

IN THE SUPREME COURT OF OHIO

Sunoco, Inc. (R&M)	:	Case No. 2009-0880
	:	
Appellant,	:	
	:	
v.	:	APPEAL FROM THE PUBLIC
	:	UTILITIES COMMISSION OF OHIO
Public Utilities Commission of Ohio	:	
	:	
Appellee.	:	
	:	

**MERIT BRIEF OF APPELLANT,
SUNOCO, INC. (R&M)**

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FILED
JUL 27 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

Appellant, Sunoco, Inc. (R&M) (also "Sunoco") is a corporation incorporated according to the laws of the Commonwealth of Pennsylvania, which operates petroleum-refining facilities in several states including the State of Ohio. One of these facilities is located at 1601 Woodville Road, Oregon, Ohio 43616 and is an electric service customer of Appellee. Right next to this refinery is another refinery owned and operated by its commercial rival and competitor, BP Oil Company ("BP"). Both Sunoco and BP have been and continue to be located in the exclusive service territory of Toledo Edison Co. ("Toledo Ed"). Toledo Ed is an "electric light company" within the meaning of §4905.03(A)(4) (Appx. 58-59) and therefore is an "electric supplier" under §4933.81(A) ORC. (Appx. 61-62). Toledo Ed, Ohio Edison Co. and CEI ("First Energy Companies") are all owned by FirstEnergy Corporation.

This case involves a contract between Sunoco and Toledo Ed for the sale of power. It also involves a contract between Toledo Ed and BP for the sale of power. These contracts are generally called "special contracts" and represent arrangements different from standard tariff rates. They are approved by the Commission under ORC §4905.31. (Appx. 60). The two competing oil refineries situated right next to each other both have "most favored nation" clauses in their contracts. The most favored nation clauses provide that either may invoke the clause to obtain a benefit given to the other.

The sole issue in this case is whether the most favored nation clause can be invoked or utilized by one of the competing refineries to extend the duration of its contract to match the contract duration of the other. If it can be used to extend the contract, then the money deposited in an escrow account by Sunoco representing the difference between its contract rate and the

Toledo Ed tariff rates for 10 months, will go back to Sunoco. The rate under the contract was considerably less than the Toledo Ed tariff rates. This money represents, among other things, the advantage that BP has gained over Sunoco by the Commission's misinterpretation of the most favored nation clause in Sunoco's contract.

While the Commission and Toledo Ed have argued otherwise, this is a simple matter of contract interpretation. Public utility law and concepts serve only as a background. Although this is an appeal from a decision of the Commission, the only issue in this case hinges upon the interpretation of the contract between Sunoco and Toledo Ed. This Court stated in *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684 that "the interpretation of a contract is a matter of law," that the Supreme Court of Ohio will, "review de novo." Appeals of orders of the Commission involving matters of law are subject to de novo review. In *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, 629 N.E.2d 423, a group of energy consumers appealed an Order of the Commission. With regard to the standard of review, this Court stated: "as to questions of law, this court has complete and independent power of review." (68 Ohio St. at 563.) This is a legal case for lawyers to decide.

This case is simple in another way as well. At the Commission both Toledo Ed and Sunoco stipulated to a list of agreed upon facts and documents. (Supp. 1-67). Virtually all assertions made herein are cited to that Joint Stipulation. They agreed, as well, to have the case determined on briefs without a hearing or argument. Moreover, they also agreed to an escrow account in which Sunoco would deposit the amounts in dispute pending a final, non-appealable decision. (Supp. 59-67). The parties come to this Court for that final decision.

STATEMENT OF FACTS

On July 1, 1996, Sunoco, then known as the Sun Company, Inc. (R&M), entered into a contract with Respondent Toledo Ed entitled "Production Incentive Agreement" ("1996 Sunoco Agreement") whereby Toledo Ed, in order to "encourage the continued operation and future expansion of" Sunoco's Woodville Road facility ("Facility") (Supp. 10) agreed to provide interruptible power to Sunoco according to the terms and conditions of that contract. (Supp. 10-25). The prefatory recitals on the opening page of the 1996 Sunoco Agreement went on to state:

"Whereas, the [Sunoco] Facility is located in a State designated 'distress zone' and the Facility is in an extremely competitive situation which disadvantages it when compared to refineries located outside of Ohio." (Supp. 10).

The 1996 Sunoco Agreement contained a provision in Section 10 entitled "COMPARABLE FACILITY PRICE PROTECTION" (hereinafter "most favored nation clause") which also addressed the competition from its next door neighbor, BP:

"10.1 A Comparable Facility shall be defined as an operating oil refinery and located within the certified service territory of The Toledo Edison Company; as such service territory is defined on January 1, 1996.

10.2 If the Company provides an arrangement, rates or charges which is or may be in effect anytime 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 characteristics/conditions, rates or charges." (Supp. 17).

Section 9 of the 1996 Sunoco Agreement provided that it was to terminate with the bill issued for usage for the month of June 2003. (Supp. 16).

The 1996 Sunoco Agreement was filed with the Public Utilities Commission of Ohio ("Commission") under Case No. 96-656-EL-AEC, "*In the Matter of Application of the Toledo*

Edison Company for Approval of a Production Incentive Agreement with Sun Company, Inc., Toledo Refinery” and approved by an Opinion and Order of the Commission entered March 12, 1998.

Sunoco and Toledo Ed have stipulated to the fact that the adjacent BP Oil refinery is the “comparable facility” within the meaning of both the 1996 Sunoco Agreement and the later Electric Service Agreement between Sunoco and Toledo Ed (“1999 Sunoco Agreement”). (Supp. 4, ¶15).

Sunoco’s competitor, BP and Toledo Ed also entered into a Production Incentive Agreement in 1996 (“BP Agreement”). This contract is dated April 23, 1996 and sets forth the terms and conditions of firm electrical service of Toledo Ed to BP for its facility at 4001 Cedar Point Road. (Supp. 27-33). Section 8 of that contract sets forth a most favored nation clause which is also entitled “COMPARABLE FACILITY PRICE PROTECTION” and provides as follows:

- “8.1 A Comparable Facility shall be defined as an operating oil refinery and located within the certified service territory of The Toledo Edison Company, as such service territory is defined on January 1, 1996.
- 8.2 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.” (Supp. 31).

Section 7 of the BP Agreement provided that it was to terminate with the bill issued for usage for the month of June 2006. (Supp. 31).

While the most favored nation clauses of the Sunoco and BP contracts were virtually identical, the initial contracts were otherwise quite different. The BP Agreement essentially provided for firm power at rates different from those in the 1996 Sunoco Agreement, which was an interruptible power contract. Interruptible power is a supply of electricity that may be curtailed by the utility upon certain conditions and is generally cheaper than firm power, which as the name implies, is not curtailable except in extreme emergencies. Moreover, while the 1996 Sunoco Agreement was to terminate with the bill issued for usage for the month of June 2003, as noted above, BP's Agreement was not over until the bill issued for usage for the month of June 2006. (Supp. 31).

At least by October 23, 1998 Toledo Ed and Sunoco were negotiating an amendment or replacement to the July 1, 1996 contract which would allow Sunoco to be served as a firm, rather than an interruptible customer, just as BP was then served. According to notes of David M. Blank, then Manager of the Rate Department for First Energy entitled "Options for Sun Oil", Sunoco requested "to get out of the 100% interruptible supply requirement of the contract ..." (Supp. 35). But for business reasons which are not in the record, Sunoco was reluctant to extend the length of the contract to match the term of the comparable BP Agreement as was required by the most favored nation clause. This is evidenced in Mr. Blank's notes in which he stated that Toledo Ed 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 firm power at a price in the [redacted] cent per kWh range, but would require Sunoco to extend the contract to 2006." (Emphasis added). (Supp. 35; ¶1). The 2006 date referenced by Mr. Blank is the same expiration date as the comparable BP Agreement.

Again on November 17, 1998 Mr. Blank drafted another memorandum that discussed the contract negotiations between Sunoco and Toledo Ed and, in particular, the Comparability Provision of the 1996 Sunoco Agreement, referring to it generally as the “most favored nation clause”. Noting a list of five pricing concepts which “can all be used to seek to meet goals that Sun has evidenced to us, as well as to meet Toledo Edison goals in any potential alteration of the existing contract”, the memo states in the first concept as follows: “Convert contract to firm power per most favored nation’s clause; we understand Sun has not been interested in this in the past, citing among other things concerns about the extension of the term to 2006.” (Emphasis supplied). (Supp. 39). Again, Mr. Blank refers to the fact that Toledo Ed insisted if Sunoco were to exercise the most favored nation clause, it must extend its contract to 2006 to comport to the expiration date of the comparable BP Agreement.

Despite its reluctance to extend its contract to match the expiration date of the comparable BP Agreement, Sunoco ultimately decided to exercise the most favored nation clause and on May 17, 1999, Sunoco entered into the 1999 Sunoco Agreement replacing Toledo Ed's 1996 Sunoco Agreement to begin providing it with firm rather than interruptible electric service. (Supp. 44-50). The second and third "Whereas" provision of the 1999 Sunoco Agreement recite, “Whereas, the Customer and Company have entered into an Electric Service Agreement dated July 1, 1996, hereinafter known as the Prior Agreement, which was filed with the Public Utilities Commission of Ohio (“PUCO”) under Case No. 96-656-EL-AEC; and Whereas, the Customer desires to purchase firm power for its Facility subject to the Comparable Facility Price Protection in the Prior Agreement. ...” (Supp. 44). Section 9 of the 1999 Sunoco Agreement also contains a most favored nation clause identical to the 1996 Sunoco Agreement and the BP Agreement:

“9.1 A Comparable Facility shall be defined as an operating oil refinery and located within the certified service territory of the Toledo Edison Company, as such service territory is defined on January 1, 1996.

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.” (Supp. 48).¹

The 1999 Sunoco Agreement goes on to provide for the same rates and charges for power as are contained in the BP Agreement. (Supp. 28-30; Supp. 45-47). Most significantly, the term of the arrangement between Sunoco and Toledo Ed is also amended to June 2006 to comport with the exact termination date in the BP Agreement. (Supp. 48).

The Application filed by Toledo Ed with the Commission for approval of the 1999 Sunoco Agreement in Case No. 679-EL-AEC also confirms Sunoco’s claim that the most favored nation clause applies to all the terms and conditions of the contract and that “arrangement” equals “agreement”. There, Toledo Ed, characterizing the identical most favored nation clause of the “previous agreement”, i.e., the 1996 Sunoco Agreement approved by the Commission in Case No. 96-656-EL-AEC, says:

“This previous agreement contained a provision that allowed the Customer the right to utilize any other agreement that the Company [Toledo Ed] provided to another customer that qualifies as a comparable facility within the Company’s service territory.” (Emphasis added). (Supp. 43).

¹ The only difference between the most favored nation clauses of the 1996 Sunoco Agreement and the 1999 Sunoco Agreement are the words “rates and charges” at the end of the 1996 Sunoco Agreement. In all other respects, the most favored nation clauses are identical, and since Sunoco believes that they are functionally the same and neither Toledo Ed nor the Commission in their filings and orders below has maintained that the additional three words are significant, for convenience, Sunoco will hereinafter refer to the most favored nation provisions in the 1996 Sunoco Agreement and the 1999 Sunoco Agreement as identical.

Obviously the underlined is a paraphrasing of the language in the most favored nation clause found in both the 1996 Sunoco Agreement and the 1999 Sunoco Agreement which provides that if the Company provides an “arrangement” at any time during the term of the Agreement to a Comparable Facility that the “customer will have the right to utilize that arrangement ... for its Facility. The Customer must comply with all other terms and conditions of the arrangement ...”. (Emphasis added). (Supp. 31; Supp. 48).

This again is an example of how the 1996 Sunoco Agreement and the meaning of that agreement are inextricably tied to the meaning of the 1999 Sunoco Agreement. Toledo Ed refers to and interprets the most favored nation clause in the prior agreement to explain the 1999 Sunoco Agreement. That explanation confirms exactly Sunoco’s interpretation of the scope and intent of the most favored nation clause. It confirms that “arrangement” as used in the clause means an entire “agreement” and therefore all the terms and conditions of that “agreement”.

In subsequent years settlements between parties and orders issued by the Commission in various Commission cases growing out of the passage of Senate Bill 3 (“SB 3”) in 1999 resulted in the further extension of both the BP Agreement and the 1996 Sunoco Agreement. First in Case No. 99-1212-EL-ETP, *“In The Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval for Their Transition Plans and for Authorization to Collect Transition Revenues”* (the “ETP Case”) which set the terms of the Toledo Ed Electric Transition Plan, the parties to that proceeding, which did not include Sunoco, agreed to a Stipulation which contained a provision, allowing the companies with special contracts, i.e., those approved by the Commission pursuant to §4905.31 (Appx. 60) of the Revised Code, a one-time right to either cancel or extend those contracts. If extended, the contracts would continue through the date that

certain regulatory transition charges or “RTCs” would be amortized and therefore cease for each of the FirstEnergy Companies. It was not clearly known at that time what that date would be. The approved Stipulation required that notice be provided to customers of their right to cancel or extend their contracts:

“The Companies will provide written notice to such customers by no later than November 1, 2000 of the rights set forth herein, along with a verification form which shall be used by the customer to exercise any such rights.” (Supp. 191).

Sunoco, though not an intervenor in the case, received the notice and like most others, elected to extend its contract through the discharge of the RTCs. (Supp. 4, ¶17).

On October 21, 2003 Toledo Ed and other parties filed an Application for a Rate Stabilization Plan in Case No. 03-2144-EL-ATA, “*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*” (the “RSP Case”). Pursuant to a Stipulation and Recommendation in that case, later approved by the Commission in an Opinion and Order dated June 9, 2004, there was a provision addressing the extension of special contracts. Section VIII, Paragraph 8 of the RSP states:

“This Plan does not affect the termination dates for special contracts as such dates would have been determined under Case No. 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008, provided that, upon request of the customer, or its agent, received within 30 days of the Commission's order in this case, the Company may extend the term of any such special contract through the period that the extended RTC charge is in effect for such Company, if doing so would enhance or maintain jobs and economic conditions within its service area.” (Supp. 92).

This Stipulation, termed the Revised Stipulation, was introduced into the case as an attachment to the rebuttal testimony of FirstEnergy's president. (Supp. 68-111). This provision gave special contract customers the right to extend their contracts through the period that RTCs', which themselves were extended in this case, would be in effect. However, this Order, unlike the one in the *ETP Case*, did not require Toledo Ed to notify its customers of their right to extend and Toledo Ed did not provide notice. BP, which was involved in the case as a member of an industrial intervenor association, Ohio Energy Group ("OEG"), was aware of the opportunity and applied for and received the potential extension. Sunoco, who was not a member of the OEG at that time, and was not otherwise represented, did not receive notice and did not apply for the extension. (Supp. 5, ¶20).

Subsequently as the post-SB 3 proceedings multiplied, yet another plan, this one entitled the Rate Certainty Plan, was filed in Case No. 05-1125-EL-ATA, "*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*" ("*RCP Case*") This proceeding involved a multitude of issues which modified and amended both the *ETP* and *RSP Cases*. The case also contained a Stipulation affecting the term of the special contracts. In Paragraph 12 of the Stipulation it provided that all the Toledo Ed special contracts that were extended as part of the *ETP Case*, but not the *RSP Case*, would terminate at the customers meter read date in February, 2008. However, all the Toledo Ed special contracts that were extended in both the *ETP* and *RSP Cases* would terminate on December 31, 2008. (Supp. 5-6, ¶23).

In late 2007, by virtue of the foregoing cases and events, BP's contract was extended to December 31, 2008, whereas Sunoco was informed that its contract would terminate in February 2008. Sunoco then began discussions with Toledo Ed. (Supp. 6, ¶25).

On November 13, 2007 Sunoco sent a letter to David M. Blank, Vice President of FirstEnergy Corporation informing him that Sunoco was invoking Section 9 of the 1999 Sunoco Agreement's most favored nation clause to extend the term of that Agreement to the term of the BP Agreement. (Supp. 6, ¶26; Supp. 54-55).

On November 16, 2007, FirstEnergy responded to Sunoco's letter and offered to meet with Sunoco concerning the issue and referring the matter to a FirstEnergy attorney. The letter also noted that FirstEnergy had a different interpretation of the provisions of the agreement cited in the November 13, 2007 Sunoco letter. (Supp. 57). In a subsequent conversation between Sunoco's attorney and the FirstEnergy attorney, FirstEnergy stated that it would not honor Sunoco's election to extend its contract with Toledo Ed as desired. (Supp. 6, ¶28).

On December 5, 2007 Sunoco, faced with greatly increased electricity costs due to the refusal of Toledo Ed to honor its election to extend the contract through the end of 2008 pursuant to the most favored nation clause of the 1999 Sunoco Agreement with Toledo Ed, filed its Complaint initiating a proceeding before the Commission and alleging the facts essentially as set forth herein. Sunoco alleged inter alia that the 1999 Sunoco Agreement was approved by the Commission under §4905.31 (Appx. 60) of the Revised Code and was a filed rate. Sunoco further alleged that Toledo Ed would be in violation of the Commission's Order approving that rate if it terminated Sunoco's service in February of 2008 because it would not honor Sunoco's

election. The Complaint prayed that the Commission order Toledo Ed to honor Sunoco's election to extend the 1999 Sunoco Agreement.

On December 21, 2007 Toledo Ed filed its answer to the Complaint generally denying that it had violated the May 17, 1999 most favored nation provision. After failed attempts at mediation, the parties agreed to submit this matter to the Commission on a stipulation of facts and briefs. (Supp. 1-66).

On February 20, 2008 Sunoco entered into an Escrow Agreement with Toledo Ed pursuant to which Sunoco agreed to pay into an escrow account held by the Bank of New York Trust Company, N.A., the difference between what Sunoco and Toledo Ed allege in their respective pleadings that Sunoco would owe Toledo Ed for electric service between its February 2008 billing date and December 31, 2008. (Supp. 60).

The Joint Stipulation of Facts was filed on May 20, 2008. (Supp. 2-67). The parties also filed a Joint Motion Requesting Administrative Notice and No Hearing. This motion lists the documents that the parties ask to be noticed and incorporated into the record of this case. (Supp. 7, ¶31). On June 26, 2008, the Commission issued an Order essentially granting that Joint Motion.

After briefing by the parties, the Commission issued an Opinion and Order on February 19, 2009 finding for Toledo Ed. (Appx. 26).

On March 19, 2009 Sunoco timely filed an Application for Rehearing of the Commission's February 19, 2009 Order (Appx. 47) and on March 30, 2009 Toledo Ed filed its Memorandum In Opposition.

On April 15, 2009 the Commission issued its Entry on Rehearing essentially reaffirming its Opinion and Order. (Appx. 38-45).

As required by law, Sunoco timely filed its Notice of Appeal to the Ohio Supreme Court on May 14, 2009. (Appx. 01).

ARGUMENT

Proposition of Law No. 1

The Order is unjust and unlawful in that it finds that the plain language of the most favored nation clause of the 1999 Sunoco Agreement between Toledo Edison Company and Sunoco did not allow Sunoco to extend the duration of the contract to make it identical to the BP Agreement.

A. The Commission erred in considering the heading of the most favored nation clause in interpreting it's scope or intent.

The primary basis for the Commission's decision was its interpretation of the language in the most favored nation clause in the 1999 Sunoco Agreement. However, from the very start the Commission got off on the wrong foot. The Commission begins its analysis by considering the title of the most favored nation clause as a guide to its intent and scope. Noting that the provision is entitled "Comparability Facility Price Protection" the Commission ventures:

"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." (Appx. 34-35).

But this analysis entirely ignores the existence of a provision of the 1999 Sunoco Agreement that specifically provides that headings should not be used to interpret the scope or intent of the clause. On page 6, the 1999 Sunoco Agreement contains the following provision:

"10.6 Clause Heading. The clause headings appearing in this Agreement have been inserted for the purpose of convenience and ready reference. They do not purport to and shall not be deemed to define, limit or extend the scope or intent of the clauses to which they pertain.² (Supp. 49).

² The 1996 Sunoco Agreement referred to extensively herein as a predecessor to the contract at issue and which is the template for interpretation of the contract also contains the "Clause Heading" provision. (Supp. 19, ¶11.8). So does the BP Agreement. (Supp. 32, ¶9.6).

Clearly then, the contract forbids an interpretation of the scope or intent of the most favored nation clause by the Clause Heading.

B. The plain language of the most favored nation clause allows Sunoco to utilize all the terms and conditions of the comparable agreement for its facility including duration.

Convenience and necessity dictate that we here repeat again the language of the most favored nation clause that is so critical to the resolution of this case. The language of the most favored nation clause of the 1999 Sunoco Agreement is as follows:

“9. COMPARABLE FACILITY PRICE PROTECTION:

- 9.1 A Comparable Facility shall be defined as an operating oil refinery and located within the certified service territory of the Toledo Edison Company, as such service territory is defined on January 1, 1996.
- 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.” (Supp. 48).

As to subsection 9.1 of the clause there is no dispute. The parties stipulated that the BP and Sunoco facilities are Comparable Facilities (Supp. 4) and the Commission so found. (Appx. 34).

As to the meat of the clause, subsection 9.2, the Commission in its Opinion and Order states:

“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." (Appx. 35).

In its Entry on Rehearing, the Commission merely confirms the conclusion of its first "so-called" methodical analysis:

"(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." (Appx. 40).

The Commission decision hinges in large part upon its interpretation of the word "arrangement". The Commission concluded that within the context of the most favored nation clause, the duration or "term" of the contract is referred to separately from "the terms and conditions of the arrangement" and is not therefore among the "terms and conditions of the arrangement" which may be utilized by Sunoco for its facility. In other words, the duration of an agreement is not a term or condition nor is it an arrangement nor any part of an arrangement.

The Commission's conclusion seems to be based entirely on the words "at any time during the term of this Agreement". There is neither precedent nor logic supporting this very important finding of the Commission. The language referred to by the Commission clearly means no more than that if Toledo Ed gives a Comparable Facility an arrangement, i.e., a contract or agreement, or, (either inside or apart from that contract or agreement), rates or charges which are more desirable to its competitor, then that competitor is able to "utilize that arrangement, rates or charges for its Facility". The language that the Commission refers to means only that Sunoco cannot invoke the contract, of a Comparable Facility if that contract or

Sunoco's contract, has already expired. But clearly it does not mean, as the Commission maintains, that the duration of the contract cannot, like other terms and conditions, be extended. The Commission has curiously based its decision on the belief that there is language in the most favored nation clause that prevents it from being exercised to extend the duration of the contract. However, a casual reading of the most favored nation clause reveals that such language simply does not exist. There is no language in the clause that excludes duration.

Nor is the interpretation of the Commission consistent with the purpose of the most favored nation clause. The object of that provision is obviously to "level the playing field" between two competitors served by the same utility, so that one or another will not suffer some disadvantage at the hands of the power company. The Commission's interpretation of the clause would quickly impair this aim. For example, if one Facility were able to obtain from the utility, through whatever means, a cheaper or more reliable supply of power for four years, his competitor might utilize the most favored nation clause to obtain those same benefits, but for only one year, if the utility so decided. If contract duration is excluded, the playing field as to the competitors could be decidedly uneven.

Sunoco's interpretation of the most favored nation clause is simply that an "arrangement" is an entire contract and that "all other terms and conditions of the arrangement" means all other terms and conditions beside "rates or charges" "including" (but not by way of limitation) firm and interruptible load characteristics/conditions. That is, if one of the competitors gets a benefit from a contract, rates or charges, the other, through the invocation of the most favored nation clause, may get all the same benefit(s), including the time duration or length of time.

Proposition of Law No. 2

The Order is unjust and unlawful in that the Commission, in interpreting the most favored nation clause in the 1999 Sunoco Agreement with Toledo Ed, failed to consider Toledo Ed's inconsistent actions, conduct, words and filings in interpreting the identical most favored nation clause when the 1996 Sunoco Agreement between Sunoco and Toledo Ed was replaced.

The Commission's Opinion and Order, after routine recitations of the positions of the parties on the above proposition, states:

“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.” (Appx. 34).

The Commission then goes on with the discussions outlined in Proposition of Law No. 1 set forth above. Apart from the statement of the parties' positions, this is the entirety of the Commission's consideration of the history of the Agreement it is interpreting in the Opinion and Order. (Appx. 26-36).

Nor did the Commission consider the parties' interpretation of the identical term in the previous contract on rehearing:

“(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.” (Appx. 41).

The Commission has refused to consider or address the history of the contractual relationship between Toledo Ed and Sunoco in interpreting the 1999 Sunoco Agreement between the two, in spite of the fact that three years before Toledo Ed and Sunoco had spoken and acted in a manner entirely inconsistent with Toledo Ed's current interpretation of the most favored nation clause and entirely consistent with Sunoco's interpretation of the most favored nation clause. As seen previously, Toledo Ed had then taken the position that any invocation of the identical most favored nation clause must result, not only in Toledo Ed obtaining a contract identical in price and firmness, but also in duration. The Commission has chosen to ignore this though it involves the same parties, the same most favored nation clause, and the same subject matter in a contract approved by the Commission.

The Commission ignored the fact that the most favored nation clause in both the 1996 Sunoco Agreement and the 1999 Sunoco Agreement are identical. Both state that if Toledo Ed provides an "arrangement, rates or charges to a Comparable Facility", then Sunoco will have the right to "utilize that arrangement, rates or charges" for the facility. And finally, that Sunoco "must comply with all other terms and conditions of the arrangement." In this context, duration is obviously a "term or condition" of the "arrangement".

The Commission refused to consider the internal memoranda of FirstEnergy's Manager of Rates, David Blank, who stated in an October 23, 1998 memorandum (paragraph 1) that Toledo Ed must "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 firm power at a price in the [redacted] cent per kWh range, but would require Sun to extend the contract to 2006". (Emphasis added). (Supp. 35). Again, the comparable BP Agreement ended in 2006. The Commission ignored a second memorandum of the same FirstEnergy Manger of Rates written

November 17, 1998 discussing Sunoco's contract options and the fact that Sunoco had, up until then, been reluctant to invoke the most favored nation clause precisely because it was told by Toledo Ed that in order to invoke the most favored nation clause it had to extend its contract length to match that of BP. According to Mr. Blank's memorandum, the first option was: "1. Convert contract to firm power per most favored nation's clause; we understand Sun has not been interested in this in the past, citing among other things concerns about the extension of the term to 2006." (Supp. 39, ¶1). Again, 2006 was the contract termination date in the BP contract. Concerning this powerful evidence, the Commission merely noted that Toledo Ed had called these two memoranda "pricing memos that were inappropriate to use in interpreting the most favored nation clause" and dismissed them summarily. (Appx. 31). What the Commission means by "pricing memos" or why characterizing Mr. Blank's memorandum as "pricing memos" results in the memorandum being "inappropriate" to use in interpreting the contract we do not know.

Instead of using this history to interpret the contract, the Commission relied on the caption of the most favored nation clause ("Comparable Facility Price Protection"), and in total disregard of the "Clause Heading" provision of the same contract, and its odd conclusion that

there is language in the most favored nation clause that explicitly prevents a party from exercising the most favored nation clause to match the duration of a comparable contract.³ Language that does not exist.

This refusal to consider a contract history which virtually shouts the meaning that both Toledo Ed and Sunoco intended that the most favored nation clause apply to contract duration, is the critical error in the Commission decision.

Proposition of Law No. 3

The Order is unjust and unlawful in that it refuses to recognize Sunoco's extension of the duration of its contract under the most favored nation clause on the grounds that Sunoco did not previously apply to extend its contract pursuant to a Stipulation in the *RSP* and *RCP Cases*.

Sunoco believes that the main thrust of the Commission's decision in this case is its interpretation of the language of the most favored nation clause and its main failing the misinterpretation of that language and the virtual exclusion of any consideration of the inconsistent conduct, action, words, etc. of Toledo Ed in interpreting the identical most favored nation clause in the replacement of the 1996 Sunoco Agreement with the 1999 Sunoco Agreement. To what extent the decision was based on more than this – to what extent it was

³ Finally, Commissioner Paul Centolella, albeit in a concurring opinion to the Entry on Rehearing concluded that the most favored nation clause did operate to extend Sunoco's Agreement. Commissioner Centolella also believed that in June of 2004, when the Order in the *RSP Case* allowed Sunoco to extend, but provided no notice of that election, Toledo Ed had an "implied duty to provide timely notice to Sunoco ... of the opportunity to extend". The Commissioner reasoned: "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." Strangely, Commissioner Centolella concurred with the majority on the grounds that Sunoco did not introduce evidence that it "in fact lacked notice of its option to extend the agreement. ..." (Appx. 45).

based on the language quoted below we cannot tell. We believe it is a result of an attempt by Toledo Ed to muddy up the waters of a very straightforward contract case by injecting murky utility concepts that are merely eluded to; but not defined. In any event, the Commission in its Opinion and Order sets forth the proposition as follows:

“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.” (Appx. 35).

The Commission on Rehearing, considered Sunoco's arguments against these manifold, but seemingly (in the mind of the Commissioners) intertwined concepts, first it repeats Toledo Ed's arguments:

“(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 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. (Appx. 41-42).

- (14) As we pointed out in our order, Sunoco extended its contract as part of the *ETP Case*, [footnote omitted] 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." (Appx. 42).

A misimpression may be left to the reader of the above-quoted language of the Opinion and Order that the RCP Stipulation actually stated that the BP Agreement was extended, but the Sunoco 1999 Agreement would terminate in February, 2008, thus reinforcing the argument that Sunoco should have been aware of its option. But neither BP or Sunoco or their contracts are mentioned in any of the Orders or Stipulations in either the *ETP Case*, the *RSP Case* or the *RCP Case*.

One part of the Commission's consideration, stated in the language above, seems to be that Sunoco is a sophisticated energy customer. (Appx. 35, ¶12; Appx. 41). The other is that 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." (Appx. 35; Appx. 41-42). Sunoco believes that its sophistication or lack thereof is not in evidence and is irrelevant.

The only thing Sunoco can decipher that is clear enough to address is the implication that Sunoco cannot invoke the most favored nation clause to extend its contract to the same length as BP's, since BP extended its contract by stipulations that were adopted in Orders of the

Commission, whereas Sunoco relies on the most favored nation clause to obtain these benefits. There are no citations to this conclusion and no logic to support it. Nothing in the most favored nation clause states or even implies that the benefits received by a Comparable Facility from Toledo Ed may not be benefits obtained by Stipulation in Commission Orders. It would be a strange most favored nation clause that would provide that a customer must obtain the same benefits as a Comparable Facility only if it obtains them in the same manner, i.e., without invoking the most favored nation clause.

While again, we feel it is irrelevant to this Court's decision, we feel compelled to address other concepts entangled in the Commission's Orders that we would characterize as equitable considerations. The Commission implies in ¶14 of its Entry on Rehearing that Sunoco waited to invoke its most favored nation clause to extend its contract, instead of electing to apply for a contract extension in the *RSP* and *RCP Case*. The Commission states that "... 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* took the risk to extend their contracts in accordance with those cases at a time when market prices were unknown". (Appx. 42, ¶14).

While "hard to believe" is hardly a standard of proof, the only evidence stipulated by the parties was that Sunoco did not receive notice of its right to extend its contract. (Appx. 42, ¶14). Nor did Sunoco attempt somehow to prove the negative, i.e., that nobody in Sunoco knew about the scope of the cases or the opportunities to extend the 1999 Sunoco Agreement. This opportunity was announced in a Revised Plan which was an exhibit to the rebuttal testimony of the First Energy President Anthony J. Alexander (Supp. 77-111) in a proceeding with 506 filed

documents (Supp. 112-129)⁴ which was not titled “Application to extend special contracts or to amend the most favored nation clause of the Agreement between Sunoco and Toledo Ed”, for instance. Rather, it was styled: “Case No. 03-2144-EL-ATA, *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*”. Clearly nothing in this title hinted that an extension of a special contract approved years ago in a separate docket might be considered or that the most favored nation clause of that Agreement would be amended. And most importantly, nothing in this Commission proceeding voided the most favored nation clause in the 1999 Sunoco Agreement.

Proposition of Law No. 4

The Order is unjust and unlawful in finding that Sunoco’s invocation of the most favored nation 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.

In its Opinion and Order the Commission stated:

“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

⁴ The parties agreed that the records in the *RSP Case*, as well as the *ETP* and *RCP Cases* were a part of the Joint Stipulation. (Supp. 7, ¶31).

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.” (Appx. 35).

On Rehearing, the Commission added the following:

- “(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 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.” (Appx. 42-43).

The “collateral attack” argument seems to rise from the fact that BP’s Agreement was extended by virtue of the Stipulations in the *RSP* and *RCP Cases*. Toledo Ed argued, and the Commission seems to agree that since BP obtained its extension from Toledo Ed in the *RSP* and *RCP Cases*, Sunoco cannot invoke the most favored nation clause to obtain a contract extension

to December, 2008, because those same Orders mean that the contracts of customers who did not know of the election to extend and did not therefore extend, terminate February of 2008.

This collateral attack argument seems to proceed from the theory that Sunoco is relying on the *RSP* and *RCP Cases* to obtain, via the most favored nation clause, the contract extension that BP got, but ignoring that the Orders in those same cases mean that Sunoco's contract terminates in February, 2008.

But there is nothing antagonistic in the operation of the most favored nation clause to the Orders of the Commission in the *RSP* and *RCP Cases*.

Nothing in the Order in Case No. 05-1125-EL-ATA, the *RCP Case*, eliminated directly or by inference the most favored nation clause in Sunoco's 1999 Sunoco Agreement. According to Toledo Ed, the date the Sunoco contract was set to expire by Commission Order was February 2008, and it would have thus expired had Sunoco not invoked the most favored nation clause in the 1999 Sunoco Agreement. (It also would have expired had BP not extended its contract). The same would have been true had not Sunoco invoked the most favored nation clause in the 1996 Sunoco Agreement to obtain the 1999 Sunoco Agreement. The Commission Order approving the 1996 Sunoco Agreement including its original June 2003 termination date was an order of no less validity than the Commission's order in the *RCP Case*. But the 1996 termination date and the alleged February 2008 termination date were and are both subject to Sunoco's invocation of the most favored nation clause. Toledo Ed explicitly recognized as much when it extended the term of the 1996 contract stating in the memoranda of Vice President David Blank (Supp. 35-40) and the Application filed in that case (Supp. 43), that Sunoco had the right under the most favored nation provision of the 1996 Sunoco Agreement to obtain an extension. The principle of

that clause – that whatever is given to one competing refinery, for whatever reason and however obtained, must be accorded to the other – is not, and was not changed by any Commission order in any case. A most favored nation clause, by definition, provides that if the “favored” party is afforded an advantage by the grantor, through whatever means, the other party must be granted the same. Toledo Ed’s argument would render that provision meaningless. Toledo Ed’s interpretation is that if BP obtains an advantage from Toledo Ed and Sunoco did not, Sunoco is out of luck, unless it is able to also obtain that advantage without invoking a most favored nation provision. What purpose does the most favored nation clause serve as thus construed?

This Complaint does not collaterally attack anything. The most favored nation is a separate and independent right that exists apart from anything Sunoco did or did not do in the *RSP Case*. There has been no application to the Commission to abrogate the most favored nation in the 1999 Sunoco Agreement. There has been no evidence or testimony to support such a move. So long as the most favored nation provision stands, Sunoco has the right to invoke it.

CONCLUSION

As the Commission’s Opinion and Order and Entry on Rehearing indicates, its ruling in the case below is based first and foremost on its reading of the language of the most favored nation clause. It called that clause unambiguous and refused to be guided by a history that patently shows not only that Toledo Ed thought and intended that the most favored nation clause allowed Sunoco to extend its 1999 Sunoco Agreement, but that the clause absolutely required Sunoco to extend its contract to same length or duration as BP.

In interpreting the plain language of the most favored nation clause, the Commission first relied on the Clause Heading of the most favored nation despite a provision in the contract prohibiting such an interpretation. Then it read the “plain language” to exclude the duration of the contract from its terms and conditions. An exclusion that any court would undoubtedly agree does not exist. Sunoco believes that the “plain language” of the contract supports its position that the 1999 Sunoco Agreement’s most favored nation clause allows it to utilize all the terms and conditions of the BP Agreement, including duration, to obtain the same benefits for its facility as were obtained by its competitor. But if the Court thinks that the language is ambiguous on that point, we urge it to consider a history of the contact that is unambiguous in its revelation of what Toledo Ed and Sunoco thought the identical most favored nation clause to mean in the predecessor contract.

As to the final two grounds which Sunoco thinks were considered by the Commission in rejecting its Complaint, we repeat that Sunoco’s contract right to invoke the most favored nation clause is not constrained or restricted or modified in any way by its failure or refusal to modify its contract in some other way. When BP filed to have its Agreement extended pursuant to orders issued by the Commission during the course of the numerous proceedings surrounding the RSPs and RCPs of the First Energy Companies, and Sunoco, for reasons irrelevant to this proceeding, did not, this did not divest Sunoco of its right under the 1999 Sunoco Agreement to demand terms comparable to the BP contract. All that the most favored nation clause requires is:

- 1) That the arrangement being sought be with a Comparable Facility. It is stipulated that the BP Cedar Point Road refinery is a “Comparable Facility”. (Supp. 4, ¶15).
- 2) That the BP Agreement was in effect during the term of the 1999 Sunoco Agreement. It is stipulated that the BP Agreement was in effect until December 31, 2008. (Supp. 4-6, ¶23).

- 3) That some notice or election to utilize the terms and conditions of the arrangement with BP be timely made. It is stipulated that on November 13, 2007 Sunoco sent its election to invoke the most favored nation clause of the 1999 Sunoco Agreement to extend its contract to December 31, 2008, the same date as the termination of the BP Agreement. (Supp. 6, ¶26; Supp. 54).
- 4) That the Sunoco 1999 Sunoco Agreement containing the most favored nation clause was in effect at the time the election to invoke the most favored nation clause was made. It is stipulated that the 1999 Sunoco Agreement was in effect at least until February 2008. (Supp. 6, ¶25).

All that is needed to be done by Sunoco to extend its 1999 Sunoco Agreement until December 31, 2008 was done.

WHEREFORE, Appellant prays that this Court reverse the Opinion and Order and Entry on Rehearing and find that the 1999 Sunoco Agreement is extended until December 31, 2008, the same length as the BP Agreement and that the funds held pursuant to the Escrow Account be paid over to Appellant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by overnight mail this 27th day of July, 2009.

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IN THE SUPREME COURT OF OHIO

Sunoco, Inc. (R&M)	:	Case No. 2009-0880
Appellant,	:	
v.	:	
Public Utilities Commission of Ohio	:	APPEAL FROM THE PUBLIC
Appellee.	:	UTILITIES Commission OF OHIO
	:	
	:	

APPENDIX

FILE

25

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.	:	Appeal from the Public
	:	Utilities Commission Of Ohio
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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FILED
MAY 14 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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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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COUNSEL FOR SUNOCO, INC. (R&M)

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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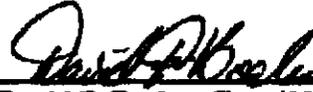
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CERTIFICATE OF FILING

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)

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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, Surcco and TB 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. 08-2144-EL-ATA, et al (RSP Case),² and Case Nos. 08-1125-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 TB and Surcco 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 or 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 Manufacturing 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 Manufacturing Company and The Toledo Edison Company for Authority to Conduct and Modify Certain Regulatory Accounting Practices and Procedures, for Their Approach 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 Manufacturing Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Their Approach.

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 Services 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 area."
- (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 90-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, 2006, 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 clause, 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 6).

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 terms "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.* (1997), 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 TB to offer Sunoco the entire agreement TB has with BP, including the length of the agreement (Sunoco Br. at 6-8). TB disagrees stating that the word "arrangement" in the most favored nation clause must be interpreted to have the same meaning as "rates" and "charges" (TB Rep. Br. at 6).

TB submits that the comparable facility price provisions in the contracts allow Sunoco to adopt rates from BP's agreement; however, TB insists that the provision does not allow for the extension of the duration of the term of the contract (TB Br. at 3, 10). TB 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 *Enfield Tannin Co. v. Minnesota Power & Light Co.* (1974), 221 N.W.2d 157. TB argues that the provision in the Sunoco contract is a "price protection" clause and not a "contract duration" clause (TB Br. at 11). In response, Sunoco submits that the court in *Enfield* 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 TB 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 TB to agree to an extension of the length of the contract to match the term of BP's contract (Sunoco Br. at 9, 94p, Br. C at 1, D). Sunoco goes on to note the application filed in Case No. 99-679-EL-AFC 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 KTC 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 KTC 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, TB 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 TB (TB 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, 2018.

Essentially, Sunoco would have the Commission find that TB's actions, words, filings, and conduct regarding the meaning of the comparable facility price provisions in the agreement confirm that TB 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.

(Ship, Ex. B 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 18, 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.

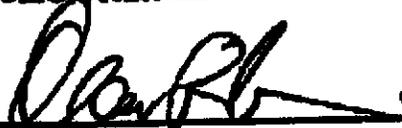
ORDER:

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.

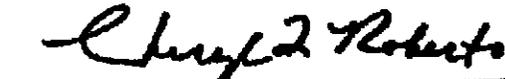
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman

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Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

FEB 19 2008



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-RL-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,

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

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Sunoco, Inc. (R&M),)	
)	
Complainant,)	
)	
v.)	Case No. 07-1255-BL-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.

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- 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

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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,

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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.

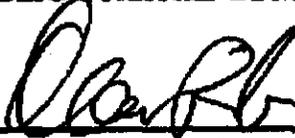
ORDER:

It is, therefore,

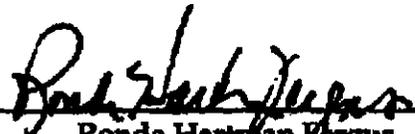
ORDERED, That the complaint be dismissed. It is, further,

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

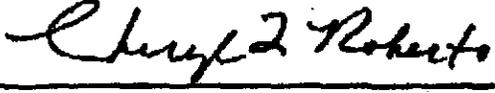
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman

Paul A. Centolella


Ronda Hartman Vergus

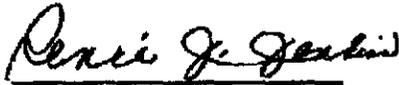

Valerie A. Lemmie


Cheryl L. Roberto

CMTP/vrm

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Renee J. Jenkins
Secretary

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.

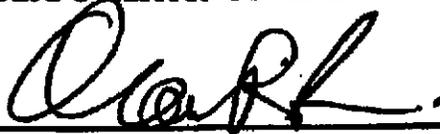
ORDER:

It is, therefore,

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

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

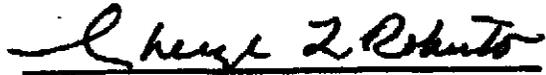


Alan R. Schriber, Chairman

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

FILE

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PUCO

VIA OVERNIGHT MAIL

March 18, 2009

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 13th Floor
Columbus, Ohio 43266-0573

Re: 07-1255-EL-CSS

Dear Sir/Madam:

Please find enclosed an original and twelve (12) copies of SUNOCO INC.'s (R&M) APPLICATION FOR REHEARING filed in the above-referenced case.

Copies have been served on all parties of record. Please place this document of file.

Respectfully yours,



David F. Boehm, Esq.
BOEHM, KURTZ & LOWRY

DFB:low
Encl.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician SM Date Processed MAR 19 2009

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF Ohio**

In The Matter of The Complaint Of
Sunoco Inc. (R&M)

COMPLAINANT,

v.

The Toledo Edison Company

RESPONDENT.

:
:
:
:
:
:

Case No. 07-1255-EL-CSS

SUNOCO, INC.'S (R&M) APPLICATION FOR REHEARING

Sunoco, Inc. (R&M) ("Sunoco") seeks rehearing of the Commission's Opinion and Order of February 19, 2009 in this matter ("Order") and submits that the Order is unlawful, unreasonable and an abuse of discretion in the following particulars:

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.
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.

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.

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.

Respectfully submitted,



David F. Boehm, Esq.

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COUNSEL FOR SUNOCO, INC. (R&M)

March 18, 2009

MEMORANDUM IN SUPPORT

1. The Order is unjust and unlawful in that it finds that the MFN clause of the 1999 Agreement between 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 and Toledo Edison, 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.

While the caption of the MFN clause only refers to comparable price protection, the text of the section clearly goes much further. The language states in part that if Toledo Edison "*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*". (Emphasis added). Obviously the concept of price comparability is addressed in the term "*rates or charges*". "*Arrangement*" goes much further however. If "*rates*" and "*charges*" meant the same as "*arrangements*" the letter would be mere surplusage. But the last sentence of Section 9.2 shows clearly that this is not so, for it provides as follows: "*The customer must comply with all other terms and conditions of the arrangement including firm and interruptible load characteristics/conditions.*" (Emphasis added). If an arrangement has terms and conditions including firm and interruptible load characteristics/conditions it obviously does not merely mean price.

The term "*arrangement*" as found in ORC 4905.31 is not defined, however ORC 4905.16 sheds some light on its meaning. In that Section "*arrangement*" is used synonymously with "*contract,*" and "*agreement,*" and it is also used as a general term that encompasses many forms of agreements.

ORC 4905.16 states:

"When and as required by the public utilities commission, every public utility shall file with it a copy of any contract, agreement, or arrangement, in writing, with any other public utility relating in any way to the construction, maintenance, or use of its plant or

property, or to any service, rate, or charge.

Unless otherwise ordered by the commission each telephone company shall file with the commission a copy of any contract, agreement, note, bond or other arrangement entered into with any telephone management, service or operating company." (Emphasis added)

The ORC's use of the phrase "*or other arrangement*" means that "*contracts, agreements, notes and bonds*" and other similar devices are all considered types of "*arrangements*." The word "*arrangement*" is used as a catch-all for any agreement between two parties memorialized in writing.

In Lake Erie Power & L. Co. v. Telling-Belle Vernon Co., 57 Ohio App. 467, 14 NB.2d 947 (1937) the Court considered GC §614-17, the predecessor of current ORC 4905.15(E) and concluded that a special contract is an "*arrangement*" under the statute. The Court stated that a "*[c]ontract whereby a public utility agrees to furnish electricity to a customer for ten-years at rates provided in the schedule of rates filed or thereafter to be filed with the Public Utilities Commission is an 'arrangement' within the meaning of that term as used in Section 614-17, General Code, details of which must be filed with and approved by the Commission before it is lawful.*" 57 Ohio App. at 467.

The term "*arrangement*" clearly encompasses all the terms and conditions of an agreement with the utility. Section 9.2, as used above, means that Sunoco may require Toledo Edison to offer it the entire agreement with BP including all other terms and conditions, including specifically (but not by way of limitation) firm and interruptible load characteristics. But also including the term or length of the contract.

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's 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.**

The contract history of the relationship between Sunoco and Toledo Edison and BP and Toledo Edison confirms precisely Sunoco's interpretation of the plain language of the MFN clause of the 1999 Agreement provision, but to the extent that the Commission finds the language ambiguous or unclear, Toledo Edison's interpretation of a prior identical MFN clause must be considered. The first contract between Sunoco and Toledo Edison also contained a MFN clause identical in all important respects to Section 9 of the 1999 Agreement. This first contract, dated July 1, 1996 (Stip. Ex. A) had a Section 10 with language identical in every respect to the 1999 Agreement, except that the last sentence in Section 10.2 contained the additional words underlined below: *"The customer must comply with all other terms and conditions of the arrangement including firm and interruptible load characteristics/conditions, rates or charges."* The difference is obviously not a distinction. The above sentence varies from Section 9.2 of the 1999 Agreement only in repeating "*rates or charge*" from the first sentence of Section 10.2.

This is very significant in that it was this comparability language which was repeatedly invoked by Toledo Edison to outline Sunoco's rights and options in the negotiations with Toledo Edison which led up to the 1999 Agreement. When Sunoco and Toledo Edison were negotiating the 1999 Agreement, David Blank, First Energy Manager of the Rate Department outlined "Options for Sun Oil" in a October 23, 1998 confidential memorandum which said that Toledo Edison "*is required*" under the MFN clause (i.e., the Comparable Facility Price Provision) of the 1996 Agreement to make available to Sunoco "*the provisions of the BP agreement*". (Stip. Ex. C, p. 1). Far from defining that requirement as only extending to the matter of price, the memo noted that this "*would provide firm power*" but would

"require Sun to extend the contract to 2006." (Stip. Ex. C, p. 1). Here in the very words of Toledo Edison it is clear that the MFN clause not only allows Sunoco to utilize the prices in the BP contract, but it requires it to utilize or agree to an extension of the length of the underlying contract to match the term of BP's arrangement.

A subsequent confidential memorandum by Mr. Blank on November 17, 1998 (Stip. Ex. D) repeats the same idea in paragraph 1 as it discusses Sunoco's options again:

"1. Convert contract to firm power per most favored nations clause, we understand Sun has not been interested in this in the past, citing among other things concerns about the extension of the term to 2006."

While Sunoco initially resisted the idea of firming up its power supply by invoking the MFN clause of the 1996 Agreement because it would be required to extend the contract until 2006, Sunoco and Toledo Edison ultimately entered into the 1999 Agreement which did exactly that.

The 1999 Agreement was filed for approval with the Commission in Case No. 99-0679-EL-AEC. The Application (Stip. Ex. E) states as follows:

"The Company and the Customer previously entered into an agreement on July 1, 1996 which was approved by the Public Utilities Commission of Ohio in Case No. 96-656-EL-AEC. This previous agreement contained a provision that allowed the Customer the right to utilize any other agreement that the Company provided to another customer that qualifies as a comparable facility within the Company's service territory." (Emphasis added).

On the very first page of the 1999 Agreement is contained the following: *"WHEREAS, the customer desires to purchase the firm power for its Facility subject to the Comparable Facility Price Protection in the Prior Agreement; and ..."*

Toledo Edison's actions, words, filings and conduct concerning the meaning of the MSN clause of the 1996 Agreement confirm and reinforce Sunoco's interpretation of its rights under the virtually identical plain language of the MFN clause in the 1999 Agreement. Toledo Edison, as it repeatedly maintained in the negotiations leading to the 1999 Agreement, was obligated by the MFN clause to allow Sunoco to utilize the terms and conditions of any arrangement between Toledo Edison and a comparable facility, which is or may be in effect at any time during the term of Sunoco's 1999 Agreement with Toledo Edison. The actions, words, filings and conduct of Toledo Edison show clearly that the obligation does not, as earlier maintained by Toledo Edison, only apply to matters of price. Toledo Edison indeed insisted that the MFN clause, when invoked, not only permitted, but required Sunoco to extend the length of the 1996 Agreement to make it identical to the BP Agreement. Clearly this is also true of the MFN clause of the 1999 Agreement that is its virtual twin. Sunoco merely asks the PUCO to order Toledo Edison to do that which it did of its own volition in 1999. Indeed it asks the Commission to order Toledo Edison to do that which Toledo Edison insisted it must do in 1999 - to honor the MFN clause.

- 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 election to extend contracts.**

The Order states, "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." While Sunoco believes this assumption or conclusion has no bearing on its

rights under the 1999 Agreement, it must again call the Commission's attention to the fact that Sunoco was not in the RSP case. Sunoco was not a signatory to the Stipulation in the RSP case. Sunoco, like everyone else, did not receive a notice from Toledo Edison that it had any election to extend its contract. It did not know that buried in a 52-page decision in a case it had not intervened in, it was required to make an election. If it had received notice of the need to "elect" to extend, as it had in the ETP case (99-1212-EL-ETP), it would have elected to extend, as it did in the ETP case. Toledo Edison's completely disingenuous assertions that this failure to elect was some cunning market hedge or "do over" are deliberately deceptive. Only the signatories to the Stipulation in the RSP were supposed to know they had an option to extend, that is why there was no notice.

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 in that case on that basis.**

Nothing in the Order in PUCO Case No. 05-1125-EL-ATA, the RCP case, eliminated directly or by inference the MFN clause in Sunoco's 1999 Agreement. According to Toledo Edison, the date the Sunoco contract was set to expire by Commission Order was February 2008, and it would have thus expired had Sunoco not invoked the MFN clause in the 1999 Agreement. (It also would have expired had BP not extended its contract). The same would have been true had not Sunoco invoked the MFN clause in the 1996 Agreement to obtain the 1999 Agreement. The Commission Order approving the 1996 Agreement including its original June 2003 termination date was an order of no less validity than the PUCO's order in the RCP case. But the 1996 termination date and the alleged February 2008 termination date were and are both subject to Sunoco's invocation of the MFN clause. Toledo Edison explicitly recognized as much when it extended the term of the 1996 contract stating in the confidential memoranda of Vice President David Blank and the Application filed in that case that Sunoco had the

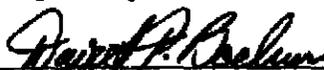
right under the MFN clause of the 1996 Agreement to obtain an extension. The principle of that clause – that whatever is given to one refinery, for whatever reason and however obtained, must be accorded to the other – is not, and was not changed by any Commission order in any case. A MFN clause, by definition, provides that if the “*favored*” party is afforded an advantage by the grantor, through whatever means, the other party must be granted the same. Toledo Edison’s argument would render that provision meaningless. Toledo Edison’s interpretation is that if BP obtains an advantage from Toledo Edison and Sunoco did not, Sunoco is out of luck, unless it is able to also obtain that advantage without invoking a MFN clause. Toledo Edison is saying, “*you didn’t get the same advantage in the same way and at the same time as BP and therefore you can’t get it through the MFN.*” What purpose does the MFN clause serve as thus construed?

This Complaint does not collaterally attack anything. The MFN clause is a separate and independent right that exists apart from anything Sunoco did or did not do in the RSP case. There has been no application to the PUCO to abrogate the MFN clause in the 1999 Agreement. There has been no evidence or testimony to support such a move. So long as the MFN clause stands, Sunoco has the right to invoke it.

CONCLUSION

Based upon the stipulated record filed in this case and upon the briefs and the laws of the State of Ohio, the Commission should reverse its February 19, 2009 Order in this case and conclude that Sunoco has met its burden of proof in establishing that Toledo Edison should have honored Sunoco's invocation of the MFN clause of its 1999 Agreement with Toledo Edison to extend the 1999 Agreement and all of its terms and conditions until December 31, 2008 and that the money escrowed by Toledo Edison and Sunoco on condition of its Order, currently in the amount of \$13,311,045.60 be paid over to Sunoco.

Respectfully submitted,



David F. Boehm, Esq.

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COUNSEL FOR SUNOCO, INC. (R&M)

March 18, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Application for Rehearing and Memorandum in Support was served by First Class United States Mail, postage prepared and electronic mail, upon the following counsel of record this 18th day of March, 2009.


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**COUNSEL FOR RESPONDENT,
THE TOLEDO EDISON COMPANY**

4905.03 Public utility company definitions.

As used in this chapter:

(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(1) A telegraph company, when engaged in the business of transmitting telegraphic messages to, from, through, or in this state;

(2) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state and as such is a common carrier;

(3) A motor transportation company, when engaged in the business of carrying and transporting persons or property or the business of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, for the public in general, over any public street, road, or highway in this state, except as provided in section 4921.02 of the Revised Code;

(4) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

(5) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying artificial gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artificial gas as is manufactured by that producer as a by-product of some other process in which the producer is primarily engaged within this state is not thereby a gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between any gas company and any other gas company or any natural gas company providing for the supplying of artificial gas and for compensation for the same are subject to the jurisdiction of the public utilities commission.

(6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state. Notwithstanding the above, neither the delivery nor sale of Ohio-produced natural gas by a producer or gatherer under a public utilities commission-ordered exemption, adopted before, as to producers, or after, as to producers or gatherers, January 1, 1996, or the delivery or sale of Ohio-produced natural gas by a producer or gatherer of Ohio-produced natural gas, either to a lessor under an oil and gas lease of the land on which the producer's drilling unit is located, or the grantor incident to a right-of-way or easement to the producer or gatherer, shall cause the producer or gatherer to be a natural gas company for the purposes of this section.

All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same are subject to the jurisdiction of the public utilities commission. The commission, upon application made to it, may relieve any producer or gatherer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed

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Lawrence - ORC - 4905.03 Public utility company definitions.

by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as the producer or gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the producer or gatherer does not engage in the distribution of natural gas to consumers.

Nothing in division (A)(6) of this section limits the authority of the commission to enforce sections 4905.90 to 4905.96 of the Revised Code.

(7) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state;

(8) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(9) A heating or cooling company, when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes;

(10) A messenger company, when engaged in the business of supplying messengers for any purpose;

(11) A street railway company, when engaged in the business of operating as a common carrier, a railway, wholly or partly within this state, with one or more tracks upon, along, above, or below any public road, street, alleyway, or ground, within any municipal corporation, operated by any motive power other than steam and not a part of an interurban railroad, whether the railway is termed street, inclined-plane, elevated, or underground railway;

(12) A suburban railroad company, when engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad;

(13) An interurban railroad company, when engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipal corporations, using electricity or other motive power than steam power for the transportation of passengers, packages, express matter, United States mail, baggage, and freight. Such an interurban railroad company is included in the term "railroad" as used in section 4907.02 of the Revised Code.

(14) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

(B) "Motor-propelled vehicle" means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

Effective Date: 01-01-2001

000059

4905.31 Reasonable arrangements allowed - variable rate.

Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees, and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:

(A) The division or distribution of its surplus profits;

(B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement.

(C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;

(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;

(E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate.

No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet.

Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs.

Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

Effective Date: 10-29-1993; 2008 SB221 07-31-2008

000060

4933.81 Certified territories for electric suppliers definitions.

As used in sections 4933.81 to 4933.90 of the Revised Code:

(A) "Electric supplier" means any electric light company as defined in section 4905.03 of the Revised Code, including electric light companies organized as nonprofit corporations, but not including municipal corporations or other units of local government that provide electric service.

(B) "Adequate facilities" means distribution lines or facilities having sufficient capacity to meet the maximum estimated electric service requirements of its existing customers and of any new customer occurring during the year following the commencement of permanent electric service, and to assure all such customers of reasonable continuity and quality of service. Distribution facilities and lines of an electric supplier shall be considered "adequate facilities" if such supplier offers to undertake to make its distribution facilities and lines meet such service requirements and, in the determination of the public utilities commission, can do so within a reasonable time.

(C) "Distribution line" means any electric line that is being or has been used primarily to provide electric service directly to electric load centers by the owner of such line.

(D) "Existing distribution line" means any distribution line of an electric supplier which was in existence on January 1, 1977, or under construction on that date.

(E) "Electric load center" means all the electric-consuming facilities of any type or character owned, occupied, controlled, or used by a person at a single location which facilities have been, are, or will be connected to and served at a metered point of delivery and to which electric service has been, is, or will be rendered.

(F) "Electric service" means retail electric service furnished to an electric load center for ultimate consumption, but excludes furnishing electric power or energy at wholesale for resale. In the case of a for-profit electric supplier and beginning on the starting date of competitive retail electric service as defined in section 4928.01 of the Revised Code, "electric service" also excludes a competitive retail electric service. In the case of a not-for-profit electric supplier and beginning on that starting date, "electric service" also excludes any service component of competitive retail electric service that is specified in an irrevocable filing the electric supplier makes with the public utilities commission for informational purposes only to eliminate permanently its certified territory under sections 4933.81 to 4933.90 of the Revised Code as to that service component. The filing shall specify the date on which such territory is so eliminated. Notwithstanding division (B) of section 4928.01 of the Revised Code, such a service component may include retail ancillary, metering, or billing and collection service irrespective of whether that service component has or has not been declared competitive under section 4928.04 of the Revised Code. Upon receipt of the filing by the commission, the not-for-profit electric supplier's certified territory shall be eliminated permanently as to the service component specified in the filing as of the date specified in the filing. As used in this division, "competitive retail electric service" and "retail electric service" have the same meanings as in section 4928.01 of the Revised Code.

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(G) "Certified territory" means a geographical area the boundaries of which have been established pursuant to sections 4933.81 to 4933.90 of the Revised Code within which an electric supplier is authorized and required to provide electric service.

(H) "Other unit of local government" means any governmental unit or body that may come into existence after July 12, 1978, with powers and authority similar to those of a municipal corporation, or that is created to replace or exercise the relevant powers of any one or more municipal corporations.

Effective Date: 10-05-1999

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