IN THE SUPREME COURT OF OHIO

In The Matter of Orwell-Trumbull Pipeline Company,	:	Case No. 18-0139
Appellant,	:	Appeal from the Public Utilities
v.	:	Commission of Ohio
The Public Utilities Commission of Ohio,	:	PUCO Case No. 15-637-GA-CSS
Appellee.	:	

NOTICE OF APPEAL BY
ORWELL-TRUMBULL PIPELINE COMPANY

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APPELLANT
ORWELL-TRUMBULL PIPELINE COMPANY'S
NOTICE OF APPEAL

Pursuant to Ohio Revised Code ("R.C.") §4903.11, §4903.13, and The Supreme Court of Ohio Rules of Practice ("S. Ct. Prac. R.") 10.02, Appellant, Orwell-Trumbull Pipeline Company ("OTPC"), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Commission") of this appeal to the Supreme Court of Ohio. OTPC appeals from the Commission's Opinion and Order entered June 15, 2016, in the above-captioned case (attached as Exhibit A hereto), and from the Commission's Second Entry on Rehearing entered November 29, 2017, in the same case (attached as Exhibit B hereto).

On July 15, 2016, OTPC timely filed an Application for Rehearing ("Application") of the June 15, 2016, Opinion and Order pursuant to R.C. §4903.10. The Commission granted OTPC's Application on August 3, 2016, but for the sole purpose of allowing the Commission additional time to consider further the matters specified in OTPC's Application. The Commission then denied OTPC's Application with respect to each of the issues being raised in this appeal within its Second Entry on Rehearing, dated November 29, 2017.

OTPC files this Notice of Appeal, complaining and alleging that both the June 15, 2016, Opinion and Order and the November 29, 2017, Second Entry on Rehearing are unlawful and unreasonable, and that the Commission erred as a matter of law in the following respects. As directed by S. Ct. Prac. R. 10.02(A)(2)(b), OTPC identifies the specific pages within its Application wherein each of the errors has been preserved, as follows:

Errors	**Preserved at Application Page Nos.**
The Commission Erred When It Failed to Enforce An Arbitration Clause Contained Within A Contract That The Commission Had Previously Approved.	2, 4-5

Errors (Continued)	Preserved at Application Page Nos.
The Commission Erred When It Ignored Constitutional Prohibitions Against The Impairment Of Contracts And Imposed Terms Of Its Own Choosing On the "Contracting" Parties.	6-8
The Commission Erred When It Rejected The Public Interest Test From The *Mobile Sierra* Doctrine, As Previously Approved And Adopted By The Commission.	8-12
The Commission Erred When It Created And Applied An Amorphous, Ad Hoc, "Justification" Standard To Guide Its Decisions Whether to Supplant The Terms Of Otherwise Binding Contracts.	12-13

WHEREFORE: OTPC respectfully submits that the Commission's June 15, 2016, Opinion and Order and its November 29, 2017, Second Entry on Rehearing are both unreasonable or unlawful and should be reversed. This case should be remanded to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,

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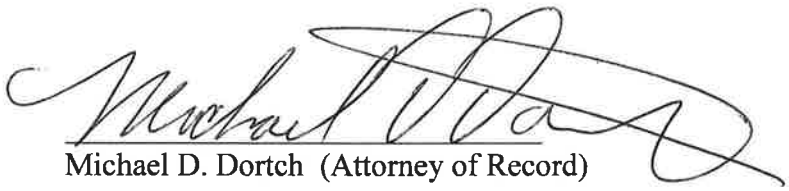
CERTIFICATE OF FILING

I hereby certify that the foregoing Notice of Appeal was filed with the Docketing Division of the Public Utilities Commission of Ohio this **January 26, 2018**, in accordance with S. Ct. Prac. R. 3.11(D)(2) and Ohio Administrative Code Section 4901-1-02(A) and 4901-1-36.



Michael D. Dortch (Attorney of Record)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the Public Utilities Commission of Ohio this **26th of January, 2018**, pursuant to S. Ct. Prac. R. 3.11(b)(2) and R.C. Section 4903.13, by hand delivering a true and accurate copy thereof to the offices of the Commission and to the Chairman of the Commission, addressed as follows:

The Hon. Asim Z. Haque, Chairman
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

I further state that, in addition, a courtesy copy of the foregoing was provided to the attorneys for the Public Utilities Commission, by electronic mail service, addressed as follows:

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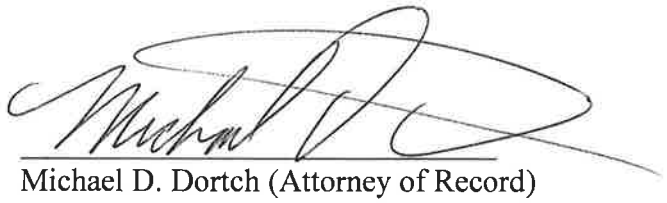

Michael D. Dortch (Attorney of Record)

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

EXHIBIT A

Company (Orwell or ONG) (Agreement).[1] *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.

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1 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 contact 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.[2] 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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[2] 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 OTP'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 affilites 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

CASE NUMBER: 15-0637-GA-CSS

CASE DESCRIPTION: ORWELL NATURAL GAS COMPANY VS ORWELL-TRUMBULL PIPELINE COMPANY LLC

DATE OF SERVICE: 6/15/2016

DOCUMENT SIGNED ON: 6/15/2016

Sign Here: SMD

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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

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PAS/sc

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NOV 29 2017

Barcy F. McNeal

Barcy F. McNeal
Secretary

CASE NUMBER: 15-0637-GA-CSS

CASE DESCRIPTION: ORWELL NATURAL GAS COMPANY VS ORWELL-TRUMBULL PIPELINE COMPANY LLC

DATE OF SERVICE: 11/29/2017

DOCUMENT SIGNED ON: NOV 29 2017

Sign Here: MN

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