THE 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.	

SECOND ENTRY ON REHEARING

Entered in the Journal on November 29, 2017

I. SUMMARY

{¶ 1} The Commission denies Orwell-Trumbull Pipeline Company, LLC's application for rehearing of the Commission's June 15, 2016 Opinion and Order regarding two complaints filed against it by Orwell Natural Gas Company relating to a reasonable arrangement between the two companies.

II. DISCUSSION

A. Applicable Law

{¶ 2} Orwell Natural Gas Company (Orwell) is a natural gas company as defined by R.C. 4905.03(E), and Orwell-Trumbull Pipeline Company, LLC (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, and both are subject to the jurisdiction of the Commission pursuant to R.C. 4905.04 and 4905.05.

{¶ 3} 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

reasonable arrangement shall be under the supervision and regulation of the Commission and is subject to change, alteration, or modification by the Commission.

{¶ 4} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 5} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

B. Procedural History

{¶ 6} On September 19, 2014, and March 31, 2015, Orwell filed complaints against OTP pursuant to R.C. 4905.26. Docketed as Case No. 14-1654-GA-CSS (14-1654) and Case No. 15-637-GA-CSS (15-637), both complaints relate to a reasonable arrangement for natural gas transportation services (Agreement) between Orwell and OTP that was approved by the Commission pursuant to R.C. 4905.31. *In re Orwell-Trumbull Pipeline Co., LLC*, Case No. 08-1244-PL-AEC, Entry (Dec. 19, 2008).

{¶ 7} In each case, OTP filed an answer denying the allegations in the complaints.

{¶ 8} On November 3 and 4, 2015, the attorney examiner conducted a consolidated hearing of 14-1654 and 15-637.

{¶ 9} On June 15, 2016, the Commission issued an Opinion and Order in these cases. Therein, we found that the complaint filed in 14-1654 should be dismissed. Additionally, as to 15-637, we concluded that the arbitration provision of the Agreement should be suspended until further order, that Orwell's request for refunds should be denied, that the Agreement

should be modified as set forth in the Opinion and Order, that OTP should file a rate case 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.

{¶ 10} On July 14, 2016, Orwell and OTP filed a joint motion to dismiss the complaint in 14-1654 with prejudice. As the complaint in 14-1654 was dismissed previously by the Commission in its June 15, 2016 Opinion and Order, no further action is necessitated by Orwell and OTP's July 14, 2016 joint filing.

{¶ 11} On July 15, 2016, OTP filed an application for rehearing in 15-637 raising three assignments of error. On July 25, 2016, Orwell and the Ohio Consumers' Counsel (OCC) filed memoranda contra OTP's application for rehearing.

{¶ 12} By Entry on Rehearing dated August 3, 2016, the Commission granted rehearing for further consideration of the matters specified in OTP's application for rehearing.

C. *Consideration of Application for Rehearing*

1. FIRST ASSIGNMENT OF ERROR

{¶ 13} In its first assignment of error, OTP contends that the Commission erred when it ignored federal and state constitutional prohibitions against the impairment of contracts. In support of its position, OTP claims that the prohibition against the impairment of contracts is one of several powers expressly set forth in Clause I, Article 1, Section 10 of the U.S. Constitution (Federal Contract Clause): "No State shall * * * make any * * * Law impairing the Obligation of Contracts * * *." OTP argues that the Commission is subject to the Federal Contract Clause and to the restraint upon the impairment of contracts. OTP further contends that, if not the Federal Contract Clause, the Commission is subject to Section 28, Article II of the Ohio Constitution (Ohio Contract Clause): "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

{¶ 14} OTP claims that the Ohio Supreme Court has repeatedly found that the Ohio Contract Clause bars a state from imposing new duties and obligations upon a person's past conduct and transactions, stating that "[a]ny change which impairs the rights of either party, or amounts to a denial or obstruction of the rights accruing by a contract, is obnoxious to this constitutional provision." *Aetna Life Ins. v. Schilling*, 67 Ohio St.3d 164, 616 N.E.2d 893 (1993). OTP also cites to several cases where it claims the Ohio Supreme Court has similarly found against the retroactive application of laws to contracts entered into prior to enactment of the statutes. *Ross v. Farmers Ins.*, 82 Ohio St.3d 281, 695 N.E.2d 732 (1998); *Burtner-Morgan-Stephens Co. v. Wilson*, 63 Ohio St.3d 257, 586 N.E.2d 1062 (1992). OTP argues these cases hold that, pursuant to the Ohio Contract Clause, a statute could not be retroactively applied to determine the distribution of royalties that were provided for in an agreement entered into prior to the enactment of the statute. In addition, OTP cites to *Kiser v. Coleman*, 28 Ohio St.3d 259, 503 N.E.2d 753 (1986), where it asserts that the Ohio Supreme Court held that the retroactive application of statutory provisions to land installment contracts that were in existence at the time of the enactment of the statutes violated the Ohio Contract Clause by impairing an obligation of contract. OTP argues that the Ohio General Assembly may not impair an obligation of contract, nor can the Ohio General Assembly authorize the Commission to impair contracts, which, according to OTP, the Commission did in modifying the Agreement in its June 15, 2016 Opinion and Order.

{¶ 15} In its memorandum contra, Orwell contends that OTP has failed to cite a single case that holds that either the Federal Contract Clause or the Ohio Contract Clause applies to reasonable arrangements approved by the Commission under R.C. 4905.31. Orwell notes that the Federal and Ohio Contract Clauses are intended to protect the expectations of parties to private contractual arrangements; whereas reasonable arrangements approved by the Commission under R.C. 4905.31 are very different from private contracts, as they are creatures of statute that require Commission approval and remain under our continuing supervision and jurisdiction. According to Orwell, parties to reasonable arrangements filed pursuant to

R.C. 4905.31 understand, at the time they are filed, that those agreements can be modified by the Commission; whereas private contracts are governed by contract law and the terms of the parties' agreements. Orwell rejects OTP's argument that the Commission's ability to modify a reasonable arrangement is limited once it is approved by the Commission and contends that OTP misinterprets R.C. 4905.31, which 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. According to Orwell, OTP was aware that the Agreement could be modified by the Commission at the time it was filed and, thus, cannot honestly claim that its rights were unexpectedly impaired by the Commission's Opinion and Order.

{¶ 16} Orwell also argues that the four cases cited by OTP are irrelevant. According to Orwell, *Aetna* and *Ross* (which involved life insurance agreements between life insurance companies and insured individuals); *Burtner-Morgan-Stephens* (which involved an oil and gas lease agreement between a gas company and landowner); and *Kiser* (which involved a land installment contract between a landowner and potential purchaser) are all cases involving private contracts, which are not at issue in this case. Further, Orwell argues that, regardless of the applicability of the Federal or Ohio Contract Clause to this case, the Commission had the authority under R.C. 4905.31 to modify the Agreement. Orwell cites to *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, in which the Ohio Supreme Court held that the Federal and Ohio Contract Clause prohibitions do not affect the Commission's proper exercise of its police powers. According to Orwell, the purpose of the Federal and Ohio Contract Clauses is to protect the legitimate expectations that arise from contractual relationships from unreasonable legislative interference and the Commission fully explained at ¶ 42-58 of the Opinion and Order why modifying the Agreement was necessary to protect Orwell's ratepayers.

{¶ 17} OCC similarly rejects OTP's claim that the Commission's modification of the Agreement violates the Federal and Ohio Contract Clauses. OCC contends that the U.S. Supreme Court has set forth a test to determine whether contracts are unconstitutionally

impaired. According to OCC, under the test, the first question is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). In this case, OCC asserts that the Commission's modifications, noted in ¶ 39-40, do not set aside the Agreement, but only modify portions of it, and were narrowly tailored to protect the public interest in Orwell's customers receiving natural gas from OTP under reasonable terms and conditions.

{¶ 18} OCC notes that the extent to which the contractual impairment is a function of industry regulation also must be considered. *Energy Reserves* at 411. OCC argues that OTP is a pipeline company regulated by the Commission and the Agreement is subject to the supervision and approval of the Commission. Thus, according to OCC, the nature of any impairment, to the extent any exists, is substantially decreased.

{¶ 19} OCC further argues that, even if the regulation or order impairs a substantial right, it still may be appropriate where there is a significant and legitimate public purpose behind the regulation or if the order is emergency or temporary. *Energy Reserves* at 411-412. In this case, OCC argues that the Opinion and Order serves the public interest of ensuring reliable gas service to Orwell's residential customers, who depend on natural gas and need multiple reliable sources of gas for their homes.

{¶ 20} Additionally, OCC argues that, while OTP cites to a number of cases that allegedly show the Commission has retroactively applied statutory provisions to the Agreement, OTP fails to acknowledge that the Ohio law in question—R.C. 4905.31—plainly gives the Commission continuing authority over the Agreement and all such reasonable arrangements. OCC also claims that R.C. 4905.31 provides that reasonable arrangements, including the Agreement in this case, remain under the supervision of the Commission; that the Commission has continuing jurisdiction over these special arrangements; and that the Commission was well within its statutory and constitutional authority in ordering the modifications to the Agreement set forth in the Opinion and Order.

{¶ 21} Upon review, we find no merit in OTP's first assignment of error. R.C. 4905.31 provides that a public utility may establish a reasonable arrangement with another public utility over the rates and terms of service that are subject to the approval of the Commission. R.C. 4905.31 also specifies that every 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." The Commission has a long history of approving special arrangements, including the Agreement at issue, under R.C. 4905.31. Here, Orwell filed a complaint challenging the reasonable arrangement embodied by the Agreement and, following a hearing on the merits of that complaint, the Commission found that certain provisions were unjust and unreasonable. Accordingly, and pursuant to the power granted us by the General Assembly, the Commission exercised its continuing supervisory and regulatory authority under R.C. 4905.31 to order modifications be made to the Agreement. OTP has raised no new arguments challenging the fact that the Agreement is a reasonable arrangement approved pursuant to R.C. 4905.31 and, as such, remains subject to the Commission's continuing jurisdiction. Furthermore, as noted by OCC, at the time the Agreement was filed, OTP was fully cognizant that the Agreement was subject to the approval and continuing jurisdiction of the Commission under R.C. 4905.31, which means the Agreement was subject to change, alteration, or modification by the Commission.

{¶ 22} OTP's arguments related to the Federal and Ohio Contract Clauses are misplaced. The Federal Contract Clause provides:

> No State shall * * * make any * * * Law impairing the Obligation of Contracts * * *.

Article I, Section 10, U.S. Constitution. Similarly, the Ohio Contract Clause provides:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts * * *.

Article II, Section 28, Ohio Constitution.

{¶ 23} We note that traditional constitutional law questions are beyond the legislative authority of the Commission to determine. The Commission is an administrative agency with powers specifically granted by the Revised Code. *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 14. In its application for rehearing, OTP has raised the claim that the Commission's modification of the Agreement constitutes an impairment of contract. Although this claim is a constitutional one, we must address it in order to resolve Orwell's complaint.[1]

{¶ 24} The basis for our analysis regarding whether there is any impairment of contract was set forth by the U.S. Supreme Court in *Energy Reserves*. Initially, the Court noted that, "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Energy Reserves*, 459 U.S. at 410 (citation omitted). The Court then set forth a three-part test to determine whether the state has impaired a contract in violation of the Federal Contract Clause:

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." * * * In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. * * *

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1 The Commission additionally acknowledges Orwell's contention that the Federal and Ohio Contract Clauses are not implicated by this case because it involves a statutorily created rate arrangement, not a private contract. At a foundational level, the Commission agrees that there are significant differences between a private contract and reasonable arrangement created under R.C. 4905.31. Significantly, reasonable arrangements are statutorily created and Commission approved exceptions or changes to what would otherwise be a customer's standard utility rate schedule and, therefore, fall within the exclusive jurisdiction of the Commission. *See, State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶18 ("The [C]ommission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service * * *."). In essence, a reasonable arrangement is a customized tariff, one that falls under the continued supervision and regulation of the Commission and is subject to change, alteration, or modification by the Commission. At the same time, however, there are also similarities between private contracts and statutory reasonable arrangements, and the Supreme Court of Ohio has consistently applied traditional concepts of contract interpretation to special arrangements.

> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem. * * *
>
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption."

Energy Reserves Group, 459 U.S. at 411-412 (alteration in original) (citations omitted).

{¶ 25} As Orwell notes, the Ohio Supreme Court applied this three-part test in *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 36-47. In that case, Utility Service Partners, Inc. (USP) appealed from an order of the Commission that made Columbia Gas of Ohio, Inc. (Columbia) responsible for the repair and replacement of hazardous natural gas service lines. In proceedings before the Commission, USP, a private company that held warranties with roughly 100,000 of Columbia's customers to repair and replace service lines, argued that the Commission's order directing Columbia to assume responsibility for those customer-owned service lines substantially impaired the obligation of USP's warranty-service contracts in violation of the Federal and Ohio Contract Clauses. In rendering its Order, the Commission undertook the analysis set forth in *Energy Reserves* taking into account the various parties' arguments and, ultimately, concluded that there was no substantial impairment of contract. *In re Columbia Gas of Ohio, Inc.*, Case No. 07-478-GA-UNC, et al., Opinion and Order (Apr. 9, 2008) at 18. The Commission further found that, "even if there were a substantial impairment of the warranty contracts in question, we would have a significant and legitimate public purpose in causing such an impairment," i.e., increasing public safety as it relates to the gas distribution system. *Id.* at 19. Finally, the Commission found that Columbia's infrastructure replacement program, by which Columbia would be responsible for repair and replacement of the service lines previously subject to USP's warranty contracts, appropriately addressed the need to improve public safety in the gas distribution system. *Id.*

{¶ 26} On appeal, the Ohio Supreme Court similarly rejected USP's impairment of contract arguments. *Util. Serv. Partners, Inc.*, 2009-Ohio-6764 at ¶ 47. Applying the analysis set forth in *Energy Reserves*, the Ohio Supreme Court first found that USP had failed to introduce to the record any contract or detailed description of any contractual terms. The Court noted that this evidentiary failure was fatal to USP's impairment-of-contract claims; "[w]ithout evidence of the 'obligation of contracts,' it is impossible to determine whether they have been 'impaired.'" *Util. Serv. Partners, Inc.*, at ¶ 39-40. Continuing, the Court concluded that—even assuming the demonstration of a substantial impairment of contract—"the order was driven by a significant and legitimate public purpose and satisfies the second part of the *Energy Reserves* test." *Id.* at ¶ 44. In reaching that conclusion, the Court noted that our order represented an exercise of police power. *Id.* Then, in examining the third and only remaining inquiry under *Energy Reserves*, the Court specified: "We have held that we will not invalidate an exercise of the police power "unless the * * * determination that the [regulation] bears a real and substantial relationship to public health, safety and welfare appears to be clearly erroneous." *Id.* at ¶ 45 (alternation in original) (citation omitted). Ultimately, the Court found that the order was well tailored to meet its objective of protecting the public's safety. *Id.* at ¶ 46.

{¶ 27} Guided by this precedent, we begin our analysis of OTP's assertion that the Commission's Opinion and Order violates the Federal and Ohio Contract Clauses with the three-part test set forth in *Energy Reserves*. Again, the first question is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves*, 459 U.S. at 411 (citation omitted). We find that OTP has failed to demonstrate that a substantial impairment of contract occurred. OTP appears to suggest that any modification of the Agreement by the Commission constitutes a substantial impairment of OTP's contractual relationship with Orwell. At its most specific, OTP finds error in the Commission's decision to (1) suspend the arbitration provision, (2) modify service from interruptible to firm, and (3) eliminate the sole-source provision. No further detail is given. Aside from its general

grievance that the Commission upset its commercial expectations by failing to enforce the parties' "original intent,"[2] OTP provided no explanation as to what contractual obligations were impaired, substantially or otherwise, with respect to the Agreement. None of the modifications to the Agreement, including those alluded to by OTP, substantially impair the parties' contractual relationship. The modifications do not prevent OTP from providing service to Orwell; nor do they prevent OTP from obtaining payment for such service. In addition, none of the modifications prohibit the parties from continuing their contractual relationship. In fact, in not terminating the Agreement, the Commission stressed the importance that Orwell and OTP maintain their commercial ties and working relationship. Opinion and Order at ¶ 39. Finally, we note that the natural gas industry has been highly regulated for many years and that the Commission has extensive authority over pipeline companies and public utilities generally. Indeed, OTP acknowledged the Commission's regulatory authority through provisions expressly stating that the Agreement is subject to the Commission's approval under R.C. 4905.31. This indicates that OTP knew that its contractual rights were subject to alteration by the Commission and that it was foreseeable that the Commission could modify the Agreement. *See Energy Reserves*, 459 U.S. at 416 (finding no substantial impairment where the natural gas industry was heavily regulated by the state and price regulation existed and was foreseeable).[3] For these reasons, we find that the Commission's modification of the Agreement in the Opinion and Order did not operate as a substantial impairment of the contractual relationship between OTP and Orwell.

{¶ 28} Under the three-part test from *Energy Reserves*, the second and third elements of the test need not be addressed if no substantial impairment of contracts is found. We have

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2 Under R.C. 4905.31, the parties are statutorily presumed to have originally intended for their reasonable arrangement to be subject to change, alteration, or modification by the Commission as a result of the arrangement being under our continuing jurisdiction.

3 *See also Employers Reinsurance Corp. v Worthington Custom Plastics, Inc.*, 109 Ohio App.3d 550, 561, 672 N.E.2d 734 (1996) ("Because the area of workers' compensation is highly regulated and because appellant's obligations under the agreements are specifically linked to the Workers' Compensation Act, we conclude that plaintiff must have expected, or at least should have expected, that changes to the Workers' Compensation Act * * * would affect its liability under the agreements.").

determined that there is no substantial impairment of the contractual relationship between OTP and Orwell. To be comprehensive, however, we will nevertheless address the remaining two parts of the test.

{¶ 29} Assuming arguendo that the Opinion and Order substantially impaired OTP's contract with Orwell, the second factor tests whether that impairment is justified by "a significant and legitimate public purpose." *Energy Reserves*, 459 U.S. at 411-412. Initially, we note that, in rejecting numerous Federal and Ohio Contract Clause challenges, the Ohio Supreme Court has affirmed the Commission's powers to protect the public health and the public safety. *See, e.g., Util. Serv. Partners, Inc. v. Pub. Util. Comm., supra; Columbia Gas of Ohio, Inc. v. Pub. Util. Comm.*, 5 Ohio St.3d 105, 109, 449 N.E.2d 433 (1983); *Atwood Resources, Inc. v. Pub. Util. Comm.*, 43 Ohio St.3d 96, 100, 538 N.E.2d 1049 (1989). In this case, we find that there is a significant and legitimate public purpose underlying the modifications adopted in the Opinion and Order. As noted in *Energy Reserves*, the Federal Contracts Clause's "prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Energy Reserves*, 459 U.S. at 410 (citation omitted).

{¶ 30} Here, the modifications are necessary to protect the public health and safety of Orwell's customers. As OCC asserts, the modifications serve the public interest by ensuring there is reliable gas service, particularly to residential customers (all of whom live in the severe northeast corner of Ohio) who need and depend on a reliable source of natural gas to heat their homes. As we found at ¶ 46 of the Opinion and Order, it was necessary to direct OTP to provide Orwell with firm, rather than interruptible, service in order to ensure that Orwell's residential customers have an adequate and reliable supply of natural gas. We also noted that the Commission's gas transportation guidelines disfavor interruptible service to serve residential customers and additionally provide that residential and public-welfare customers must have adequate backup or a reliable alternative supply. Similarly, we found that the elimination of the sole-source provision was warranted to further the best interests of Orwell and its customers. As we noted at ¶ 56 of the Opinion and Order, the record in this case

demonstrated a need for Orwell to have the option of arranging for transportation service with sources other than OTP. Specifically, we found that the sole-source provision of the Agreement is not in the best interest of Orwell's customers, as it limits Orwell's ability to bring more suppliers to market and to competitively source its supplies. We also found that the sole-source provision caused an overreliance on OTP, exacerbated by the elimination of the interconnections with DEO, which overreliance causes reliability problems for Orwell. Orwell must be able to ensure the reliability of its distribution system, particularly for the safety of its residential customers. Therefore, even if there were a substantial impairment in this case, the modification of the Agreement was necessitated by a significant and legitimate public purpose: protecting the health and safety of Orwell's natural gas customers. As such, the second part of the *Energy Reserves* test is satisfied.

{¶ 31} The third question under the test is "whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves*, 459 U.S. at 412 (alteration in original) (citation omitted). We find OTP has also failed to demonstrate that the adjustments made by Commission's Opinion and Order violate this portion of the three-part test. Here, the modifications to the Agreement corrected unjust and unreasonable terms of the statutory reasonable arrangement, were based on reasonable conditions, and are appropriate and necessary to accomplish their public purpose. The modification of the Agreement requiring that OTP provide firm, rather than interruptible, natural gas transportation service to Orwell and its customers will ensure that residential customers do not face interruptions of service. Opinion and Order at ¶ 46. In addition, the elimination of the sole-source provision of the Agreement, in conjunction with the reinstallation of dismantled interconnections with DEO, will enhance the competitive nature of Orwell's gas procurement for its customers. Opinion and Order at ¶ 56-57. This further ensures adequate, reliable natural gas service to Orwell's customers.

{¶ 32} Having fully analyzed the issue under the *Energy Reserves* test, we find that the modifications adopted in the Opinion and Order do not constitute any federal or state constitutional impairment of the contractual relationship between OTP and Orwell. Accordingly, we find no merit to OTP's Federal and Ohio Contract Clause arguments.

{¶ 33} No case cited by OTP in support of its argument persuades us differently, as none shares similar issues or facts with this case. In *Aetna Life Ins. v. Schilling, supra,* the Ohio Supreme Court found that a statute nullifying a spouse's designation of a beneficiary payable under an insurance policy, when the marital relationship was terminated after the designation was made, unconstitutionally impairs the obligation of contracts as applied to contracts entered into before the effective date of the statute. In *Kiser v. Coleman, supra,* the Ohio Supreme Court found that the retroactive application of statutes limiting the availability of non-judicial forfeitures of land contracts to such contracts entered into before the effective date of the statutes violated the state constitutional prohibition against enactment of retroactive laws or laws impairing obligation of contracts. In *Burtner-Morgan-Stephens Co. v. Wilson, supra,* the Ohio Supreme Court found that R.C. 1509.27(D) may not be retroactively applied to the distribution of royalties that are provided for in an oil and gas lease that was entered into and recorded prior to the enactment of the statutory provision. And, in *Ross v. Farmers Ins., supra,* the Ohio Supreme Court held that a claim for underinsured motorist coverage is governed by the law in effect on the date of the contract, not the date of the accident giving rise to the claim. The focus of these cases is the Ohio Contract Clause's prohibition against retroactive laws via application of new statutes to pre-existing contracts. Of the four, only *Burtner-Morgan-Stephens* discusses the inherent police power of the state, and *Burtner-Morgan-Stephens* did so only to stress that this police power could not be utilized to govern the distribution of royalties. Finally, none of the cases exist in the same regulatory setting as the one before this Commission. Accordingly, nothing raised by OTP in its first assignment of error warrants modifying our decision, and we find that OTP's application for rehearing on this issue should be denied.

2. SECOND ASSIGNMENT OF ERROR

{¶ 34} In its second assignment of error, OTP contends that the Commission erred when it rejected the public interest test from *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (hereafter referred to as the "*Mobile-Sierra* doctrine"), which OTP asserts was previously approved and adopted by the Commission in *In re Ohio Power Co.*, Case No. 75-161-EL-SLF (*Ohio Power*), Entry (Aug. 25, 1975), Opinion and Order (Aug. 4, 1976). Under this assignment of error, OTP also argues that the Commission improperly relied on *In re Martin Marietta Magnesia Specialties v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104, and *In re Ormet Primary Aluminum Corp.*, 129 Ohio St.3d 9, 2011-2377, 494 N.E.2d 991, in modifying the Agreement. More specifically, OTP asserts that these cases do not support our statement that the Commission is authorized to regulate, supervise, or modify a reasonable arrangement and change the terms of the arrangement without the consent of the public utility. Opinion and Order at ¶ 36. Instead, OTP contends that, in *Martin Marietta*, the Commission expressly disavowed that it had evoked the extraordinary power of R.C. 4905.31; and, OTP contends that, in *Ormet*, the Commission was simply applying its power under R.C. 4905.31 to amend, modify, or change the terms of a proposed reasonable arrangement that was still unlawful because the contract had not yet been approved. OTP argues that the Commission should be concerned that it reached the result in this case only by abandoning its own precedent. OTP contends that the Commission's thoughtful analysis and adoption of the *Mobile-Sierra* doctrine within its *Ohio Power* decision, and the abandonment of the doctrine in this case, is remarkable. Tangentially, OTP also asserts that there was no cause for the complaint arising from the Agreement because Orwell never alleged that OTP failed to conform to the Agreement or any terms of the Agreement pursuant to R.C. 4905.26.

{¶ 35} Orwell contends that OTP makes the same arguments regarding the applicability of the *Mobile-Sierra* doctrine that it raised in post-hearing briefs and has presented nothing new in its application for rehearing. Orwell asserts that the Commission fully considered the

parties' arguments at ¶ 28-38 of the Opinion and Order and correctly determined that the *Mobile-Sierra* doctrine does not apply in this case. Orwell claims that, as noted by the Commission at ¶ 37 of the Opinion and Order, the *Mobile-Sierra* doctrine is based on interpretations of federal statutes—the Natural Gas Act and the Federal Power Act—and that neither federal statute is at issue in this case. In addition, Orwell notes that the Commission determined that "[t]he Ohio Supreme Court has never considered or adopted the application of the *Mobile-Sierra* doctrine to a matter arising under R.C. 4905.31." Opinion and Order at ¶ 38. Because OTP failed to raise any new arguments regarding the *Mobile-Sierra* doctrine, Orwell submits that OTP's application for rehearing should be denied.

{¶ 36} Orwell also asserts that OTP is mistaken in its claim that the Commission erred by failing to provide sufficient justification for rejecting its decision in *Ohio Power*. Orwell notes that the Ohio Supreme Court has held that the Commission is allowed to overturn its own precedent so long as the Commission explains why it is making its decision. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52. According to Orwell, the Court has stated that a "few simple sentences" are enough to satisfy the Commission's obligation to explain the basis of its decision. In this case, Orwell notes that the Commission devoted many pages of its Opinion and Order to analyzing *Ohio Power*, the *Mobile-Sierra* doctrine, and R.C. 4905.31. As discussed above, Orwell asserts that the Commission correctly concluded that the *Mobile-Sierra* doctrine does not apply to reasonable arrangements and correctly determined that the Commission has continuing authority to modify reasonable arrangements pursuant to R.C. 4905.31. Therefore, according to Orwell, the Commission satisfied its obligation to explain why it was overturning *Ohio Power*.

{¶ 37} Lastly, Orwell rejects OTP's claim that Orwell did not have reasonable grounds to file its complaint or for a hearing. Orwell contends that OTP raised this same argument at pages 9-11 of its post-hearing brief, and it was properly rejected by the Commission. Orwell states that it brought its complaint against OTP under R.C. 4905.26, which is "broad in

scope as to what kinds of matters may be raised by complaint before the [Commission]." *Allnet Communications Services, Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117, 512 N.E.2d 350 (1987). Orwell contends that complaints filed under R.C. 4905.26 are a means to challenge a prior Commission order, Commission-approved rate or charge, or Commission-approved reasonable arrangement. Orwell notes that it alleged in its complaint that the terms of the Agreement were unjust and unreasonable. Orwell notes that R.C. 4905.26 provides that "if it appears that reasonable grounds for complaint are stated, the [C]ommission shall fix a time for hearing and shall notify complainants and the public utility thereof." Orwell further notes that, based on the allegations in Orwell's complaint, the attorney examiner set this matter for hearing. According to Orwell, after examining the evidence from the hearing, the Commission determined that certain provisions of the Agreement were unreasonable and modified the Agreement pursuant to R.C. 4905.31.

{¶ 38} OCC argues that the Commission did not err when it rejected the *Mobile-Sierra* doctrine from applying to contracts approved under R.C. 4905.31. OCC argues that the *Mobile-Sierra* doctrine is a federal 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." *Federal Power Comm. v. Sierra Pacific Power Co.*, 350 U.S. 348, 354 (1956). OCC notes that the *Mobile-Sierra* doctrine has been traditionally applied by the U.S. Supreme Court in the context of the Natural Gas Act and the Federal Power Act for wholesale gas and electricity contracts, which are not at issue here.

{¶ 39} OCC maintains that the complaint filed by Orwell in this case goes far beyond a challenge to the rate OTP charges to transport gas; indeed, the only issues raised by OTP in its application for rehearing are: the switching of gas from interruptible to firm service; suspension of the arbitration provision; and the limitation preventing Orwell from using other pipeline systems. OCC maintains that the related modifications made by the Commission were ordered

to be made to protect Orwell's residential customers and are not rate challenges. Furthermore, OCC asserts that neither the Federal Power Act nor the Natural Gas Act gives FERC the authority to change or modify contracts, which is explicitly granted to the Commission over reasonable arrangements by R.C. 4905.31. In addition, OCC argues that, even if the Commission were to apply the *Mobile-Sierra* doctrine to reasonable arrangements under R.C. 4905.31, the Agreement would still not meet the doctrine's standards. Asserting that not only had OTP already violated the Agreement by issuing invoices outside the Agreement, which were retracted the day before the hearing, OCC maintains that the Agreement was not the product of arms-length bargaining as required by the *Mobile-Sierra* doctrine.

{¶ 40} With respect to OTP's second assignment of error, we find no merit. The arguments made by OTP in its second assignment of error regarding the *Mobile-Sierra* doctrine and *Martin Marietta* were previously made on pages 7-8 and 11-12 of OTP's post-hearing briefs and were fully considered in our Opinion and Order at ¶ 28-39. We also explained at length why the *Mobile-Sierra* doctrine was inapplicable to the present case and why the Ohio Supreme Court has found 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. Opinion and Order at ¶ 36-39. Thus, we need not repeat that discussion here.

{¶ 41} OTP's arguments regarding our decision to overturn our application of the *Mobile-Sierra* doctrine in *Ohio Power* also lack merit. Set forth at ¶ 38 of the Opinion and Order, our decision to overturn that aspect of *Ohio Power* was made after full consideration and analysis of the arguments made by OTP, Orwell, OCC, and Staff. As reiterated by Orwell in its post-hearing reply brief, the facts of *Ohio Power* are distinguishable from the instant case. There was no evidence in *Ohio Power* comparable to the evidence in this case, which reflects that the Agreement would potentially cause system reliability problems, did not appear to be the result of an arm's-length transaction, and was detrimentally affecting the rates paid by other customers, including residential customers. Further, a single instance of applying

the *Mobile-Sierra* doctrine to a reasonable arrangement between two public utilities over a 40 year period does not amount to the creation of binding precedent.[4] *Ohio Power* was unique and presented a set of facts that are quite different from those presented in this case. Our rejection of *Ohio Power* was also a recognition that, given more than 40 years during which the Commission has approved special arrangements between public utilities, a single, unique case should not control our decision regarding the special arrangement in this case or other distinguishable cases in the future. Our decision further recognizes recent Supreme Court of Ohio rulings regarding the Commission's authority under R.C. 4905.31. For example, the *Mobile-Sierra* doctrine governs contracts which are the result of an arm's-length, freely-negotiated transaction. However, reasonable arrangements under R.C. 4901.31 do not require the utility's consent. In fact, in 2008, R.C. 4905.31 was amended to allow non-utilities the ability to file reasonable arrangements for Commission approval. Accordingly, the Court has declined to hold that a reasonable arrangement is the mutual agreement between the parties. Further, the Court has stated that the statute affirmatively gives the Commission, rather than the utilities, the final say over arrangements and that the power to modify a reasonable arrangements is not conditioned on the agreement of the utility. *Ormet*, 129 Ohio St.3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶ 33-36.

{¶ 42} We similarly find no merit in OTP's argument that there were no reasonable grounds for the complaint or for a hearing. R.C. 4905.26 provides that: "if it appears that reasonable grounds for complaint are stated, the [C]ommission shall fix a time for hearing and shall notify complainants and the public utility thereof." In 15-637, Orwell's complaint requested that the Commission modify terms of the Agreement it alleged to be unjust and unreasonable. Based on the allegations in Orwell's complaint, the attorney examiner set this matter for hearing and notified all parties. No party objected, and the attorney examiner

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[4] Furthermore, the Commission did not make a broad policy statement in applying the *Mobile-Sierra* doctrine in *Ohio Power;* instead, the Commission stated only that it was "proper to apply this 'public interest' test in this case." *Ohio Power,* Opinion and Order (Aug. 4, 1976) at 6.

conducted the hearing. Rehearing is not the time to raise tardy arguments regarding the basic viability of Orwell's complaint.

3. THIRD ASSIGNMENT OF ERROR

{¶ 43} In its third assignment of error, OTP asserts that the Commission erred when it created and applied an amorphous, ad hoc "justification" standard. OTP contends that, under the Commission's "newly created standard," all Commission-approved contracts are subject to the often random shifts in societal, political, or economic winds. OTP argues that the Commission justified its new standard by stating that "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." Opinion and Order at ¶ 39. OTP argues that this standard is meaningless and can be invoked by any party to challenge any contract that has become even moderately inconvenient to the challenging party.

{¶ 44} In its memorandum contra, Orwell contends that the Commission did not create a new standard in this case. According to Orwell, the standard the Commission applied is the just and reasonable standard under R.C. 4905.26, which is commonly applied by the Commission and consistent with Ohio law. Citing *Allnet*, Orwell states that the complaint process established under R.C. 4905.26 is broad in scope as to what matters may be raised by a complaint before the Commission. *Allnet*, 32 Ohio St.3d 115 at 117. Continuing, Orwell asserts that this broad scope includes the ability to challenge unjust or unreasonable rates, even rates that have been previously approved by the Commission. Further, Orwell notes that R.C. 4905.31 provides the Commission with the authority to modify reasonable arrangements. Orwell maintains that, based on this legal authority, the Commission examined the terms of the Agreement to determine if they were just and reasonable. Orwell adds that the Commission modified only those provisions that it determined to be unjust or unreasonable and explained the law and facts supporting its decision at ¶ 41-77 in the Opinion and Order.

{¶ 45} With respect to OTP's third assignment of error, we find no merit. In this case, as with all complaint cases before us, the Commission applied R.C. 4905.26; therefore, the Opinion and Order is consistent with Ohio law. The complaint process established under R.C. 4905.26 allows parties to challenge, among other things, "any rate, fare, charge, toll, rental, schedule, classification, or service, or any * * * service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, [as] in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law," including rates that have been previously approved by the Commission. This is not a new standard for a complaint case. Additionally, R.C. 4905.31 provides the Commission with the authority to modify reasonable arrangements. Here, pursuant to the complaint filed by Orwell, we examined the terms of the Agreement to determine if they were just and reasonable; and, following a hearing wherein both parties presented evidence, the Commission modified only those provisions of the Agreement found to be unjust or unreasonable. Moreover, the Commission fully explained the law and facts supporting its findings that: the application of the *Mobile-Sierra* doctrine in *Ohio Power* was rejected (¶ 36-39); interruptible service under the Agreement should be modified to be firm service (¶ 46); the sole source provision of the Agreement must be modified (¶ 56-58); the term of the Agreement should remain unchanged (¶ 64); and OTP should file an application to establish just and reasonable rates to be applied to the natural gas transportation service to Orwell under the Agreement (¶ 76-77). Accordingly, nothing raised in OTP's third assignment of error warrants modifying the decision.

III. ORDER

{¶ 46} It is, therefore,

{¶ 47} ORDERED, That the application for rehearing filed by OTP be denied as set forth above. It is, further,

{¶ 48} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

PAS/sc

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NOV 29 2017

Barcy F. McNeal
Secretary