

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**IN RE:**

<b>APPLICATION OF B&amp;W PIPELINE, LLC</b>	<b>)</b>	
<b>FOR A CERTIFICATE OF</b>	<b>)</b>	
<b>CONVENIENCE AND NECESSITY TO</b>	<b>)</b>	<b>DOCKET NO. 13-00151</b>
<b>OPERATE A NATURAL GAS PIPELINE</b>	<b>)</b>	
<b>SYSTEM IN PICKETT, MORGAN &amp;</b>	<b>)</b>	
<b>FENTRESS COUNTIES</b>	<b>)</b>	

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**AMENDED RESPONSES TO TRA DATA  
REQUEST #1, QUESTIONS 7, 8, 9, 10, 22 AND 23**

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B&W Pipeline, LLC ("B&W" or "the Company"), stated in response to Question 7 of TRA Data Request #1 that the Company has seven "customers" who are taking gas directly from the pipeline pursuant to easement contracts and that the Company intends to discontinue this service and transfer each customer to a distribution carrier authorized to serve that area.

Based upon further research, the Company has determined that there are eight, not seven, instances in which landowners are taking gas from the pipeline and that in those situations where the landowner has a contractual right to receive gas from the pipeline in exchange for giving the pipeline an easement, the Company will continue to provide gas to the landowner under the terms and conditions of the easement agreement. Copies of each of the eight easement contracts have been provided to the TRA and the Consumer Advocate.

Easement contracts which provide for free or reduced price gas in exchange for easement rights are common in the oil and gas industry. See Williams & Meyers, Oil and

Gas Law, Section 661 ("Many variants of the free gas clause are to be found in oil and gas leases.") These easements are recorded in the county where the property is located and are interpreted and enforced, when necessary, by state courts. Since each property owner receives gas pursuant to a private contract, state utility commissions do not have jurisdiction over the terms and conditions under which gas is provided to these customers. See "Petition for Declaratory Order of Russell Adams" et seq., Pennsylvania Public Utilities Commission, Docket No. P-0011914 (June 13, 2002); Adams v. Public Utility Commission, 819 A.2d 631 (Commonwealth Court of Pennsylvania, 2003), holding "The rights asserted by Petitioners derive from a private contract, and the PUC lacks jurisdiction over private contractual disputes." Southgate Development Corp. v. Columbia Gas Transmission, 358 N.E.2d 526 (Supreme Court of Ohio, 1976), holding "Neither the Federal Power Commission nor the Public Utility Commission has jurisdiction to construe or enforce an easement contract." Copies of these opinions are attached.

B&W is currently investigating each of the eight easement contracts. It appears in some cases that the contracts do not, in fact, allow the landowner to take gas from the pipeline, contrary to the landowner's claim. In other cases, it appears that the landowner is taking more gas than can reasonably be used "for domestic purposes" as provided in the easement contract. B&W has retained local counsel to investigate these issues and, where necessary, take appropriate action to address illegal or excessive usage. If, however, the landowner is entitled under an easement contract to receive free gas for domestic use, B&W has determined that it has a contractual obligation to abide by the

terms of that agreement. Therefore, absent an agreement with the customer or a court ruling which changes the easement contracts, B&W will honor its contractual obligations.

B&W therefore amends its responses to TRA Data Request #1, questions 7, 8, 9, 10, 22 and 23. The amended responses are attached.<sup>1</sup>

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

By: 

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<sup>1</sup> These Data Requests were based on a statement in the Company's Application that the Company intended to discontinue providing gas to these "customers." Based on further research, as described above, the Company will continue providing gas where it is required to do so by an easement contract.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amendment has been sent by first class mail on  
Oct. 22, 2014 to:

Navitas Utility Corporation  
121 Eakly Campus Road  
Eakly School  
Eakly, OK 73033

Rachel Newton  
Assistant Attorney General  
Consumer Advocate and Protection Division  
Office of the Attorney General and Reporter  
P.O. Box 20207  
Nashville, TN 37202-0207

  
\_\_\_\_\_  
HENRY WALKER

**B&W PIPELINE**

**Response to TRA Data Request #1**

**Docket 13-00151**

7. The Petition states that there are seven (7) residential customers that are provided natural gas services by B&W and that B&W is in the process of transferring those customers to Navitas. Have these customers been notified of the transfer?

**RESPONSE:**

After B&W purchased the pipeline, B&W learned that there are eight landowners receiving gas directly from the transmission line. These landowners have been taking gas from the pipeline, without charge, for a substantial period of time. Each landowner's situation is different. Some have granted the pipeline an easement which provides that the landowner is entitled to receive gas for domestic use, without charge, in exchange for the easement. In other cases, the landowner has granted the pipeline an easement but it appears that there is no provision in the easement which allows the landowner to take free gas. Nevertheless, the landowner has been taking gas, without charge, for a substantial period and claims to have a right to free gas.

B&W is now in the process of investigating each situation. B&W is not in the business of providing gas distribution service to any customer and does not seek authority to become a distribution company. The gas that is currently being supplied to landowners is provided only as payment for an easement under the terms and conditions stated in the easement agreements. B&W does not have a legal obligation to serve those landowners except as stated in the easement agreements. As long as those agreements remain in effect, B&W will honor its contractual obligations.

**B&W PIPELINE**  
**Response to TRA Data Request #1**  
**Docket 13-00151**

8. What rate have the seven (7) residential customers been paying B&W for natural gas services and for transport of those services?

**RESPONSE:**

No landowner is being charged for gas. See the response to Question 7.

**B&W PIPELINE**

**Response to TRA Data Request #1**

**Docket 13-00151**

**9. How will the customers be affected by the transfer to Navitas?**

**RESPONSE:**

No customer will be transferred to Navitas.

**B&W PIPELINE**

**Response to TRA Data Request #1**

**Docket 13-00151**

10. Describe in detail the transaction that will take place to transfer the seven (7) customers. Provide a copy of the contract between Navitas and B&W including details as to any monies changing hands as a result of the transfer.

**RESPONSE:**

No customer will be transferred to Navitas.



**B&W PIPELINE**

**Response to TRA Data Request #1**

**Docket 13-00151**

22. The Petition states that B&W provides natural gas service to 7 residential customers. Provide all copies of any invoices/bills to the 7 customers during 2013, inclusive of volumes and total amount due each bill.

**RESPONSE:**

See Response to Question 7. None of these landowners is paying for gas. Where usage is metered (but not billed), it appears that some of the landowners are using more gas than could reasonably be consumed for domestic use at one location.

**B&W PIPELINE**

**Response to TRA Data Request #1**

**Docket 13-00151**

23. How long has B&W been providing natural gas services to the 7 residential customers.

**RESPONSE:**

Eight landowners take gas from the pipeline. They are not residential customers but take gas pursuant to individual easement contracts. Those contracts were in place when B&W acquired ownership of the pipeline.

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg PA 17105-3265**

Public Meeting held June 13, 2002

Commissioners Present:

Glen R. Thomas, Chairman  
Robert K. Bloom, Vice Chairman  
Aaron Wilson, Jr.  
Terrance J. Fitzpatrick  
Kim Pizzingrilli

Petition for Declaratory Order of  
Russell Adams, John F. Adams and  
Beverly J. Hamilton Regarding  
Columbia Gas of Pennsylvania, Inc.  
and Columbia Gas Transmission  
Corporation

Docket No. P-00011914

**ORDER**

**BY THE COMMISSION:**

Now before the Commission is a Petition for a Declaratory Order (Petition) regarding the termination of natural gas service to a parcel of land in Greene County, Pennsylvania filed August 30, 2001. This Petition was filed by the current co-owners of the land, Russell Adams, John F. Adams, and Beverly J. Hamilton. By the Petition, the Petitioners seek to avoid the termination of service without Commission approval. This relief hinges on whether the Commission has jurisdiction over the underlying natural gas service.

This Petition was served on the Office of Trial Staff, the Office of Consumer Advocate, the Office of Small Business Advocate, Columbia Gas of Pennsylvania, Inc. (Columbia Gas), Columbia Gas Transmission Corporation (Columbia Transmission) and CONSOL Energy, Inc. (CONSOL) and the Pennsylvania Department of Environmental

Protection. CONSOL filed an Answer to the Petition and a Motion to Dismiss on September 18, 2001. Columbia Gas and Columbia Transmission filed Answers to the Petition and Motions to Dismiss on October 2, 2001.

On October 29, 2001, the Petitioners filed an Amended Petition for Declaratory Order Nunc Pro Tunc. Columbia Gas, Columbia Transmission and CONSOL filed Responses and Answers in opposition to the Amended Petition on November 5 and 7, 2001, respectively.

Because we believe that we lack subject matter jurisdiction over what is a private contractual dispute, we will grant the motions filed by Columbia Gas, Columbia Transmission and CONSOL and dismiss the instant Petition.

## **BACKGROUND**

The Petitioners are citizens of the States of Pennsylvania and West Virginia who are co-owners of a parcel of land (Land) in Greene County, Pennsylvania. Columbia Gas is a Pennsylvania based natural gas distribution company. Columbia Transmission is an interstate gas pipeline company. CONSOL is a Pennsylvania coal mining company that owns sub-surface mining and mineral rights throughout the state.

On September 4, 1899 the then owners of the Land signed an agreement to lease the gas and oil rights of the property to one W.H. Ullom. This lease was later assumed by the Manufacturers Light and Heat Company (Manufacturers), a regulated Pennsylvania public utility. As a consequence of this lease a certain number of natural gas wells were drilled on the Land. Two of the wells that were drilled were given the serial numbers "L-1059" and "L-2878" respectively. Well L-1059 has also been given the number "218" by CONSOL under its system of identifying wells.

On July 29, 1957, the then owners of the land and Manufacturers signed a Lease Modification Agreement (Agreement). The Agreement gave all rights to oil and gas on the Land to lessee Manufacturers in exchange for natural gas service provided to the lessors as described in the Agreement. Under the Agreement, the lessors would receive on an annual basis 200,000 cubic feet of natural gas free of cost for domestic use for properties located on the Land. Gas drawn in excess of this amount would be paid for by the lessors according to Manufacturers currently prevailing rate in the area.

In 1971, well L-1059 was plugged, as it no longer produced natural gas. It has not been used since that time to provide natural gas service to anyone.

Columbia Transmission became the successor to the Agreement as a consequence of the Commission-approved merger between Manufacturers and Columbia Gas.

On August 2, 1991 a contract, titled "Agreement for Delivery of Free Gas and Overburn Gas Provided by Lease" (Contract) was entered into between Columbia Transmission and Russell T. and Julia Adams, who were the owners of the Land prior to the Petitioners. Well 2878 was specifically identified in the document as the well subject to the Contract. This Contract provided for the continued free natural gas service of up to 200,000 cubic feet on an annual basis to properties located on the land. Gas used in excess of that amount ("overburn gas") would be paid for according to the Columbia Gas's "rate prevailing from time to time in the general locality" of the Land. Columbia Gas was designated by the Contract to act as the agent of Columbia Transmission in the service and maintenance of any gas facilities on the Land and in the collection of monies owed by the lessors for overburn gas.

On July 16, 2001 CONSOL filed a "Notice of Intention by Well Operator to Plug a Well" with the Pennsylvania Department of Environmental Protection. The well identified on this form was L-1059, also identified with the CONSOL number 218. The avowed

purpose of the replugging of the well was to allow mining in the vicinity of the Land to go forward in a safe and reasonable manner.

On August 9, 2001 Petitioners received a letter from Columbia Transmission advising them of the impending termination of natural gas service. Specifically, Columbia Transmission notified the Petitioners that CONSOL intended to plug the gas well that was located on Petitioner's land. The well was apparently incorrectly identified in the letter as "gas storage well 2878." Exhibits E and F of the Petition clearly show that it was well 1059 that was being replugged by CONSOL. Well 2878 was in fact an active well.

The letter stated that well 2878 would be plugged sometime on or after October 15, 2001. The reason cited by the letter for the closure of the well was the ongoing mining activities of CONSOL. Petitioners were advised to obtain an alternate source of energy in the interim. Given the apparent factual inaccuracy in the October 15 correspondence, the exact reason for the termination of natural gas service is not clear.

During this time period there were some discussions between the Petitioners and CONSOL regarding an alternate source of energy for the Land. These discussions did not resolve this matter. According to a letter received by the Commission from Petitioners' counsel, natural gas service to the Land was terminated on January 18, 2002.

In their petitions, the Petitioners request that this Commission find that the provision of natural gas service to the Land was being undertaken by Columbia Gas as a public utility. They also ask the Commission to find that the termination of service may not take place without Commission approval and the provision of an alternate source of natural gas to the Land.

## DISCUSSION

As demonstrated by the lengthy background provided above, this matter is complicated by certain factual disputes. However there are enough undisputed facts in the record for the Commission to render a decision on the Petition. It is clear that Petitioners were receiving natural gas service as a result of an agreement with Columbia Transmission. The parties agree that Columbia Transmission is not a public utility subject to Commission regulation. Under the Contract, Petitioners were to receive 200,000 cubic feet of gas free on an annual basis. Gas used in excess of that amount, described as "overburn gas", was to be paid for by the Petitioners according to the distribution company's prevailing rate at the time. The Respondents, for whatever reason, decided to terminate this service in late 2001. The Commission has before it copies of two agreements, from 1957 and 1991 respectively, entered into by the parties, or their predecessors in interest, regarding the provision of natural gas service to the Land. These agreements describe in detail the terms of the provision of, compensation for, and termination of natural gas service. The authenticity and accuracy of these documents are not in question, only how they should be interpreted.

According to the Petitioners, these agreements reflect a provision of natural gas service by a regulated public utility to the Land and subject to a Commission approved tariff. They assert that the Respondents therefore cannot terminate natural gas service without both Commission approval and the provision of a replacement source of energy for the Petitioners.

The Respondents' interpretation of these agreements is quite different. They submit that these documents are private contractual agreements. They assert that the agreements give them the right to terminate natural gas service to the Land under certain circumstances, which they apparently believe were met in this case. As neither party to the agreement is a regulated public utility, Respondents ask that the Petition be dismissed for lack of jurisdiction.

Central to our analysis is the language of the Contract of 1991. The parties to the Contract are Columbia Transmission, which is not a regulated public utility, and the predecessors in interest in the Land to the Petitioners. It should be noted that nowhere in this document is it found that natural gas service will be provided to the Petitioners subject to a Commission-approved tariff. The document provides that 200,000 cubic feet will be provided to Petitioners free of charge on an annual basis. Gas in excess of this amount, or “overburn gas” is to be billed at the “Distribution Company’s applicable rate prevailing from time to time in the general locality of Applicant’s premises” according to the Contract. These terms of payment do not equate with a Commission approved tariff. Also, Columbia Gas is not providing tariff service to Petitioners under the terms of the Contract. Accordingly, these agreements are private in nature, and termination of service under these agreements is not subject to our jurisdiction.

This analysis is consistent with our prior determination in *William E. Piper v. Columbia Gas of Pennsylvania, Inc.*, Docket No- C-881720 (Order entered September 2, 1988). In that dispute the Complainant had contracted with Columbia Transmission for the provision of natural gas service via an “Agreement for Delivery of Free Gas and Overburn Gas provided by Lease.” As in the instant dispute, Columbia Gas was described as a distribution company and designated as the agent of Columbia Transmission for the purpose of performing all duties under the agreement relating to service, maintenance and billing. Administrative Law Judge George Kashi concluded that Columbia Gas was not providing tariff service but rather acting as an agent of Columbia Transmission and “performing a ministerial act in a private contract.” He also held the agreement between Columbia Transmission and the Complainant to be a private contract not subject to Commission jurisdiction. Accordingly, the Motions to Dismiss of Columbia Transmission and Columbia Gas were granted.

The present dispute is not materially distinguishable from the one in the *Piper* case. It is clear that the 1991 agreement reflects the provision of natural gas service pursuant to a



private contract and not a Commission approved tariff. As in the *Piper* case, Columbia Transmission was successor to an agreement of a regulated public utility. This fact does not act to convert a private agreement to a Commission-approved tariff. Neither party to the 1991 contract is a regulated public utility subject to Commission jurisdiction. Columbia Gas, as in the *Piper* case, was not providing tariff service but rather performing ministerial duties as an agent of a party to a private contract. It is well settled that the Commission has no jurisdiction over such private contractual disputes. See *Allport Water Authority v. Winburne Water Company*, 393 A.2d 673 (Pa. Super. 1978). It is thus not for the Commission to determine whether Columbia Transmission has violated the provisions of its contract with the Petitioners when it terminated their natural gas service; **THEREFORE**,

**IT IS ORDERED:**

1. That the Motion to Dismiss of Columbia Gas of Pennsylvania, Inc. and Columbia Gas Transmission Corporation is granted.
2. That the Motion to Dismiss of CONSOL Energy, Inc. is granted.
3. That the Petition of Russell Adams, John F. Adams and Beverly J. Hamilton for a Declaratory Order is denied.

BY THE COMMISSION

James J. McNulty,  
Secretary

(SEAL)

ORDER ADOPTED: June 13, 2002

ORDER ENTERED: June 13, 2002

819 A.2d 631  
Commonwealth Court of Pennsylvania.

Russell ADAMS, John F. Adams,  
and Beverly J. Hamilton, Petitioners,

v.

PUBLIC UTILITY COMMISSION, Respondent.

Submitted on Briefs Dec. 6,  
2002. | Decided March 21, 2003.

Landowners sought review of Public Utilities Commission (PUC) decision, No. P-00011914, that PUC lacked jurisdiction to resolve private contractual dispute between landowners and natural gas company. The Commonwealth Court, No. 1697 C.D. 2002, Leavitt, J., held that PUC lacked jurisdiction over private contractual dispute between landowners and natural gas company.

Affirmed.

West Headnotes (2)

[1] **Contracts**

✦ Construction as a Whole

**Contracts**

✦ Language of Instrument

When reviewing a contract, courts must review and consider the entire instrument giving effect to all its provisions and construing it according to the plain meaning of its language.

2 Cases that cite this headnote

[2] **Mines and Minerals**

✦ Furnishing Gas or Oil to Lessor

Public Utilities Commission (PUC) lacked jurisdiction to dispose of private contractual dispute between landowners and natural gas company, after gas company notified landowners that it planned to plug a leased well and would no longer be providing free natural gas to landowner; natural gas company did not provide gas service to landowners in its capacity as a utility but as a purchaser of mineral rights

for which payment was made in the form of gas service, as opposed to cash, and gas service was not provided by a regulated utility pursuant to an approved tariff and a certificate of public convenience.

Cases that cite this headnote

**Attorneys and Law Firms**

\*631 Donald D. Saxton, Jr., Washington, for petitioners.

\*632 Shane Rooney, Harrisburg, for respondent.

Kevin C. Abbott, Pittsburgh, for intervenors, Columbia Gas Transmission and Columbia Gas of PA.

Before PELLEGRINI, J., LEAVITT, J., and KELLEY, Senior Judge.

**Opinion**

OPINION BY Judge LEAVITT.

Russell Adams, John F. Adams and Beverly J. Hamilton (Petitioners) petition for review of an adjudication of the Pennsylvania Public Utility Commission (PUC) that dismissed their petition a declaratory relief. Specifically, Petitioners requested the PUC to order the Columbia Gas Transmission Corporation (Columbia Transmission) and the Columbia Gas of Pennsylvania, Inc. (Columbia Gas) to provide them natural gas service. The PUC, however, held that it lacked jurisdiction to dispose of what it found to be a private contractual dispute. We affirm.

Petitioners own a parcel of land (Property) located in Greene County, Pennsylvania, which has been the subject of a series of leases for oil and gas rights. Under the first lease, dated September 4, 1899, Albert Owen, W.M. Owen and E.A. Owen granted W.H. Ullom the gas and oil rights on the Property. Subsequently, this lease was acquired by Manufacturers Light and Heat Company (Manufacturers), a regulated Pennsylvania public utility. Under the 1899 lease, a number of natural gas wells were drilled, including Well L-1059, which is located on the Property.

On July 29, 1957, Earl Ray Owen and Margaret Owen, the then owners of the Property, agreed to certain lease modifications (1957 Agreement) that are relevant to this

case. First, the parties agreed to a fixed lease term of fifty years and a secondary term of "so long as oil or gas can be produced in paying quantities or so long as gas is held in storage or withdrawn from wells or strata underlying the tract or in the immediate vicinity operated by Manufacturers Light and Heat Company and referred to as the 'Majorsville Storage Field.' " Reproduced Record 25 (R.R. ----). Second, the royalty payments were fixed at delivery of 200,000 cubic feet of natural gas *per annum* to the Property owner, free of charge. However, Manufacturers retained the right to charge for gas drawn in excess of 200,000 cubic feet in accordance with its prevailing rates for domestic customers. Third, the 1957 Agreement gave Manufacturers the right to terminate gas service by abandoning its wells and removing its pipelines. Finally, The 1957 Agreement extended its terms to the lessors, heirs, executors, successors and assignees of either party.

As a consequence of a 1971 merger<sup>1</sup> between Columbia Transmission and Manufacturers, Columbia Transmission<sup>2</sup> took the place of Manufacturers in the 1957 Agreement. On August 2, 1991, Columbia Transmission entered into an agreement with Russell T. and Julia Adams, then owners of the Property, entitled "Agreement for Delivery of Free Gas and Overburn Gas Provided by the Lease." (1991 Agreement). R.R. 59a. The 1991 Agreement referenced specifically Well 2878, which is located on land adjacent to the \*633 Property,<sup>3</sup> but it did not alter the basic payment terms set forth in the 1957 Agreement.

<sup>1</sup> We take judicial notice of the merger between Columbia Transmission and Manufacturers Transmission division that was approved by the Federal Power Commission.

<sup>2</sup> Columbia Transmission is an interstate natural gas pipeline subject to the jurisdiction of the Federal Energy Regulatory Commission, and the parties agree it is not a regulated public utility subject to the jurisdiction of the Commission.

<sup>3</sup> Presumably natural gas on the Property exited Well 2878 thus entitling Property owners to continued payment in the form of natural gas service.

On July 16, 2001, Consol Pennsylvania Coal Company (Consol) filed a "Notice of Intention by Well Operator to Plug a Well" with the Pennsylvania Department of Environmental Protection, identifying the target as "Well L-1059." R.R. 35a, 36a. However, on August 9, 2001, Columbia Transmission advised Petitioners that "Well 2878" would be plugged and

abandoned by October 15, 2001; it further advised Petitioners that once the well was plugged, Petitioners' rights to free service under the 1991 Agreement would terminate. R.R. 33a.

In response, Petitioners filed a Petition for Declaratory Order with the PUC on August 28, 2001, seeking to compel Columbia Transmission and Columbia Gas to continue to deliver natural gas to them or to provide substitute service.<sup>4</sup> Their petition claimed that the object of both the 1957 and 1991 Agreements was Well 2878, not Well 1059, which was not even operable in 1957. Thus, it decided that Consol must be replugging Well 1059, and Well 2878 must be still producing, thereby entitling Petitioners continued royalties from the respondents in the form of natural gas service.

<sup>4</sup> Consol was originally a named defendant in this action, but is not a party to the current appeal.

Columbia Gas filed a Motion to Dismiss and Answer, contending that the PUC lacked jurisdiction over the matter because Petitioners received natural gas service pursuant to a private contract and not pursuant to the published tariff of a regulated utility. Further, Columbia Gas contended that it acted solely as an agent of Columbia Transmission and, as such, was not a proper party. Columbia Transmission also filed a Motion to Dismiss and Answer, agreeing with Columbia Gas that the PUC lacks subject matter jurisdiction over private contracts such as the 1899 lease, the 1957 Agreement or the 1991 Agreement.<sup>5</sup> Columbia Transmission also challenged the PUC's ability to issue an order to it because, as an interstate gas pipeline, it is subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission.

<sup>5</sup> On October 26, 2001, the Petitioners filed a Motion to File an Amended Petition for Declaratory Order Nunc Pro Tunc requesting the PUC to allow the Petitioner to amend their petition to challenge the validity of the 1991 Agreement. Columbia Transmission and Columbia Gas filed a response in opposition, noting that the Petitioners' motion was untimely, failed to conform to the PUC's regulations and did not address or cure the jurisdictional flaws of the original Petition. Petitioners challenge to the PUC's response to their Motion need not be addressed in light of our holding that the PUC lacks jurisdiction over private contracts, such as the 1991 Agreement.

On June 13, 2002, the PUC granted the Motions to Dismiss. The PUC held that it lacked jurisdiction because the dispute arose from a private contract to which neither party was a

public utility subject to its regulation. It agreed that Columbia Gas, which is a regulated utility, was not providing utility service but, rather, administrative service as an agent of Columbia Transmission. Petitioners then sought our review.

On appeal, the Adams argue, *inter alia*, that Columbia Transmission and Columbia Gas have violated the requirements of 66 Pa.C.S. § 1501,<sup>6</sup> which require continuous \*634 and safe service by public utilities. They contend that the 1957 Agreement imposed these statutory requirements upon Manufacturers and its successors, and the PUC is charged with enforcement of these statutes. Accordingly, they argue it was error for the PUC to dismiss their petition.

<sup>6</sup> In relevant part, it provides,  
Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.  
66 Pa.C.S. § 1501.

[1] We begin with an examination of the relevant and applicable contractual language. Section 1 of the 1991 Agreement provides in relevant part as follows:

Applicant's right to receive gas is derived *solely* from referenced lease, and *the delivery of gas by Transmission Company to applicant* is not to be construed as a recognition of Applicant's right to be supplied with gas under any other condition or circumstances.

R.R. 59a. (emphasis added). Section 2 of the 1991 Agreement recites that Columbia Gas functions as the agent of Columbia Transmission,

to install, maintain, and operate the service regulator(s), the meter, and all

related fittings from the tap through the meter, and to perform associated services in the handling of the [Adams] account, including the collection of any monies due from [the Adams] to [Columbia] Transmission Company on account of the delivery of overburn gas.

R.R. 59a. These provisions could scarcely be clearer that<sup>7</sup> Petitioners' right to natural gas service is derived entirely from a private contract and not from "another circumstance," such as a certificate of public convenience or a filed tariff.

<sup>7</sup> When reviewing a contract, we must review and consider the entire instrument giving effect to all its provisions and construing it according to the plain meaning of its language. *Grant v. Southwestern Pennsylvania Water Authority*, 144 Pa.Cmwlth. 638, 601 A.2d 1359 (1992).

[2] First, the 1991 Agreement makes it clear that Columbia Transmission, not Columbia Gas, is the entity that provides Petitioners with natural gas service. Columbia Transmission is not regulated by the PUC but by the Federal Energy Regulatory Commission. Columbia Gas is regulated by the PUC when it provides utility services. Here, it only provides administrative services to Petitioners, and the PUC does not regulate administrative services, even when provided by a public utility.

Second, Section 1 of the 1991 Agreement states that the rights of Petitioners derive "solely" from the leases and not from any other condition or circumstance. Even if Columbia Transmission were regulated by the PUC, it did not provide gas service to Petitioners in its capacity as a utility but as a purchaser of mineral rights for which payment was made in the form of gas service, as opposed to cash.

Thus, the 1991 Agreement demonstrates that Petitioners' service was not provided by a regulated utility pursuant to an approved tariff and a certificate of public convenience. The PUC correctly declined jurisdiction. However, Petitioners contend \*635 that it is the 1957 Agreement, not the 1991 Agreement, that is dispositive of the PUC's jurisdiction. They contend that under the 1957 Agreement, Manufacturers was obligated to provide regulated public utility gas service, in addition to the free service, as royalties, and this obligation had been assumed by Manufacturers' successor. In support, they note that the 1957 Agreement allowed Manufacturers to

charge for service in excess of 200,000 cubic feet using the rate established for its "domestic customers."

The 1957 Agreement<sup>8</sup> did not obligate Manufacturers to provide natural gas to the public, which is the hallmark of a public utility. *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 418 Pa. 430, 212 A.2d 237 (1965). It obligated Manufacturers to pay royalties for its mineral rights in the form of a prescribed amount of natural gas service, *i.e.*, 200,000 cubic feet *per annum*. Thereafter, Manufacturers had the right to charge Petitioners at a rate equivalent to what it charged domestic customers; the contract does not even reference a PUC regulated tariff. However, even if the 1957 Agreement established the excess charge by incorporating by reference Manufacturers' approved tariff, the result would be the same. The excess charge resulted from free negotiations and whether expressed by reference to a published tariff or to a published tide chart, this charge does not create jurisdiction in the PUC. It is the contract, not the publication, that is the source of Petitioners rights, obligations and remedies.

8

We also note that the 1957 Agreement provided for the "gas to be used at the Lessors own risk and Lessee not be in any way liable for insufficient supply caused by the use of pumping stations, breakage of lines or otherwise." R.R. 63a. This assumption of risk by Petitioners is inconsistent with their claim that they are receiving public utility services pursuant to 66 Pa.C.S. § 1501. *See* n. 6 *infra*.

The rights asserted by Petitioners derive from a private contract, and the PUC lacks jurisdiction over private contractual disputes. *Allport Water Authority v. Winburne Water Company*, 258 Pa.Super. 555, 393 A.2d 673 (1978). Accordingly, the decision of the Commission is affirmed.

### ORDER

AND NOW, this 21st day of March, 2003, the order of the Public Utility Commission dated June 13, 2002, in the above-captioned proceeding is hereby affirmed.

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End of Document

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**History (2)**

**Direct History (2)**

1. In re Columbia Gas of Pennsylvania, Inc.  
2002 WL 31986335 , Pa.P.U.C. , June 13, 2002

*Decision Affirmed by*

2. Adams v. Public Utility Com'n ➤  
819 A.2d 631 , Pa.Cmwlth. , Mar. 21, 2003

48 Ohio St.2d 211  
Supreme Court of Ohio.

SOUTHGATE DEVELOPMENT CORP., Appellee,  
v.  
COLUMBIA GAS TRANSMISSION CORP., Appellant.

No. 76-299. | Dec. 15, 1976.

Property owner brought suit alleging interstate gas line's refusal to fulfill easement agreement and seeking declaratory relief and determination that gas line was bound to sell gas to owner while gas was conveyed through owner's property and prayed for specific performance and for such other and further relief as complainant might be entitled to at law or equity. The Court of Common Pleas, Lorain County, granted motion to dismiss for lack of subject matter jurisdiction, and owner appealed. The Court of Appeals reversed and remanded, and the cause came before the Supreme Court on appeal pursuant to allowance of a motion to certify the record. The Supreme Court, Paul W. Brown, J., held that trial court was not confined to allegations of complaint in determining subject matter jurisdiction pursuant to motion to dismiss and it could consider material pertinent to such inquiry without converting motion into one for summary judgment; and that Court of Common Pleas had subject matter jurisdiction over case wherein owner sought to enforce easement contract against interstate gas line.

Judgment of Court of Appeals affirmed.

Stern, J., dissented with opinion in which Celebrezze, J., concurred.

West Headnotes (5)

[1] **Pretrial Procedure** ➡ Matters Considered in General

Trial court is not confined to allegations of complaint when determining its subject matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. Civ.R. 12(B)(1, 6).

144 Cases that cite this headnote

[2] **Public Utilities** ➡ Jurisdiction of Courts in Advance of or Pending Proceedings Before Commission

Even though interstate gas line was not subject to regulation by the Public Utilities Commission, where duty sought to be enforced against gas line was not one exacted by the Commission, but was claimed to have arisen contractually through grant to gas line of an easement, statute giving the Public Utilities Commission exclusive jurisdiction to require all intrastate public utilities to furnish their products and render all services exacted by the Commission or by law would not preclude court's subject matter jurisdiction in action brought by landowner to require gas line to supply it with gas pursuant to contract providing for grant of easement over owner's property. R.C. § 4905.04.

10 Cases that cite this headnote

[3] **Gas** ➡ Duty to Supply Gas

Even if under existing regulations interstate gas line was required to obtain authority from its regulatory agency, the Federal Power Commission, for permission to use its interstate transmission pipeline for purpose of making a

direct retail sale, where property owner sought to enforce an easement contract which allegedly required the gas line to supply property owner with gas, subject matter of action arose in contract and determination of questions of construction or validity, together with declaration of rights, status or other legal relations under such contract was within subject matter jurisdiction of the common pleas courts. R.C. § 2721.03.

2 Cases that cite this headnote

[4] **Public Utilities** ⇌ **Contracts**

Neither the Federal Power Commission nor the Public Utilities Commission has jurisdiction to construe and enforce an easement contract.

1 Cases that cite this headnote

[5] **Pretrial Procedure** ⇌ **Matters Considered in General**

Where trial court receives material from the party in various forms, not relevant to subject matter jurisdiction, but bearing upon extent of relief which might be granted, and where, under these circumstances, trial court grants motion to dismiss the action on grounds that court lacks subject matter jurisdiction, and issues an ex parte protective order limiting the opportunity of the adverse party to introduce material reasonably pertinent to the question of availability of part of the relief sought, it is inappropriate for trial court to consider a Civ.R. 12(B)(6) motion to effect that the complaint fails to state a claim upon which relief can be granted. Civ.R. 12(B)(1, 6).

97 Cases that cite this headnote

**\*\*527 Syllabus by the Court**

**\*211** 1. The trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment.

2. R.C. 4905.04 is not applicable to an action for declaratory relief upon a contract against an interstate gas transmission company which is exclusively regulated by the Federal Power Commission.

Appellant, Columbia Gas Transmission Corporation (Columbia), as successor to the Ohio Fuel Gas Company, owns and operates a natural gas pipeline in interstate commerce, which passes through the land of the appellee, Southgate Development Corporation (Southgate), pursuant to a right-of-way easement. Southgate is the assignee of the grantor of the right-of-way easement pursuant to a contract dated September 16, 1963, which provides that the landowner has the right to purchase natural gas from the pipeline for use on the premises in consideration for the grant of the easement and until Columbia desires to remove or abandon such pipeline.

Southgate commenced an action in the Court of Common Pleas of Lorain County alleging its demand and **\*212** Columbia's refusal to fulfill the contractual right in question and seeking declaratory relief as to the duties and obligations of the defendant, Columbia, under the aforesaid 'right-of-way easement.' Southgate is also seeking a determination that Columbia is bound by the provisions of the right-of-way easement to sell gas to Southgate while gas is conveyed through said tracts, and prays for an order that the duties and obligations of Columbia be specifically performed and for such other and further relief as complainant may be entitled to at law or equity.



Columbia responded to the complaint, not by filing an answer admitting or denying its obligations under the contract, but by filing a motion to dismiss for the reasons that '(t)his Court of Common Pleas does not have jurisdiction of the subject matter presented and for the relief sought by the complaint.'

This motion, which clearly raised the defense of lack of subject-matter jurisdiction, under Civ.R. 12(B)(1), may have been intended to assert the additional defense of failure to state a claim upon which relief can be granted, under Civ.R. 12(B)(6).

Material pertinent to subject-matter jurisdiction presented to the trial court by Columbia admitted that Columbia is the present owner and operator of the natural gas pipeline passing through Southgate's property, and is the wholesaler of the gas flowing through that pipeline; and that both the pipeline in question and the gas therein are in interstate commerce and therefore within the exclusive regulatory jurisdiction of the Federal Power Commission. Columbia represented further that the right-of-way deed upon which Southgate relies was issued while Columbia's predecessor was an 'integrated gas company' subject to dual state and federal regulation; that thereafter a division of the integrated company's functions into those involving interstate pipeline operation and that which concerned the intrastate sale and delivery of gas to retail consumers occurred; and that the latter functions were 'spun off' to Columbia Gas of Ohio.

In that material, Columbia Gas Transmission then argued \*213 that, through these events, Columbia Gas of Ohio became the obligee of the contractual obligation involved. It was maintained further that the enforcement of this obligation was then \*\*528 because of, and now remains subject to, R.C. 4905.04, within the exclusive jurisdiction of the Public Utilities Commission of Ohio so that only that agency may now require, and only Columbia Gas of Ohio may, in the statutory language, be required 'to furnish their products and render all services exacted by the commission or by law.'

Columbia Gas Transmission argued, alternatively, that if it is found to be the obligee under the easement contract, then, in that event, its authority to use its interstate transmission pipeline for the purpose of making a direct sale, i. e., a retail sale for industrial or commercial purposes directly from its pipeline, must be derived from its regulatory agency, the Federal Power Commission, citing *Federal Power Comm. v. Transcontinental Gas Pipe Line Corp.* (1961), 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377.

Southgate initiated discovery in the form of interrogatories, which were answered in part. Columbia objected to the remaining interrogatories and to notices to take depositions, and obtained, ex parte, an order precluding further discovery by way of those depositions. The trial court granted the motion to dismiss for lack of subjectmatter jurisdiction.

Southgate filed its notice of appeal assigning the following errors:

'1. The Court of Common Pleas of Lorain County, Ohio erred in entering judgment dismissing this action for want of jurisdiction of the subject matter.

'2. The Court of Common Pleas of Lorain County, Ohio erred by considering matters on a motion to dismiss for lack of subject matter jurisdiction not within scope of Civ.R. 12 and Civ.R. 56, and by denying Southgate a reasonable opportunity to present all material made pertinent to such motion by Civ.R. 12(B) and Civ.R. 56.'

The Court of Appeals reversed and remanded the cause to the trial court.

\*214 This cause is now before this court pursuant to the allowance of a motion to certify the record.

#### Attorneys and Law Firms

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Miraldi & Barrett Co., L. P. A., Ray L. Miraldi, Amherst, Thomas E. Morgan, Columbus, H. L. Snyder and Larry L. Roller, Charleston, W. Va., for appellant.

### Opinion

PAUL W. BROWN, Justice.

On its face, Civ.R. 12(B)(1) would appear to require that a motion to dismiss a complaint for reason of lack of jurisdiction of the court over the subject matter should be determined from the face of the complaint. Such a conclusion would be buttressed by observing that when a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleadings, Civ.R. 12(B)(6) specifically authorizes that the motion may be treated as a motion for summary judgment and disposed of as provided in Civ.R. 56.

Federal practice relevant to Ohio Civ.R. 12(B)(1), however, clearly recognizes the obligation of a trial court to determine at the earliest time whether it has jurisdiction, and authorizes a court to consider outside matter attached to a motion to dismiss for lack of jurisdiction without converting it into a motion for summary judgment if such material is pertinent to that inquiry. *Alabama, ex rel. Baxley, v. Woody* (1973), 5 Cir., 473 F.2d 10.

[1] [2] We conclude that materials which are pertinent to the claim that the court did not have subject-matter jurisdiction may properly be received by the trial court. On the basis of the materials so adduced, we conclude that the provisions of R.C. 4905.04 are not destructive of the trial court's jurisdiction here. That statute gives the Public Utilities Commission exclusive jurisdiction to require all intrastate public utilities to furnish their products and render all services exacted by the commission or by law. Admittedly, appellant, an interstate gas line, is not subject to \*215 regulation by the Public Utilities Commission, and the duty \*\*529 sought to be enforced was not one exacted by the commission or by law so as to be within the contemplation of that statute, but was claimed to have arisen contractually. See *Public Utilities Commission of Ohio v. United Fuel Gas Co.* (1943), 317 U.S. 456, 467, 63 S.Ct. 369, 87 L.Ed. 396.

[3] [4] With regard to appellant's alternate argument that under existing regulations, it must obtain authority to use its interstate transmission pipeline for the purpose of making a direct retail sale from its regulatory agency, the Federal Power Commission, the fact that this assertion may be entirely true is not destructive of the trial court's subject-matter jurisdiction. Neither the Federal Power Commission nor the Public Utilities Commission has jurisdiction to construe or enforce an easement contract. The subject matter of this action arises in contract and the determination of questions of construction or validity, together with the declaration of rights, status or other legal relations under such contracts, by Common Pleas Courts is specifically authorized by R.C. 2721.03.

[5] The trial court received material from the appellant in various forms, not relevant to subject-matter jurisdiction, but bearing upon the extent of the relief which might be granted. Where under these circumstances a trial court grants a motion to dismiss an action on grounds that the court lacks subject-matter jurisdiction, and issues an ex parte protective order limiting the opportunity of the adverse party to introduce material reasonably pertinent to the question of the availability of part of the relief sought, it is inappropriate for it to consider a Civ.R. 12(B)(6) motion that the complaint fails to state a claim upon which relief can be granted.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

C. WILLIAM O'NEILL, C. J., and HERBERT, J. J. P. CORRIGAN and WILLIAM B. BROWN, JJ., concur.

STERN and CELEBREZZE, JJ., dissent.

\*216 STERN, Justice (dissenting).

I dissent for the reason that the appellee has failed to state a justiciable cause of action in its complaint. Under R.C. 4905.04 and 4905.26, the Public Utilities Commission has jurisdiction to order gas utility service to a prospective customer. Columbia Gas of Ohio, as the successor to the gas distribution business, is required to furnish gas utility service under the easement contract, even though appellant, Columbia Transmission, owns and operates the pipeline which supplies the gas. It is only the February 18, 1976, order of the Public Utilities Commission in *In re Application of Columbia Gas of Ohio, Inc., to Clarify Policies Relating to Gas Restrictions* (case No. 75-584 GA-AGC) which prevents the granting of service, and denies appellee a superior position to other prospective users of gas utility service.

The Federal Power Commission under Section 7 of the Natural Gas Act, Section 717f, Title 15, U.S.Code also has jurisdiction to order appellant to furnish gas to appellee.

The administrative restrictions upon the furnishing of gas service to the appellee are a result of the present energy crisis.

I fully recognize the rights afforded appellee under the right-of-way easement to obtain gas utility service. However, this requirement must be subordinated to the authority vested by the Congress of the United States and the General Assembly of Ohio in public regulatory agencies to direct the curtailment of gas utility services for new customers in the interest of conservation of fuel.

I would reverse the judgment of the Court of Appeals and reinstate the judgment of the Court of Common Pleas.

CELEBREZZE, J., concurs in the foregoing dissenting opinion.

#### Parallel Citations

358 N.E.2d 526, 2 O.O.3d 393