Major Energy Servs. LLC v Orange & Rockland Utils., Inc.
2020 NY Slip Op 31807(U)
June 8, 2020
Supreme Court, New York County
Docket Number: 654710/2018
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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MAJOR ENERGY SERVICES LLC,

Plaintiff,

- v -

ORANGE AND ROCKLAND UTILITIES, INC.,

Defendant.

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INDEX NO. 654710/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION & ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8-34 were read on this motion to DISMISS.

Pursuant to CPLR 3211(a)(1) and (7), defendant Orange and Rockland Utilities, Inc. (O&R) moves to dismiss the complaint (Dkt. 10 [Complaint]). Plaintiff Major Energy Services LLC (Major Energy) opposes. Defendant's motion is granted.

I. Background [1]

This case arises from a monetary dispute between a natural gas utility and an energy supply company (ESCO) operating within the utility's territory. Defendant O&R, a New York corporation wholly owned by Con Edison, is a public utility that delivers natural gas to roughly 133,000 customers in Orange and Rockland Counties. Plaintiff Major Energy, a New York LLC, is an ESCO that supplies natural gas to roughly 6,700 customers in O&R's territory.

A. The Parties' Relationship and Its Regulatory Framework

O&R delivers natural gas to Major Energy's customers in O&R's territory, who are considered "transportation service" customers of O&R. Each month, O&R bills Major Energy's

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

customers for their usage and remits the proceeds, less delivery costs, to Major Energy. Natural gas supplied by Major Energy and delivered to its customers by O&R is transported over interstate pipelines to O&R's local network of distribution pipelines before arriving at the homes or businesses of end consumers. O&R's natural gas customers that are ***not*** customers of an ESCO like Major Energy are O&R's "full-service" customers, to which O&R both supplies and delivers natural gas.

Under the transportation service arrangement, Major Energy must supply the amount of gas that its "firm" (uninterruptible) service customers are expected to use on any given day. O&R, which contracts with interstate pipeline operators to transport gas, releases some of its capacity rights on those pipelines to allow Major Energy to deliver its own gas to O&R's citygate, the entry point into O&R's local network from the interstate pipeline. But during the increased-demand winter months of November through March, Major Energy purchases some gas from O&R to supply to Major Energy's customers, instead of supplying all the gas itself. This is called "Winter Bundled Sales" (WBS) service. The amount of gas O&R sells to Major Energy each day during the winter months under WBS is called the "Winter Bundled Sales Volume" (WBSV).

An array of contracts, tariffs, manuals, and laws govern the relationship between the plaintiff ESCO and the defendant utility. A government agency, the New York Public Service Commission (PSC), regulates and oversees the natural gas industry—among other utilities—in New York State. To that end, the PSC approves tariffs proposed by public utilities that set forth pricing information and other terms of service (Public Service Law § 66[12]), including the tariff applicable to O&R's natural gas services, "Orange and Rockland Utilities, Inc.'s Schedule for Gas Service P.S.C. No. 4 – GAS" (Gas Tariff). The PSC also conducts hearings upon complaint or its own motion that a utility's "rates, charges or classifications or [its] acts or regulations … are unjust,

unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law" (PSL § 66[5]). The PSC further prescribes certain business procedures for ESCOs and natural gas (and electric) utilities by enacting the "Uniform Business Practices" (UBP) (*see* Case 98-M-1343, 1999 NY PSC Op No. 99-3, 1999 WL 135114).

PSC regulations allow each natural gas utility to promulgate a "Gas Transportation Operating Procedure" (GTOP) manual which, along with the applicable tariffs and the UBP, governs the utility's relationship with ESCOs like Major Energy. However, "while the [GTOP] may include factors that affect the amount of the customer's bill, such as rates, balance tolerances and charges, these must continue to be stated in the [utility] company's tariff" (*see* Dkt. 15 [1999 WL 1334729 (NY PSC Case No. 97-G-1380, Dec. 21, 1999)] at 4-6). The utility, further, must provide PSC and ESCOs 30 days' notice of any proposed amendments (*id.* at 5). The notice period allows time for the PSC to "object and make changes in consultation with the [utility] company or its customers and/or [ESCOs]" (1997 WL 33482518 [NY PSC Case 93-G-0932, Dec. 19, 1997]).

Finally, Major Energy and O&R entered at least three contracts. The first, titled "Consolidated Billing and Assignment Agreement" (Billing Agreement [Dkt. 19]), dated June 11, 2007, governs payments from Major Energy customers to O&R and from O&R to Major Energy. Next, an agreement titled "ESCO Operating Agreement" (ESCO Agreement [Dkt. 21]), dated December 26, 2007, addresses O&R's agreement to deliver gas to Major Energy customers. Finally, a contract titled "Capacity Release Service Agreement" (CRS Agreement [Dkt. 14]), dated October 1, 2016, requires O&R to release part of its daily interstate pipeline capacity to Major Energy and requires Major Energy to pay capacity release charges to the interstate pipeline operator for the volume of released capacity. An unexecuted form of the CRS Agreement is appended to the GTOP (Dkt. 11 [GTOP] at 51-54).

B. Facts Precipitating This Action

In May 2016, O&R amended the GTOP, effective November 1, 2016, adding a single paragraph to Section D (Dkt. 16 [letter to PSC] at 22). On June 22, 2016, O&R emailed the proposed amended GTOP to Major Energy and others (Dkt. 17 [email and attachments]). The following day, O&R sent another email stating as follows:

> Pursuant to O&R's GTOP change, please note that effective July 1, 2016 capacity release volumes will be based on the ESCOs peak month/average day volume during the summer period (April through October). During the winter months only will the capacity release volume be reduced by the Winter Bundled Sales volume [WBSV] (Dkt. 18 [email] at 2).

The day after that, O&R sent another email to the same recipients, clarifying that "instead of the capacity release change being in effect July 1, 2016, O&R will make this change to be in effect April 1, 2017" (*id.* at 1). The email informed the recipients that new "release numbers for July 2016 will be sent out later today" and apologized for the "confusion" (*id.*).

On September 21, 2018, Major Energy sued O&R for breach of contract, alleging that O&R had increased Major Energy's capacity release charges to include WBSV (Complaint ¶¶ 20-26). These charges previously excluded WBSV all 12 months a year (*id.* ¶ 10), but O&R no longer excludes WBSV between April and October (Dkt. 23 [O&R Br. In Supp. of Mot. To Dismiss] at 10-11). Major Energy contends that O&R withheld money in breach of the Billing Agreement (Complaint ¶ 35) with no corresponding change to the GTOP (*id.* ¶ 31). Major Energy seeks damages exceeding $500,000 and declaratory relief (*id.* ¶¶ 36-37).

C. Relevant Provisions of the Applicable Contracts, Tariffs and Rules

i. Gas Tariff

Two sections of the Gas Tariff are relevant to this case: Service Classification No. 11 (Dkt. 12 [SC11]) and Service Classification No. 6 (Dkt. 13 [SC6]). SC11 sets forth terms of service for

ESCOs, such as Major Energy, that "transport gas … utilizing capacity released to [ESCO] by [O&R] as provided" under SC11, "for receipt and redelivery ... by [O&R] on a firm basis to the firm transportation customer(s) pursuant to" SC6 (Dkt. 12 at 1). O&R's "Mandatory Capacity Release Service" is described as follows:

> [ESCO] must contract for firm upstream pipeline capacity ***under the terms and conditions of this Service Classification and the GTOP*** for the period commencing November 1, and extending to October 31 of each year (the "capacity release period"). [ESCO] ***must contract for such capacity equal to*** the Maximum Aggregated Daily Contract Quantity ("***MAX ADCQ***") (***as defined in the GTOP***) to serve the needs of [ESCO's] firm transportation customers served under [SC6] …. [ESCO] must use such capacity to serve [its] firm transportation customers behind [O&R's] citygate during the months of November through March when the temperature is forecast to be below the prescribed temperature …. Capacity will be allocated to [ESCOs] in accordance with the [GTOP]. … Firm interstate pipeline capacity will be released to [ESCO] at [O&R's] Adjusted WACOT [Weighted Average Cost of Transportation]. [ESCO] shall be directly billed by the pipeline for such capacity and will be responsible for paying the pipeline for such charges (Dkt. 12 at 2 [emphasis added]).

SC11 further describes that O&R "will provide to [ESCO] the [WBSV], the ADCQ, and the MAX ADCQ for its customers ***as defined and determined in the GTOP***" (*id.* at 5 [emphasis added]).[2] Finally, it notes that service under SC11 is subject to the GTOP and the UBP and that in the event of any conflict between SC11 and the UBP, "the UBP shall control" (*id.* at 1).

SC6 sets forth terms of service for "[f]irm transportation of customer-owned gas" within O&R's territory for customers that have contracted with an ESCO, such as Major Energy, that supplies gas under SC11 (Dkt. 13 [SC6] at 1). SC6 describes WBS service as follows:

> The Winter Bundled Sales Service Option provides for [ESCO] to deliver gas to [O&R's] citygate on behalf of all customers in

[2] The ADCQ ("Aggregated Daily Contract Quantity") represents the amount of gas the ESCO is required to deliver to O&R's citygate each day in a given month (Dkt. 12 [SC11] at 15; *accord* Dkt. 11 [GTOP] at 16).

> [ESCO's] Aggregation Group based on the customers' average daily usage for the same month last year, weather-normalized, with [O&R] redelivering the gas to [ESCO's] customers on an as-needed basis, except that a portion of [ESCO's] customers total gas requirements during the period November through March (winter period) shall include an amount of WBS gas purchased by [ESCO] from [O&R] in accordance with and at the rates set forth in [SC11] (*id.* at 4).

SC6 explains that as of April 1, 2016, WBS service is ***mandatory*** for all customers (*id.* at 1).

ii. Sections D and E of the GTOP

Section D of the GTOP specifies ESCOs' obligations to purchase the WBSV of natural gas from O&R in winter (Dkt. 11 [GTOP] at 16-18). It also defines how ADCQ, WBSV and MAX ADCQ are calculated.

The GTOP's formula for ADCQ, which represents the amount of gas the ESCO is required to deliver to O&R's citygate each day in a given month, varies by season. For the summer period, April through October, ADCQ is "the volume of gas [ESCO] is ***required to deliver*** to [O&R's] citygate each day ***to serve its customers' average daily use during the month***, based on the sum of the [ESCO's] customers' prior year's weather-normalized daily gas usage for the same month" (*id.*). The ADCQ for the rest of the year is defined as follows:

> The ADCQ for the period November through March (winter period) is the volume of gas that [ESCO] is ***required to deliver*** to [O&R's] citygate each day. The ADCQ is based on the sum of [ESCO's] customers' prior year's weather-normalized daily gas usage for the same month, ***less a daily amount of WBS gas to be purchased by [ESCO] from [O&R]*** (*id.* at 16 [emphasis added]).

The GTOP defines the MAX ADCQ as follows:

> MAX ADCQ is the maximum daily amount [ESCO] will be required to deliver ***in any winter month*** to [O&R's] citygate for all customers in [its] Aggregation Group. The MAX ADCQ is also ***the amount of daily pipeline capacity that must be obtained by [ESCO] for all customers*** in [its] Aggregation Group (*id.* at 16).

The May 2016 amendment added a single paragraph to Section D:

> If [ESCO] subscribes to Winter Bundled Sales Service ("WBSS") for an upcoming Winter Period (November 1 - March 31), ***[ESCO's] firm transportation capacity requirements*** needed to serve its Firm Transportation Customers ***shall be reduced*** to recognize the portion of the MDQs of gas that are being provided by [O&R] under WBSS during the Winter Period (*id.* at 17 [emphasis added]; *see also* Dkt. 17 [redline] at 24).

Section E of the GTOP describes O&R's "Mandatory Capacity Release Service" as follows, in relevant part:

> [ESCO] ***must obtain firm upstream pipeline capacity equal to its MAX ADCQ*** .... [ESCO] must use such capacity to serve its firm transportation customers behind [O&R's] citygate during the months of November through March ("winter period") when the temperature is forecasted to be below the level identified [by O&R]. ...
>
> A[n ESCO] serving its firm transportation customers by taking capacity from [O&R] must execute the Capacity Release Service Agreement ("CRSA") ... within 20 calendar days of receipt from [O&R] of the capacity allocations available for the upcoming Capacity Release Period.
>
> [ESCO] must contract for ***firm upstream pipeline capacity*** under the terms and conditions of SC 11 ***for the period commencing November 1 and extending to October 31*** of each year (the "Capacity Release Period"). [ESCO] ***must contract for such capacity equal to the Maximum Aggregated Daily Contract Quantity ("MAX ADCQ")*** ... to serve the needs of [ESCO's] firm transportation customers served under SC 6 (Dkt. 11 at 18).

iii. CRS Agreement

Under the CRS Agreement, as of the effective date of November 1, 2016, "O&R will release [its] capacity rights and obligations" and Major Energy "will assume those rights and obligations" (Dkt. 14 at 1). In mid-October 2016, O&R was to "advis[e]" Major Energy by email of the daily amount of released capacity, which was to be based on Major Energy's "projected firm customer pool" as of the effective date (*id.*). Major Energy could then reject the advised amount

within two days of the notification (*id.*), but was otherwise required to "***pay the Pipelines directly*** for all charges associated with the use of the Released Capacity" (*id.* at 2 [emphasis added]). The agreement further states that the parties are bound to SC11 and the GTOP (*id.*).

iv. Billing Agreement

The Billing Agreement (Dkt. 19) addresses O&R's arrangement with Major Energy to issue consolidated bills to Major Energy's customers and to accept customer payments on Major Energy's behalf. Section 3.1, titled "Resolution of Disputes" states: "If a dispute arises between Parties, including those issues requiring NYPSC action, the dispute resolution process set forth in the NYPSC UBPs ***will be followed***" (Dkt. 19 at 21 [emphasis added]).

Section 3.9 of the Billing Agreement, titled "Applicable Law and Forum," states as follows, in relevant part:

> Each Party irrevocably consents that ***any legal action or proceeding arising under or relating to this Agreement*** will be brought in a court of the State of New York or a federal court of the United States of America located in the State of New York, County of New York. Each Party irrevocably waives any objection that it may now or in the future have to the State of New York, County of New York as the ***proper and exclusive forum*** for any legal action or proceeding arising under or relating to this Agreement (*id.* at 27 [emphasis added]).

v. ESCO Agreement

The ESCO Agreement addresses the relationship between O&R and Major Energy as natural gas service providers for delivery and supply, respectively. Section 2.5 of the ESCO Agreement, titled "Resolution of Disputes," states: "If a dispute arises between Parties, including those issues requiring NYPSC action, the dispute resolution process described in Section 8 of the UBP ***will be followed***" (Dkt. 21 at 3 [emphasis added]).

Section 3.6 of the ESCO Agreement, titled "Applicable Law and Forum," states as follows, in relevant part:

> ESCO irrevocably consents that ***any legal action or proceeding arising under or relating to this Agreement*** will be brought in a court of the State of New York or a federal court of the United States of America located in the State of New York, County of New York. ESCO irrevocably waives any objection that it may now or in the future have to the State of New York, County of New York as the ***proper and exclusive forum*** for any legal action or proceeding arising under or relating to this Agreement (*id.* at 5 [emphasis added]).

vi. UBP

UBP Section 8, titled "Disputes Involving Distribution Utilities, ESCOs Or Direct Customers," has two parts. Part A, titled "Applicability," states as follows:

> This Section describes the dispute resolution processes ***available*** at the Department [of Public Service] to resolve disputes relating to competitive energy markets involving utilities [and] ESCOs[.] … ***They are*** … ***not applicable to matters that***, in the opinion of the Department Staff, should be submitted by formal petition to the Public Service Commission for its determination or ***are pending before a court, state or federal agency. The availability of the processes does not limit the rights of a distribution utility [or] ESCO*** … ***to submit any dispute to another body for resolution*** (Dkt. 22 [UBP] at 48).

Part B, titled "Dispute Resolution Processes," begins as follows: "Distribution utility tariffs and operating and service agreements between the parties ***shall identify*** the processes used to resolve disputes and ***shall refer*** to the dispute resolution processes described in this Section as ***acceptable*** processes to resolve disputes" (*id.* [emphasis added]). Subpart B(1) describes the non-expedited "Standard Process," starting with written notice to the opposing party and Department of Public Service (DPS) staff. If the dispute is not settled after 40 days, a party may request an "initial decision" from DPS, which is then appealable to the PSC (*id.* at 48-49).[3]

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[3] Section 8(B)(1) describes the "Standard Process" as follows, in relevant part:

> Any distribution utility [or] ESCO … may ***initiate a formal dispute resolution process by providing written notice to the opposing party and Department Staff***. Such notice shall include a statement that the UBP dispute resolution process is

II. Discussion

On a motion to dismiss, the facts alleged in the pleading are accepted as true, as are all reasonable inferences in the proponent's favor that may be gleaned from them (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). Dismissal must be denied if the pleading sets forth a viable cause of action (*see id.*). Deficiencies in the pleading, moreover, may be remedied by proper affidavits (*see Amaro*, 60 AD3d at 492; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). Under CPLR 3211(a)(1), a motion to dismiss will be granted if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively

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> initiated, a description of the dispute, and a proposed resolution with supporting rationale. Department Staff may participate in the process at this or any later point to facilitate the parties' discussions and to assist the parties in reaching a mutually acceptable resolution.
>
> a. No later than ten calendar days following receipt of the dispute description, if no mutually acceptable resolution is reached, ***the opposing party shall provide a written response containing an alternative proposal*** for resolution with supporting rationale and send a copy to Department Staff.
>
> b. No later than ten days after receipt of the response, if no mutually acceptable resolution is reached, ***any party or Department Staff may request that the parties schedule a meeting for further discussions***. ....
>
> c. If no mutually acceptable resolution is reached within 40 calendar days after receipt of the written description of the dispute, any party may request an initial decision from the Department. A party to the dispute may ***appeal the initial decision to the Public Service Commission*** ... (Dkt. 22 at 48-49 [emphasis added]).

Section 8(B)(2) describes the "Expedited Process" for emergencies (*id.* at 49).

establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], citing *Leon*, 84 NY2d at 88 [1994]).

Contracts "are construed in accord with the parties' intent," the best evidence of which is the language of the contract itself, read as a whole (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569, 572 [2002]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.* at 569). Contractual language is unambiguous if it has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]; *see Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] ["To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation"]).

Whether a contract is ambiguous "is a question of law to be resolved by the courts" (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Moreover, "provisions in a contract are not ambiguous merely because the parties interpret them differently" (*Mount Vernon Fire Ins. Co. v Creative Hous. Ltd.*, 88 NY2d 347, 352 [1996]). Extrinsic or parol evidence—outside the four corners of the document—is "admissible only if a court finds an ambiguity in the contract" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]).

"A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings,* 1 AD3d 170, 171 [1st Dept 2003] [citations omitted]). Moreover, "[i]n construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless" (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc.*, 63

NY2d 396, 403 [1984]). Accordingly, "conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect" (*Isaacs v Westchester Wood Works, Inc.*, 278 AD2d 184, 185 [1st Dept 2000]).

O&R moves to dismiss this action on three alternative grounds: (1) Major Energy's failure to submit the underlying dispute to the processes referenced by the Billing and ESCO Agreements and described in Section 8 of the UBP; (2) the doctrine of primary jurisdiction; and (3) the filed-rate doctrine. The dispute-resolution provisions in the Billing and ESCO Agreements are dispositive and mandate dismissal of this action.

Section 3.1 of the Billing Agreement, titled "Resolution of Disputes," unambiguously requires: "If a dispute arises between Parties, including those issues requiring NYPSC action, ***the dispute resolution process set forth in the NYPSC UBPs will be followed***" (Dkt. 19 at 21 [emphasis added]). Section 2.5 of the ESCO Agreement similarly states: "If a dispute arises between Parties, including those issues requiring NYPSC action, ***the dispute resolution process described in Section 8 of the UBP will be followed***" (Dkt. 21 at 3 [emphasis added]).

Major Energy contends that the contracts do not obligate it to submit to the UBP process. First, it argues that O&R agreed to forum selection clauses stating that legal actions or proceedings arising under or related to the agreements will be brought in a court in New York County and designating New York County as the proper and exclusive forum for any such action or proceeding (*see* Dkt. 19 [Billing Agreement] at 21; Dkt. 21 [ESCO Agreement] at 5). Second, it asserts that Section 8 of the UBP—to which the Billing and ESCO Agreements both refer—describe the dispute resolution processes as "available" and "acceptable" and are thus permissive, not obligatory.

Interpreting the agreements in conjunction with the UBP, Billing Agreement § 3.1 and ESCO Agreement § 2.5 ***require*** the parties to submit their dispute to the Section 8(B) procedures. The agreement provisions state that the parties "**will**" follow the UBP process, not simply that they "may" take advantage of the available process or that the process is one of many "acceptable" routes. "Will be followed" means just that—it is ***not*** simply an option. A contrary interpretation of the parties' contracts would render the "will" a mere "may."

The statements of the UBP regarding the processes being "available," requiring that the parties' contracts refer to them as "acceptable" and stating that "[t]he availability of the processes does not limit the rights of a distribution utility [or] ESCO … to submit any dispute to another body for resolution," do not compel a different conclusion. It is not the availability of the processes that limits Major Energy's right to bring this dispute to court, but its contractual commitment to use agreed-upon methods for resolving disputes. The UBP, moreover, minimally required the parties refer to the processes as acceptable; here, they went a step further, making them mandatory. Finally, that the processes described by the UBP are "not applicable to matters … pending before a court" does not give Major Energy a license to circumvent the contracts mandating those processes and prohibiting commencement of this plenary action.

Nor do the New York County forum-selection clauses render the contracts ambiguous. Indeed, the dispute-resolution and forum-selection provisions can be harmonized. The parties agreed to follow the UBP process, and any ***challenge*** to the final outcome was to be brought—as an article 78 proceeding—in New York County (*see Isaacs*, 278 AD2d at 185; *see also Edgewater Growth Capital*, 69 AD3d at 439, 439 [1st Dept 2010]). A strong policy favors enforcement of these agreements to resolve disputes through the UBP's administrative process. The general

forum-selection clause does not negate Major Energy's commitment, in more specific provisions, to use the UBP process (*see Isaacs*, 278 AD2d at 185).

Dismissal is also mandated by the doctrine of primary jurisdiction, which provides that "where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding" (*Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 730 [1st Dept 1984]). The New York Court of Appeals has explained:

> The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency (*Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 22 [1982]).

The doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body" (*Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 156 [1988], quoting *United States v Western Pac. R. R. Co.*, 352 US 59, 64 [1956]). "Deference to primary administrative review is particularly important where the matters under consideration are inherently technical and peculiarly within the expertise of the agency" (*Davis v Waterside Hous. Co., Inc.*, 274 AD2d 318, 319 [1st Dept 2000]). Application of the doctrine may warrant dismissal, but parties may seek judicial review under article 78 once administrative remedies are exhausted (*see Wong v Gouverneur Gardens Hous. Corp.*, 308 AD2d 301, 305 [1st Dept 2003]).

Significantly, Public Service Law § 66(5) vests the PSC with the power to hold hearings "upon its own motion or upon complaint" to assess whether "the rates, charges or classifications

or the acts or regulations" of gas utility corporations "are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law." If the answer is yes, the PSC "***shall determine and prescribe*** … the ***just and reasonable rates, charges and classifications*** thereafter to be in force ... ***notwithstanding*** that a higher or lower rate or charge has heretofore been prescribed by general or special statute, ***contract***, grant, franchise condition, ***consent or other agreement***, and the just and reasonable acts and regulations to be done and observed" (*id.* [emphasis added]; *see also generally National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 33 NY3d 336, 351 [2019] [describing that "the PSC is empowered to regulate utilities' transportation of gas"], *rearg denied*, 33 NY3d 1130 [2019]).

Here, it is appropriate to wait for the PSC to apply its specialized knowledge and experience (*see Township of Thompson v New York State Elec. & Gas Corp.*, 25 AD3d 850, 851-852 [3d Dept 2006]); *Brownsville Baptist Church v Consol. Edison Co. of New York*, 272 AD2d 358, 359 [2d Dept 2000]). The complaint asks this court to allocate capacity release charges pursuant to the GTOP, which was promulgated by O&R under PSC regulations and is referenced in O&R's tariff. Because this dispute concerns both the construction and reasonableness of a utility tariff, it belongs at the regulatory agency in the first instance (*see United States v Western Pac. R. Co.*, 352 US 59, 63 [1956]; *see also id.* at 69 ["where, as here, the problem of cost-allocation is relevant, and where therefore the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues, then it is the (agency) which must first pass on them"]).

There is no need to reach the issue of the applicability of the filed-rate doctrine, which further prohibits court challenges to utility rates established by regulatory agencies in order to "ensure that rates charged are stable and non-discriminatory" (*Minihane v Weissman*, 226 AD2d 152, 152 [1st Dept 1996]). Accordingly, it is

ORDERED that the motion of defendant Orange and Rockland Utilities, Inc. to dismiss the Complaint is granted, and the Complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

6/8/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER