

IN THE SUPREME COURT OF OHIO
On Appeal from the Public Utilities Commission of Ohio

Sunoco, Inc. (R&M)	:	Case No. 09-0880
Appellant,	:	
v.	:	
Public Utilities Commission of Ohio	:	Appeal from the Public Utilities Commission Of Ohio
Appellee.	:	Public Utilities Commission of Ohio Case No. 07-1255-EL-CSS

NOTICE OF APPEAL OF APPELLANT,
SUNOCO, INC. (R&M)

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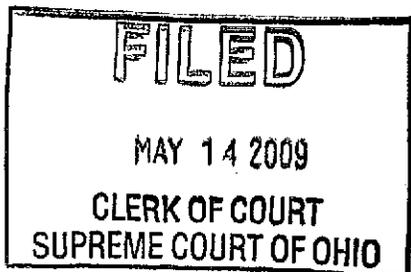
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NOTICE OF APPEAL OF APPELLANT, SUNOCO, INC. (R&M)

Appellant, Sunoco, Inc. (R&M) (“Sunoco” or “Appellant”), pursuant to R.C. 4903.11, 4903.13 and S. Ct. Prac. R. II(3)(B) hereby gives notice of its appeal to the Supreme Court of Ohio and to the Public Utility Commission of Ohio (“Commission” or “Appellee”). The appeal is from Appellee’s Opinion and Order entered into its Journal on February 19, 2009 and the Entry on Rehearing journalized on April 15, 2009 in PUCO Case No. 07-1255-EL-CSS, entitled “*In the Matter of the Complaint of Sunoco, Inc. (R&M) v. The Toledo Edison Company*”.

Appellant was the complainant in this proceeding. On March 19, 2009 Appellee, pursuant to R.C. 4903.10, timely filed an Application for Rehearing from the Opinion and Order dated February 19, 2009. On April 15, 2009 the Appellant’s Application for Rehearing was denied with respect to the issues raised in this appeal.

Appellant complains and alleges that Appellee’s February 19, 2009 Opinion and Order and Appellee’s April 15, 2009 Entry on Rehearing in Case No. 07-1255-EL-CSS are unlawful, unjust and unreasonable in the following respects, as set forth in Appellant’s Application for Rehearing.

1. The Order is unjust and unlawful in that it finds that the “Comparable Facility Price Protection” (hereinafter “MFN clause”) of the 1999 Agreement between Toledo Edison Company (“Toledo Edison”) and Sunoco only allowed Sunoco to invoke the provision to obtain a price for power from Toledo Edison identical to that in the Agreement between BP Oil Company (“BP”) and Toledo Edison¹, and did not allow it to invoke the MFN clause to extend the duration of the contract to make it identical to the BP Agreement.

¹ It was agreed by the Parties and found by the Commission that the BP Oil Company refinery is a “Comparable Facility” within the meaning of the 1996 and 1999 Service Agreement between Sunoco and Toledo Edison.

2. The Order is unjust and unlawful in that to the extent that the Commission finds the MFN clause of the 1999 Agreement with Toledo Edison ambiguous, it ignores Toledo Edison's actions, words, filings and conduct in interpreting the virtually identical MFN clause in the 1996 predecessor contract between Sunoco and Toledo Edison, to not only allow, but require, Sunoco to extend that contract to the same termination date as the BP Agreement.
3. The Order is unjust and unlawful in that it refuses to recognize Sunoco's extension of the duration of its contract under the MFN clause on the grounds that Sunoco did not previously elect to apply to extend its contract pursuant to a Stipulation in cases to which it was not a party (the RSP and RCP cases), and which, by their subject matter, gave no notice that contract extensions were or could be a subject of those cases and in which Toledo Edison gave no hint of an option or election to extend contracts.
4. The Order is unjust and unlawful in finding that Sunoco's invocation of the MFN clause to extend the duration of its contract to the same term as the BP Agreement was an attempt to "*collaterally attack our decisions in the RSP Case and the RCP Case*" and deciding against Sunoco on that basis.

WHEREFORE, Appellant respectfully submits that Appellee's February 19, 2009 Opinion and Order and Appellee's April 15, 2009 Entry on Rehearing in Case No. 17-1255-EL-CSS are unlawful, unjust and unreasonable and should be reversed. This case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,



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May 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Sunoco, Inc. (R&M) was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of record by overnight mail this 14th day of May, 2009.



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CERTIFICATE OF FILING

I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



David F. Boehm, Esq. (0021881)
Counsel for Appellant
Sunoco, Inc. (R&M)

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Sunoco,)	
Inc. (R&M),)	
)	
Complainant,)	
)	
v.)	Case No. 07-1235-EL-CSS
)	
The Toledo Edison Company,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, hereby issues its opinion and order.

APPEARANCES:

Mark A. Hayden, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Calfee, Halter & Griswold, LLP, by James F. Lang, 1400 KeyBank Center, 800 Superior Avenue, Cleveland, Ohio 44114, on behalf of The Toledo Edison Company.

Boehm, Kurtz & Lowry, by David F. Boehm, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Sunoco, Inc. (R&M).

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

The Toledo Edison Company (TE or the company) is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and a public utility as defined in Section 4905.02, Revised Code. TE, along with Ohio Edison Company and The Cleveland Electric Illuminating Company are wholly-owned subsidiaries of FirstEnergy Corporation (jointly these subsidiaries will be referred to herein as FirstEnergy). Sunoco, Inc. (R&M) (Sunoco) is a customer of TE.

On December 6, 2007, Sunoco filed a complaint against TE stating that, contrary to TE's position, its agreement with TE terminates at the end of December 2008, rather than February 2008. The complainant alleges that, if its agreement with TE is terminated in

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February 2008, its electric bills will be millions of dollars higher and it will operate at a competitive disadvantage.

On May 20, 2008, Sunoco and TE filed a joint stipulation of facts (stipulation of facts). By entry issued June 26, 2008, the attorney examiner granted the parties' motion requesting that administrative notice be taken of various documents filed in Case Nos. 99-1212-EL-ETP, et al. (*ETP Case*),¹ Case Nos. 03-2144-EL-ATA, et al. (*RSP Case*),² and Case Nos. 05-1125-EL-ATA, et al. (*RCP Case*).³ By that same entry, the attorney examiner granted the parties' request that no hearing be conducted and that the case move forward to the briefing stage; however, the attorney examiner reserved the right to convene a hearing subsequent to the filing of briefs if, upon review of the filings, it was determined that a hearing was necessary. The parties filed their initial briefs on July 10, 2008, and TE and Sunoco filed their reply briefs on July 30, and July 31, 2008, respectively.

II. APPLICABLE LAW

The complaint in this proceeding was filed pursuant to Section 4905.26, Revised Code, which provides, in relevant part, that the Commission will hear a case:

[u]pon complaint in writing against any public utility . . . that any rate . . . charged . . . is in any respect unjust, unreasonable unjustly discriminatory, unjustly preferential, or in violation of law . . . or that any . . . practice . . . relating to any service furnished by the public utility . . . is . . . in any respect unreasonable, unjust, . . . unjustly discriminatory, or unjustly preferential.

It should be noted that, in complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667. Thus, in order to prevail, the complainant must prove the allegations in its complaint, by a preponderance of the evidence.

¹ *In the Matter of the Application of First Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues.*

² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period.*

³ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals.*

III. DISCUSSION AND CONCLUSIONS

A. Joint Stipulations of Facts

According to the stipulation of facts entered into by the parties, the parties agree, *inter alia*, to the following facts:

- (1) TE and Sunoco entered into a Production Incentive Agreement between TE and Sun Company, Inc. (R&M) dated July 1, 1996 (hereinafter, the 1996 Sun Agreement).
- (2) TE and BP Oil Company (BP) entered into a Production Incentive Agreement between TE and BP Oil Company dated April 23, 1996 (hereinafter, the 1996 BP Agreement).
- (3) On October 23, 1998, and November 17, 1998, David M. Blank, then manager of the Rate Department for FirstEnergy, drafted internal memoranda describing various options available to Sunoco and TE.
- (4) TE and Sunoco entered into an Electric Service Agreement dated May 17, 1999 (hereinafter, the 1999 Service Agreement).
- (5) The 1999 Service Agreement is a special contract that was approved by the Commission pursuant to Section 4905.31, Revised Code.
- (6) The 1999 Service Agreement superseded and cancelled the 1996 Sun Agreement with the bill issued by TE for usage for June 1999.
- (7) Pursuant to the 1999 Service Agreement, TE and Sunoco intended that the 1999 Service Agreement would remain in effect through the bill issued for usage by TE for June 2006, unless otherwise modified pursuant to the terms of the 1999 Service Agreement.
- (8) BP refinery is a comparable facility as that term is defined in Paragraph 9.1 of the 1999 Service Agreement.
- (9) TE and several other parties entered into a stipulation dated April 13, 2000, in the ETP Case, which, *inter alia*, gave each electric service customer that had entered into a special contract with TE a one-time opportunity to extend the terms of its

contract pursuant to the ETP stipulation's terms. The Commission approved the ETP stipulation by order issued July 19, 2000.

- (10) As required by the ETP order, TE gave notice to each special contract customer that it could extend the term of its contract to the extent authorized in the ETP stipulation. On December 21, 2001, Sunoco elected to extend the term of its 1999 Service Agreement. BP elected to extend the term of the 1996 BP Agreement.
- (11) On October 21, 2003, TE and other parties filed an application for approval of a rate stabilization plan in the *RSP Case*, which, *inter alia*, provided that the RSP would not affect the termination dates for special contracts as such dates would have been determined under the *ETP Case*.
- (12) TE and other signatory parties filed a stipulation in the *RSP Case* on February 11, 2004, and a Revised RSP on February 24, 2004, which included a proposal that "upon request of the customer, or its agent, received within 30 days of the Commission's order in this case, the [c]ompany may extend the term of any such special contract through the period that the extended [regulatory transition charge] RTC charge is in effect for such Company, if doing so would enhance or maintain jobs and economic conditions within the service areas."
- (13) By order issued June 9, 2004, in the *RSP Case*, the Commission approved the Revised RSP, subject to the modifications and conditions in the order. The Commission determined that the provision allowing for possible further extension of special contracts was reasonable. Unlike the case of the election to extend the term of the agreement in the *ETP Case*, the RSP order did not require notification to contract customers of the opportunity to extend, and TE did not directly communicate to BP, or any other contract customer, regarding the 30-day period for extending special contracts authorized in the RSP order.
- (14) Within 30 days of the issuance of the RSP order, BP requested to extend the term of the 1996 BP Agreement. TE agreed to extend the term of the 1996 BP Agreement.

- (15) Sunoco did not submit a request to TE to extend the term of the 1999 Service Agreement as authorized by the RSP order.
- (16) On September 9, 2005, TE and other parties filed, in the *RCP Case*, an application requesting approval of a rate certainty plan and a stipulation. The stipulation provided that special contracts extended under the *RSP Case*, such as the 1996 BP Agreement, would continue in effect until December 31, 2008. The stipulation further provided that special contracts extended under the *ETP Case*, but not extended under the *RSP Case*, such as Sunoco's agreement, would continue in effect until the customer's meter read date in February 2008. Sunoco did not intervene in the *RCP Case* and did not sign the stipulation.
- (17) On January 4, 2006, the Commission approved the proposed RCP and the stipulation.
- (18) On or about May 16, 2007, TE informed Sunoco that Sunoco's agreement would terminate on Sunoco's meter read date in February 2008.
- (19) Sunoco sent TE a letter dated November 13, 2007, stating that "it is exercising its right under the [a]greement to utilize the BP Oil Company arrangement including, in particular, the term of that arrangement which has been extended until December 31, 2008, and disputing TE's right to terminate the contract in February 2008."
- (20) TE sent Sunoco a letter dated November 16, 2007, stating that "we have a different interpretation of the impact of the provision of the contract."
- (21) TE has disputed Sunoco's claim that it has the right to extend the term of the agreement until December 31, 2008.
- (22) Sunoco filed its complaint on December 5, 2007. On February 20, 2008, TE entered into an escrow agreement with Sunoco pursuant to which Sunoco will pay into the escrow account the difference between what Sunoco and TE allege should be the cost for electric service between the February 2008 billing date and December 31, 2008.

B. Positions of the Parties

The issue in this case centers around the most favored nation clauses, entitled "Comparable Facility Price Protection" (comparable facility price provisions), contained within the 1996 Sun Agreement and the 1999 Service Agreement between the parties. Sunoco points out that, as stipulated to by the parties in this case, the BP refinery is a comparable facility within the meaning of both the 1996 Sun Agreement and the 1999 Service Agreement (Sunoco Br. at 2; Stip. at 3). Therefore, Sunoco asserts that, since TE has an agreement with a comparable facility, BP, Sunoco has the right to utilize BP's arrangement, rates, or charges for its facility (Sunoco Br. at 2).

Sunoco notes that, while the 1996 BP Agreement had a comparable facility price provision identical to the same entitled section in the 1996 Sun Agreement, the other provisions of these contracts were quite different. For example, the 1996 Sun Agreement was an interruptible power agreement and the 1996 BP Agreement was to terminate in June 2006. According to Sunoco, after the parties entered into the 1996 Sun Agreement, 1998 internal memoranda by Mr. Blank with TE acknowledged that Sunoco had requested to get out of the interruptible supply requirement and noted that TE would "continue to make available, as is required under the most favored nation clause in the contract, the provisions of the BP agreement. This would provide for firm power . . . but would require Sun to extend the contract to 2006" (Sunoco Br. at 3-4; Stip. Ex. C at 1). In response to this perspective, TE explains that these internal memoranda constitute "pricing memos" and that Sunoco has inappropriately attempted to use these memoranda to show the parties' intent as to the interpretation of the comparable facility price provision (TE Rep. Br. at 8).

Subsequent to the 1998 memoranda, Sunoco explains that TE and Sunoco entered into the 1999 Service Agreement which referenced Sunoco's desire to purchase power subject to the comparable facility price provision in the 1996 Sun Agreement, provided for the same rates as in the 1996 BP Agreement, and extended the contract to June 2006. In addition, the 1999 Service Agreement contained a comparable facility price provision, which is almost identical to the 1996 Sun Agreement and the 1996 BP Agreement (Sunoco Br. at 4).

Sunoco also notes that BP was able to have its agreement extended through December 2008, in connection with TE's *RSP Case* and *RCP case*. However, TE informed Sunoco that its 1999 Service Agreement expires in February 2008. Sunoco explains that, in response to Sunoco's notification to TE that it would be invoking the comparable facility price provision of the 1999 Service Agreement, TE stated that it had a different interpretation of the agreement and would not honor Sunoco's election (Sunoco Br. at 5).

Sunoco alleges that the comparable facility price provision in the 1999 Service Agreement requires TE to allow Sunoco to utilize all of the terms and conditions of the

1996 BP Agreement, including the price, firmness of service, and term of the contract. Regardless of the fact that the caption of this provision refers to comparable price protection, Sunoco believes that the text of the provision goes further referring to "arrangements," as well as rates and charges. Moreover, Sunoco notes that the last part of the provision, which states that "[t]he Customer must comply with all other terms and conditions of the arrangement including firm and interruptible load characteristics/conditions," does not only mean price. Sunoco offers that the term "arrangement," as used in the Ohio Revised Code, is synonymous with the terms "contract" and "agreement." According to Sunoco, this interpretation of arrangement is supported by case law. See *Lake Erie Power & Light Co. v. Telling-Belle Vernon Co.* (1937), 57 Ohio App. 467, 14 N.E.2d 947. Therefore, Sunoco insists that, since the term "arrangement" encompasses all of the terms and conditions of an agreement, Sunoco may require TE to offer Sunoco the entire agreement TE has with BP, including the length of the agreement (Sunoco Br. at 6-8). TE disagrees stating that the word "arrangement" in the most favored nation clause must be interpreted to have the same meaning as "rates" and "charges" (TE. Rep. Br. at 6).

TE submits that the comparable facility price provisions in the contracts allow Sunoco to adopt rates from BP's agreement; however, TE insists that the provision does not allow for the extension of the duration of the term of the contract (TE Br. at 3, 10). TE points to case precedent from Minnesota to support its contention that the phrase "terms or conditions" contained in the most favored nation clause of the contract refers to "the covenants and provisions of the agreement other than its duration." See *Eveleth Taconite Co. v. Minnesota Power & Light Co.* (1974), 221 N.W.2d 157. TE argues that the provision in the Sunoco contract is a "price protection" clause and not a "contract duration" clause (TE. Br. at 11). In response, Sunoco submits that the court in *Eveleth* based its decision on the intentions of the parties when interpreting the most favored nation clause (Sunoco Rep. Br. at 4, 6).

Sunoco also points to the history behind the 1996 Sun Agreement and the 1999 Service Agreement and the fact that the comparable facility price provisions in those two documents are almost identical. Sunoco further refers to Mr. Blank's statements in his 1998 correspondence, which note that TE is required under the most favored nation clause in the 1996 Sun Agreement to make available to Sunoco the provisions of the 1996 BP Agreement that "would provide firm power . . . but require Sun to extend the contract to 2006," as support for Sunoco's position that the comparable facility price provision requires TE to agree to an extension of the length of the contract to match the term of BP's contract (Sunoco Br. at 9; Stip. Ex. C at 1, D). Sunoco goes on to note the application filed in Case No. 99-679-EL-AEC requesting approval of the 1999 Service Agreement, which references the comparable facility price provision in the 1996 Sun Agreement and Sunoco's right to "utilize any other agreement" pursuant to this provision and that Sunoco "desires

to purchase the firm power" subject to the comparable facility price provision, as support for its position (Sunoco Br. at 9-10).

Sunoco submits that the 1999 Service Agreement was approved by the Commission pursuant to Section 4905.31, Revised Code, and was a filed rate. Further, Sunoco alleges that, if TE does not honor Sunoco's election under the comparable facility price provision of the agreement and terminates the agreement in February 2008, TE will be in violation of the Commission's order approving the agreement (Sunoco Br. at 5).

Conversely, TE states that, by virtue of the Commission's approval of the 1999 Service Agreement pursuant to Section 4905.31, Revised Code, such agreement is subject to "the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission" (TE Br. at 3). TE notes that the RCP order extended the date on which the RTC collection would cease to a date that was substantially beyond any date originally intended under either the ETP Case or the RSP Case. According to TE, the RCP order fixed the termination date for Sunoco's contract to coincide with the parties' original expectations, in that the February 2008 termination date set forth in the RCP is consistent with the ETP's method of calculating the contract termination date (TE Br. at 7-8). TE believes that, to find that the contract between the parties does not terminate in February 2008, would put into question the certainty and reliability of the Commission's order, violate the terms of the contract and the Commission order, and unreasonably benefit Sunoco by allowing Sunoco to retroactively eliminate its risk of participating in the competitive energy market. TE states that Sunoco had the same opportunity as all other special contract customers to extend its contract and that the time for Sunoco to extend the contract was in 2004, not in 2008 (TE Br. at 1). TE submits that BP elected to extend its contract in 2004, thus, accepting the risk that its contract price would be higher than the market prices four years in the future; however, Sunoco did not accept that risk and, in 2004, "elected" to not extend its contract (TE Br. at 5, 8). In response, Sunoco states that it did not "elect" to not extend its contract, rather, it was not a party to the RSP Case and TE did not give notice to Sunoco letting Sunoco know that it could elect to extend its contract (Sunoco Rep. Br. at 2).

Moreover, TE maintains that both BP and Sunoco are "extremely sophisticated and possess a high degree of knowledge regarding the energy business" and there is no way of knowing why BP and Sunoco chose different paths. TE believes that "had competitive market pricing developed sufficiently between 2004 and 2008 so as to produce a better price for Sunoco than the contract price, Sunoco would have happily accepted the February 2008 termination date and switched to another supplier" (TE Br. at 8-9).

According to TE, the complainant cannot be permitted to collaterally attack the Commission's RCP order, which provides that the date on which the RTC ceases and the contract terminates is the complainant's billing date in February 2008. TE submits that,

given that this issue turns on an allocation of risk with regard to future market pricing, the only reasonable time to contest the termination dates that were fixed in the RCP order would have been at the time of the RCP order; however, TE points out that no party filed an application for rehearing or an appeal on this issue. Therefore, the Commission should reject the complainant's collateral attack on the RCP order, according to TE (TE Br. at 6-7). In response, Sunoco claims that this case does not constitute a collateral attack, because nothing in the RCP order eliminated, either directly or by inference, the most favored nation clause in the 1999 Service Agreement (Sunoco Rep. Br. at 8).

C. Conclusion

There is no dispute between the parties that, in fact, BP is a comparable facility within the meaning of the comparable facility price provision. Therefore, the Commission is being asked to consider whether the comparable facility price provision only refers to the rates and charges for electric service contained in the comparable BP contract, or whether such provision also provides for the adoption of the duration of the rates and charges for electric service contained in the BP contract. In addition, we believe that we must address the question of whether the comparable facility price provision in the contract is applicable given that the extension of BP's contract occurred within the context of the *RCP Case*. Upon review of the facts and the arguments of the parties, we conclude that the comparable facility price provision does not enable Sunoco to extend the termination date of the contract to BP's termination date of December 31, 2008.

Essentially, Sunoco would have the Commission find that TE's action, words, filings, and conduct regarding the meaning of the comparable facility price provisions in the agreement confirm that TE is required to extend the length of Sunoco's agreement and make it identical to the 1996 BP Agreement. However, in determining the meaning of the comparable facility price provision, the Commission must examine the language contained in the contract. As set forth in the 1999 Service Agreement, this provision is titled "Comparable Facility Price Protection" and provides, in part:

9.2 If the Company provides an arrangement, rates, or charges which is or may be in effect at any time during the term of this Agreement, to a Comparable Facility within its certified territory, then the Customer will have the right to utilize that arrangement, rates or charges for its Facility. The Customer must comply with all other terms and conditions of the arrangement including firm and interruptible load characteristics/conditions.

(Stip. Ex. E at 5). The first indication of the scope of the most favored nation clause is the title of the clause itself, which plainly indicates that the clause is intended to provide price protection between comparable facilities and is not intended to deal with the termination

date of the contract. Furthermore, the complainant attempts to interpret the word "arrangement," as used in this provision, to infer a relationship with the duration of the contract; however, the Commission believes that such an interpretation is not consistent with the plain meaning of the clause. The Commission finds that, within the context of the comparable facility price provisions, the duration or "term" of the contract is referred to separately from the "terms and conditions of the arrangement." Clearly, the language "during the term of this agreement," which is contained in the most favored nation clause, makes that clause applicable to provisions of the contract other than the duration of the contract. Thus, we can not find that the most favored nation clause enables Sunoco to adopt the duration or "term" of BP's contract.

As pointed out by TE, the complainant is a sophisticated energy consumer that employs experts responsible for purchasing electricity for the complainant. The Commission is not aware of why Sunoco waited until now to allege the applicability of the most favored nation clause to the termination date of the contract. Sunoco was given the same opportunity to extend its contract pursuant to the *RSP Case* as BP was given; however, Sunoco did not extend its contract. Moreover, the Commission notes that the extension of BP's contract to December 31, 2008, occurred pursuant to the terms of the RCP stipulation and Commission's approval of that stipulation in the *RCP Case*, and not the terms of the 1996 BP Agreement. The RCP stipulation provided that, since BP extended its contract in accordance with the RSP stipulation, BP's contract would terminate December 31, 2008; however, since Sunoco extended its contract as part of the *ETP Case*, but not the *RSP Case*, Sunoco's contract would terminate in February 2008. Thus, to allow Sunoco to collaterally attack our decisions in the *RSP Case* and the *RCP Case* at this late date may, in fact, be viewed as providing Sunoco with an unfair advantage over BP which apparently followed the cases and took the risk to extend its contract at a time when today's market rates were not known to them.

Accordingly, upon consideration of the evidence of record, the Commission finds that the complainant has not sustained its burden of proof and shown that TE's actions are unjust, unreasonable, and unlawful and in violation of any rule or statute, including Section 4905.31, Revised Code. Furthermore, the Commission finds that any arguments made by the parties and not addressed in this opinion and order are denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) TE is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code.
- (2) TE and Sunoco entered the 1996 Sun Agreement on July 1, 1996.

- (3) TE and BP entered into the 1996 BP Agreement on April 23, 1996.
- (4) TE and Sunoco entered into the 1999 Service Agreement on May 17, 1999.
- (5) Sunoco filed this complaint against TE on December 6, 2007.
- (6) Sunoco and TE filed a joint stipulation of facts on May 20, 2008.
- (7) Initial briefs were filed on July 10, 2008, and TE and Sunoco filed their reply briefs on July 30, and July 31, 2008, respectively.
- (8) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 214 N.E.2d 666.
- (9) The complainant has not provided sufficient evidence to demonstrate that TE has violated any applicable order, statute, or regulation; thus, the complainant has not sustained its burden of proof.

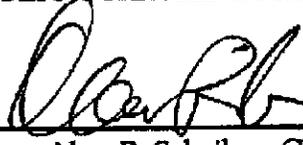
ORDER:

It is, therefore,

ORDERED, That the complaint be dismissed. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

FEB 19 2009



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Sunoco, Inc. (R&M),)	
)	
Complainant,)	
)	
v.)	Case No. 07-1255-EL-CSS
)	
The Toledo Edison Company,)	
)	
Respondent.)	

ENTRY ON REHEARING

The Commission finds:

- (1) On December 6, 2007, Sunoco, Inc. (R&M) (Sunoco) filed a complaint against The Toledo Edison Company (TE) stating that, contrary to TE's position, its agreement with TE terminates at the end of December 2008, rather than February 2008. The complainant alleged that, if its agreement with TE is terminated in February 2008, its electric bills will be millions of dollars higher and it will operate at a competitive disadvantage.
- (2) By opinion and order issued February 19, 2009, the Commission dismissed the complaint finding that the complainant had not provided sufficient evidence to demonstrate that TE had violated any applicable order, statute, or regulation. Through our order in this case, we considered whether the comparable facility price provision in the 1999 Service Agreement between Sunoco and TE only refers to the rates and charges for electric service contained in the comparable 1996 BP Oil Company (BP) Agreement between BP and TE, or whether such provision also provides for the adoption of the duration of the rates and charges for electric service contained in the 1996 BP Agreement. Furthermore, we addressed the question of whether the comparable facility price provision in the 1999 Service Agreement is applicable given that the extension of BP's contract occurred within the context

of the *RCP Case*.¹ Ultimately, in our order, we concluded that the comparable facility price provision in the 1999 Service Agreement does not enable Sunoco to extend the termination date of the contract to BP's termination date of December 31, 2008.

- (3) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (4) On March 19, 2009, Sunoco filed an application for rehearing of the Commission's February 19, 2009, order in this case. The complainant sets forth four grounds for rehearing.
- (5) On March 30, 2009, TE filed a memorandum in opposition to Sunoco's application for rehearing stating that the request simply reiterates arguments that were considered and rejected by the Commission in its order in this case.
- (6) In its first ground for rehearing, Sunoco states that the Commission's order is unjust and unlawful because the Commission found that the comparable facility price provision in the 1999 Service Agreement only allows Sunoco to invoke the provision to obtain a price for power from TE that is identical to BP, and that the provision does not allow Sunoco to extend the termination date of the contract to make it identical to the date in the 1996 BP Agreement. Sunoco believes that the Commission misinterpreted the word "arrangement" as it is used in the comparable facility price provision in the 1999 Service Agreement. Sunoco argues that the word "arrangement," as used in this context, encompasses all of the terms and conditions of the agreement; thus, TE is required to offer Sunoco the entire agreement it has with BP, including the term of the contract.
- (7) In response to Sunoco's first ground for rehearing, TE states that the 1999 Service Agreement does not contain language allowing Sunoco to extend its contract. TE agrees with the

¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals, Case Nos. 05-1125-EL-ATA, et al., Opinion and Order (January 4, 2006) (rate certainty plan [RCP] Case).*

Commission that Sunoco's analysis of the word "arrangement" to infer a relationship with the duration of the contract is not consistent with the plain meaning of the clause; rather, the provision relied on by Sunoco considers the duration of the agreement outside of the scope of an "arrangement." According to TE, under Sunoco's interpretation, the word "arrangement" would override the remainder of the clause. Furthermore, TE points out that Sunoco failed to extend its contract as part of the *RSP Case*.

- (8) In our order, we methodically analyzed the terms of the 1999 Service Agreement and reasoned that, within the context of the comparable facility price provision, the duration or "term" of the contract is referred to separately from the "terms and conditions of the arrangement." Thus, we concluded that the comparable facility price provision was applicable to provisions of the contract other than the duration of the contract. Sunoco has raised nothing on rehearing that we did not already consider in our order. Therefore, we find that Sunoco's first ground for rehearing is without merit and should be denied.
- (9) In its second ground for rehearing, Sunoco maintains that the order is unjust and unlawful to the extent it finds the comparable facility price provision in the 1999 Service Agreement ambiguous and ignores TE's actions when TE interpreted the virtually identical clause in the first agreement entered in to between Sunoco and TE (the 1996 Sun Agreement) to require that Sunoco extend the contract to the same termination date as the 1996 BP Agreement. Sunoco points out that, when Sunoco and TE were negotiating the 1999 Service Agreement, internal correspondence at TE indicated that TE was required under the comparable facility price provision of the 1996 Sun Agreement to make available the provisions of the 1996 BP Agreement, including the extension of the agreement to 2006. Furthermore, Sunoco submits that the language in the application filed at the Commission requesting approval of the 1999 Service Agreement supports its position that, due to the comparable facility price provision in the 1996 Sun Agreement, Sunoco could use any other agreement that TE provided to another customer.

- (10) TE disagrees with Sunoco's assertion in its second ground for rehearing that the Commission found the comparable facility price provision to be ambiguous. However, even if the Commission had found the clause to be ambiguous, the Commission considered and rejected each of Sunoco's arguments relating to the parties' past conduct and appropriately found that the internal correspondence at TE did not override the plain terms of the 1999 Service Agreement.
- (11) As we stated in our order, Sunoco would have us rely on TE's conduct and filings to determine the meaning of the comparable facility price provision. However, we concluded that it is more appropriate to focus our examination on the language contained in the contract. Contrary to Sunoco's inference, the Commission did not find that the 1999 Service Agreement was ambiguous. Therefore, we find that Sunoco's second ground for rehearing is without merit and should be denied.
- (12) Sunoco asserts, as its third ground for rehearing, that the order is unjust and unlawful because it did not recognize Sunoco's extension of the duration of the 1999 Service Agreement under the comparable facility price provision on the grounds that Sunoco did not previously elect to apply to extend its contract pursuant to the *RSP Case*² and the *RCP Case*. Sunoco points out that it was not a party to these cases and that it did not receive notice of the need to elect to extend its contract.
- (13) TE notes that, in light of the fact that the Commission determined in its order that the comparable facility price provision did not affect the duration of the contract, Sunoco's third ground for rehearing is irrelevant. Furthermore, TE explains that Sunoco is a sophisticated energy consumer, which employs experts responsible for purchasing electricity, and Sunoco received the exact same notice and opportunity to extend its contract as BP did. According to TE, Sunoco has offered no evidence of why it waited years after the effective dates of the RSP and RCP to collaterally attack the termination

² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case Nos. 03-2144-EL-ATA, et al., Opinion and Order (June 9, 2004) (rate stability plan [*RSP Case*]).

date approved in the *RCP Case*. Finally, TE notes that the Commission rightly pointed out, in its order, that the extension of the BP contract to December 31, 2008, occurred pursuant to the terms of the *RCP Case* and the 1996 BP Agreement was not changed in any way to allow for this extension.

- (14) As we pointed out in our order, Sunoco extended its contract as part of the *ETP Case*,³ which is the predecessor to the *RSP Case* and the *RCP Case*. With this in mind, as well as the fact that Sunoco is a large energy consumer, which employs experts responsible for purchasing its power, it is hard to believe that Sunoco was unaware of the import of the *RSP Case* and the *RCP Case*. Other large energy consumers followed the *RSP Case* and the *RCP Case* and took the risk to extend their contracts in accordance with those cases at a time when today's market prices were unknown. Thus, to allow Sunoco to collaterally attack our decisions in those cases at this late date, now that market prices are a known factor, could be viewed as providing Sunoco with an unfair competitive advantage. Accordingly, we conclude that Sunoco's third ground for rehearing is without merit and should be denied.
- (15) In its fourth ground for rehearing, Sunoco states that the order is unjust and unlawful because it found that Sunoco's invocation of the comparable facility price provision to extend the termination date of the contract was an attempt to collaterally attack the Commission's decisions in the *RSP Case* and the *RCP Case*. According to Sunoco, the comparable facility price provision provides that "if the 'favored' party is afforded an advantage by the grantor, through whatever means, the other party must be granted the same." Sunoco further argues that the comparable facility price provision "is a separate and independent right that exists apart from anything Sunoco did or did not do in the *RSP case*."
- (16) Once again, TE asserts that Sunoco's fourth ground for rehearing is irrelevant, because the Commission determined in its order that the comparable facility price provision did not affect the duration of the contract. However, even if the

³ *In the Matter of the Application of First Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000) (electric transition plan [*ETP Case*]).

Commission had not found against Sunoco on this point, TE believes that Sunoco's argument on this ground would fail, because Sunoco's argument depends upon the establishment of the termination date of the 1996 BP Agreement, which cannot be determined without reference to the *RSP Case* and the *RCP Case*. TE submits that Sunoco cannot, on the one hand, rely on the Commission's orders in those cases and then, on the other hand, argue that the practical effects of the orders must be ignored.

- (17) The Commission agrees with TE that Sunoco cannot have it both ways; it can not say that the comparable facility price provision is separate and independent from the *RSP Case* and the *RCP Case* and then turn around and seek to benefit from the fact that, by virtue of the *RSP Case* and the *RCP Case*, BP was able to extend the termination date of its contract to December 31, 2008. Therefore, upon consideration of Sunoco's final ground for rehearing, we find that it is without merit and should be denied.

ORDER:

It is, therefore,

ORDERED, That Sunoco's application for rehearing be denied. It is, further,

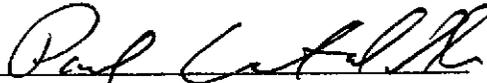
BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Sunoco,)
Inc. (R&M),)
)
Complainant,)
)
v.) Case No. 07-1255-EL-CSS
)
The Toledo Edison Company,)
)
Respondent.)

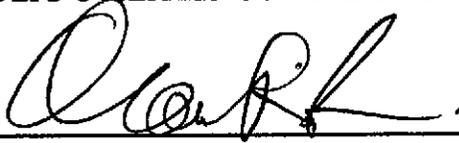
CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

I concur in the result of the Commission's Entry on Rehearing. In my view, the most favored nation clause in Sunoco's contract both extended to Sunoco a time limited option, consistent with RSP case, to extend its agreement and included an implied duty for Toledo Edison to provide timely notice to Sunoco in June 2004 of the opportunity to extend the contract. A term that places solely on the party with most favored nation protection the obligation to determine what options are being offered to others with comparable contracts would provide hollow protection to the party that had secured such rights. Nonetheless, in the absence of evidence that Sunoco in fact lacked notice of its option to extend the agreement, I find that the complainant has not carried its burden of proof in this case.


Paul A. Centolella

ORDERED, That copies of the entry on rehearing be served upon all interested persons of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO



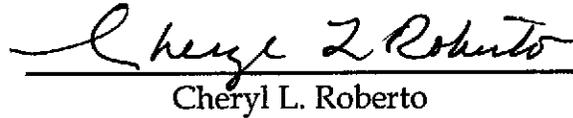
Alan R. Schriber, Chairman

Paul A. Centolella



Ronda Hartman Fergus

Valerie A. Lemmie



Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

APR 15 2009



Renee J. Jenkins
Secretary