ORIGINAL

IN THE SUPREME COURT OF OHIO

Martin Marietta Magnesia Specialties, LLC, The Calphalon Corporation, Kraft Foods Global, Inc., Worthington Industries and Brush Wellman, Inc.,	)	Case Nos. 2009-1064, 2009-1065, 2009-1067, 2009-1071, and 2009-1072
Appellants,	)	
v.	)	On Appeal from the Public Utilities Commission of Ohio
The Public Utilities Commission of Ohio,	)	Case Nos. 08-67-EL-CSS, 08-145-EL-CSS, 08-146-EL-CSS, 08-254-EL-CSS, and 08-893-EL-CSS
Appellee.	)	

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I. INTRODUCTION

A. Basis of this Appeal.

This appeal from the Public Utilities Commission of Ohio (the "Commission") involves the straightforward interpretation of special contracts for electric services between Toledo Edison ("TE"), a subsidiary of FirstEnergy, and each of the following entities: Worthington Industries ("Worthington"), The Calphalon Corporation ("Calphalon"), Kraft Foods Global, Inc. ("Kraft"), Brush Wellman, Inc. ("Brush"), and Martin Marietta Magnesia Specialties, LLC ("Martin Marietta"), collectively referred to as "Appellants." Appellants appeal the above-captioned cases on the grounds that the Commission unreasonably and unlawfully erred in allowing Toledo Edison to unilaterally and prematurely terminate Appellants' special contracts.

B. Executive Summary of the Case.

A longstanding principle recognized by this Court holds that the "right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint." *Wallace v. Balint* (2002), 94 Ohio St.3d 182, 186, 2002-Ohio-480, 761 N.E.2d 598, citing *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 231 N.E.2d 301. This fundamental principle (ignored by the Commission) must guide the outcome of this case.

In these consolidated cases, TE and Appellants separately entered into Commission-approved special contracts under Ohio Revised Code ("R.C.") 4905.31 at various times during the 1990s. In 2001, each Appellant duly executed an amendment to their special contract (hereinafter the "2001 Amendments"). The clear and unambiguous language of the 2001 Amendments extended Appellants' special contracts through the date on which TE ceased the collection of its RTC. The 2001 Amendments expressly define the acronym "RTC" to mean

Regulatory Transition Charges (hereinafter referred to as "RTC Charges"). It is uncontroverted that TE continued to collect its RTC Charges through December 31, 2008.

Even so, TE consciously determined that it would unilaterally and prematurely terminate Appellants' special contracts in February 2008, while continuing to collect its RTC Charges through December 31, 2008. The Commission's decisions in these consolidated cases sanctioned TE's failure to comply with the parties' mutually agreed upon terms and are contrary to the clear and unambiguous language of Appellants' special contracts, as extended by the 2001 Amendments. In simpler terms, the Commission erred as a matter of law because its decisions allowing TE to prematurely terminate these contracts are fundamentally incompatible with long-standing precedent from this Court, Chapter 49 of the Ohio Revised Code, authority of the United States Supreme Court, and the most fundamental concepts of due process.

II. INTRODUCTION TO THE APPELLANTS

Each Appellant operates a large industrial facility in Ohio which takes electric service from TE pursuant to an electric services agreement filed with, and approved by, the Commission pursuant to R.C. 4905.31. (*In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., Pilkington North America, Inc. and Martin Marietta Magnesia Specialties v. The Toledo Edison Company, LLC*, Case Nos. 08-67-EL-CSS, 08-145-EL-CSS, 08-146-EL-CSS, 08-254-EL-CSS, and 08-893-EL-CSS, February 19, 2009 Opinion and Order, hereinafter the "Opinion & Order") (Appellants' Appx. at 036).[1] As a group, Appellants employ 1,590 Ohioans at facilities within the TE service area. A brief introduction to the Appellants follows.

[1] All references to Appellants' Appendix will be abbreviated to "Appellants' Appx. at __" following a full citation to the appropriate document.

A. Worthington Industries.

Worthington is a corporation organized and existing under the laws of the state of Ohio with its principal place of business in Ohio. (Appellants' Supp. at 0002).[2] Worthington operates a steel processing facility located in York Township, near the village of Delta, Fulton County, Ohio (the "Worthington Facility"). (Appellants' Supp. at 0002). The Worthington Facility is one of 13 steel processing facilities (including joint ventures) within the company, and provides pickling, hot dip galvanizing, and slitting capabilities for a diversified customer base which includes automotive, construction, agriculture, hardware and appliance markets. (Appellants' Supp. at 0107). The Worthington Facility, with 170 total employees, is 425,000 square feet in size and ships in excess of 900,000 tons of steel per year. (Appellants' Supp. at 0107). The Worthington Facility consumed approximately two million kW of electricity in 2007, equal to 5.95% of its Total Variable Operating Cost. (Appellants' Supp. at 0107). Electric costs represent a very significant percentage of the Worthington Facility's production costs. (Appellants' Supp. at 0107).

B. The Calphalon Corporation.

Calphalon is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Ohio. Calphalon operates a manufacturing facility located in Perrysburg, Ohio (the "Calphalon Facility"). (Appellants' Supp. at 0003). The Calphalon Facility employs about 250 people. (Appellants' Supp. at 0113). The cost of electricity alone accounts for about 12% of the total cost of doing business at the Calphalon Facility. (Appellants' Supp. at 0113).

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[2] All references to Appellants' Supplement will be abbreviated to "Appellants' Supp. at __" following a full citation to the appropriate document.

C. Kraft Foods Global, Inc.

Kraft, a corporation organized and existing under the laws of the State of Delaware, purchases electricity and natural gas for approximately 100 manufacturing and other facilities in the United States and Canada. (Appellants' Supp. at 0003 and 0120). The Toledo, Ohio flour milling plant served by TE (the "Kraft Facility") is one of those facilities. (Appellants' Supp. at 0003). The Kraft Facility employs more than 95 people and annually purchases about $17 million in goods and services from local vendors. (Appellants' Supp. at 0131). In 2007, TE charged the Kraft Facility approximately $1.8 million for electricity billed at special contract rates. (Appellants' Supp. at 0123).

D. Brush Wellman, Inc.

Brush is a corporation organized and existing under the laws of the State of Ohio with its principal place of business located in Ohio. (Appellants' Supp. at 0004). Brush is the leading global supplier of high performance copper, nickel, and beryllium alloys (Appellants' Supp. at 0136) and operates a manufacturing facility located in Ottawa County, Elmore, Ohio (the "Brush Facility"). (Appellants' Supp. at 0004). The Brush Facility employs approximately 600 people and consumes approximately 100,000/MWh of electricity each year. (Appellants' Supp. at 0136).

E. Martin Marietta Magnesia Specialties, LLC.

Martin Marietta is a limited liability company organized and existing under the laws of the state of Delaware, with its principal place of business in Raleigh, North Carolina. (Appellants' Supp. at 0081). It is registered as a foreign limited liability company with the Ohio Secretary of State. (Appellants' Supp. at 0081). Martin Marietta operates a limestone facility in Woodville, Ohio (the "Martin Marietta Facility"). (Appellants' Supp. at 0081). The Martin Marietta Facility mines dolomitic limestone that is calcined to produce dolomitic lime, which is

then sold to steel mills for the production of steel and magnesia chemicals. (Appellants' Supp. at 0081). The limestone not converted to lime is sold as aggregate for use on construction projects. (Appellants' Supp. at 0081). The Martin Marietta Facility employs 175 people. (Appellants' Supp. at 0081). The Martin Marietta Facility consumes approximately 6 million kWh of electric energy each and every month, (Appellants' Supp. at 0087), for which it paid TE well over $3 million per year at contract rates. (As extrapolated from Appellants' Supp. at 0087-0088).

III. PROCEDURAL HISTORY

Worthington, Calphalon, Kraft, and Brush separately filed complaints against TE with the Commission, alleging violations of statutory, regulatory, and contractual duties relating to the provision of electric services under their special contracts. By entry dated April 7, 2008 and at the hearing on July 23, 2008, the Commission consolidated the complaints of these parties for hearings. On June 17, 2008, Worthington, Calphalon, Kraft, Pilkington, and Brush filed with the Commission a Joint Stipulation of Facts negotiated with and agreed to by TE, the testimony of their management witnesses, and the jointly sponsored expert testimony of Anthony J. Yankel;[3] as entered into the record of this case at the hearing before the Attorney Examiner on July 23, 2008.

Contemporaneously, Martin Marietta filed a complaint against TE alleging virtually identical grounds and moved to consolidate its complaint with those of the other Appellants on July 17, 2008. Prior to the hearing in this matter, the Attorney Examiner consolidated Martin Marietta's complaint and accepted a separate Joint Stipulation of Facts entered into between Martin Marietta and TE; this document was also entered into the record of this case at the July 23, 2008 hearing.

[3] Martin Marietta is also relying on the expert testimony of Anthony J. Yankel as presented by the other Appellants during the hearing.

On February 19, 2009, the Commission issued the Opinion & Order denying the relief sought by Appellants. (See Appellants' Appx. beginning on 0034). On March 20, 2009, and pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the Opinion and Order dated February 19, 2009. (Appellants' Appx. beginning on 0057). The Appellants' Application for Rehearing was denied with respect to the issues being raised in this appeal by an Entry on Rehearing entered in the Commission's Journal on April 15, 2009 (the "Entry on Rehearing"). (Appellants' Appx. beginning on 0025).

IV. STATEMENT OF FACTS

Long before the deregulation of the electric industry began under Amended Substitute Senate Bill 3 ("SB 3"), TE and each of the Appellants separately entered into Commission-approved special contracts for electric service under R.C. 4905.31. (Appellants' Supp. 0002-0004 and 0081-0082). Those special contracts were filed with, and approved by, the Commission as reasonable special arrangements under R.C. 4905.31. (Appellants' Supp. at 0003-0004 and 0082).

A. The FirstEnergy Electric Transition Plan Proceeding, Case Nos. 99-1212-EL-ETP ("ETP Case").

As mandated by SB 3, TE and the two other Ohio FirstEnergy operating companies filed an electric transition plan with the Commission for non-competitive and provider of last resort generation services beginning in 2001. TE and numerous intervening parties subsequently entered into a comprehensive Stipulation and Recommendation dated April 17, 2000 (the "ETP Stipulation), which the Commission modified and approved through its Opinion and Order dated

July 19, 2000 (the "ETP Order"). (Appellants' Supp. at 0005-0006).[4] Appellants were neither intervening parties in the ETP Case nor signatories of the ETP Stipulation.

1. Extension of Appellants' R.C. 4905.31 special contracts with TE were by mutual consent and consistent with the ETP Stipulation.

The ETP Stipulation authorized TE to offer its special contract customers a "one-time right through December 31, 2001 to extend their current contracts through the date on which the RTC charges cease." (Appellants' Supp. at 0006). The ETP Stipulation (as approved by the ETP Order) required TE to notify each special contract customer that it could terminate, leave unchanged, or extend the term of its special contract as provided for by that stipulation. (Appellants' Supp. at 0006).

Upon receipt of their notices from TE, each of the Appellants timely elected to extend its special contract. Each Appellant duly executed an amendment prepared by TE (the 2001 Amendments) to incorporate the new termination date into its previously-approved special contract. (Joint Stipulation, ¶ 34) (Appellants' Supp. at 0006).

The recitals to the 2001 Amendments specifically recognized that TE was "prepared and willing to extend the Agreement through the date which Regulatory Transition Costs are recovered for the Company as provided for in the Company's Stipulation and Recommendation dated April 13, 2000, included in Paragraph 3, page 5, entitled Contract Options." (Appellants' Supp. at 0022, 0034, 0045, 0052 and 0101). Whereupon the express language of the 2001 Amendments memorialized Appellants' extensions of their special contracts through the "bill rendered for the electric usage through the date which RTC [Charges] ceases for [TE]."

[4] Both the ETP Stipulation and ETP Order can be found in Appellants' Supplement beginning on 0383 and 0415, respectively.

(Appellants' Supp. at 0022, 0034, 0045, 0052 and 0101). The 2001 Amendments expressly define the acronym "RTC" to mean Regulatory Transition Charges.

B. TE's Rate Stabilization Plan in Case No. 03-2144-EL-ATA, et al. (the "RSP Case").

On October 21, 2003, TE and the other Ohio FirstEnergy operating companies filed an application in the RSP Case for approval of a comprehensive rate stabilization plan (the "RSP") for generation service beginning on January 1, 2006. (Appellants' Supp. at 0006-0007). TE and certain intervening parties agreed to and filed a Stipulation and Recommendation on February 11, 2004 (the "RSP Stipulation"). (Appellants' Supp. at 0007). Appellants were neither intervening parties in the RSP Case nor signatories to the RSP Stipulation. (Appellants' Supp. at 0007). Signatories to the RSP Stipulation included the Ohio Hospitals Association, Industrial Energy Users-Ohio ("IEU-Ohio"), Ohio Energy Group ("OEG"), and Ohio Partners for Affordable Energy. (Appellants' Supp. at 0007).

The RSP Stipulation subsequently was revised, expanded, and re-filed on February 24, 2004 as an attachment to the testimony of Anthony J. Alexander (the "Revised RSP"). (Appellants' Supp. at 0007).[5]

1. The 2001 Amendments were not affected by TE's RSP Case.

TE's rate stabilization plan did not change the termination date of Appellants' special contracts as extended under the 2001 Amendments. The initial RSP filed on October 21, 2003, the RSP Stipulation filed on February 11, 2004, and the Revised RSP filed on February 24, 2004 used the same language for Section VIII(8), which stated: "[t]his Plan does not affect the termination dates for special contracts as such dates would have been determined under Case 99-

[5] A copy of the Revised RSP can be found in Appellants' Supplement beginning on 0487.

1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008." (Appellants' Supp. at 0009-0010 and 0052).

2. TE did not provide notice to Appellants (or any of its other special contract customers) of their rights under Section VIII(8) to further extend their special contracts.

The RSP Stipulation as incorporated into the Revised RSP, however, did expand the language of Section VIII(8) of the initially filed RSP by adding the underlined language below, which created an opportunity to further extend the term of many special contracts:

> This Plan does not affect the termination dates for special contracts as such dates would have been determined under Case 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008, <u>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.</u>

(Appellants' Supp. at 0009-0010 and 0582). Unlike its actions in the ETP Case, TE did not provide notice of this extension option to the 46 special contract customers eligible to further extend their special contracts after the filing of the RSP Stipulation, the Revised RSP, or the Commission's approval of the RSP Order. (See Appellants' Supp. at 0011).

As logically expected, TE received requests from only nine of the 46 special contract customers eligible for such extensions within the 30-day window provided as part of the Commission's RSP Order issued on June 9, 2004. (Appellants' Supp. at 0010). Only North Star Steel, BP, Buckeye Pipeline System, Chrysler, Pro Medica Health Systems, GM, Ford, Metamora Grain Facility, and The Andersons timely requested extensions. (Appellants' Supp. at 0010). Most, if not all, of these nine customers were members of the intervening industrial groups which actively participated in the RSP Case and signed the RSP Stipulation. For non-participants (e.g. Appellants), TE made the "extension offer" by merely filing it with the

Commission's docketing system during the middle of the case. The Commission docket files 2,000 cases each year. This particular RSP case contained 12,932 pages. To monitor each one of those pages and expect one paragraph to pop out constituted a severe burden, especially in light of the 30-day window for special contract customers to request an extension. (Appellants' Supp. at 0328-0330).

C. TE's Rate Certainty Plan, Case No. 05-1125-EL-ATA, et al. (the "RCP Case").

On September 9, 2005, TE and the other FirstEnergy Ohio operating companies filed an application for approval of a rate certainty plan (the "RCP").[6] That case was resolved largely as set forth in a Stipulation and Recommendation filed with the application signed by TE, the other FirstEnergy operating companies, OEG, IEU-Ohio, and a number of municipalities (the "RCP Stipulation"). (Appellants' Supp. at 0007-0008). Appellants neither signed the RCP Stipulation nor intervened in the RCP Case. (Appellants' Supp. at 0007-0008).

Paragraph 12 of the RCP Stipulation stated in pertinent part that:

> The special contracts that were extended under the RSP shall continue in effect for each Company until December 31, 2008 for Ohio Edison and Toledo Edison and December 31, 2010 for CEI. The special contracts that were extended as part of the ETP case, but not the RSP case, shall continue in effect until the special contract customer's meter read date in the following months (which are consistent with the ETP's method of calculation of the contract end dates): . . . Toledo Edison – February 2008.

(Appellants' Supp. at 0008). The clear and unambiguous language of the 2001 Amendments to Appellants' special contracts terminates those contracts upon the date that TE ceased the collection of its RTC Charges. This language remained in tact.

Without regard for that contract language (and quite possibly without awareness that such language even existed), non-parties to those contracts, including municipalities and consumer

[6] A copy of the RCP filing can be found in Appellants' Supplement beginning on 0583.

groups, signed the RCP Stipulation. TE used that stipulation as the basis for its right to terminate the Appellants' special contracts on a date certain in February, 2008 regardless of whether TE ceased the collection of its RTC Charges at that time. (Appellants' Supp. at 0368-0371). Notably, the TE witness advocating that position during the hearing in this case never knew about the contractual termination language. (Appellants' Supp. at 0369-0374).

The Commission approved the RCP Stipulation by its Opinion and Order in the RCP Case with no discussion of Paragraph 12 or its effect upon existing contracts.[7] Of course, the Commission may not have recognized the need to discuss Paragraph 12 or its effect upon existing contracts. Neither TE nor anyone else ever submitted Appellants' special contracts to the Commission to suggest modification would be necessary. Thus, the clear and unambiguous language of the termination clauses TE included in the 2001 Amendments – language which depended entirely upon the date TE ceased collecting RTC Charges.

D. TE's Purported Termination of Appellants' Special Contracts in February 2008.

Between February 2006 and February 2007, TE relied on Paragraph 12 of the RCP Stipulation to inform each of the Appellants that their respective special contracts would terminate on their meter read date in February 2008. (Appellants' Supp. at 0008-0009 and 0085). TE did not rely on its cessation of the collection of RTC Charges to terminate Appellants' special contracts under the 2001 Amendments. (Appellants' Supp. at 0009). In fact, it is undisputed that TE did not stop collecting its RTC Charges on Appellants' meter read dates in February 2008. (Appellants' Supp. at 0009).

[7] A copy of the RCP Order can be found in Appellants' Supplement beginning on 0627.

E. The Escrow Agreements between TE and all but one of Appellants.

Upon the filing of the complaints in these consolidated proceedings, TE entered into an escrow agreement with each of the Appellants except for Martin Marietta, which made payments under protest and at the higher tariff rates from the February 2008 meter read date through December 31, 2008. (Appellants' Supp. at 0011 and 0088).

Under the escrow agreements, the Appellants except Martin Marietta paid TE at the special contract rates from the February 2008 meter read dates through December 31, 2008. At the same time, the Appellants (except Martin Marietta) paid the difference between contract and tariff billing rates for electric service on and after the February 2008 meter read dates through December 31, 2008 into separate escrow accounts held by the Bank of New York. (Appellants' Supp. at 0011). By the middle of 2008, the Appellants had paid the following amounts into escrow:

- Worthington – $299,213.02, which was through May 2008 (Appellants' Supp. at 0108);
- Calphalon – $166,595.73, the first three monthly payments (Appellants' Supp. at 0115);
- Kraft – $132,000, which was through May 2008; and
- Brush – approximately $293,504.00, which was through May 2008) (Appellants' Supp. at 0137).

The escrow payments, which continued through December 31, 2008, will not be disbursed until this Court issues its mandate.

Under protest, Martin Marietta paid TE $442,407.89 more in electricity costs from its February meter read date through its June 2008 invoice (and additional amounts thereafter through December 31, 2008) than it would have paid pursuant to the rate this Commission approved in the TE/Martin Marietta special contract. (Appellants' Supp. at 0088).

V. STANDARD OF REVIEW

Pursuant to R.C. 4903.13, this Court retains the power to reverse, vacate, or modify a Commission' order when "of the opinion that such order was unlawful or unreasonable." The burden rests with the appellant to demonstrate that the Commission's decisions are against the manifest weight of the evidence or clearly unsupported by the record, *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921. The Court will not reverse a Commission decision without a showing that the order has or will harm or prejudice the appellant. *Myers v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 299, 302, 595 N.E.2d 873.

As to appeals from Commission decisions involving questions of law, the Court has "complete and independent review." *Ohio Edison Co. v. Pub. Util. Comm.* (1977), 78 Ohio St. 3d 466, 469, 678 N. E 2d 922. In essence, legal issues undergo "more intensive examination than * * * factual questions." *MCI Corp. v. Pub. Util. Comm.* (1988), 38 Ohio St. 3d 266, 269, 527 N.E.2d 777. The construction and application of special arrangements under R.C. 4905.31 involve questions of law when facts are not in controversy. *Saalfield Publishing Co. v. Pub. Util. Comm.* (1948), 149 Ohio St. 113, 117, 77 N.E.2d 914, syllabus 1.

VI. LAW AND ARGUMENT

The material facts of this case are not in dispute because they were stipulated to and otherwise presented to the Commission through witnesses at the evidentiary hearing. For the convenience of this Court, the material, undisputed facts upon which this case turns are restated herein:

- Appellants' Commission-approved special contracts all predate the regulatory restructuring activities in Ohio over the past decade;
- As a result of the ETP Case, and through the 2001 Amendment, Appellants' special contracts were extended through the date on which TE ceased the collection of its RTC Charges;

- In the subsequent RSP and RCP cases, the Commission authorized TE to continue collecting RTC Charges through a date certain, December 31, 2008, with no further regard to the kWh sales levels achieved by TE;
- Appellants were not signatories to the stipulations entered within the RSP and/or RCP Cases and were not parties to those cases;
- Except for the original extensions of Appellants' special contracts as part of the ETP Case (the 2001 Amendments), no other amendments or modifications were ever made to Appellants' special contracts;
- Appellants' special contracts were never ordered modified by the Commission in either the RSP or RCP cases;
- TE continued collecting RTC Charges, with Commission approval, until December, 31, 2008;
- TE unilaterally terminated Appellants' special contracts in February, 2008 based upon its achievement of certain kilowatt-hour sales levels rather than the cessation of its RTC Charges.

PROPOSITION OF LAW NO. 1: When a Commission-approved special contract for electric service clearly and unambiguously states that the contract terminates on the date the electric utility stops collecting regulatory transition charges, the Public Utilities Commission errs in allowing the utility to unilaterally terminate the contract while still collecting the specified charges and failing to give effect to the contract's clear expression of the parties' intent.

The Commission erred by not applying the clear and unambiguous language in the mutually agreed upon 2001 Amendments to Appellants' special contracts, which expressly stated that Appellants' special contracts would terminate on the date that TE ceased the collection of its RTC Charges. TE terminated Appellants' special contracts in February 2008, but did not cease the collection of its RTC Charges until December 31, 2008. The Commission unreasonably and unlawfully permitted TE to unilaterally terminate Appellants' special contracts long before the date provided in the 2001 Amendments. (Appellants' Appx. at 027-028 and 058-061).

A. When a contract is clear and unambiguous, the intent of the parties is evidenced only by the express language used by the parties in the four corners of the contract.

A fundamental rule of contract interpretation holds that when a "contract is clear and unambiguous ... its interpretation is a matter of law" – in this case, a matter to be determined by this Court. *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66, 609 N.E.2d 144. Because the standard of review is de novo, this Court must be guided by a longstanding principle of contract law – namely, that contract interpretation is designed to carry out the "intent of the parties, as that intent is evidenced by contractual language." *Skivolocki v. East Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, paragraph 1 of the syllabus. It follows that "where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246. See also *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N. E. 2d 898, 900-901; *Blosser v. Enderlin* (1925), 113 Ohio St. 121, 129, 148 N.E. 393 (explaining that when an agreement is in writing "there can be no intendment or implication inconsistent with the express terms thereof"). More simply stated, the intent of the parties resides in the explicit language used in a contract. *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, syllabus ¶ 1 (explaining that the "intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement"). See also *Henderson-Achert Lithographic Co. v. John Shillito Co.* (1901), 64 Ohio St. 236, 252, 60 N.E. 295, 298 (explaining that contracts are construed "according to the intention of the parties, as derived from the language they have employed").

B. The 2001 Amendments used clear and unambiguous language to establish a definitive termination date for Appellants' special contracts.

A contract or contract term is unambiguous when the meaning is clear. A contract enters the realm of ambiguity only when "it is susceptible of two conflicting but reasonable interpretations." *Schottenstein Trustees v. Carano*, Franklin App. No. 99AP-1222, 2000 Ohio App. LEXIS 4493 (attached to Appellants' Appx. beginning on 065). . See also *United Telephone Co. v. Williams Excavating, Inc.* (1997), 125 Ohio App.3d 135, 153, 707 N.E.2d 1188, citing *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271.

Long ago, this Court recognized that a "written contract which calls for continuous performance, not for a definite term in point of time but for a term dependent upon an event which is certain to occur" is definite and certain and "is not void for uncertainty as to time." *Fuchs v. The United Motor Stage Co., Inc.* (1939) 135 Ohio St. 509, 21 N.E.2d 669, syllabus one. The language of the 2001 Amendments that establishes a definite and certain termination date for Appellants' special contracts is clear and unambiguous.

It is undisputed that TE offered, and Appellants accepted, a "one time right" to extend their special contracts "through the date which RTC ceases for the Company [TE]." (Appellants' Supp. at 0006). The 2001 Amendments specifically define RTC to mean Regulatory Transition Charges. (Appellants' Supp. at 0006). The word "ceases" is commonly understood to mean "to stop, forfeit, suspend, or bring to an end." A synonym of the word "cease" is "stop". Black's Law Dictionary (8 Ed. Rev. 2007) 237. The special contracts ended when TE ceased (or stopped) the collection of its Regulatory Transition Charges on December 31, 2008. (Appellants' Supp. at 0009).

Because the language in each of Appellants' special contracts is clear and unambiguous, it is the only evidence of the parties' intent and it controls the outcome of this case. Thus, this Court must conclude that Appellants' special contracts continued through the date TE ceased the collection of its RTC Charges, which undisputedly occurred on December 31, 2008.

C. TE failed to terminate Appellants' special contracts by ceasing the collection of its RTC Charges prior to December 31, 2008.

Appellants recognize that under the clear and unambiguous language in the 2001 Amendments, TE retained the unquestioned contractual power to terminate Appellants' special contracts by ceasing the collection of its RTC Charges. If, in fact, TE had stopped collecting its RTC Charges in February 2008 (and thereby terminated Appellants' special contracts), Appellants would not have filed their complaints asking the Commission to compel TE to continue providing electric service through the end of the full term of the Appellants' extended special contracts.

TE nevertheless disregarded the clear and unambiguous language of the 2001 Amendments by terminating Appellants' special contracts in February 2008 while continuing to collect RTC Charges through the end of 2008. TE must stick to the bargain it struck with Appellants. The special contracts continue through the date on which TE ceased the collection of its RTC Charges, which was December 31, 2008. Thus, the Commission erred by allowing TE to unilaterally terminate Appellants' special contracts while still collecting its RTC Charges, thereby sanctioning TE's unlawful attempt to rid itself of contractual bargains it no longer liked.

D. The Commission improperly failed to exercise its supervisory powers under R.C. 4905.31 to compel TE to continue providing Appellants with electric service under the terms of their special contracts as amended by the 2001 Amendments.

Under Ohio's statutory scheme, R.C. 4905.04 grants the Commission certain supervisory and regulatory powers over public utilities. More specifically, R.C. 4905.31, allows interested parties to enter into practicable or advantageous financial devices that become lawful upon Commission approval. Special arrangements (i.e. Appellants' special contracts) become legally enforceable by the Commission when approved by and filed with the Commission under R.C. 4905. 31. *Columbus, Delaware & Marion Elect. Co. v. Pub. Util. Comm.* (1928), 119 Ohio St. 282, 163 N.E. 914, *Suburban Power Co. v. Pub. Util. Comm.* (1931), 123 Ohio St. 275, *In re Complaint of Cookson Pottery v. Pub. Util. Comm.* (1954) 161 Ohio St. 498, 120 N.E.2d 98.

The Commission retains supervisory powers over special arrangements that have been filed with, and approved by, the Commission (i.e. Appellants' special contracts). In particular, the Commission retains "certain powers to compel the continuance of public utility service which had been legally established to the end of the full term of an existing contract * * *." *Suburban Power Co.,* supra at 275, syllabus one.

In this proceeding, the Commission committed reversible error by failing to apply the clear and unambiguous language of the 2001 Amendments which extended Appellants' special contract rates and charges through December 31, 2008 – the date that TE ceased the recovery of its RTC Charges. By failing to require TE to continue providing service to Appellants through the full term of their contracts (and rubber-stamping TE's unilateral and unlawful cancellation of Appellants' special contracts on the February 2008 meter read dates), the Commission improperly and unlawfully sanctioned TE's breach of the terms of Appellants' legally established special contracts.

PROPOSITION OF LAW NO. 2: The Public Utilities Commission acts unlawfully and unreasonably when it relies upon parol evidence to interpret and then modify clear and unambiguous contract language.

The Commission violated fundamental principles of Ohio contract law by using parol evidence to modify the clear and unambiguous language in the 2001 Amendments to Appellants' special contracts. The parties expressly intended for Appellants' special contracts to terminate when TE ceased the collection of its RTC Charges. As Ohio law recognizes, "[i]ntentions not expressed . . . have no existence and may not be shown by parol evidence." *Aultman Hosp. Assn. v. Community Mutual Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920, citing to *Charles A. Burton, Inc.* v. *Durkee* (1952), 158 Ohio St. 313, 49 O.O. 174, 109 N.E.2d 265.

A. The parol evidence rule.

The parol evidence rule is based upon the idea that final written agreements are "of a higher nature than earlier statements, negotiations, or oral agreements." *Galmish v. Cicchini* (2000), 90 Ohio St. 3d 22, 27, 734 N.E.2d 782. The parol evidence rule itself states that "a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing." (Emphasis added). *Bellman v. Am. Int'l Group* (2007), 113 Ohio St.3d 323, 325-326, 2007-Ohio-2071, 865 N.E.2d 853. Thus, application of the parol evidence rule depends upon whether Appellants' special contracts (including the 2001 Amendments) represent the full embodiment – or full integration – of the agreement between Appellants and TE.

B. The 2001 Amendments are fully integrated agreements subject to the parol evidence rule.

Contract integration "is not dependent upon the existence of an integration clause." In fact, "[t]he presence of an integration clause makes the final written agreement no more integrated than does the act of embodying the complete terms into the writing." *Bellman*, 113

Ohio St.3d at 327. Rather, a "contract that appears to be a complete and unambiguous statement of the parties' contractual intent is presumed to be an integrated writing." *Id.* at 326. Thus, the question of whether Appellants' special contracts (including the 2001 Amendments) represent the full embodiment – or full integration – of the parties' agreement turns on whether the agreement clearly and unambiguously expresses the parties' intent as to the termination date.[8] As previously explained, the termination date in the 2001 Amendments is clear and unambiguous – and directly tied to the date on which TE ceased the collection of its RTC Charges. *Supra* discussion of Proposition of Law No. 1.

C. The Commission improperly relied on extrinsic evidence to interpret and directly contradict the clear and unambiguous language in the 2001 Amendments.

In direct violation of the parol evidence rule, the Commission improperly relied on extrinsic evidence from the ETP Stipulation approved in the ETP Case to directly contradict the clear and unambiguous (and therefore fully integrated) termination dates in the Commission-approved 2001 Amendments. (Appellants' Appx. at 061). More specifically, the Opinion and Order changed the clear and unambiguous termination date in the 2001 Amendments from the date TE ceased the collection of its RTC Chargers to the date TE's cumulative sales reached defined kWh sales levels. The Commission erroneously concluded that Appellants entered into their 2001 Amendments based on the unexpressed intention that Appellants' special contracts terminated when TE achieved certain kWh sales level targets rather than when TE actually ceased the collection of its RTC Charges on December 31, 2008. (Appellants' Appx. at 049-050).

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[8] Regardless, the special contracts of at least three of the Appellants (Kraft, Brush Wellman and Martin Marietta contain integration clauses stating that modification to their special contracts required a writing signed by authorized representatives of both parties. (Appellants' Supp. at 0042, 0049, and 0094)

Ignoring the clearly expressed language in the 2001 Amendments, the Commission relied solely upon parol evidence to conclude that the "February 2008 termination date was consistent with the ETP's method of calculation of the termination dates for contracts." (Appellants' Appx. at 051). The Commission reiterated that point in its Entry on Rehearing that:

> What the Commission did was review, in detail, the evidence and arguments in these cases, which included consideration of our previous orders in the ETP Case, RSP Case, and the RCP Case. As we stated previously, based upon our review, we concluded that the ETP stipulation specifically provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level and the February 2008 termination dates for the complainants' contracts were consistent with this method for calculating the termination dates. The fact that the Commission disagrees with the complainants' interpretation of the contract does not mean that we modified the contract; rather, we are appropriately interpreting our previous orders.

(Appellants' Appx. at 030). This Commission statement epitomizes the improper use of parol evidence to create a materially different agreement from that originally agreed upon by both Appellants and TE in their 2001 Amendments to continue their special contracts until RTC Charges were no longer collected. The Commission's use of evidence from the stipulations and orders in the ETP Case relating to kWh sales levels to not only contradict, but also to definitively change the termination dates of Appellants' special contracts. In doing so, the Commission erred because "[e]vidence can not be introduced to show an agreement between the parties materially different from that expressed by clear and unambiguous language of the instrument." *Blosser v. Enderlin, supra,* 113 Ohio St. 121, paragraph two of syllabus.

The clear and unambiguous language in the 2001 Amendments extended performance under Appellants' special contracts through a date certain – the date on which TE ceased the collection of its RTC Charges. The parties never intended for the 2001 Amendments to terminate in mid-2007, July 2008, or on the February 2008 meter read dates based on achieved kWh sales to calculate the termination dates, <u>unless</u> TE also ceased the collection of its RTC

Charges. The clear and unambiguous language of the 2001 Amendments does not refer to or depend upon TE reaching its kWh tracking goals.

This Court expressly recognizes that the parol evidence rule "assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document * * * were not intended by the parties to survive." *Bellman*, 113 Ohio St.3d at 326 Because the intent of the parties is embodied in the clear and unambiguous language of the 2001 Amendments to Appellants' special contracts, the termination date necessarily became tethered – through the language drafted by TE and approved by the Commission – to the date on which TE ceased collecting its RTC Charges. Had TE intended the termination date to be something else, TE should have written it into the 2001 Amendments.

Therefore, in direct violation of the parol evidence rule, the Commission committed reversible error by improperly using extrinsic evidence predating the 2001 Amendments to contradict (and change) the clear and unambiguous language in the 2001 Amendments.

PROPOSITION OF LAW NO. 3: The Public Utilities Commission acts unlawfully and unreasonably when it *sub silentio* exercises its "extraordinary" power under RC 4905.31 to change, alter or modify a contract without expressly invoking that authority and without express notice to counterparties to that contract that it is considering such an exercise.

The Commission erred by *sub silentio* exercising its "extraordinary" power under R.C. 4905.31 to modify the clear and unambiguous language of the 2001 Amendments to Appellants' special contracts without requiring that TE satisfy the Commission's public interest test. (Appellants' Appx. at 029 and 061-062).

TE argued the Commission modified the termination dates for the 2001 Amendments when approving the RCP Case to establish specific dates for termination of the special contracts without regard to collecting RTC Charges. (Appellants' Supp. at 0144). The Commission,

however, implicitly denied such a modification in its Opinion and Order, and explicitly did so in its Entry on Rehearing by affirmatively stating that its decision did not modify the contract. (Appellants' Appx. at 030).

Special arrangements approved by the Commission under R.C. 4905.31, such as Appellants' special contracts with TE, remain "subject to change, alteration, or modification by the commission." Even so, the Commission emphasized that this "power to modify existing contracts between a utility and its customers as conferred by Section 4905.31 must be viewed as an **extraordinary** power in light of constitutional restraints against impairment of the obligations of contract and constitutional guarantees of due process." (Emphasis added). *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, August 4, 1976 Opinion & Order, Case No. 75-161-EL-SLF. (Emphasis added) (Appellants' Supp. at 0656). Because the power "to modify contracts is an extraordinary power, the party seeking to invoke it is subject to a burden of the highest order." *Id.* In essence, these straightforward statements by the Commission establish two guiding principles when applying R.C. 4905.31: 1) the power to modify special contracts is an "extraordinary power"; and 2) exercising this extraordinary power is subject to a "burden of the highest order."

A. The Commission's "public interest" test.

To satisfy this burden of the highest order, a utility must make a "showing that the contract adversely affects the public interest." *Id.* The Commission's public interest test incorporates principles from the well-established Sierra-Mobile Doctrine at the federal level. This doctrine was established by the United States Supreme Court in the cases of *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* (1956), 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373, and *FPC v. Sierra Pacific Power Co.* (1956), 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388. This doctrine allows the Federal Energy Regulatory Commission ("FERC") to "abrogate or modify

freely negotiated private contracts that set firm rates or establish a specific methodology for setting the rates for service . . . **only if required in the public interest**." (Emphasis added). *Dominion Transmission, Inc. v. FERC* (C.A. D.C., 2008), 533 F.3d 845, 852-853. Thus, the Sierra-Mobile Doctrine recognizes that the "regulatory system. . . is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these [utility] agreements only in circumstances of unequivocal public necessity." *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment* (Sept. 12, 2007 Entry on Rehearing), Case No. 07-478-GA-UNC, citing *Permian Basin Area Rate Cases* (1968), 390 U.S. 747, 822, 747, 88 S.Ct. 1344, 20 L.Ed.2d 312. (Appellants' Supp. at 0649).

In fact, the doctrine expressly prohibits utility contracts from being "disturbed by a regulatory agency simply upon a showing that the arrangement [sic] is unprofitable or yields the company less than a fair rate of return." (*In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, August 4, 1976 Opinion & Order, Case No. 75-161-EL-SLF) (Appellants' Supp. at 0656). Instead, a utility contract (i.e. the 2001 Amendments) can only be modified when that contract "adversely affects the public interest."

B. The Commission, while denying modification of the 2001 Amendments, allowed TE to terminate the special contracts in February 2008 notwithstanding TE's continued collection of RTC Charges through December 31, 2008.

On rehearing, the Commission itself stated that it: "did not modify the terms of the complainants' special contracts," and thereby expressly admits that it did not exercise its

"extraordinary" modification powers under R.C. 4905.31. (Emphasis added) (Appellants' Appx. at 030).

Despite its own admission in its Entry on Rehearing, the Commission adopted TE's position, and *sub silentio* exercised its "extraordinary" power to amend, alter or modify Appellants' special contracts in concluding that the termination date of Appellants' special contracts was the meter read date in February 2008. The Commission's decision, however, violates its own precedent (i.e. the public interest test) without justification for the deviation.

In one of the seminal U.S. Supreme Court decisions that gave the Sierra-Mobile Doctrine its name, the Court explained "[W]hile it may be that the [FERC] may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair rate of return or that, if it does so, it is entitled to be relieved of its improvident bargain." *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.* (2008), 128 S.Ct. 2733, 2737, 171 L.E.2d 607, quoting *FPC v. Sierra Pacific Power Co.* (1956), 350 U.S. 348, 354-355. Recently, the Court elaborated on this principle, noting:

> [in] wholesale markets, the party charging the rates and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.' Therefore, only when the mutually agreed-upon contract rate seriously harms the consuming public may the Commission declare it not to be just and reasonable.

Id. at 2746.

The guiding principles used by the Commission in *Ohio Power* identified three situations when a utility contract "adversely affects the public interest" including when it:

1. "impairs the financial ability of the utility to continue to render service";
2. "creates an excessive burden on other customers of the company"; or
3. "results in unjust discrimination."

In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief, August 4, 1976 Opinion & Order, Case No. 75-161-EL-SLF (Appellants' Supp. at 0656). None of these circumstances exist in this case.

Perfectly apparent from the record in this case is the fact that TE failed to meet, or even attempt to meet, its "burden of the highest order" by showing that Appellants' special contracts in any way adversely affected the public interest. Here, TE attempts to rely on language from prior Commission orders and stipulations as tantamount to the exercise of the Commission's extraordinary power under R.C. 4905.31, despite offering no evidence that Appellants' special contracts adversely affect the public interest.

Indeed, TE did not, and could not, produce any evidence that the extension of Appellants' special contracts in accordance with the clear and unambiguous language in the 2001 Amendments would impair TE's (or its parent company, FirstEnergy's) financial ability to render continued service in northern Ohio.

TE presented no evidence that Appellants' special contracts would impair its financial ability to continue rendering service. TE is part of the "nation's fifth largest investor-owned electric system," (http://investors.firstenergycorp.com/phoenix.zhtml?c=102230&p=irol-homeprofile), FirstEnergy reported record profits in 2007. In fact, FirstEnergy's net income in 2007 was $1.31 billion, compared with net income of $1.25 billion in 2006 and $861 million in 2005. (2007 Annual Report, http://www.firstenergycorp.com/financialreports/index.html).

Furthermore, in 2006 alone, the 46 TE special contract customers paid approximately $165.2 million for electricity. (Appellants' Supp. at 0010). The 37 customers that did not extend their contracts under the terms of the RCP Case, including the Appellants, paid approximately $73.1 million for TE service in 2006. (Appellants' Supp. at 0010).

In addition, the special contracts entered into by the Appellants and TE do not create an excessive burden on other TE customers. TE's 46 special contract customers, including Appellants, provide TE with substantial revenues for electric services. Further, TE recovers its transition costs as part of those revenues. Indeed, the ETP Stipulation and ETP Order extended Appellants' special contracts under the 2001 Amendments until TE ceases collection of its RTC Charges, which occurred on December 31, 2008. Other TE customers benefit because these special contracts, including Appellants' special contracts, promote economic development in Ohio on the basis of jobs and purchases of goods and services within the service area. (Appellants' Supp. at 0564-0565). Clearly, the special contracts create no excessive burden on other customers purchasing electricity from TE – and in fact, enhance the public interest.

Finally, the special contracts, as statutory creatures properly enacted under R.C. 4905.31, provide for a reasonable and non-discriminatory classification of service for larger energy users. Special contracts under R.C. 4905.31 are designed to provide larger energy using special contract customers with "stable long-term competitive pricing of energy services" and "assure supplies of electricity and [to] enhance economic development." (Appellants' Supp. at 0528, explaining the purpose of the Revised RSP). Rather than discriminate among customers, these special contracts represent a long-recognized, reasonable service classification based on usage and service characteristics.

The Commission erred in *sub silentio* exercising its "extraordinary" powers under R.C. 4905.31 to change the clear and unambiguous termination date of Appellants' special contracts in violation of its own public interest test. Therefore, Appellants' special contracts remained in effect through the date on which TE ceased the collection of its RTC Charges – which occurred

on December 31, 2008. During those ten months, TE harmed Appellants by charging them higher rates for service than provided for by their special contracts.

PROPOSITION OF LAW NO. 4: The Public Utilities Commission violates the constitutional right to due process of law when it modifies the clear and unambiguous language of a contract in proceedings to which a signatory to the contract was not a party, did not receive adequate notice, and lacked an opportunity to be heard on the subject.

The Commission violated Appellants' due process rights by failing to give Appellants adequate notice or the opportunity to be heard on the subject of TE's alleged modification of the clear and unambiguous language of the 2001 Amendments. (Appellants' Appx. at 030-031 and 062-063).

The thrust of TE's argument, adopted by the Commission, blamed Appellants' failure to extend their special contracts under the RSP Stipulation on "ignorance, inattention, or deliberate choice" (*Brief of Respondent the Toledo Edison Company*, filed August 26, 2008, p. 2) – and the redress sought through the consolidated complaint proceedings by Appellants as an "over-active sense of entitlement." (*Brief of Respondent the Toledo Edison Company*, filed August 26, 2008, p. 2). However, even Commissioner Centolella recognized in his concurring opinion that TE's lack of notice was a cause for concern. (Appellants' Appx. at 033). TE's failure to provide notice to Appellants of the fact that the terms of their special contracts were allegedly being changed by the initial RSP filing on October 21, 2003 (let alone the opportunity to further extend their special contracts under the Revised RSP) as part of the RSP Case violates the fundamental principle of fairness as embodied in and protected by the due process clause.

A. Procedural Due Process: Notice and the Opportunity to be Heard.

The Due Process Clause of the Fifth Amendment, which applies to the states through the Fourteenth Amendment, states: ""No person shall * * * be deprived of life, liberty, or property, without due process of law." *In re Thompkins* (2007), 115 Ohio St. 3d 409, 411, 2007-Ohio-

5238, 875 N.E.2d 582. This phrase has been difficult to interpret and comes down to the concept of "fundamental fairness." *Id.* In essence, "[b]efore the state may deprive a person of a property interest, it must provide procedural due process consisting of notice and a meaningful opportunity to be heard. *Ohio Ass'n of Pub. Sch. Employees, AFSCME v. Lakewood City Sch. Dist. Bd. of Educ.* (1994), 68 Ohio St. 3d 175, 176, 624 N.E.2d 1043.

B. Appellants were harmed by TE's failure to notify, and/or provide legally adequate notice of TE's efforts to modify the termination provision in the 2001 Amendments.

The lack of notice resulted from a sequence of events in the RSP Case beginning with the newspaper notice published in the Toledo Blade on November 6, 2003. TE filed the RSP Case in September 2003, followed by TE's October 21, 2003 request to, among other things, modify regulatory accounting practices and establish regulatory transition charges after the market development period ended. (Appellants' Supp. at 0526). The October 21, 2003 filing included the language that: "This Plan does not affect the termination dates for special contracts as such dates would have been determined under Case 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008." (Appellants' Supp. at 0009).

Following the filing of the RSP, TE published a legal notice in the Toledo Blade, (Appellants' Supp. at 0011 and 0079) on November 6, 2003 which explained:

> The Public Utilities Commission of Ohio has scheduled hearings * * * to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals, and to Establish Regulatory Transition Charges Following the Market Development Period.

Nowhere in this notice is there any indication that Appellants' special contracts would be discussed in the RSP, let alone unilaterally modified. In fact, the notice failed to mention that a rate stabilization plan had been filed, or was going to be filed. Also, the notice did not alert readers to the possibility of other proposals not included in the initial RSP filing.

In its order, the Commission unlawfully concluded that TE's referral to the "RTC charge" as an issue in the RSP Case resulted in publication of a sufficient notice on November 6, 2003. Past precedent of this Court, developed in the context of notices under R.C. 4909.19, supports Appellants' position that the RSP notification was deficient because it: 1) caused interested special contract customers (i.e. Appellants) not to know about the initial RSP proposal; 2) discouraged participation by special contract customers (i.e. Appellants) by not knowing about the RSP; and 3) resulted in the denial of an opportunity to present evidence during those hearings on the meaning and scope of the undisclosed proposal to extend the contracts of TE's special contract customers. Further, the notice failed to draw attention to possible additional proposals (i.e. the RSP Stipulation or Revise RSP).

For example, in *Committee Against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St. 2d 231, 371 N.E.2d 547, the applicant filed for approval of measured rate telephone service, but the published notice under RC 4909.19 failed to mention that service. RC 4909.19 requires publication of the substance and prayer of the application to increase rates for distribution services by the public utility in the form approved by the Commission. Instead, the notice only generally referred to the measured rate telephone service in the exhibits to the application. Challenging the notice, a committee of customers alleged the denial of due process based upon the opportunity to be heard by the Commission. This Court agreed, reasoning that subscribers would have no interest in participating in the hearings simply from reading the published notice. The notice's failure to specifically mention measured rate telephone service denied subscribers the opportunity to present evidence opposing the selected experimental area and the proposed service.

In a similar case, *Assn. of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St. 2d 172, 398 N.E. 2d 784, the applicant attempted to cure a deficient notice by enclosing information about the measured rate service increase in brochures mailed with the monthly bills. This Court deemed the proposed cure insufficient to satisfy the mandatory legal notice requirement in R.C. 4909.19. *Assn. of Realtors,* 60 Ohio St. 2d at 175-176. Citing to its prior precedent in *Against MRT*, the Court reasoned that insufficient notice would cause subscribers not to know about the rate service, cause disinterest in participating during the hearings, and consequently, deny them the opportunity to present evidence during Commission hearings on the undisclosed proposal. The remedy required re-noticing and resumed evidentiary hearings. *Assn. of Realtors,* 60 Ohio St. 2d 176.

C. TE's insufficient Notice (Actually Lack of Notice Whatsoever) Harmed Appellants.

Appellants were harmed by the insufficient notice because, months after its publication, TE and other parties in the RSP Case agreed to and filed the RSP Stipulation on February 11, 2004. (Appellants' Supp. at 0006-0007). None of the Appellants intervened in the RSP Case, and none signed the RSP Stipulation. (Appellants' Supp. at 0007). TE separately filed the RSP Stipulation and incorporated it into the Revised RSP, which was re-filed with the Commission on February 24, 2004 through the direct testimony of Anthony J. Alexander. (Joint Stipulation, ¶ 38) (See Appellants' Supp. at 0007). The Revised RSP expanded upon the language of Section VIII(8) as set forth in the initial RSP Stipulation by adding the underlined language below:

> This Plan does not affect the termination dates for special contracts as such dates would have been determined under Case 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008, <u>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.</u>

(Appellants' Supp. at 0009-0010 and 0582). Both the initial RSP Stipulation and Revised RSP arising from the filing of the case included language stating: "This Plan does not affect the termination dates for special contracts as such date would have been determined under Case No. 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008." Even if Appellants' failure to extend their special contracts under the RSP Stipulation could be blamed on "ignorance, inattention, or deliberate choice," (*Brief of Respondent the Toledo Edison Company*, filed August 26, 2008, p. 2), as suggested by TE, the fact that TE directly stated the RSP Case had no effect on Appellants' special contracts would justify any alleged "ignorance" or "inattention."

Despite this very significant addition to the RSP Stipulation, TE did not publish a new notice or directly notify any of its 46 special contract customers, including Appellants. Because none of the Appellants was a party to the RSP Case, TE's failure to provide direct notice under the circumstances meant that Appellants failed to receive any reasonable notice of the extension offer. Furthermore, the legal notice published by the Commission regarding the RSP Case did <u>not</u> describe the need (let alone opportunity) to further extend or "re-extend" the special contracts and did not mention the filing of an RSP or any stipulation. In fact, the published notice could not have done so because the notice preceded both the RSP Stipulation and the much later introduction of the revised RSP Stipulation. (Appellants' Supp. at 0007 and 0011).

TE claims that: 1) the newspaper notice specifically mentioned Regulatory Transition Charges, which provided Appellants "and their energy management departments and outside energy consultants sufficient incentive to follow the course of the RSP Case"; and 2) publication of the RSP Order in June 2004 through the Commission's docketing system was sufficient to give special contract customers notice of the 30-day window to extend their contracts. These

contentions, however, seek to unreasonably shift the blame from both TE and the Commission's failure to abide by the constitutional protections afforded by the due process clause.

The newspaper notice did not provide Appellants with proper notice that the terms of their special contracts could potentially be modified in the RSP Case. Appellants' lack of knowledge is exemplified by the following:

- *None* of the individual Appellants intervened in the RSP Case.
- *None* of the individual Appellants was a signatory to the RSP Stipulation or Revised RSP.
- *None* of the Appellants had an energy consultant or any other representative monitoring the RSP Case.
- Of the 46 TE special contract customers who were eligible to extend their special contracts as provided for in the Revised RSP, TE received requests from only nine (9) within the required 30-day time period. None of the nine had intervened in the RSP Case, but all were represented in the case by either the IEU or OEG, based upon their membership in those organizations.
- Members of the intervening industrial groups (IEU-Ohio and OEG) who participated in the RSP Case were the only special contract customers to actually receive direct notice of this offer to extend. None were members of either IEU-Ohio or OEG at that time.[9]
- Appellants were not alerted to the substance of the rate stabilization plan or subsequent stipulations so as to allow them to appear at the evidentiary hearings to present evidence and defend their interests.
- TE extended the term of the special contract for each customer requesting an extension, but after filing the RSP Stipulation, revised RSP Stipulation, or RSP Order, did not directly notify each special contract customer through direct mailings or bill inserts of the opportunity to extend their contracts. (Appellants' Supp. at 0011).
- None of the individual Appellants were notified by their respective TE customer service representative of the RSP Stipulation, the Revised RSP, the RSP Order, or the 30-day window for extending special contracts.

[9] By providing service copies to intervenors and other interested persons, it is clear that TE did not exclusively rely on the Commission docketing electronic system for making that offer.

For non-participants, such as Complainants, TE made the "offer to extend" by merely filing the Revised RSP in the Commission docketing system during the middle of the case. TE allegedly relied on the public docketing system to notify non-intervenors, such as Complainants, of the extension rights in Paragraph VIII(8) of the Revised RSP. But, as Complainants' expert witness Tony J. Yankel testified, this same public docketing system has:

> *** approximately two thousand cases filed every year ***. This particular case, the RSP case, contained 12,932 pages. To monitor each one of those pages and expecting something in one paragraph to pop out at you, I think that's a severe burden ***.

(Appellants' Supp. at 0328-0329).

Kraft witness Richard Leggett also testified that he "found it rather challenging" to navigate the Commission's public docketing system. (Appellants' Supp. at 0251). Furthermore, by the time the Revised RSP finally was filed on the public docket and the 30-day window came into existence, the period for intervention was over. A Commission Entry dated November 7, 2003 set the deadline for intervening in the RSP Case as December 10, 2003. The Revised RSP was filed along with the Rebuttal Testimony of Anthony J. Alexander on February 24, 2004 – more than three months after the deadline for intervening.

D. The Remedy for TE's Insufficient Notice to Appellants.

If the Court rules in Appellant' favor under Propositions of Law 1, 2, or 3 finding that the 2001 Amendments continued through December 31, 2008 – the date on which TE ceased its RTC Charges, the Court need not reach Proposition of Law 4. However, a contract based remedy is warranted if the Court finds in Appellants' favor on Proposition 4. Insufficient notice denied Appellants knowledge about the RSP Stipulation, and in particular revised and expanded Paragraph (VIII)(8), thereby denying Appellants the opportunity to intervene and otherwise oppose the RSP Stipulation. The remedy proposed by Appellants is reformation of the 2001

Amendments to provide for termination on December 31, 2008 as if extended within 30 days of the RSP Order issued on June 9, 2004.

II. CONCLUSION

Appellants respectfully submit that the Commission's February 19, 2009 Opinion and Order and April 15, 2009 Entry on Rehearing are unreasonable and/or unlawful and should be reversed. This case should be remanded to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,

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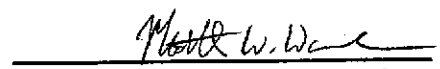
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Joint Merit Brief of Appellants was served by electronic mail and regular mail this 21st day of August 2009.



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IN THE SUPREME COURT OF OHIO

Martin Marietta Magnesia Specialties, LLC, The Calphalon Corporation, Kraft Foods Global, Inc., Worthington Industries and Brush Wellman, Inc.,	))))))	Case Nos. 2009-1064, 2009-1065, 2009-1067, 2009-1071, and 2009-1072
Appellants,	)	
v.	)))	On Appeal from the Public Utilities Commission of Ohio
The Public Utilities Commission of Ohio,	)	Case Nos. 08-67-EL-CSS, 08-145-EL-CSS, 08-146-EL-CSS, 08-254-EL-CSS, and 08-893-EL-CSS
Appellee.	)	

APPENDIX TO JOINT APPELLANTS' MERIT BRIEF

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In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Pilkington North American, Inc. v. The Toledo Edison Company, PUCO Case Nos. 08-67-EL-CSS, *et al.*, Entry on Rehearing (April 15, 2009) 025

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IN THE SUPREME COURT OF OHIO

In the Matter of Martin Marietta Magnesia Specialties, LLC,	:	Case Nos. 09-1064
Appellant,	:	
v.	:	Appeal from the Public Utilities Commission of Ohio
The Public Utilities Commission of Ohio,	:	Public Utilities Commission of Ohio: Case No. 08-0893-EL-CSS
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT, MARTIN MARIETTA MAGNESIA SPECIALTIES, LLC.

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FILED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT, MARTIN MARIETTA MAGNESIA SPECIALTIES, LLC.

Appellant, Martin Marietta Magnesia Specialties, LLC ("Martin Marietta"), pursuant to R.C. § 4903.11, R.C. § 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notices to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Commission") of this appeal to the Supreme Court of Ohio. The appeal is from Appellee's Opinion and Order entered on February 19, 2009, and the Entry on Rehearing entered on April 15, 2009, in the above captioned case. The Commission consolidated this case against The Toledo Edison Company ("Toledo Edison") with other similar complaints against Toledo Edison brought by Kraft Foods Global Inc. (Case No. 08-146), Worthington Industries (Case No. 08-67), The Calphalon Corporation (Case No. 08-145), Pilkington North America, Inc. (Case No. 08-255) and Brush Wellman, Inc. (Case No. 08-254).

On March 20, 2009, Appellant timely filed an Application for Rehearing from the Commission's Opinion and Order dated February 19, 2009, pursuant to R.C. § 4903.10. The Commission denied the Application for Rehearing with respect to the issues being raised in this appeal by an Entry on Rehearing entered April 15, 2009.

Appellant files this Notice of Appeal, complaining and alleging that both the February 19, 2009, Opinion and Order and the April 15, 2009, Entry on Rehearing, are unlawful and unreasonable, and that the Appellee erred as a mater of law in the following respects as raised in the Appellant's Application for Rehearing:

1. The Commission erred in permitting Toledo Edison to unilaterally terminate its special contract for electric services with Appellant (the "Special Contract") in February 2008 by failing to apply the clear and unambiguous language of the 2001 amendment to the Special Contract, which extended the term of the Special

Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

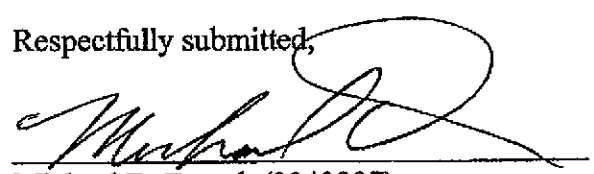
2. The Commission erred by using parol evidence to interpret, and then modify, the clear and unambiguous language in the 2001 amendment to the Special Contract that extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

3. The Commission erred in permitting Toledo Edison to unilaterally modify the clear and unambiguous language of the 2001 amendment to the Special Contract by failing to invoke, but nonetheless *sub silentio* exercising, its "extraordinary" power under RC 4905.31 to change, alter or modify the termination date of the Special Contract.

4. In violation of Appellant's constitutional right to due process of law, the Commission erred in permitting Toledo Edison to rely on regulatory decisions in proceedings, to which Appellant was not a party, did not receive adequate notice, and lacked an opportunity to be heard on the subject, to modify the clear and unambiguous language in the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

WHEREFORE, Appellant respectfully submits that Appellee's February 19, 2009 Opinion and Order, and the April 15, 2009 Entry on Rehearing are unreasonable or unlawful 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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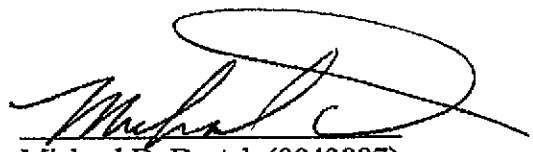
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Martin Marietta Magnesia Specialties, LLC was served upon the Chairman of the Public Utilities Commission of Ohio by delivering a copy at the office of the Chairman at 180 East Broad Street, Columbus, Ohio 43215, and upon the parties of record listed below by regular U.S. Mail, this 12 day of June 2009.



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CERTIFICATE OF FILING

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

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Trial Attorney for Appellant,
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ORIGINAL

IN THE SUPREME COURT OF OHIO

THE CALPHALON CORPORATION,	:	
Appellant,	:	Appeal from the Public Utilities Commission of Ohio
v.	:	09-1065
THE PUBLIC UTILITIES COMMISSION OF OHIO,	:	Public Utilities Commission of Ohio Case No. 08-145-EL-CSS
Appellee.	:	

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NOTICE OF APPEAL

Appellant The Calphalon Corporation, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or the "Commission") of this appeal to the Supreme Court of Ohio from: 1) Appellee's Opinion and Order entered in its Journal on February 19, 2009; and 2) Appellee's Entry on Rehearing entered in its Journal on April 15, 2009 in the above captioned case, which had been consolidated with the cases of Worthington Industries (Case No. 08-67), Kraft Foods Global, Inc. (Case No. 08-146), Brush Wellman, Inc. (Case No. 08-254), and Martin Marietta Magnesia Specialties, LLC (Case No. 08-893).

On March 20, 2009, and pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the Opinion and Order dated February 19, 2009. The Appellant's Application for Rehearing was denied with respect to the issues being raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on April 15, 2009.

Appellant files this Notice of Appeal, complaining and alleging that both Appellee's February 19, 2009 Opinion and Order, and Appellee's April 15, 2009 Entry on Rehearing, are unlawful and unreasonable, and that the Appellee erred as a matter of law in the following respects, as raised in the Appellant's Application for Rehearing:

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2. The Commission erred by using parol evidence to interpret, and then modify, the clear and unambiguous language in the 2001 amendment to the Special Contract that extended the term of the Special Contract through December 31, 2008, the

date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

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4. In violation of Appellant's constitutional right to due process of law, the Commission erred in permitting Toledo Edison to rely on regulatory decisions in proceedings, to which Appellant was not a party, did not receive adequate notice, and lacked an opportunity to be heard on the subject, to modify the clear and unambiguous language in the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

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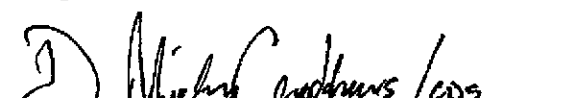
Respectfully submitted,



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THE CALPHALON CORPORATION

Certificate of Service

I hereby certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to all parties to the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code on June 12, 2009.

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D. Michael Grodhaus, Counsel of Record

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Certificate of Filing

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

D. Michael Grodhaus /ODS

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2009 JUN 12 PM 12: 32
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IN THE SUPREME COURT OF OHIO

Kraft Foods Global, Inc	)	Case No. 09-1067
Appellant,	)	Appeal from the Public Utilities Commission of Ohio
v.	)	
The Public Utilities Commission of Ohio,	)	Public Utilities Commission of Ohio: Case No 08-146-EL-CSS
Appellee.	)	

NOTICE OF APPEAL OF APPELLANT, KRAFT FOODS GLOBAL, INC.

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FILED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF THE APPEAL OF APPELLANT, KRAFT FOODS GLOBAL, INC.

Appellant, Kraft Foods Global, Inc., pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notices to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "Commission") of this appeal to the Supreme Court of Ohio. The appeal is from Appellee's Opinion and Order entered into its Journal on February 19, 2009, and the Entry on Rehearing entered in its Journal on April 15, 2009 in the above captioned case 08-146-EL-CSS before the Commission. Appellant, Kraft Foods Global, Inc., was the complainant in this proceeding. The Case is entitled *In the Matter of the Complaint of Kraft Foods Global, Inc. v. The Toledo Edison Company.* In light of similar facts and analogous issues, the Commission consolidated the Kraft complaint case with complaints against Toledo Edison by Worthington Industries (Case No. 08-146), The Calphalon Corporation (Case No. 08-145), Brush Wellman, Inc. (Case No. 08-254), and Martin Marietta Magnesia Specialties, LLC (Case No. 08-893).

On March 20, 2009, Appellant timely filed, pursuant to R.C. 4903.10, an Application for Rehearing from the Opinion and Order, dated February 19, 2009. The Appellant's Application for Rehearing was denied with respect to the issues being raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on April 15, 2009.

Appellant files this Notice of Appeal, complaining and alleging that both Appellee's February 19, 2009 Opinion and Order, and Appellee's April 15, 2009 Entry on Rehearing, are unlawful and unreasonable, and that the Appellee erred as a matter of law in the following respects, as raised in the Appellant's Application for Rehearing:

1. The Commission erred in permitting Toledo Edison to unilaterally terminate its special contract for electric services with Appellant (the "Special Contract") in February 2008 by failing to apply the clear and unambiguous language of the 2001 amendment to the Special Contract, which extended the term of the Special

Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

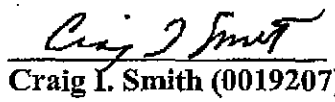
2. The Commission erred by using parol evidence to interpret, and then modify, the clear and unambiguous language in the 2001 amendment to the Special Contract that extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

3. The Commission erred in permitting Toledo Edison to unilaterally modify the clear and unambiguous language of the 2001 amendment to the Special Contract by failing to invoke, but nonetheless *sub silentio* exercising, its "extraordinary" power under RC 4905.31 to change, alter or modify the termination date of the Special Contract.

4. In violation of Appellant's constitutional right to due process of law, the Commission erred in permitting Toledo Edison to rely on regulatory decisions in proceedings, to which Appellant was not a party, did not receive adequate notice, and lacked an opportunity to be heard on the subject, to modify the clear and unambiguous language in the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

Wherefore, Appellant respectfully submits that Appellee's February 19, 2009 Opinion and Order, and Appellee's April 15, 2009 Entry on Rehearing, are unreasonable and/or unlawful 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 Appellant,
Kraft Foods Global, Inc.

Certificate of Filing

I certify that a Notice of Appeal of Kraft Foods Global, Inc. 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.

Craig I. Smith
Counsel for Appellant,
Kraft Foods Global, Inc.

Certificate of Service

I certify that a copy of the Notice of Appeal of Kraft Foods Global, Inc. was served, as listed below, upon The Toledo Edison Company, and the Public Utilities Commission of Ohio, by regular U.S. Mail, postage pre-paid, and upon the Chairman of the Public Utilities Commission of Ohio, pursuant to section 4903.13 of the Revised Code, by leaving a copy at the office of the Chairman in Columbus, Ohio 43215, this 12th day of June 2009.

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Public Utilities Commission of Ohio

Craig I. Smith
Counsel for Appellant,
Kraft Foods Global, Inc.

IN THE SUPREME COURT OF OHIO

Worthington Industries, Appellant, v. The Public Utilities Commission of Ohio, Appellee.	))))))))))	Case No. 09-1071 Appeal from the Public Utilities Commission of Ohio Case No. 08-67-EL-CSS

NOTICE OF APPEAL OF APPELLANT WORTHINGTON INDUSTRIES

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Counsel for Appellee, Public Utilities Commission of Ohio

FILED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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NOTICE OF APPEAL

Appellant, Worthington Industries, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or the "Commission") of this appeal to the Supreme Court of Ohio from: 1) Appellee's Opinion and Order entered in its Journal on February 19, 2009; and 2) Appellee's Entry on Rehearing entered in its Journal on April 15, 2009 in the above captioned case, which had been consolidated with the cases of The Calphalon Corporation (Case No. 08-145), Kraft Foods Global, Inc. (Case No. 08-146), Brush Wellman, Inc. (Case No. 08-254), and Martin Marietta Magnesia Specialties, LLC (Case No. 08-893).

On March 20, 2009, and pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the Opinion and Order dated February 19, 2009. The Appellant's Application for Rehearing was denied with respect to the issues being raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on April 15, 2009.

Appellant files this Notice of Appeal, complaining and alleging that both Appellee's February 19, 2009 Opinion and Order, and Appellee's April 15, 2009 Entry on Rehearing, are unlawful and unreasonable, and that the Appellee erred as a matter of law in the following respects, as raised in the Appellant's Application for Rehearing:

1. The Commission erred in permitting Toledo Edison to unilaterally terminate its special contract for electric services with Appellant (the "Special Contract") in February 2008 by failing to apply the clear and unambiguous language of the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

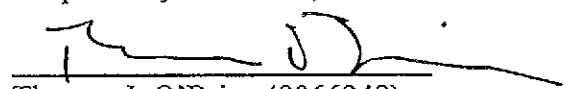
2. The Commission erred by using parol evidence to interpret, and then modify, the clear and unambiguous language in the 2001 amendment to the Special Contract that extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

3. The Commission erred in permitting Toledo Edison to unilaterally modify the clear and unambiguous language of the 2001 amendment to the Special Contract by failing to invoke, but nonetheless *sub silentio* exercising, its "extraordinary" power under RC 4905.31 to change, alter or modify the termination date of the Special Contract.

4. In violation of Appellant's constitutional right to due process of law, the Commission erred in permitting Toledo Edison to rely on regulatory decisions in proceedings, to which Appellant was not a party, did not receive adequate notice, and lacked an opportunity to be heard on the subject, to modify the clear and unambiguous language in the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

WHEREFORE, Appellant respectfully submits that Appellee's February 19, 2009 Opinion and Order, and Appellee's April 15, 2009 Entry on Rehearing, are unreasonable and/or unlawful 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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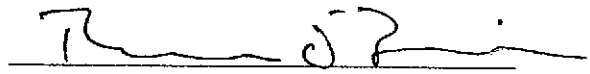
Counsel for Appellant
Worthington Industries

CERTIFICATE OF FILING

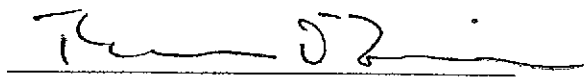
I certify that a Notice of Appeal of Worthington Industries has been filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



Thomas J. O'Brien
Counsel for Appellant
Worthington Industries

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Worthington Industries was served upon Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman at 180 East Broad Street, Columbus, Ohio 43215, and upon the parties of record listed below by regular U.S. Mail, this 12th day of June 2009.



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IN THE SUPREME COURT OF OHIO

Brush Wellman, Inc.,	)	09-1072
	)	
Appellant,	)	Case No. _____
	)	
v.	)	
	)	Appeal from the Public
The Public Utilities Commission of Ohio,	)	Utilities Commission of Ohio
	)	Case No. 08-254-EL-CSS
Appellee.	)	
	)	

NOTICE OF APPEAL OF APPELLANT BRUSH WELLMAN, INC.

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FILED
JUN 12 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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NOTICE OF APPEAL

Appellant, Brush Wellman, Inc., pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or the "Commission") of this appeal to the Supreme Court of Ohio from: 1) Appellee's Opinion and Order entered in its Journal on February 19, 2009; and 2) Appellee's Entry on Rehearing entered in its Journal on April 15, 2009 in the above captioned case, which had been consolidated with the cases of Worthington Industries, Inc. (Case No. 08-67), The Calphalon Corporation (Case No. 08-145), Kraft Foods Global, Inc. (Case No. 08-146), and Martin Marietta Magnesia Specialties, LLC (Case No. 08-893).

On March 20, 2009, and pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the Opinion and Order dated February 19, 2009. The Appellant's Application for Rehearing was denied with respect to the issues being raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on April 15, 2009.

Appellant files this Notice of Appeal, complaining and alleging that both Appellee's February 19, 2009 Opinion and Order, and Appellee's April 15, 2009 Entry on Rehearing, are unlawful and unreasonable, and that the Appellee erred as a matter of law in the following respects, as raised in the Appellant's Application for Rehearing:

1. The Commission erred in permitting Toledo Edison to unilaterally terminate its special contract for electric services with Appellant (the "Special Contract") in February 2008 by failing to apply the clear and unambiguous language of the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

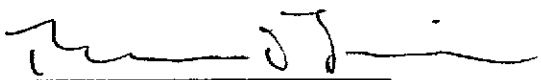
2. The Commission erred by using parol evidence to interpret, and then modify, the clear and unambiguous language in the 2001 amendment to the Special Contract that extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

3. The Commission erred in permitting Toledo Edison to unilaterally modify the clear and unambiguous language of the 2001 amendment to the Special Contract by failing to invoke, but nonetheless *sub silentio* exercising, its "extraordinary" power under RC 4905.31 to change, alter or modify the termination date of the Special Contract.

4. In violation of Appellant's constitutional right to due process of law, the Commission erred in permitting Toledo Edison to rely on regulatory decisions in proceedings, to which Appellant was not a party, did not receive adequate notice, and lacked an opportunity to be heard on the subject, to modify the clear and unambiguous language in the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

WHEREFORE, Appellant respectfully submits that Appellee's February 19, 2009 Opinion and Order, and Appellee's April 15, 2009 Entry on Rehearing, are unreasonable and/or unlawful 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 Appellant
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CERTIFICATE OF FILING

I certify that a Notice of Appeal of Brush Wellman, Inc. 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.

Thomas J. O'Brien
Counsel for Appellant
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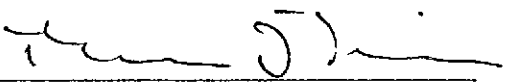
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Brush Wellman, Inc. was served upon Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman at 180 East Broad Street, Columbus, Ohio 43215, and upon the parties of record listed below by regular U.S. Mail, this 12th day of June 2009.



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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of	)	
Worthington Industries,	)	
The Calphalon Corporation,	)	
Kraft Foods Global, Inc.,	)	
Brush Wellman, Inc., and	)	
Martin Marietta Magnesia Specialties, LLC,	)	Case Nos. 08-67-EL-CSS
	)	08-145-EL-CSS
Complainants,	)	08-146-EL-CSS
	)	08-254-EL-CSS
v.	)	08-893-EL-CSS
	)	
The Toledo Edison Company,	)	
	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC, (collectively, complainants) filed complaints against The Toledo Edison Company (TE) between January 23, 2008, and July 17, 2008. These complaints were consolidated, due to the fact that the underlying facts set forth by the complainants are similar. Generally, the complainants alleged that TE attempted to unilaterally amend the special contracts it entered into with the complainants. According to the complainants, TE's actions are unjust, unreasonable, and unlawful and in violation of Sections 4905.22, 4905.31, 4905.32, 4905.35, Revised Code, and Rule 4901:1-1-03, Ohio Administrative Code.

(2) By opinion and order issued February 19, 2009, the Commission dismissed the complaints finding that the complainants had not provided sufficient evidence to demonstrate that TE had violated any applicable order, statute, or regulation. The Commission noted that the complainants are seeking a determination by the Commission that the rates set forth in the special contracts entered into between the complainants and TE, as amended in 2001, should continue

through the date on which TE ceases collecting the RTC charges, which the complainants submit is December 31, 2008. The Commission further noted that TE, on the other hand, insists that the special contracts terminate on the complainants' billing dates in February 2008, as provided for in the rate certainty plan (RCP),[1] which is consistent with the method set forth in the electric transition plan (ETP)[2] for calculating the end dates for the special contracts. In arriving at its conclusion, the Commission reviewed the stipulations and orders in the *ETP Case*, the *RSP Case*,[3] and the *RCP Case*.

Initially, the Commission took note of the fact that the stipulation approved in the *ETP Case* required TE to notify its special contract customers that they could extend their current contracts through the date on which the RTC charges cease for TE; further, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kilowatt hour (kWh) sales level. In response to this offer, the complainants opted to extend their initial special contracts and entered into the 2001 amendments with TE.

Next, the Commission noted that the stipulation approved in the *RSP Case* did not require that TE provide notice to its special contracts customers that they had the option to extend their contracts. However, based on the arguments in the cases, the Commission believed the complainants were looking to the Commission to conclude, almost five years after the order in the *RSP Case*, that TE should have provided written or oral notice to the special contract customers of the option to extend the provisions of the contract even though no such notice was required by the Commission's order in the *RSP Case*. The

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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) (*RCP Case*).

2 *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) (*ETP Case*).

3 *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*).

Commission concluded in these cases that such a finding would be inappropriate and found no merit in the complainants' arguments on this point.

Turning to the provisions in the *RCP Case*, the complainants believed that no language in the stipulation approved in the *RCP Case* relieved TE of its obligation under the 2001 amendments to perform those agreements until it ceased collection of the RTC charges. However, the Commission, in its conclusion in these cases, reiterated the point that the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level and, therefore, the February 2008 termination date approved in the *RCP Case* was consistent with the ETP's method of calculation of the termination dates for the contracts. The Commission concluded that the record in these cases clearly reflects that, regardless of the sales calculation, no scenario results in continuation of the special contracts through December 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 20, 2009, the complainants filed an application for rehearing of the Commission's February 19, 2009, order in these cases.[4] The complainants set forth three grounds for rehearing.

(5) On March 30, 2009, TE filed a memorandum in opposition to the complainants' joint application for rehearing stating that the request simply reiterates arguments that were considered and rejected by the Commission in its order in these cases.

(6) In their first ground for rehearing, the complainants assert that the Commission failed to apply the clear and unambiguous termination language in the 2001 amendments to the special contracts. According to the complainants, the language in the 2001 amendments provides that the contracts will terminate on

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4 The Commission notes that the February 19, 2009, order addressed the above captioned complaints, as well as the complaint filed by Pilkington North America, Inc. (Pilkington), in Case No. 08-255-EL-CSS. However, Pilkington did not file an application for rehearing of the Commission's order.

the date that TE stops collecting RTC charges. TE stopped collecting RTC charges on December 31, 2008; therefore, complainants' argue that the termination date for the contracts is December 31, 2008. Contrary to the Commission's conclusion, the complainants insist that the termination provisions of their contracts are not based on the attainment of defined kWh sales levels as suggested by the stipulations in the *ETP Case*, *RSP Case*, and the *RCP Case*. Furthermore, the complainants argue that it is irrelevant that the RTC charges continued beyond the date the defined kWh sales were achieved, because the only legally relevant fact is that the termination provisions in the 2001 amendments are tied to the cessation of the RTC charges, and anything outside of the 2001 amendments (i.e., the parol evidence contained in the stipulations in the *ETP Case*, *RSP Case*, and the *RCP Case*) is irrelevant.

(7) In response to the complainants' first ground for rehearing, TE states that the Commission applied the correct termination date, February 2008, to the contracts. According to TE, the Commission rightly determined that the ETP stipulation, under which the complainants extended their contracts, provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh level. Subsequently, the *RSP Case* gave the complainants the opportunity to further extend their contracts; then the *RCP Case* held that contracts extended under the ETP, but not the RSP, would continue until the meter read date in February 2008. TE points out that, without reference to the definition of RTC charges in the various Commission orders and the associated stipulations, the termination language contained in the special contracts would have no meaning. TE submits that the complainants continue to ignore the fact that what is being collected today in the RTC charge is not what was collected in 2001. Moreover, TE states that, since the Commission has the express authority to modify the contracts at issue, the complainants' argument relating to the issues that the Commission may consider, whether parol evidence or not, must fail. TE reasons that the complainants did not extend their agreement under the *RSP Case* and now they are attempting to collaterally attack the Commission's decision in the *RSP Case* for their own failure to act.

(8) With regard to the complainants' first ground for rehearing, the Commission finds that they have raised no new issue that we did not already consider at length in our order. The complainants are essentially asking us to ignore the language in the stipulation approved in the *ETP Case* which ties the calculation of the RTC charges to kWh sales, even though it was the *ETP Case* that formed the basis for the 2001 amendments. As we recognized in our order, the ETP stipulation specifically provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level; the February 2008 termination dates for the complainants' contracts were consistent with this method for calculating the termination dates. Furthermore, the complainants were given an opportunity in the subsequent *RSP Case* to extend their contracts. The fact that the complainants did not follow the *RSP Case* and extend their contracts cannot now be cured by redefining the meaning of RTC charges as set forth in the *ETP Case*. Therefore, we conclude that the complainants' request for rehearing on this issue is without merit and should be denied.

(9) In their second ground for rehearing, the complainants assert that the Commission erred by modifying the terms of the complainants' special contracts without requiring TE to meet the burden imposed by Section 4905.31, Revised Code, and show that modification of the termination date was needed to protect the public interest. According to the complainants, the Commission's conclusion that the termination date of the contracts is tied to the kWh sales level is not legally supportable because it ignores the language of the special contracts entered into by TE and the complainants, in favor of language contained in a stipulation to which only TE, and not the complainants, is a party.

(10) Contrary to the assertions by the complainants in their second assignment of error, TE submits that neither the Commission nor TE improperly modified the contracts in any way. TE believes that, when the Commission fixed the termination date of the complainants' contracts in the RCP order, the Commission was not acting because the rates in the contracts were unreasonable or unjust, but the Commission "was simply fixing what was up until then a moving target so as to ensure that the parties' intentions were satisfied." Furthermore, TE

offers that no party sought to set aside the contracts in a manner that would be subject to the statutory public interest standard of review. Rather, TE posits that, because the RCP order materially altered the process for collecting RTC charges, the Commission had to decide what the termination date would be for those contracts that were tied to the original RTC charge.

(11) To clarify, through our order, the Commission did not modify the terms of the complainants' special contracts. What the Commission did was review, in detail, the evidence and arguments in these cases, which included consideration of our previous orders in the *ETP Case*, *RSP Case*, and the *RCP Case*. As we stated previously, based upon our review, we concluded that the ETP stipulation specifically provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level and the February 2008 termination dates for the complainants' contracts were consistent with this method for calculating the termination dates. The fact that the Commission disagrees with the complainants' interpretation of the contract does not mean that we modified the contract; rather, we are appropriately interpreting our previous orders. Accordingly, we find that the complainants' second ground for rehearing is without merit and should be denied.

(12) The complainants contend, in their third ground for rehearing, that the Commission's order violates the complainants' right to due process. In support of this argument, the complainants note that none of them were parties to the *ETP Case*, *RSP Case*, or the *RCP Case*, and TE never brought an action against any of them under Section 4905.26, Revised Code, to obtain a determination that the special contract termination provisions were unreasonable or unlawful under Sections 4905.22 or 4905.31, Revised Code, or any other statutory provision. Therefore, the complainants posit that they were never given adequate notice or the opportunity to be heard on the subject of TE's efforts to modify the termination provisions in the contracts.

(13) TE responds to the complainants' third ground for rehearing by pointing out that the issue of whether the complainants were required to join as parties to the *RSP Case* and the *RCP Case* was "extensively considered by the Commission" in the order in

these cases. According to TE, the Commission appropriately acknowledged that: neither the stipulation nor the order in the *RSP Case* required TE to provide notice to special contracts customers; the newspaper publication in the *RSP Case* referenced the RTC charge as an issue in that case; the complainants have experts in their employ that could have tracked the *RSP Case*; and that all of TE's special contracts customers, including the complainants, had the same opportunity to participate in the *RSP Case*.

(14) Upon consideration of the complainants' third assignment of error, the Commission finds that it is without merit. Again, contrary to the complainants' position, the Commission did not modify the termination provisions of the special contracts. Moreover, as TE points out, we thoroughly reviewed and considered all of the evidence and arguments raised in these cases. The complainants took advantage of the opportunity presented by virtue of the *ETP Case* to extend their contracts; however, they then wish to submit that their rights to due process were violated because they were not parties to the case. Similarly, the complainants could have either been parties to the *RSP Case* and the *RCP Case* or they could have had their experts follow the cases. In any event, the record in these cases clearly indicates, as reflected in our order, that the complainants were properly afforded due process. Accordingly, we conclude that the complainants' third ground for rehearing should be denied.

ORDER:

It is, therefore,

ORDERED, That the complainants' joint 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 1 5 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of	)	
Worthington Industries,	)	
The Calphalon Corporation,	)	
Kraft Foods Global, Inc.,	)	
Brush Wellman, Inc., and	)	
Martin Marietta Magnesia Specialties, LLC,	)	Case Nos. 08-67-EL-CSS
	)	08-145-EL-CSS
Complainants,	)	08-146-EL-CSS
	)	08-254-EL-CSS
v.	)	08-893-EL-CSS
	)	
The Toledo Edison Company,	)	
	)	
Respondent.	)	

CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

I am concerned by the lack of specific notice to contract parties in the RCP case that their contracts would be subject to interpretation or potential modification in that proceeding. However, based on the record in these cases, I am not persuaded, considering anew the terms of the 2001 agreements, that a different result from that reached in the RCP case is appropriate. I therefore concur in the result of the Commission's Entry on Rehearing.

Paul A. Centolella

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of	)	
Worthington Industries,	)	
The Calphalon Corporation,	)	
Kraft Foods Global, Inc.,	)	
Brush Wellman, Inc.,	)	
Pilkington North America, Inc., and	)	Case Nos. 08-67-EL-CSS
Martin Marietta Magnesia Specialties, LLC,	)	08-145-EL-CSS
	)	08-146-EL-CSS
Complainants,	)	08-254-EL-CSS
	)	08-255-EL-CSS
v.	)	08-893-EL-CSS
	)	
The Toledo Edison Company,	)	
	)	
Respondent.		

OPINION AND ORDER

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

APPEARANCES:

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

Bricker & Eckler, LLP, by Thomas J. O'Brien and Matthew W. Warnock, 100 South Third Street, Columbus, Ohio 43215, on behalf of Worthington Industries, Brush Wellman, Inc., and Pilkington North America, Inc.

Waite, Schneider, Bayless & Chesley, Co., LPA, by D. Michael Grodhaus, 107 South High Street, Suite 450, Columbus, Ohio 43215, on behalf of The Calphalon Corporation.

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Kraft Foods Global, Inc.

Kravitz, Brown & Dortch, LLC., by Michael D. Dortch and Richard R. Parsons, 145 East Rich Street, Columbus, Ohio 43215, on behalf of Martin Marietta Magnesia Specialties, LLC.

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

The Toledo Edison Company (TE) 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). Worthington Industries (Worthington), The Calphalon Corporation (Calphalon), Kraft Foods Global, Inc. (Kraft), Brush Wellman, Inc. (Brush), Pilkington North America, Inc. (Pilkington), and Martin Marietta Magnesia Specialties, LLC (Martin), are customers of TE.

Worthington, Calphalon, Kraft, Brush, and Pilkington (collectively, complainants) filed complaints against TE between January 23, 2008, and March 24, 2008. On March 14 and 24, 2008, Calphalon and Worthington, respectively, filed amended complaints. As explained in further detail below, the underlying facts set forth by the complainants are similar. Generally, the complainants allege that TE attempted to unilaterally amend the special contracts it entered into with the complainants. According to the complainants, TE's actions are unjust, unreasonable, and unlawful and in violation of Sections 4905.22, 4905.31, 4905.32, 4905.35, Revised Code, and Rule 4901:1-1-03, Ohio Administrative Code (O.A.C.). TE filed its answers to the complaints and the amended complaints between February 13, 2008, and April 3, 2008. By entries issued March 13, 2008, and April 7, 2008, the attorney examiner, *inter alia*, consolidated these five complaints. On July 17, 2008, Martin filed a complaint against TE, along with a motion requesting that its case be consolidated with the other five cases. The attorney examiner granted Martin's motion for consolidation at the hearing held in these matters on July 23, 2008 (Martin is also referred to as a complainant).

An evidentiary hearing was held in these matters on July 23, 2008. Briefs and reply briefs were filed by TE and the complainants on August 26, 2008, and September 23, 2008, respectively. At the request of the parties, the reply brief deadline was extended to September 26, 2008.

II. APPLICABLE LAW

The complaints in these proceedings were 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 . . ..

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

III. DISCUSSION AND CONCLUSIONS

A. Joint Stipulations of Facts

At the hearing, TE, Worthington, Calphalon, Kraft, Brush, and Pilkington presented a joint stipulation of facts. Likewise, TE and Martin submitted a joint stipulation of facts. These two documents shall be jointly referred to as the stipulations of fact. According to the stipulations of fact, the parties agree, *inter alia*, to the following facts:

(1) The complainants individually entered into initial special contracts with TE between 1990 and 1997, whereby TE agreed to provide them electric service with the individual contracts expiring between 1995 and 2006.

(2) These initial special contracts were approved by the Commission pursuant to Section 4905.31, Revised Code.

(3) The complainants individually entered into special contracts with TE to extend the termination date of their initial special contracts.

(4) By order issued July 19, 2000, the Commission approved an electric transition plan (ETP) stipulation, in Case No. 99-1212-EL-ETP (*ETP Case*).[1]

(5) The ETP stipulation authorized TE to give its special contract customers a "one-time right through December 31, 2001 to extend their current contracts through the date at which the RTC

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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*, Case Nos. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000).

charges cease for TE." As required by the ETP stipulation and the ETP order, TE gave notice to each special contracts customer that it could terminate, leave unchanged, or extend the term of its contract. The complainants received the notifications. Each complainant elected to extend its special contract. The individual contracts defined RTC to mean regulatory transition charges.

(6) The ETP order determined for TE its total allowable transition costs, including the costs for regulatory transition assets, pursuant to Section 4928.39, Revised Code, at $1,366,034,515. The transition charges for customer classes and rate schedules are the charges established under Section 4928.40, Revised Code. Under the ETP stipulation, regulatory transition costs would be collected until TE's cumulative sales, after January 1, 2001, reached 71,613,718[2] kilowatt hour (kWh) or until June 30, 2007, whichever occurred earlier. The sales level and date could be adjusted as provided for in the ETP stipulation.

(7) On October 21, 2003, FirstEnergy filed an application for approval of a rate stabilization plan (RSP) in Case Nos. 03-2144-EL-ATA, et al. (*RSP Case*).[3]

(8) On February 11, 2004, FirstEnergy, Ohio Hospitals Association, Cargill Incorporated, Industrial Energy Users-Ohio (IEU-Ohio), Ohio Energy Group (OEG), and Ohio Partners for Affordable Energy filed a stipulation in the *RSP Case*.

(9) On February 24, 2004, FirstEnergy filed a Revised RSP in the *RSP Case* that included language from the RSP stipulation. The Revised RSP provided that TE's collection of RTC charges would continue until the earlier of (a) the last bills rendered reflecting July 2008 usage for TE or (b) when kWh distribution sales after January 1, 2004, reached 44,032,303,000 kWh.

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2 The Commission notes that, while the stipulations in these cases references 71,613,718 kWh as the sales level set forth in the ETP stipulation, the ETP stipulation utilizes the sales level of 71,613,788,718 kWh.

3 *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).

(10) By order issued June 9, 2004, the Commission approved the Revised RSP, with modifications and conditions. The RSP order also provided for recovery of shopping credit incentive deferrals and other deferrals created by the Revised RSP through an Extended RTC. By entry on rehearing in the *RSP Case*, the Commission approved a reduction in TE's distribution sales target to 42,748,303,000 kWh.

(11) On September 9, 2005, FirstEnergy filed an application in Case Nos. 05-1125-EL-ATA, et al. (*RCP Case*)[4] requesting approval of a rate certainty plan (RCP) as set forth in a stipulation signed by FirstEnergy, OEG, IEU-Ohio, and a number of municipalities.

(12) The RCP provided, in part, for adjustment of the regulatory transition cost and extended regulatory transition cost recovery periods and the regulatory transition cost rate levels to concurrently recover all amounts authorized by the Commission through usage as of December 31, 2008, for TE.

(13) Paragraph 12 of the RCP stipulation states as follows:

> The special contracts that were extended under the RSP shall continue in effect for each Company until December 31, 2008 for...Toledo Edison.... The special contracts that were extended as part of the ETP case, but not the RSP case, shall continue in effect until the special contract customers' meter read date in the following months (which are consistent with the ETP's method of calculation of the contract end dates):...Toledo Edison - February 2008;....

(14) By order issued January 4, 2006, the Commission approved, with modifications, the RCP and the RCP stipulation. The RCP order authorized TE to recover RTCs through December 31, 2008, and TE has continued to recover RTCs after complainants' February 2008 billing dates.

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4 *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).

(15) Between February 2006 and September 2007 TE informed each of the complainants that their special contract would terminate at the complainant's meter read date in February 2008.

(16) The February 2008 termination dates of the complainants' special contracts, as set out in the RCP stipulation, were consistent with the RTC kWh targets adopted in the *ETP Case* and the *RSP Case*. TE did not directly rely on the accounting for, and of, regulatory assets, and whether recovery of the regulatory transition charge ceased, as the basis for terminating the complainants' special contracts. On March 1, 2008, TE's cumulative sales after February 1, 2001, were 74,146,556,221 kWh, and cumulative sales after January 1, 2004, were 43,810,526,741 kWh. TE projects its regulatory transition charge will cease on or before December 31, 2008.

(17) The RSP filed in the *RSP Case* on October 21, 2003, provided, in part, that the "[p]lan 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." The approved Revised RSP expanded that RSP language to read as follows:

> 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.

(18) There were 46 TE special contract customers that were eligible to further extend their special contracts as provided for in the Revised RSP; nine of these 46 customers requested that TE extend the term of their special contracts within the required 30

days after issuance of the RSP order. None of the nine had intervened in the *RSP Case*.

(19) No special contract customer that requested an extension during the 30-day period authorized by the RSP order was refused. No special contract customer requested an extension pursuant to the process set forth in the Revised RSP before or after the 30-day period. Complainants did not submit a request to TE to extend the terms of their special contracts during the 30-day period.

(20) FirstEnergy published notice of the December 3, 2003, hearing and the local public hearings in the *RSP Case* as set forth in the Commission's October 28, 2003, entry in the *RSP Case*. TE did not directly notify each special contract customer through direct mailings or bill inserts of the opportunity for special contract customers to extend their contracts after filing the RSP stipulation, Revised RSP, or after the RSP order.

(21) The parties requested that administrative notice be taken of various filings in the *ETP Case*, *RSP Case*, and *RCP Case*.

(Jt. Ex. 1; Martin/TE Jt. Ex. 1).

In addition, TE has entered into escrow agreements with Worthington, Calphalon, Kraft, Brush, and Pilkington pursuant to which each complainant will pay into escrow account the difference between what each complainant and TE allege should be the cost for electric service between their February 2008 billing date and December 31, 2008. The escrow agreements provide that, unless the parties agree otherwise, the funds will be disbursed upon receipt by the escrow agent of a final, non-appealable order of the Commission ordering the amount of the escrowed funds and interest to be disbursed (Jt. Ex. 1 at 11). At the hearing, witnesses for Worthington, Calphalon, Kraft, Brush, and Pilkington estimate that the following has or will be deposited in the escrow account: Pilkington, $1 million from March through December 2008; Worthington, $1 million from March through December 2008; Brush, $2 million from March through December 2008, which represents a 40 percent increase in costs; Kraft, $300,000 to $650,000 from March through December 2008, which represents a 20 to 43 percent increase in costs; Calphalon, $166,595.73 for the three months after TE said the contract was terminated in February 2008, which represents a 54 percent increase in costs (Tr. at 28, 43, 55; Kraft Ex. 1 at 4; Calphalon Ex. 1 at 5). Furthermore, from its February 2008 meter read date through June 2008, Martin spent approximately $442,407 more on electricity than it would have spent had the contract continued in effect; the difference represents an increase of 24.2 percent in Martin's electricity costs (Martin/TE Jt. Ex. 1 at 9).

B. Complainants' Factual Arguments

By way of background, witnesses for the complainants state that: Pilkington has a plant in Rossford, Ohio with approximately 300 employees and the largest operation at that plant is float glass production; Worthington has a Delta, Ohio steel processing facility with 170 employees; Brush has a facility in Elmore, Ohio with approximately 600 employees that produces high performance copper, nickel, and beryllium alloys; Kraft has a flour milling plant in Toledo, Ohio with 95 employees; Calphalon has a cookware and accessories plant, and distribution center in Perrysburg, Ohio with 250 employees; and Martin has a limestone facility in Woodville, Ohio that has 175 employees (Pilkington Ex. 1 at 2; Worthington Ex. 1 at 1-2; Brush Ex. 1 at 1; Kraft Ex. 1 at 1 and 2 at 4; Calphalon Ex. 1 at 2-3; Comp. Br. at 6-7).

The witness for Calphalon asserts that, with the enormous increase in electricity costs, it will be difficult for the company to remain economically competitive and viable in Ohio compared to the costs of similar products from China (Calphalon Ex. 1 at 6). Since the Pilkington facility is an automotive manufacturing facility, its witness submits that it is the "most at-risk of business specie." According to the witness for Pilkington, to successfully compete in the global automotive market, its facility must have access to competitively priced electricity (Pilkington Ex. 1 at 2-3). Worthington's witness points out that electricity accounts for 5.95 percent of the total variable operating cost for its Delta facility, "which is a significant percentage for any single input to production costs." Worthington's witness states that the increased electric rates resulting from termination of the special contract by TE will reduce employee profit sharing by $237,000. Moreover, Worthington's witness submits that, in a globally-competitive market, an increased electricity expense on the magnitude noted above is a serious burden (Worthington Ex. 1 at 2).

The complainants submit that their initial special contracts with TE were approved by the Commission in accordance with Section 4905.31, Revised Code. Furthermore, the complainants explain that the complainants and TE modified the initial special contracts from time to time, including an amendment in 2001, as approved by the Commission. However, the complainants allege that TE unilaterally modified the initial contracts, as amended in 2001, without direct notice to the complainants and without the complainants' consent (Comp. Br. at 1, 9-10).

Mr. Eddy, testifying on behalf of Kraft explains that the initial contracts were amended in 2001 pursuant to a written offer made by TE in conjunction with the *ETP Case* which set forth options, one of which would extend the special contract until the collection of regulatory transition charges cease for TE (Kraft Ex. 2 at 3). However, witnesses for the complainants submit that no one from their companies was made aware of the opportunity in 2004 to extend their contracts with TE. Had the companies been aware that

they could lock in their contract rate until December 31, 2008, the witnesses contend that the complainants would have done so (Kraft Ex. 2 at 5; Calphalon Ex. 1 at 6).

Mr. Yankel, testifying on behalf of all the complainants[5], set forth the complainants' position with regard to the issues surrounding the special contracts entered into between the complainants and TE. He points out that the primary focus of these complaints is on the 2001 amendments to the complainants' special contracts, which were put in place in response to the ETP stipulation. Within these 2001 amendments, witness Yankel notes that the terms "regulatory transition costs," "regulatory transition charges," and "RTC" are used in such a way that they may be confusing. The witness points out that the "regulatory transition costs," which are incurred by TE, and the "regulatory transition charges," which are paid by customers, are not the same thing and that the focal point of these cases is the "regulatory transition charges," not the costs. According to witness Yankel, in the 2001 contracts, the term "RTC" refers to "regulatory transition charges," not costs. Furthermore, he points to the language in the 2001 contract amendments which specify that TE desired to extend the existing contracts "through the date which RTC ceases," which he believes refers to when the regulatory transition charges cease (Comp. Ex. 1 at 3-4).

Witness Yankel begins his analysis stating that the *ETP Case* set a recovery period for TE's regulatory transition costs via the regulatory transition charges based upon specific energy consumption levels, and the ETP stipulation contemplated that the revenue collected in the RTC charge would cease for TE by June 30, 2007. The witness explains that, under the terms of the approved ETP stipulation, special contracts customers were given the option of extending their contracts through the date the RTC charge ceases for TE. Thus, he explains that, in accordance with the stipulation and order in the *ETP Case*, special contracts customers, including the complainants, were sent written notice from TE in 2001 of the possibility to terminate or extend the term of their contracts. Of those special contracts customers, Yankel stated that 46, including the complainants, opted to extend their contracts (Comp. Ex. 1 at 5-6, 21; Comp. Br. at 11).

According to the complainants, in the *ETP Case*, the recovery of the regulatory transition costs was tracked in order to ensure that the dollars specified for eventual recovery were, in fact, recovered; but the termination of the complainants' special contracts under the 2001 amendments were dependent on the date that TE ceased collection of the RTC charges, not the cost recovery. The complainants argue that, while the ETP order determined the total allowable transition costs that TE could recover, the order did not tie the termination dates of the complainants' special contracts to tracked recovery of the regulatory transition costs (Comp. Br. at 12). Pilkington's position is that the special contract should continue until December 31, 2008, or whenever TE's collection

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5 Martin is not sponsoring Yankel's testimony (Tr. at 10).

of the RTC charges ceases (Pilkington Ex. 1 at 3). Kraft's witness Eddy agrees, stating that the 2001 agreement with TE was that TE had to cease collecting its RTC charges before the special contract ended; however, the witness points out that TE cancelled the special contract rate arrangements to start charging higher contract rates, while TE continues to collect RTC charges from Kraft and other customers (Kraft Ex. 1 at 3).

Subsequent to the *ETP Case*, witness Yankel explains that the Commission considered the *RSP Case*. The witness notes that none of the complainants in the instant cases were parties in the *RSP Case* (Comp. Ex. 1 at 21). Witness Yankel points out that the newspaper notice published by TE in the *RSP Case*, which was based on the application in that case, stated that "[t]his Plan does not affect the termination dates for special contracts as such dates would have been determined under [the *ETP Case*]" (Comp. Ex. 1 at 10).

Mr. Yankel states that the RSP stipulation: contemplated that the regulatory transition costs would end for TE in July 2008, rather than June 2007, as set forth in the *ETP Case*; provided for an Extended RTC charge after July 2008, to recover the regulatory transition costs; and, in Paragraph VIII(8), provided that "upon request of the customer...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 RTC charge is in effect...if doing so would enhance or maintain jobs and economic conditions within its service territory" (Comp. Ex. 1 at 11, 24). According to the complainants, the Extended RTC charge was designed to go into effect after the RTC charge ended in order to allow for recovery of certain deferrals created by the RSP stipulation; however, TE was required to file for Commission approval of the Extended RTC charge before it could become effective and TE never made that filing. As a result, the complainants argue that the RTC charge never ended and the Extended RTC charge never became effective (Comp. Br. at 17-18). Therefore, according to the complainants, the *RSP Case* and Paragraph VIII(8) of the Revised RSP left undisturbed the termination date of the 2001 amendments to the contracts that were approved through the *ETP Case* for those customers who did not extend their contracts within the 30-day window; accordingly, the termination date is the date on which the RTC charge ceases for TE (Comp. Br. at 13, 25-26; Comp. Ex. 1 at 14).

In response, TE submits that the Revised RSP specifically provided that the Extended RTC charge would become effective when the RTC charge was no longer effective; thus, no additional filing was necessary. TE explains that the RCP transformed the RTC charge that had been in place since the *ETP Case* into RTC components (comprised of both the RTC and the Extended RTC) that took on a new role in recovering costs that were not contemplated by the parties in 2001 when the contract extensions were tied to TE's collection of the RTC charges. According to TE, the only reason the RTC charge would not end in late 2007 or early 2008 as contemplated by the parties in 2001 was because TE agreed in the *RSP Case* and the *RCP Case* to stabilize rates and accept

additional deferrals through 2008. Therefore, in order "to ensure that the termination of the [c]omplainants' special contracts was not affected by this transformation in the purpose of the RTC charges/components, the RCP fixed the termination date for Toledo Edison's special contract customers during the month when the RTC charge, as originally formulated, would most-likely have ended – February 2008" (TE Rep. Br. at 4-5).

According to witness Yankel, while the stipulation in the *RSP Case* gave special contract customers the right to request a contract extension when the RTC charges cease, it inappropriately placed the full burden of knowing about the extensions and timely requesting an extension on the customers. The witness goes on to note that, while copies of the stipulation in the *RSP Case* were served on the intervenors, unlike in the *ETP Case*, TE provided no notice, via written or verbal communication, informing the complainants regarding the need for or opportunity to extend their contracts. Witness Yankel further notes that the limited 30-day window from the issuance of the order in the *RSP Case* for special contracts customers to act to extend the contracts placed a burden on those who did not participate in the *RSP Case* because the offer to extend the contracts was only available publically through the Commission's docketing system. He asserts that only the special contracts customers that were members of IEU-Ohio or OEG, which intervened in the *RSP Case*, were aware of the 30-day window to request an extension (Comp. Ex. 1 at 12-13). Therefore, according to the complainants, the concept of equitable estoppel prohibits TE from arguing that the complainants should have known of the opportunity to extend their contracts because, due to the fact that the complainants received direct notification pursuant to the *ETP Case* even though they did not intervene in that case, the complainants reasonably relied on TE to provide future notices concerning their contracts (Comp. Br. at 36). TE submits that the complainants' equitable estoppel argument does not apply, stating that the complainants have not shown that TE "intentionally or negligently induced [c]omplainants to believe that Toledo Edison would directly notify them of the opportunity. . .to amend their special contracts" (TE Rep. Br. at 13).

In the subsequent *RCP Case*, none of the complainants in the instant cases were parties (Comp. Ex. 1 at 21). Witness Yankel submits that, in the *RCP Case*, the use of the term Extended RTC charge was nullified, because TE "never implemented the accounting treatment contemplated under the revised RSP [s]tipulation and Revised RSP"; and TE projected that the RTC charge would continue in effect until it ceases on December 31, 2008. Consequently, according to the witness, the terms of the complainants' contracts continue in effect, as long as TE collects the RTC charge, the RTC charge has never ceased, and the Extended RTC charge was never put in place (Comp. Ex. 1 at 11, 15, 19). The complainants emphasize that the terms of the 2001 amendments to the special contracts do not refer to or depend on any calculation; the termination of the 2001 amendments only depend on when TE ceases the RTC charge. However, the complainants acknowledge that the ETP stipulation, the 2001 amendments, and the RCP order all contemplated that TE would cease recovery of its RTC charges when certain kWh targets had been achieved,

which they believe is why the RCP stipulation provides that the special contracts would terminate in February 2008; but, now TE projects that its RTC charges will cease at the end of December 2008 (Comp. Br. at 19). Furthermore, Yankel submits that the RCP stipulation provided for lower rates and maintaining the historic base distribution rates (Comp. Ex. 1 at 16). In the witness' view, there is no basis for treating the nine customers that exercised the option provided for in the Revised RSP any differently than the complainants that extended their contracts pursuant to the ETP stipulation, because all 46 customers had 2001 amendments that continued through the date that the RTC charges cease for TE (Comp. Ex. 1 at 19-20).

C. TE's Factual Arguments

TE's witness Norris submits that the February 2008 termination date of the complainants' special contracts, as set forth in the RCP, is consistent with the regulatory transition cost kWh targets adopted in the *ETP Case* and the *RSP Case*. The witness explains that, according to the ETP stipulation, special contract customers were given the right to extend their contracts through the date at which the RTC charges cease for TE. He goes on to note that the ETP stipulation provided for two options for terminating TE's collection of the RTC charges: when the kWh distribution sales met 71,613,788,718 kWhs; or June 30, 2007. Norris further explains that, in a March 2003 compliance filing made in Case No. 02-2877-EL-UNC,[6] TE estimated that it would cease recovering RTC, based on the RTC kWh target, in February 2008; the estimated date was later adjusted to March 2008. According to the witness, using updated information, and assuming the kWh method set out in the *ETP Case* of calculating when TE would cease recovering the RTC, the date would now be in May 2008 (TE Ex. 1 at 3-4, 6). TE submits that the 2001 amendments entered into between TE and each of the complainants changed the termination date of the contracts from a fixed date to one that was based on formulas involving distribution sales (TE Br. at 8).

Mr. Norris then turned to the *RSP Case* stating that, in accordance with the Commission's order, TE's collection of the RTC charges would cease on the earlier of the last bills rendered in July 2008 or when the kWh distribution sales after January 1, 2004, reached 42,748,303,000 kWh; it was estimated that the kWh target would be reached by the end of 2007. According to the witness, using updated information and assuming the kWh method used in the *RSP Case* of calculating when TE would cease recovering RTC, the date would now be in January 2008 (TE Ex. 1 at 5).

With regard to the *RCP Case*, witness Norris explains that, whereas the *ETP Case* and the *RSP Case* were conditioned upon RTC recovery and the kWh sales targets, the RCP established specific dates for special contracts, notwithstanding any collection of the RTC

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6 *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 of Tariff Adjustments.*

charges. The witness notes that, pursuant to the *RCP Case*, special contracts that were extended under the *RSP Case* continued until December 31, 2008; however, contracts that were extended as part of the *ETP Case*, but not the *RCP Case*, such as the complainants' contracts, continued in effect until the customer's meter read date in February 2008 for TE (TE Ex. 1 at 6). Thus, according to TE, the RCP order modified each special contract extended under the *ETP Case*, but not the *RSP Case*, and established a definite, easily understood termination date. In TE's view, the February 2008 termination date was consistent with the parties' original expectations, with the distribution sales targets set forth in the ETP order, as well as the distribution sales targets in the RSP order (TE Br. at 7-8, 11-12). The complainants contend that Norris' "testimony asserting that TE has met its RTC kWh targets using the ETP and RSP tracking methods before terminating [c]omplainants' special contracts on the February 2008 meter read dates is irrelevant...contract termination remained tied to TE's continuing collection of RTC charges" (Comp. Br. at 24).

TE points out that each of the complainants are sophisticated purchasers of electric service that have employees who are responsible for purchasing electricity for their Ohio facilities and that they have obtained discounted rates from TE for many years. TE asserts that the complainants were given the same opportunity as all other special contracts customers in 2004 to extend the duration of their special contracts; however, the complainants did not request an extension during the 30-day window authorized in the *RSP Case*. TE points out that TE was not required either by rule or order of the Commission to provide notice of the opportunity to extend the complainants' contracts pursuant to the Revised RSP; instead contract customers received notice via the Commission's docket in this case (TE Br. at 4-7).

D. Parties' Legal Arguments

The complainants argue that, by terminating the special contracts ten months before the termination date, TE is violating Section 4905.22, Revised Code, by demanding unjust and unreasonable charges for electric service in excess of that allowed by the Commission in the *ETP Case* and the Commission-approved 2001 amendments (Comp. Rep. Br. at 10). Contrary to the complainants' assertions, TE avers that it has not violated Section 4905.22, Revised Code, pointing out that the complainants admit that they are being charged pursuant to a tariff that has been deemed just and reasonable by the Commission. Moreover, TE notes that the complainants' now-terminated contracts, which were authorized by Section 4905.31, Revised Code, are an exception to Section 4905.22, Revised Code. According to TE, when the Commission approved the February 2008 termination date for the complainants' contracts, the complainants "defaulted to the just and reasonable Commission-approved tariff rate" (TE Br. at 15).

Furthermore, the complainants maintain that TE is violating Section 4905.31 and Section 4905.32, Revised Code, by charging unjust and unreasonable rates because "those rates are significantly higher tariff/market rates rather than those approved in the special contracts" (Comp. Rep. Br. at 10). TE contends that it has not violated Section 4905.31 or Section 4905.32, Revised Code, by not charging special contract rates between February 2008 and December 2008. According to TE, Section 4905.31, Revised Code, does not apply because the Commission fixed the termination date on the contracts for February 2008 as authorized by Section 4905.31, Revised Code; furthermore, a utility cannot violate the non-discrimination requirements of Section 4905.32, Revised Code, by charging in accordance with its tariff (TE Br. at 16).

The complainants also argue that TE has mischaracterized the Commission's power to amend, alter, or modify contracts under Section 4905.31, Revised Code. The complainants point to Commission precedent for the proposition that the Commission's power to modify special contracts is an extraordinary power and exercising this power is subject to a "burden of the highest order."[7] The complainants submit that, in order to satisfy this burden, TE must show that the contract adversely affects the public interest. According to the complainants, the Commission's public interest test[8] incorporates the federal *Sierra-Mobile Doctrine,*[9] which provides that a utility contract can only be modified if it adversely affects the public interest by: impairing the financial ability of the utility to render service; creating an excessive burden on other customers of the company; or resulting in unjust discrimination. The complainants insist that TE has not, and cannot, produce any evidence that would satisfy this test and show that the special contracts adversely affect the public interest (Comp. Br. at 27-28). TE responds saying that the *Sierra-Mobile Doctrine* is a presumption of contract validity applied by the Federal Energy Regulatory Commission and federal appellate courts, which applies when a contracting party seeks to terminate its contract because the rates in the contract are unjust and unreasonable; however, according to TE this presumption is not applicable in these cases (TE Rep. Br. at 9).

Furthermore, the complainants submit that basic common law principles of contract law prevent TE from unilaterally changing the terms of the special contracts that were approved pursuant to Section 4905.31, Revised Code (Comp. Br. at 31). The complainants also contend that the 2001 amendments clearly memorialized a definitive termination date for the contracts to be the date the RTC charges ceased, and that TE can not attempt to use Paragraph VIII(8) of the RCP stipulation to modify the termination date of the contracts to make indefinite and already certain term (Comp. Br. at 34-35). TE argues that the

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7 *In the Matter of the Application of Ohio Power Company to Cancel Certain Special Power Agreements and for Other Relief*, Case No. 750161-EL-SLF, Opinion and Order (August 4, 1976).

8 *Id.*

9 *United Gas Pipe Line Co., v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

complainants have failed to sustain their burden of proving that TE has violated any laws, rules, or orders of the Commission. TE submits that, as contracts approved by the Commission pursuant to Section 4905.31, Revised Code, TE's contracts with the complainants are subject to "the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission" (TE Br. at 3-4).

According to the complainants, if the Commission did, in fact, unilaterally modify the special contracts, TE violated Section 4905.35, Revised Code, because "it discriminated in the highly divergent types of notice provided to its special contracts customers regarding the opportunity to extend their special contracts in the RSP Case" (Comp. Rep. Br. at 10). Furthermore, the complainants argue that TE violated Section 4905.35, Revised Code, by giving undue and unreasonable preference or advantage to nine of TE's special contract customers, while unduly prejudicing or disadvantaging the remaining 37 contracts customers, including the complainants. In support of their argument, the complainants note that, in accordance with the *ETP Case*, TE treated each of the special contract customers similarly by giving them direct notice and the same opportunity to extend their contracts. However, in the *RSP Case*, the complainants argue that TE unreasonably disadvantaged the complainants because TE failed to provide those special contracts customers who did not participate in the *RSP Case*, including the complainants, the same notice to extend the contracts that was received by special contracts customers who were represented by active participants in the *RSP Case* (Comp. Br. at 37-38). In response, TE states that it has not violated Section 4905.35, Revised Code, in that all customers were given the same opportunity to extend their contracts under the RSP order and no special contract customer that submitted a request for extension within the 30-day window was refused (TE Br. at 18).

The complainants assert that TE violated Rule 4901:1-1-03(B), O.A.C., because it failed to provide direct notice to the complainants describing the change in criteria or terms involving the opportunity for the complainants to extend their special contracts under the revised RSP. According to the complainants, the Revised RSP is a reasonable arrangement approved pursuant to Section 4905.31, Revised Code, and is a rate schedule that is publicly filed and enforceable; therefore, failure to provide notice to the complainants of the right to extend their contracts violates Rule 4901:1-1-03(B), O.A.C. (Comp. Br. at 39-40). Conversely, TE states that it has not violated Rule 4901:1-1-03, O.A.C., because: this rule only applies to tariffs and does not apply to special contracts under Section 4905.31, Revised Code; the extension opportunity provided for in the RSP order was not a change or modification to the terms on the special contracts; and, since disclosure under this rule is required within 90 days after the effective date of the new or modified rates schedule, the fact that the extension opportunity was limited to the 30-day window, renders the disclosure requirements moot (TE Br. at 20).

TE insists that the complainants cannot be permitted to collaterally attack the Commission's RCP order which, in effect, fixed the "date which RTC ceases" for purposes of the complainants' special contracts as each of the complainants billing dates in February 2008 (TE Br. at 10). According to TE, if the Commission were to find in favor of the complainants, it would be: putting into question the certainty of the Commission's orders; violating the unambiguous terms of the RCP order; and unreasonably benefitting the complainants by retroactively eliminating their risk of participating in competitive energy markets. TE asserts that the time for the complainants to extend their contracts was during the 30-day window in 2004, which is the same opportunity afforded to the other special contract customers, not in 2008, which benefits the complainants by eliminating their market risk entirely because the 2008 market prices are now known (TE Br. at 2, 13). TE submits that, given that this issue turns on an allocation of risk with regard to future market pricing, the only reasonable time to contest the termination dates that were fixed in the RCP order would have been at the time of the RCP order; however, TE points out that no party filed an application for rehearing or an appeal on this issue. Therefore, the Commission should reject the complainants' collateral attack on the RCP order, according to TE (TE Br. at 10-11). In response, the complainants state that, even if the complaints are considered collateral attacks on the RCP order as TE claims, the Ohio Supreme Court has recognized the use of complaints filed pursuant to Section 4905.26, Revised Code, "as a means of collateral attack on a prior proceeding"[10] (Comp. Rep. Br. at 9).

E. Conclusion

The complainants are seeking a determination by the Commission in these cases that the rates set forth in the special contracts entered into between the complainants and TE, as amended in 2001, should continue through December 31, 2008. The complainants insist that the 2001 amendments extend the special contracts through the date on which TE ceases collecting the RTC charge, which the complainants submit is December 31, 2008. On the other hand, TE insists that the special contracts terminate on the complainants' billing dates in February 2008, as provided for in the RCP, which is consistent with the ETP's method of calculating the end dates for the special contracts. Our consideration of the arguments raised by the parties in support of their positions requires a review of the stipulations and our orders in the *ETP Case*, the *RSP Case*, and the *RCP Case*. None of the complainants were parties in the *ETP Case*, the *RSP Case*, or the *RCP Case*, or members of an industrial group that was a party to those cases.

The stipulation approved in the *ETP Case* required TE to notify its special contract customers that they could extend their current contracts through the date on which the RTC charges cease for TE; further, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level. In

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10 *Allnet Comm. Services, Inc., v. Pub. Util. Comm.*, 1 Ohio St.3d 22, 24 (1982); *Western Reserve Transit v. Pub. Util. Comm.*, 39 Ohio St.2d 16, 18 (1974).

response to this offer, the complainants opted to extend their initial special contracts and entered into the 2001 amendments with TE.

Next came the *RSP Case*. Of particular importance to the cases at hand is Paragraph VIII(8) from the Revised RSP stipulation, which reads as follows:

> This Plan does not affect the termination dates for special contracts as such dates would have been determined under [the *ETP Case*], 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. . ..

The complainants did not request to extend their special contracts in accordance with the Revised RSP. As noted previously, the ETP stipulation required that TE provide notice to its special contracts customers that they had the option to extend their contracts; however, no such notification requirement was set forth in the Revised RSP stipulation or the order in the RSP Case approving the stipulation. Nonetheless, without specific language in the Revised RSP stipulation or order approving the stipulation, the complainants would have the Commission conclude in the instant cases that TE had an obligation to notify the complainants of the option pursuant to the Revised RSP to extend their special contracts beyond the termination date provided for in the 2001 amendments. The Commission disagrees. Essentially, we are being asked to find almost five years after our order in the RSP Case that TE should have provided written or oral notice to the special contract customers of the provision in the Revised RSP even though no such notice was required by the stipulation or any Commission order. Such a finding would clearly be inappropriate at this point in time. The Commission cannot determine, in hindsight, that TE should have provided notice when, in fact, neither the RSP stipulation nor the order required such notice. Additionally, the Commission cannot now require a modification to an approved stipulation to require the addition of such notice. Furthermore, the complainants acknowledged that the initial newspaper publication of the RSP Case referenced the RTC charge as an issue in the case. Moreover, the Commission finds no merit in the complainants' argument that equitable estoppel prohibits TE from arguing that the complainants should have known of the option in the RSP Case to extend the contracts because, due to the fact that TE notified them of this option in the ETP Case, the complainants reasonably relied upon TE to notify them in subsequent cases. It is undisputed on the record in these cases that, unlike the subsequent cases, the stipulation and the order in the ETP Case required TE to notify its special contract customers of the extension option. As TE notes, there is no evidence in the record in these cases that would lead to the conclusion that TE in any manner caused the complainants to believe, absent a

directive in a specific case such as the one in the ETP Case, that TE would provide notification to the complainants in subsequent cases.

In addition, as TE points out, the complainants have experts under their employ that are responsible for purchasing electricity for their Ohio facilities and they could have followed the *RSP Case* through the Commission's docketing system (Tr. 21, 34-35, 46-47, 61-62, 110-112). In fact, given that their special contract termination dates had been at issue in a similar prior proceeding before the Commission, i.e., the *ETP Case*, the Commission would imagine that the complainants' experts would follow subsequent related cases, such as the *RSP Case*. All 46 of TE's special contract customers had the same opportunity to participate in the *RSP Case* and all 46 of them were given the same opportunity under the Revised RSP stipulation to extend their contract. Therefore, contrary to the assertions of the complainants, there is no evidence that TE provided any preference or advantage to any of the 46 special contracts customers or that TE treated the nine special contracts customers that opted to extend their contracts within the 30-day window any differently than it treated the 37 special contracts customers that did not extend their contracts. In fact, to allow the complainants to collaterally attack our decisions in the *RSP Case* and the *RCP Case* at this late date may actually be viewed as providing the complainants with an unfair advantage over the nine contract customers who followed the cases and took the risk to extend their contracts at a time when today's market rates were not known to them.

Turning now to the provisions in the *RCP Case*, Paragraph 12 from the RCP stipulation is pertinent to our decision in these complaint cases and it states:

> The special contracts that were extended under the RSP shall continue in effect for each Company until December 31, 2008 for...Toledo Edison.... The special contracts that were extended as part of the ETP case, but not the RSP case, shall continue in effect until the special contract customers' meter read date in the following months (which are consistent with the ETP's method of calculation of the contract end dates):...Toledo Edison – February 2008;....

The complainants believe that no language in paragraph 12 of the RCP stipulation relieved TE of its obligation under the 2001 amendments to perform those agreements until it ceased collection of the RTC charges. However, as we stated previously, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level; thus, the February 2008 termination date was consistent with the ETP's method of calculation of the termination dates for the contracts. Furthermore, as pointed out by TE, the extension of the RTC collection through December 2008 did not affect the termination of the special contracts. As expressed by TE, we understand that part of the reason the RTC did not end earlier, as contemplated by the

parties to the 2001 amendments, was to stabilize rates by allowing TE to defer costs through 2008; the fact that the RCP enumerated the termination date of the special contracts for TE as February 2008, in accordance with the original method of calculation agreed to by TE and the complainants in the 2001 amendments, ensured that the special contracts were not disturbed by the extension of the RTC. Therefore, the Commission believes the record clearly reflects that, regardless of the sales calculation, no scenario results in continuation of the special contracts through December 2008. Thus, given the applicable language which addresses the termination date of the special contracts, we do not believe that the complainants could have reasonably relied on their contracts extending through December 2008. Moreover, the Commission notes that, similar to the arguments raised in the discussion of the *RSP Case*, the RCP stipulation likewise did not require notification of customers.

Accordingly, upon consideration of the evidence of record, the Commission finds that the complainants have not sustained their burden of proof and shown that TE's actions are unjust, unreasonable, and unlawful and in violation of Sections 4905.22, 4905.31, 4905.32, 4905.35, Revised Code, and Rule 4901:1-1-03, O.A.C. Furthermore, the Commission finds that any arguments made by 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) The complainants individually entered into initial special contracts with TE between 1990 and 1997, whereby TE agreed to provide them electric service with the individual contracts expiring between 1995 and 2006.

(3) The complainants filed complaints against TE between January 23, 2008, and July 17, 2008.

(4) An evidentiary hearing was held in these matters on July 23, 2008. Briefs and reply briefs were filed by TE and the complainants on August 26, 2008, and September 26, 2008, respectively.

(5) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

(6) The complainants have not provided sufficient evidence to demonstrate that TE has violated any applicable order, statute, or regulation; thus, the complainants have not sustained their burden of proof.

ORDER:

It is, therefore,

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

FEB 19 2009

Reneé J. Jenkins
Secretary

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 6, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

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ORC Ann. 4905.04 (2009)

§ 4905.04. Power to regulate public utilities and railroads

(A) The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

(B) Subject to *sections 4905.041 [4905.04.1]* and *4905.042 [4905.04.2] of the Revised Code*, division (A) of this section includes such power and jurisdiction as is reasonably necessary for the commission to perform pursuant to federal law, including federal regulations, the acts of a state commission as defined in *47 U.S.C. 153.*

HISTORY:

GC § 614-3; 102 v 549, § 5; 113 v 256; Bureau of Code Revision, 10-1-53; 129 v 313 (Eff 9-21-61); 146 v S 306. Eff 6-18-96; 151 v H 218, § 1, eff. 11-4-05.

LEXSTAT ORC 4905.31

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 6, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

Go to the Ohio Code Archive Directory

ORC Ann. 4905.31 (2009)

§ 4905.31. Special contract law

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.

HISTORY:

GC § 614-17; 102 v 549, § 19; 112 v 266; Bureau of Code Revision, 10-1-53; 136 v H 579 (Eff 12-21-75); 138 v S 88 (Eff 1-16-80); 138 v H 21 (Eff 7-2-80); 144 v S 359 (Eff 12-22-92); 145 v S 153. Eff 10-29-93; 152 v S 221, § 1, eff. 7-31-08.

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC,	)	Case Nos. 08-67-EL-CSS
	)	08-145-EL-CSS
Complainants,	)	08-146-EL-CSS
	)	08-254-EL-CSS
v.	)	08-893-EL-CSS
	)	
The Toledo Edison Company,	)	
	)	
Respondent.	)	
	)	

COMPLAINANTS' JOINT APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code ("R.C.") Section 4903.10 and Ohio Administrative Code Rule 4901-1-35, Worthington Industries, Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC (collectively referred to as "Complainants") respectfully file this joint application for rehearing from the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") on February 19, 2009 (the "Opinion and Order.") In the Opinion and Order, the Commission erred by finding that "[t]he complainants have not provided sufficient evidence to demonstrate that TE has violated any applicable order, statute, or regulation." The grounds supporting this Application for Rehearing are set forth in the attached Memorandum in Support.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

From its inception, this case has been about a fundamental principle of contract law—namely that parties are bound by the terms of the contract they enter into. The Complainants' special contracts at issue in this case expressly and unambiguously state that they terminate on the date that Toledo Edison Company ("TE") stops collecting RTC charges.[1] TE stopped collecting RTC charges on December 31, 2008. Therefore, the only determination that is consistent with the unambiguous language in the Complainants' special contracts is that the contracts terminated on December 31, 2008, and not a day earlier.

TE nonetheless terminated the Complainants' special contracts before December 31, 2008, thereby breaching the express terms of the special contracts, and thereby violating R.C. 4905.22, 4905.31, and 4905.32. The Commission's finding to the contrary unlawfully validates TE's reliance upon language that TE included within the ETP, RSP and RCP Stipulations (to which Complainants were not parties) to modify the plain language of the termination provisions of Complainants' special contracts without adequate notice to the Complainants and without providing them a reasonable opportunity to be heard, thereby violating Complainants' constitutional right to due process of law.

[1] The 2001 Amendments used the acronym "RTC" to mean Regulatory Transition Charges. In this Application for Rehearing, Complainants refer to the Regulatory Transition Charge as the "RTC charge," Regulatory Transition Charges as the "RTC charges," Regulatory Transition Cost as "RTC," and Regulatory Transition Costs as "RTCs."

II. LAW AND ARGUMENT

A. The Commission failed to apply the clear and unambiguous termination language in the 2001 Amendments.

A fundamental rule of contract interpretation mandates that when a "contract is clear and unambiguous . . . its interpretation is a matter of law."[2] During the 1990s, TE and Complainants separately entered into Commission-approved special contracts under R.C. 4905.31.[3] In 2001, as authorized by this Commission through orders issued in TE's ETP Case, TE offered the Complainants a one-time opportunity to extend the terms of those contracts. Accordingly, each Complainant executed an amendment to their special contract (hereinafter the "2001 Amendments.")[4] The 2001 Amendments extended the original termination dates of the Complainants' special contracts ". . . through the date at which the RTC charges cease."[5]

The operative language of the 2001 Amendments clearly and unambiguously provides that the special contracts continue until TE ceased its collection of the RTC charges. Because TE collected RTC charges through December 31, 2008, it is clear from the four corners of the 2001 Amendments that the special contracts remained effective through December 31, 2008.

To avoid the result mandated by language that TE itself chose to define the termination of the 2001 Amendments, TE points to irrelevant parol evidence—namely language contained in the ETP, RSP, and RCP Stipulations. Most significantly, TE relies upon language in the ETP Stipulation in which the parties in that case agreed that TE should be permitted to collect RTC

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[2] *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St. 3d 64, 66.

[3] Joint Exhibit 1, ¶¶ 5 through 32.

[4] See *Joint Post-hearing Brief of Joint Complainants* ("Joint Brief"), p. 11.

[5] Joint Exhibit 1, ¶ 34.

charges until TE's "cumulative sales reached a defined kWh sales level."[6] TE insists that this language also means the contracts terminate upon the date those sales levels were achieved.

The Commission adopted TE's flawed reasoning when it found that because the ETP Stipulation contained this language at the time the 2001 Amendments were executed, the parties "understood" that the contracts would cease when the defined kWh sales level was reached. Continuing on, the Commission then reasoned that because the RSP and RCP Stipulations recite that the contract termination dates remain consistent with RTC charge recovery period as described in the ETP Stipulation the Complainants' special contracts were not breached by TE.

The first problem with the Commission's reasoning is that the Complainants' special contracts with TE do not contain or refer to the language within the ETP Stipulation. The termination provisions of Complainants' contracts simply are not based upon the attainment of defined kWh sales level as suggested by the ETP stipulation and the later RSP and RCP stipulations—all of which are merely TE's agreements *with other parties*—not with the Complainants. Instead, the 2001 Amendments expressly and unambiguously state that the special contracts terminate when "the RTC [charges] cease for the Company."[7]

The second fallacy with the Commission's reasoning is that TE continued to collect RTC charges long after the defined kWh sales levels were achieved. Even though TE was authorized to continue collecting those charges by Order of this Commission, this Commission's authority to collect RTC charges did not—and in the absence of all contracting parties, could not—lawfully change the meaning of the plain language of the special contracts to which Complainants are parties. In short, it matters not at all whether TE, the Complainants, or even this Commission anticipated, in 2001, that the RTC charges would cease when the defined kWh

[6] *See* Opinion & Order, at 18.

[7] *See* 2001 Amendments.

sales level was reached. The legally relevant fact is that the contract termination provisions are tied to the cessation of RTC charges. The fact that RTC charges continued beyond the date the defined kWh sales were achieved, and thus beyond the date parties to the ETP Stipulation expected RTC charges to end is irrelevant. The contract language controls.

Because the termination date of Complainants' special contracts was clearly expressed as the date TE ceased to collect RTC charges, there was no need to look to parol evidence contained within the ETP, RSC, or RCP Stipulations. As a matter of law, therefore, Complainants provided sufficient proof that TE breached the 2001 Amendments when it terminated the special contracts before ceasing its collection of RTC charges. As such, TE violated the provisions of R.C. 4905.22, 4905.31, and 4905.32 and rehearing is appropriate.

B. The Commission's decision modifies, *sub silentio,* Complainants' special contracts.

TE argued, and the Commission agreed, that the termination date of the special contracts was tied to a defined kWh sales level within the contract language. This contention is legally unsupportable because it ignores the language of the special contracts to which *both* TE and the Complainants are parties in favor of language contained in stipulations to which *only* TE, and not the Complainants, are parties. By endorsing TE's argument, the Commission attempts to modify the contract rights of the parties but avoid responsibility for that modification.

R.C. 4905.31, of course, provides that special contracts are "subject to change, alteration, or modification by the commission." This Commission has previously recognized, however, that "the power to modify existing contracts between a utility and its customers as conferred by R.C. 4905.31 must be viewed as an extraordinary power in light of constitutional restraints against

impairment of the obligations of contract and constitutional guarantees of due process."[8] Because the power "to modify contracts is an extraordinary power, the party seeking to invoke it is subject to a burden of the highest order."[9] In order to satisfy this burden of the highest order, there must be a "showing that the contract adversely affects the public interest."[10]

As previously discussed in Complainants' briefs, TE failed to satisfy its high evidentiary burden that the modification of the termination date was needed to protect the public interest.[11] In fact, TE chose to not even acknowledge the burden to exist. Instead, it chose to baldly insist that the language of the contract means something other than what it says. It is of course incorrect, and because the Commission's Order also ignores the plain contract language and imposes language from the stipulations instead, the Commission is effecting a modification of the contracts without admitting that it is doing so and without compelling TE to meet the burden imposed by law. The Commission's Order is therefore in error.

C. The Opinion and Order violates Complainants' constitutional right to due process of law.

Not one of the Complainants was ever joined as a party to the ETP, RSP, or RTC proceedings before this Commission. TE never brought any action against the Complainants pursuant to R.C. 4905.26 to obtain a determination that the special contract termination provisions were unreasonable or unlawful within the meaning of R.C. 4905.22, R.C. 4905.31, or any other provision of Ohio law. As a result, the Complainants were never given legally adequate notice of, or an opportunity to be heard upon the subject of, TE's efforts to modify the

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[8] *In the Matter of the Application of Ohio Power Company to Cancel Certain Special Power Agreements and For Other Relief*, Case No. 75-161-EL-SLF (*Opinion & Order* dated August 4, 1976) (discussed in greater detail on pages 27-28 of Complainants' Joint Brief).

[9] *Id.*

[10] *Id.*

[11] *See* Complainants' Joint Brief, pp. 27-31. See also Complainants' Joint Reply, pp. 7-9.

termination provisions of their special contracts. The Commission's Opinion and Order of February 19, 2009, approves this Constitutional violation. As a result, rehearing is appropriate.

III. CONCLUSION

Based on the foregoing, Complainants respectfully request that the Commission grant their request for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by electronic mail and regular mail this 20th day of March, 2009.

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LEXSEE 2000 OHIO APP. LEXIS 4493

Schottenstein Trustees dba Main/270 Centre, Plaintiff-Appellee, v. Michael A. Carano et al., Defendants-Appellants.

No. 99AP-1222

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2000 Ohio App. LEXIS 4493

September 29, 2000, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Municipal Court.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant lessees challenged a judgment of the Franklin County Municipal Court (Ohio), granting summary judgment to plaintiff lessor in its action to recover rent payments from defendants arising from their assignee's holding over and failing to pay rent.

OVERVIEW: Defendants entered into a five-year lease to rent plaintiff's premises with the option to renew for another five-year term. Pursuant to the lease, defendants were prohibited from assigning the premises without plaintiff's prior written consent. Nonetheless, four years later, and without plaintiff's consent, defendants assigned their lease to assignees. When the first lease expired, assignees continued to possess the premises, and plaintiff continued to accept rent payments. Plaintiff sued defendants when assignee later failed to make rent payments. Plaintiff was awarded a monetary judgment for past rent due and attorney fees. Defendants contended plaintiff was estopped from objecting to the assignment because plaintiff accepted rent from the assignee for 11 months. Judgment was affirmed. Because defendants failed to present sufficient evidence to demonstrate a genuine issue of material fact concerning plaintiff's knowledge of the assignment, liability was properly imposed on defendants arising from their assignee's holding over and failure to pay rent. Finally, the lease's attorney fees clause was not vague merely because it did not define what were reasonable fees.

OUTCOME: Judgment was affirmed; trial court properly granted summary judgment on plaintiff's claim for rent, as defendants presented no evidence to demonstrate plaintiff's knowledge of the assignment, such as checks to show who made monthly rental payments. Trial court's ability to exercise its own discretion in awarding attorney fees did not render lease's attorney fees clause vague.

CORE TERMS: lease's, assignee, lessor, lessee, attorney fees, summary judgment, rental payments, rent, assigned, vague, municipal, rent payments, issue of material fact, moving party, consented, genuine, surety, non-moving, objecting, knowingly, ambiguous, estopped, monthly, notice, security deposit, default judgment, assignment of error, unenforceable, counterclaim, cross-claim

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards >

Appropriateness
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN1] In accordance with *Ohio R. Civ. P. 56*, summary judgment evidence must be construed most strongly in favor of the nonmoving party; summary judgment should be granted only if no genuine issue of fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the non-moving party. A motion for summary judgment first forces the moving party to inform the court of the basis of the motion and to identify portions in the record which demonstrate the absence of a genuine issue of material fact. If the moving party makes that showing, the non-moving party then must produce evidence on any issue for which the party bears the burden of production at trial.

Contracts Law > Types of Contracts > Lease Agreements > General Overview
Real Property Law > Landlord & Tenant > Lease Agreements > Subleases
Torts > Premises Liability & Property > Lessees & Lessors > General Overview
[HN2] An assignment is a transaction whereby the lessee transfers his entire interest in a premises for the unexpired term of the original lease to another party, an assignee. The assignment divests the lessee of any interest in the property and transfers it to the assignee. However, the lessee is still in privity of contract with the original lessor, and the lessee thus is not relieved of its express obligation to pay rent. When a lease is assigned, the assignee becomes the principal obligor for rent payments and the lessee becomes a surety toward the lessor for the assignee's performance. The liability of the lessee generally continues notwithstanding the lessor's consent to the assignment or acceptance of rent payments.

Real Property Law > Landlord & Tenant > Lease Agreements > Assignments
Real Property Law > Landlord & Tenant > Lease Agreements > Subleases
Real Property Law > Landlord & Tenant > Tenancies > Tenancies at Sufferance
[HN3] Under California law a lessee is liable as a surety for a hold over assignee only when the lessor does not consent to the assignment.

Real Property Law > Landlord & Tenant > Lease Agreements > Subleases
[HN4] A lessor that knowingly allows an assignment to continue is deemed to have consented to that assignment.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview
Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Formation > Ambiguity & Mistake > General Overview
[HN5] Contract language is ambiguous when it is susceptible of two conflicting but reasonable interpretations.

COUNSEL: Law Office of Marlene B. Brisk, and Marlene B. Brisk, for appellee.

Zacks Law Group, L.L.C., and James R. Billings, for appellant.

JUDGES: BRYANT, J., GREY and BROWN, JJ., concur. GREY, J., retired, of the Fourth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: BRYANT

OPINION

(REGULAR CALENDAR)

BRYANT, J.

Defendants-appellants, Michael A. Carano and Tri-State Chiropractic ("TSC"), appeal from a judgment of the Franklin County Municipal Court granting summary judgment to plaintiff-appellee, Schottenstein Trustees dba Main/270 Centre.

On or about March 31, 1993, defendants and Dr. Albert Rivera, now deceased, entered into a five-year lease to rent plaintiff's premises at 6010 East Main Street in Columbus, Ohio, for $ 1,200 a month. At the completion of the initial five-year term defendants had the option to renew the lease for another five-year term with increased rental payments. Pursuant to paragraph twelve of the lease, defendants were prohibited from assigning or sub-leasing the premises without plaintiff's prior written consent. Nonetheless, on **[*2]** or about

October 1, 1997, and without plaintiff's consent, defendants assigned their lease to Dr. Todd Wilson and Buckeye Chiropractic LLC, who assumed the obligations under the lease. After that date, Dr. Wilson apparently made all payments on the lease.

On March 31, 1998, the lease between the parties expired. Dr. Wilson allegedly continued to possess the premises, and plaintiff continued to accept rental payments for the premises. At some future time Dr. Wilson failed to make rental payments as due, and on November 4, 1998, plaintiff served defendants and Dr. Wilson with a three-day notice to vacate the premises. *R.C. 1923.04*. According to plaintiff, three months of rent and other charges, totaling $ 3,841.79, were owed on the premises.

On November 13, 1998, plaintiff filed a complaint against defendants and Dr. Wilson in Franklin County Municipal Court seeking possession of the premises and damages. Plaintiff claimed that as of the expiration of the lease on March 31, 1998, the lease had been renewed on a month-to-month basis. By judgment entry dated December 7, 1998, the municipal court granted plaintiff judgment for restitution of the premises. On January 15, 1999, defendants **[*3]** filed (1) their answer to plaintiff's complaint, (2) a counterclaim against plaintiff for the return of its security deposit, and (3) a cross-claim against Dr. Wilson for contribution and indemnification.

Plaintiff ultimately filed a motion for summary judgment on its claims against defendants and defendants' counterclaim, and a motion for default judgment against Dr. Wilson. By entry dated May 24, 1999, the trial court granted judgment in plaintiff's favor against defendants in the total amount of $ 3,987.39 plus interest, an amount that included $ 1,345.60 in attorney fees and $ 1,200 reduction for defendants' security deposit. In that entry, Dr. Wilson and Dr. Rivera were dismissed with prejudice as parties to the action. However, on June 4, 1999, by a *nunc pro tunc* entry of the court, Dr. Wilson's dismissal as a party was set aside and a default judgment was entered against him by separate entry. Because their cross-claim against Dr. Wilson was still pending, defendants voluntarily dismissed that claim to appeal the trial court's decision to this court, assigning the following error:

THE FRANKLIN COUNTY MUNICIPAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT **[*4]** IN FAVOR OF THE APPELLEE AGAINST APPELLANTS TRI STATE CHIROPRACTIC AND MICHAEL CARANO.

In their assignment of error, defendants contend that because plaintiff received and accepted checks from Dr. Wilson beginning in October of 1997, plaintiff knew defendants assigned the lease to Dr. Wilson without the requisite consent and cannot now seek compensation arising from that breach, as they waived any breach of the provision that prohibited an assignment without plaintiff's prior consent. Contending the trial court erred in failing to so conclude, defendants also assert the trial court erred in awarding attorney fees because the language in the lease providing for an award of such fees was unenforceable.

[HN1] In accordance with *Civ.R. 56*, the evidence must be construed most strongly in favor of the nonmoving party; summary judgment should be granted only if no genuine issue of fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 375 N.E.2d 46*. A motion for summary judgment first forces the moving **[*5]** party to inform the court of the basis of the motion and to identify portions in the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt (1996), 75 Ohio St. 3d 280, 296, 662 N.E.2d 264*. If the moving party makes that showing, the non-moving party then must produce evidence on any issue for which the party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108, 570 N.E.2d 1095*, paragraph three of the syllabus (*Celotex v. Catrett [1986], 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548*, approved and followed).

[HN2] An assignment is a transaction whereby the lessee (defendants) transfers his or her entire interest in a premises for the unexpired term of the original lease to another party, an assignee (Dr. Wilson). See, *e.g.*, *N.R.I. Co. v. N.R. Dayton Mall, Inc., 1991 Ohio App. LEXIS 5377* (Nov. 1, 1991), Montgomery App. No. 12528, unreported. The assignment divests the lessee of any interest in the property and transfers it to the assignee. However, the lessee is still in privity of contract with the original lessor (plaintiff), and the lessee thus is not relieved of its express **[*6]** obligation to pay rent. *Smith v. Harrison (1884), 42 Ohio St. 180*; *Harmony Lodge v. White (1876), 30 Ohio St. 569*, paragraph one of the

syllabus. When a lease is assigned, the assignee becomes the principal obligor for rent payments and the lessee becomes a surety toward the lessor for the assignee's performance. *Gholson v. Savin (1941), 137 Ohio St. 551, 557, 31 N.E.2d 858.* The liability of the lessee generally continues notwithstanding the lessor's consent to the assignment or acceptance of rent payments. *Id.*; *City National Bank & Trust Co. v. Swain (1939), 29 Ohio L. Abs. 16, 25.*

The issue in this case is further complicated by the assignee's holding over past the termination date of the lease. Thus, the relevant issue resolves to what liability the lessee has when the assignee holds over. Ohio courts have not specifically addressed this question, but many other states have and the rationale applied by California is persuasive. [HN3] Under California law a lessee is liable as a surety for a hold over assignee only when the lessor does not consent to the assignment. See *Meredith v. Dardarian (1978), 83 Cal. App. 3d 248, 253-254, 147 Cal. Rptr. 761.* **[*7]** The rationale is sound: the lessee would not have been liable in the absence of the assignment, and if the assignment was with the lessor's consent, the lessor should look to the assignee for payment. Thus the question becomes whether the plaintiff consented to the assignment here.

Although defendants claim plaintiff knew the lease was assigned to Dr. Wilson, plaintiff's summary judgment motion indicated to the contrary. In support, plaintiff submitted an affidavit of its credit manager, Ruth Gross, who stated plaintiff (1) never agreed to release defendants from their liability under the lease, (2) did not ever know defendants had surrendered possession of the premises, but believed TSC was still in business at the premises, and (3) knew Dr. Wilson had entered the premises.

Defendants nonetheless contend plaintiff consented to the assignment, or alternatively, is estopped from objecting to it because plaintiff accepted rent from the assignee for a period of approximately eleven months. In support of their argument, defendants point to *Finkbeiner v. Lutz (1975), 44 Ohio App. 2d 223, 337 N.E.2d 655.* In *Finkbeiner*, the court held that when a lessor accepts rent **[*8]** payments from an assignee, the lessor is "put on notice that an assignment had been made." *Finkbeiner, at 227.* If the lessor "knowingly permits it (the assignment) to continue," the lessor is estopped from objecting to the assignment. *Id.* Thus, [HN4] a lessor that knowingly allows an assignment to continue is deemed to have consented to that assignment.

The facts here, however, are distinguishable from *Finkbeiner*. In *Finkbeiner*, the assignee made rental payments to the lessor for a period of nine years through checks written on the corporate account of the assignee. Conversely, the entire period of the assignment here was only eleven months. Moreover, no checks were introduced to show who made the monthly rental payments. Defendants alternatively suggest plaintiff necessarily was aware of the assignment because plaintiff named the assignee a defendant party to the suit. While plaintiff's actions indicate it knew Dr. Wilson also was in possession of the premises, they do not suggest plaintiff was aware of the assignment.

In the final analysis, defendants presented no evidence to demonstrate an issue of material fact concerning plaintiff's knowledge of the assignment, such **[*9]** as checks to show who made the monthly rental payments. Because defendants failed to present sufficient evidence to demonstrate a genuine issue of material fact concerning plaintiff's knowledge of the assignment, liability can be imposed on defendants arising from their assignee's holding over and failing to pay rent: the lessee assumes the position of surety toward the lessor and remains in that position even if the assignee holds over. *Meredith, supra.* The trial court properly granted summary judgment on plaintiff's claim for rent.

Defendants next contend the trial court erred in granting plaintiff attorney fees. Pursuant to paragraph thirty-three of the lease, in case of litigation involving default on the lease defendants "shall be responsible for (plaintiff's) reasonable attorney's fees." Submitted with plaintiff's motion for summary judgment was an affidavit from its attorney stating that she had expended 7.25 hours of work in the matter at a cost of $ 135 an hour, plus $ 65 in court costs. The trial court granted attorney fees to plaintiff in the amount of $ 1,345.60. Defendants now contend that the clause in the lease awarding attorney fees is vague and ambiguous **[*10]** because it does not define reasonable attorney fees and therefore is unenforceable.

[HN5] Contract language is ambiguous when it is susceptible of two conflicting but reasonable interpretations. *United Telephone Co. v. Williams Excavating, Inc. (1997), 125 Ohio App. 3d 135, 153, 707 N.E.2d 1188*, citing *Inland Refuse Transfer Co. v.*

Browning-Ferris Industries of Ohio, Inc. (1984), 15 Ohio St. 3d 321, 322, 474 N.E.2d 271. Defendants do not argue how the attorney fees clause can reasonably be interpreted in different ways. Rather, they contend the phrase "reasonable attorney's fees" is not defined and therefore vague.

The lease's attorney fees clause is not vague merely because it does not define what are reasonable fees. The clause allows the trial court the discretion it possesses to determine the amount appropriate to the case. The trial court's ability to exercise its own discretion does not render the clause vague.

Having found no error in the trial court's granting summary judgment to plaintiff, we overrule defendants' assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

GREY and BROWN, JJ., concur.

GREY, **[*11]** J., retired, of the Fourth Appellate District, assigned to active duty under authority of *Section 6(C), Article IV, Ohio Constitution.*