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., Appellants,	)	Case Nos. 09-1064 09-1065 09-1067 09-1071 09-1072
v.	)	On Appeal From the Public Utilities Commission of Ohio
THE PUBLIC UTILITIES COMMISSION OF OHIO, et al., Appellees.	)	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

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I. INTRODUCTION

The Public Utilities Commission of Ohio (the "Commission") did not err in rejecting Appellants' efforts to retroactively add approximately ten additional months to their deeply-discounted electric service contracts with The Toledo Edison Company ("Toledo Edison").[1] As the Commission ordered on January 4, 2006 in Case No. 05-1125-EL-ATA (the "RCP Order"),[2] Appellants' special contracts terminated on their respective meter read dates in February 2008. Appellants argued below that Toledo Edison violated several provisions of Ohio's public utilities laws by not allowing the special contracts to continue in effect through 2008, but Toledo Edison was obligated to follow the Commission's order. Appellants have abandoned all such claims on appeal and have resorted instead to questioning the Commission's authority, exercised in the RCP Order, to fix their respective meter read dates in February 2008 as the end date for Appellants' special contracts. The Commission properly rejected this collateral attack on the RCP Order.

Appellants took advantage in 2001 of an opportunity to extend their special contracts "through the date at which the RTC charges cease" for Toledo Edison. (Supp. 6 at ¶ 34.) This language as used in each contract amendment was copied directly from Toledo Edison's Electric Transition Plan, which the Commission approved by Opinion and Order issued July 19, 2000

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[1] The complainants below were Worthington Industries ("Worthington"), The Calphalon Corp. ("Calphalon"), Kraft Foods Global, Inc. ("Kraft"), Brush Wellman, Inc. ("Brush"), Pilkington North America, Inc. ("Pilkington") and Martin Marietta Magnesia Specialties, LLC ("Martin Marietta"). Pilkington did not appeal. Worthington, Calphalon, Kraft, Brush and Martin Marietta collectively are referred to herein as "Appellants."

[2] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case Nos. 05-1125-EL-ATA *et al.* (Opinion and Order January 4, 2006).

(the "ETP Order").[3] As one of Appellants' witnesses conceded at hearing, making the end date of the special contracts contingent upon the date when RTC charges ceased meant that "there's no fixed [termination] date *per se*" for the ESAs. (Supp. 230.) The Commission, in the exercise of its continuing authority over special contracts pursuant to R.C. § 4905.31, necessarily had to determine at a future date when RTC charges ceased for Toledo Edison. As discussed below, this need became even more pronounced when the Commission, again in the RCP Order, eliminated the RTC charge used in 2001 by the parties as a reference point. The Commission acted reasonably in allowing special contract customers to obtain the full benefit of their original bargain by extending the end date of their special contracts until February 2008 – the date when the original RTC charges would have ceased had they not been eliminated in 2006.

The Commission's findings were reasonable, lawful, and grounded upon the evidence and the controlling law. Appellants 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. As Sophisticated Purchasers of Electric Services, Appellants Sought Out and Obtained Discounted Rates From Toledo Edison for Many Years.

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. 4 at ¶ 4.) Toledo Edison provided electric service to a manufacturing facility operated by each Appellant pursuant to an Electric Service Agreement ("ESA") entered into as early as 1991 (Kraft) and as late as 1997 (Calphalon).

[3] *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).

(Supp. 2-3 at ¶¶ 5-25; Supp. 81 at ¶¶ 8-13.) Each ESA was a special arrangement or contract filed with and approved by the Commission. *Id.* As such, pursuant to R.C. § 4905.31, the ESAs remained subject to "the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." (*See* Supp. 177.)

Each Appellant that provided testimony agreed that the electric service it obtains from Toledo Edison is critical to its operations, that its cost for electric service is an important issue, and that obtaining the lowest cost electric service is part of its business plan. (Supp. 195-96, 206-07, 222-23.) Thus, each Appellant has one or more employees (Calphalon has twelve to fifteen) who are responsible for purchasing electricity for their Ohio facilities. (Supp. 193-94, 205-06, 219-20, 269-71.) In addition, Worthington, Kraft and Calphalon all have retained outside energy consultants, while Brush has considered it. (Supp. 196, 211, 225, 241, 272.)

B. Appellants Elected to Extend the Duration Term of Their Special Contracts as Authorized by the ETP Order.

Each of the ESAs was entered into before the restructuring of the electric industry began in 1999 with the passage of S.B. 3, which was codified as R.C. Chapter 4928. S.B. 3 required that electric service be unbundled into generation, transmission and distribution service components, and mandated that the generation component of electric service be open to competition beginning January 1, 2001. *See* R.C. §§ 4928.01, 4928.03, 4928.34. To effect this transition to competitive markets, electric distribution utilities in Ohio were required to obtain the Commission's approval of a detailed transition plan governing the transition to competitive markets during a "market development period," which would end on December 31, 2005 unless otherwise ordered by the Commission. *See* R.C. §§ 4928.31-.43.

On July 19, 2000, 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").[4] 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 authorized by the Commission in the ETP Order, Toledo Edison's special contract customers, including Appellants, 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. 6 at ¶ 34; Supp. 82 at ¶ 18; Supp. 387, 420, 481.) 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. 6 at ¶ 34; Supp. 82 at ¶ 18.) Appellants elected to extend the duration of their special contracts prior to December 31, 2001. *Id.*

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. 6 at ¶¶ 34-35; Supp. 82-83, ¶¶ 18-19; Supp. 387, 398.) However, this end date was a moving target, as it depended upon

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[4] The parties stipulated in the proceedings below that the Commission could take administrative notice of certain stipulations, entries and orders filed in Case No. 99-1212-EL-ETP (the "ETP Case"), Case No. 03-2144-EL-ATA (the "RSP Case") and Case No. 05-1125-EL-ATA (the "RCP Case"). (Supp. 12 at ¶ 58; Supp. 88 at ¶ 41.) This included the ETP Order and the Stipulation and Recommendation filed April 17, 2000 (the "ETP Stipulation) in the ETP Case; the Revised Rate Stabilization Plan ("Revised RSP") filed February 24, 2004, the Opinion and Order filed June 9, 2004 (the "RSP Order") in the RSP Case; and the Rate Certainty Plan ("RCP") filed on September 9, 2005, and the RCP Order entered on January 4, 2006 in the RCP Case. *Id.*

both a distribution sales target and the amortization of deferrals. (Supp. 398.) Thus, by adopting a termination date that depended specifically upon continuing Commission jurisdiction over and review of Toledo Edison's ETP, Appellants accepted that the termination date of their ESAs would depend upon, and could be altered by, future actions of both Toledo Edison and the Commission.

C. Although All Special Contract Customers Were Given the Same Opportunity in 2004 to Extend the Duration Term of Their Special Contracts and Nine Customers Did So, Appellants Did Not Request Such An Extension.

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. 6-7 at ¶¶ 36-38; Supp. 83-84 at ¶¶ 20-22; *see* R.C. § 4928.14.)[5] The case caption and published legal notice specifically referenced potential changes to Regulatory Transition Charges, which put special contract customers who had extended their contracts via the ETP Order on notice that the RSP could affect their contract end dates. (*See* Supp. 79, 522.)

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

[5] *See In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA (Opinion and Order Ju 9, 2004) (RSP Order).

Company, if doing so would enhance or maintain jobs and economic conditions within its service area." (Supp. 9-10 at ¶ 51; Supp. 85-86 at ¶ 31; Supp. 502.) Thus, the Revised RSP placed the burden on special contract customers to request an extension and did not require Toledo Edison to act in the first instance. To the contrary, Toledo Edison was not required by any order or rule of the PUCO or any provision of Ohio law 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. 11 at ¶ 55; Supp. 87 at ¶ 35.) Instead, contract customers received notice via the Commission's publication of the RSP Order through its docket and website. (*See* Supp. 179, 251 (describing "wonderful" and "easy" method of accessing RSP documents via the Commission's website).)

On June 9, 2004, the Commission authorized Toledo Edison to proceed to implement the Revised RSP as modified by the Commission. (Supp. 7 at ¶ 39; Supp. 84 at ¶ 23.) In the RSP Order, the Commission described the contract extension opportunity as "reasonable," found that it did not discriminate against customers served under tariffed rates, and further found that contract extensions requested by special contract customers would promote economic development in Ohio. (Supp. 564-65.) Within thirty days of June 9, 2004, nine special contract customers elected to extend their contracts and thereby accepted the risk that their contract price could be higher than market prices four years in the future; Appellants did not extend their contracts and, thus, chose not to accept that risk. (Supp. 10-11 at ¶ 53-54; Supp. 86-87 at ¶ 33-34.)

None of the nine special contract customers which extended their contracts as permitted by the RSP Order were intervenors in the RSP Case. (Supp. 10 at ¶ 53; Supp. 86 at ¶ 33.)[6]

[6] Appellants suggest in their Brief that these customers participated in the RSP Case through

Similarly, although at least one of the complainants below had an energy consultant who was specifically monitoring the RSP Case and had read the Revised Stipulation (Supp. 177-79, 181), none of them elected to intervene in the RSP Case or to oppose the Revised RSP or RSP Order.[7] No one prevented Appellants from monitoring, participating or intervening in the RSP Case. (Supp. 200-01, 211, 212, 233, 249-50, 275.) Appellants were given the same opportunity as all other special contract customers to extend their special contracts, but they did not submit a request to extend the term of their ESAs during the thirty-day period authorized by the RSP Order. (Supp. 11 at ¶ 55; Supp. 87 at ¶ 34; Supp. 216-17.)

D. In the RCP Order, the Commission Approved a Clear Termination Date for Appellants' Special Contracts Which Was Consistent Both with the Parties' Intent and with the Tracking Mechanisms in the ETP Case and RSP Case.

Approximately nineteen months later, the Commission approved Toledo Edison's RCP, which, among other things, fixed the end dates of Appellants' special contracts. (Supp. 8 at ¶¶ 43-44; Supp. 84-85 at ¶¶ 27-28.) The RCP provided that special contracts extended under the RSP Case 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 Appellants' ESAs, would continue in effect until the customer's meter read date in February 2008. (Supp. 8 at ¶ 43; Supp. 84-85 at ¶ 27; Supp. 604.) Thus, the RCP Order modified each

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trade associations (Appellants' Brief at 9), but this suggestion finds no support in the record. The undisputed facts as stipulated to be the parties were that none of these customers intervened in the RSP Case. (*See* Supp. 10 at ¶ 53; Supp. 526.)

[7] Appellants only "evidence" with regard to their failure to participate in the RSP Case was proffered by an engineer retained as a "consultant" who had no special expertise qualifying him as an expert witness and who lacked any direct personal knowledge of any actual facts so as to qualify him as a lay witness. (Supp. 293-96, 300, 305-15.) Indeed, this witness admitted at hearing that he never talked to anyone employed by any of the Appellants who had direct knowledge of what actually happened with regard to their participation in the RSP Case. (Supp. 327.)

special contract extended under the ETP Case but not the RSP Case to establish a definite termination date that could be easily understood by all parties.

As stated in the RCP, the February 2008 termination date was consistent with the ETP's method of calculation of the contract end dates. (Supp. 604.) Appellants agreed in a 2001 amendment to their ESAs that the ESAs would terminate on the "date which RTC ceases" for Toledo Edison, and "RTC" was defined in a whereas clause of the amendment as meaning "Regulatory Transition Charges." (Supp. 22, 34, 45, 52, 101.) Under the ETP Order, Regulatory Transition Charges would be collected until the earlier of June 30, 2007 or the date when Toledo Edison's cumulative sales after January 1, 2001 reached 71,613,718 kWh. (Supp. 6 at ¶ 35; Supp. 83 at ¶ 19; Supp. 141-42.) Thus, the intent of the parties in 2001 was that the ESAs would terminate in mid-2007. (Supp. 254.) In compliance filings made by Toledo Edison with the Commission in 2003 and 2004, Toledo Edison estimated that, because of lower than expected sales, the distribution sales target would be reached in early 2008. (Supp. 142.)

The Revised RSP, RSP Order and RSP Entry on Rehearing provided that Regulatory Transition Charges would cease with the earlier of July 2008 bills or when distribution sales after January 1, 2004 reached 42,748,303,000 kWh. (Supp. 7 at ¶ 38-39; Supp. 83-84 at ¶¶ 22-23; Supp. 143.) Based on Toledo Edison's distribution sales estimates, this new target was expected to be reached by the end of 2007. (Supp. 143.) Based on actual sales, this target was attained in January 2008. (Supp. 143; *see* Supp. 9 at ¶ 50 (as of March 1, 2008, cumulative sales after January 1, 2004 were 43,810,526,741 kWh, well in excess of RSP target).) Thus, the February 2008 termination date authorized by the RCP Order was consistent with the parties' original expectations, with the distribution sales target in the ETP Order, and with the distribution sales target in the RSP Order.

In addition to addressing when RTC charges would end, the Revised RSP also created new regulatory costs that would be recovered by Toledo Edison through an "extended RTC charge" after the regulatory costs created by the ETP Order were recovered through the "RTC charge." (Supp. 7 at ¶ 40; Supp. 496, 521.) The RCP Order issued two years later eliminated the RTC charge created in the ETP Order and substituted in its place "RTC rate components (RTC and Extended RTC)" that would concurrently recover all regulatory costs, including those created in the Revised RSP and RCP, through December 31, 2008. (Supp. 8 at ¶ 42; Supp. 598-99.) As a result, the RTC collected by Toledo Edison through 2008 was not the "RTC" referenced in the ESAs.

Although each 2001 ESA amendment had changed the termination date of each ESA from a fixed date to one based on formulas involving distribution sales and was, thus, particularly subject to continuing fluctuation, none of the Appellants elected to intervene in the RSP Case or RCP Case. The record is unclear as to why the various Complainants failed to act. Neither Worthington's witness nor Calphalon's witness was part of the purchasing group that was responsible for monitoring these cases and had little to no knowledge regarding what that group did. (Supp. 193-201, 269, 276-79.) Brush's witness did appear to be the employee responsible for tracking these cases, but he admitted that he did not pay attention. (Supp. 206-07, 210-11.) The two Kraft employees responsible for energy procurement blamed their admitted ignorance both on the outside energy consultant one had retained to track Ohio activities and on a local representative of Toledo Edison. (Supp. 225, 233-35, 245, 250, 262.) Martin Marietta, which filed its complaint only five days before the hearing below, submitted no testimony. (Supp. 166, 169).

E. As Required by the RCP Order, Toledo Edison Continued to Provide Discounted Electric Service to Appellants Until Their Respective Meter Read Dates in February 2008 and then Treated Appellants the Same as All Other Similarly-Situated Customers Taking Tariffed Service.

Between February 2006 and September 2007, Toledo Edison discussed the February 2008 termination date with each Complainant. (Supp. 8-9 at ¶ 45-48; Supp. 85 at ¶ 29.) Each special contract terminated on that date as required by the RCP Order, and Appellants then began taking service under the applicable standard tariff. Of course, Appellants, as large industrial energy users, also had the option upon contract termination or thereafter of taking service from a competitive retail electric service supplier. Since each Appellant's billing date in February 2008, Toledo Edison is no longer providing discounted electric service to Appellants but is, instead, treating Appellants the same as all other similarly-situated customers taking service under Commission-approved tariff rates. (Supp. 207-09, 230-33, 239-40, 273-74.)

Between January 23, 2008 and February 15, 2008, Worthington, Calphalon and Kraft filed complaints claiming entitlement to a contract extension offered for a thirty-day period some three and a half years earlier. On March 14, 2008, Brush and Pilkington copied Worthington's complaint, and, on July 17, 2008 (five days before the hearing), Martin Marietta copied these complaints.

III. ARGUMENT

Proposition of Law No. 1

When a Special Contract Includes a Technical Term that Has Been Defined by the Commission Order Authorizing the Special Contract, the Commission Acts Reasonably and Lawfully in Enforcing the Parties' Intent As Reflected in that Order and Contract.

In their first and second propositions of law,[8] Appellants argue that the language of their respective ESAs clearly entitles them to pay discounted contract rates "through the date which RTC ceases for the Company." Appellants' Brief at 14-18. Appellants further argue that, because the contract language is unambiguous, the Commission erred by considering parol evidence to interpret and modify the language of the contract. *Id.* at 19-22. However, Appellants failed to carry their burden of proving that they had the contractual right under the 2001 ESA amendments to obtain specially discounted electric service after their billing dates in February 2008. *See Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189, 190. Indeed, if one accepts Appellants' argument that the Commission should have ignored all of its prior orders describing and defining RTC, then the ESAs terminated on January 1, 2006 when Toledo Edison ceased collecting the RTC referenced in the ESAs. The Commission did not err in extending the contract end date until February 2008 to give Appellants the full benefit of their bargain as was contemplated by all parties in 2001.

A. The RTC Charges Contemplated By the Parties In the ESAs Ceased on January 1, 2006.

Appellants' argument is deceptively simple: the contract says "the date which RTC ceases," and RTC ceased on December 31, 2008. Yet the second proposition is not true. The RTC referenced in the ESAs was collected by Toledo Edison through December 31, 2005 as

[8] Appellants treated these two related propositions as one argument in their Application for Rehearing filed with the Commission (*see* Appx. 59-61), and Toledo Edison will do the same here.

authorized by the ETP Order and RSP Order. Beginning on January 1, 2006, Toledo Edison continued to collect various regulatory transition costs through what were called "RTC rate components" (*See* Supp. 598), but this was not the "RTC" referenced in the ESAs. That RTC no longer existed. As discussed below, because the RCP effectively eliminated the "RTC" referenced in the ESAs, the RCP benefitted Appellants by separately extending the end dates of their ESAs to coincide with the date when RTC would have ceased if left undisturbed. However, if Appellants truly intended that the Commission apply literally and strictly the language of the contract to the facts as presented and understood by the Commission (which ordered in the RCP Order that the "RTC rate components" be substituted for the original RTC), then the Commission should have terminated Appellants' contracts on or about January 1, 2006. The Commission acted reasonably in rejecting Appellants' request to ignore all context and subsequent events.

B. The Commission Applied The Correct Termination Date To The Contracts.

When Appellants agreed in 2001 to a termination date for their special contracts that depended upon the date when Regulatory Transition Charges, as defined in the ETP Case, ceased for Toledo Edison, they adopted a moving target, as it depended upon both a distribution sales target and the amortization of deferrals. (Supp. 398, 413.) By adopting a termination date that depended specifically upon continuing Commission jurisdiction over and review of Toledo Edison's ETP, Appellants accepted that the termination date of their special contracts would depend upon, and could be altered by, future actions of both Toledo Edison and the Commission. Of course, under R.C. § 4905.31, the Commission retained continuing jurisdiction over all of Appellants' special contracts. (*See* Supp. 56, 177.) When the RTC charge originally selected as the target for termination was altered effective January 1, 2006, the Commission acted reasonably in setting the termination date of each of Appellants' contracts based on the parties'

original agreement. The Commission did not add new terms to the special contracts and did not rely on parol evidence to alter the meaning of the contracts. Instead, the Commission merely enforced the contracts pursuant to their original terms.

The responsibility of the Commission was to construe the ESAs, as amended in 2001, to determine the intent of the parties and to give it effect. *Aultman Hosp. Assoc. v. Community Mut. Ins. Co.* (1989), 46 Ohio St. 3d 51, 53. The intent of the parties is "presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St. 3d 130, 130, at syll. ¶ 1. Writings executed as part of the same transaction should be read as a whole, and the intent of each party is gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.* (1997), 78 Ohio St. 3d 353, 361. Technical terms used in a contract should be given their technical meaning unless a different intention is clearly expressed. *Id.* Moreover, a court need not resort to extrinsic evidence to give effect to the parties' intentions unless "the language is unclear or ambiguous, *or where the circumstances surrounding the agreement invest the language of the contract with a special meaning*." *Kelly*, 31 Ohio St. 3d at 132 (emphasis added).

Attempting to determine the intent of the parties as expressed in the phrase "through the date which RTC ceases for the Company" without reference to the Commission orders which created this language and also created and altered the RTC charges upon which it is based, is an impossible and irrational task. As the Commission correctly pointed out in its Opinion and Order, the ETP Stipulation *both* authorized Appellants' extension of their ESAs based on RTC charges *and* specified the circumstances under which RTC charges would cease. (Appx. 49; *see* Supp. 6 at ¶ 35; Supp. 387, 398.) As a Kraft witness agreed, making the end date of the ESAs contingent upon the date when RTC charges ceased meant that "there's no fixed [termination]

date *per se*" for the ESAs. (Supp. 230.) Thus, the Commission necessarily had to determine the technical meaning of "RTC" as used in the ESAs by reviewing the circumstances surrounding the agreement.

The termination language contained within the ESAs has no meaning absent an understanding of what "RTC" is as defined by the Commission and the associated stipulations and orders. By order, the Commission defined the date when RTC ceases for the Toledo Edison on two separate occasions:

- In the ETP Case, as the earlier of June 30, 2007 or the date when cumulative sales, after January 1, 2001, reached 71,613,718 kWh. (Supp. 398, 413.)

- In the RSP Case, as the earlier of (a) the last bills rendered reflecting July 2008 usage; or (b) when kWh distribution sales after January 1, 2004 reached 42,748,303,000 kWh. (Supp. 7 at ¶¶ 38-39; Supp. 495-96, 521, 549.) Commission Staff estimated in 2003 that this target would be reached by the end of 2007, and, based on actual sales, it was reached in January 2008. (Supp. 143.)

Thus, a Kraft witness explained at hearing that, at the time Appellants elected to amend their ESAs in 2001, the expectation was that the special contracts would terminate on or about June 2007:

> Q. Do you remember that the expectation at that time was that the contract would terminate on or around the end of June 2007?
>
> A. I think at that time that was the time that it was expected to run out. The actual time, I guess, was determined based on when the regulatory transition charges stopped being collected.

(Supp. 254.) Similarly, as a result of the RSP Case, the expectation was that the ESAs would terminate in late 2007, but no later than July 2008.

In the RCP Case, however, the Commission authorized Toledo Edison to diverge from the ETP and RSP method for collecting RTC charges by adding new components to the RTC charges then in use and extending the collection period applicable to all components until

December 31, 2008. (Supp. 598-99, 640.) The date when the new "RTC rate components" would cease for Toledo Edison was thereby extended to a date that was substantially beyond any date originally intended in either the ETP or RSP Cases. Thus, the Commission fixed the termination dates for special contracts, including Complainants' ESAs, to coincide with the parties' original expectations. The February 2008 date is, as set forth in the RCP and as explained in the testimony of a Toledo Edison witness, "consistent with the ETP's method of calculation of the contract end dates." (Supp. 141-44, 604.) As such, the Commission reasonably and lawfully gave effect to the intent of the parties by fixing February 2008 end dates for each of the ESAs.

Because the Commission retained continuing jurisdiction over the ESAs, Appellants are mistaken in arguing that the Commission's review was limited by the parol evidence rule or otherwise. The parol evidence rule prohibits the use of earlier or contemporaneous agreements to modify a final written agreement. *See Galmish v. Cicchini*, 90 Ohio St. 3d 22, 27, 2000-Ohio-7. It does not apply when circumstances surrounding a contract invest the language of the contract with a special or technical meaning, and it does not apply to bar consideration of post-agreement circumstances. *See Kelly*, 31 Ohio St. 3d at 132. The Commission reasonably relied upon the ETP Order to give meaning to the technical word "RTC" as used in the 2001 ESA amendments, which were authorized by and simply implemented the language approved in the ETP Stipulation. (*See* Supp. 387.) The Commission did not modify the meaning of the ESAs by doing so, and did not rely upon earlier or contemporaneous agreements of the parties. The Commission also reasonably relied upon its own orders issued after the 2001 ESA amendments to extend the end date of the ESAs until February 2008. In neither case did the Commission use

earlier or contemporaneous agreements of the parties to modify the ESAs. Therefore, the Commission did not violate the parol evidence rule.

The Commission acted reasonably and lawfully when it fixed the end dates of Appellants' special contracts as their respective billing dates in February 2008, as these end dates were consistent with the language of the 2001 ESA amendments and carried out the parties' original intent.

Proposition of Law No. 2

The Commission Does Not Exceed Its Authority Under R.C. § 4905.31 When It Enforces a Special Contract As Written to Give Effect to the Contracting Parties' Intent.

Appellants argue in their Third Proposition of Law that Toledo Edison and the Commission modified the terms of their special contracts improperly, because Toledo Edison did not establish that the modification of the termination date was needed to protect the public interest. Appellants' Brief at 22-28. Complainants also claim that the failure of the Commission to agree with their interpretation of the contract was in fact a modification of the contract which failed to meet the necessary "burden of the highest order." *Id.* at 26. The Commission properly rejected both arguments because the Commission's decision protected the parties' original intent as reflected in the language of the ESAs. In short, the Commission did not modify the ESAs.

Appellants' reliance on the *Mobile-Sierra* presumption is extremely misguided. What Appellants refer to as the "Sierra-Mobile Doctrine" is actually a presumption of contract validity applied by the Federal Energy Regulatory Commission ("FERC") and federal appellate courts when reviewing claims that rates in wholesale power contracts are not "just and reasonable" under the Federal Power Act. *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 128 S. Ct. 2733, 2739-40 (2008). When one party to the contract challenges the rates being charged as unjust or unreasonable and the parties have not otherwise negotiated the

application of a different standard of review, the FERC will consider whether setting aside the contract is in the public interest. *Id.* In short, *Mobile-Sierra* applies when a contracting party seeks to terminate its contract because the rates therein are unjust and unreasonable. Only one PUCO decision has ever referenced the *Mobile-Sierra* presumption, and that case, as with the FERC decisions it references, involved a utility seeking to set aside a contract because the rates were alleged to be unjust and unreasonable. *See 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, 1976 Ohio PUC LEXIS 6 (Aug. 4, 1976) (Supp. 652-67).

Mobile-Sierra has no application here. When the Commission fixed the termination date of Complainants' special contracts in the RCP Order, it was not acting because rates in the special contracts were unjust or unreasonable. Instead, it was simply fixing what was up until then a moving target so as to ensure that the parties' intentions were satisfied. No party sought to set aside the contract in a manner that would be subject to the public interest standard of review.[9]

To the contrary, because the RCP Order materially altered the process for collecting RTC charges/components, the Commission necessarily had to decide when special contracts that were tied to the original RTC Charge would terminate. After extensive briefing on this issue from Appellants and Toledo Edison, the Commission held that it did <u>not</u> modify the ESAs when it ordered in the RCP Order that the ESAs would terminate on their February 2008 billing dates: "the ETP stipulation provided that the RTC charges would be collected until TE's cumulative

[9] While engaging in an irrelevant effort to apply the *Mobile-Sierra* elements to the very different circumstances presented in this case, Appellants also attempt to make use of purported facts relating to Toledo Edison's parent company. This portion of Appellants' Brief lacks any connection to the record, includes statements that are not subject to judicial notice, and does not address any harm relating to Toledo Edison. *See* Appellants' Br. at 26-27. Toledo Edison hereby objects to Appellants' efforts to invent a record to support its case.

sales reached a defined kWh sales level; thus, the February 2008 termination date was consistent with the ETP's method of calculation of the termination dates for the contracts." (Appx. 51.) The Commission also found in its Entry on Rehearing that it was not modifying the terms of the ESAs. (Appx. 30.) If the *Mobile-Sierra* presumption were to be applied under circumstances such as those presented here, then the Commission's continuing jurisdiction under R.C. § 4905.31 essentially would be eliminated. The Commission clarified the meaning of "RTC charges" so as to preserve the contracts in the form originally agreed to by the parties; it did not set aside these contracts as unjust or unreasonable. Thus, the Commission acted reasonably and lawfully in rejecting Appellants' reliance on *Mobile-Sierra*.

Proposition of Law No. 3

The Commission Does Not Violate the Due Process of a Contracting Party By Issuing an Order That Does Not Alter the Party's Contract In Any Way.

Appellants' Third Proposition of Law claims that Toledo Edison deprived them of their right to due process by not providing sufficient notice of the RSP Order's limited opportunity to extend the end date of special contracts. This claims fails for at least four reasons:

- Appellants failed to show that they did not have actual notice of the opportunity to extend their contracts;
- at minimum, Appellants had constructive notice of this opportunity;
- Appellants waived this claim by waiting to request the opportunity to extend their contracts until early 2008 when market pricing was clear; and
- Appellants were not prejudiced, as their special contracts were not affected in any way by the Commission's RSP Order.

A. Appellants Failed to Prove They Lacked Actual Notice of the Revised RSP and RSP Order.

We do not know what Appellants actually knew in 2004 when this opportunity was made available for a limited time by the Commission because Appellants failed to provide testimony on this point. The one complainant below whose witness actually confessed to specific knowledge of the Revised RSP – which he gained from monitoring the Commission's website – did not appeal. (Supp. 177-82.) The witnesses for the other complainants, now Appellants, all agreed that low-cost electricity was critical to their operations and that each had employees or outside energy consultants dedicated to obtaining the lowest cost electricity as part of their business plans. (Supp. 193-96, 205-07, 211, 219-23, 225, 241, 269-72.) Thus, as the Commission noted, Appellants' experts had both the opportunity and the motivation to follow the RSP Case through the Commission's docketing system. Pilkington did precisely this, as did the many other special contract customers who either opted to extend their contracts or opted not to do so. (Appx. 51; Supp. 10 at ¶ 53.) Yet, from the testimony provided by Appellants, it appears Brush and Kraft were negligent in failing to track the RSP Case, with Kraft looking to shift blame to an outside energy consultant retained by Kraft. (Supp. 206-07, 210-11, 225, 233-35, 245, 250, 262.) Worthington, Calphalon and Martin Marietta elected not to present a witness with direct knowledge of its energy management activities, so the decision making of these companies remained unexplained. (Supp. 166, 169, 193-201, 269, 276-79.)

Appellants have attempted to back into a "no notice" position by relying on what the Commission and Toledo Edison did not do. The Commission did not order Toledo Edison to directly notify each special contract customer of the RSP Order extension opportunity. (Appx. 50.) Toledo Edison did not "directly notify each special contract customer through direct mailings or bill inserts" of the extension opportunity provided in the RSP Order. (Supp. 11 at ¶

55.) However, Appellants have failed to prove that this lack of direct notice *from Toledo Edison* leads inevitably to the conclusion that Appellants were deprived of due process *by Toledo Edison.* As discussed below, Appellants are deemed to have received notice from the Commission, and Appellants failed to produce any witnesses willing to testify that they attempted to obtain information from the Commission regarding the RSP Order and were turned away. Intentional ignorance has never qualified as a legitimate basis for a due process claim.

In addition, actual notice in Commission proceedings is necessary only when required by Ohio statute. *See, e.g., City of Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 446, 450. The right to participate in a Commission proceeding is statutory, not constitutional. *Id.* at 453; *see also Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 369, 2007-Ohio-53, ¶ 38 ("there is no constitutional right to notice and hearing in utility-related matters if no statutory right to a hearing exists"); *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St. 3d 244, 249, 1994-Ohio-469 ("absent express statutory provision, a ratepayer has no right to notice and hearing under the Due Process Clauses of the Ohio and United States Constitutions"). As such, any due process right which Appellants would have to receive notice of the RSP Order would have to stem directly from R.C. Title 49. *Id.* Yet Appellants have not shown that the Commission was required by Ohio's utilities laws to provide direct notice to special contract customers of the Revised RSP and RSP Order. Likewise, Appellants have not shown that Toledo Edison violated any provision of state law or Commission order by not providing direct notice to any of its special contract customers. Thus, there can be no Due Process Clause violation.

B. Appellants Had Constructive Notice of the RSP Order.

Constructive notice via maintenance of a public record or docket is sufficient to put entities, including parties and non-parties alike, on notice of potential issues and satisfies Due

Process requirements. *See, e.g., Zashin, Rich, Sutula & Monastra Co., L.P.A. v. Offenberg* (Cuyahoga 1993), 90 Ohio App. 3d 436, 443 ("where actual notice is not provided, constructive notice that comes from the court's setting down the trial date upon its docket may satisfy the dictates of due process"); *Rickard v. Ohio Dept. Liquor Control* (Franklin 1986), 29 Ohio App. 3d 133, 141 ("constructive notice" that a permit to sell liquor could be abrogated through a local option election, coupled with notice by publication that such legislation was pending, satisfied due process). Public notice provided by a government agency's website is sufficient, and at least as good as newspaper notice. *See Central Puget Sound Regional Transit Auth. v. Miller*, 128 P.3d 588, 595 (Wash. 2006). Indeed, a non-party to a state's public utilities commission proceeding is deemed to have constructive notice of a commission order on the date the order is docketed with the commission's secretary. *See Norwich Land Co. v. Pub. Util. Comm.*, 363 A.2d 1386, 1389 (Conn. 1975).

All reports, records, files, books, accounts, papers, and memoranda in the Commission's possession are public records open to inspection by interested parties and their attorneys. R.C. § 4905.07. *See also* O.A.C. 4901-3-01(A)(1) (Commission meetings open to public and all formal action taken in public). The Commission's agenda and all documents filed in its proceedings are freely available to all from the Commission's office and its website. *See* O.A.C. 4901-3-01(C) (notice of Commission's agenda is available from Commission's legal department, the information rack within the docketing division, from the Commission's web site or, upon request, via e-mail). In fact, two hearing witnesses agreed that accessing documents through the Commission's website is "wonderful" and "easy." (Supp. 179, 251.) Therefore, the Commission's posting of the Revised RSP and the RSP Order on the Commission's website was sufficient to give all interested parties constructive, if not actual, notice of the proceedings.

Indeed, Appellants stipulated that the Commission provided public notice of Toledo Edison's RSP application intended, among other things, to "establish Regulatory Transition Charges following the market development period." *See Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 376 (newspaper publication pursuant to R.C. § 4909.19 gave potentially interested parties constructive notice). As the Commission observed, Appellants knew that their special contract termination dates were an issue in the ETP Case, and the newspaper notice published in the RSP Case put Appellants on notice that the RTC Charge was an issue in that case (Appx. 31, 51.) Appellants' election to do nothing under these circumstances cannot be the basis for a Due Process violation.

C. Appellants Waived Any Argument Regarding Notice By Waiting Three and a Half Years Before Raising the Issue.

Even if Appellants had a constitutionally protected right to receive notice from Toledo Edison of the extension opportunity approved by the Commission (which they do not), Appellants' unexplained delay in asserting that right would be fatal under the principles of waiver and laches. *See Jefferson Regional Water Auth. v. Montgomery Cty.* (Montgomery 2005), 161 Ohio App. 3d 310, 313, 2005-Ohio-2755, ¶ 7 (laches); *Glidden Co. v. Lumbermens Mut. Cas. Co.* (2006), 112 Ohio St. 3d 470, 478, 2006-Ohio-6553, ¶ 49 (waiver). Appellants had at least constructive notice of the extension opportunity on June 9, 2004, when the RSP Order was docketed. (Supp. 7 at ¶ 39; Supp. 10 at ¶ 52.) Appellants admit to having actual notice of the February 2008 termination date of the ESAs beginning February 13, 2006. (Supp. 9 at ¶ 49.) Yet the first complaint was not filed by Appellants until January 23, 2008. This delay was unexcused, unexplained, and prejudicial to the Commission's efforts to develop competitive markets.

As the Commission found, "to allow the complainants to collaterally attack our decisions in the RSP Case and RCP Case at this late date may actually be viewed as providing the complainants with an unfair advantage over the nine contract customers who followed the cases and took the risk to extend their contracts at a time when today's market rates were not known to them." (Appx. 51.) Moreover, all forty six of Toledo Edison's special contact customers had the same opportunity to participate in the RSP Case, and all forty six of them were given the same opportunity to extend their contracts. *Id.* Complainants were treated in accordance with the Commission's orders, and in the exact same way as other special contract customers. *Id.* While all special contract customers were afforded an equal opportunity to extend their contracts under the Revised RSP, Appellants sat silently, waited until 2008 market pricing was clear, and then went pleading to the Commission *in 2008* to obtain risk-free special contract pricing. Because Appellants' opportunity in 2004 to extend the term of their contracts until the end of 2008 turned on an allocation of risk appurtenant to future market pricing, the only reasonable time to contest the reasonableness of the RSP Order was at or around the time of the RSP Order. The Commission acted reasonably and lawfully and denying Appellants' complaints.

D. Appellants Were Not Prejudiced by Toledo Edison's Alleged Failure to Provide Notice to Appellants.

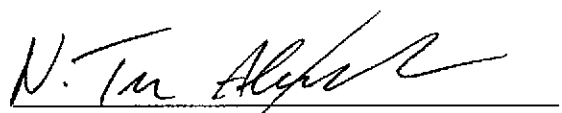
Appellants have not demonstrated that they were harmed by Toledo Edison's claimed failure to provide direct notice of the RSP Order to Appellants. An order of the Commission will not be reversed on the basis of an error that did not prejudice the appellant. *See Industrial Energy Consumers v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 551, 552. The RSP Order did not modify Appellants' special contracts in any way. Both prior to and after the RSP Order, the end date of Appellants' ESAs depended upon the date when RTC charges ceased. The RSP Order did eliminate the ETP Order's defined date of June 30, 2007 and substituted in its place a defined

date of July 2008. (*See* Supp. 6 at ¶ 35; Supp. 7 at ¶ 38.) Yet Appellants have not claimed they were harmed by this. Thus, Toledo Edison's claimed failure to give direct notice to Appellants of the RSP Order did not prejudice Appellants.

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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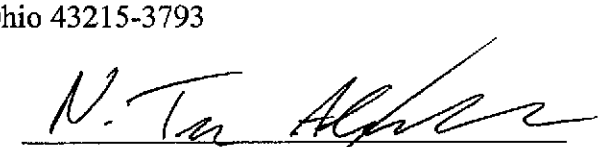

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