ORIGINAL

**IN THE SUPREME COURT OF OHIO**

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

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FILED
OCT 08 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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## TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION ..... 1

II. LAW AND ARGUMENT ..... 3

A. The Clear and Unambiguous Language in the 2001 Amendments to Appellants' Special Contracts Controls the Outcome of this Case ..... 3

1. The 2001 Amendments used clear and unambiguous language to establish a definitive termination date for Appellants' special contracts. ..... 4

2. TE could not terminate Appellants' special contracts prior to the date the collection of its RTC Charges ceased ..... 7

3. Neither Appellants' special contracts nor the 2001 Amendments refer to, depend upon, or intend for Appellants' special contracts to terminate based upon the recovery of "extended" RTC Charges or "RTC rate components." ..... 8

B. Extrinsic Parol Evidence Cannot be Used to Contradict and/or Change the Clear and Unambiguous Termination Dates in the 2001 Amendments. ..... 9

1. The contract termination dates in the 2001 Amendments were not tied to TE achieving certain kWh sales targets. ..... 9

2. Reliance Upon the ETP Calculation To Determine the End of Appellants' Contracts is Barred by the Parol Evidence Rule. ..... 11

C. The Commission made *"sub silentio"* modifications to Appellants' 2001 Amendments. ..... 11

D. The Collateral Attack Arguments are Contrary to Ohio law and Designed to Distract from the Real Issues in this Case. ..... 13

E. Insufficient Notice in the RSP and RCP Cases Failed to Alert Appellants of the Need to Protect their Interests in those Cases ..... 14

III. CONCLUSION ..... 16

CERTIFICATE OF SERVICE ..... 18

## TABLE OF AUTHORITIES

Page

### CASES

*Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241 ..... 4, 5

*Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 22 ..... 14

*Bellman v. Am. Int'l Group* (2007), 113 Ohio St.3d 323, 2007-Ohio-2071, 865 N.E.2d 853 ..... 9

*Fuchs v. The United Motor Stage Co., Inc.* (1939) 135 Ohio St. 509, 21 N.E.2d 669 ..... 4

*Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411 ..... 5

*McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77 ..... 6

*Monnett v. Monnett* (1888), 46 Ohio St. 30 ..... 6

*Western Reserve Transit v. Pub. Util. Comm.* (1974), 39 Ohio St.2d 16 ..... 14

### STATUTES

R.C. 4905.26 ..... 14, 15

R.C. 4905.31 ..... 11

R.C. 4928.39 ..... 2

R.C. 4928.40 ..... 2, 8

## I. INTRODUCTION

This case is a straightforward contract case. The only legitimate issue is whether Toledo Edison breached its contracts with Appellants. Therefore, this is not a case that requires an in-depth understanding of utility law, the deregulation of the electric industry (as the Commission's Merit Brief implies), or the details of numerous Commission proceedings (as the merit briefs of TE and the Commission imply). To the contrary, this case involves a simple contract dispute that requires this Court to consider only one undisputed fact – and then, in light of that single undisputed fact, enforce the mutually agreed upon termination language in the 2001 Amendments to Appellants' special contracts.

Appellants' special contracts with Toledo Edison ("TE") ended on the parties' clearly intended and mutually agreed upon date certain – the date TE ceased the collection of its RTC Charges.[1] (Appellants' Supp. at 0009 and 0085). TE stipulated before the Commission that it expected to cease the collection of its RTC Charges on December 31, 2008. (Appellants' Supp. at 0009, 0085, 0374, and 0379, where TE witness Norris explains "I believe they're [the RTCs] scheduled to cease at the end of 2008"). There is no evidence to the contrary.

This Court must allow Appellants to receive the true benefit of their bargain. Appellants seek reversal of the Commission's decisions that sanctioned TE's failure to comply with the parties' clear, unambiguous, and mutually agreed upon termination date. To hold otherwise would allow TE to have its cake and eat it too—namely to charge Appellants the much higher standard service offer (SSO) rate for electricity while continuing to collect RTC Charges. This was not the bargained for contract. TE's unlawful and premature termination of Appellants' special contracts should not be rewarded with such a double recovery.

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[1] Appellants' Reply Brief refers to the phrase "regulatory transition charges" as "RTC Charges."

The merit briefs submitted by TE and the Commission both seek to justify the unilateral and premature termination of Appellants' special contracts in February 2008, while simultaneously and inconsistently claiming that the RTC Charges actually ended in 2005 but TE extended Appellants' deal through February 2008 gratis (which is entirely incorrect).

To sustain that position, TE creates legal fictions. Specifically, TE claims it actually collected "extended" RTCs and/or "RTC rate components" from 2006 through December 31, 2008 (TE Merit Brief, p. 12 and Commission Merit Brief, pp. 15-16), instead of the RTC Charges defined in the 2001 Amendments. To make matters worse, the Commission affirms these assertions based on its claim that the "term [RTC] means what the Commission intended it to mean" (i.e. RTCs, "extended" RTCs or "RTC rate components"), rather than how Appellants and TE specifically defined RTCs within the four corners of the 2001 Amendments. (Commission Merit Brief, p. 19).

The Commission's powers, however, are statutorily limited by R.C. 4928.39 and R.C. 4928.40 (governing regulatory transition charges). R.C. 4928.40 specifically defines the parameters of allowable regulatory transition charges, and provides the Commission with its sole source of authority for the creation of TE's RTC Charges. The statute does not differentiate between or among classes of regulatory transition charges. The RTC Charges referred to in the 2001 Amendments were the only regulatory transition charges that TE was allowed to collect under R.C. 4928.40. TE billed these RTCs to its customers, including Appellants, from 2001 through December 31, 2008. TE never collected so-called "extended" regulatory transition charges or "RTC rate components" from its customers. Thus, the termination date of the special contracts must be the December 31, 2008 – the date on which TE ceased the collection of its RTC Charges.

Significantly, TE could have defined a specific termination date in the 2001 Amendments other than the date on which TE ceased the collection of its RTC Charges, but did not. TE could have tied the termination of Appellants' special contracts to the tracking of its regulatory assets, but did not. Instead, TE expressed the termination date of Appellants' special contracts as the date TE ceased the collection of its RTC Charges—or December 31, 2008. (Appellants' Supp. at 0009 and 0085).

Finally, and perhaps most importantly, the simple fact remains that both the Commission and TE retained the power to terminate Appellants' special contracts at any time by simply ceasing TE's collection of RTC Charges. This did not happen. Under the 2001 Amendments, Appellants remained full service electric customers at discounted standard service offer (SSO) rates, while TE continued to collect the same RTC Charges on Appellants' bills (and in the same amount) from 2001 through December 31, 2008. In this appeal, Appellants merely want the benefit of their bargain based upon the clearly expressed intentions in the 2001 Amendments (TE's discounted rate while paying the RTC Charges). TE failed to live up to that bargain by charging full standard service offer rates <u>and</u> still collecting its RTC Charges. The Commission unreasonably and unlawfully has gone along with it.

## II. LAW AND ARGUMENT

### A. The Clear and Unambiguous Language in the 2001 Amendments to Appellants' Special Contracts Controls the Outcome of this Case.

The clear and unambiguous language in the 2001 Amendments establishes a definite and certain termination date for Appellants' special contracts – the date that TE ceased the collection of its RTC Charges. See *Fuchs v. The United Motor Stage Co., Inc.* (1939) 135 Ohio St. 509, 21 N.E.2d 669, syllabus one (explaining that a "written contract which calls for continuous performance, not for a definite term in point of time but for a term dependent upon an event

which is certain to occur" is definite and certain and "is not void for uncertainty as to time"). And, contrary to the assertions of the Commission and TE, the intent of a clear and unambiguous contract is evidenced solely by the express language used by the parties in the four corners of that contract. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246 (explaining that "where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties").

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

No one disputes that TE offered, and Appellants accepted, a "one time right" to extend their pre-existing special contracts until terminated with the "bill rendered for the electric usage through the date which RTC ceases for the Company [TE]." (Appellants' Supp. at 0006). As part of the 2001 Amendments, Appellants and TE mutually defined the term RTC to mean Regulatory Transition Charges. (Appellants' Supp. at 0006). Thus, the contract is clear and unambiguous and entitled Appellants to pay the special contract rate until TE ceased the collection of its RTC Charges.

TE, however, claims it is "impossible and irrational" to determine the parties' intent as to when the billing of RTC Charges ceased "without reference to the Commission orders which created this language and also created and altered the RTC Charges upon which it is based." (TE Merit Brief, p. 13). This statement is itself irrational. Determining the date on which the RTC Charges ended requires no reference to orders of the Commission. It requires absolutely no understanding of the public policy reasons for which the RTC Charges were initially created, and absolutely no knowledge about why TE stopped billing its RTC Charges. Quite simply, the termination event happened when TE, for whatever reason, stopped billing the RTC Charges to

its customers. That date was December 31, 2008. TE's argument is nothing more than an attempt to confuse the issues and make ambiguous the straightforward termination language in the 2001 Amendments.

Ohio law is emphatic that "where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246. TE even recognizes this fact by citing to *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, syllabus ¶ 1 for the proposition that the "intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." (TE Merit Brief at p. 13). Since the Commission approved the clear and unambiguous language in the 2001 Amendments to express the parties' intent, the four corners of that document control the outcome of this case.

Both TE and the Commission attempt to justify why TE continued to collect its RTC Charges through December 31, 2008, even though TE claims to have terminated Appellants' special contracts in February 2008. Appellees conjure up legal fictions to support their arguments – the concepts of "extended" RTCs and "RTC rate components." The story goes that these different charges were collected from 2005 forward, rather than the RTCs referenced and expressly defined in the 2001 Amendments. The story continues that, while TE could have terminated the special contracts in 2006, TE continued those special contracts until the February 2008 meter read dates to be consistent with the kWh tracking mechanism set forth in the ETP Case. This story, however, is based on the false premise that TE somehow collected a charge other than the RTC Charges billed under its tariffs and expressly defined in the 2001 Amendments.

The fact is that the RTC Charges created in 2001 continued without change (and at the same rate) through December 31, 2008. The only thing that changed over that period of time was the total revenue that the Commission authorized TE to collect through its RTC Charge. By interjecting the fictions of "extended" RTCs and "RTC rate components" into the story, TE and the Commission intended to divert attention from the authorized RTC Charges to which the clear and unambiguous language of the 2001 Amendments expressly defined as "regulatory transition charges" for purposes of these contracts. There simply is no rational, logical, or legal basis for TE and the Commission to impose an alternative meaning of regulatory transition charges not based upon the clear and unambiguous contract language.

The *Foster Wheeler Enviresponse* case cited by TE states that "[t]echnical terms used in a contract should be given their technical meaning **unless a different intention is clearly expressed**." (Emphasis added). (TE Merit Brief, p. 13). TE drafted, and the Commission approved, the 2001 Amendments that referred to the term regulatory transition charges by the acronym RTC. No other intent whatsoever can be found within that document. Thus, Appellants' special contracts terminated when TE stopped billing RTC Charges.

Even if the 2001 Amendments are deemed ambiguous (which Appellants in no way concede), TE drafted these documents. Under longstanding Ohio law "where there is doubt or ambiguity in the language of a contract, it will be construed strictly against the party who prepared it." *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 80. See also *Monnett v. Monnett* (1888), 46 Ohio St. 30, 34-35 (holding that the "words of obligation in a contract, 'are interpreted most strongly against the obligor, for it is presumed that he used those most favorable to his interests; and all doubtful terms or ambiguous words are to be construed against him. He who speaks, should speak plainly, or the other party may explain to his own advantage'").

The clear and unambiguous language of Appellants' special contracts as amended by the 2001 Amendments, constitutes the only evidence of the parties' intent, and must control the outcome of this case. The date that TE ceased the collection of its RTC Charges, which undisputedly occurred on December 31, 2008, represents the only fact beyond the four corners of the contracts themselves that is relevant to this Court's determination of when Appellants' special contracts ended. Therefore, regardless of the sub silentio, unexpressed, additional, or supplemental intentions held by TE and/or the Commission, the 2001 Amendments clearly express the intention of the parties that the acronym RTC means the regulatory transition charge authorized for TE to bill customers under R.C. 4928.40. The "extended" RTC or "RTC rate components" simply were never authorized under R.C. 4928.40 as billable charges, and have no place in this case.

**2. TE could not terminate Appellants' special contracts prior to the date the collection of its RTC Charges ceased.**

Under the clear and unambiguous language in the 2001 Amendments, TE always retained the unquestioned contractual power to terminate Appellants' special contracts. To do so, TE merely needed to cease the collection of its RTC Charges. Had that actually occurred, Appellants would not have filed their complaints asking the Commission to compel TE to continue providing electric service at the special contract rate through the end of 2008.

TE nevertheless disregarded the clear and unambiguous language of the 2001 Amendments in order to terminate Appellants' special contracts in February 2008 while continuing to collect RTC Charges through the end of 2008. (Appellants' Supp. at 0009, 0085, 0374, and 0379, where TE witness Norris explains "I believe they're [the RTCs] scheduled to cease at the end of 2008").

The special contracts unambiguously continue through the date on which TE ceased the collection of its RTC Charges, which was December 31, 2008. The Commission erred by allowing TE to unilaterally terminate Appellants' special contracts while still collecting its RTC Charges, thereby sanctioning TE's unlawful attempt to rid itself of contractual bargains it no longer found to be to its advantage.

**3. Neither Appellants' special contracts nor the 2001 Amendments refer to, depend upon, or intend for Appellants' special contracts to terminate based upon the recovery of "extended" RTC Charges or "RTC rate components."**

As previously discussed, regulatory transition charges are statutorily-created charges under R.C. 4928.40 authorized by the Commission for collection as transition revenues. The detailed complexities of the regulatory transition charges, however, are not the subject of this Reply Brief – or of this case. The only relevant information from these statutes is the simple fact that the regulatory transition charges authorized for recovery under R.C. 4928.40 were the regulatory transition charges identified in the 2001 Amendments, and not the amorphous "extended" regulatory transition charge or "RTC rate components" that were never billed to TE's customers.

Appellants' simple and straightforward special contracts ended "with the bill rendered for the electric usage through the date which RTC ceases for [TE]." (Appellants' Supp. at 0006 and 0083). The merit briefs of TE and the Commission never dispute that TE collected such RTC Charges which TE continuously billed at the same rates from 2001 through December 31, 2008. Faced with the irrefutable truth that the RTC Charges continued until December 31, 2008, TE and the Commission now attempt to put new labels on those charges in order to argue that Appellants' special contracts ended prior to December 31, 2008.

Despite its attempts to relabel the RTC Charge as something else, TE collected **the same** RTC Charges from Appellants **at the same rates** from January 1, 2001 through December 31, 2008. The recently invented fictions of "extended" RTCs and "RTC rate components" never became billable charges under Commission approved TE rate schedules, never appeared on Appellants' bills, and were never collected by TE. The undisputed evidence shows TE collected revenues by billing the RTC Charges through December 31, 2008. The contracts therefore terminated on that date.

### B. Extrinsic Parol Evidence Cannot be Used to Contradict and/or Change the Clear and Unambiguous Termination Dates in the 2001 Amendments.

In this context, and as set forth in detail on pages 19-22 of Appellants' Joint Merit Brief, the Commission violated fundamental principles of Ohio contract law by using extrinsic evidence to modify the clear and unambiguous language in the 2001 Amendments. The Commission's merit brief only compounds this mistake by claiming that the "termination language contained within the ESAs [the 2001 Amendments] has no meaning absent an understanding of what 'RTC' is as defined by the Commission and the associated stipulations and orders." (TE Merit Brief, p. 14).

The parol evidence rule, however, emphasizes that "a writing intended by the parties to be a final embodiment of their agreement **cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing**." (Emphasis added). *Bellman v. Am. Int'l Group* (2007), 113 Ohio St.3d 323, 325-326, 2007-Ohio-2071, 865 N.E.2d 853. Use of the ETP Case's methodology to calculate the expected (but not guaranteed) termination date of the clear and unambiguous termination date violates the parol evidence rule by modifying the 2001 Amendments.

#### 1. The contract termination dates in the 2001 Amendments were not tied to TE achieving certain kWh sales targets.

TE drafted, and the Commission approved, the language of the 2001 Amendments that terminated Appellants' special contracts when TE ceased the collection of its RTC Charge. It is irrelevant that in 2001 both the Commission and TE anticipated that TE would cease imposing the RTC Charges when certain sales targets were achieved. Subsequent events negated that initial expectation.

In the RSP case, the Commission "re-set" the kWh target at TE's request when TE's sales proved to be less than anticipated, thereby causing the revenue TE collected through the RTC to also be less than originally projected. Then, in the RCP case, the Commission authorized TE to create additional regulatory assets and to continue imposing regulatory transition charges to collect revenues associated with those new regulatory assets. The Commission, obviously, possessed the authority to issue such orders, and the Appellants do not quibble with that authority.

The Commission's authority to approve or disapprove the continued imposition of the RTC Charges is not, and has never been, the issue. Neither TE nor the Commission acknowledge the fact that these subsequent events did not, and could not, change Appellants' expectations that their special contracts would continue until the RTC Charges ceased to be collected. TE collected its RTC Charges through December 31, 2008. Appellants' contracts, therefore, continued to that date. Any other outcome directly conflicts with the express terms of Appellants' contracts.

If the Commission intended to modify the contracts for any reason, it could do so only through the "extraordinary" statutory power granted it through R.C. 4905.31. It was not free to do so by relying upon its own intent – not expressed in any way within Appellants' special

contracts – that Appellants' special contracts should terminate when TE achieved certain kWh sales level targets, or collected a specific revenue figure.

### 2. Reliance Upon the ETP Calculation To Determine the End of Appellants' Contracts is Barred by the Parol Evidence Rule.

There is absolutely no support in the four corners of the 2001 Amendments for TE's conclusion that, upon reaching certain kWh targets established in the ETP and RSP Cases, it could terminate Complainants' special contracts while continuing to collect RTC Charges. The terms of the 2001 Amendments do not refer to, depend upon, incorporate by reference, or intend for Appellants' special contracts to terminate upon TE reaching its kWh tracking goals – even if the original expectation was that reaching the tracking goals and stopping the collection of RTC Charges would occur simultaneously. TE could have included such alternative termination language in the 2001 Amendments, but chose not to do so. The Commission could have ordered TE to include such language, but chose not to do so. In any event, TE even admitted that it did not rely on the kWh tracking goals in the termination of Appellants' special contracts. (Appellants' Supp. at 0009 and 0085). It is clear that the termination of Appellants' special contracts was tied solely to TE's recovery of its RTC Charges – charges that TE collected through December 31, 2008.

## C. The Commission made *"sub silentio"* modifications to Appellants' 2001 Amendments.

Side-stepping a direct response to Appellants' assertions that the Commission "sub silentio" modified the 2001 Amendments, the Commission instead argues that Appellants were not harmed or prejudiced because termination in February 2008 provided Appellants with the bargained-for benefits of their contracts. (Commission Merit Brief, p. 11). The Commission's argument, however, would serve only to distract the Court from the Commission's actions that in

fact modified the termination dates of Appellants' special contracts without Appellants' knowledge, much less their acquiescence.

In reality, Appellants did not receive the benefit of their bargains as the TE and the Commission argue. Instead, each Appellant suffered serious financial harm as a result of the Commission's sub silentio endorsement of TE's modification to Appellants' special contracts so as to terminate them in February 2008. Between February 2008 and December 31, 2008, Appellants were forced to pay between 20% and 50% more for electricity than they would have paid pursuant to their special contract rates. (Appellants' Supp. at 0088, 214, and 230-231). Between February and May 2008, this amounted to greater than $1 million.[2] The amounts incurred between June 2008 and the end of the year totaled significantly more than this $1 million dollar amount.

Moreover, this Court should reject the understandable efforts by TE and the Commission to distance themselves from the *Mobile-Sierra* doctrine as previously applied by the Commission itself in the *Ohio Power* case. Notably, the Commission concedes that its principles adopted in the *Ohio Power* case "seemed useful for the Commission's analysis" of a case in which a utility was seeking authority "to terminate an existing agreement with a customer" the effect of which "would have been to raise the cost of power to the customer." (Commission's Merit Brief, pp. 20-21). Despite the obvious similarity between its own description of the facts in *Ohio Power* and the facts in this case, the Commission summarily concludes that the doctrine has no application to the facts in this case. The sole basis offered for this conclusion is a statement that the Commission denied the utility's request in *Ohio Power,* and the utility pursued no appeal to this Court.

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[2] A more detailed financial analysis can be found on pages 8-9 of Appellants' Joint Post-Hearing Brief filed before the Commission.

Further, TE's sole basis for ignoring the principles in *Mobile-Sierra* is its claim that the Commission's RCP Order did not modify Appellants' special contracts when permitting TE to terminate the contract in February, 2008 (rather than when TE ceased the collection of its RTC Charges). (TE Merit Brief, p. 17). Significantly, TE ignores the fact that the termination date "fixed" in the RCP Order is emphatically not the termination date "fixed" by the terms of the contract.

Indeed, *Mobile Sierra* remains strongly persuasive in this case, just as it was in *Ohio Power*. Because the power "to modify contracts is an extraordinary power, the party seeking to invoke it is subject to a burden of the highest order."[3] This simple, straightforward statement by the Commission in the *Ohio Power* case establishes two key principles: 1) the power to modify special contracts is an "extraordinary power;" and 2) exercising this extraordinary power is subject to a "burden of the highest order." Neither of these principles have even attempted to have been achieved in this case, and neither the Commission nor TE presents a legal or factual basis to undercut Appellants' argument that the Commission improperly and sub silentio modified Appellants' special contracts by allowing TE to terminate those contracts before the end of the RTC.

### D. The Collateral Attack Arguments are Contrary to Ohio law and Designed to Distract from the Real Issues in this Case.

Both TE (before the Commission and this Court) and the Commission repeatedly characterize this case as a "collateral attack" on the Commission's Orders in the RSP and RCP Cases. (See Commission Merit Brief, pp. 34-36 and TE Merit Brief, p. 1). As previously emphasized before the Commission, this argument is simply incorrect.

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[3] *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, August 4, 1976 Opinion & Order, Case No. 75-161-EL-SLF.

Appellees fail to identify the issues determined by the Commission in the RSP and RCP cases now allegedly under collateral attack by Appellants, who neither intervened nor participated in those cases. The Commission's vague references in its merit brief inaccurately portray Appellants' positions on the relationships between "RTC," "extended RTC" and "RTC rate components." In sum, the Appellees present no basis for their arguments that Appellants "collaterally attack" previous Commission's Orders.

Furthermore, even if the complaints in this consolidated proceeding somehow could be construed as a collateral attack on the Commission's Orders, this Court emphatically recognizes the "use of R.C. 4905.26 as a means of collateral attack on a prior proceeding." *Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 22, 24. See, also, *Western Reserve Transit v. Pub. Util. Comm.* (1974), 39 Ohio St.2d 16, 18 (explaining that the language in R.C. 4905.26 is "extremely broad, and would permit what might be strictly viewed as a 'collateral attack' in many instances"). In accordance with the Court's holdings, the issues raised in Appellants' complaints, even if they are considered "collateral attacks" on the Commission's Orders, are justified.

### E. Insufficient Notice in the RSP and RCP Cases Failed to Alert Appellants of the Need to Protect their Interests in those Cases.

Assuming, arguendo, that the RSP and RCP cases are even relevant to the interpretation of Appellants' special contracts (and Appellants vigorously dispute that they are) the insufficient notice provided in the RSP and RCP cases denied Appellants their due process rights to participate in the hearings and be heard on the matters of their contracts. Indeed, the notice provided in the RSP and RCP cases failed to satisfy the statutory criteria applicable to public notices when the Commission exercises its rate-making authority.

Even if a lesser standard applies to notices under R.C. 4909.18, the overwhelming fact remains that the notice provided in the RSP and RCP Cases did nothing to inform Appellants (or anyone else) that their previously negotiated special contracts with TE were to be injected into those proceedings, let alone modified by the Commission. When TE approached Appellants with respect to the 2001 Amendments, it reached out to Appellants directly and individually. That was the course of dealing with respect to these contracts. TE only changed these expectations after the fact.

TE's additional argument that the Appellants waived their right to complain on the basis of laches is unsupported. TE's assertions about telling Appellants as early as 2006 that it would terminate their contracts in February 2008 were not sufficient to amount to even an anticipatory breach of contract. TE could have simply ceased the collection of its RTC Charges on that date. Had it done so, TE would have complied with the contracts, and the contracts would have terminated by their terms in February 2008.

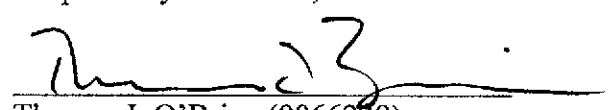
The reality, as the evidence demonstrates, is that Appellants' special contracts were only interjected into the RSP and RCP Cases long after the fact and to avoid Appellants' legitimate claims. TE even expressly represented approximately one month after filing the RSP case (and before public notice was issued regarding that case) that "This Plan does not affect the termination dates for special contracts as such dates would have been determined under Case 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008." (Appellants' Supp. at 009.) The issue therefore was not a part of the RSP case until a revised Stipulation expanded upon language contained within Section VIII(8) of the stipulation as originally proposed. Similarly, the issue was not raised within the RCP case until language was included in a stipulation agreed to by parties that did not include Appellants.

The lack of sufficient notice in the RSP and RCP cases stands in stark contrast to what the Commission directed in the ETP case. In that case, when TE offered a one-time opportunity to extend the terms of existing contracts, the Commission directed TE to provide the contract customers with actual notice. Neither TE nor the Commission provided similar, separate and direct notice to interested persons following the RSP/RCP Stipulations or the RSP/RCP Orders approving those stipulations. As a result, the Commission and TE have violated the fundamental goal of all notice requirements—that of notifying interested persons of the necessity of protecting one's legitimate interests.

## III. CONCLUSION

At some point, the fairness determination must be what a reasonable person would recognized to be fair, not the "fairness" that lawyers attempt to justify after the fact and contrary to the plain terms of a simple contract. Appellants respectfully submit that the Commission's February 19, 2009 Opinion and Order and April 15, 2009 Entry on Rehearing are unreasonable and/or unlawful and should be reversed. This matter should be remanded to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,



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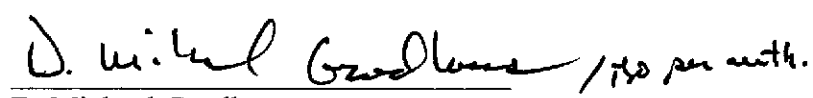

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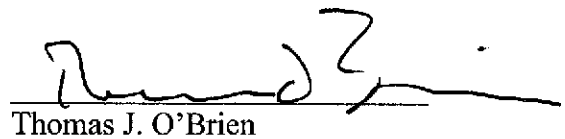
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Joint Reply Brief of Appellants was served by electronic mail and regular mail this 8th day of October 2009.



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