

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

<b>Sunoco, Inc. (R&amp;M),</b>	:	Case No. 09-0880
	:	
Appellant,	:	Appeal from the Public Utilities
	:	Commission of Ohio, Case No. 07-
v.	:	1255-EL-CSS, <i>In the Matter of the</i>
	:	<i>Complaint of Sunoco, Inc. vs. The</i>
<b>The Public Utilities Commission</b>	:	<i>Toledo Edison Company for the</i>
<b>of Ohio,</b>	:	<i>Alleged Early Termination of a</i>
	:	<i>Contract.</i>
Appellee.	:	

MERIT BRIEF  
SUBMITTED ON BEHALF OF APPELLEE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

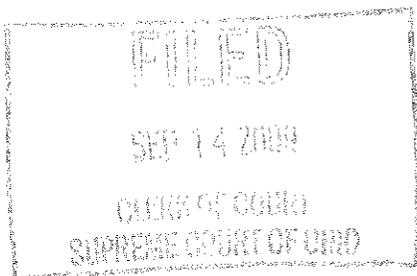
**David F. Boehm**  
(Reg. No. 0021881)  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
(513) 421-2255 (telephone)  
(513) 421-2764 (fax)  
dboehm@BKLawfirm.com

**Counsel for Appellant,  
Sunoco, Inc. (R&M)**

**Richard Cordray**  
(Reg. No. 0038034)  
Ohio Attorney General

**Duane W. Luckey**  
(Reg. No. 0023557)  
Section Chief

**Sarah J. Parrot**  
(Reg. No. 0082197)  
Counsel of Record  
**Thomas W. McNamee**  
(Reg. No. 0017352)  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 9th Floor  
Columbus, Ohio 43215-3793  
(614) 466-4396 (telephone)  
(614) 644-8764 (fax)  
duane.luckey@puc.state.oh.us  
sarah.parrot@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us



**Counsel for Appellee,  
The Public Utilities Commission of  
Ohio**

**Mark A. Hayden**

(Reg. No. 0081077)

Attorney

FirstEnergy Service Company

76 South Main Street

Akron, Ohio 44308

(330) 761-7735 (telephone)

(330) 384-3875 (fax)

haydenm@firstenergycorp.com

**James F. Lang**

(Reg. No. 0059668)

Counsel of Record

**N. Trevor Alexander**

(Reg. No. 0080713)

Calfee, Halter & Griswold LLP

1400 KeyBank Center

800 Superior Avenue

Cleveland, Ohio 44114

(216) 622-8200 (telephone)

(216) 241-0816 (fax)

jlang@calfee.com

tallexander@calfee.com

**Counsel for Intervening Appellee,  
The Toledo Edison Company**

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The Commission reasonably and lawfully determined that the plain language of the price protection provision did not permit Sunoco to extend the duration of the ESA. This Court will not reverse or modify a decision of the Commission where, as here, the record contains sufficient probative evidence to show that the Commission’s determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. Ohio Rev. Code Ann. § 4903.13 (Anderson 2009); <i>Dayton Power &amp; Light Co. v. Pub. Util. Comm’n</i> , 4 Ohio St. 3d 91, 447 N.E.2d 733 (1983). .....	11
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**IN THE  
SUPREME COURT OF OHIO**

<b>Sunoco, Inc. (R&amp;M),</b>	:	Case No. 09-0880
	:	
Appellant,	:	Appeal from the Public Utilities
	:	Commission of Ohio, Case No. 07-
v.	:	1255-EL-CSS, <i>In the Matter of the</i>
	:	<i>Complaint of Sunoco, Inc. vs. The</i>
<b>The Public Utilities Commission</b>	:	<i>Toledo Edison Company for the</i>
<b>of Ohio,</b>	:	<i>Alleged Early Termination of a</i>
	:	<i>Contract.</i>
Appellee.	:	

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**MERIT BRIEF  
SUBMITTED ON BEHALF OF APPELLEE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**INTRODUCTION**

Sunoco, Inc. (R&M) (“Sunoco” or “Appellant”) is a retail customer of the Toledo Edison Company (“Toledo Edison”), which is an operating subsidiary of FirstEnergy Corporation (“FirstEnergy”). Sunoco has the choice to purchase electricity from Toledo Edison or another supplier, and has elected to buy from Toledo Edison. As a large industrial customer, Sunoco has for more than a decade enjoyed a discount on the price of electricity pursuant to an Electric Service Agreement (“ESA”) with Toledo Edison. The ESA is a special contract approved and supervised by the Public Utilities Commission of Ohio (“Commission”) and authorized by R.C. 4905.31. Rather than pay more according to Toledo Edison’s tariff, Sunoco has benefitted from significant savings under the ESA and, despite an opportunity to extend its duration, Sunoco failed to do so.

Having grown accustomed to paying less, Sunoco seeks to convince this Court that the economically advantageous ESA should have terminated ten months later than it actually did. Although Sunoco has received the benefit of the bargain that it made, it now tries to make that bargain last a little longer. Sunoco asks this Court to provide a better deal than it bargained for with Toledo Edison and a better deal than the Commission approved. Sunoco would have this Court rewrite the Commission's orders approving the end dates of Toledo Edison's special contracts, so as to extend the duration of its own agreement and the substantial savings that it afforded for many years. The Court should reject Sunoco's invitation to call into question the certainty of final Commission orders.

The Commission reasonably determined that the ESA terminated in February 2008, not December 2008, as Sunoco contends. The Commission made this determination on the basis of both the unambiguous terms of the ESA and its own prior orders. The Commission's orders issued in this case are entirely reasonable and should be affirmed.

### **STATEMENT OF THE FACTS AND CASE**

The facts of this case are undisputed. The only question is whether the term of the Electric Service Agreement ("ESA") ended on Sunoco's meter read date in February 2008, as mandated by an opinion and order issued by the Commission in 2006, or on December 31, 2008, as argued by Sunoco. The case began with a complaint filed pursuant to R.C. 4905.26, in which Sunoco alleged that Toledo Edison was obligated to

provide discounted pricing on electricity through the end of 2008, despite the Commission's earlier order.

**A. The ESA and Its “Comparable Facility Price Protection” Provision**

The discount was provided to Sunoco by Toledo Edison through a Production Incentive Agreement beginning in 1996, and later through the ESA, which was dated May 17, 1999. *In the Matter of the Complaint of Sunoco, Inc. vs. The Toledo Edison Company*, Case No. 07-1255-EL-CSS (hereinafter “*In re Sunoco*”) (Opinion and Order at 3) (February 19, 2009), Appellant’s App. at 28; Joint Stip. at 2, Appellant’s Supp. at 3.<sup>1</sup> In addition to the discounted pricing, the ESA outlined the terms and conditions under which Sunoco received electric service at its petroleum refinery in Oregon, Ohio. Joint Stip. at 1, 2, Appellant’s Supp. at 2, 3; Joint Stip. Ex. E, Appellant’s Supp. at 42-50. As a “reasonable arrangement” authorized by R.C. 4905.31, the ESA was a special contract filed with and approved by the Commission. *In the Matter of the Application of The Toledo Edison Company for Approval of an Electric Service Agreement with Sunoco, Inc.*, Case No. 99-679-EL-AEC, *et al.* (Finding and Order at 15) (June 20, 2002), App. at 18; Joint Stip. at 2, Appellant’s Supp. at 3; Joint Stip. Ex. E, Application at 1, Appellant’s Supp. at 43. As such, the ESA remained subject to the ongoing “supervision and

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<sup>1</sup> References to appellant’s appendix are denoted “Appellant’s App. at \_\_\_\_;” references to appellant’s supplement are denoted “Appellant’s Supp. at \_\_\_\_;” references to appellee’s appendix attached hereto are denoted “App. at \_\_\_\_;” and references to appellee’s second supplement are denoted “Sec. Supp. at \_\_\_\_.” References to the joint stipulation of facts filed before the Commission by Sunoco and Toledo Edison on May 20, 2008 are denoted “Joint Stip. at \_\_\_\_.”

regulation” of the Commission. Ohio Rev. Code Ann. § 4905.31 (Anderson 2009), Appellant’s App. at 60; Joint Stip. at 3, Appellant’s Supp. at 4. Sunoco and Toledo Edison agreed that the ESA “shall commence with the billing cycle for the bill rendered for the month of June 1999 and shall continue thereon for seven (7) years.” Joint Stip. Ex. E, Application at 1, Appellant’s Supp. at 43; *see also* Joint Stip. Ex. E at 5, Appellant’s Supp. at 48. Thus, Sunoco and Toledo Edison originally intended the ESA to end in 2006. *Id.*

The ESA’s terms and conditions were similar to a Production Incentive Agreement between Toledo Edison and BP Oil Company (“BP”) dated April 23, 1996 (“BP Agreement”). Joint Stip. at 2, Appellant’s Supp. at 3; Joint Stip. Ex. B, Appellant’s Supp. at 27-33. BP received electric service from Toledo Edison at its refinery located at 4001 Cedar Point Road. Joint Stip. at 2, 3, Appellant’s Supp. at 3, 4; Joint Stip. Ex. B, Appellant’s Supp. at 27-33. The BP and Sunoco refineries are “comparable facilities” as defined in Section 8.1 of the BP Agreement and Section 9.1 of the ESA, and both agreements contained a provision for “comparable facility price protection.” Joint Stip. at 3, Appellant’s Supp. at 4; Joint Stip. Ex. B at 5, Appellant’s Supp. at 31; Joint Stip. Ex. E at 5, Appellant’s Supp. at 48. This provision permitted Sunoco to utilize the pricing from the BP Agreement for the duration of the ESA. Joint Stip. Ex. E at 5, Appellant’s Supp. at 48. BP likewise enjoyed the same protection. Joint Stip. Ex. B at 5, Appellant’s Supp. at 31. The ESA’s “comparable facility price protection” provision (“price protection provision”) states in full:

9. COMPARABLE FACILITY PRICE PROTECTION:

- 9.1 A Comparable Facility shall be defined as an operating oil refinery and located within the certified service territory of the Toledo Edison Company, as such service territory is defined on January 1, 1996.
- 9.2 If the Company provides an arrangement, rates or charges which is or may be in effect at any time during the term of this Agreement, to a Comparable Facility within its certified territory, then the Customer will have the right to utilize that arrangement, rates or charges for its Facility. The Customer must comply with all other terms and conditions of the arrangement including firm and interruptible load characteristics/conditions.

Joint Stip. Ex. E at 5, Appellant's Supp. at 48.

**B. History of Earlier Commission Proceedings**

On June 22, 1999, the General Assembly enacted legislation to restructure the electric industry. *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 Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, *et al.* (hereinafter "*In re FirstEnergy Corp.*") (Opinion and Order at 4) (July 19, 2000), App. at 21. It required electric utilities to file with the Commission a plan to provide for retail competition in the generation component of electric service. *Id.* In 2000, pursuant to a stipulation and Commission order approving Toledo Edison's electric transition plan ("ETP"), Toledo Edison offered its special contract customers, including Sunoco and BP, a time-limited, one-time right to extend their current contracts to the extent authorized by the ETP stipulation – namely,

“through the date at which the [regulatory transition] charges cease.”<sup>2</sup> *In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP (Stipulation and Recommendation at 5) (April 17, 2000), Appellant’s Supp. at 191; *see also In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP (Opinion and Order at 6, 67, 71) (July 19, 2000), App. at 22-24; Joint Stip. at 3, Appellant’s Supp. at 4. As required by the stipulation, Toledo Edison notified its special contract customers of this one-time right. *In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP (Stipulation and Recommendation at 5) (April 17, 2000), Appellant’s Supp. at 191; Joint Stip. at 3, Appellant’s Supp. at 4. Sunoco and BP were among the customers that opted to extend the duration of their special contracts. Joint Stip. at 3, Appellant’s Supp. at 4.

In 2003, Toledo Edison sought the Commission’s approval of a rate stabilization plan (“RSP”) and, in 2004, a revised RSP, to take effect at the end of the market development period on January 1, 2006. *In the Matter of the Applications 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 No. 03-2144-EL-ATA (hereinafter “*In re Toledo Edison Co.*”) (Opinion and Order at 2, 3, 4) (June 9, 2004), Appellant’s Supp. at 133, 134, 135. Notice of the proceeding

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<sup>2</sup> The ETP stipulation provided that RTC recovery was to continue either until Toledo Edison’s cumulative sales reached a specified level or until June 30, 2007, whichever occurred first. *In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP (Stipulation and Recommendation at 16) (April 17, 2000), App. at 36.

was provided by publication. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Entry at 5) (October 28, 2003), App. at 29. By stipulation and Commission order approving and modifying the revised RSP, Toledo Edison was authorized, upon request of a special contract customer received within thirty days of the RSP opinion and order, to “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.” *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Revised Rate Stabilization Plan at 16) (February 24, 2004), Appellant’s Supp. at 92; *see also In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 8-9, 40-42, 52, 53) (June 9, 2004); Appellant’s Supp. at 139-140, 171-173, 183, 184; Joint Stip. at 3, 4, Appellant’s Supp. at 4, 5.

Unlike the ETP stipulation, the RSP stipulation did not require Toledo Edison to notify, nor did Toledo Edison actually notify, special contract customers of this chance to extend their contracts. *See In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Revised Rate Stabilization Plan at 16) (February 24, 2004), Appellant’s Supp. at 92; Joint Stip. at 4, Appellant’s Supp. at 5. The option to extend was addressed in the Commission’s RSP opinion and order, which was available to the public via the Commission’s docket and web site. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 8-9, 40-42, 52) (June 9, 2004), Appellant’s Supp. at 139-140, 171-173, 183. BP timely elected to extend its contract. Joint Stip. at 4, Appellant’s Supp. at 5. Sunoco, however, failed to extend the ESA and did not then, in 2004, assert a claimed right to utilize BP’s new contract term, as it does now. *Id.*

In 2005, Toledo Edison sought the Commission's approval of a rate certainty plan ("RCP"). *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 No. 05-1125-EL-ATA, *et al.* (hereinafter "*In re Toledo Edison Co.*") (Opinion and Order at 2) (January 4, 2006), App. at 33. By stipulation and Commission order approving the RCP, the duration of Toledo Edison's special contracts was fixed. *In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Stipulation and Recommendation at 12) (September 9, 2005), App. at 39; *see also In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Opinion and Order at 14) (January 4, 2006), App. at 34; Joint Stip. at 4, 5, Appellant's Supp. at 5, 6. Special contracts extended under the RSP, such as the BP Agreement, were set to expire on December 31, 2008. *In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Stipulation and Recommendation at 12) (September 9, 2005), App. at 39; Joint Stip. at 5, Appellant's Supp. at 6. Special contracts extended under the ETP but not extended under the RSP, such as Sunoco's ESA, were fixed to end on the customer's meter read date in February 2008, which was consistent with the ETP's method of calculation of the contract end dates. *Id.*

### **C. History of Complaint Proceeding**

In May 2007, Sunoco was informed by Toledo Edison that the ESA would terminate on Sunoco's meter read date in February 2008. Joint Stip. at 5, Appellant's Supp. at 6. Several months later, in November 2007, Sunoco first disputed this date and requested Toledo Edison to extend the ESA on the basis of BP's termination date of

December 31, 2008 and the ESA's price protection provision. Joint Stip. at 5, Appellant's Supp. at 6; Joint Stip. Ex. G, Appellant's Supp. at 54-55. Sunoco was informed by Toledo Edison that it had a different interpretation of the price protection provision. Joint Stip. at 5, Appellant's Supp. at 6; Joint Stip. Ex. H, Appellant's Supp. at 57.

On December 6, 2007, Sunoco filed a complaint against Toledo Edison before the Commission. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 1) (February 19, 2009), Appellant's App. at 26. Sunoco alleged that termination of the ESA as of Sunoco's meter read date in February 2008 was a violation of the Commission order approving the ESA under R.C. 4905.31. *Id.* at 1, 8, Appellant's App. at 26, 33. Sunoco argued that, if the ESA was not extended to December 31, 2008, its electric bills would be millions of dollars more and that it would operate at a competitive disadvantage to BP. *Id.* at 1-2, Appellant's App. at 26-27.

Sunoco and Toledo Edison filed a joint stipulation of facts on May 20, 2008. *Id.* at 2, Appellant's App. at 27. On May 30, 2008, the parties filed a joint motion requesting that the Commission take administrative notice of certain documents filed in the earlier ETP, RSP, and RCP proceedings:

- From the ETP proceeding, Case No. 99-1212-EL-ETP, stipulation and recommendation filed April 17, 2000; supplemental settlement materials filed May 9, 2000; and opinion and order issued July 19, 2000;

- From the RSP proceeding, Case No. 03-2144-EL-ATA, application and rate stabilization plan filed October 21, 2003; stipulation and recommendation filed February 11, 2004; revised rate stabilization plan filed February 24, 2004, as an attachment to the rebuttal testimony of Anthony J. Alexander; opinion and order issued June 9, 2004; and entry on rehearing issued August 4, 2004;
- From the RCP proceeding, Case No. 05-1125-EL-ATA, application and rate certainty plan, and stipulation and recommendation, filed September 9, 2005; supplemental stipulation filed November 7, 2005; and opinion and order issued January 4, 2006.

*In re Sunoco*, Case No. 07-1255-EL-CSS (Joint Motion Requesting Administrative Notice and No Hearing at 5) (May 30, 2008), Sec. Supp. at 5. In their motion, Sunoco and Toledo Edison also requested that the case move forward to briefing, as the parties had determined that a hearing and testimony were not necessary. *Id.* at 4, Sec. Supp. at 4. On June 26, 2008, the attorney examiner granted the parties' motion, but reserved the right to convene a hearing subsequent to the filing of briefs if necessary. *In re Sunoco*, Case No. 07-1255-EL-CSS (Entry at 3) (June 26, 2008), Sec. Supp. at 9. The attorney examiner also accepted the joint stipulation of facts and granted the parties' request that administrative notice be taken of the documents from the earlier proceedings. *Id.* at 1-2, Sec. Supp. at 7-8. Sunoco and Toledo Edison filed their initial briefs on July 10, 2008

and their reply briefs on July 30, 2008. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 2) (February 19, 2009), Appellant's App. at 27.

The Commission's opinion and order was issued on February 19, 2009. Having thoroughly considered the evidence, the Commission concluded that the price protection provision did not enable Sunoco to extend the termination date of the ESA to December 31, 2008. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 9-10) (February 19, 2009), Appellant's App. at 34-35. Sunoco filed an application for rehearing on March 19, 2009, which was denied on April 15, 2009. *In re Sunoco*, Case No. 07-1255-EL-CSS (Entry on Rehearing at 2, 6) (April 15, 2009), Appellant's App. at 39, 43. On May 14, 2009, Sunoco sought review by this Court of the Commission's opinion and order and entry on rehearing.

## ARGUMENT

### Proposition of Law No. I:

**The Commission reasonably and lawfully determined that the plain language of the price protection provision did not permit Sunoco to extend the duration of the ESA. This Court will not reverse or modify a decision of the Commission where, as here, the record contains sufficient probative evidence to show that the Commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. Ohio Rev. Code Ann. § 4903.13 (Anderson 2009); *Dayton Power & Light Co. v. Pub. Util. Comm'n*, 4 Ohio St. 3d 91, 447 N.E.2d 733 (1983).**

The Commission considered all of the evidence presented to it and determined that the price protection provision did not allow Sunoco to extend the term of the ESA beyond

February 2008. Accordingly, the Commission found that Sunoco failed to show that Toledo Edison violated any rule or statute, including R.C. 4905.31, or that its actions were unjust, unlawful, or unreasonable. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 10) (February 19, 2009), Appellant's App. at 35. Dismissing the complaint, the Commission concluded that Sunoco had failed to sustain its burden of proof. *Id.*; see *Grossman v. Pub. Util. Comm'n*, 5 Ohio St. 2d 189, 190, 214 N.E.2d 666, 667 (1966) ("The burden of proof rests upon the complainant.").

Sunoco has likewise failed to make its case before this Court. R.C. 4903.13 provides that an order of the Commission "shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." Ohio Rev. Code Ann. § 4903.13 (Anderson 2009), App. at 2. Interpreting this statutory standard, the Court has consistently stated that it will uphold an order of the Commission "where the record contains sufficient probative evidence to show that the commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." *Dayton Power & Light Co. v. Pub. Util. Comm'n*, 4 Ohio St. 3d 91, 94, 447 N.E.2d 733, 735 (1983). As the appellant, Sunoco bears the burden of showing that the Commission's orders are against the manifest weight of the evidence or clearly unsupported by the record. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 86, 765 N.E.2d 862, 867 (2002). As it failed to sustain its burden of proof before the Commission, Sunoco has also failed to make the requisite showing before this Court.

**A. Sunoco did not raise the issue of the price protection provision’s heading in its application for rehearing or notice of appeal. An appellant fails to invoke the jurisdiction of the Court where, as here, an issue is not set forth in the application for rehearing or notice of appeal. Ohio Rev. Code Ann. §§ 4903.10, 4903.13 (Anderson 2009); *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 114 Ohio St. 3d 340, 872 N.E.2d 269 (2007); *Consumers’ Counsel v. Pub. Util. Comm’n*, 70 Ohio St. 3d 244, 638 N.E.2d 550 (1994).**

Sunoco argues that the Commission should not have considered the clause heading of the price protection provision, “Comparable Facility Price Protection,” as evidence of its meaning. Section 10.6 of the ESA provides that its clause headings are “for the purpose of convenience and ready reference” and “do not purport to and shall not be deemed to define, limit or extend the scope or intent of the clauses to which they pertain.” Joint Stip. Ex. E at 6, Appellant’s Supp. at 49. Sunoco, however, failed to raise this issue in its application for rehearing filed with the Commission.<sup>3</sup> *See In re Sunoco*, Case No. 07-1255-EL-CSS (Application for Rehearing) (March 19, 2009), Appellant’s App. at 47-57. R.C. 4903.10 requires:

Such application [for rehearing] shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Ohio Rev. Code Ann. § 4903.10 (Anderson 2009), App. at 1. “[S]etting forth specific grounds for rehearing is a jurisdictional prerequisite for . . . review” by the Court, which

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<sup>3</sup> Rather than having challenged this issue in its application for rehearing, Sunoco instead conceded that the price protection provision’s heading “only refers to comparable price protection.” *In re Sunoco*, Case No. 07-1255-EL-CSS (Application for Rehearing at 3) (March 19, 2009), Appellant’s App. at 49.

has strictly applied the specificity requirement. *Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247-248, 638 N.E.2d 550, 553 (1994) (rejecting substantial compliance argument); *Agin v. Pub. Util. Comm'n*, 12 Ohio St. 2d 97, 98, 232 N.E.2d 828, 829 (1967) (finding "some similarity" between grounds in rehearing application and brief's statements of law on appeal insufficient to comply with statute). As the Court has explained, "[i]t may fairly be said that, by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question." *City of Cincinnati v. Pub. Util. Comm'n*, 151 Ohio St. 353, 378, 86 N.E.2d 10, 23 (1949).

Sunoco further failed to raise the issue in its notice of appeal. See *In re Sunoco*, Case No. 07-1255-EL-CSS (Notice of Appeal) (May 14, 2009), Appellant's App. at 1-4. An appellant is required to file a notice of appeal "setting forth the order appealed from and the errors complained of." Ohio Rev. Code Ann. § 4903.13 (Anderson 2009), App. at 2. The Court lacks jurisdiction to consider specific issues not set forth in a notice of appeal. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 349, 872 N.E.2d 269, 278 (2007); *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 211, 874 N.E.2d 764, 768 (2007). Because Sunoco neglected to raise the issue of the price protection provision's heading in its application for rehearing and notice of appeal, Sunoco is precluded from raising the issue now on appeal and the Court should decline to consider it.

Even if Sunoco had properly preserved its argument, the analysis employed by the Commission to assess the meaning of the price protection provision was nevertheless reasonable. The Commission appropriately focused its review of the price protection provision on its plain language. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 9-10) (February 19, 2009), Appellant's App. at 34-35; *In re Sunoco*, Case No. 07-1255-EL-CSS (Entry on Rehearing at 3) (April 15, 2009), Appellant's App. at 40. Although the Commission noted that the heading of the provision suggests that its purpose is to provide price protection, the Commission also carefully examined the language of the provision itself. *Id.* The clause heading was thus only one of several reasons that the Commission concluded that the plain meaning of the price protection provision did not enable Sunoco to extend the term of the ESA. As the Court has often affirmed, an order of the Commission will not be reversed on the basis of an error that did not prejudice the appellant. *Industrial Energy Consumers v. Pub. Util. Comm'n*, 63 Ohio St. 3d 551, 552, 589 N.E.2d 1289, 1290 (1992); *Akron v. Pub. Util. Comm'n*, 55 Ohio St. 2d 155, 161, 378 N.E.2d 480, 484 (1978); *Ohio Edison Co. v. Pub. Util. Comm'n*, 173 Ohio St. 478, 496, 184 N.E.2d 70, 83 (1962); *Cincinnati v. Pub. Util. Comm'n*, 151 Ohio St. 353, 365, 86 N.E.2d 10, 18 (1949). In light of the Commission's thorough consideration of the plain language of the price protection provision itself, Sunoco was not prejudiced by the Commission's contemplation of the provision's heading.

**B. The Commission appropriately applied the plain language of the price protection provision. The agreement of parties to a written contract is to be ascertained from the language of the instrument. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St. 3d 130, 509 N.E.2d 411 (1987); *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925).**

Sunoco's primary contention is that the ESA's price protection provision allowed Sunoco to apply the termination date of the BP Agreement to the ESA. The crux of Sunoco's argument is that the use of the word "arrangement" in the price protection provision enabled Sunoco to adopt any portion of the BP Agreement. Sunoco ignores the significance of the fact that BP was only able to extend the BP Agreement through December 2008 in connection with Toledo Edison's RSP and RCP cases. Sunoco had the same opportunity to extend the ESA pursuant to the Commission's orders in those cases, but it did not elect to do so. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 10) (February 19, 2009), Appellant's App. at 35.

The Commission properly rejected Sunoco's argument, concluding that Sunoco's overly broad interpretation of the word "arrangement" to encompass the ESA's duration was "not consistent with the plain meaning" of the ESA. *Id.* The Commission also noted that, within the price protection provision, the duration of the ESA was specifically referred to separately from the word "arrangement." *Id.* The provision states that "[i]f the Company provides an *arrangement*, rates or charges which is or may be in effect at any time during the *term* of this Agreement, to a Comparable Facility within its certified territory, then the Customer will have the right to utilize that arrangement, rates or charges for its Facility." Joint Stip. Ex. E at 5, Appellant's Supp. at 48. The Commission concluded that the phrase "during the term of this Agreement" rendered the price

protection provision “applicable to provisions of the contract other than the duration of the contract.” *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 10) (February 19, 2009), Appellant’s App. at 35.

As the Court has stated many times over the years, “[t]he agreement of parties to a written contract is to be ascertained from the language of the instrument.” *Latina v. Woodpath Development Co.*, 57 Ohio St. 3d 212, 214, 567 N.E.2d 262, 264 (1991) (quoting *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925) (syllabus)); *see, e.g., Saunders v. Mortensen*, 101 Ohio St. 3d 86, 88, 801 N.E.2d 452, 454 (2004); *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 219, 797 N.E.2d 1256, 1261 (2003); *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St. 3d 353, 361, 678 N.E.2d 519, 526 (1997); *Graham v. Drydock Coal Co.*, 76 Ohio St. 3d 311, 313, 667 N.E.2d 949, 952 (1996); *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St. 3d 635, 638, 597 N.E.2d 499, 501 (1992); *Kelly v. Med. Life Ins. Co.*, 31 Ohio St. 3d 130, 130, 509 N.E.2d 411, 411 (1987) (syllabus). If the contract is not ambiguous, its plain language must be applied. *St. Marys v. Auglaize Cty. Bd. of Comm’rs*, 115 Ohio St. 3d 387, 390, 875 N.E.2d 561, 566 (2007) (“Where the terms in a contract are not ambiguous, courts are constrained to apply the plain language of the contract.”); *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St. 3d 306, 308, 875 N.E.2d 31, 34 (2007) (“When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.”).

The price protection provision expressly applies only to “an arrangement, rates or charges . . . in effect at any time during the term” of the ESA. Joint Stip. Ex. E at 5,

Appellant's Supp. at 48. This language itself contemplates that the "term" of the ESA is something quite distinct from an "arrangement." The fact that the price protection provision uses the two separate words "arrangement" and "term" in different parts of the provision and in different contexts indicates that Sunoco and Toledo Edison intended those words to have different meanings.

The word "arrangement" is used in conjunction with the words "rates" and "charges." The price protection provision specifically refers to "an arrangement, rates or charges." Joint Stip. Ex. E at 5, Appellant's Supp. at 48. This Court has recognized the maxim *noscitur a sociis* in finding that the meaning of the words used in a contract may be determined by those with which they are associated. *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St. 3d 353, 362, 678 N.E.2d 519, 526 (1997) (citing *New York Coal Co. v. New Pittsburgh Coal Co.*, 86 Ohio St. 140, 167, 174, 99 N.E. 198, 204, 206 (1912)). The entire point of the provision is to protect Sunoco against Toledo Edison's extension of a more favorable price to BP, which is a competitor of Sunoco's.

Sunoco, however, argues that the word "arrangement" encompasses essentially any type of "term or condition" that Toledo Edison might choose to offer to a special contract customer. This argument stretches the meaning of the price protection provision beyond its plain language. If the word "arrangement" were to include the duration of the contract, it would have unintended and irrational consequences. Sunoco would be able to extend the ESA indefinitely should Toledo Edison continue to enter into special contracts with other oil refineries operating "comparable facilities." Sunoco could perpetually

elect to extend the ESA, despite the fact that it clearly provided for a term beginning in June 1999 and ending in June 2006. Joint Stip. Ex. E at 5, Appellant's Supp. at 48. The application for Commission approval of the ESA also states that the ESA "shall commence with the billing cycle for the bill rendered for the month of June 1999 and shall continue thereon for seven (7) years." Joint Stip. Ex. E, Application at 1, Appellant's Supp. at 43.

Even assuming for the sake of argument that Sunoco's interpretation is correct and that the word "arrangement" encompasses a contract extension, Sunoco nevertheless failed to comply with the "terms and conditions of the arrangement" as required by the price protection provision. Joint Stip. Ex. E at 5, Appellant's Supp. at 48. The "arrangement" offered to BP was made pursuant to the RSP case. Joint Stip. at 4, Appellant's Supp. at 5. The stipulation in that case, which was approved by the Commission with certain modifications, afforded all of Toledo Edison's special contract customers, including BP and Sunoco, a one-time right to extend their agreements, provided that they notified Toledo Edison of their election within thirty days of the Commission's order approving the RSP. *Id.* BP complied with this requirement, notifying Toledo Edison within the thirty-day period. *Id.* Sunoco, however, did not provide the required notice to Toledo Edison. *Id.* Sunoco argues that it is entitled to all of the same benefits as its competitor. Sunoco was offered the same benefit as BP, but Sunoco failed to comply with the terms of the offer and thus with the language of the price protection provision upon which Sunoco attempts to rely.

Sunoco also asserts that the Commission's decision rests entirely on its reading of the phrase "at any time during the term of this Agreement" and that the decision is inconsistent with the purpose of the price protection provision. Sunoco, again, failed to raise these arguments in its application for rehearing<sup>4</sup> and thus, for the reasons discussed above, has waived the right to assert them now. Even if Sunoco had properly perfected these arguments, the Commission reasonably concluded that the specific and independent reference to the "term" of the ESA indicated that the ESA's duration was not to be considered an "arrangement" or one of the "terms and conditions" of an arrangement. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 10) (February 19, 2009), Appellant's App. at 35; *In re Sunoco*, Case No. 07-1255-EL-CSS (Entry on Rehearing at 3) (April 15, 2009), Appellant's App. at 40.

As is apparent from the four corners of the ESA, the purpose of the price protection provision was to ensure that Sunoco would pay the same electric rates as BP and any other competitors operating "comparable facilities" under similar contracts. Sunoco enjoyed the benefit of this price protection for many years. Sunoco now attempts to twist one word beyond its plain meaning so that Sunoco may continue to benefit from a discount in its electric rates. The Commission reasonably concluded that the meaning of the price protection provision could not be so distorted. Its orders should be affirmed.

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<sup>4</sup> Sunoco's argument in its application for rehearing was limited to its assertion that the Commission should have found that the word "arrangement" encompassed the duration of the BP Agreement. *In re Sunoco*, Case No. 07-1255-EL-CSS (Application for Rehearing at 3-4) (March 19, 2009), Appellant's App. at 49-50. Therefore, with respect to its first proposition of law, Sunoco has properly preserved only this question for review by the Court. *Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247-248, 638 N.E.2d 550, 553 (1994).

## Proposition of Law No. II:

**Because the Commission did not find that the ESA's price protection provision was ambiguous, the Commission did not consider extrinsic evidence of the parties' intent. Extrinsic evidence is considered to give effect to the parties' intent only if the language of the contract is ambiguous. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 797 N.E.2d 1256 (2003); *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St. 3d 635, 597 N.E.2d 499 (1992).**

The Commission applied the plain language of the price protection provision and concluded that the provision did not allow Sunoco to extend the duration of the ESA. The Commission reached its conclusion by examining the plain meaning of the price protection provision. *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 9-10) (February 19, 2009), Appellant's App. at 34-35; *In re Sunoco*, Case No. 07-1255-EL-CSS (Entry on Rehearing at 4) (April 15, 2009), Appellant's App. at 41. Because the language of the provision was unambiguous, the Commission did not look beyond the language found within the four corners of the ESA. *Id.*

Sunoco argues that the Commission's analysis should have ventured beyond the ESA to determine the parties' intent. Specifically, Sunoco contends that the Commission should have considered extrinsic evidence of the parties' negotiations of a prior agreement. Although Sunoco describes this extrinsic evidence in its brief, Sunoco does not explain the basis for its argument or cite any legal authority for its proposition. In its notice of appeal and application for rehearing, however, Sunoco explained the grounds for its argument. Sunoco explicitly contended that the Commission erred in not considering extrinsic evidence of the parties' intent to the extent that it found the price

protection provision to be ambiguous. *In re Sunoco*, Case No. 07-1255-EL-CSS (Notice of Appeal at 3) (May 14, 2009), Appellant's App. at 3; *In re Sunoco*, Case No. 07-1255-EL-CSS (Application for Rehearing at 5) (March 19, 2009), Appellant's App. at 51. Despite Sunoco's contention, the Commission did not find that the ESA was ambiguous. *In re Sunoco*, Case No. 07-1255-EL-CSS (Entry on Rehearing at 4) (April 15, 2009), Appellant's App. at 41. Nowhere in its orders did the Commission even suggest that it found the ESA to be ambiguous.

In its brief, Sunoco seems to suggest, for the first time and at this late stage in the proceedings, that the Commission should have considered outright the extrinsic evidence, as well as the language of the ESA.<sup>5</sup> Sunoco argues that the Commission should have accounted for the parties' actions and communications dating back well before their execution of the ESA, and that it should have done so regardless of the clarity of the contractual language. This sweeping argument is without merit.<sup>6</sup>

To determine the intent of the parties, the Commission correctly looked to the language of the ESA itself, which the Commission did not find to be ambiguous. *In re*

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<sup>5</sup> This extrinsic evidence was before the Commission pursuant to the parties' joint stipulation of facts, and the Commission summarized the evidence in its opinion and order. See *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 6, 7) (February 19, 2009), Appellant's App. at 31, 32.

<sup>6</sup> Neither is the argument properly before the Court. As discussed above, because Sunoco failed to raise this argument on rehearing and in its notice of appeal, Sunoco is foreclosed from raising it now. *Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247-248, 638 N.E.2d 550, 553 (1994). The only issue before the Court is whether the Commission erred by not considering extrinsic evidence to the extent that it found the price protection provision to be ambiguous. The Commission did not find the provision to be ambiguous. *In re Sunoco*, Case No. 07-1255-EL-CSS (Entry on Rehearing at 4) (April 15, 2009), Appellant's App. at 41.

*Sunoco*, Case No. 07-1255-EL-CSS (Entry on Rehearing at 4) (April 15, 2009), Appellant’s App. at 41; *In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 9) (February 19, 2009), Appellant’s App. at 34. As discussed above, “[t]he intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement.” *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St. 3d 353, 361, 678 N.E.2d 519, 526 (1997). If the contract is unambiguous, the plain language within the four corners of the agreement must be applied. *St. Marys v. Auglaize Cty. Bd. of Comm’rs*, 115 Ohio St. 3d 387, 390, 875 N.E.2d 561, 566 (2007); *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St. 3d 306, 308, 875 N.E.2d 31, 34 (2007). Extrinsic evidence is considered to give effect to the parties’ intentions only if the language of the contract is ambiguous. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St. 3d 635, 638, 597 N.E.2d 499, 501 (1992) (“If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity.”); *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 219, 797 N.E.2d 1256, 1261 (2003) (“When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. . . . On the other hand, where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties’ intent.”).

As required with any unambiguous agreement, the Commission applied the plain language of the price protection provision, and determined that the language employed by the parties did not enable Sunoco to extend the duration of the ESA. The Commission

lawfully and reasonably declined Sunoco's invitation to consider extrinsic evidence of the parties' past actions and statements. The Commission's orders should be affirmed.

**Proposition of Law No. III:**

**Sunoco had exactly the same opportunity as did BP and is therefore not harmed. This Court will not reverse a decision of the Commission unless the appellant can show prejudice. *Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 402 N.E.2d 1175 (1980).**

Appellant's propositions of law three and four labor under the misapprehension that BP was afforded some opportunity that Sunoco was not. This is entirely mistaken. Sunoco had exactly the same opportunities, although, in retrospect, it did not capitalize on those opportunities as well as BP did. Understanding why this is so necessitates an understanding of the development of electric restructuring in Ohio, which will be discussed below.

Both BP and Sunoco entered into contracts with Toledo Edison before electric restructuring. As they are competitors, and neighbors, neither wanted the other to have an opportunity in its dealings with Toledo Edison that it did not have. Both therefore had comparable facility price protection provisions in their contracts. Sunoco's contract was signed in 1999 and, barring outside events, was to continue until June 2006.

Outside events did intervene in the form of the first electric restructuring bill (termed "SB 3" and now codified as Chapter 4928 of the Ohio Revised Code). SB 3 was a watershed event in that it permitted retail customers to buy electricity from someone other than their local electric company for the first time. Industrial customers, along with others, in Ohio had long pushed for just such a change in state law and, with SB 3, now

they had it. Implementing this new law carried with it problems, particularly as regards these special contracts.

SB 3 required “unbundling,” that is to say the existing charges were to be broken down into distribution, transmission, and generation components. Customers who stayed with the utility would continue to pay the same total amount as before (ignoring minor effects of tax law change adjustments), although their bills would now reflect the various components. Customers who shopped would not pay for generation, because they would now be buying that from their new supplier, but would pay a regulatory transition charge (“RTC”). The purpose of the RTC was to give the utility the opportunity to collect some of the amounts that had accumulated on the utility’s books during prior regulation, which would not be recoverable at all in a competitive environment. Ohio Rev. Code Ann. § 4928.39 (Anderson 2009), App. at 2. This was the mechanism designed to resolve the complex “stranded cost” issue that had stalled electric restructuring legislation for years before SB 3. The bill provided a five year “market development period” during which prices for tariff customers were frozen, but they would be permitted to shop, if they paid the RTC charge.

Special contract customers did not fit well into this new structure. Generally speaking, customers with special contracts did not have the ability to shop. Their contracts tied them to the utility for the term. Sunoco, for example, would not have been able to shop until its term was up in 2006. This was not in keeping with the competitive thrust of the bill. Likewise, the termination of the contracts did not match with stability that the General Assembly had meant to provide with the market development period.

For example, if a special contract terminated during the market development period, the customer would (in the absence of action by the Commission) return to the otherwise applicable tariff. This would have meant a large increase in costs for those special contract customers, which is exactly what the legislature did not want.

The Commission resolved the various problems with the poor fit between special contracts and the new regulatory regime. It offered customers a choice. A customer could cancel the contract and shop for a new power supplier. Given the history of electric restructuring legislation, one might have thought this would have been very popular with industrial customers, retail access being the point of the exercise. One would be wrong. Few, if any, industrial users exercised this option. The alternative was, if the customer provided notice by the end of 2001, it could continue to buy from the utility at the same rate for so long as the RTC charge was being charged to other customers. *In re FirstEnergy Corp.*, Case No. 99-1212-EL-ETP (Stipulation and Recommendation at 5) (April 17, 2000), Appellant's Supp. at 191. How long this RTC charge would last was an accounting matter. There was a fixed amount of regulatory assets that had to be paid off by the RTC charge. *Id.* at 16, App. at 36. Once the amounts collected through the RTC charge equaled the amount of the regulatory assets, the RTC would stop.<sup>7</sup> *Id.* In this way, there was a kind of matching, both the rate paid and the RTC were tied to the period before electric restructuring, and under the Commission's ETP order, they would end at the same time (if the customer elected not to shop).

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<sup>7</sup> The RTC collection was projected to end on June 30, 2007 for Toledo Edison. *Id.* at 16, App. at 36.

Both Sunoco and BP exercised the option and extended their contracts. Joint Stip. at 3, Appellant's Supp. at 4. This changed the terminus date of the Sunoco special arrangement from June 2006 to the undetermined date when Toledo Edison would no longer charge the RTC. This date was later fixed by the Commission as February 2008. *In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Opinion and Order at 14), App. at 34; *In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Stipulation and Recommendation at 12) (September 9, 2005), App. at 39. Thus, when the contract was terminated in February 2008, Sunoco got exactly what it was entitled to, a contract that ended when RTC collections ended. The Commission's order in the RCP case changed nothing as regards Sunoco; it merely defined that which had not been defined previously, that is, the end of the RTC.

The story of the RTC is more complicated. With the approaching end of the market development period with its fixed rates, increasing concerns were expressed that there would be large price spikes for consumers in January 2006. To address these concerns, the Commission requested, and the utilities proposed, rate stabilization plans. Notice of FirstEnergy's filing was provided to the public through publication.<sup>8</sup> *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Entry at 5) (October 28, 2003), App. at 29. These complicated plans were to smooth out any rate adjustments associated with the end of the frozen rates and one such plan was approved for the FirstEnergy operating

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<sup>8</sup> Sunoco had more reason than just the newspaper notice to follow developments at Toledo Edison. At that point in time, Sunoco did not know when its contract with Toledo Edison would end. Determining when the contract would end required additional action by the Commission to fix the end of the RTC collection. Sunoco would certainly have been following developments in this arena.

companies. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 53) (June 9, 2004), Appellant's Supp. at 184. As a part of these plans, certain additional costs were included within the RTC, and the timeframe over which the underlying RTC would have to be charged would, of necessity, have to change. This adjustment was termed "extended RTC." How long it would be collected was also unknown, although it would have to be longer than the RTC without consideration of the new costs.

In keeping with its earlier matching of the length of special contracts with the collection of RTC, the Commission again offered customers a choice. A customer that did nothing could keep its current deal, essentially paying its current contract rate as long as the RTC was being collected without regard to the extension done in the order. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 8-9, 40-42, 52, 53) (June 9, 2004), Appellant's Supp. at 139-140, 171-173, 183, 184; *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Revised Rate Stabilization Plan at 10, 16, Attachment 7 at 3) (February 24, 2004), Appellant's Supp. at 86, 92, 111. Although it still could not be known when this collection would end (depending, as it did, on the level of electricity sales and other factors), the Commission did specify that the collection could not go on past July 2008. *Id.* Alternatively, if the customer acted within thirty days, the customer's price would continue until the extended RTC was fully collected or December 31, 2010, whichever occurred first. *Id.* No opportunity to cancel was afforded. *Id.*

Special contract customers were given the opportunity to decide for themselves, essentially gamble, which time for the termination of their contract would be more beneficial for them – the unknown end of the RTC collection that must be at or before

July 2008 or the equally unknown end of the extended RTC collection that must be at or before December 31, 2010. BP placed its bet and chose the unknown end of the extended RTC. Joint Stip. at 4, Appellant's Supp. at 5. Sunoco did nothing.<sup>9</sup> *Id.*

The rate stabilization plan experienced difficulty within a year. Rapid fuel price changes were creating large increases for customers and causing instability. To reduce this volatility, FirstEnergy proposed a "rate certainty plan" that was intended to smooth the fluctuations associated with fuel price increases and defer uncollected amounts to be included in later rates. As part of the overall plan, end points for the RTC and the extended RTC were proposed. The Commission approved this plan and fixed the terminus dates – February 2008 for the RTC and December 2008 for the extended RTC collection. *In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Opinion and Order at 14), App. at 34; *In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Stipulation and Recommendation at 12) (September 9, 2005), App. at 39. The Commission's intent was quite specific; it adopted the terms of a stipulation that said:

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

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<sup>9</sup> It has been argued that Sunoco had no notice and, hence, no opportunity to act. This is incorrect. Notice by publication was provided and, in any event, Sunoco had every reason to follow these developments as it knew that future Commission action regarding its contract had to occur. Additionally, contrary to Sunoco's assertions, there was no evidence before the Commission showing that Sunoco did not have notice. Sunoco and Toledo Edison stipulated only that Toledo Edison was not required to notify, nor directly communicated with any of its special contract customers regarding the option to extend. Joint Stip. at 4, Appellant's Supp. at 5.

following months (which are consistent with the ETP's method of calculation of the contract end dates): Ohio Edison – November 2007; Toledo Edison – February 2008; and CEI – December 2008.

*In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Stipulation and Recommendation at 12) (September 9, 2005), App. at 39; *In re Toledo Edison Co.*, Case No. 05-1125-EL-ATA (Opinion and Order at 14), App. at 34. This order is quite clear. Sunoco's contract was extended under the ETP case, but not under the RSP. Joint Stip. at 3, 4, Appellant's Supp. at 4, 5. The end date for Sunoco's contract was, therefore, February 2008. BP's contract was extended under both so it ended in December 2008.

Sunoco argues that the price protection provision of its contract means that BP's termination date should apply to Sunoco as well, essentially that Sunoco could choose between the two termination dates.<sup>10</sup> This reading of the ESA cannot be supported. It would result in an outcome directly opposed to the Commission's intent. Sunoco's reading would allow its contract to end in December 2008 when it had not extended its contract under the option created in the RSP case. Clearly, the Commission meant that the December 2008 termination date would only apply when contracts had been extended under the RSP case; no exceptions were created. Sunoco's reading would create an

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<sup>10</sup> Although it is unstated, it is a logical necessity, under Sunoco's analysis, that BP would have this ability as well; that is to say that BP could have chosen the February 2008 termination date because it was available to Sunoco or it could have chosen to stick with its own date of December 2008. The Commission's intent was not to allow special contract customers to wait and see how market conditions turned out before making their choices. Rather, the Commission simply meant to fix the end dates based upon events already over.

exception where the Commission meant there to be none and, therefore, Sunoco's reading is invalid.

That BP acted to extend under the RSP case is unavailing for Sunoco. The price protection provision does not apply by its own terms. Again, Section 9.2 of the provision says:

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

Joint Stip. Ex. E at 5, Appellant's Supp. at 48. Although Sunoco refers frequently to the first portion of the price protection provision, it ignores the second. To obtain the same "arrangement" as BP (even if it is accepted *arguendo* that the length of the contract is something that was ever meant to be encompassed by this provision), Sunoco has to "comply with all other terms and conditions of the arrangement including firm and interruptible load characteristics/conditions." *Id.* Sunoco has not done so.

The extension available under the RSP was conditional:

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.

*In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Revised Rate Stabilization Plan at 16) (February 24, 2004), Appellant's Supp. at 92; *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 8-9, 40-42, 52, 53) (June 9, 2004), Appellant's Supp. at 139-140, 171-173, 183, 184. Sunoco simply did not meet these conditions. Sunoco made no application to Toledo Edison and Toledo Edison made no decision about whether extending Sunoco's contract would enhance or maintain jobs and economic conditions within its service territory. Both of these must occur before a contract can be extended under the requirements of the price protection provision itself. Neither precondition has occurred and therefore Sunoco is not entitled to extend under the very provision to which it points. Sunoco cannot have it both ways. It cannot claim rights under the order unless it complies with the conditions on those rights.

Sunoco's fundamental error is that it believes that the price protection provision requires that Sunoco be given the same outcome enjoyed by BP. That is not the case. Even assuming that Sunoco's interpretation of the price protection provision is correct, the provision would only require that service be offered to Sunoco on the same terms as BP. This is to say that Sunoco should have the same opportunity that BP does. In this case, Sunoco did not capitalize on the opportunity. BP did. Sunoco is not harmed and this Court will not reverse a Commission decision in the absence of a showing of harm. *Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 335, 402 N.E.2d 1175, 1175 (1980) (syllabus).

In sum, special contract customers were given two opportunities – once in the ETP case and again in the RSP case – to extend the length of their agreements. Each of these

opportunities was created unilaterally by the Commission and each had Commission-imposed limitations on its availability. Sunoco exercised its first option but did not exercise it the second time. It now wants to rely on the actions of BP to re-write this history. It cannot. Sunoco's argument would create conflict between Commission orders. It would create a result in violation of the Commission's directive. Even if the price protection provision meant what Sunoco says, it required that Sunoco comply with the same conditions as BP and it has not done so. The provision, therefore, has no application.

Appellant has gotten all to which it was entitled. The Commission so found and it should be affirmed.

**Proposition of Law No. IV:**

**A decision cannot be collaterally attacked unless that decision was issued without jurisdiction or was obtained by fraud. *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375, 875 N.E.2d 550 (2007).**

Sunoco objects to the import of parts of an old Commission decision that is not on appeal in this case. Although Sunoco seeks to exercise the option to extend its special contract as granted by the Commission in its RSP order, Sunoco does not want the conditions the Commission placed on that option in the same RSP order to apply to it.

Those conditions plainly do, as can be seen by reading them:

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.

*In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Revised Rate Stabilization Plan at 16) (February 24, 2004), Appellant's Supp. at 92; *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 8-9, 40-42, 52, 53) (June 9, 2004), Appellant's Supp. at 139-140, 171-173, 183, 184. Although Sunoco has couched its arguments in terms of the price protection provision in its special contract, that provision does not enable Sunoco to extend the ESA, as has been shown in the first three propositions of this brief. Sunoco's remaining argument is an objection to the Commission's characterization of Sunoco's case as a collateral attack on the RSP and RCP decisions. *See In re Sunoco*, Case No. 07-1255-EL-CSS (Opinion and Order at 10) (February 19, 2009), Appellant's App. at 35. The Commission noted that if it were to permit Sunoco to collaterally attack these orders, it could "be viewed as providing Sunoco with an unfair advantage over BP." *Id.*

Such an attack is impermissible on the facts of this case. As recently discussed by this Court, a collateral attack on a decision is only permitted in limited contexts, specifically where the decision attacked was issued without jurisdiction or was obtained through fraud. *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375, 380, 875 N.E.2d 550, 556 (2007). Neither condition holds or is even alleged in this case.

The Commission has ongoing jurisdiction over special contracts approved pursuant to R.C. 4905.31. The section itself shows this, providing that "[e]very 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.” Ohio Rev. Code Ann. § 4905.31 (Anderson 2009), Appellant’s App. at 60. The Court has recognized this authority, finding that “any contract for service entered into by a public utility and a patron thereof . . . is subject to the supervision of the Public Utilities Commission and is not binding and enforceable in so far as it conflicts with a finding and order of the Commission and the rates thereby approved and established.” *Cleveland & Eastern Traction Co. v. Pub. Util. Comm’n*, 106 Ohio St. 210, 218, 140 N.E. 139, 141 (1922) (citing *Patterson Foundry & Machine Co. v. Ohio River Power Co.*, 99 Ohio St. 429, 124 N.E. 241 (1919) (syllabus)).

It is plain that the Commission was acting under this authority in the RSP case when it gave all special contract parties, without regard to any language in any special contract, the conditional ability to extend the time period during which their rates would remain in place. Because Sunoco wants to have access to the contract extension option that the Commission created, Sunoco has no choice but to concede the Commission’s ability to act. Sunoco simply wants to avoid the conditions that went along with the option. The Commission had jurisdiction in this case.

No fraud has been alleged. Actions of the Commission are presumed reasonable unless there is a showing in an appeal that the decision was unlawful or unreasonable. Ohio Rev. Code Ann. § 4903.13 (Anderson 2009), App. at 2; *Office of Consumers’ Counsel v. Pub. Util. Comm’n*, 18 Ohio St. 3d 264, 265, 480 N.E.2d 1105, 1106 (1985); *Ohio-American Water Co. v. Pub. Util. Comm’n*, 68 Ohio St. 2d 104, 106, 428 N.E.2d

860, 861-862 (1981). In the absence of any showing or even a bare allegation, there can have been no fraud.

Because there was neither fraud nor a lack of jurisdiction, the Commission's earlier RSP and RCP decisions cannot be collaterally attacked in this case. Appellant's efforts to do so should be denied by this Court.

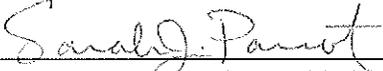
### CONCLUSION

The Commission properly determined that the plain language of the price protection provision did not allow Sunoco to extend the duration of the ESA. Even assuming that Sunoco's interpretation of the price protection provision is the correct one, the provision required Sunoco to comply with the same conditions of the arrangement extended to BP. This Sunoco failed to do. The Commission's orders are reasonable, supported by the record, and should be affirmed.

Respectfully submitted,

**Richard Cordray** (0038034)  
Ohio Attorney General

**Duane W. Luckey** (0023557)  
Section Chief

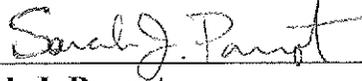
  
\_\_\_\_\_  
**Sarah J. Parrot** (0082197)  
Counsel of Record  
**Thomas W. McNamee** (0017352)  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 9th Floor  
Columbus, Ohio 43215-3793  
(614) 466-4396 (telephone)

(614) 644-8764 (fax)  
duane.lucy@puc.state.oh.us  
sarah.parrot@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us

**Counsel for Appellee,  
The Public Utilities Commission of Ohio**

**PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 14th day of September, 2009.



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**Sarah J. Parrot**  
Assistant Attorney General

**Parties of Record:**

**David F. Boehm**  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202

**Mark A. Hayden**  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308

**James F. Lang**  
**N. Trevor Alexander**  
Calfee, Halter & Griswold LLP  
1400 KeyBank Center  
800 Superior Avenue  
Cleveland, Ohio 44114

# APPENDIX

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**4903.10 Application for rehearing.**

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take

any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

**4903.13 Reversal of final order - notice of appeal.**

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

**4928.39 Determining total allowable transition costs.**

Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:

- (A) The costs were prudently incurred.
- (B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.
- (C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs.

Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section.

Further, the commission's order under this section shall separately identify regulatory assets of the utility that are a part of the total allowable amount of transition costs determined under this section and separately identify that portion of a transition charge determined under section 4928.40 of the Revised Code that is allocable to those assets, which portion of a transition charge shall be subject to adjustment only prospectively and after December 31, 2004, unless the commission authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to division (B)(2) of section 4928.40 of the Revised Code.

The electric utility shall have the burden of demonstrating allowable transition costs as authorized under this section. The commission may impose reasonable commitments upon the utility's collection of the transition revenues to ensure that those revenues are used to eliminate the allowable transition costs of the utility during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage, in the provision by the utility of regulated or unregulated products or services.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Approval of a Contract with Champion ) Case No. 95-315-EL-AEC  
International Corporation. )

In the Matter of the Application of The )  
Toledo Edison Company for Approval )  
of an Electric Service Agreement with ) Case No. 96-1404-EL-AEC  
Schuller International, Inc. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 98-374-EL-AEC  
Service Agreement with Areway Inc. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 98-994-EL-AEC  
Service Agreement with Standard )  
Products Co. )

In the Matter of the Application of )  
The Toledo Edison Company for )  
Approval of an Electric EL-AEC ) Case No. 98-1182-EL-AEC  
Service Agreement with Rotaforge Inc. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 98-1624-EL-AEC  
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Company for Approval of an Electric ) Case No. 99-362-EL-AEC  
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In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 99-581-EL-AEC  
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Products, Inc. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-678-EL-AEC  
Agreement with Tenneco Automotive. )

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In the Matter of the Application of The Toledo Edison Company for Approval of an Electric Service Agreement with Sunoco, Inc.	) ) ) )	Case No. 99-679-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Arrangement with A New Customer Ravens Metal Products.	) ) ) )	Case No. 99-690-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Arrangement with An Existing Customer Rez-Tech Corporation.	) ) ) )	Case No. 99-691-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Arrangement with an Existing Customer (McDonalds Corporation).	) ) ) )	Case No. 99-728-EL-AEC
In the Matter of the Application of Toledo Edison Company for Approval of an Arrangement with an Existing Customer (McDonalds Corporation).	) ) ) )	Case No. 99-729-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with USY - US Yachiyo Inc.	) ) ) )	Case No. 99-790-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Hidreth Manufacturing, LLC.	) ) ) )	Case No. 99-791-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Ashland Conveyor Products.	) ) ) )	Case No. 99-792-EL-AEC



In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval an Electric Service Agreement with Primary Health Systems of Ohio L.P.	) ) ) ) )	Case No. 99-1041-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with The Sherwin-Williams Company.	) ) ) ) )	Case No. 99-1044-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with PHS Mt. Sinai, Inc.	) ) ) ) )	Case No. 99-1046-EL-AEC
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In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Ziegler Tire and Supply Company.	) ) ) ) )	Case No. 99-1050-EL-AEC
In the Matter of the Application of The Cleveland-Electric Illuminating Company for Approval an Electric Service Agreement with Voss Development Company.	) ) ) ) )	Case No. 99-1051-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Thomas Steel Strip Corp.	) ) ) ) )	Case No. 99-1148-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Kirby Company.	) ) ) ) )	Case No. 99-1239-EL-AEC

In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Shiloh Industries / Liverpool Coil / Valley City Steel.	) ) ) ) )	Case No. 99-1272-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Catholic Charities Facilities Corp.	) ) ) ) )	Case No. 99-1330-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Hilton Garden Gateway Hotel.	) ) ) ) )	Case No. 99-1402-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Holiday Inn Express.	) ) ) ) )	Case No. 99-1403-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with CSC, Ltd.	) ) ) ) )	Case No. 99-1404-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Pratt Industries.	) ) ) ) )	Case No. 99-1405-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Harwick Chemical Manufacturing Corporation.	) ) ) ) )	Case No. 99-1406-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with TW Industrial Properties L.L.C.	) ) ) ) )	Case No. 99-1407-EL-AEC

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 99-1408-EL-AEC  
Service Agreement with Colonial )  
Marketplace. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1409-EL-AEC  
Agreement with Navistar )  
International Transportation Corp. )

In the Matter of the Application of )  
The Toledo Edison Company for )  
Approval of an Amendment to the ) Case No. 99-1410-EL-AEC  
Electric Service Agreement with )  
Libbey-Owens-Ford Co. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 99-1411-EL-AEC  
Service Agreement with State )  
Industrial Products. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 99-1416-EL-AEC  
Service Agreement with Progressive )  
Plastics, Inc. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 99-1417-EL-AEC  
Service Agreement with Kenmore )  
Construction Company. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1558-EL-AEC  
Agreement with Sterilite Corporation )  
of Ohio. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1559-EL-AEC  
Agreement with Advance )  
Automotive System. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1560-EL-AEC  
Agreement with Marion Industries, Inc. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1561-EL-AEC  
Agreement with ARNCO Corporation. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 99-1562-EL-AEC  
Service Agreement with The Geon )  
Company. )

In the Matter of the Application of )  
The Cleveland Electric Illuminating )  
Company for Approval of an Electric ) Case No. 99-1563-EL-AEC  
Service Agreement with Southcorp )  
Packaging USA. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1564-EL-AEC  
Agreement with Bellevue )  
Manufacturing Company. )

In the Matter of the Application of )  
The Illuminating Company for )  
Approval of an Arrangement ) Case No. 99-1565-EL-AEC  
with an Existing Customer )  
(The Geon Company). )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1566-EL-AEC  
Agreement with Printing Concepts, Inc. )

In the Matter of the Application of )  
The Ohio Edison Company for )  
Approval of an Electric Service ) Case No. 99-1567-EL-AEC  
Agreement with Win Plastic )  
Extrusions. )

In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Norfolk and Southern Railway Company.	) ) ) ) )	Case No. 00-01-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Arrangement with an Existing Customer (Rittman Paperboard Company).	) ) ) ) )	Case No. 00-43-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Kowalski Heat Treating.	) ) ) ) )	Case No. 00-304-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Colliers International, Agent for Charter One Bank.	) ) ) ) ) )	Case No. 00-305-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Mantaline Corporation.	) ) ) ) )	Case No. 00-306-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Performance Elastomers.	) ) ) ) )	Case No. 00-307-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Texler, Inc.	) ) ) ) )	Case No. 00-308-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Millard Refrigerated Services.	) ) ) ) )	Case No. 00-310-EL-AEC

95-315-EL-AEC et al.

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In the Matter of the Application for  
Approval of an Addendum A to a  
Contract for Electric Service Between  
Ohio Power Company and Globe  
Metallurgical, Inc. )  
)  
) Case No. 00-380-EL-AEC  
)  
)

In the Matter of the Application of  
The Cleveland Electric Illuminating  
Company for Approval of an Electric  
Service Agreement with Net Shape  
Technologies, Inc. )  
)  
) Case No. 00-452-EL-AEC  
)  
)

In the Matter of the Application of  
The Ohio Edison Company for  
Approval of an Electric Service  
Agreement with Envelope 1. )  
)  
) Case No. 00-453-EL-AEC  
)  
)

In the Matter of the Application of  
The Ohio Edison Company for  
Approval of an Electric Service  
Agreement with Boardman Molded  
Plastics. )  
)  
) Case No. 00-454-EL-AEC  
)  
)

In the Matter of the Application of  
The Cleveland Electric Illuminating  
Company for Approval of an Electric  
Service Agreement with Arrowhead  
Industries. )  
)  
) Case No. 00-455-EL-AEC  
)  
)

In the Matter of the Application of  
The Cleveland Electric Illuminating  
Company for Approval of an Electric  
Service Agreement with Great Lakes  
Cold Storage. )  
)  
) Case No. 00-456-EL-AEC  
)  
)

In the Matter of the Application of  
Ohio Edison Company for Approval  
of an Arrangement with an Existing  
Customer Allen Aircraft Products. )  
)  
) Case No. 00-457-EL-AEC  
)  
)

In the Matter of the Application of  
Ohio Edison Company for Approval  
of an Arrangement with an Existing  
Customer Little Tikes. )  
)  
) Case No. 00-458-EL-AEC  
)  
)

In the Matter of the Application of  
The Cleveland Electric Illuminating  
Company for Approval of an Electric  
Service Agreement with Thermagon. )  
)  
) Case No. 00-475-EL-AEC  
)  
)

In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Olympic Steel, Inc.	) ) ) ) )	Case No. 00-480-EL-AEC
In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Shelton Industries.	) ) ) ) )	Case No. 00-584-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Steel Valley Plastics.	) ) ) ) )	Case No. 00-696-EL-AEC
In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Patrick Products, Inc.	) ) ) ) )	Case No. 00-801-EL-AEC
In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and M-Tek, Inc.	) ) ) ) )	Case No. 00-802-EL-AEC
In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and MGQ Incorporated.	) ) ) ) )	Case No. 00-803-EL-AEC
In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Heinz USA.	) ) ) ) )	Case No. 00-804-EL-AEC
In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Heinz USA.	) ) ) ) )	Case No. 00-805-EL-AEC
In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Ameriwood Industries, Inc.	) ) ) ) )	Case No. 00-806-EL-AEC

In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Pressed Paperboard Technologies, LLC. ) ) ) Case No. 00-807-EL-AEC ) ) )

In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Taylor Made Glass of Ohio, Inc. ) ) ) Case No. 00-854-EL-AEC ) ) )

In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and IBM Corporation. ) ) ) Case No. 00-855-EL-AEC ) ) )

In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Polar Minerals. ) ) ) Case No. 00-856-EL-AEC ) ) )

In the Matter of the Application for Approval of a Contract for Electric Service Between Ohio Power Company and Jason Incorporated dba Janesville Products. ) ) ) Case No. 00-857-EL-AEC ) ) )

In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Discover Financial Services, Inc. ) ) ) Case No. 00-858-EL-AEC ) ) )

In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Crane Plastics Company. ) ) ) Case No. 00-859-EL-AEC ) ) )

In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Midwest Forge. ) ) ) Case No. 00-955-EL-AEC ) ) )

In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Delphi Packard Electric.	) ) ) ) )	Case No. 00-956-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of Amendment No. 1 to an Electric Service Agreement with American Tank & Fabricating Co.	) ) ) ) )	Case No. 00-957-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Feature Foods.	) ) ) )	Case No. 00-958-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Fleming Companies.	) ) ) )	Case No. 00-959-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Net Shape Technologies, Inc.	) ) ) ) )	Case No. 00-1165-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Catholic Charities Facilities Corporation.	) ) ) ) )	Case No. 00-1166-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Pentair Water Treatment Group.	) ) ) ) )	Case No. 00-1285-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with ConAgra, Inc.	) ) ) )	Case No. 00-1286-EL-AEC

In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with ConAgra, Inc.	) ) ) )	Case No. 00-1287-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Elkem Metals Company L.P.	) ) ) ) )	Case No. 00-1413-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Advanced Ceramic, Inc.	) ) ) ) )	Case No. 00-2084-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Plain Dealer Publishing Co.	) ) ) ) )	Case No. 00-2085-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of Amendment No. 1 to the Electric Service Agreement with Argo-Tech Corporation.	) ) ) ) )	Case No. 00-2086-EL-AEC
In the Matter of the Application of The Cleveland Electric Illuminating Company for Approval of an Electric Service Agreement with Unity Rubber.	) ) ) ) )	Case No. 00-2525-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Akron Steel Treating Co.	) ) ) ) )	Case No. 01-56-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with GEI of Columbiana, Inc.	) ) ) ) )	Case No. 01-57-EL-AEC

In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Cloverleaf Cold Storage.	) ) ) ) )	Case No. 01-58-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Stoll Farms, Inc.	) ) ) ) )	Case No. 01-59-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with B & C Diversified Products, Inc.	) ) ) ) )	Case No. 01-94-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with Millard Refrigerated Services.	) ) ) ) )	Case No. 01-95-EL-AEC
In the Matter of the Application of The Ohio Edison Company for Approval of an Electric Service Agreement with PPG Industries, Inc.	) ) ) ) )	Case No. 01-167-EL-AEC

#### FINDING AND ORDER

The Commission finds:

- (1) The Applicants, Columbus Southern Power Company, Ohio Power Company, Monongahela Power Company, The Dayton Power and Light Company, The Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, The Ohio Edison Company and The Toledo Edison Company are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) The Applicants have petitioned this Commission for approval of Electric Service Agreements with various customers. The parties entered each agreement prior to January 1, 2001.
- (3) The agreements include rates, terms and provisions other than those provided in the approved tariffs, which would, absent the agreements, be applicable.

- (4) Previous Commission policy has allowed electric contracts filed pursuant to Section 4905.31, Revised Code, to become effective upon the filing date with the Commission.
- (5) Under the provisions of the stipulation filed on April 17, 2000, in Case No. 99-1212-EL-ETP, which was approved by the Commission in its Opinion and Order dated July 19, 2000, customers of the FirstEnergy operating companies with contracts filed pursuant to Section 4905.31, Revised Code, were given the right, through December 31, 2001, to cancel such contracts without penalty or to extend the contracts through the date at which the RTC charges cease for each operating company. Therefore, certain of the agreements listed above may have been terminated or extended. Also, the terms of some of the agreements listed above may be complete.
- (6) The Commission finds it reasonable to allow these contracts to run their course. Therefore, subject to the determinations and restraints of Senate Bill 3, the contracts are approved.
- (7) Our approval of these contracts does not constitute state action for the purpose of the antitrust laws. It is not our intent to insulate the Applicant or any party to a contract approved by this Finding and Order from the provisions of any state or federal law, which prohibit the restraint of trade.

It is, therefore,

ORDERED, That the agreements attached to each application are approved. Two copies of the agreements as filed with each application shall be accepted for inclusion in this docket. It is, further,

ORDERED, That the case docket for each of the applications listed above be closed. It is, further,

ORDERED, That the Commission's approval of these agreements does not constitute state action for the purpose of the antitrust laws. It is, further,

ORDERED, That nothing in this Finding and Order shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule or regulation. It is, further,

ORDERED, That a copy of this Finding and Order be served upon the Applicants, the Customers and all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



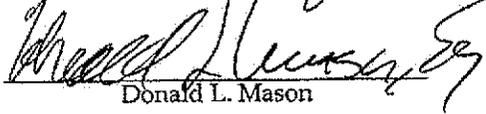
Alan R. Schriber, Chairman



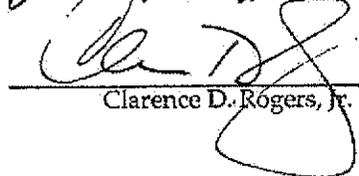
Ronda Hartman Fergus



Judith A. Jones



Donald L. Mason

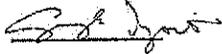


Clarence D. Rogers, Jr.

JMM:ct

Entered in the Journal

JUN 20 2007



Gary E. Vigorito  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of First- )  
Energy Corp. on Behalf of Ohio Edison ) Case No. 99-1212-EL-ETP  
Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 99-1213-EL-ATA  
Edison Company for Approval of Their )  
Transition Plans and for Authorization ) Case No. 99-1214-EL-AAM  
to Collect Transition Revenues. )

OPINION AND ORDER

The Commission, coming now to consider the stipulations, testimony, and other evidence presented in this proceeding, hereby issues its opinion and order.

APPEARANCES:

Arthur E. Korkosz, Stephen L. Feld, James W. Burk, and Gary D. Benz, FirstEnergy Corp., 76 South Main Street, Akron, Ohio 44308; Jones, Day, Reavis & Pogue, by Paul T. Ruxin and Helen L. Liebman, 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215; Calfee, Halter & Griswold, LLP, by Kevin M. Sullivan, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688; and Morgan, Lewis & Griswold, LLP, by Thomas P. Gadsden, 1701 Market Street, Philadelphia, Pennsylvania 19103-2921, on behalf of the FirstEnergy operating companies.

Betty D. Montgomery, Attorney General of the State of Ohio, by Duane W. Luckey, Section Chief, and William L. Wright and Robert A. Abrams, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215-3793, on behalf of the staff of the Public Utilities Commission of Ohio.

Robert S. Tongren, Ohio Consumers' Counsel, and Barry Cohen, Evelyn R. Robinson, David C. Bergmann, and John Smart, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485, on behalf of the residential customers of the FirstEnergy operating companies.

McNees, Wallace & Nurick, by Samuel C. Randazzo, Gretchen J. Hummel, and Kimberly J. Wile, Fifth Third Center, 21 East State Street, Suite 1700, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

Boehm, Kurtz & Lowry, by Michael L. Kurtz, 2110 CBLD Center, 36 East Seventh Street, Cincinnati, Ohio 45202, on behalf of the Kroger Company.

Lawrence J. Stelzer, Jr., 50 West Broad Street, Suite 2020, Columbus, Ohio 43215, on behalf of the Ohio Council of Retail Merchants.

David H. Williams, Law Director, 324 Perry Street, Defiance, Ohio 43512, on behalf of the city of Defiance.

Betty D. Montgomery, Attorney General of the State of Ohio, by Jodi M. Elsass-Locker, Assistant Attorney General, 77 South High Street, 29<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of the Ohio Department of Development.

## I. HISTORY OF THE PROCEEDING

On June 22, 1999, the Ohio General Assembly passed legislation requiring the restructuring of the electric utility industry and providing for retail competition with regard to the generation component of electric service (Amended Substitute Senate Bill No. 3 of the 123<sup>rd</sup> General Assembly). Governor Bob Taft signed this legislation (hereinafter S.B. 3) on July 6, 1999 and most provisions of S.B. 3 became effective on October 5, 1999. Section 4928.31, Revised Code, required each electric utility to file with the Commission a transition plan for the company's provision of retail electric service in the state of Ohio.

On October 4 and 5, 1999, the FirstEnergy Corp. operating companies (Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company)<sup>1</sup> filed three related applications with the Commission. In the first application (Case No. 99-1212-EL-ETP), FirstEnergy requested approval of its electric transition plan and for authorization to recover transition revenues. In the second application (Case No. 99-1213-EL-ATA), the company sought approval of new tariffs to implement the electric transition plan. In the third application (Case No. 99-1214-EL-AAM), FirstEnergy sought authority for certain accounting practices it alleged are consistent with its electric transition plan.

By entry issued October 14, 1999, the Commission stated that it could not find that FirstEnergy's transition plan filing would conform with the requirements of Section 4928.31(A), Revised Code, and the Commission suspended the timeframe associated with approval of the transition plan. On November 4, 1999, the Commission issued an entry modifying the October 14 ruling, and rejecting FirstEnergy's transition plan filing as substantially inadequate inasmuch as the Commission had yet to adopt rules for the filing of transition plans. The Commission directed the company to refile its plan after the Commission had adopted rules governing the filing of transition plans. The Commission's rules were issued on November 30, 1999.

On December 22, 1999, FirstEnergy refiled its transition plan, as well as applications for tariff approval and accounting authority. A technical conference was conducted on January 4, 2000, at which FirstEnergy explained its filing and answered

<sup>1</sup> FirstEnergy Corp. will be referred to as FirstEnergy or the company, and the three operating companies will be referred to individually as Ohio Edison, CEL, and Toledo Edison, respectively, or collectively as the companies or operating companies.

prehearing conference was conducted to discuss pending procedural matters. Pursuant to rulings made by the attorney examiner, nonsignatory intervenor testimony was filed on April 24, 2000 and testimony in support of the stipulation was submitted on April 26, 2000. Hearings were conducted on May 4 and May 8, 2000. On May 9, 2000, a second agreement entitled "Supplemental Settlement Materials" (Jt. Ex. 2) was filed by FirstEnergy, NewEnergy, Columbia, and WPS Energy Services. MAPSA, NEMA, Strategic Energy, Unicom, Enron, and Exelon signed the agreement as nonopposing stipulating parties. Additional evidentiary hearings were held on May 10, 11, 12, and 15, 2000. Local public hearings were conducted on May 30, 2000 in Toledo, on June 2, 2000 in Cleveland, and on June 5, 2000 in Barberton, Ohio.

Initial legal briefs were filed on June 2, 2000 and reply briefs were submitted on June 9, 2000. We note that CNG Retail Services Corporation (CNG) filed a motion to intervene and a brief on June 2, 2000. CNG's motion for intervention is untimely and shall be denied. Accordingly, CNG's brief will not be addressed or considered in this opinion and order.

## II. SUMMARY OF THE STIPULATIONS

The "Stipulation and Recommendation"<sup>2</sup> submitted on April 17, 2000 provides, among other things, that:

- (1) Base distribution electric rates, as unbundled by each of the operating companies, will be frozen through December 31, 2007 (Sec. IV.1);
- (2) Residential customer charge rate reductions, as contained in the previously approved rate plans of the operating companies, will be reflected as a separate rider for all residential customers instead of as a reduction to the generation charge (Sec. IV.2);
- (3) Special contract customers will have a one-time right, through December 31, 2001, to cancel any such contracts without penalty, as well as a one-time right during the same period to extend their current contracts (Sec. IV.3);
- (4) The FirstEnergy operating companies will refile the unbundled residential tariffs to reflect a 5 percent reduction in the generation component, including the regulatory transition charge (RTC) and generation transition charge (GTC) components, and the companies will not seek to

<sup>2</sup> This stipulation and the "Supplemental Settlement Materials" filed on May 9, 2000 will be jointly referred to as the "stipulation," "settlement," or "agreement."

- (2) Requiring the companies to reimburse marketers for certain transmission costs;
- (3) Requiring the companies to reduce charges to residential customers during the market development period by 5 percent of transition costs;
- (4) Requiring the companies to extend the rate plan reductions for residential customers beyond 2005;
- (5) Freezing base distribution rates for an additional 2 years beyond the market development period;
- (6) Giving contract customers the right to cancel or extend their contracts under the same rates, terms, and conditions as are available under the customers' currently approved contracts, thus providing those customers with the option of choosing another supplier;
- (7) Committing an additional \$25 million for low income housing energy efficiency improvement;
- (8) Providing additional shopping incentives, with automatic upward adjustments for commercial and industrial customers if the 20 percent shopping goal is not met;
- (9) Putting the companies at risk for the non-recovery of transition costs up to \$500 million if the 20 percent switching goal is not achieved;
- (10) Providing additional commitments to resolve interface, seam, and reciprocity issues impacting transmission;
- (11) Creating a technical task force to deal with operational issues that will likely arise after the start of retail competition;
- (12) Requiring after-tax gains on any future cash sales of generating assets to be used across company lines, so benefits from such sales are not lost and can be used across the three operating companies;
- (13) Creating a tracking mechanism for recovery of regulatory assets, and a final date for terminating the companies'

- (6) Local public hearings were held on May 30, 2000 in Toledo, on June 2, 2000 in Cleveland, and on June 5, 2000 in Barberton.
- (7) FirstEnergy's transition plan, as modified by the settlement agreements described above, satisfy the 15 prerequisites set forth in Section 4928.34(A), Revised Code.
- (8) Pursuant to Section 4928.39, Revised Code, the total allowable transition costs for the FirstEnergy operating companies are \$2,527,579,833 for Ohio Edison, \$3,017,813,280 for CEL, and \$1,366,034,515 for Toledo Edison.
- (9) FirstEnergy's transition plan, as modified by the settlement agreements, satisfies the requirements of S.B. 3, and is approved for the reasons and to the extent set forth herein.

It is, therefore,

ORDERED, That FirstEnergy's transition plan and the settlement agreements filed on April 17, 2000 and May 9, 2000 are approved, to the extent set forth herein, and subject to final approval of FirstEnergy's compliance tariffs. It is, further,

ORDERED, That the tariff amendments and accounting authority requested by FirstEnergy are approved in accordance with the discussion set forth in this order. It is, further,

ORDERED, That FirstEnergy and other interested intervenors follow the timelines for informal review and comments with respect to the company's compliance tariffs, and that FirstEnergy file an application for approval of its compliance tariffs in accordance with the directives set forth above. It is, further,

ORDERED, That the Commission's actions in this proceeding do not constitute state action for the purposes of antitrust laws. It is not out intent to insulate FirstEnergy from any provisions of state or federal laws that prohibit the restraint of trade. It is, further,



Case No. 98-1633-EL-UNC. With the transfer of operational control, the Applicants assert that all competitive retail electric service (CRES) suppliers in Applicants' service territory will be required to begin scheduling energy and reserving transmission with the MISO on October 1, 2003 or such later date as the MISO assumes control of the ATSI system.

In addition, in 03-1966 et al., the Applicants also propose changes to their supplier tariffs to incorporate the terms of the Stipulation and Recommendation adopted by the Commission in Case No. 02-1944-EL-CSS (02-1944) regarding changes in the partial payment posting priority (Stipulation).

- (2) In 03-1966 et al., motions for intervention were filed by the Ohio Consumers' Counsel; Dominion Retail Inc.; Green Mountain Energy Company; and MidAmerican Energy Company, Strategic Energy LLC, WPS Energy Services, Inc. (WPS), and Constellation NewEnergy, Inc. (Marketers). The intervenors have raised concerns regarding Applicants' proposed changes to their tariffs and procedures for scheduling transmission services. The Marketers argue that the tariff changes will result in higher transmission costs to CRES suppliers and to their customers through the implementation of the MISO transmission tariffs. They also point out that the Applicants' electric transition plans (ETP) approved by the Commission provide for the Applicants to remain responsible for transmission and ancillary services and that they agreed to fully reimburse any supplier serving retail customers within their service territories for the cost of any associated transmission charges imposed by the Pennsylvania-New Jersey-Maryland Interconnection, LLC (PJM) and/or MISO. Further, the Marketers assert that Applicants' tariff changes are not only contrary to the ETP stipulation, but are in violation of the rate cap imposed by Section 4928.34(A), Revised Code. Applicants filed memoranda contra to the motions to intervene.
- (3) On October 10, 2003, WPS filed a motion to require the re-filing of the portion of Applicants' applications regarding tariff approval changes to reflect the Stipulation in 02-1944. WPS contends that the review of the Applicants' tariff changes dealing with 02-1944 should not be controversial and is a matter of determining whether the proposed tariffs actually comply with the Commission's August 6, 2003 order approving the Stipulation. With regard to those tariff changes, WPS comments that one correction is required. WPS states that Article XII, section A, should be modified to reflect the Applicants' existing procedure of paying CRES suppliers

on the next business day following the posting of customers' payments for CRES power rather than the 14 days referred to in the proposed tariffs. WPS argues that this modification is in keeping with the terms of the Stipulation.

- (4) On October 21, 2003, Applicants filed an application in Case No. 03-2144-EL-ATA (03-2144) for authority to continue and modify certain regulatory accounting practices and procedures, for tariff approvals, and to establish regulatory transition charges following the market development period (MDP). The Applicants request regulatory authority to establish rates for generation service under Chapter 4928, Revised Code, to be effective as of the end on the MDP, on January 1, 2006. The Applicants propose to either (a) establish a competitive bidding process to determine standard offer generation service rates commencing as of January 1, 2006 under which the price for generation services would be determined by then current market prices, or (b) implement a comprehensive rate stabilization plan, through December 31, 2008, which they contend will provide stable long-term competitive pricing of energy services for their customers, assure electricity and enhance economic development within their service areas.
- (5) After reviewing the above-captioned applications and the other pleadings filed, the Commission believes that, with one exception, a hearing on the applications is warranted to provide affected parties an opportunity to express their views on the applications. The one exception relates to the portion of the 03-1966 et al. applications requesting approval for tariff changes to implement the Stipulation approved in 02-1944. The Commission finds those tariff changes to be appropriate with one modification to reflect the Applicants' existing procedure of paying CRES suppliers on the next business day following the posting of customers' payments for CRES power rather than the 14 days referred to in the proposed tariffs. The Commission also will direct that the Applicants continue to provide their customers and the CRES suppliers, serving customers within Applicants' service territories, transmission and ancillary services pursuant to their current tariffs/procedures or interim agreements entered into with CRES suppliers, pending Commission resolution of these applications.
- (6) With the exception of 02-1944, the above-captioned cases should be consolidated for purposes of hearing.

- (7) The Commission will establish the following procedural schedule for the remainder of the applicants' requests set forth in the applications:
- (a) Interested parties to these proceedings will have until Wednesday, November 19, 2003 to intervene in these proceeding and file written objections to Applicants' applications.
  - (b) A technical and procedural conference will be held on Wednesday, November 5, 2003, at 10:00 a.m., in hearing room 11-B at the offices of the Commission.
  - (c) Applicants' testimony will be due by Wednesday, November 12, 2003.
  - (d) All other parties wishing to present testimony will have until Wednesday, November 19, 2003 to file that testimony.
  - (e) An evidentiary hearing will be held on Wednesday, December 3, 2003, at 10:00 a.m., in hearing room 11-D at the offices of the Commission.
  - (f) A public hearing to take testimony from the public regarding these applications will be held as follows:

November 20, 2003 at 5:00 p.m. - Toledo

Seagate Convention Centre,  
401 Jefferson Avenue,  
Room 104,  
Toledo, Ohio

November 24, 2003 at 4:00 p.m. - Cleveland

Frank J. Lausche, State Office Building,  
615 W. Superior Avenue, 6<sup>th</sup> & Superior,  
2<sup>nd</sup> Floor Auditorium,  
Cleveland Ohio 44113

November 25, 2003 at 6:00 p.m. - Kent

Kent State University  
Kiva Student Center  
Kiva Auditorium  
Kent, Ohio 44242

- (g) Due to the abbreviated period for the start of the hearing, the response time for discovery should be shortened to seven days. Discovery requests and replies shall be made by hand delivery, email, or telefax. An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him or her that a request will be forthcoming. To the extent that a party has difficulty responding to a particular discovery request within the seven-day period, counsel for the parties should discuss the problem and work out a mutually satisfactory solution. Except with permission of the attorney examiner, no discovery request shall be made after November 24, 2003.
- (8) The parties that have filed motions to intervene noted above have set forth reasonable grounds to intervene. Accordingly, the motions to intervene should be granted.
- (9) The Commission will publish the following notice of the hearings one time in a newspaper of general circulation in each county in the service area affected by the applications:

LEGAL NOTICE . . .

The Public Utilities Commission of Ohio has scheduled hearings in Case Nos. 03-2144-EL-ATA and 03-1966-EL-ATA et al., being In the Matter of the Applications of The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals, and to Establish Regulatory Transition Charges Following the Market Development Period. Public hearings for the purpose of taking testimony from the public are scheduled for November 20, 2003 at 5:00 p.m., at the Seagate Convention Centre, 401 Jefferson

Avenue, Room 104, Toledo, Ohio; November 24, 2003 at 4:00 p.m., at the Frank J. Lausche, State Office Building, 615 W. Superior Avenue, 6<sup>th</sup> & Superior, 2<sup>nd</sup> Floor Auditorium, Cleveland Ohio 44113; and on November 25, 2003 at 6:00 p.m., at Kent State University, Student Center, Kiva Auditorium, Kent, Ohio 44242. An evidentiary hearing is scheduled for December 3, 2003, at 10:00 a.m., in hearing room 11-D at the offices of the Commission, 180 East Broad Street, Columbus, Ohio. For additional information regarding this matter, contact the Commission's Hotline at 1-800-686-7826. The hearing impaired can reach the Commission via TTY-TDD at 1-800-686-1570 or in Columbus at 466-8180.

It is, therefore,

ORDERED, That motions to intervene set forth in finding (2) be granted. It is, further,

ORDERED, That, with the exception of 02-1944, the above-captioned cases are consolidated for purposes of hearing. It is, further,

ORDERED, That the schedule for filing intervention, objections, prefiled testimony, and discovery as set forth in finding (7) be observed. It is, further,

ORDERED, That the technical and procedural conference and hearings be scheduled as set forth in finding (7). It is, further,

ORDERED, That notice of the hearings be published in accordance with finding (10). It is further,

ORDERED, That the Applicants continue to provide their customers and CRES suppliers, serving customers within Applicants' service territories, transmission and ancillary services pursuant to their current tariffs/procedures or interim agreements entered into with CRES suppliers, pending Commission resolution of the applications. It is, further,

ORDERED, That those tariff provisions concerning implementation of the terms of the Stipulation approved by the Commission in 02-1944 are approved as modified pursuant to finding (5). It is, further,

ORDERED, That the Applicants are authorized to file in final form, four complete printed copies of the approved tariffs consistent with the findings of this entry, and to cancel and withdraw the superseded tariffs. One copy shall be filed with the 02-1944 case docket, one shall be filed with the Applicants' TRF dockets, and the remaining two copies shall be designated for distribution to the Commission staff. It is, further,

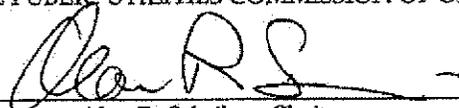
ORDERED, That the approved tariffs become effective upon filing. It is, further,

ORDERED, That FirstEnergy shall make all approved tariffs available on their official company websites and shall provide all approved tariffs electronically to the Commission's docketing division. It is, further,

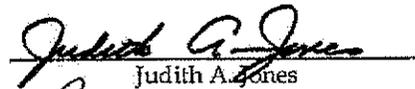
ORDERED, That the Applicants shall explain to all affected customers the tariff changes within 30 days of this entry. The proposed notice shall be submitted to the Commission's Office of Public Affairs for review and approval prior to sending to customers. It is, further,

ORDERED, That a copy of this entry be served on the Applicants and all parties of record in these proceedings and in Case No.99-1212-EL-ETP.

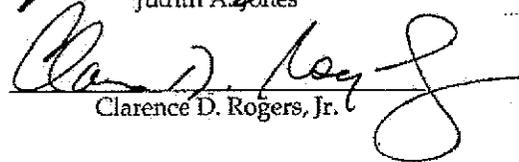
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Ronda Hartman Ferguson

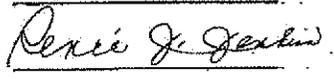
  
Judith A. Jones

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Donald L. Mason

  
Clarence D. Rogers, Jr.

RRG;geb

Entered in the Journal  
**OCT 28 2003**

  
René J. Jenkins  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Application of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company and The Toledo Edison ) Case No. 05-704-EL-ATA  
Company for Approval of a Generation )  
Charge Adjustment Rider. )  
)  
In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric ) Case No. 05-1125-EL-ATA  
Illuminating Company and The Toledo Edison ) Case No. 05-1126-EL-AAM  
Company for Authority to Modify Certain ) Case No. 05-1127-EL-UNC  
Accounting Practices and for Tariff Approvals. )

OPINION AND ORDER

The Commission, coming now to consider the application, testimony, and other evidence presented in this proceeding, hereby issues its opinion and order.

APPEARANCES:

FirstEnergy Corp., by Mr. James W. Burk, 76 South Main Street, Akron, Ohio 44308, and Jones Day, by Ms. Helen L. Liebman, 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215 on behalf of the Applicants (First Energy or the Companies).

Jim Petro, Attorney General of the State of Ohio, by Duane W. Luckey, Senior Deputy Attorney General, Mr. William L. Wright, Mr. Thomas McNamee and Ms. Elizabeth Stevens, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Ohio Consumers' Counsel (OCC), by Janine L. Migden-Ostrander, Consumers' Counsel, Ms. Ann M. Hotz, Assistant Consumers' Counsel, Office of Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of residential utility consumers of FirstEnergy Corp. operating utilities.

McNees, Wallace & Nurick, by Mr. Samuel C. Randazzo and Mr. Daniel J. Neilsen, Fifth Third Center, Suite 1700, 21 East State Street, Columbus, Ohio 43215, on behalf of Industrial Energy Users of Ohio (IEU-Ohio).

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Mr. Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Elyria Foundry Company.

City of Cleveland (Cleveland), by Mr. William Sigli, Chief Assistant Director of Law, 601 Lakeside Avenue, Cleveland, Ohio 44114, and Chester, Willcox & Saxbe, LLP, by Mr. John W. Bentine and Mr. Bobby Singh, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213 on behalf of the City of Cleveland.

Vorys, Sater, Seymour & Pease LLP, by Mr. M. Howard Petricoff, Mr. W. Jonathan Airey, and Mr. William S. Newcomb, 52 East Gay Street, PO Box 1008, Columbus, Ohio 43215, on behalf of Constellation NewEnergy, Inc.; Constellation Energy Commodities Group, Inc. (jointly Constellation companies); Direct Energy, LLC; and WPS Energy.

Boehm, Kurtz & Lowry, by Mr. Michael L. Kurtz, 36 East Seventh Street, Suite 2110, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

City of Stow, by Joseph Haefner, City Attorney, 3760 Darrow, Stow, Ohio 44224, on behalf of the City of Stow.

#### I. HISTORY OF THE PROCEEDINGS

On May 27, 2005, Ohio Edison Company (Ohio Edison or OE), The Cleveland Electric Illuminating Company (CEI) and The Toledo Edison Company (Toledo Edison or TE) (collectively, "Companies") filed a joint application (Case No. 05-704-EL-ATA) for approval of a generation charge adjustment rider (GCAF) pursuant to the rate stabilization plan approved in *In the Matter of the Applications 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 No. 03-2144-EL-ATA, Opinion and Order (June 9, 2004) and Entry on Rehearing (August 4, 2004) (RSP).

On September 9, 2005, the Companies filed a series of cases (Case No. 05-1125-EL-ATA, et seq.) seeking approval of what they named their rate certainty plan (RCP) as an alternative to the GCAF. With those filings, the Companies filed a stipulation and recommendation (initial stipulation) (Joint Ex. 1B)<sup>1</sup>. On November 4, 2005, the Companies filed a supplemental stipulation in the RCP cases (Joint Ex. 2). (The initial stipulation and the supplemental stipulation together will be referred to as the revised stipulation). The

<sup>1</sup> The Companies marked the application and initial stipulation in the RCP case as Joint Exhibit 1. For clarity in this Opinion and Order, the application will be referred to as Joint Exhibit 1A, and the initial stipulation will be referred to as Joint Exhibit 1B.

CONCLUSIONS OF LAW:

- (1) The revised stipulation as clarified is the product of serious bargaining among capable, knowledgeable parties.
- (2) The revised stipulation as clarified as a package, benefits ratepayers and the public interest.
- (3) The revised stipulation as clarified does not violate any important regulatory principles.

ORDER:

It is, therefore,

ORDERED, That the revised stipulation as clarified is approved, along with the necessary authorizations to make accounting changes consistent with the revised stipulation as clarified. It is, further,

ORDERED, that the Companies shall provide to staff, on an annual basis, all information needed (including access to source documents) to perform an effective and efficient review of their fuel costs so that the amounts of excess increased fuel costs to be capitalized under the revised stipulation can be contemporaneously reviewed. It is, further,

ORDERED, That the Companies shall provide staff, on an annual basis, the information on individual project accounts for which they seek to defer certain distribution expenses, and provide supporting work papers demonstrating that the costs to be deferred are reasonable, appropriately incurred, clearly and directly related to the necessary infrastructure improvements and reliability needs of the Companies that are in excess of expense amounts already included in the current rate structures of each of the Companies shall be provided to staff annually and prior to booking the deferral for review. Also, on an annual basis, each of the Companies shall provide to staff a demonstration of the usage of expense amounts included in current rates and shall provide documentation that the amounts claimed for each annual deferral amount are in excess of the amounts in current rates. It is, further,

ORDERED, That the Companies are granted the authority to capitalize and defer the fuel deferral amounts and distribution deferral amount computed and reviewed in accordance with the revised stipulation as clarified for the years 2006, 2007 and 2008. It is, further,

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BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

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 their )  
Transition Plans and for Authorization to )  
Collect Transition Revenues )

Case No. 99-1212-EL-ETP

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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 Tariff Approval )

Case No. 99-1213-EL-ATA

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 Certain Accounting )  
Authority )

Case No. 99-1214-EL-AAM

STIPULATION AND RECOMMENDATION

Attorney for Applicant  
Arthur E. Korkosz  
Trial Attorney  
FirstEnergy Corp.  
76 South Main Street  
Akron, OH 44308  
(330) 384-5849  
Fax: (330) 384-3875

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IX. REGULATORY ASSET TRACKING

1. A tracking mechanism will be established such that when a specific level of kWh distribution sales are met on a Company-by-Company basis, then the RTC recovery for that Company will cease at that point, but in any event not beyond December 31, 2010. The specific level of kWh distribution sales by Company are set forth in Attachment 7.

2. The net gain and tax differences that impact the RTC recovery period discussed above will be converted to an equivalent kWh and be subtracted from the otherwise specified number of kWh as set forth in Attachment 7. Also, any new deferrals or adjustments as discussed above will be similarly converted into an equivalent kWh and be added to the otherwise specified number of kWh as set forth in Attachment 7. An example of the conversion formula is set forth in Attachment 8.

3. Notwithstanding anything to the contrary, the RTC recovery periods shall not extend beyond December 31, 2006 for OE, June 30, 2007 for TE and December 31, 2008 for CEI, unless the additional time is necessary to amortize the deferrals resulting from more than 20% of any class by Company having shopped, and/or to accommodate a significant change in the business environment or economy which results in a substantial deviation from the estimated sales used herein as determined by the Commission.

X. RESTRUCTURING SECURITIES

The Signatory Parties agree for purposes of this section that the Commission may consider RTC recovery in a manner similar to accounts receivable, and accordingly may allow the Companies to pledge such RTC recovery receipts as security for any financing, provided that (a) the proceeds of such financing are used to redeem or pay-off debt or other overlapping obligations so as to accelerate the corporate separation required by the

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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 No. 05- 1125 EL-ATA  
Case No. 05- 1126 EL-AAM  
Case No. 05- 1127 EL-UNC

**APPLICATION**

Ohio Edison Company (hereinafter "OE"), The Cleveland Electric Illuminating Company (hereinafter "CEI"), and The Toledo Edison Company (hereinafter "TE", with OE, CEI and TE, individually referred to as "Company" and collectively referred to as the "Companies"), each of which is an electric light company and a public utility pursuant to Sections 4905.02 and 4905.03 O.R.C., by this Application request approval of their Rate Certainty Plan ("RCP" or "Plan") as described herein.

As part of the approval of the RCP, the Companies seek regulatory authority to implement fuel cost increases, previously authorized in the Companies' Rate Stabilization Plan, Case No. 03-2144-EL-ATA et seq. ("RSP case"), through a fuel recovery mechanism, to decrease the RTC rate component in an equivalent amount to the fuel cost increase and extend the recovery period therefore. The Companies also seek authority to create and recover, and set forth a recovery methodology for, new regulatory assets, and certain other accounting modifications. Finally, approval is sought for an extension of current distribution base rates to maintain the level of rates affected by the Plan throughout the Plan period.

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of Ohio )</b>	
<b>Edison Company, The Cleveland Electric )</b>	
<b>Illuminating Company, and The Toledo )</b>	Case No. 05-_____ EL-ATA
<b>Edison Company for Authority to )</b>	Case No. 05-_____ EL-AAM
<b>Modify Certain Accounting Practices )</b>	Case No. 05-_____ EL-UNC
<b>and for Tariff Approvals )</b>	

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**STIPULATION AND RECOMMENDATION**

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**A. INTRODUCTION**

Rule 4901-1-30, Ohio Administrative Code ("OAC") provides that any two or more parties to a proceeding may enter into a written stipulation covering the issues presented in such a proceeding. The purpose of this document is to set forth the understanding and agreement of the parties who have signed below (the "Signatory Parties") and to recommend that the Public Utilities Commission of Ohio (the "Commission" or "PUCO") approve and adopt this Stipulation and Recommendation ("Stipulation"), as part of its Opinion and Order in these proceedings, resolving all of the issues in the proceedings.

This Stipulation is supported by adequate data and information; represents a just and reasonable resolution of issues in this proceeding; violates no regulatory principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable Signatory Parties in a cooperative process and undertaken by the Signatory Parties representing a wide range of interests to resolve the aforementioned issues. While this Stipulation is not binding on

Paragraph 9; and (2) the maximum time period for recovery of Ohio Edison and Toledo Edison Extended RTC amounts will revert to the recovery period provided in the RSP.

11. The residential rate credits initially approved in the ETP case and preserved in the RSP case shall continue in effect for each Company until the earlier of a residential customer's meter read date in December 2008 for Ohio Edison and Toledo Edison and a residential customer's meter read date in December 2010 for CEI or the dates the RTC and Extended RTC amounts are fully recovered by the respective company.
12. 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): Ohio Edison – November 2007; Toledo Edison – February 2008; and CEI – December 2008.
13. In an effort to encourage conservation, certain incentive rates, originally designed to incent greater use of electricity, will be grandfathered such that no new customers or premises will be permitted take electric service pursuant to such rates after approval of the RCP by the PUCO. A list of such rates is attached hereto and incorporated herein and marked as Attachment 3.
14. Nothing in the Plan and this Stipulation shall be used or construed for any purpose to imply, suggest or otherwise indicate that the results produced through the compromise reflected represent fully the objectives of any Signatory Party nor that the application of Statement of Financial Accounting Standards No. 71 is no longer appropriate with