

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

ORWELL NATURAL GAS)	
COMPANY,)	
)	
)	Case No.: 16-2419--GA-CSS
Complainant,)	
)	
vs.)	
)	
ORWELL-TRUMBULL PIPELINE)	
COMPANY, LLC,)	
)	
)	
Respondent.)	

ORWELL-TRUMBULL PIPELINE, LLC’S
MOTION TO STRIKE ORWELL NATURAL GAS COMPANY’S MOTION TO
COMPEL ENFORCEMENT OF COMMISSION-APPROVED REASONABLE
ARRANGEMENT AND IN THE ALTERNATIVE
ORWELL-TRUMBULL PIPELINE, LLC’S MEMORANDUM CONTRA

Now comes Orwell-Trumbull Pipeline, LLC (“OTPC”), by and through its undersigned counsel, to respectfully request that this Commission strike Orwell Natural Gas Company’s (“ONG’s”) Motion to Compel Enforcement of Commission-Approved Reasonable Arrangement (“Motion”). In the event that the Commission does not strike ONG’s Motion, then OTPC respectfully requests that this Commission accept this as its Memorandum Contra to the Motion. A memorandum in support is attached.

Respectfully Submitted,

/s/ Michael D. Dortch

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Orwell-Trumbull Pipeline Company (“OTPC”) respectfully moves the Public Utility Commission of Ohio (“Commission” or “PUCO”) to strike Orwell Natural Gas Company’s (“ONG’s”) Motion to Compel Enforcement of Commission-Approved Reasonable Arrangement (“Motion”) based on the following grounds: (1) this Commission does not have jurisdiction to hear this case; (2) to the extent this Commission has jurisdiction to hear this case, it must defer to the Lake County Court of Common Pleas under the doctrine of primary jurisdiction; and (3) ONG’s Memo to Enforce is actually a misidentified Motion for Summary Judgment that fails to meet the standards required to obtain an order disposing of this case without an evidentiary hearing. In the event that the Commission does not strike ONG’s Motion, then the Commission should deny ONG’s Motion on the same grounds.

II. MATERIAL FACTS

A. This Commission's Orders In Case No. 08-1244-PL-AEC And Case No. 15-637-GA-CSS.

By an Entry dated July 8, 2008 in Case No. 08-1244-PL-AEC ("2008 Entry"), this Commission approved a "reasonable arrangement" (the "Contract") between ONG and OTPC. In 2015, however, ONG filed a complaint with this Commission, alleging that many of the terms of the Commission-approved Contract were unreasonable and therefore the Contract should be terminated. After the hearing and the post-hearing briefs filed by OTPC, ONG, the Ohio Consumers' Counsel ("OCC") and the PUCO's Staff ("Staff"), the Commission, in an Opinion and Order entered June 15, 2016 in Case No. 15-637-GA-CSS ("2016 Order"): (1) denied ONG's request to terminate the Contract; (2) re-affirmed certain terms of the Contract; and (3) modified other terms of the Contract. Following the Commission's modification of the Contract, the terms of the Contract that are material to the issues raised by ONG in both its Motion and its Complaint are clear, unambiguous, and immutable as to service provided between the 2016 Order and today. Those material terms are:

- (1) the rates applicable to the transportation service OTPC provides to ONG is \$1.01 per MFC;
- (2) OTPC was ordered to provide ONG with, and ONG was ordered to purchase from OTPC, transportation service on a "firm" rather than "interruptible" basis.
- (3) The Maximum Daily Quantity ("MDQ") reserved by ONG for its exclusive use equals 2000 Dth per day.

In response to the 2016 Order, OTPC filed an Application for Rehearing ("OTPC's Application for Rehearing") on July 15, 2016. OTPC's Application for Rehearing argued that the 2016 Order: (1) ignored Constitutional prohibitions against the impairment of contracts; (2)

failed to follow the Commission's precedent from *In the Matter of the Application of Ohio Power Company to Cancel Certain Special Power Agreements and For Other Relief*, Case No. 75-161-EL-SLF; and (3) created a new standard for the Commission to modify contracts that would invite disenchanted persons or entities to declare that a "dispute" exists in order to present virtually any evidence that may justify their disenchantment.

ONG did not file an Application for Rehearing. In fact, ONG filed a Memorandum Contra to OTPC's Application for Rehearing on July 25, 2017. In ONG's Memorandum Contra to OTPC's Application for Rehearing, ONG stated the reasons why it believed the Commission's 2016 Order was proper. This Commission granted OTPC's Application for Rehearing, by Entry dated August 3, 2016, "for further consideration of the matters specified in [OTPC's] application." Nearly fifteen months later, OTPC's Application for Rehearing remains pending.

B. The Lake County Lawsuit.

Pending a decision on its Application for Rehearing, OTPC issued its first invoice to ONG that imposed charges for firm service on July 22, 2016. That invoice recognized OTPC's obligation to provide and charge for firm transport. That invoice recognized the 2,000 Dth MDQ. On October 20, 2016, after several months in which OTPC was unable to secure OTPC's voluntary compliance with this Commission's 2016 Order, OTPC filed a breach of contract claim against ONG in the Court of Common Pleas in Lake County, Ohio. That case was docketed as Case No. 16-CV-001776 ("Lake County Lawsuit"). ONG filed its Answer and Counterclaim ("ONG's Counterclaim") in the Lake County Lawsuit on January 11, 2017. In its Counterclaim, ONG raised essentially the same arguments it raises herein. Also on January 11, 2017, ONG filed a Motion to Expedite the Hearing ("Motion to Expedite") in the Lake County

Lawsuit. OTPC timely filed its Answer to ONG's Counterclaim and did not oppose ONG's Motion to Expedite a decision in the Lake County Lawsuit.

On June 28, 2017, OTPC deposed Michael Zappitello, Director of Gas Procurement for ONG. On July 14, 2017, ONG filed a Motion to Dismiss in the Lake County Lawsuit ("ONG's Motion to Dismiss). On July 17, 2017, OTPC filed a Motion for Summary Judgment in the Lake County Lawsuit ("OTPC's Motion for Summary Judgment"). On July 25, 2017, ONG filed a Motion to Stay in the Lake County Lawsuit ("ONG's Motion to Stay"). Each Motion filed by ONG and OTPC has required subsequent Memorandum Contrasts and Replies to those Memorandum Contrasts.¹ On September 5, 2017, ONG filed a Notice of Substitution of Counsel in the Lake County Lawsuit.

C. ONG's Efforts To Repeat The Lake County Lawsuit In This Forum.

Months after the Lake County Lawsuit was filed, ONG filed its Complaint in this Case ("PUCO Lawsuit"). OTPC timely answered ONG's Complaint in the PUCO Lawsuit on March 8, 2017.² On July 7, 2017, OTPC filed a Motion to Dismiss in the PUCO Lawsuit ("OTPC's Motion to Dismiss"). That motion remains pending. ONG filed a Notice of Substitution of Counsel on September 13, 2017 in the PUCO Case. The same day, ONG's new counsel filed the Motion now at issue. Each Motion filed by ONG and OTPC has (or will) require subsequent Memorandum Contrasts and Replies to those Memorandum Contrasts.

¹ OTPC did not challenge ONG's Motion to Expedite in the Lake County Lawsuit.

² OTPC's Answer was timely because OTPC was not served with ONG's Complaint in the PUCO Case until February 20, 2017.

III. LAW & ARGUMENT

A. The Motion Should Be Stricken Because This Commission Does Not Have Jurisdiction To Hear ONG's Complaint, Which Means That This Commission Does Not Have the Authority To Grant ONG's Motion.

Pursuant to Ohio Revised Code (“O.R.C.”) §4905.05 and §4905.26, this Commission 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. Despite the broad jurisdiction and authority granted this Commission, the Ohio Supreme Court has repeatedly held that this Commission 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 p. 30- 31, and *Allstate Insurance Co.*, 119 Ohio St. 3d 301. In other words, cases to determine rates and terms of service are subject to the unique and exclusive jurisdiction of this Commission. Cases to enforce the rates and terms of service established by this Commission are matters properly heard by Courts with appropriate jurisdiction.

ONG's Complaint contains a Prayer for Relief that is intentionally unclear as to what ONG is actually seeking from this Commission. However, ONG's Complaint can be interpreted in either of two ways.³ Either way ONG's Complaint is interpreted, this Commission does not have the jurisdiction over this matter. The first way ONG's Prayer for relief could be interpreted

³ With considerable effort, ONG's Complaint could theoretically be interpreted a third way. In that interpretation, ONG would seek only prospective relief, contending that despite being consistent with this Commission's 2016 Order, OTPC's rates are nonetheless unreasonable, unjust, or unlawful. OTPC, of course, concedes this Commission would have jurisdiction to hear that complaint. The problem with this interpretation of ONG's Complaint is threefold, however. First, this Commission already concluded that it was unable to determine just and reasonable rates in Case No. 15-637-GA-CSS. Thus, ONG could not be asking this Commission to do so based upon an existing record. Second, a proceeding already exists for the very purpose of determining OTPC's rates in Case No. 16-1726-PL-AIR. Thus, ONG's complaint in this matter would be pointless. Third, this interpretation ignores ONG's Complaint, which is expressly based upon invoices OTPC already issued ONG, based upon the 2016 Order.

is as a demand for a declaratory judgment concerning the proper interpretation of the 2016 Order. If this is ONG's desired interpretation of its Complaint then the Commission does not have the ability to provide the remedy ONG seeks. Simply put, this Commission has no power to issue declaratory judgments. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 1976 Ohio App. Lexis 6720 at *6 (9th District). ONG is aware of this fact and therefore tries to seek a "clarification" instead of a "declaration." However, ONG use of a synonym should not allow it seek a remedy that this Commission does not have jurisdiction to provide.

The second way ONG's Complaint may be interpreted is as a request that this Commission re-visit and change its 2016 Order. If that is ONG's intent, its "claim" is barred for two reasons. The first reason ONG's "application for rehearing" claim is barred is because ONG failed to file a timely application for rehearing of the Commission's 2016 Order. O.R.C. §4903.10 requires that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not set forth in the application [for rehearing]." This application would have been due on July 15, 2016, pursuant to O.A.C. §4901-1-35. ONG filed no such application.

The second reason ONG's "application for rehearing" is barred is because it seeks a relief that is unavailable to it due to the Filed Rate Doctrine and the prohibition in Ohio against retro-active rate making. O.R.C. §4905.32 mandates:

"No public utility shall charge ... a different rate ... than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate ... so specified, ... except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

A utility's rate may be embodied in a tariff or within a reasonable arrangement. The Contract, between ONG and OTPC, is a "reasonable arrangement" as defined by Ohio Revised Code ("O.R.C.") §4905.31. OTPC has no option except to provide service upon Commission-approved terms, at the Commission approved rate. ONG has no option but to pay the Commission approved rate for service, upon Commission-approved terms.

Further, it is fundamental Ohio law that **even this Commission's hands are tied at this point.** This Commission is a creature of statute that may exercise only those powers granted it by the Ohio General Assembly. The Ohio Supreme Court has repeatedly held that this Commission's powers do not include the power to determine the legal rights and obligations of the parties to the contract. *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. This Commission also cannot engage in retroactive rate-making. *See Kecko Indus. v. Cincinnati & Suburban Tel. Co.* (1957), 166 Ohio St. 254, 257. See, also, *Lucas County Commissioners v. Public Utilities Commission*, 80 Ohio St.3d 348, 885 N.E.2d 501 (1997); *Industrial Energy Users-Ohio v. Public Utilities Commission of Ohio*, 117 Ohio St.3d 486, 885 N.E.2d 195 (2008); *In re Application of Columbus Southern Power Co. v. Public Utilities Commission of Ohio*, 138 Ohio St.3d 863, 8 N.E.3d 863 (2014); and *In re Complaint of Pilkington N. Am., Inc.* 145 Ohio St.3d 125, 47 N.E.3d 786 (2015).

In fact, under the Filed-Rate Doctrine, the Commission's ratemaking authority is prospective only. *Lucas County Commissioners*, 80 Ohio St.3d at 347, 686 N.E.2d at 504. In other words, the rates filed with and approved by the Commission are the only lawful rates and the only rates that a utility can charge its customers under O.R.C. §4905.32, even if those rates are subsequently determined to be unjust, unreasonable, or unlawful. *In re Pilkington*, 145 Ohio

St.3 at 131, 47 N.E.3d at 793. Therefore, past invoices based on the lawful rate of a reasonable arraignment are breach of contract claims that are beyond the jurisdiction of this Commission.

B. The Primary Jurisdiction Rule Bars ONG's Complaint in this Forum.

Ohio recognizes and enforces a “jurisdictional priority rule.” This rule applies whenever efforts are made to invoke the jurisdiction of two or more tribunals having concurrent jurisdiction over the subject matter of a dispute. In such cases, “. . . the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals.” *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (Franklin County) 1999 Ohio App. LEXIS 4175; 1999 WL 694742. No tribunal of coordinate jurisdiction is thereafter at liberty to interfere with proceedings that occur in the first to assert its jurisdiction. *Weenik & Sons Co. v. Ct. of Comm. Pleas, Cuyahoga Cty* (1948), 150 Oeshio St. 349.

Proceedings are considered “properly initiated” for purposes of the rule based upon when service of process is complete. As between the Lake County action and this action, pending before this Commission, process was successfully served in the Lake County action on December 22, 2016, pursuant to Rule 4(C). Process was not completed in this proceeding, however, until February 17, 2017. Because the Lake County action was filed first, and because service of process was completed in the Lake County action before service was complete in this case, the Lake County Court of Common Pleas has exclusive jurisdiction to address the disputed matters.⁴

⁴ In addition, because it is patently clear that ONG deliberately attempted, on multiple occasions, to avoid service of process in the Lake County Case, jurisdiction in the Lake County Court of Common Pleas would likely be deemed appropriate on the date action was filed in that Court – even if service were not first completed by that tribunal. *See, B-Dry System v. Krnenthal*, (Montgomery County) 1999 Ohio App. LEXIS 3080, 1999 WL 961248.

C. ONG Has Failed To Satisfy The Requirements Of A Motion For Summary Judgment.

ONG “Motion to Compel” is in fact nothing but a disguised Motion for Summary Judgment. This is evident because ONG is asking the Commission to determine the merits of this case without holding a hearing. Specifically, ONG is asking this Commission to determine the merits of this case by employing ONG’s preferred interpretation of the Contract after it was amended by the 2016 Order. However, simply mislabeling its Motion does not relieve ONG of the obligations necessary to obtain a judgment without a hearing.

There is no summary judgment provision in the Commission’s administrative provisions and procedures. However, this Commission reviews motions for summary judgment the same way that Courts review motions for summary judgment under Ohio R. Civ. P. 56(C). Specifically, this Commission will grant summary judgment, without the need for a hearing, when: (1) there is no genuine issue of material fact;⁵ (2) the moving party is entitled to a judgment as a matter of law;⁶ and (3) even when viewing the evidence strongly in favor of the non-moving party, reasonable minds could come to only one conclusion.⁷ ONG’s Motion fails on all of these grounds.

It is true that there is no material dispute of facts in this case. OTPC was ordered to provide firm transport. OTPC is doing so, at the rate of \$1.01 per MCF – the only rate authorized by the Contract, and a rate this Commission unequivocally left unchanged, pending its decisions in OTPC’s rate case. Of course, the interpretation of the Contract after it was

⁵ See Entry dated October 24, 2007 in, *In the Matter of the Complaint of Debra and Andrew Dennewitz and State Farm Fire & Casualty Company v. East Ohio Gas Company dba Dominion East Ohio*, Case No. 07-517-GA-CSS at ¶5.

⁶ See Entry dated February 5, 1999 in, *In the Matter of the Complaint of Nancy M. Cole v. Cincinnati Gas & Electric Company*, Case No. 98-821-EL-CSS at ¶3.

⁷ See Entry dated November 9, 2005 in, *In the Matter of the Complaint of Don Holmes v. United Telephone Company of Ohio dba Sprint*, Case No. 03-253-TP-CSS at ¶9.

amended by the 2016 Order is in dispute. In fact, both ONG and OTPC have now filed lawsuits disputing the meaning of the Contract after it was amended by 2016 Order. Specifically, OTPC properly brought a breach of contract claim in the Lake County Lawsuit, while ONG improperly seeks a “clarification” of this Commission’s 2016 Order that it failed to raise at the appropriate time, in an Application for Rehearing.⁸

In either venue, ONG is unlikely to succeed on the merits. And in neither venue does it have any hope of succeeding as a matter of law, particularly when the evidence is viewed “strongly in favor of the non-moving party” as is proper when this Commission or a court evaluates a dispositive motion. This is because the facts of this case are that the Contract was drafted as an interruptible transportation contract. The Contract, as originally drafted, acknowledged that multiple **Rates** are charged for the transportation of natural gas through natural gas pipeline systems.

This is evidenced by the specific language used in Contract. Specifically, the language states:

***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 (5th) anniversary date for the remaining term of this Agreement to reflect the higher of \$0.95 per Thousand Cubic Feet (Mcf) or a negotiated rate to reflect the then current market conditions existing on each such rate adjustment date. If the parties cannot agree on a rate adjustment amount, OTPC shall have the option to increase the Rate by the increase in the consumer price index all items (Cleveland, Ohio) (“CPI”) as calculated from July 1, 2008 to each applicable rate adjustment date.⁹

⁸ It is perhaps ironic that OTPC attempted to warn this Commission in Case no. 15-637 that attempting to amend a Contract after the Contract had been approved by the Commission would invite issues such as that now raised by the dispute between ONG and OTPC.

⁹ The Contract’s specific terms include the word “Rates” repeatedly. “Rates,” of course, is the plural of the word “rate.” The plural of a word denotes that there will be more than one of something.

Because the contract was interruptible as initially drafted by the parties, the only applicable contract rate stated was a commodity charge, (“Commodity Charge”). Commodity Charges, of course, are imposed based upon quantities actually shipped.

This Commission, however, chose to amend the Contract drafted by the parties. When it imposed a firm service obligation, however, it was necessarily aware that its Order directing OTPC to reserve space on the system for ONG would prevent OTPC from offering that same space to any another shipper. The Commission was equally aware that the amount of capacity reserved in pipeline contracts is expressed as a Maximum Daily Quantity (“MDQ”), and the Commission would have observed that the MDQ contained within the ONG/OTPC Contract was 2000 Dth. The Commission, obviously, was also aware that in the pipeline industry, transporters are compensated for such reservations of system space through “reservation” or “capacity” charges (“Capacity Charge”) that are based upon the specific amount of capacity reserved for the exclusive use of the shipper benefitting from the firm contract.

Not only would this Commission have understood the result of its Order, but ONG understood, as well. ONG’s position in Case No. 15-637-GA-CSS was in large part based upon the alleged “necessity” of amending the contract so that the “inferior” quality interruptible service was replaced with firm transport service. ONG’s Director of Gas Procurement and its principal witness in that matter, Mr. Michael Zappitello, (“Mr. Zappitello”) testified that firm service was more valuable, and therefore typically more expensive, than interruptible service and argued for the imposition of firm service nonetheless. *Transcript, Case No. 15-637-GA-CSS, November 3, 2015 Hearing, Vol. I*, Page 139, Lines 12 – 21. ONG’s disenchantment when it recognized that its costs had just increased as a result of this Commission’s 2016 Order does not

mean that pipeline companies that impose capacity charges for firm service are acting unjustly, unreasonably, or unlawfully. Nor does that increase signify that OTPC's charges are unreasonable, unjust, or unlawful.

IV. CONCLUSION

ONG obfuscates its demands, and it mischaracterizes even the nature of its Motion, because the law is clear that this Commission does not have jurisdiction in this matter and that the proper forum for a determination of the obligations contained in the existing approved Contract is with the Lake County Court of Common Pleas.¹⁰ OTPC is unclear whether ONG: (1) believes that it has a "home court advantage" with the Commission; (2) is merely trying to increase OTPC's legal fees to encourage settlement; or (3) has no plan and is simply hoping that this Commission can somehow bail ONG out of the situation it bumbled its way into when it first challenged the Contract from which it had benefitted from for more than eight (8) years.¹¹ Whichever the case may be, this Commission cannot allow ONG's continued attempts at deception lead to an unlawful outcome. For these reasons, and the reasons stated in this Memorandum in Support, the Commission should STRIKE ONG's Motion, or in the alternative DENY ONG's Motion.

¹⁰ Again, OTPC acknowledges that this Commission has the authority to **prospectively** determine issues involving its rates. OTPC's **future** rates, however, will be determined in Case No. 16-1726-PL-AIR, i.e. the Rate Case – not in this wasteful and unnecessary sideshow.

¹¹ The evidence in Case No. 15-637-GA-CSS plainly demonstrated that to the date of the hearing in that case, the Contract had provided a net benefit to ONG and its ratepayers.

Respectfully Submitted,

/s/ Michael D. Dortch

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CERTIFICATE OF SERVICE

The PUCO's e-filing system will serve notice of this filing upon counsel for the Complainant and the Staff of the Public Utilities Commission of Ohio. Further, I hereby certify that a true and accurate copy of the foregoing was served upon counsel for the Complainant this September 28, 2017, by electronic mail:

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Summary: Motion OTPC's Motion to Strike Orwell Natural Gas Company's Motion to Compel Enforcement of Commission-Approved Reasonable Arrangement and in the Alternative OTPC's Memorandum Contra electronically filed by Mr. Justin M Dortch on behalf of Orwell-Trumbull Pipeline Company, LLC