeline Co

3511 Lost Nation Road  
Suite 213  
Willoughby, OH 44094

Invoice Date: 8/24/2016

Firm Charges Only

Production  
Month: September

Due By: 9/1/2016

Contract Number  
1003

Net  
MCF  
60,000

INVOICE  
AMOUNT  
\$60,600.00

CONTRACT NUMBER: 1003

INVOICE NUMBER: 092016Firm

### VOLUME

FIRM Contract Amount	Number of Days	Net MCF
----------------------------	----------------------	------------

### FEES

Firm Demand Fee	Total Charge
-----------------------	-----------------

TOTALS	2,000	30	60,000	\$60,600.00	\$0.00	\$0.00	\$60,600.00
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# **Orwell Trumbull Pipeline Company**

3511 Lost Nation Road, Suite 213

Willoughby, OH 44094

(440) 255-1945

## **INVOICE**

**Bill To:**

Orwell Natural Gas  
5640 Lancaster-Newark Rd. NE  
Pleasantville, OH 43148

10/10/16

Invoice #: 987

Due: upon receipt

MONTH	DESCRIPTION	Rate	TOTAL
September-16	Transportation @ \$1.01 per MCF		
	Mcf's		
	Less free gas		
	0.0 Subtotal	\$ -	\$ -
	Covered under firm transportation		\$ 62,620.00
	TOTAL		
	Telemeter Charges		
	Slate Route 20, East Ave	2 \$ 125.00	\$ 250.00
	West Walnut, Heisley	2 \$ 125.00	\$ 250.00
	Liberty Greens, Taylor-May	2 \$ 125.00	\$ 250.00
	Franks Rd, Auburn-Pekin Rd	2 \$ 125.00	\$ 250.00
	Thwing Rd, Chardon Shopping	2 \$ 125.00	\$ 250.00
	Nature Preserve, Crile Rd	2 \$ 125.00	\$ 250.00
	Tyler Blvd, Grand River	2 \$ 125.00	\$ 250.00
	Tri Point, Andrews Osborne	2 \$ 125.00	\$ 250.00
	Total Telemeter Charges	16	\$ 2,000.00
	Total		\$ 2,000.00
Note:	Please see next page for imbalance statement		
GRAND TOTAL:			\$ 64,620.00

\*\*\*PLEASE SEND THIS REMITTANCE WITH PAYMENT\*\*\*

**Bill To:**

0  
5640 Lancaster-Newark Rd. NE  
Pleasantville, OH 43148

0 10/10/16

Invoice #: 987

0 \$ 64,620.00

Amount Paid: \_\_\_\_\_

COMMON PLEAS COURT  
LAKE COUNTY, OHIO  
Case Designation Form Loc. R II(C)(1)  
For all cases except Foreclosure

Orwell-Trumbull Pipeline Company, LLC Case No. \_\_\_\_\_  
VS

Orwell Natural Gas Company Judge \_\_\_\_\_

FILED

2016 OCT 20 A 11:08

Per LOC R. II (C)(3), refiling of cases previously dismissed under Civ. R. 41 must have a designation upon the face of the complaint that the action is being refiled. The word "REFILING" must appear in upper case letter under the word "COMPLAINT". Directly beneath the word "REFILING" the complaint shall identify the case number of this dismissed action. Former Case no. \_\_\_\_\_

Case Categories (Mark one category only)

Administrative Appeal (Specific ORC Sec.) Section \_\_\_\_\_  
Consumer Sales Practices: Actions commenced under applicable section of ORC Chapters: 109, 1315, 1317, 1321, 1322, 1333, 1334, 1345, 1349, 3953, 4505, 4549, 4710, 4712, 4719, 4775, 4905 or 5311

☒ Contract or Quasi Contract

☐ Criminal

☐ Declaratory Judgment

☐ See Foreclosure Case Designation Form

☐ Foreign Judgment

☐ Malpractice (specify) \_\_\_\_\_

☐ Credit Card (CI)

☐ Personal Injury

☐ Product Liability

☐ Professional Tort

☐ Provisional Remedy (Replevin, Attachment, Garnishment)

☐ Workers Compensation

☐ Other Tort \_\_\_\_\_

☐ Other Civil \_\_\_\_\_

16CV001776

RICHARD L COLLINS JR

The designation "money only" may not be used if one of the above specific categories is applicable. Further, the caption shall note any statutory provision that is unique to the particulate cause and controls the time within which the case is to proceed, once filed. (EX. Miscellaneous – Contest of Election (ORC Section 3515.10 – Hearing within 30 days.)

Revised Code Section unique to this particular cause which controls the time within which the case is to proceed: \_\_\_\_\_



Signature

Michael D. Dortch (0043897)

Printed name & Registration No.

Kravitz, Brown & Dortch, LLC

Firm name

65 E State Street, Suite 200 Columbus, OH 43215

Address

614.464.2000

Phone number

Maureen G. Kelly  
Clerk Of Common Pleas Court  
Lake County Courthouse West Annex, 25 North Park Place  
Painesville OH 44077  
440-350-2657

In The Court Of Common Pleas  
General Division  
Lake County, Ohio

FILED

2016 OCT 20 A 11:08  
MAUREEN G. KELLY  
LAKE CO. CLERK OF COURT

Caption: Orwell Trumbull Pipeline Co, LLC

Case No. \_\_\_\_\_

vs.

Orwell Natural Gas Company

Instruction For Service  
(General)

To The Clerk:

You are hereby instructed to serve the following parties by

\_\_\_\_\_ Regular Mail

☒ Certified Mail

\_\_\_\_\_ Sheriff Of County

( ) Residence

( ) Personal

\_\_\_\_\_ Process Server

With the following paper

**16CV001776**

**RICHARD L COLLINS JR**

☒ Regular Summons (28 Days)

\_\_\_\_\_ Amended Complaint Summons

\_\_\_\_\_ Answer and Counterclaim or Third Party Summons

\_\_\_\_\_ Other:

\_\_\_\_\_ With Journal Entry

\_\_\_\_\_ Without Journal Entry

Name of pleadings: Complaint

Name and Address

Party Orwell Natural Gas Company

Party 8470 Station Street

Party Mentor, OH 44060

Party \_\_\_\_\_

Prepared By: Michael D. Dortch (0043897)

Address: Kravitz Brown & Dortch, LLC

65 E. State St. Ste 200, Columbus, OH 43215

Telephone 614.464.2000

*Counsel for Orwell Natural Gas Company*

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**12/20/2016 2:16:05 PM**

**in**

**Case No(s). 16-2419-GA-CSS**

Summary: Complaint Service Letter Orwell Natural Gas Company's Complaint and Request for Relief electronically filed by Ms. Gina M Piacentino on behalf of Orwell Natural Gas Company