

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MICHIGAN CONSOLIDATED GAS
COMPANY, a Michigan corporation,

Plaintiff/Counter-Defendant,

v

File No. 95-13656-CK
HON. PHILIP E. RODGERS, JR.

SAVOY OIL & GAS, INC. SHAREHOLDER
TRUST and THOMAS C. PANGBORN, as
Trustee,

Defendant/Counter-Plaintiff.

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**DECISION AND ORDER GRANTING MICHIGAN
CONSOLIDATED GAS COMPANY'S MOTION FOR REMAND**

In 1995, the Plaintiff Michigan Consolidated Gas Company ("MichCon") filed an action for declaratory judgment regarding construction of its contract to purchase natural gas from Defendant Savoy Oil & Gas, Inc. ("Savoy"). Savoy filed a counterclaim for breach of contract and demanded a jury trial.

On November 1, 1996, this Court granted MichCon's Motion for Summary Disposition holding that the gas purchase contract was clear and unambiguous and that MichCon had no obligation to accept commitments of gas from Savoy other than those from wells expressly listed in the contract. In an unpublished opinion issued July 10, 1998, the Court of Appeals reversed, holding that the contract was ambiguous. On March 7, 2000, the Michigan Supreme Court denied MichCon's application for leave to appeal, but observed that the contract contained a further ambiguity which had not been noted by the Court of Appeals.

On remand to this Court, MichCon filed a Motion for Remand to the Michigan Public Service Commission ("PSC") on the basis of primary jurisdiction. By an Order dated June 13, 2000, the Court dispensed with oral argument on the motion pursuant to MCR 2.119(E)(3). The Court had MichCon's Motion and Brief in Support and Savoy's Response. The Court gave MichCon 30 days from the date of the Order to file a Reply and gave the PSC 30 days from the date of the Order in which to file its amicus curiae brief. Any party who wanted to respond to the PSC's brief had to do so within 45 days of the date of the Order. It has now been more than 45 days since the date of the Order.

For the reasons that will now be described, the Court grants MichCon's Motion for Remand to the Michigan Public Service Commission.

In support of its motion, MichCon relies upon the PSC's statutory authority, 1929 PA 9, MCL 483.101, et seq; MSA 22.1301, et seq and MCL 460.6(1); MSA 22.13(6)(1) as well as the doctrine of primary jurisdiction as established by the Court of Appeals in various decisions since 1997 that have consistently reaffirmed that the PSC has primary jurisdiction to interpret gas purchase contracts. See, *JAF Properties, Inc v Public Service Commission*, unpublished opinion per curiam, December 3, 1999 (Docket No. 209405); *Dominion Reserves, Inc v Michigan Consolidated Gas Co*, released for publication on March 10, 2000 (Docket No. 216331); and *North Michigan Land & Oil v Michigan Consolidated Gas Co*, order of the Court of Appeals, March 27, 2000 (Docket No. 223319).

In opposition to the motion, Savoy argues that: (1) MichCon waived primary jurisdiction because it did not timely and properly raise it. *Travelers Ins Co v Detroit Edison*, 237 Mich App 485; 603 NW2d 317 (1999); (2) the PSC does not have jurisdiction over breach of contract actions

for past damages, but only over prospective determinations of price terms in gas purchase contracts; and (3) remand to the PSC would be unconstitutional: a) it would deprive Savoy of its constitutional right to trial by jury; b) it would violate Savoy's due process rights; and c) it would violate the doctrine of separation of powers.

I.

PRIMARY JURISDICTION

This Court recognized by its Decision and Order dated January 30, 1997 in the case of *Michigan Consolidated Gas Co v Aztec Producing Co*, Grand Traverse County Circuit Court File No. 95-13655-CK that the PSC has primary jurisdiction of disputes involving gas purchase contracts. Like the present case, *Aztec* involved disputes as to whether MichCon was obligated to purchase Antrim gas from defendant Aztec. This Court's decision in *Aztec* was based upon the Court of Appeals decision released for publication on January 24, 1997 in *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210; 561 NW2d 854 (1997), lv den 457 Mich 859; 581 NW2d 728 (1997). In *Energy Reserves*, the Court rejected the argument that the PSC lacked jurisdiction to hear breach of contract claims. The Court said:

This Court has repeatedly held that the PSC has primary jurisdiction over the interpretation of gas purchase contracts. *Miller Bros v Public Service Comm*, 180 Mich App 227, 233; 446 NW2d 640 (1989); *Antrim Resources v Public Service Comm*, 179 Mich App 603, 611; 446 NW2d 515 (1989). Moreover, this Court expressly considered and rejected North Michigan's arguments regarding the PSC's authority to resolve contractual claims in *North Michigan, supra* at 437; 536 NW2d 259.

Energy Reserves, supra at 216.

Thus, this Court held in *Aztec* that the PSC has primary jurisdiction over disputes involving contracts related to the purchase of natural gas and it would defer jurisdiction to it. MCR 2.116(C)(4).

The doctrine of primary jurisdiction and its proper application are described in *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 70-72; 559 NW2d 647 (1997), as follows:

Primary jurisdiction "is a concept of judicial deference and discretion." LeDuc, Michigan Administrative Law, § 10:43, p 70. The doctrine exists as a "recognition

of the need for orderly and sensible coordination of the work of agencies and of courts.” *White Lake Improvement Ass’n v City of Whitehall*, 22 Mich App 262, 282; 177 NW2d 473 (1970). In *White Lake*, the Court of Appeals correctly noted that “[t]he doctrine of primary jurisdiction does not preclude civil litigation; it merely suspends court action.” *Id* at 271; 177 NW2d 473. Thus, LeDuc notes, “[p]rimary jurisdiction is not a matter of whether there will be judicial involvement in resolving issues, but rather of when it will occur and where the process will start.” *Id* at § 10:44, p 73. A court of general jurisdiction considers the doctrine of primary jurisdiction “whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency.” *Id*, § 10:43 at 70.

In *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 613; 327 NW2d 805 (1982), we applied the United States Supreme Court’s definition of the doctrine from *United States v Western Pac R Co*, 352 US 59; 77 S Ct 161; 1 L Ed 2d 126 (1956):

“‘Primary jurisdiction’ . . . applies where a claim is originally cognizable in the courts and 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.”

The Court observed, “No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” *Id* at 64; 77 S Ct at 165.

Professors Davis and Pierce identify three major purposes that usually govern the analysis when a court is deciding whether to defer to an administrative agency under this doctrine. First, a court should consider “the extent to which the agency’s specialized expertise makes it a preferable forum for resolving the issue. . . .” Second, it should consider “the need for uniform resolution of the issue. . . .” Third, it should consider “the potential that judicial resolution of the issue will have an adverse impact on the agency’s performance of its regulatory responsibilities.” Davis & Pierce, 2 *Administrative Law* (3d ed), § 14.1, p 272. Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body.

Thus, this Court holds that the PSC has primary jurisdiction over this dispute. It has primary jurisdiction to interpret the gas purchase contract at issue.

II.
WAIVER

Savoy argues that MichCon failed to raise the affirmative defense of primary jurisdiction in its responsive pleading and, therefore, it is waived. Savoy relies upon *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485; 601 NW2d 317 (1999).

In *Travelers*, a property insurer brought a subrogation action against the steam utility for breach of contract seeking to recover \$1.6 million in insurance benefits paid to repair the damage caused when the insured's water lines froze and burst after the utility interrupted the steam service for more than 24 hours. Seventeen months after the original complaint was filed, the plaintiff amended its complaint after the court granted summary disposition for the defendant. In its answer to the amended complaint, the steam utility asserted a primary jurisdiction defense for the first time. The trial court granted the utility's motion for summary disposition because the PSC had primary jurisdiction, and the insurer appealed as of right. The Court of Appeals reversed and held that, "in order for the affirmative defense of primary jurisdiction to be properly and timely stated, it must be raised in either the responsive pleading, as originally filed, or by motion under MCR 2.118." *Id* at 495. The Court did not approve of Detroit Edison's attempt to add the defense for the first time in its answer to an amended complaint because the allegations affecting primary jurisdiction remained unchanged. Thus, the Court said, "defendant's primary jurisdiction defense must be deemed waived under MCR 2.111(F)." *Id* at 498. In reaching this conclusion, the Court of Appeals noted that "nothing occurred in the seventeen months between the filing of plaintiff's original complaint and its amended complaint that would have brought this doctrine to light for the first time." *Id* at 498.

In the instant case, the Complaint was filed in 1995. On November 1, 1996, this Court found that the gas purchase contract was unambiguous and granted MichCon's motion for summary disposition. Savoy appealed as of right. On July 10, 1998, the Court of Appeals, in an unpublished opinion, reversed and remanded, holding that the contract was ambiguous. On March 7, 2000, the Michigan Supreme Court denied the parties' applications for leave to appeal, but observed that, "in addition to the ambiguities noted in the opinion of the Court of Appeals, there is a further ambiguity." The case came back to this Court for further proceedings. MichCon immediately filed a motion for remand to the PSC.

While the initial appeal was pending in this case, the Court of Appeals decided the *Energy Reserves* case and released its opinion for publication on April 9, 1997. In *Energy Reserves*, the PSC had determined that the letter agreement upon which the plaintiffs brought their breach of contract action “never became effective, because it was not filed with or approved by the PSC.” The Court of Appeals affirmed. The subsequent action by the plaintiffs to enforce the letter agreement was summarily dismissed by the trial court. The Court of Appeals affirmed on principles of res judicata, saying:

This Court has repeatedly held that the PSC has primary jurisdiction over the interpretation of gas purchase contracts. *Miller Bros v Public Service Comm*, 180 Mich App 227, 233; 446 NW2d 640 (1989); *Antrim Resources v Public Service Comm*, 179 Mich App 603, 611; 446 NW2d 515 (1989). Moreover, this Court expressly considered and rejected North Michigan's arguments regarding the PSC's authority to resolve contractual claims in *North Michigan*, *supra* at 437; 536 NW2d 259.

Previously, the Court of Appeals had held that the PSC has statutory jurisdiction to regulate natural gas purchase contract price changes. *Miller Brothers*, *supra*. In *Antrim Resources*, *supra*, it had held that the PSC has jurisdiction to establish a reasonable and appropriate price at which a common purchaser may receive natural gas and to approve any price change. In *North Michigan*, *supra*, it had held that the PSC has jurisdiction to change the contract price to be paid by a common purchaser of natural gas; not just jurisdiction to approve or disapprove an already agreed-upon price change. Thus, prior to 1997, the Court of Appeals decisions regarding the jurisdiction of the PSC had all been decided in the context of disputes over the PSC's jurisdiction to regulate natural gas contract prices. The *Energy Reserves* decision was much broader. In *Energy Reserves*, the Court held that the PSC has primary jurisdiction to “interpret the terms of a gas purchase contract.” The PSC's determination that the letter agreement was invalid was res judicata in subsequent litigation to enforce that agreement.

The instant case does not involve a natural gas price change. Instead, it involves a determination of what gas MichCon is obligated to buy from Savoy pursuant to their gas purchase contract. This is precisely the type of interpretation that requires the PSC's expertise and implicates “the need for uniform resolution of the issue” and “the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities.”

Rinaldo's, supra, at 72. This is especially true in light of the fact that this Court originally found that the subject contract is unambiguous and yet the Court of Appeals and the Supreme Court found that the subject contract is ambiguous.

Energy Reserves expanded the jurisdiction of the PSC. For the first time, the Court of Appeals held that the PSC has primary jurisdiction to interpret gas purchase contracts, not merely to set reasonable and appropriate gas prices. As a result of the *Energy Reserves* case, the doctrine of primary jurisdiction became applicable to the interpretation of the gas purchase contract in the instant case. Under these circumstances, MichCon's failure to raise the defense of primary jurisdiction in its initial responsive pleading did not waive the defense. There has been no prejudice to Savoy and were a motion to amend deemed to be necessary, this Court would grant it. Regularity in the interpretation of gas purchase contracts should predominate in the resolution of this waiver issue over a procedural technicality divorced from meaningful prejudice.

III.

CONSTITUTIONALITY

Savoy argues in opposition to the motion for remand that a remand would a) deprive Savoy of its constitutional right to trial by jury; b) violate Savoy's due process rights; and c) violate the doctrine of separation of powers. Savoy's argument that the remand would deprive it of its constitutional right to trial by jury is without merit. On remand, the PSC will determine, pursuant to the parties' contract, what gas MichCon is obligated to purchase from Savoy. That determination is appealable to the Court of Appeals. However, once the PSC's interpretation of the contract becomes final, if either party fails to perform its obligations under the contract as construed, it may initiate an action in the courts to enforce the contract. A jury may be demanded to decide any factual issue, including the amount of damages, if any, suffered by Savoy.

Savoy's argument that the remand would violate its due process rights is also without merit. This argument was rejected in *Antrim Resources, supra*. There, the Court of Appeals held that Act 9 incorporates the "just and reasonable" test from the electricity rate statute, 1909 PA 106, giving the PSC jurisdiction to approve natural gas prices between producers and utilities. The PSC considers a variety of factors in setting a reasonable and appropriate price, including "the contract

pricing provisions, the cost of interstate and intrastate natural gas, past PSC-approved gas purchase prices, the cost of alternative fuels and governmentally established gas prices.” *Id* at 614. Thus, the PSC inspects and interprets contracts to determine if the pricing provisions are “reasonable and appropriate.”

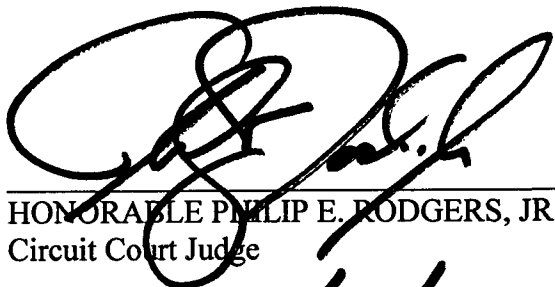
PSC determinations are appealable to the Court of Appeals. The standard of judicial review of a decision of the PSC is whether that decision is lawful and supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28. Thus, a remand to the PSC would not violate Savoy’s due process rights.

Savoy’s argument that a remand to the PSC would violate the constitutional requirement of separation of powers was expressly considered and rejected by the Court of Appeals in *North Michigan, supra*, where the Court of Appeals held that the PSC had authority to determine the validity of the parties’ letter agreement and declare the rights of the parties. *Id* at 437; 536 NW2d 259.

CONCLUSION

In conclusion, this case must be remanded to the Michigan Public Service Commission. The PSC has specialized expertise in the area of interpreting natural gas purchasing contracts. The contract in this case was determined to be ambiguous by both the Court of Appeals and the Michigan Supreme Court. In order to promote consistency in the industry, the PSC should interpret the contract and declare the rights of the parties. This case should be and hereby is remanded to the Michigan Public Service Commission.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

8/23/00