

IN THE SUPREME COURT OF OHIO

SUNOCO INC. (R&M),	)	
Appellant,	)	CASE NO. 09-0880
	)	
v.	)	On Appeal From
	)	The Public Utilities
THE PUBLIC UTILITIES COMMISSION	)	Commission of Ohio
OF OHIO, et al.,	)	
	)	Public Utilities Commission of Ohio
Appellees.	)	Case No. 07-1255-EL-CSS
	)	

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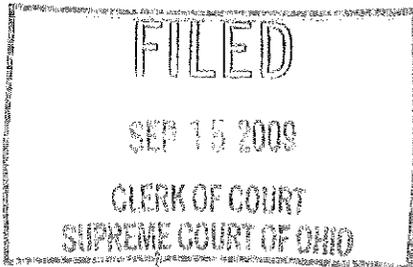
BRIEF OF INTERVENING APPELLEE THE TOLEDO EDISON COMPANY

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## I. INTRODUCTION

The Public Utilities Commission of Ohio (the “Commission”) did not err in applying the plain language of a “most favored nation” clause of a special contract so as to prevent Sunoco Inc. (R&M) (“Sunoco”) from extending the contract’s term and thereby gaining an unfair competitive advantage. Sunoco agreed in 1999 to purchase firm electric service from The Toledo Edison Company (“Toledo Edison”) under the terms of an Electric Service Agreement (“ESA”), which was a special contract entitling Sunoco to receive special, deeply-discounted pricing for electric service. The most favored nation clause in the ESA, which permitted Sunoco to adopt an arrangement, rates or charges provided by Toledo Edison to a comparable facility during the term of the ESA, did not also include language authorizing Sunoco to extend the term of the ESA to match that of a comparable facility. Thus, the Commission reasonably and lawfully determined that Sunoco lacked such a right.

Sunoco faced a choice in the summer 2004. Its ESA was due to expire in late 2007, but the Commission gave it the opportunity to either extend its special contract pricing through the end of 2008 or to allow the special contract to expire so that it could take advantage of whatever competitive market pricing would be available in late 2007. Sunoco chose the latter option while its neighbor operating a comparable facility, The BP Oil Company, opted to extend its own special contract through the end of 2008. It wasn’t until December 2007, when Sunoco was certain that market pricing for 2008 would be less favorable than the special contract pricing BP would receive, that Sunoco filed a complaint seeking to obtain BP’s pricing without any of BP’s associated risk.

Although the Commission observed that Sunoco’s complaint could be viewed as providing Sunoco an unfair competitive advantage (Appx. 35), the Commission’s key finding is that the plain language of the most favored nation clause in the ESA simply is not so broad as to

allow Sunoco to extend its term. The Commission's conclusions were reasonable, lawful, and grounded upon the evidence and the controlling law. Sunoco failed to meet the required burden of proof, and failed to provide sufficient evidence to demonstrate that Toledo Edison violated any applicable law. Therefore, this Court should affirm the Commission's Order.

## **II. STATEMENT OF FACTS**

### **A. Toledo Edison and Sunoco Entered Into an ESA With a Price Protection Provision In 1999.**

Toledo Edison is a public utility, as defined by R.C. § 4905.03(A)(4), and is duly organized and existing under the laws of Ohio. (Supp. 3 at ¶ 5.) Starting with Sunoco's June 1999 bill, Toledo Edison provided electric service to a petroleum-refining facility operated by Sunoco in Oregon, Ohio (the "Sunoco Facility") pursuant to an ESA dated May 17, 1999. (Supp. 2-4, 48.) The ESA replaced and superceded an earlier contract in order to convert Sunoco from interruptible to firm electric service. (Supp. 4 at ¶ 13; Supp. 44.) The ESA was a special arrangement or contract filed with and approved by the Commission in Case No. 99-679-EL-AEC. (Supp. 4 at ¶ 12.) As such, pursuant to R.C. § 4905.31, the ESA remained subject to "the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." Toledo Edison and Sunoco intended that the ESA would remain in effect through the bill issued for usage for June 2006, except that the parties could terminate the ESA by mutual agreement for any reason. (Supp. 4 at ¶ 14; Supp. 48.)

The terms and conditions of the ESA were similar to a Production Incentive Agreement entered into by Toledo Edison and BP Oil Company ("BP") on April 23, 1996 (the "BP Agreement") pursuant to which Toledo Edison provided electric service to a BP oil refinery located in Oregon, Ohio (the "BP Facility"). (Supp. 3 at ¶ 8; Supp. 27-33.) The BP Facility and

the Sunoco Facility are “Comparable Facilities” as defined in Section 8.1 of the BP Agreement and Section 9.1 of the ESA. (Supp. 3 at ¶ 15.) Indeed, both the BP Agreement and the ESA include a “comparable facility price protection” provision allowing Sunoco or BP to adopt rates and similar non-rate “arrangements” from the other’s agreement while their own agreement is in effect. (Supp. 31 at § 8 and Supp. 48 at § 9.) The “comparable facility price protection” provision in the ESA reads 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 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 terms and conditions of the arrangement including firm and interruptible load characteristics/conditions.

**B. Special Contract Customers, Including Sunoco and BP, Received an Opportunity in 2001 to Extend the Termination Date of Their Special Contracts In Furtherance of Electric Utility Transition to Competitive Markets**

Approximately one year after the ESA went into effect, the Commission approved an Electric Transition Plan for Toledo Edison and its affiliated public utilities to implement then-new R.C. Chapter 4928. *See 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 Nos. 99-1212-EL-ETP *et al.* (Opinion and Order July 19, 2000) (the “ETP

Order”).<sup>1</sup> The details of the Electric Transition Plan were set forth in a stipulation – referred to as the ETP Stipulation – that was filed in the ETP Case on April 17, 2000.

As set forth in the ETP Stipulation and as authorized by the Commission in the ETP Order, Toledo Edison’s special contract customers, including BP and Sunoco, were given a one-time opportunity to continue, cancel, or extend the duration of their contracts provided they gave Toledo Edison notice of their choice before the end of 2001. (Supp. 4 at ¶ 16; Appellee Appx. 23.) As ordered by the Commission, Toledo Edison gave notice to each special contract customer that it could extend the term of its contract to the extent authorized by the ETP Stipulation. (Supp. 4 at ¶ 17.) Both BP and Sunoco elected prior to December 31, 2001 to extend the duration of their special contracts. (Supp. 4 at ¶ 17.)

The contract extension was not until a specific date but, instead, depended upon the date when Regulatory Transition Charges, as defined in the ETP Case, ceased for Toledo Edison, which the parties expected would be no later than June 30, 2007. (Supp. 4 at ¶ 17; Appellee Appx. 36.) However, this end date was a moving target, as it depended upon both a distribution sales target and the amortization of deferrals. (Appellee Appx. 36.) Thus, by adopting a termination date that depended specifically upon continuing Commission jurisdiction over and review of Toledo Edison’s ETP, Sunoco accepted that the termination date of its ESA would depend upon, and could be altered by, future actions of both Toledo Edison and the Commission.

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<sup>1</sup> The parties stipulated in the proceedings below that the Commission could take administrative notice of all stipulations, entries and orders filed in Case No. 99-1212-EL-ETP (the “ETP Case”), which included the ETP Order and the Stipulation and Recommendation filed April 17, 2000 (the “ETP Stipulation”). (Supp. 6 at ¶ 31.)

**C. In 2004, BP Further Extended the Termination Date of Its Special Contract, But Sunoco Did Not Take Advantage of The Same Opportunity.**

Between 2001 and 2005, Toledo Edison prepared for the provision of competitive retail electric generation service as required by various provisions of R.C. Chapter 4928 and the Commission's ETP Order. In particular, in 2003, Toledo Edison applied to the Commission for approval of a market-based standard service offer in the form of a Rate Stabilization Plan ("RSP") and, in early 2004, a Revised RSP, which would take effect on January 1, 2006 following the end of the market development period. (Supp. 4-5 at ¶¶ 18-19.) See R.C. § 4928.14. On June 9, 2004, the Commission authorized Toledo Edison to proceed to implement the Revised RSP as modified by the Commission. (Supp. 5 at ¶ 20.)<sup>2</sup>

One notable provision of the Revised RSP authorized Toledo Edison, upon request of a special contract customer received within thirty days of the RSP 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." (Supp. 5 at ¶ 19; Supp. 92.) Toledo Edison was not required to provide notice to special contract customers of this opportunity to extend, and Toledo Edison did not directly communicate to any customer regarding the thirty-day window for extending its contract. (Supp. 5 at ¶ 20.) Instead, contract customers received notice via the Commission's publication of the RSP Order through its publicly available docket and website. Within thirty days of June 9, 2004, BP elected to extend its contract and thereby accepted the risk that its contract price could be

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<sup>2</sup> The parties stipulated in the proceedings below that the Commission could take administrative notice of all stipulations, entries and orders filed in 03-2144-EL-ATA (the "RSP Case"), which included the Revised Rate Stabilization Plan ("Revised RSP") filed February 24, 2004 as an attachment to the Rebuttal Testimony of Anthony J. Alexander, the Opinion and Order filed June 9, 2004 (the "RSP Order"), and the Entry on Rehearing filed August 4, 2004 ("RSP Entry on Rehearing"). (Supp. 6 at ¶ 31.) The entirety of the Revised RSP is included in the Supplement at pages 77-111.

higher than market prices four years in the future; Sunoco did not extend its contract and, thus, chose not to accept that risk. (Supp. 5 at ¶¶ 21-22.) At the time, Sunoco also did not assert any claimed right to incorporate BP's new contract term into its own ESA.

For special contract customers such as Sunoco that extended the term of their contract under the ETP Order but not the RSP Order, the RSP Order also further defined the conditions used to determine the contract end date. Under the terms of the Revised RSP and the RSP Order, Sunoco's ESA and the special contracts of other similarly situated customers would terminate when Toledo Edison attained a specific distribution sales target (consistent with the ETP Case), but in any case no later than July 2008. (Supp. 85-86, 111, 157.)

Sunoco's description of these events in its Merit Brief includes three assertions not in the record below. *See* Sunoco Br. at 10. The record does not establish or contain any reference to: (1) BP's participation in an industrial association; (2) Sunoco's lack of participation in such an association; or (3) Sunoco's failure to receive notice of the opportunity to extend. Indeed, Sunoco received notice through the Commission's publicly available docket. Sunoco elected not to present any testimony on this question or any other issue.

**D. The Commission Ordered in January 2006 that Sunoco's ESA Would Terminate in February 2008, But Sunoco Waited Until Late 2007, When 2008 Market Pricing Was Known, to Try to Back Into BP's Later Termination Date.**

On September 9, 2005, Toledo Edison and other parties filed a Rate Certainty Plan (the "RCP") with the Commission in Case No. 05-1125-EL-ATA *et al.* (the "RCP Case"). (Supp. 5 at ¶ 23.) Among other things, the RCP sought to maintain retail customer rate levels by capitalizing and deferring certain fuel costs and distribution costs over the 2006-08 period. (Appellee Appx. 34, 37.) The Commission issued an Opinion and Order on January 4, 2006 (the "RCP Order") approving the RCP, which, among other things, fixed the end dates of both the BP

and Sunoco special contracts.<sup>3</sup> (Supp. 5-6 at ¶¶ 23-24.) The RCP provided that special contracts extended under the RSP Case, such as the BP Agreement, would continue in effect until December 31, 2008. The RCP further provided that special contracts extended under the ETP Case but not extended under the RSP Case, such as Sunoco's ESA, would continue in effect until the customer's meter read date in February 2008. (Supp. 6 at ¶ 23; Appellee Appx. 39.) As explained in the RCP, the February 2008 termination date was consistent with the ETP's method of calculation of the contract end dates. (Appellee Appx. 39.)<sup>4</sup> Thus, Sunoco and the other similarly situated special contract customers received exactly what they bargained for in 2001.

On or about May 16, 2007, Toledo Edison corresponded with Sunoco to remind it that the ESA would terminate on Sunoco's meter read date in February 2008. (Supp. 6 at ¶ 25.) Sunoco waited until November 13, 2007 to dispute this termination date and to attempt to extend its contract pursuant to the "comparable facility price protection" provision in the ESA. (Supp. 6 at ¶¶ 25-26.) Sunoco waited until December 6, 2007 – nearly three and a half years after the RSP Order – to file its complaint seeking to obtain the contract extension offered in the RSP Case. (Supp. 6 at ¶ 29.)

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<sup>3</sup> Sunoco's Merits Brief misleadingly states that the BP and Sunoco contract termination dates were set by the Commission in "late 2007." Sunoco Br. at 11. As stipulated by the parties, this was done on January 4, 2006. (Supp. 6 at ¶¶ 23, 24.)

<sup>4</sup> As with the ETP and RSP Cases, the parties stipulated below that the Commission could take administrative notice of the RCP filed on September 9, 2005, and the RCP Order entered on January 4, 2006. (Supp. 7 at ¶ 31.)

### III. ARGUMENT

#### Proposition of Law No. 1

**An Electric Service Agreement with a most favored nation clause ends on the termination date set forth in the agreement unless the clause contains clear language authorizing an extension of the agreement's term.**

**A. The Commission Did Not Err In Recognizing that the Heading of the Most Favored Nation Clause is "Comparable Facility Price Protection."**

Sunoco objects that the Commission "got off on the wrong foot" by recognizing that the most-favored-nation clause in the ESA is entitled "Comparable Facility Price Protection." Sunoco Br. at 14. This was not an objection raised by Sunoco in its briefing or its Application for Rehearing below. Under R.C. § 4903.10, rehearing applications "shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Additionally, "[n]o party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application." *Id.* Thus, this Court has held that "setting forth specific grounds for rehearing is a jurisdictional prerequisite for our review." *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St. 3d 244, 247; *Agin v. Pub. Util. Comm.* (1967), 12 Ohio St. 2d 97, 98. Having failed to raise this issue before the Commission, and specifically in its Application for Rehearing, Sunoco cannot raise the issue here. Thus, Sunoco has waived this objection, and this Court need not consider it.

Regardless, the Commission did not err in noting that the heading of this clause in the ESA refers to price protection for comparable facilities. This is consistent with the two paragraphs of the clause itself. The first paragraph, Section 9.1, defines comparable facilities. (Supp. 48.) The second paragraph, Section 9.1, provides price protection between comparable facilities during the term of the ESA. (*Id.*) As the Commission correctly noted, neither paragraph deals with the termination date of the ESA. (Appx. 15.) Thus, the title "Comparable

Facility Price Protection” for this clause is an accurate description of the language of the clause, and the title does not limit or extend the scope or intent of the clause.

**B. Sunoco Failed to Carry Its Burden of Proving that the Most Favored Nation Clause of the ESA Entitles It to Extend the Duration Term of the ESA.**

Sunoco failed to show below, and again fails in arguing here, that it has the contractual right under the “comparable facility price protection” provision of the ESA to utilize the duration term of the BP Agreement as an “arrangement, rates or charges for its Facility.” Sunoco has the burden of proof, and it has not met that burden. *See Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189, 190. The Commission correctly rejected Sunoco’s claim because the contractual provision upon which Sunoco relies is limited by its plain terms to price protection and does not allow Sunoco to extend the duration term of the ESA.

***1. The plain language of the price protection clause does not authorize Sunoco to incorporate into the ESA the duration term of the BP Agreement.***

Because Section 9.2 of the ESA entitles Sunoco to utilize at its facility any “arrangement, rates or charges” that Toledo Edison provided during the term of the ESA to BP, the crux of the issue before the Commission was whether the duration term of the BP Agreement was an “arrangement, rates or charges.” Clearly, the duration of a contract is neither a rate nor a charge. Thus, Sunoco argued that the duration of the BP Agreement was an “arrangement” that Sunoco could incorporate into the ESA. The Commission correctly found that Sunoco’s interpretation ignored the plain meaning of the clause. (Appx. 15.) To the extent terms in a contract are clear and unambiguous, then the intent of the parties is found solely in the language used and one need not go beyond the plain language of the agreement to determine the rights and obligations of the parties. *Hamilton Ins. Servs. v. Nationwide Ins. Cos.* (1999), 86 Ohio St. 3d 270, 273; *Blosser v. Enderlin* (1925), 113 Ohio St. 121, syll. ¶¶ 1, 2. As the Commission observed, the clause uses

the word “term” separately from “all other terms and conditions of the arrangement” and, thus, the duration of the contract is not included within the plain meaning of “arrangement” and “other terms and conditions of the arrangement.” (Appx. 15, 20.)

Although Sunoco cites to no court decisions supporting its argument, the Commission had the benefit of several court decisions that reviewed similar “most favored nation” clauses in supply contracts and rejected the same argument Sunoco makes here. For example, the Minnesota Supreme Court considered a nearly identical issue and determined in *Eveleth Taconite Co. v. Minnesota Power & Light Co.* (Minn. 1974), 221 N.W.2d 157, that a “most favored nation” clause in a utility supply contract does not permit a customer to alter the period of duration of the contract. In that case, the parties entered into two contracts, one with a three-year term and one with a five-year term, to provide all necessary electric power to Eveleth’s plant and mine. The contracts also contained a most favored nation clause entitling Eveleth to utilize “at any time during the term of this agreement, . . . more favorable price, terms or conditions” from a competitor’s contract.<sup>5</sup> Subsequent to the signing of Eveleth’s contracts, Minnesota Power executed contracts with other taconite producers, and the terms and conditions of those contracts were the same as Eveleth’s except they each had a ten-year term, and, being later in time, contained different termination dates. When the time came for termination of Eveleth’s contracts, Eveleth insisted the most favored nation clause in its contracts entitled it to the same

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<sup>5</sup> The clause provided as follows: “Company [defendant Minnesota Power] agrees that, if at any time during the term of this agreement it has in effect an agreement which gives or grants to any other customer, similarly engaged in the taconite industry and who receives the same class and type of electric service as Eveleth Taconite Company, more favorable treatment for the purchase of said electric service or otherwise gives or grants to any such customer more favorable price, terms or conditions, with respect to said other customer’s purchase of said electric service, Company shall notify Eveleth Taconite Company in writing with respect to said more favorable treatment, price, terms or conditions and said Eveleth Taconite Company, at its election, may request Company to substitute for this agreement such more favorable agreement in its entirety or on an equivalent basis to amend this agreement to give effect to such substitution.” *Id.* at 158-59.

termination date as that contained in the longest contract into which Minnesota Power had entered with other taconite producers. Without this requested extension of the term of its contract, Eveleth was required to pay a higher rate for electricity than that paid by the other competing companies.

The Minnesota Supreme Court rejected Eveleth's contention and, in finding that the electricity purchaser could not, under the most favored nations clause, extend the duration of its contract based upon the electric utility's contract with another customer, held:

the phrase "terms or conditions," as used in the most-favored-nations clause, was intended by the parties to mean the covenants and provisions of the agreement other than its duration, and that the word "term" has a distinct meaning signifying the period of duration of the contract during which more favorable terms and conditions could, upon the election of plaintiff, be substituted into the agreement.

*Id.* at 161-62. The *Eveleth* court relied upon an earlier Colorado court decision that also distinguished a contract's "term" or duration from the contract's "terms," which are the "conditions, limitations and propositions which comprise and govern the acts which the contracting parties agree expressly or impliedly to do or not to do." *Id.* at 161 (quoting *Hurd v. Whitsett* (1878), 4 Colo. 77). As the *Eveleth* court explained, the use of two separate phrases in the most favored nation clause – "term" and "terms or conditions" – in different parts of the clause and in different contexts was further evidence that the parties intended those words to have different meanings.

Likewise, Sunoco's price protection clause is exactly what it purports to be – a "price protection" clause and not a "contract duration" clause. By its express terms, it applies only to "an arrangement, rates or charges . . . *in effect at any time during the term of this Agreement.*" (Supp. 48 (emphasis added).) Thus, by allowing Sunoco to opt into an arrangement, rates or charges in effect for BP during the term of the ESA, the clause specifically limits the utilization

of any such arrangement, rates or charges to the term of the ESA. *See Waterloo v. Haworth* (7th Cir. 2006), 467 F.3d 641, 646-47 (because MFN provision began with “during the term of this Agreement, . . .” the party’s obligations were specifically limited to the term of the Agreement). The price protection clause refers to the “term” of the ESA to describe its duration while separately using the words “arrangement, rates or charges” to describe the price protection provisions and arrangements – such as the choice between interruptible or firm service – that may be utilized by the Sunoco facility. Moreover, the second sentence of the clause refers to “all other terms and conditions of the arrangement” that Sunoco must comply with when utilizing an “arrangement, rates or charges for its Facility,” thereby clearly indicating that “arrangement, rates and charges” are simply “terms and conditions” of the ESA. As in *Eveleth*, the parties used the words “term” and “arrangements, rates or charges” in different contexts and intended that they have different meanings. Nowhere in the price protection provision or elsewhere in the ESA is there language authorizing Sunoco to extend the ESA by incorporating the term of the BP Agreement.

Courts consistently have found that contracts with most favored nation clauses end on the termination date specified in the contract unless the contract itself contains specific language authorizing an extension of the contract’s term. *See Baker Car & Truck Rental v. City of Little Rock* (Ark. 1996), 325 Ark. 357, 362 (court cannot rewrite parties’ agreement to insert language authorizing extension); *See also Waterloo*, 467 F.3d at 646 (finding that MFN clause “only provides insight into the parties obligations during the term of the contract. It does not extend the Agreement past its express termination date.”). As an example, the most favored nation clause at issue in *Saikhon v. United Farm Workers of America* (4th App. Dist. 1980), 163 Cal. Rptr. 3d 488, 489, specifically authorized a contracting party to change to a “termination date”

negotiated by the union with another produce company “during the term” of the agreement. Any such language is noticeably absent from the Sunoco ESA, which specifically defines its “term and effective date” in Section 8 and separately sets out “price protection” provisions in Section 9.

Had Sunoco wished to obtain a longer ESA, it could have negotiated such an agreement by including specific language authorizing a longer or extended term, or it could have opted to extend its contract duration in the summer of 2004 as authorized by the Commission’s RSP Order. Because it did neither, the Commission did not err in denying Sunoco’s complaint.

**2. Sunoco interprets the price protection clause to endow the word “arrangement” with a meaning not intended by the parties.**

Although Sunoco argues on appeal that the meaning of the price protection clause is plain and does not require interpretation, Sunoco nevertheless proposes that the Court should interpret “arrangement” to mean “an entire contract.” Sunoco Br. 17.<sup>6</sup> Although Toledo Edison does not believe application of interpretative principles is necessary in this case, those principles reveal that Sunoco’s interpretation violates the canon of construction *noscitur a sociis*, which instructs that a word may be known by the company it keeps.

*Noscitur a sociis* may be used to determine the intent of contracting parties or of drafters of statutes, and it teaches that a general term in a series is interpreted to have a similar meaning and scope to similar or more specific terms in the same series. See *Jarecki v. G.D. Searle & Co.* (1961), 367 U.S. 303, 307; *Ashland Chem. Co. v. Jones*, 92 Ohio St. 3d 234, 236-38, 2001-Ohio-184; *Black’s Law Dictionary* at 1060 (6th ed. 1990). As explained in *Jarecki*, when one ambiguous word in a series is accompanied by other words having a precise and narrow meaning, then that one word should be interpreted precisely and narrowly so that the

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<sup>6</sup> Sunoco argued to the Commission, but has elected not to argue here, that the word “arrangement” means “contract” because the word “arrangement” appears in R.C. § 4905.16 and “is used somewhat synonymously with ‘contract.’” (R. 21 at 6-7).

interpretation of the series as a whole is consistent with the drafters' intentions. *Jarecki*, 367 U.S. at 307. Similarly, this canon of construction is "often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth." *Id.*

In the "comparable facility price protection" clause, the word "arrangement" must be interpreted to have a meaning similar to "rates" and "charges." To the extent Sunoco (or this Court) believes the word "arrangement" is ambiguous, application of the maxim *noscitur a sociis* requires that "arrangement" take its meaning from the words around it. As also explained in *Jarecki*, one word in a series should not be given such a broad meaning such as to render the rest of the words in the series a mere redundancy. *Id.* at 307-08. Sunoco's extremely broad interpretation of the word "arrangement" as used in the "comparable facility price protection" clause does exactly this, as it eliminates any need for the words "rates" and "charges." For each of these words to have meaning, they must be interpreted to refer both to the pricing provisions available to comparable facilities ("rates and charges") and to *similar* non-price terms, such as the choice between interruptible and firm power that was so important to Sunoco. Because Sunoco's interpretation violates a generally-accepted canon of construction and is an attempt to rewrite the agreement of the parties, it should be rejected by this Court.

Sunoco also argues that the intent of the parties was to "level the playing field" so that neither BP nor Sunoco has a competitive advantage. Sunoco Br. 17. Yet a contract termination does not necessarily disadvantage the purchaser under the contract; instead, it affords both parties the opportunity to renegotiate terms and conditions that could be more or less favorable. The risk addressed by a most favored nation clause is lost opportunity while a long-term contract is in effect. This risk is eliminated when a contract ends, as the contracting parties are then free to take advantage of multiple opportunities. Because Sunoco's ESA terminated approximately

ten months earlier than BP's, Sunoco had an exclusive opportunity during that time period to shop for electric service or to accept service under Toledo Edison's general tariff. If market pricing offered by competitive suppliers in 2008 had been lower than the special contract price, Sunoco would not have been arguing now for a "level playing field."

Indeed, Sunoco and BP were on a level playing field in the summer of 2004 when the RSP Order gave each the opportunity to determine electric service pricing for 2008 by choosing either contract pricing or competitive market pricing. BP chose contract pricing over market pricing, and Sunoco did the opposite. Each considered the risks and benefits of locking in a definite price for 2008, and each presumably acted in what each thought was its best interest. By not extending the ESA in the summer of 2004 and making a different choice from BP, Sunoco "unleveled" the playing field. As the Commission found, Sunoco's "twenty-twenty hindsight" complaint filed in December 2008 sought an unfair advantage over BP, which took the risk to extend its contract at a time when 2008 market rates were unknown. (Appx. 35).

Sunoco failed to prove that the intent of the parties was to give Sunoco a competitive advantage over BP. Therefore, the Commission acted reasonably and lawfully in applying the plain language of the ESA to reject Sunoco's complaint.

### **Proposition of Law No. 2**

**The Commission did not err by applying the plain language of a contract instead of adopting a conflicting interpretation based on speculation and conjecture.**

Sunoco's Second Proposition of Law reads as if the parties conducted a full hearing before the Commission in which the parties were afforded the opportunity to explore the offers and counteroffers that were made in the months prior to the execution of the ESA on May 17, 1999. From the details of these offers and counteroffers, suggests Sunoco, the Court may infer that the parties intended that the most favored nation clause contained in the 1996 ESA required

Sunoco to accept the term of the BP Agreement when it sought comparable price protection under Section 10.2 of that ESA. Sunoco Br. 19-20. The Commission did not err by refusing to engage in such speculation, particularly given that the limited record clearly did not support it.

Firstly, because the February 2008 termination date of the ESA, as amended by the RSP and RCP Orders, is clear and unambiguous, the Commission did not err in failing to consider extraneous matters outside the four corners of the ESA itself. *See Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St. 3d 130, syll. ¶ 1; *Blosser v. Enderlin* (1925), 113 Ohio St. 121, syll. ¶ 1. The evidence before the Commission demonstrated that Toledo Edison and Sunoco initially agreed upon a clearly defined duration term and termination date of June 2006, which was amended pursuant to the ETP Order and amended again by the RSP and RCP Orders, and which has passed in due course. The parties had clearly defined intentions with regard to the termination date and there is no evidence to suggest that the parties agreed or intended at any time that Sunoco's ESA would continue in effect beyond the end date as defined in the ETP, RSP and RCP cases. Sunoco may not extend the term of its ESA beyond the ESA's express termination date, or that date as modified by Commission order, absent a clear contractual right to do so. Because no such right appears in the most favored nation clause at issue, it was unnecessary for the Commission to consider Sunoco's extrinsic "evidence."

Secondly, the parties' integration of their agreement into a writing may not be varied or contradicted by evidence of prior agreements, negotiations or other extrinsic evidence. *See Galmish v. Cicchini*, 90 Ohio St. 3d 22, 27, 2000-Ohio-7. The parol evidence rule is not a rule of evidence, but a rule of substantive Ohio law which defines the limits of a contract. *Id.* "The principal purpose of the parol evidence rule is to protect the integrity of written contracts. . . . By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and

enforceability of finalized written instruments.” *Id.* (internal citation omitted). The value of this rule is made clear here, where Sunoco has been motivated by economic gain and 20/20 hindsight to spin a tale that violates the integrity of the contract actually entered into by the parties. Because the termination date of the ESA is clear and unambiguous, Sunoco is barred by Ohio law from relying upon extrinsic evidence to support its alternative story line.

Thirdly, Sunoco’s purported “evidence” of the parties’ intent does not exist in the record and is insufficient to carry Sunoco’s burden of proof. In cases in which courts have looked beyond the language of a contract to determine the contracting parties’ intent, the party seeking to utilize a most favored nation clause to extend the term of a contract has borne a heavy burden of proof. *See Eveleth*, 221 N.W.2d at 160; *Baker Car & Truck Rental v. City of Little Rock* (Ark. 1996), 325 Ark. 357, 364 (court holds that parties to lease containing most favored nation clause never intended that the length of their agreement would be extended). Sunoco asserts that it “was told by Toledo Edison [in 1998] that in order to invoke the most favored nation clause it had to extend its contract length to match that of BP” (Sunoco Br. 20, emphasis in original), but there is no evidence in the record – *i.e.*, the Joint Stipulation of Facts – of what Toledo Edison told Sunoco. Instead of presenting any such evidence during a hearing, Sunoco elected to waive hearing and to rely on the facts in the Joint Stipulation. One such fact is that FirstEnergy’s Rate Department Manager authored two *internal* memoranda in October and November 1998 – at least six months *prior* to the date of the ESA – describing options available to Sunoco and Toledo Edison. (Supp. 3 at ¶¶ 9-10.) As *internal* memoranda, these documents were unknown to Sunoco until produced in discovery in the proceeding below.<sup>7</sup> Thus, Sunoco has failed to, and

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<sup>7</sup> Sunoco admits these memoranda were for internal use only and, thus, provide no hint of what Sunoco’s intent was in 1999. (Supp. 3 at ¶¶ 9, 10; R. 22 at p. 3-4 (referring to “confidential notes” and “confidential memorandum”).) Sunoco elected not to provide any direct evidence of the parties’ intent and decided instead to rely extensively on innuendo and speculation.

cannot, demonstrate that it relied upon any part of the memoranda when entering into the ESA some six months later.

These memoranda are nothing more than evidence of the FirstEnergy rate department's internal review of Sunoco's request to substitute some form of market-based pricing for the 100% interruptible supply requirement then in its 1996 contract. It makes sense that memoranda discussing the market-based pricing options available to Sunoco were authored by FirstEnergy's rate department manager. What does not make sense, and what is further unsupported by the record, is Sunoco's attempt to convert these pricing memos into statements of Toledo Edison's and Sunoco's intent as to the interpretation of the "comparable facility price protection" clause in the 1999 ESA. Because Sunoco lacks any direct evidence of the parties' intent, it elected instead to spin a tale that it hoped would catch the attention of the Commission.

The Commission did not err in finding that Sunoco's "evidence" failed to carry Sunoco's burden of proof.

### **Proposition of Law No. 3**

**As provided in R.C. § 4905.31, the Commission may approve a special contract and then later amend the termination date of the contract by order.**

Sunoco complains in its Third Proposition of Law that the Commission's Order improperly referenced the regulatory events resulting in the modification of the termination date of Sunoco's ESA. Sunoco Br. 21-25. However, Sunoco appears to have forgotten that the ESA was a special contract authorized by R.C. § 4905.31. As such, it remained subject to the Commission's continuing "supervision and regulation" and was "subject to change, alteration, or modification by the commission." R.C. § 4905.31. In this case, once Sunoco elected to modify the termination date of the ESA as provided in the ETP Order in 2001 using a "moving target" that depended upon the amount of Regulatory Transition Charges collected by Toledo Edison

over the next several years, Sunoco was on notice that the end date of the ESA would be determined by later Commission order. Thus, the choices Sunoco and BP made with respect to those later orders, which were issued in the RSP and RCP Cases, is relevant to understanding both the actual termination date of Sunoco's ESA and the BP Agreement as well as Sunoco's belated attempts to circumvent those orders.

Sunoco is dismissive of the regulatory process. However, absent that process, its ESA would have terminated in June 2006. (Supp. 4 at ¶ 14; Supp 48.) Sunoco's ESA was extended until February 2008 only as a result of the ETP Order, RSP Order and RCP Order. Likewise, the BP Agreement would have terminated prior to December 2008 but for the Commission's ETP Order, RSP Order and RCP Order. Indeed, although Sunoco sought to incorporate into the ESA the December 2008 end date applicable to BP, the record does not reflect that a December 2008 end date was written into the BP Agreement. Instead, BP's December 2008 end date existed solely because of the RSP Order and RCP Order. Sunoco has not offered any evidence that a written amendment adopting this end date for the BP Agreement was ever executed by Toledo Edison and filed with the Commission. Thus, although the price protection clause in the ESA applies to an "arrangement, rates or charges" *provided by Toledo Edison* to a comparable facility, the December 2008 end date was provided by the Commission, not Toledo Edison. As the Commission observed:

Sunoco cannot have it both ways; it can not say that the comparable facility price provision is separate and independent from the *RSP Case* and the *RCP Case* and then turn around and seek to benefit from the fact that, by virtue of the *RSP Case* and the *RCP Case*, BP was able to extend the termination date of its contract to December 31, 2008.

(Appx. 43.)

In 2001, the parties adopted a termination date that depended upon the date when Regulatory Transition Charges, as defined in the ETP Case, ceased for Toledo Edison, which the

parties expected would be no later than June 30, 2007. (Supp. 4 at ¶ 17; Appellee Appx. 36.) As a result, Sunoco must have understood that future proceedings concerning Toledo Edison's collection of Regulatory Transition Charges could affect the termination date of the ESA. The RSP and RCP Cases were two such proceedings. Indeed, although Sunoco complains that there were many documents filed in the RSP Case, Sunoco recognizes that the case caption for the RSP Case specifically disclosed that Regulatory Transition Charges were at issue. *See* Sunoco Br. 24-25. There is no record evidence supporting Sunoco's claim, which it made below and repeats in its Merit Brief, that it lacked notice of its right to extend its contract under the RSP Order. *See* Sunoco Br. 24.<sup>8</sup> Thus, it was reasonable for the Commission to reject Sunoco's unsupported claims that it knew nothing about the RSP and RCP Cases, and it was reasonable for the Commission to question Sunoco's gamesmanship in waiting until all market risk was eliminated before attempting to take advantage of an option that BP took in the summer of 2004.<sup>9</sup>

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<sup>8</sup> Although Sunoco claims in its Merit Brief that the parties stipulated that Sunoco did not receive notice (Sunoco Br. 24), Sunoco does not cite the Joint Stipulation for this assertion. The parties' stipulation was limited to the fact that Toledo Edison did not directly communicate with individual special contract customers regarding the option in the RSP Order to extend special contracts. (Supp. 5 at ¶ 20.) By waiving hearing, Sunoco forfeited the opportunity to present evidence that it lacked notice. Indeed, Commissioner Centolella based his decision supporting the Commission's Entry on Rehearing specifically on Sunoco's failure to prove that it lacked notice. (Appx. 45.) At minimum, Sunoco had constructive notice of the Commission's proceedings as required by R.C. § 4905.07 and O.A.C. 4901-3-01. Posting of the Revised RSP and the RSP Order on the Commission's publicly available website is sufficient to give all interested parties constructive, if not actual, notice of the proceedings. *See Central Puget Sound Regional Transit Auth. v. Miller* (Wash. 2006), 128 P.3d 588, 595.

<sup>9</sup> BP did not intervene or participate in the RSP Case, but it nevertheless understood the importance of the proceeding to it as a special contract customer and exercised its business judgment in monitoring the proceeding and then choosing to exercise the extension option within the thirty-day period authorized by the RSP Order. (Supp. 5 at ¶ 21; Supp. 135.) Sunoco has not submitted evidence demonstrating what type of business judgment it exercised.

#### **Proposition of Law No. 4**

**If a most favored nation clause in a special contract subject to Commission jurisdiction contains language permitting a party to extend the term of the contract, the Commission may exercise its supervisory authority under R.C. § 4905.31 to prevent an extension that would afford the party an unfair competitive advantage.**

The Commission's finding that Sunoco's extension of its ESA to match the termination date in the BP Agreement would provide Sunoco with an unfair advantage is dicta given that the Commission first determined that the language of the ESA did not permit such an extension. However, because the Commission possesses supervisory jurisdiction over all special contracts, the Commission did not err in considering the effect that such an extension would have on the credibility of its prior orders and on the competitive market as a whole. Under the particular facts presented, the Commission correctly determined that Sunoco's complaint, if granted, would unreasonably discriminate in favor of Sunoco and against BP.

The Commission fixed the termination date of Sunoco's ESA in its RCP Order as Sunoco's meter read date in February, 2008. The RCP Case ended with its Entry on Rehearing issued on March 1, 2006. No party sought rehearing of the termination dates approved by the Commission in the RCP Order, and no party filed an appeal to this Court on that issue. Because Sunoco's ability to extend the term of its contract until the end of 2008 turned on an allocation of risk appurtenant to future market pricing, the only reasonable time to contest the termination dates fixed in the RCP Order was *at the time of the RCP Order*. Therefore, the Commission correctly described Sunoco's complaint as amounting to a collateral attack on the RCP Order.

Sunoco's retroactive attempt, nearly two years after the effective date of the RCP Order and three and a half years after the RSP Order, to alter the termination date fixed in the RCP Order presented the Commission with a potential threat to competitive market development. By ordering in early January 2006 that special contracts extended under the ETP Case would

terminate in February 2008, the Commission placed all contracting parties on an equal footing with regard to future pricing risk at a time when future pricing was unknown. From experience regulating utility markets, the Commission is aware that market rate projections are inherently uncertain and the probability that forecasts are accurate declines over time. *See, e.g., In re Dayton Power and Light Co.*, Case No. 05-276-EL-AIR at ¶ 8, 2006 WL 770570 (Entry on Rehearing Feb 22, 2006). Thus, the option afforded special contract customers in the RSP Case in mid-2004, which allowed those customers to extend their contracts until the end of 2008, was a true option given the uncertainty of market rate projections. No one could say at the time (and there is no evidence in the record from which the Commission could conclude) whether BP or Sunoco put itself in a better economic position. Likewise, the Commission's RCP Order fairly apportioned market risk by fixing termination dates that recognized the contracting parties' prior choices.

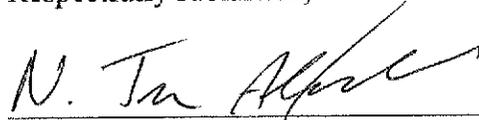
While Sunoco and BP both were afforded an equal opportunity to extend their contracts under the Revised RSP, Sunoco sought special treatment through its complaint. It was not unreasonable for the Commission to recognize that both companies are extremely sophisticated and possess a high degree of knowledge regarding the energy business. The two companies applied that sophistication and knowledge in starkly different ways when presented in 2004 with the option to extend their contracts. BP monitored Commission proceedings and took the risk in 2004 that its contract extension would be beneficial to it in 2008; Sunoco sat silently, waited until 2008 market pricing was clear, and then went pleading to the Commission to obtain risk-free special contract pricing. The Commission had no legal basis in 2008 for rewarding Sunoco's conduct. Indeed, even if the Commission had found that the price protection clause in Sunoco's ESA permitted Sunoco to modify the duration term of its ESA, the Commission

nevertheless would have been justified in denying Sunoco's complaint on the ground that Sunoco's request would unreasonably discriminate in favor of Sunoco and against BP.

#### IV. CONCLUSION

For the foregoing reasons, Toledo Edison respectfully asks that the Court affirm the Opinion and Order of the Commission in all respects.

Respectfully submitted,



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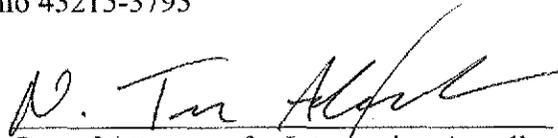
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**CERTIFICATE OF SERVICE**

The foregoing Brief of Intervening Appellee was served via regular U.S. Mail, postage pre-paid, on this 15th day of September, 2009, upon the following:

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