

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

B&W Pipeline, LLC                    )  
  )  
v.    )     Docket No. 20-00004  
  )  
Navitas TN NG, LLC                 )

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MOTION TO DISMISS COUNTERCLAIM

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Pursuant to Commission rules 1220-01-02-.03(2)(a) and (e), B&W Pipeline, LLC (“B&W” or “B&W Pipeline”) moves to dismiss the Counterclaim filed by Navitas TN NG, LLC (“Navitas” or “Navitas TN”) because the Tennessee Public Utility Commission (“the Commission”) is not a court and therefore has no jurisdiction over (1) a claim of theft brought under T.C.A. § 35-102(3); (2) a claim of unjust enrichment brought under the equitable doctrine of *quantum meruit*; or (3) a claim for damages from lost sales caused by a loss of pressure in the pipeline.<sup>1</sup>

Background

This dispute originated when Navitas TN sent a letter to B&W Pipeline dated December 10, 2019. (A copy is attached to the Complaint filed by B&W). In the letter, Navitas said, “It has come to our attention that B&W Pipeline and/or its affiliates involved in gas flooding operations for oil production has [sic] not received invoices for regulated natural gas services provided by Navitas . . . from the usage period of July 1, 2017 to December 31, 2017.” The letter continued, “Enclosed for payment are your updated invoices in the total amount of \$344,515.48.” The letter

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<sup>1</sup> In its Counterclaim, paragraphs 22-27, Navitas also alleges that B&W has violated various sections of B&W’s “SOC.” An SOC is a “Statement of Operating Conditions” filed with the Federal Energy Regulatory Commission (“FERC”) and sets forth the rates, terms and conditions of B&W’s interstate transportation services. Navitas, however, does not seek any relief based on those alleged violations that, in any event, can only be addressed by the FERC. Therefore, this Motion does not address those allegations other than in this footnote.

explained that the invoices had been calculated in accordance with the Commission-approved rates of Navitas that were “in effect at the time of your usage.”

In other words, the letter from Navitas made it appear that B&W Pipeline “and/or its affiliates” had purchased over \$344,000 in gas from Navitas during a six-month period in 2017 and that Navitas had inadvertently failed to send B&W monthly invoices for those purchases of “regulated natural gas services.” Navitas attached the six, supposedly overlooked invoices to the letter and sent a copy of the letter and the invoices to the Tennessee Commission.

The letter and the accompanying invoices were fraudulent. No sales had occurred; no gas was missing;<sup>2</sup> and, as Navitas later admitted, the company generated and sent the invoices to B&W Pipeline only to retaliate against the pipeline for having asked for and been granted by the Federal Energy Regulatory Commission a substantial increase in the pipeline’s interstate rates.<sup>3</sup>

Two days after receiving the fraudulent invoices, B&W Pipeline notified Navitas that unless Navitas withdrew them, B&W would file a complaint with the Tennessee Commission

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<sup>2</sup> As explained in B&W’s Complaint, paragraphs four through seven, B&W Pipeline transported about 55,000 Mcfs of gas owned by Navitas commingled with about 12,000 Mcfs of gas owned by Rugby, a B&W affiliate, during the period July 1, 2017 through December 31, 2017. The pipeline delivered over 11,000 Mcfs of commingled gas to Rugby and over 53,000 Mcfs of commingled gas to Navitas TN and its affiliate, Navitas KY. In other words, except for minor losses from leaks and shrinkage, each shipper received all of the gas that it had purchased and paid the pipeline to deliver.

<sup>3</sup> The FERC decision approving B&W’s higher rates was issued on May 17, 2019 and filed with the Tennessee Commission on May 24, 2019. The FERC order made the rates effective July 17, 2017.

On June 18, 2019, B&W sent Navitas an invoice for service provided during May, 2019 at the FERC rate as well as an invoice for the period July 17, 2017 through April 30, 2019. Because of the large amount of the arrearage, \$593,675.47, B&W offered to discuss payment over a reasonable period of time. Navitas never responded to the invoice but filed a petition asking FERC to reconsider its order. The petition was denied on September 4, 2019.

Based on an examination of gas cost filings by Navitas KY at the Kentucky Public Service Commission, B&W discovered that Navitas KY had been recovering from its Kentucky customers about 90% of the monthly, flat charge of \$13,897 approved by the Tennessee Commission in Docket 15-00042. B&W notified the Kentucky Commission on August 20, 2019 that it would credit Navitas KY for those amounts. B&W sent a revised invoice to Navitas on October 8, 2019, showing an arrearage of \$335,359.68. Navitas responded on November 5, 2019 by raising various objections to paying the arrearage and on December 10, 2019, sent B&W six invoices totaling over \$344,000 for alleged gas purchases two years earlier. As described in footnote 10, *infra*, Navitas has now admitted that the invoices were created and sent only in retaliation against B&W because the pipeline had invoiced Navitas for transportation services at the new, FERC-approved rate.

which “may and should result in serious consequences for Navitas TN.” (A copy of that letter is also attached to the Complaint.)

Navitas declined to withdraw the invoices. Therefore, on January 8, 2020, B&W filed a formal Complaint with the Tennessee Commission. In the Complaint, B&W explained that all the gas that Navitas had shipped over the pipeline during this period was delivered by B&W to Navitas TN or its Kentucky affiliate, Navitas KY, that Navitas had not lost any gas (other than a small amount due to line loss and shrinkage) and that, as Navitas KY admitted to the Kentucky Commission (and has now admitted to the Tennessee Commission), Navitas belatedly created and sent the invoices two years after the fact to try to offset the impact of B&W’s 2019 rate increase. See footnote 10, infra. In the Complaint, B&W asked the Commission to open a “show cause” investigation of Navitas TN to consider the imposition of “substantial penalties” including the revocation of the utility’s Tennessee certificate and referral to a district attorney general.<sup>4</sup> Complaint, paragraph 20.

In response to the Complaint, Navitas filed an “Answer” to the Complaint and a “Counterclaim” against B&W Pipeline.

In the Answer and Counterclaim, Navitas dropped the pretense that the utility had unintentionally failed to send B&W six monthly invoices for “regulated natural gas services” between July and December, 2017. Instead, Navitas now alleges that B&W stole gas worth over \$344,000 during those six months. Paragraph 4 of the Answer states, “B&W did not purchase gas from Navitas; they took it for their own enrichment.” Similarly, paragraph 21 of the Counterclaim states, “B&W” has intentionally and knowingly committed fraud and theft against Navitas TN in

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<sup>4</sup> See “Show Cause Proceeding Against Gasco Distribution Systems, Inc.” Dockets 97-00160 and 97-00293. The Commission and the Consumer Advocate pursued “show cause” investigations of another gas distribution utility, Gasco Distribution Systems, for violations much less serious than what Navitas has done.

violation of T.C.A. § 65-35-102(3)” which prohibits the theft of gas and provides for civil and criminal penalties.

In the “Requested Relief” section of the Counterclaim, Navitas states three claims for relief.

It asks that the Commission:

1. Find that B&W has stolen gas from Navitas in violation of T.C.A. § 65-35-102(3);
2. Find that B&W “has been unjustly enriched such to warrant a finding of *quantum meruit*,” and
3. Find that B&W is liable to Navitas “for the loss of sales as a result of the curtailment Navitas experienced in July 2017.”

Requested Relief, paragraphs 1-3.

As discussed below, the Commission is not a court and has no statutory authority to grant relief to Navitas for any of these claims. Navitas has therefore failed “to state a claim upon which relief can be granted.”<sup>5</sup> See Commission rules 1220-01-02-.03(2)(a) and (e).

#### Discussion

As the Tennessee Supreme Court has explained, the Commission “is not a Court” but an administrative agency “exercising such commingled legislative, executive and judicial functions that it cannot be made a Court.” Louisville & Nashville Railroad Co. v. Fowler, 271 S.W.2d 188 (Tenn., 1954). The Commission only has the powers that are granted to it by statute. “The powers of the Commission must be found in the statutes. If they are not there, they are non-existent.” Tennessee-Carolina Transportation, Inc. v. Pentecost, 334 S.W.2d 950 (Tenn. 1960). While these enabling statutes “undoubtedly require a liberal rather than a narrow interpretation . . . the Commission’s powers remain rooted in its enabling legislation . . . so its actions must be

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<sup>5</sup> Since the agency has no jurisdiction to grant relief for these claims, it is also precluded from making any of the findings requested by Navitas. See T.C.A. § 4-5-222(a), which states that an administrative agency may not issue a declaratory order unless the issue presented lies within “the primary jurisdiction of the agency.”

harmonious and consistent with its statutory authority.” Tennessee Cable Television Association v. Public Service Commission, 844 S.W.2d 151 (Tenn. Ct. App., 1992).

Since the Commission is not a court, it has no authority to grant relief for any of the claims made by Navitas. Therefore, the Counterclaim must be dismissed.

First, Navitas asks the Commission to find that B&W has stolen gas in violation of T.C.A. § 65-35-102(3).<sup>6</sup> Even if these charges were true, Navitas has not stated a claim for relief that the Commission has authority to grant.<sup>7</sup> Nothing in T.C.A. § 65-35-101 et seq. grants jurisdiction to the Commission. See T.C.A. § 65-35-107 (stating that “nothing in this chapter” confers jurisdiction on the Commission). To the contrary, the statute expressly grants enforcement jurisdiction to the state’s civil and criminal courts.<sup>8</sup> See T.C.A. §65-35-104 (describing the right

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<sup>6</sup> The charges of theft made by Navitas are based on the utility’s erroneous assertion that gas belonging to Navitas that enters the pipeline at one end must be the identical gas that is delivered to Navitas at the other end.

Gas is a fungible commodity, and gas owned by one shipper may be commingled with, or replaced by, gas owned by other shippers prior to delivery. As B&W’s federal tariff states in Section 6.14, “It is understood and agreed” that gas delivered to B&W at the upstream end of the pipeline “will not be identical” to the gas leaving the pipeline at the downstream end. See B&W’s Complaint, paragraph 5, emphasis added.

The charge of theft and, indeed, this entire dispute is based on Navitas’ repeated claim that the gas it owns must be segregated from other gas on the pipeline so that the gas molecules purchased by Navitas and delivered to the pipeline for shipment are the very same gas molecules delivered to Navitas customers. See Answer, paragraphs 5, 8, 13, 15, and 16. This argument ignores how pipelines actually work. “Since natural gas is fungible, its ‘transportation’ does not always take the form of the physical carriage of a particular supply of gas to its destination. Just as Western Union can ‘transport’ money from one place to another by accepting cash at the starting point and paying out different, but equivalent, cash at the destination, so too pipelines transport gas by . . . ‘exchange’ (a process by which one party delivers gas to another party at one place in exchange for receiving gas at another place).” Associated Gas Distributors v. FERC, 899 F.2d 1250 at 1254 (D.C. Circ. 1990). To accuse B&W of stealing gas from Navitas would be like accusing Western Union of stealing money because the dollar bills handed to Western Union by the consignor are not the identical bills delivered to the consignee. Moreover, Navitas admits that it became aware in July, 2017 that B&W was delivering to Rugby gas purchased by Navitas commingled with gas purchased by Rugby. “Statement of Facts,” paragraphs 1-4. Navitas did not accuse B&W of theft at the time and is making the charge now only in a bad faith attempt to offset the impact of the FERC rate increase.

<sup>7</sup> Under Tennessee law, a motion to dismiss for failure to state a claim “contemplates that all relevant and material allegations in the complaint, even if true and correct, do not constitute a cause of action.” Lanier v. Rains, 229 S.W.3d 656, 660 (Tenn. 2007).

<sup>8</sup> Navitas also refers to T.C.A. § 65-28-103(a), but that statute simply states that intrastate pipelines are public utilities and subject to the Commission’s regulatory jurisdiction.

to bring a “civil action in any court of appropriate jurisdiction”) and § 105 (describing the right to bring criminal charges).

Second, Navitas claims that B&W was unjustly enriched by taking the gas and seeks “equitable” relief under the theory of “*quantum meruit*.” Counterclaim, paragraph 10; Requested Relief, paragraph 2. Only a court with equity jurisdiction can grant equitable relief. The Commission is not a court, has no equitable powers and cannot hear a claim of *quantum meruit*.

Third, Navitas alleges that in July, 2017, B&W removed gas from the pipeline causing a loss of pressure in the pipeline that “resulted in a loss of an estimated 46% of sales” by Navitas during that month. “Statement of Facts,” paragraphs 1-3. In the Counterclaim, Navitas asks that the Commission find that B&W is responsible for Navitas’ loss of sales in July, 2017. Requested Relief, paragraph 3. If these allegations were true, Navitas’ remedy would be to file a civil suit seeking appropriate damages. The Commission is not a court and has no authority to hear a civil suit or award damages. Navitas cites no statute granting the Commission such authority.

### Conclusion

As explained in B&W’s Complaint, this dispute arises from Navitas’ attempt to offset over \$335,000 owed to B&W as a result of the FERC rate increase by belatedly fabricating invoices that purport to show that B&W had either purchased or stole gas worth that amount two years earlier. Navitas continues to make this claim despite having admitting that no gas was lost<sup>9</sup> and that the invoices were sent only because of the FERC rate increase.<sup>10</sup>

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<sup>9</sup> See, pre-filed testimony of Thomas Hartline in TPUC docket 19-00084 at p. 3 in which Mr. Hartline acknowledged that whatever gas belonging to Navitas was delivered by B&W Pipeline to Rugby was replaced by an equal amount of gas from local wells owned by a B&W affiliate.

<sup>10</sup> See, Counterclaim, paragraph 5 (admitting that because B&W “invoiced Navitas under the new transmission tariff authorized by FERC” Navitas responded by sending an “invoice [to] B&W Pipeline for natural gas services rendered during the period . . . July 1, 2017 through December 31, 2017.” See also, B&W’s Complaint, paragraph 18, describing how Navitas made the same admission to the Kentucky Commission.

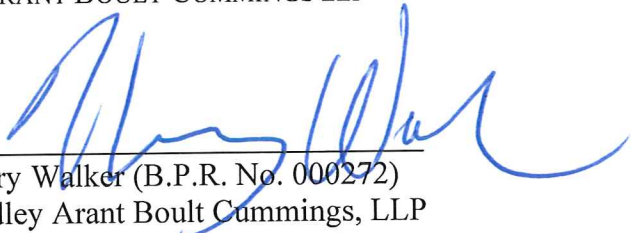
The validity of the invoices from Navitas will be addressed during the litigation of B&W's Complaint, but there is no reason to litigate the three claims for relief raised by Navitas in the Counterclaim. Each claim is unquestionably outside the agency's purview.

Therefore, B&W asks that the Counterclaim filed by Navitas be dismissed.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

By: \_\_\_\_\_

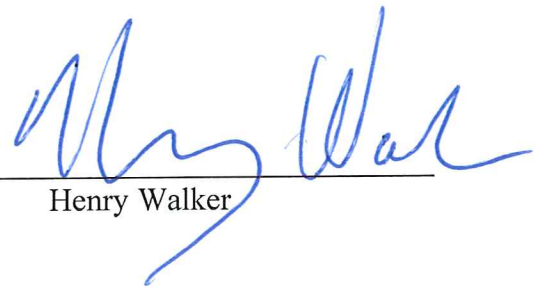


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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of June, 2020, a copy of the foregoing document was served on the parties of record, via electronic delivery and U.S. Mail, postage prepaid, addressed as follows:

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