ORIGINAL

IN THE
SUPREME COURT OF OHIO

Martin Marietta Magnesia Specialties, LLC, The Calphalon Corporation, Kraft Foods Global, Inc., Worthington Industries, and Brush Wellman, Inc.,	:	Case Nos. 09-1064 09-1065 09-1067 09-1071 09-1072
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 08-67-EL-CSS, 08-145-EL-CSS, 08-146-EL-CSS, 08-254-EL-CSS, 08-893-EL-CSS, *In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

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

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IN THE
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Martin Marietta Magnesia Specialties, LLC, The Calphalon Corporation, Kraft Foods Global, Inc., Worthington Industries, and Brush Wellman, Inc.,	:	Case Nos. 09-1064 09-1065 09-1067 09-1071 09-1072
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 08-67-EL-CSS, 08-145-EL-CSS, 08-146-EL-CSS, 08-254-EL-CSS, 08-893-EL-CSS, *In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

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

INTRODUCTION

Martin Marietta Magnesia Specialties, LLC ("Martin Marietta"), The Calphalon Corporation ("Calphalon"), Kraft Foods Global, Inc. ("Kraft"), Worthington Industries ("Worthington"), and Brush Wellman, Inc. ("Brush") (collectively, "Appellants") are retail customers of The Toledo Edison Company ("Toledo Edison"), which is an operating subsidiary of FirstEnergy Corporation ("FirstEnergy"). Appellants have the choice to purchase electricity from Toledo Edison or another supplier, and have elected to buy from Toledo Edison. As large industrial customers, Appellants have for more than a

decade enjoyed a discount on the price of electricity pursuant to special contracts with Toledo Edison. These special contracts have been approved and supervised by the Public Utilities Commission of Ohio ("Commission") and are authorized by R.C. 4905.31. Rather than pay more according to Toledo Edison's tariff, Appellants have benefitted from significant savings under their special contracts and, despite an opportunity to extend their duration, Appellants failed to do so.

Having grown accustomed to paying less, Appellants seek to convince this Court that their economically advantageous special contracts should have terminated ten months later than they actually did. Although Appellants have received the benefit of the bargain that they made, they now try to make that bargain last a little longer. Appellants ask this Court to provide a better deal than they bargained for with Toledo Edison and a better deal than the Commission approved. Appellants 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 their own agreements and the substantial savings that they afforded for many years. The Court should reject Appellants' invitation to call into question the certainty of final Commission orders.

The Commission reasonably determined that the special contracts terminated in February 2008, not December 2008, as Appellants contend. The Commission made this determination on the basis of both the plain terms of the special contracts and its own prior orders. The Commission's orders are entirely reasonable and should be affirmed.

STATEMENT OF THE FACTS AND CASE

The facts of these cases are largely undisputed. The only question is whether the special contracts ended on Appellants' 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 Appellants. The cases all began with complaints filed pursuant to R.C. 4905.26, in which Appellants alleged that Toledo Edison was obligated to provide discounted pricing on electricity through the end of 2008, despite the Commission's earlier order.

The discount was provided through a special contract or "Electric Service Agreement" ("ESA") executed by each of the Appellants and Toledo Edison, originating between 1991 and 1997 and expiring between 1995 and 2006. *In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC.*, Case Nos. 08-67-EL-CSS, *et al.* (hereinafter *"In re Worthington Industries"*) (Opinion and Order at 3) (February 19, 2009), Appellants' App. at 36; June Joint Stip. at 2-5, Appellants' Supp. at 2-5; July Joint Stip. at 2-3, Appellants' Supp. at 81-82.[1] In addition to the discounted pricing, the special contracts outlined the terms and conditions under which Appellants

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[1] References to Appellants' appendix are denoted "Appellants' App. at ___;" references to Appellants' supplement are denoted "Appellants' 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 Calphalon, Kraft, Worthington, Brush, and Toledo Edison on June 17, 2008 are denoted "June Joint Stip. at ___;" and references to the joint stipulation of facts filed before the Commission by Martin Marietta and Toledo Edison on July 23, 2008 are denoted "July Joint Stip. at ___."

received electric service at their manufacturing facilities. June Joint Stip. at 2, 3, 4, Appellants' Supp. at 2, 3, 4; June Joint Stip. Ex. A, C, E, H, Appellants' Supp. at 14-21, 23-33, 35-42, 46-51; July Joint Stip. at 2-3, Appellants' Supp. at 81-82; July Joint Stip. Ex. A, Appellants' Supp. at 92-98.

As a "reasonable arrangement" authorized by R.C. 4905.31, each of the special contracts was filed with and approved by the Commission, and remained subject to the ongoing "supervision and regulation" of the Commission. Ohio Rev. Code Ann. § 4905.31 (Anderson 2009), Appellants' App. at 55; *In re Worthington Industries*, Case Nos. 08-67-EL-CSS, *et al.* (Opinion and Order at 3) (February 19, 2009), Appellants' App. at 36; June Joint Stip. at 2, 3, 4, Appellants' Supp. at 2, 3, 4; July Joint Stip. at 3, Appellants' Supp. at 82.

A. 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 Nos. 99-1212-EL-ETP, *et al.* (hereinafter *"In re FirstEnergy Corp."*) (Opinion and Order at 4) (July 19, 2000), Appellants' Supp. at 418. 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 Appellants, a time-limited, one-time right to continue or cancel their current contracts, or to extend them to the extent authorized by the ETP stipulation – namely, "through the date at which the [regulatory transition] charges cease." *In re FirstEnergy Corp.*, Case Nos. 99-1212-EL-ETP, *et al.* (Stipulation and Recommendation at 5) (April 17, 2000), Appellants' Supp. at 387; *see also In re FirstEnergy Corp.*, Case Nos. 99-1212-EL-ETP, *et al.* (Opinion and Order at 6, 67, 71) (July 19, 2000), Appellants' Supp. at 420, 481, 485; June Joint Stip. at 5-6, Appellants' Supp. at 5-6; July Joint Stip. at 3-4, Appellants' Supp. at 82-83. The ETP stipulation provided that regulatory transition cost recovery was to continue either until Toledo Edison's cumulative distribution sales reached a specified level or until June 30, 2007, whichever occurred first. *In re FirstEnergy Corp.*, Case Nos. 99-1212-EL-ETP, *et al.* (Stipulation and Recommendation at 16) (April 17, 2000), Appellants' Supp. at 398.

As required by the ETP stipulation, Toledo Edison notified its special contract customers of the opportunity to continue, cancel, or extend their agreements. *Id.* at 5, Appellants' Supp. at 387; June Joint Stip. at 6, Appellants' Supp. at 6; July Joint Stip. at 3, Appellants' Supp. at 82. Appellants were among the customers that opted to extend the duration of their special contracts. June Joint Stip. at 6, Appellants' Supp. at 6; July Joint Stip. at 3-4, Appellants' Supp. at 82-83. The amendments to their special contracts provided that each contract "shall terminate with the bill rendered for the electric usage

through the date which RTC ceases for the Company."[2] June Joint Stip. Ex. B, D, G, I, Appellants' Supp. at 22, 34, 45, 52; July Joint Stip. Ex. C, Appellants' Supp. at 101. "RTC" was defined to mean regulatory transition charges. *Id.*

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), Appellants' Supp. at 525, 526, 527. Notice of the proceeding was provided by publication. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Entry at 5) (October 28, 2003), Sec. Supp. at 5; June Joint Stip. at 11, Appellants' Supp. at 11; June Joint Stip. Ex. N, Appellants' Supp. at 79; July Joint Stip. at 8, Appellants' Supp. at 87, July Joint Stip. Ex. E, Appellants' Supp. at 104.

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

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[2] The amendment to Worthington's special contract provided that the agreement would expire on the date on which RTC ceased or October 31, 2007, whichever was later. June Joint Stip. Ex. B, Appellants' Supp. at 22.

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), Appellants' Supp. at 502; *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), Appellants' Supp. at 531-532, 563-565, 575, 576; June Joint Stip. at 6-7, 9-11, Appellants' Supp. at 6-7, 9-11; July Joint Stip. at 4-5, 6-8, Appellants' Supp. at 83-84, 85-87.

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), Appellants' Supp. at 502; June Joint Stip. at 11, Appellants' Supp. at 11; July Joint Stip. at 8, Appellants' Supp. at 87. 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), Appellants' Supp. at 531-532, 563-565, 575; Tr. at 20, 92, Appellants' Supp. at 179, 251. Appellants did not request that Toledo Edison extend their special contracts. June Joint Stip. at 11, Appellants' Supp. at 11; July Joint Stip. at 8, Appellants' Supp. at 87.

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 Nos. 05-1125-EL-ATA, *et al.* (hereinafter *"In re Toledo Edison Co."*) (Opinion and Order at 2) (January 4, 2006), Appellants' Supp. at 628. By stipulation and Commission order approving the RCP, the duration of Toledo Edison's special contracts was fixed. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 12) (September 9, 2005), Appellants' Supp. at 604; *see also In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Opinion and Order at 14) (January 4, 2006), Appellants' Supp. at 640; June Joint Stip. at 7-8, Appellants' Supp. at 7-8; July Joint Stip. at 5-6, Appellants' Supp. at 84-85.

Special contracts extended under the RSP were set to expire on December 31, 2008. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 12) (September 9, 2005), Appellants' Supp. at 604; June Joint Stip. at 8, Appellants' Supp. at 8; July Joint Stip. at 5, Appellants' Supp. at 84. Special contracts extended under the ETP but not extended under the RSP, such as Appellants' agreements, 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. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 12) (September 9, 2005), Appellants' Supp. at 604; June Joint Stip. at 8, Appellants' Supp. at 8; July Joint Stip. at 5-6, Appellants' Supp. at 84-85. Following the RCP case, Toledo Edison informed each of the Appellants that its special

contract would terminate on its meter read date in February 2008. June Joint Stip. at 8-9, Appellants' Supp. at 8-9; July Joint Stip. at 6, Appellants' Supp. at 85.

B. History of Complaint Proceedings

Between January 23, 2008 and March 24, 2008, Calphalon, Kraft, Worthington, and Brush filed their complaints against Toledo Edison before the Commission. *In re Worthington Industries*, Case Nos. 08-67-EL-CSS, *et al.* (Opinion and Order at 2) (February 19, 2009), Appellants' App. at 35. The underlying facts of each complaint were similar, and each of the Appellants alleged that Toledo Edison attempted to unilaterally amend its special contract. *Id.* By entries issued on March 13, 2008 and April 7, 2008, the attorney examiner consolidated the complaints. *Id.*

Calphalon, Kraft, Worthington, Brush, and Toledo Edison filed a joint stipulation of facts on June 17, 2008. *Id.* at 3, Appellants' App. at 36. On July 17, 2008, Martin Marietta filed a complaint against Toledo Edison, along with a motion requesting that its case be consolidated with the other cases. *Id.* at 2, Appellants' App. at 35. Martin Marietta and Toledo Edison filed a joint stipulation of facts on July 23, 2008. *Id.* at 3, Appellants' App. at 36. In the joint stipulations, the parties agreed that the Commission could 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; entry issued October 28, 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.

Id. at 7, Appellants' App. at 40; June Joint Stip. at 12, Appellants' Supp. at 12; July Joint Stip. at 9-10, Appellants' Supp. at 88-89. On July 23, 2008, an evidentiary hearing was held during which the attorney examiner granted Martin Marietta's motion for consolidation. *In re Worthington Industries*, Case Nos. 08-67-EL-CSS, *et al.* (Opinion and Order at 2) (February 19, 2009), Appellants' App. at 35. Appellants filed a joint initial brief on August 26, 2008 and a joint reply brief on September 26, 2008. *Id.* Toledo Edison filed its initial and reply briefs on the same dates. *Id.*

The Commission's opinion and order was issued on February 19, 2009. Having thoroughly considered the evidence, the Commission determined that the special contracts did not extend through 2008, as Appellants contended, and that Appellants failed to show that Toledo Edison violated any rule or statute or that its actions were unjust, unlawful, or unreasonable. *Id.* at 19-20, Appellants' App. at 52-53. Dismissing

the complaints, the Commission concluded that Appellants had failed to sustain their burden of proof. *Id.* (citing *Grossman v. Pub. Util. Comm'n*, 5 Ohio St. 2d 189, 190, 214 N.E.2d 666, 667 (1966)). Appellants filed a joint application for rehearing on March 20, 2009, which was denied on April 15, 2009. *In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC.*, Case Nos. 08-67-EL-CSS, *et al.* (Entry on Rehearing at 3, 7) (April 15, 2009), Appellants' App. at 27, 31. On June 12, 2009, Appellants sought review by this Court of the Commission's opinion and order and entry on rehearing.

ARGUMENT

Proposition of Law No. I:

> **Appellants had exactly the benefit of their special contracts and are 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).**

Appellants' third proposition of law asserts that the Commission *sub silentio* changed the terms of Appellants' contracts and violated a legal standard in doing so. In fact, the situation is nearly the exact opposite. Appellants are unhappy that the Commission did not change the terms of their contracts as it did for others. The Commission did nothing silently and the legal standard presented by Appellants has no application to the situation before the Court. Understanding this requires a discussion of

the complex relationship between the restructuring of the electric industry and pre-existing R.C. 4905.31 reasonable arrangements.

A. R.C. 4905.31 Reasonable Arrangements and Electric Restructuring

Each of the Appellants entered into contracts with Toledo Edison before electric restructuring. Every agreement had a termination date and, barring outside events, would continue until that time.

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 4. 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.

R.C. 4905.31 customers did not fit well into this new structure. Generally speaking, customers with R.C. 4905.31 reasonable arrangements did not have the ability to shop. Their arrangements tied them to the utility for the term. This was not in keeping with the competitive thrust of the bill. Likewise, the termination of the arrangements did not match with stability that the General Assembly had meant to provide with the market development period. For example, if an arrangement 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 customers, which is exactly what the legislature did not want. In addition, it was unclear how much RTC responsibility the R.C. 4905.31 customers should bear. They had not paid the full tariff rate (with its assumption of full payment of the now stranded costs that the RTC was meant to reflect). Because these customers did not pay in full before restructuring, it was unclear whether they should pay in full after it.

The Commission resolved the various problems with the poor fit between R.C. 4905.31 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 was being charged to other customers. *In re FirstEnergy Corp.*, Case Nos. 99-1212-EL-ETP, *et al.* (Stipulation and Recommendation at 5) (April 17, 2000), Appellants' Supp. at 387. How long the RTC would last was an accounting matter. There was a fixed amount of regulatory assets that had to be paid off by the RTC. *Id.* at 16, Appellants' Supp. at 398. Once the amounts collected through the RTC equaled the amount of the regulatory assets, the RTC would stop.[3] *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).

Appellants exercised the option and extended their contracts. June Joint Stip. at 6, Appellants' Supp. at 6; July Joint Stip. at 3-4, Appellants' Supp. at 82-83. This changed the terminus dates of those R.C. 4905.31 reasonable arrangements from the individual dates provided in the agreements to the undetermined date when Toledo Edison would no longer charge the RTC. The contract end date was later fixed by the Commission as February 2008. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Opinion and Order at 14) (January 4, 2006), Appellants' Supp. at 640; *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 12) (September

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[3] The RTC collection was projected to end when Toledo Edison's distribution sales reached a certain level or on June 30, 2007, whichever occurred first. *Id.*

9, 2005), Appellants' Supp. at 604. Thus, when these contracts terminated in February 2008, Appellants got exactly what they were entitled to, contracts that ended after RTC collections had ended. The Commission's order in the RCP case changed nothing as regards Appellants; 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.[4] *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Entry at 5) (October 28, 2003), Sec. Supp. at 5; June Joint Stip. at 11, Appellants' Supp. at 11; June Joint Stip. Ex. N, Appellants' Supp. at 79; July Joint Stip. at 8, Appellants' Supp. at 87, July Joint Stip. Ex. E, Appellants' Supp. at 104. 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 companies. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 53) (June 9, 2004), Appellants' Supp. at 576. As a part of these plans, certain additional costs were to be collected by continuing a charge at the

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[4] Appellants had more reason than just the newspaper notice to follow developments at Toledo Edison. At that point in time, they did not know when their arrangements with Toledo Edison would end. Determining when the arrangements would end required additional action by the Commission to fix the end of the RTC collection. Appellants would certainly have been following developments in this arena.

same level as the RTC after the point in time when the RTC itself ended.[5] 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 R.C. 4905.31 reasonable arrangements with the collection of the 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 extended RTC. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 8-9, 40-42, 52, 53) (June 9, 2004), Appellants' Supp. at 531-532, 563-565, 575, 576; *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), Appellants' Supp. at 496, 502, 521. Although it still could not be known when the RTC 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.*

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5 Maintaining a charge in this way has significant value. It provides added stability for customers. Providing stability for customers was the point of the rate stabilization plan and the rate certainty plan that followed.

R.C. 4905.31 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. Appellants did nothing. June Joint Stip. at 11, Appellants' Supp. at 11; July Joint Stip. at 8, Appellants' Supp. at 87.

As a result of this inaction, the R.C. 4905.31 reasonable arrangements of the Appellants did not change. The termination date of the arrangements remained as it had been prior to the Commission's RSP order – the end of the RTC. Had the Appellants exercised the opportunity the Commission created, the arrangements would have had to change. They would have had to reflect a new termination date, specifically the date on which the extended RTC ended. Thus, it is Appellants, not the Commission, that advocate a change to the existing arrangements. Appellants got exactly what their agreements called for. Appellants are dissatisfied not because the Commission changed their deal – the Commission did nothing of the sort. Rather, Appellants are unhappy because the Commission did not change their deal. Thus, Appellants' third proposition of law must be rejected.

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 out the fluctuations associated with fuel price increases and defer uncollected amounts to be included in later rates. As part of the overall plan, these regulatory costs were to be

collected concurrently with the RTC and extended RTC through new "RTC rate components," which were to continue through December 31, 2008. The Commission approved this plan and fixed the terminus dates – February 2008 for contracts tied to the RTC collection and December 2008 for contracts tied to the extended RTC collection. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Opinion and Order at 14) (January 4, 2006), Appellants' Supp. at 640; *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 6-7, 12) (September 9, 2005), Appellants' Supp. at 598-599, 604. 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 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 Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 12) (September 9, 2005), Appellants' Supp. at 604; *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Opinion and Order at 14) (January 4, 2006), Appellants' Supp. at 640. The order is quite clear. Appellants' arrangements were extended under the ETP case, but not under the RSP. June Joint Stip. at 6, 11, Appellants' Supp. at 6, 11; July Joint Stip. at 3-4, 8, Appellants' Supp. at 82-83, 87. The end date for Appellants' arrangements was therefore February 2008. Nothing whatever

changed. Appellants had exactly what their arrangements called for. Appellants' criticism of the Commission for *sub silentio* changing the arrangements is therefore meaningless. The arrangements were not changed. Indeed, it is the very lack of change to which the Appellants object.

B. The Commission Defines the RTC and Its Collection.

Appellants labor under the misapprehension that they and Toledo Edison can define the meaning of the RTC and its collection. They are wrong in this regard. The Commission inserted the notion of the RTC into the R.C. 4905.31 reasonable arrangements between Appellants and Toledo Edison. It did so unilaterally. The term means what the Commission intended it to mean. The Commission was quite clear about this. The RTC was created in the ETP case to provide for the collection of certain well-defined costs that would have been uneconomic in the new competitive environment created by SB 3. This was the RTC to which the Commission referred when it allowed the alteration and extension of the existing R.C. 4905.31 arrangements between Appellants and Toledo Edison in 2001. That the Commission later created a new charge to collect different costs, first the extended RTC and then the RTC rate components, does not change what the Commission meant in the arrangements. By statute, it is the Commission that regulates these arrangements – not the signatories regulating the Commission. Ohio Rev. Code Ann. § 4905.31 (Anderson 2009), Appellants' App. at 55.

C. The Old Case Cited by Appellants Is Irrelevant.

Appellants have found an old Commission case that they argue is controlling. *In the Matter of the Application of Ohio Power Company to Cancel Certain Special Power*

Agreements and for Other Relief, Case No. 75-161-EL-SLF (hereinafter *"Ohio Power"*) (Opinion and Order) (August 4, 1976), Appellants' Supp. at 652-667. Although the case makes for interesting historic reading, it has no application to the situation before this Court.

In *Ohio Power*, the Commission was faced with a novel situation; a utility was asking the Commission to step in and terminate an existing agreement with a customer. *Id.* at 2, Appellants' Supp. at 653. This was in 1975, long before any thought of electric competition. *Id.* The effect of giving the utility what it wanted would have been to raise the cost of power for the customer, perhaps substantially. In those days before SB 3, the customer would have had no choice. Selecting another supplier was impossible. The Commission looked for a standard to apply in assessing the application. It looked to the statute itself and found only a general grant of authority to change, alter, or modify arrangements, not any explicit direction as to what criteria to apply in determining when or if an arrangement should be changed, altered, or modified. *Id.* at 4-5, Appellants' Supp. at 655-656. Thus, the statute did not provide what the Commission was looking for.

The Commission then turned to the *Mobile-Sierra* doctrine, which would bind the Federal Energy Regulatory Commission in a similar situation. *Id.* at 5, Appellants' Supp. at 656. Although this doctrine is not binding on the Commission, as the Commission so noted in *Ohio Power*, it seemed useful for the Commission's analysis to consider the application pending before it in that case and so it did, finding that the utility had made an insufficient showing under the doctrine and rejecting the application. *Id.* at 5, 16,

Appellants' Supp. at 656, 667. No appeal was taken and therefore this Court did not address the matter.

None of this has anything to do with the case before this Court. No utility has unilaterally sought to cancel an existing arrangement. Indeed, the only change to Appellants' R.C. 4905.31 arrangements is the one that they endorsed – the change of the termination date from the time specified in the agreements themselves to the end of the RTC. Thus, even if *Mobile-Sierra* were an appropriate test to use to determine if a change should be permitted, there is no change to assess.

Whether the Commission would apply the *Mobile-Sierra* doctrine again if a similar case arose is an open question. No such case has arisen in the thirty-three years since *Ohio Power* and the environment has changed substantially. Customers have legal options to utility service that they did not have in 1975. R.C. 4905.31 itself is different in that it now allows unilateral applications by customers for reasonable arrangements, something not permitted in 1975. Presumably, the Commission will address these matters if an appropriate case would arise. This is not such a case.

D. Summary

Appellants' third proposition of law is perfectly incorrect. The Commission did not change Appellants' R.C. 4905.31 arrangements *sub silentio*. The only change to those agreements was the one endorsed by the Appellants themselves, the one setting the termination date as the end of the RTC. That end was an accounting matter that the Commission determined at the appropriate time. Appellants got exactly what they agreed to. Their *Ohio Power* argument depends on a change that did not occur as a matter of

fact and therefore has no application in this case. Appellants' third proposition should be rejected and the Commission affirmed.

Proposition of Law No. II:

> **The Commission properly applied the plain language of Appellants' special contracts. 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).**

In their first proposition of law, Appellants argue that the Commission wrongly applied the plain language of their contracts in finding that those agreements ended in February 2008 rather than December 2008. Appellants, however, confuse the RTC with the extended RTC and the RTC rate components, and thereby attempt to convince this Court that the RTC endured for a longer period than it actually did. In their second proposition of law, Appellants argue that the Commission unlawfully considered its earlier orders from the ETP, RSP, and RCP proceedings, which Appellants label "parol evidence." Appellants seek to divorce their contracts from those orders. Such a separation is not possible, as the meaning of Appellants' agreements is completely dependent on the very orders that they would have the Commission and this Court ignore.

A. The RTC Ceased on January 1, 2006.

Appellants' primary argument is that their special contracts continued through December 2008 by virtue of the plain language found in the amendments to the agreements. Specifically, they point to language providing that their special contracts "shall terminate with the bill rendered for the electric usage through the date which RTC

ceases for the Company." June Joint Stip. Ex. B, D, G, I, Appellants' Supp. at 22, 34, 45, 52; July Joint Stip. Ex. C, Appellants' Supp. at 101. Appellants fail to recognize that the RTC ended well before even February 2008, which was the date approved by the Commission as the end date of Appellants' special contracts.

The Commission therefore properly rejected Appellants' interpretation of the language in the contracts. The Commission reached its decision by thoroughly reviewing the stipulations and orders in the ETP, RSP, and RCP proceedings. *In re Worthington Industries*, Case Nos. 08-67-EL-CSS, *et al.* (Opinion and Order at 16-19) (February 19, 2009), Appellants' App. at 49-52. The Commission noted that the ETP stipulation, under which Appellants extended their special contracts, provided that the RTC would be collected until Toledo Edison's cumulative sales reached a certain level or until June 30, 2007, whichever occurred first. *Id.* at 12, 16, 18, Appellants' App. at 45, 49, 51. Additionally, the Commission found that termination of Appellants' special contracts in February 2008 was consistent with the ETP's method of calculating the termination date. *Id.* at 18-19, Appellants' App. at 51-52. Finally, the Commission determined that the fact that the Commission-approved RCP stipulation enumerated the termination date of the special contracts for Toledo Edison as February 2008, which was consistent with the original method of calculation specified in the ETP stipulation, ensured that the special contracts were not disturbed by the extended collection of the altered RTC and extended RTC through the RTC rate components. *Id.* at 19, Appellants' App. at 52. The Commission concluded that there was "no scenario" that would allow Appellants' special contracts to continue through December 2008. *Id.*

The Court has stated many times over the years that "[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)); *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).

Contrary to Appellants' argument, termination of Appellants' special contracts in February 2008 was consistent with the plain language found in the agreements, which provided that they were to terminate when "RTC ceases for the Company." June Joint Stip. Ex. B, D, G, I, Appellants' Supp. at 22, 34, 45, 52; July Joint Stip. Ex. C, Appellants' Supp. at 101. Considering that language alone, Appellants' contracts should actually have ended much sooner. The RTC ended on January 1, 2006. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Opinion and Order at 14) (January 4, 2006), Appellants' Supp. at 640; *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 6-7) (September 9, 2005), Appellants' Supp. at 598-599. At that time, new "RTC rate components" comprised of both the RTC and extended RTC, among other charges, were implemented, replacing the RTC referenced in

the amendments to Appellants' contracts. *Id.* It is only due to the Commission's RCP order that the contracts continued through February 2008, which was the month in which the RTC, as initially devised, would most likely have ended.

As discussed above, under FirstEnergy's rate stabilization plan adopted by the Commission in 2004, new deferrals resulted in new regulatory costs that were to be recovered by Toledo Edison through the extended RTC. *In re Toledo Edison Co.*, Case No. 03-2144-EL-ATA (Opinion and Order at 8-9, 40-42, 52, 53) (June 9, 2004), Appellants' Supp. at 531-532, 563-565, 575, 576; *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), Appellants' Supp. at 496, 502, 521; June Joint Stip. at 7, Appellants' Supp. at 7; July Joint Stip. at 5, Appellants' Supp. at 84. This was to occur after the regulatory costs approved in the ETP order had been recovered through the RTC. *Id.*

In 2006, pursuant to the Commission-approved rate certainty plan, these recovery periods were modified. Toledo Edison was authorized to recover all regulatory costs, including those approved in the RSP and RCP orders, at the same time. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Opinion and Order at 14) (January 4, 2006), Appellants' Supp. at 640; *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 6-7) (September 9, 2005), Appellants' Supp. at 598-599; June Joint Stip. at 8, Appellants' Supp. at 8; July Joint Stip. at 5, Appellants' Supp. at 84. These costs were to be recovered through the new RTC rate components, which consisted of the RTC and extended RTC, among other charges, and were set to end no later than December 31, 2008. *Id.*

The Commission's adoption of the rate certainty plan therefore altered the RTC as originally established by the Commission in the ETP case. The costs to be recovered by the new RTC rate components were not the same costs recovered by the RTC. To ensure that the duration of Appellants' special contracts was not affected by the implementation of the new RTC rate components, the rate certainty plan set the termination date of Appellants' special contracts for the month in which the RTC, as originally planned, would most probably have ended on the basis of the sales target. That month was February 2008 for Toledo Edison's special contract customers, which was consistent with the method for determining the end date of the special contracts, as established in the ETP case.

The RTC rate components were designed to recover costs that were not contemplated in 2001 when Appellants' special contracts were extended. Those contracts were tied to Toledo Edison's collection of the RTC, not the RTC rate components, and collection of the RTC ceased long before February 2008. Because the Commission's conclusion in this case is consistent with both its prior orders and the plain language of Appellants' contracts, Appellants' first proposition of law should be rejected.

B. The Commission's Prior Orders Are Not Parol Evidence.

The Commission-approved rate certainty plan fixed the end date of Appellants' special contracts as February 2008, which was the month in which collection of the RTC, as initially formulated in the ETP case, would most likely have ceased on the basis of the sales target. The Commission thus reasonably determined that Appellants' special contracts ended in February 2008. Appellants argue that the ETP stipulation adopted and

approved by the Commission and the ETP order itself constitute parol evidence that the Commission should not have considered in this case.

Disregarding entirely the clear import of the Commission's earlier orders, Appellants argue that the Commission's decision should be based exclusively on the language in their contract amendments, which provides that the agreements were to end when the "RTC ceases." June Joint Stip. Ex. B, D, G, I, Appellants' Supp. at 22, 34, 45, 52; July Joint Stip. Ex. C, Appellants' Supp. at 101. Appellants cite to this language as the sole evidence of the intent of the parties in extending the special contracts. As explained above, the RTC ended long before February 2008, and the Commission's orders are therefore consistent with the plain language of the agreements. Consequently, there is no merit in Appellants' argument that the Commission relied on parol evidence to reach an outcome in conflict with the plain language of their agreements.

Further, the Commission's earlier orders are not parol evidence within the meaning of the rule. The Commission's orders are not "evidence of prior or contemporaneous oral agreements, or prior written agreements" between Appellants and Toledo Edison. *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 27, 734 N.E.2d 782, 788 (2000). The parol evidence rule regards such "earlier expressions to be merged into or superseded by the written document." *Id.* at 27-28, 734 N.E.2d at 789. In reaching its decision, the Commission did not consider evidence of any agreement between Appellants and Toledo Edison other than the final written amendments to Appellants' special contracts.

The Commission's orders in the ETP, RSP, and RCP proceedings are not parol evidence, but rather final orders issued pursuant to the Commission's statutory authority,

as found in Title 49 of the Ohio Revised Code. In particular, the Commission has authority over reasonable arrangements such as Appellants', which remain subject to the supervision and regulation of the Commission. Ohio Rev. Code Ann. § 4905.31 (Anderson 2009), Appellants' App. at 55; *see also Jacot v. Secrest*, 153 Ohio St. 553, 558, 93 N.E.2d 1, 4 (1950) ("A contract made in pursuance of a statute or resolution, must be construed as though such statute or resolution had been incorporated into such contract." (quoting *Banks v. De Witt*, 42 Ohio St. 263 (1884))). The parol evidence rule simply has no application here, and Appellants should not be permitted to contravene final orders of the Commission by invoking it.

Even assuming for the sake of argument that the Commission's earlier orders are parol evidence, those orders were an integral part of Appellants' contracts, and provided special meaning to language used in the agreements. *Graham v. Drydock Coal Co.*, 76 Ohio St. 3d 311, 313-314, 667 N.E.2d 949, 952 (1996) ("Extrinsic evidence is admissible to ascertain the intent of the parties . . . when circumstances surrounding the agreement give the plain language special meaning."); *Latina v. Woodpath Development Co.*, 57 Ohio St. 3d 212, 214, 567 N.E.2d 262, 264 (1991) ("Parol evidence . . . is admissible to provide special meaning given by the industry to language employed in a contract.").

The extensions to the original agreements were offered to Appellants pursuant to the Commission-approved stipulation in the ETP case, which is stated within the amendments themselves. June Joint Stip. Ex. B, D, G, I, Appellants' Supp. at 22, 34, 45, 52; July Joint Stip. Ex. C, Appellants' Supp. at 101. Additionally, the agreements were extended until the "RTC" ceased. *Id.* Although "RTC" is defined by the agreements to

mean "regulatory transition charges," the meaning of "regulatory transition charges" is only apparent from the Commission's earlier orders. Finally, determining when the contracts would end required additional action by the Commission to fix the end point of the RTC collection. The termination date was accordingly fixed pursuant to the RCP case. *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Stipulation and Recommendation at 12) (September 9, 2005), Appellants' Supp. at 604; *In re Toledo Edison Co.*, Case Nos. 05-1125-EL-ATA, *et al.* (Opinion and Order at 14) (January 4, 2006), Appellants' Supp. at 640. Appellants' agreements are therefore entirely dependent on the orders that Appellants prefer to ignore. Appellants also forget that the Commission retains express supervisory authority over special contracts, including the right to modify them, and may therefore consider all of the evidence presented to it. Ohio Rev. Code Ann. § 4905.31 (Anderson 2009), Appellants' App. at 55.

Appellants attempt to isolate their special contracts from the effect of the Commission's ETP, RSP, and RCP orders, and seek an outcome that is in direct opposition to those orders. Appellants' attempt to side step the Commission's regulatory authority by invoking an inapplicable rule should be rejected.

Proposition of Law No. III:

> **The right to participate in a ratemaking proceeding is statutory, not constitutional, and absent express statutory provision, a ratepayer has no right to notice under the due process clauses of the Ohio and United States Constitutions. *Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 638 N.E.2d 550 (1994); *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 527 N.E.2d 777 (1988); *MCI Telecommunications***

***Corp. v. Pub. Util. Comm'n*, 32 Ohio St. 3d 306, 513 N.E.2d 337 (1987); *Armco, Inc. v. Pub. Util. Comm'n*, 69 Ohio St. 2d 401, 433 N.E.2d 923 (1982); *Cleveland v. Pub. Util. Comm'n*, 67 Ohio St. 2d 446, 424 N.E.2d 561 (1981); *Committee Against MRT v. Pub. Util. Comm'n*, 52 Ohio St. 2d 231, 371 N.E.2d 547 (1977) (Brown, P., J., dissenting).**

A. Statutory Notice Is All that Is Required.

Appellants' fourth proposition of law labors under the misapprehension that there is some constitutional right to due process as Appellants would define it. This position is simply wrong. Although proceedings at the Public Utilities Commission of Ohio are generally dressed in quasi-judicial garb, ratemaking[6] is fundamentally a legislative activity. Constitutional rights to due process do not attach to legislative activity. Indeed, if the General Assembly chose to do so, it could set rates directly without any Public Utilities Commission, providing no process whatsoever and no appeal. The General Assembly has not chosen this course; instead, it has chosen to act through the Public Utilities Commission of Ohio. This choice does not change the constitutional framework. The only process due in a Public Utilities Commission of Ohio proceeding is that defined by the legislature through statute. Just as the Commission itself is a creature of statute, its procedural requirements are a creature of statute. The process due is that provided in the statutes under which the Commission operates.

This Court has recognized this situation. It has noted:

> At common law, a utility had the same right as other businesses to set the rate for its services. Its customers had no

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6 Appellants can hardly claim that the Commission was not engaged in ratemaking. Their entire objection is that they were charged the wrong rate.

> substantive right to a fixed rate, and thus had no procedural rights in the ratemaking process. With the advent of regulation, ratemaking became solely a legislative function and, absent express statutory provision, ratepayers had no right to participate in that process through the ballot box.

Consumers' Counsel v. Pub. Util. Comm'n, 70 Ohio St. 3d 244, 249, 638 N.E.2d 550, 554 (1994) (citations omitted). As this Court has further noted, "any legal right which a ratepayer would have to notice or a hearing would have to stem directly from the statutes." *Cleveland v. Pub. Util. Comm'n*, 67 Ohio St. 2d 446, 453, 424 N.E.2d 561, 566 (1981). Despite Appellants' protestations, the only notice to which they were entitled was the notice provided by statute.

B. Statutory Notice Was Provided.

Conspicuous by its absence from Appellants' argument is any identification of a statutorily required notice that was not given. The absence is because none exists. Appellants appear to believe that specific notice must be provided to them as individual companies. There is nothing in Title 49 that requires that.

Appellants object that they did not receive notice of the Commission's RSP case but they did insofar as the law requires it. The RSP case was FirstEnergy's first filing to set a market-based standard service offer to apply after the end of the market development period established under SB 3 during which the rates were frozen. The governing statute for this proceeding was R.C. 4928.14 (subsequently substantially amended), which provided that the procedure to be used was that found in R.C. 4909.18. Ohio Rev. Code Ann. § 4928.14 (Anderson 2008) (amended 2008), App. at 3. That section establishes different notice requirements depending on whether the application

filed seeks an increase or not. Ohio Rev. Code Ann. § 4909.18 (Anderson 2009), App. at 1. This Court has already noted that a first RSP application is not one for an increase in an existing rate, stating:

> The commission has discretion under R.C. 4909.18 in determining whether an application seeks a rate increase. R.C. 4909.18 applies to increases of an "existing" rate charged by a utility. Here, although the commission's order approved CG & E's rate as a market-based standard service offer, that rate had not yet been implemented. Even if the commission's approval of CG & E's alternative proposal amounted to a rate increase over the market-based standard service offer approved in its original order, it was not an increase of an existing rate. The notice, investigation, and hearing requirements of R.C. 4909.19 are not triggered because they apply only upon application for a rate increase pursuant to R.C. 4909.18, which we have determined did not occur.

Ohio Consumers' Counsel v. Pub. Util. Comm'n, 111 Ohio St. 3d 300, 305, 856 N.E.2d 213, 221 (2006). Toledo Edison's RSP case was also a first application to establish a market-based standard service offer and was therefore not an application for an increase in an existing rate, just as the Court discussed in *Ohio Consumers' Counsel*. The statute defines the notice required in such circumstances, stating:

> If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application.

Ohio Rev. Code Ann. § 4909.18 (Anderson 2009), App. at 1. The record reveals that this is exactly the notice that was provided:

> 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, 6th & Superior, 2nd 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.

In re Toledo Edison Co., Case No. 03-2144-EL-ATA (Entry at 5) (October 28, 2003), Sec. Supp. at 5; June Joint Stip. at 11, Appellants' Supp. at 11; June Joint Stip. Ex. N, Appellants' Supp. at 79; July Joint Stip. at 8, Appellants' Supp. at 87, July Joint Stip. Ex. E, Appellants' Supp. at 104. Appellants argue that this notice is insufficient but it is perfectly clear that an application was filed. It is equally perfectly clear that the case

would deal with the RTC as the notice says so. Appellants were quite aware, or should have been, that the RTC determined the termination date of the agreements they had with Toledo Edison and that the RTC was at issue in the case. Appellants have received the notice to which they were entitled.

Even if Appellants argued that the relevant statute was R.C. 4905.31, they would be incorrect. That statute contains no notice provision at all. *See* Ohio Rev. Code Ann. § 4905.31 (Anderson 2009), Appellants' App. at 55. At most, any notice requirement would have to arise from R.C. 4909.18 and, as already discussed, such notice was provided.

Appellants' fourth proposition of law is incorrect as a matter of law and fact. Appellants claim rights to notice arising from the Constitution but the only rights to notice in a ratemaking proceeding arise from statute. They claim they were not notified when in fact they received the notice the statute requires. Appellants are wrong and the Commission's orders 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).**

Appellants' argument is really quite simple. Appellants believe that the RTC is the same as the extended RTC and the RTC rate components and that they were allowed to maintain their contracts while these charges were being collected. The Commission disagrees. "RTC" does not equal "extended RTC" or "RTC rate components." The

Commission made these determinations in the RSP and RCP cases, which are not on appeal here. To argue with those decisions now is a collateral attack. 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 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), Appellants' App. at 55. 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)); *see also Sparks v. Pub. Util. Comm'n*, 69 Ohio St. 2d 47, 49, 430 N.E.2d 924, 925 (1982).

It is plain that the Commission was acting under this authority in the RCP case when it fixed the end dates of the special contracts, and 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. Additionally, the Commission was acting pursuant to R.C. 4928.14 (since significantly amended), which section requires notice pursuant to R.C. 4909.18, which was provided, as discussed above.[7] The Commission had jurisdiction in the RSP and RCP cases.

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 1; *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. Appellants' efforts to do so should be denied by this Court.

CONCLUSION

The Commission properly determined that Appellants' special contracts did not continue through December 2008. The RTC rate components that were collected by

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[7] Notice is not properly at issue, as R.C. 4905.31 provides no notice requirement, as discussed previously, and notice was provided pursuant to R.C. 4909.18 in any event.

Toledo Edison in February 2008 and beyond were not the same as the RTC upon which termination of Appellants' special contracts was determined. The Commission did not unlawfully consider parol evidence, and it did not exercise – silently or otherwise – its power to modify Appellants' contracts. The Commission's decision is consistent with the plain language of the agreements as well as its earlier orders, and Appellants received the notice to which they were entitled. The Commission should be affirmed.

Respectfully submitted,

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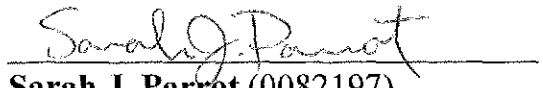

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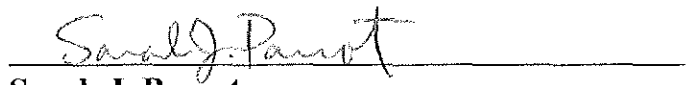
PROOF OF SERVICE

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 18th day of September, 2009.



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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.

Effective Date: 10-01-1953

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the

commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

Effective Date: 01-11-1983

4928.14 Market-based standard service offer; option to purchase electric service.

(A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.

(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. Prior to January 1, 2004, the commission shall adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders. The commission may require that the competitive bidding process be reviewed by an independent third party. No generation supplier shall be prohibited from participating in the bidding process, provided that any winning bidder shall be considered a certified supplier for purposes of obligations to customers. At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.

(C) After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. A supplier is deemed under this division to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(2) The supplier is no longer capable of providing the service.

(3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(4) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Effective Date: 10-05-1999 (amended 2008)

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.

Effective Date: 10-05-1999