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

MOTION FOR RECONSIDERATION
OF INTERVENING APPELLEE THE TOLEDO EDISON COMPANY

Craig I. Smith (0019207)
(Counsel of Record)
2824 Coventry Road
Cleveland, Ohio 44120
(216) 561-9410
(216) 921-0204 (fax)
wis29@yahoo.com

ATTORNEY FOR APPELLANT KRAFT FOODS GLOBAL, INC.

Michael D. Dortch (00438097)
(Counsel of Record)
Kravitz, Brown & Dortch, LLC
65 East State St., Ste. 200
Columbus, Ohio 43215
(614) 464-2000
(614) 464-2002 (fax)
mdortch@kravitzllc.com

ATTORNEY FOR APPELLANT MARTIN MARIETTA MAGNESIA SPECIALTIES, LLC

Michael DeWine (0009181)
Attorney General of Ohio
William L. Wright (0018010)
Section Chief
Thomas W. McNamee (0017352)
(Counsel of Record)
John H. Jones (0051913)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th floor
Columbus, Ohio 43215-3793
(614) 466-4396
(614) 644-8764 (fax)
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
john.jones@puc.state.oh.us

ATTORNEYS FOR APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

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CLERK OF COURT
SUPREME COURT OF OHIO

Thomas J. O'Brien (0066249)
Matthew W. Warnock (0082368)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
(614) 227-2300
(614) 227-2390 (fax)
tobrien@bricker.com
mwarnock@bricker.com

ATTORNEYS FOR APPELLANTS WORTHINGTON INDUSTRIES AND BRUSH WELLMAN

Daniel W. Wolff (0074168)
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2621
(202) 628-5116 (fax)
dwolff@crowell.com

ATTORNEY FOR APPELLANT THE CALPHALON CORPORATION

Mark A. Hayden (0081077)
Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
(Counsel of Record)
N. Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
talexander@calfee.com

ATTORNEYS FOR INTERVENING APPELLEE, THE TOLEDO EDISON COMPANY

Pursuant to S. Ct. Prac. R. 11.2, Intervening Appellee, The Toledo Edison Company ("Toledo Edison"), respectfully moves the Court to reconsider its August 24, 2011 Slip Opinion (the "Opinion") reversing the decision of the Public Utilities Commission of Ohio ("Commission"). The Court properly recognized that the parties' 2001 Amendments to their special contracts stated that the contracts "shall terminate with the bill rendered for the electric usage through the date which [the regulatory-transition charge] ceases for the [Toledo Edison] Company." Opinion ¶ 23. That recognition, however, is not dispositive of the issue presented in the case. Because the 2001 Amendments do not include a specific fixed date for the termination of the special contracts, the Court must look beyond the four corners of the document to identify where the Commission determined the end date. The Commission's factual determination of the end date for the special contracts is entitled to deference by this Court.

The Court erred in stating that "the commission was bound to give effect to the parties' intent, as expressed in the plain language of the agreements." *Id.* As expressly stated in R.C. § 4905.31, the Commission is authorized to modify any provision of the parties' special contracts, including as necessary to reflect changing regulatory conditions. Unlike typical contracts between private parties, Commission-approved special contracts remain subject to the regulation and supervision of the Commission and their continuation does not depend solely upon the original intent of the contracting parties. The Commission should give due consideration to the parties' intent, of course, as it did in the Rate Certainty Plan ("RCP") Order and in these complaint cases. Yet the Commission is not bound to give effect to that intent. To the contrary, it is bound first and foremost to implement the public utility laws of Ohio in a reasonable and lawful manner, including the laws requiring that retail electric generation service transition to a competitive market. Appellants did not show that the Commission's decision to fix February

2008 as the end date for each of their special contracts – so that Appellants' load would finally be available to that competitive market – was unreasonable or unlawful under Ohio's public utility laws. The Commission's independent exercise of its authority provided in R.C. § 4905.31 in establishing the fixed end date for the special contracts should not be disturbed by this Court.

The Court also erred in assuming that the Appellants' simplistic interpretation of the 2001 Amendments was the parties' or the Commission's intent when the Commission authorized the extension of the special contracts. Neither Toledo Edison nor the Commission could ever have intended that the special contracts would be extended for as long as Toledo Edison's tariffs included charges named "Regulatory Transition Charges." It was Toledo Edison's interpretation and the Commission's interpretation that the reference to "Regulatory Transition Charges" in the 2001 Amendments tied directly to the Electric Transition Plan ("ETP") Stipulation and the Commission's ETP Order. It was, after all, these two documents that were the source for this term, these two documents that defined this term (it was not defined anywhere in the 2001 Amendments), and these two documents that were specifically identified in the Whereas clauses of the 2001 Amendments as establishing the legal basis for the extension offered in the 2001 Amendments. (*See* Supp. 22.) That this was the Commission's interpretation is vitally important because the 2001 Amendments would not have existed but for the Commission's approval of them in the ETP Order.[1] The Commission authorized Toledo Edison to extend Appellants' special contracts until such time as the Regulatory Transition Charges approved in the ETP Order ceased, and that is what Toledo Edison offered to Appellants. To offer more than this, or to misinterpret the offer as meaning more than this, would have violated the ETP Order.

[1] The 2001 Amendments expressly provided that "the PUCO has agreed to these terms as part of its approval of the Company's Stipulation and Recommendation dated April 13, 2000." (Supp. 22.)

Yet the Court's Opinion ignores the ETP Order and ignores the Commission's and Toledo Edison's intent.

There is only one place in the record where the Court can find the end date of Appellants' special contracts, and it is February 2008, not December 31, 2008. The Court necessarily had to look outside the four corners of the 2001 Amendments to resolve the issue presented in this case, i.e., to determine the end date of the special contracts. Certainly the 2001 Amendments do not set forth a fixed date certain for the termination of those contracts. The Commission's RCP Order determined when these Regulatory Transition Charges would have ceased consistent with the ETP Order. The Commission then independently fixed the end date for the special contracts as Appellants' billing dates in February 2008. (Supp. 604, 640.) Based upon R.C. § 4905.31, the Commission had the authority to specify the end date for the special contracts and it did so, regardless of its basis for doing so.

Although the Court's Opinion is replete with statements that the Regulatory Transition Charges referenced in the 2001 Amendments ended on December 31, 2008, there is no record support for these statements. The RCP Order issued on January 4, 2006, did *authorize* Toledo Edison to impose a revised and updated form of a transition charge until no later than December 31, 2008. However, Appellants made no attempt to demonstrate that the transition charge approved by the RCP Order was the same charge referenced in the 2001 Amendments or that recovery of regulatory transition costs and any associated transition charges continued until December 31, 2008.[2] Appellants jumped to these conclusions without submitting any evidence

[2] Collection of the transition charge authorized by the RCP Order depended upon recovery of several categories of costs created by the RSP and RCP Orders. Thus, the transition charge authorized by the RCP Order ended on ***or before*** December 31, 2008. The record does not contain any indication as to when this charge actually ceased. Notably, at no time did Toledo Edison stipulate that the "RTC" referenced in the 2001 Amendments continued through

that they were true, and apparently persuaded the Court to jump with them. In looking beyond the four corners of the contract to find the correct end date, which the Court had to do, the Court should have looked to and relied upon the only record evidence of when the special contracts ended: the Commission's previous determination that the special contracts ended in February 2008.

Indeed, the Court erred when it assumed that the Regulatory Transition Charges referenced in the 2001 Amendments constituted the same Regulatory Transition Charge that ended on December 31, 2008. As the Commission stated in its Entry on Rehearing below, the Appellants (not Toledo Edison) were "redefining the meaning of RTC Charges as set forth in the *ETP Case*." (Appx. 29.) The term "Regulatory Transition Charges" does not appear in any dictionary and does not have a plain meaning. To the contrary, this term found its way into the 2001 Amendments solely because the Commission had defined it and bestowed it with special meaning in Toledo Edison's ETP Case. As such, the Commission was best positioned to determine, using its special regulatory expertise, the intended length of the special contract extension referenced in the 2001 Amendments, and then to separately fix the specific end date under its authority in R.C. § 4905.31.

The Court should reconsider its Opinion because it erroneously assumed what the intent of Toledo Edison and the Commission was related to the special contract extension at issue, failed to acknowledge that the Court must look beyond the four corners of the 2001 Amendments to reach a resolution of the issue presented in this appeal, and, looking beyond the four corners of the 2001 Amendments, failed to accept that the Commission properly specified the fixed end date for the termination of the 2001 Amendments under its authority set forth in R.C. § 4905.31.

December 31, 2008, and the Commission did not err in finding that it did not.

Accordingly, Toledo Edison requests that this Court reconsider and vacate its Opinion and give due consideration to Toledo Edison's arguments set forth herein and render an Order on Reconsideration consistent with those arguments.

Respectfully submitted,

Mark A. Hayden (0081077)
Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
(Counsel of Record)
N. Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
talexander@calfee.com

Attorneys for Intervening Appellee,
The Toledo Edison Company

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MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF INTERVENING APPELLEE THE TOLEDO EDISON COMPANY

Craig I. Smith (0019207)
(Counsel of Record)
2824 Coventry Road
Cleveland, Ohio 44120
(216) 561-9410
(216) 921-0204 (fax)
wis29@yahoo.com

ATTORNEY FOR APPELLANT KRAFT FOODS GLOBAL, INC.

Michael D. Dortch (00438097)
(Counsel of Record)
Kravitz, Brown & Dortch, LLC
65 East State St., Ste. 200
Columbus, Ohio 43215
(614) 464-2000
(614) 464-2002 (fax)
mdortch@kravitzllc.com

ATTORNEY FOR APPELLANT MARTIN MARIETTA MAGNESIA SPECIALTIES, LLC

Michael DeWine (0009181)
Attorney General of Ohio
William L. Wright (0018010)
Section Chief
Thomas W. McNamee (0017352)
(Counsel of Record)
John H. Jones (0051913)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th floor
Columbus, Ohio 43215-3793
(614) 466-4396
(614) 644-8764 (fax)
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
john.jones@puc.state.oh.us

ATTORNEYS FOR APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas J. O'Brien (0066249)
Matthew W. Warnock (0082368)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
(614) 227-2300
(614) 227-2390 (fax)
tobrien@bricker.com
mwarnock@bricker.com

ATTORNEYS FOR APPELLANTS WORTHINGTON INDUSTRIES AND BRUSH WELLMAN

Daniel W. Wolff (0074168)
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2621
(202) 628-5116 (fax)
dwolff@crowell.com

ATTORNEY FOR APPELLANT THE CALPHALON CORPORATION

Mark A. Hayden (0081077)
Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
(Counsel of Record)
N. Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
talexander@calfee.com

ATTORNEYS FOR INTERVENING APPELLEE, THE TOLEDO EDISON COMPANY

I. THE COURT'S OPINION MISTAKENLY LIMITED THE COMMISSION'S JURISDICTION OVER SPECIAL CONTRACTS THAT WERE CREATED AND CONTINUED TO EXIST SOLELY BY VIRTUE OF COMMISSION AUTHORITY.

The Court recognized that special contracts remain subject to the regulation and supervision of the Commission pursuant to R.C. § 4905.31, but concluded that the Commission could not defend its Opinion and Order below on this ground because it had stated on rehearing that it did not modify the special contracts. Opinion ¶ 32. This is an incorrect reading of the Commission's Entry on Rehearing and of the Commission's actions in the Electric Transition Plan ("ETP"), Rate Stabilization Plan ("RSP") and Rate Certainty Plan ("RCP") cases. The Court must look at and consider what the Commission actually did, not just what they said they intended to do or not do. What the Commission stated in its Entry on Rehearing was that it was appropriately interpreting its previous orders in those cases. It was in those cases that the Commission exercised its R.C. § 4905.31 authority to both approve extension of Appellants' special contracts (in the ETP Case) and fix the end date of those same contracts (in the RCP Case). The Court erred in determining that the Commission did not exercise its authority to do so but was, instead, solely obligated to implement the 2001 Amendments to reflect the parties' intentions.

Each of the Appellants' special contracts was "under the supervision and regulation of the commission, and [was] subject to change, alteration, or modification by the commission." R.C. § 4905.31. When the special contracts were modified in the ETP case to extend their end dates until the date when "RTC ceases" for Toledo Edison (Supp. 22), that modification was ordered by the Commission and subject to its ongoing supervision and regulation. When the Commission fixed the end date for the special contracts as each of Appellants' billing dates in February 2008, that action also was taken pursuant to R.C. § 4905.31. Every time the Commission takes any action involving special contracts, it acts pursuant to R.C. § 4905.31. The

Commission can exercise only that jurisdiction conferred upon it be statute,[3] and the only statute authorizing supervision and regulation of special contracts is R.C. § 4905.31.

Thus, for the Court to say that the Commission cannot now rely upon R.C. § 4905.31 improperly places form over substance. Relying upon its expertise, the Commission examined the history of the special contract extensions and the regulatory changes that had occurred since the ETP case. Based upon that analysis, the Commission then correctly fixed the end date of the special contracts as February 2008 in the RCP Order, stating that it did so to give effect to the language of the 2001 Amendments that the Commission had approved in the ETP Order. (*See* Supp. 29-30, 51-52.) But the critical action was that the Commission set the fixed end date for the special contracts – and that end date then became fixed regardless of the quality, depth, or accuracy of the Commission's analysis, and is not subject to reversal unless shown to be unreasonable or unlawful.

The Commission specifically found below that Appellants' newly-invented and self-serving interpretation of the 2001 Amendments was not reasonable and was an attempt to redefine the meaning of "RTC" as set forth in the ETP Order and as applied in the RCP Order. (Supp. 29, 52.) Appellants' understanding in 2008 of when "RTC ceases" is not the determinative factor because the Commission acted pursuant to R.C. § 4905.31 to fix an end date for Appellants' special contracts in its RCP Order issued on January 4, 2006. No other end date for Appellants' special contracts appears in any document in the record.

The Commission's Opinion and Order issued below on February 1, 2009, should not be confused with the Commission's ETP Order and RCP Order. In the Opinion and Order, the Commission "did not modify the terms of complainants' special contracts." (Supp. 30.)

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[3] *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097, 1101.

However, in the latter two orders, the Commission exercised its authority under R.C. § 4905.31 in the ETP Order to extend the end date of the special contracts and then again exercised its authority under R.C. § 4905.31 in the RCP Order to fix the end date for the special contracts. In response to Appellants' complaints, the Commission reviewed all of the facts of the ETP, RSP and RCP cases and determined that Appellants were attempting to rewrite history. (*See* Supp. 29-30.) The operative event was the RCP Order, which is when the Commission approved the February 2008 termination of Appellants' special contracts. The Commission did not believe it needed to modify the special contracts in its Opinion and Order below because the final determination with regard to these contracts was made on January 4, 2006 in the RCP Order and the Commission believed that the fixed date it set was wholly consistent with the intent of the 2001 Amendments. But the approval issued pursuant to R.C. § 4905.31 in the RCP Order independently set the fixed end date, and Appellants failed to show that the Commission's RCP Order was unreasonable or violated any of Ohio's public utility laws.

The Commission exercised its R.C. § 4905.31 *supervisory* authority in the RCP Order when it determined when "RTC" as referenced in the 2001 Amendments ceased. The date when "RTC ceased" clearly was not known by any party when the 2001 Amendments were executed in late 2001. Although the parties understood that it likely would occur on or before June 30, 2007, this end date was subject to change by the Commission. (Supp. 6, Jt. Stip. of Facts ¶ 35.) The Commission changed the *possible* end date in the RSP Order (as authorized by the ETP Order) and then fixed the end date in the RCP Order. If any of Appellants disagreed with these decisions, they were free to intervene and object. They did not.

However, even if Appellants and the Court are correct that the 2001 Amendments meant *any* RTC, not just the RTC created by the ETP Order, the Commission nevertheless properly

exercised its authority to fix the end dates of the special contracts. The RCP Order fixed the end dates of the special contracts pursuant to R.C. § 4905.31. Regardless of whether this Court believes that the Commission was supervising, regulating, changing, altering or modifying the special contracts in the RCP Order, the Commission had the authority to do any and all of these. Even if the Commission was mistaken in believing that the parties' intent as reflected in the 2001 Amendments was something other than as determined by this Court, the Commission still had the statutory authority to fix end dates for the special contracts that the Commission believed were appropriate, and it did so. Every month that these special contracts were extended was an additional month that Appellants' load was withheld from the competitive market, and the Commission was obligated to ensure the development of those markets. *See* R.C. § 4928.02. Thus, the Commission fixed end dates for the special contracts that were consistent with Ohio's public utility laws and the authority granted by R.C. § 4905.31. Regardless of whether the Commission was supervising or modifying, the Commission had authority under R.C. § 4905.31 to do what it did in the RCP Order. Toledo Edison complied with that order as required by law, and Appellants failed to make any showing that the February 2008 end dates were unreasonable or unlawful. Therefore, the Court erred by second guessing the Commission's RCP Order and by reversing the Commission's Opinion and Order below.

II. THE COURT'S OPINION MISTAKENLY ASSUMED THAT THE REGULATORY TRANSITION CHARGES APPROVED BY THE COMMISSION IN THE ETP CASE CONTINUED AFTER TOLEDO EDISON'S ADOPTION OF A STANDARD SERVICE OFFER PURSUANT TO R.C. § 4928.14.

The Court's Opinion suggests that the Commission erred by not determining "the intent of the parties to the special contracts from the four corners of the document." Opinion ¶ 24. Yet the Commission and this Court can determine from the four corners of the 2001 Amendments

only that the termination date of the parties' special contracts depends upon the date when Regulatory Transition Charges cease for Toledo Edison. (Supp. 22, 45, 52, 74, 101.) Both the Commission and this Court necessarily had to go outside the four corners of the 2001 Amendments to determine: (1) what "Regulatory Transition Charges" meant, and (2) when the date was that they ceased. Indeed, Appellants' own witness admitted that making the end date of the 2001 Amendments contingent upon the date when Regulatory Transition Charges cease meant that "there's no fixed [termination] date *per se*" for the special contracts. (Supp. 230.) While the Commission engaged in a detailed and thoughtful analysis of the record and its previous orders to answer this question, the Court simply assumed the answer was December 31, 2008.[4] The Court plainly erred in ignoring the Commission's analysis and in jumping to a conclusion not supported by the record.

In contrast to the facts presented in *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, which is cited by the Court for the proposition that the Court will not give a contract a construction contrary to the plain language of the contract, "Regulatory Transition Charges" are not common words that have an ordinary meaning discernable within the four corners of the 2001 Amendments. In *Aultman*, the Court decided that the meaning of the words "subscriber" and "service contracts" was "clearly evidenced from the overall contents of the instrument." *Id.* at 54, 544 N.E.2d at 923. The 2001 Amendments define "RTC" to mean "Regulatory Transition Charges," but contain no other context *except for*

[4] In the Court's review of Appellants' First Proposition of Law in paragraphs 21-25, there is no analysis of when Toledo Edison ceased collecting Regulatory Transition Charges. Instead, the Court notes Appellants' claim that the operative date was December 31, 2008 (Opinion ¶ 21) and then concludes that the special contracts "remained in effect until December 31, 2008, when the utility ceased collecting the regulatory-transition charges" (Opinion ¶ 25). Nowhere in between these statements is an analysis of the record that would allow the Court to reach its conclusion. The four corners of the 2001 Amendment certainly offer no guidance on the question.

references to the ETP Stipulation and the Commission's ETP Order. As stated in the second Whereas clause, it was Toledo Edison's intent that the contract would be extended "through the date which Regulatory Transition Costs are recovered for [Toledo Edison] as provided for in [Toledo Edison's] Stipulation and Recommendation dated April 13, 2000, included in Paragraph 3, page 5, entitled Contract Options." (Supp. 22.)[5] As further explained in the fifth Whereas clause, the contract extension had been pre-approved by the Commission in the ETP Order. (*Id.*) A proper understanding of what the parties intended in using "the date which RTC ceases" as the end date of the 2001 Amendments cannot be achieved by ignoring the ETP Stipulation and ETP Order specifically referenced in the 2001 Amendments as the basis for the parties' agreement.

Assume a $50 bet between two sports fans based on whether "the Clippers win 50 games." This agreement is as clear and unambiguous as the agreement to terminate the 2001 Amendments upon "the date which RTC ceases." In both cases, a proper understanding of the parties' agreement requires additional information – what does Clippers or RTC mean? Do the sports fans making the bet mean the Columbus Clippers or the Los Angeles Clippers? Do the parties to the 2001 Amendments mean the RTC authorized by the ETP Order or any RTC authorized in the future? Just looking at the four corners of the 2001 Amendments, as the Court's Opinion suggests, the parties intended for the special contracts to continue until the cessation of the RTC approved by the Commission to recover Regulatory Transition Costs authorized by the ETP Stipulation (as suggested by the second, third, fourth and fifth Whereas clauses).

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[5] Although the Court's Opinion states that nothing in the 2001 Amendments is evidence of the parties' agreement that the contract termination dates would be determined by a calculation that tied regulatory transition charges to distribution sales (Opinion ¶ 24), the second Whereas clause is that evidence.

A material difference between the agreements in the preceding paragraph is that the sports bet and the contract in *Aultman* lacked a third-party referee intimately involved in the contract formation. In contrast, the 2001 Amendments were authorized by the Commission and subject to its continuing jurisdiction. Indeed, Toledo Edison could not have offered to extend the parties' special contracts absent Commission approval of the offer. And that offer could be no more and no less than what the Commission approved in the ETP Order on April 13, 2000, as referenced in the 2001 Amendments. Yet the Court's Opinion does not take into consideration that the Commission is in the best position to understand what it ordered Toledo Edison to do. The Court erred by not deferring to and accepting as reasonable the Commission's understanding of the complex regulatory history that prompted the ETP Stipulation, ETP Order and the 2001 Amendments.

Indeed, the Court confused an essential issue in this case, which is the difference between Regulatory Transition ***Charges*** and Regulatory Transition ***Costs***. This confusion is understandable given that the parties and the Commission often used the abbreviation "RTC" when referring to either, but it is a confusion that must be resolved in order for the Court to properly understand the Commission's decision below. The confusion is most apparent, and most telling, in the Court's substitution of the term "Regulatory Transition Charges" for the term "Regulatory Transition Costs" when mis-stating a provision of the parties Joint Stipulation of Facts:

> Toledo Edison and appellants filed a joint stipulation of facts in these cases when they were before the commission that stated that the rate-certainty-plan case "authorized [Toledo Edison] to recover [regulatory-transition charges] through December 31, 2008, and [Toledo Edison] has continued to recover [regulatory-transition charges] after [appellants'] February 2008 billing dates."

Opinion ¶ 36 (Supp. 8, Jt. Stip. of Facts ¶ 44.) The parties did not stipulate to the bracketed substitutions inserted by the Court, and the bracketed substitutions certainly do not reflect the parties' intent. The parties stipulated that Regulatory Transition ***Costs*** were recovered pursuant to the RCP Order through December 31, 2008.[6] As explained in paragraph 42 of the Joint Stipulation of Facts, the "RCP provided, in part, for adjustment of Regulatory Transition Cost and Extended Regulatory Transition Cost recovery periods and the Regulatory Transition Cost rate levels to concurrently recover all amounts authorized by the PUCO through usage as of December 31, 2008 for TE as described in Paragraphs 2-4 of the RCP." (Supp. 8.) Although it is impossible to determine simply from this description what the RCP involved, it also should be obvious that the complex cost recovery regime authorized by the RCP Stipulation and RCP Order was something far afield from the Regulatory Transition Charges approved in the ETP Order and referenced in the 2001 Amendments.

In the regulatory world, of course, charges and costs are interrelated and are subject to extensive Commission regulation. Cost recovery must be approved by the Commission, and a charge is then used to recover the cost. In the ETP Order, the Commission approved recovery under R.C. § 4928.39 of a certain level of transition costs, and it authorized recovery of those costs under R.C. § 4928.40 through Regulatory Transition Charges. (Supp. 6, Jt. Stip. of Facts ¶ 35.) Toledo Edison's recovery of those costs, and thus the use of Regulatory Transition Charges, was authorized until its cumulative sales after January 1, 2001 reached 71,613,718 kWh, but in any case could not extend beyond June 30, 2007. (*Id.*) The charge existed for one purpose:

[6] Counsel for the Commission stated during oral argument that recovery of the transition *costs* authorized in the ETP Order ended February 2008, but the record reflects that a small portion of the original transition *costs* continued to be recovered as an element of the RTC rate components created by the RTC Stipulation. (See Supp. 599.) The Court misunderstood counsel's statement as a claim that Toledo Edison stopped collecting regulatory transition *charges* in February 2008. Opinion ¶ 35.

recovery of R.C. § 4928.39 authorized costs. The 2001 Amendments were authorized by this same ETP Order and the ETP Stipulation, and the "RTC" referenced in the 2001 Amendments are the Regulatory Transition Charges described in the ETP Stipulation and approved in the ETP Order. (Supp. 6, Jt. Stip. of Facts ¶ 34. *See* Supp. 387, 395-96, 398, 412-13.) Among other things, the ETP allowed the Commission to adjust the end date of Regulatory Transition Cost collection for economic conditions. (Supp. 398.) The Court's Opinion should have recognized, as the Commission did, that the meaning of the "RTC" referenced in the 2001 Amendments necessarily depends upon Toledo Edison's collection of Regulatory Transition Costs pursuant to R.C. § 4928.39, the ETP Stipulation and the ETP Order.

The market development period for transitioning to a competitive market for retail electric generation service ended December 31, 2005. *See* R.C. § 4928.40(A). At the Commission's urging, however, because market development had not occurred to the extent expected and fuel costs, and associated electric generation costs, were unexpectedly increasing, Toledo Edison submitted plans to the Commission to establish a Standard Service Offer ("SSO") that would stabilize rates between January 1, 2006 and December 31, 2008. (Supp. 525-26, 535, 630.) The RSP was the first of these plans, and the RCP was the second. (Supp. 6-8.) Importantly, the provisions in these plans were authorized by R.C. § 4928.14,[7] not by R.C. §§

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[7] R.C. § 4928.14, as in effect prior to 2008, stated, in relevant part, as follows:

> (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

4928.39 and 4928.40. (*See* Supp. 536, 567-68.) These plans authorized recovery of new categories of costs under R.C. § 4928.14, but continued to refer to these new costs as "transition" costs and to refer to associated cost-recovery mechanisms as transition charges because the plans themselves were intended to continue the transition to the competitive marketplace that exists today in Toledo Edison's service territory.

The RSP Order included an extension, on account of economic conditions as authorized in the ETP, of the existing Regulatory Transition Cost recovery period and the corresponding RTC charge until a revised sales target was reached, but no later than July 2008. (Supp. 7, 495-96, 548-49.) Thus, the RSP did not alter the Regulatory Transition Charges referenced in the 2001 Amendments, other than to extend the period during which they would collect Regulatory Transition Costs. The RSP separately created new regulatory costs tied to the provision of the new SSO[8] that would be collected using an "extended RTC charge" (Supp. 7, 496), which clearly

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> 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.

The Court recognized in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 847 N.E.2d 1184, 2006-Ohio-2110, that the RSP was filed pursuant to R.C. § 4928.14, but reversed and remanded to ensure that the RSP included a reasonable means for customer participation.

[8] These costs related to shopping incentive deferrals and other deferrals. (Supp. 496.)

was a different animal from the Regulatory Transition Charges referenced in the 2001 Amendments.

The RCP retained a Regulatory Transition Charge as an element of the SSO for 2006-2008, but repurposed it in the same way that the Generation Transition Charge from the ETP was renamed and repurposed as the Rate Stabilization Charge in the RSP.[9] First, the level of the charge was reduced in order to off-set on a dollar-for-dollar basis Toledo Edison's partial recovery of its increased fuel costs up to a cap, with any cost increases above the cap deferred. (Supp. 600-01.)[10] Second, the Regulatory Transition Charges created by the ETP Order were replaced by "RTC rate components (RTC and Extended RTC)" that would concurrently recover all regulatory costs, including those created in the RSP and RCP cases, through December 31, 2008. (Supp. 8 at ¶ 42; Supp. 598-99.) These costs were not entirely the same Regulatory Transition Costs that the Commission authorized in 2001 to be recovered through the Regulatory Transition Charges and, thus, not the same "RTC" within the intent of the parties as reflected in the 2001 Amendments. As a result, the same Regulatory Transition Charges or "RTC" referenced in the 2001 Amendments did not remain in effect through December 31, 2008.

When the parties stipulated that "TE projects its Regulatory Transition Charge will cease on or before December 31, 2008" (*see* Opinion ¶ 36), this was a reference to the charge authorized by the Commission in the RCP Order, not the charges authorized by the Commission in the ETP Order. (*See* Supp. 9, at ¶ 50.) The Court states in its Opinion that the Joint

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[9] *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 847 N.E.2d 1184, 2006-Ohio-2110, ¶ 20. Unfortunately for purposes of the present case, although the Regulatory Transition Charge was repurposed, it was not renamed. If it had been, all the confusion that resulted in this appeal and in the Court's Opinion could have been avoided.

[10] *See Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 871 N.E.2d 1176, 2007-Ohio-4164, ¶ 44.

Stipulation of Facts did not distinguish between the Regulatory Transition Charges referred to in the 2001 Amendments and the charge authorized in the RCP case. Opinion ¶ 37. However, the Joint Stipulation of Facts was carefully negotiated by the parties in a manner that avoided argument and, in particular, avoided answering the ultimate issue presented in the case. The Joint Stipulation of Facts summarized and incorporated in full the stipulations and orders from the ETP, RSP and RCP cases, and reference to these documents was and is necessary to determine whether the Regulatory Transition Charges referred to in the 2001 Amendments are the same Regulatory Transition Charge authorized by the Commission in the RCP Order. Indeed, Appellants recognized the importance of these cases by including the stipulations and orders from each in its Supplement on appeal. (Supp. 382-651.) The Commission correctly reviewed its prior orders and determined that the only charge that possibly could have been in effect in 2008 was the charge authorized by the RCP Order, not the Regulatory Transition Charges authorized by the ETP Order. Because the Commission authorized both charges, the Court should have deferred to the Commission's reasonable conclusion regarding what it had authorized.

Toledo Edison did litigate, and indeed proved to the Commission's satisfaction, that it was collecting only the RTC rate components between February and December 2008. *See* Opinion ¶ 38. These RTC rate components were generally referred to as a Regulatory Transition Charge, but they were not the same Regulatory Transition Charges referenced in the 2001 Amendments. The Court's mistake was in assuming that this appeal could be decided simply by determining whether or not a Regulatory Transition Charge existed between February and December 2008. In fact, the existence of such a charge with this name was not disputed. What was plainly in dispute was whether the charge that was in effect in 2008 was what was intended

by the parties in 2001 when they agreed that the special contracts would terminate when the Regulatory Transition Charges authorized by the ETP Order ceased. The Commission correctly determined that it was not, and then protected the parties' original intent by fixing a termination date that was consistent with both the parties' original intent and state policy regarding the development of competitive markets reflected in R.C. § 4928.02.

As Justice Cupp asked during oral argument, this is a simple question of fact. The Court erred by substituting its judgment for that of the Commission, which understood that the Regulatory Transition Charge that continued past February 2008 was not the end-date trigger established in the 2001 Amendments.

III. CONCLUSION

The fixed end date for the special contracts in question was not specified in the 2001 Amendments, but was expressly determined under the Commission's authority in R.C. § 4905.31 and set forth in the RCP Order and RCP Stipulation. The Court should not disturb this Commission finding. For the foregoing reasons, Toledo Edison's Motion for Reconsideration should be granted, and the Court should vacate its August 25, 2011 Slip Opinion and consider the merits of Toledo Edison's and the Commission's arguments based on a proper understanding of the facts presented and render an Opinion upon reconsideration consistent therewith.

Respectfully submitted,

Mark A. Hayden (0081077)
Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
(Counsel of Record)
N. Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
talexander@calfee.com

Attorneys for Intervening Appellee,
The Toledo Edison Company

CERTIFICATE OF SERVICE

The foregoing Motion for Reconsideration was served via regular U.S. Mail, postage pre-paid, on this 6th day of September, 2011, upon the following:

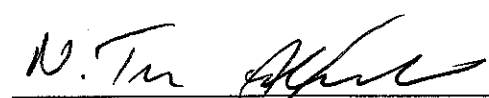
Craig I. Smith
2824 Coventry Road
Cleveland, Ohio 44120

Michael D. Dortch
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215

Thomas J. O'Brien
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Daniel W. Wolff
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

William L. Wright
Thomas W. McNamee
John H. Jones
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th floor
Columbus, Ohio 43215-3793



One of Attorneys for Intervening Appellee