ORIGINAL

IN THE SUPREME COURT OF OHIO

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

JOINT MEMORANDUM OF APPELLANTS IN OPPOSITION TO MOTION FOR RECONSIDERATION OF INTERVENING APPELLEE, THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

Applying basic principles of contract law, this Court *unanimously* held that Intervening Appellee, The Toledo Edison Company ("Toledo Edison"), breached its contracts for electric service with Appellants[1] by terminating those contracts in February 2008, but continuing to collect regulatory transition charges ("RTC") for 10 more months, through December 31, 2008. Opinion ¶ 30. There is no reason to reconsider that holding. Toledo Edison's Motion for Reconsideration ("Motion") and accompanying Memorandum in Support ("Memo in Support") do nothing more than repackage and rehash issues already considered and passed upon by this Court. The Motion for Reconsideration should therefore be denied.

II. STANDARD OF REVIEW

This Court allows a party to move for reconsideration of a decision on the merits, but does not permit the movant to use its motion as an opportunity to re-argue the case. S. Ct. Prac. 11.2(B) & (B)(4). Generally, this Court grants reconsideration only "to correct decisions which, upon reflection, are deemed to have been made in error." See *State ex rel. Huebner v. West Jefferson Village Council* (1996) 75 Ohio St.3d 381, 383.

III. LEGAL ARGUMENT

The pertinent facts follow: First, in the 2001 Amendments to Appellants' existing special contracts for electric service, Appellants and Toledo Edison mutually agreed that the special

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[1] The term "Appellants" collectively refers to Worthington Industries ("Worthington"), The Calphalon Corporation ("Calphalon"), Kraft Foods Global, Inc. ("Kraft"), Brush Wellman, Inc. ("Brush"), and Martin Marietta Magnesia Specialties, LLC ("Martin Marietta").

contract rates would continue "through the date which RTC ceases." Second, the parties expressly defined the term "RTC" to mean "regulatory transition charges" in the 2001 Amendments. Third, the phrase "transition charge" is a statutorily-created charge, and thus means what the Ohio General Assembly intended it to mean. *See* R.C. 4928.40. Fourth, Toledo Edison billed and collected the RTC through December 31, 2008. Fifth, and contrary to both the clear and unambiguous language in the 2001 Amendments and Toledo Edison's continued collection of the RTC through December 31, 2008, Toledo Edison unilaterally terminated the Appellants' contracts in February 2008. (Hence the breach, as this Court held). Sixth, in opinions and orders entered years after the parties agreed to the 2001 Amendments, the Public Utilities Commission of Ohio ("PUCO") authorized Toledo Edison to collect additional transition *costs* through the RTC until December 31, 2008.

As it has throughout this dispute, Toledo Edison's motion for reconsideration continues to conflate the distinction between transition costs and transition charges. The Ohio General Assembly has spoken on this issue and has plainly rejected any such attempt. R.C. 4928.40 provides that the PUCO is to determine the *transition costs* incurred by a utility, and may then determine a *transition charge* designed to recover those transition costs. The statute further provides that the PUCO may make adjustments to the transition costs through the transition charge; even, as here, allowing the recovery of increased transition costs. The statute, therefore, recognizes a plain distinction between "costs" and "charges." Costs are recovered through a charge. They are separate and distinct concepts.

The parties recognized the distinction between "costs" and "charges" within the 2001 Amendments. The 2001 Amendments define RTC to mean "Regulatory Transition Charge." The 2001 Amendments provide that the contract terminates when the RTC ceases. Now,

unhappy with what the 2001 Amendments actually say, Toledo Edison: (1) ignores the most basic rules of contract interpretation; and (2) instead posits that, because the 2001 Amendments do not include a "specific fixed date for termination of the special contracts," the Court "must" consider extrinsic evidence and, in doing so, defer to the Commission's factual determination of the end date. Motion at 1. Of course, Toledo Edison cites to no rule of contract interpretation that says parties must agree to a fixed termination date. The reason is simple—there is no such rule. In fact, the law of Ohio is just the opposite. *See Fuchs v. The United Motor Stage Co., Inc.* (1939), 135 Ohio St. 509, paragraph one of the syllabus (holding that contracts of a "term dependent upon an event which is certain to occur" are valid).

In pushing aside the clear and unambiguous language in the 2001 Amendments, Toledo Edison ignores two basic rules of contract interpretation: (1) "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; and (2) the intent of the parties resides in the explicit language used in a contract, *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d. 130, syllabus ¶ 1 (explaining that the "intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement").

It is undisputed that TE offered, and Appellants accepted, a "one time right" to extend their special contracts "through the date which RTC ceases for the Company [TE]." The term RTC is certainly not ambiguous, as it was expressly defined by the parties in the 2001 Amendments to mean "Regulatory Transition Charges," and based upon the concepts embedded in R.C. 4928.40. The word "ceases" is commonly understood to mean "to stop, forfeit, suspend, or bring to an end." A synonym of the word "cease" is "stop." Black's Law Dictionary (8 Ed.

Rev. 2007) 237. The Appellants' contracts ended when TE ceased (or stopped) the collection of its Regulatory Transition Charges on December 31, 2008.

Toledo Edison, however, wants to create ambiguity by circumventing these longstanding rules of contract interpretation, and inventing a meaning for the term RTC from the later-decided RSP and RCP cases, neither of which Appellants were parties to, and the very existence of which neither of the parties could have contemplated in 2001.

More specifically, Toledo Edison seeks to rewrite the agreed upon definition of RTC in the 2001 Amendments by arguing that the term RTC does not always mean what the parties specifically defined that term to mean in the 2001 Amendments, or even as the General Assembly would have understood the term. Rather, Toledo Edison baldly states that RTC can sometimes mean something else, such as an "extended RTC charge" or "RTC rate components." Memo in Support at 10-11. Such Humpty-Dumpty-esque reasoning[2] was rejected once already, and should not be revisited now. *See* Opinion ¶¶ 36-37.

This is simply too slick. The name, amount, and purpose of the RTC collected by Toledo Edison never changed, even after Toledo Edison began recovering additional transition costs through the RTC. Making matters worse, Toledo Edison takes umbrage with the Court's understanding of the stipulation of fact entered into by the parties before the Commission, which stated that Toledo Edison's "Regulatory Transition Charge will cease on or before December 31, 2008." As this Court pointed out, had Toledo Edison <u>not</u> intended to concede that it collected the RTC through December 31, 2008, it "could have stipulated to that fact or litigated the issue."

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[2] *See* Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-Glass and What Alice Found There* 219 (George Slade ed., Barnes & Noble Classics 2004) (1871) ("'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less.'").

Opinion ¶ 38. But, Toledo Edison did not do this, and instead stipulated that it collected RTC through December 31, 2008, the clear and unambiguous termination date of the 2001 Amendments.

Along those same lines, Toledo Edison's meager "Clippers" analogy only serves to underscore the weakness of its position. *See* Memo in Support at 6. Whatever two parties may mean when they wager on a Clippers game (either the baseball or basketball variety), when the parties to a contract tie the termination date to the collection of regulatory transition charges, the term regulatory transition charges takes its meaning from the obvious sources: the contract, and R.C. 4928.40. The definition is certainly not, as Toledo Edison insists, derived from the ETP case (improper parol evidence because it was decided before the 2001 Amendments were even executed), and even more certainly not from the unforeseeable and unimagined RSP and RCP cases. If the Appellants and Toledo Edison desired to carve up the RTC into "components," and tie the end date of their contracts to such components (or even to the recovery of an explicit amount of revenue), they retained the right to do so. However, no such modifications were made to the 2001 Amendments. The undisputed evidence shows Toledo Edison did not, as it argues at various points, stop collecting the RTC on January 1, 2006, in February 2008, or on any date other than December 31, 2008—the clear and unambiguous termination date in the 2001 Amendments. See Opinion ¶ 38-39.

It is also instructive to note how Toledo Edison's tack has changed since its merit brief was filed. Toledo Edison's merit brief stressed the need for this Court to decide the case based upon the parties' *intent*. *See* Intervenor Br. at 13. This Court (and of course the Appellants) agreed with that analytical approach, and this Court's holding reflects that analysis. *See* Opinion ¶ 23. The problem for Toledo Edison, of course, is that it actually cares little about what *the*

parties to this case intended in the 2001 Amendments, and instead cares only about what Toledo Edison agreed to with *other parties* at the time it resolved the RSP and RCP cases—cases which this Court held to be irrelevant to the outcome of this case. *See* Opinion ¶ 30.

Having gotten nowhere on intent, Toledo Edison tacitly concedes in the Motion that the Court was correct in finding that Appellants and Toledo Edison agreed in the 2001 Amendments that the special contracts would terminate once Toledo Edison ceased collecting the RTC. At that point, Toledo Edison clumsily pivots to stake its position on the ground that the intent of the parties as expressed in the clear and unambiguous language of the 2001 Amendments should have been ignored by the Court. Instead, Toledo Edison claims that the Court should have deferred to the Commission's misguided attempt to harmonize the meaning of RTC (as used within the 2001 Amendments) and the outcomes in the RSP and RCP cases.

Admittedly, this Court frequently relies on the expertise of a state agency in interpreting a law when "highly specialized issues" are involved and "where agency expertise would . . . be of assistance in discerning the presumed intent of our General Assembly." *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d. 305, 2007 -Ohio- 4164, 871 N.E.2d 1176 (internal citations omitted). As this Court recognized, however, there was no need in this case for the Commission's expertise on utility issues because this Court possesses "complete and independent power of review as to all questions of law in appeals from the PUCO. " *Id.* ¶14. And, in Ohio, when a "contract is clear and unambiguous ... its interpretation is a matter of law." *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66, 609 N.E.2d 144, 145. Toledo Edison's pleas for "deference" are unwarranted because there is no highly specialized issue in this case requiring the Commission's expertise. Instead, this is a simple and straightforward contract case for which this Court is the proper arbiter.

Finally, Toledo Edison blatantly abandons "intent" altogether by claiming that because "Commission-approved special contracts remain subject to the regulation and supervision of the Commission," and "the Commission is not bound to give effect to [the parties'] intent," this Court must defer to the Commission. Motion at 1. In essence, Toledo Edison opines that: (1) there is no such thing as sanctity of contract in Ohio between private parties entering into contracts; (2) the Commission is omnipotent; and (3) this Court must essentially accept the Commission's decisions as binding edicts (committing judicial review to the dead-letter file). Memo in Support at 1-4.

The law of contract that Toledo Edison conjures is a frightening one, especially for those doing, or considering doing, business in Ohio. Fortunately, this Court understands that principles of contract interpretation have evolved over the years precisely to avoid the type of interpretive morass that Toledo Edison has concocted. First and foremost, the intent of the parties controls. Second, where the contract is clear and unambiguous, there is no reason to look beyond the four corners of the document. *See* Opinion ¶ 30.

Moreover, it is quite telling that Toledo Edison *does not cite a single authority* to support its proposition that a "special contract" – a "reasonable arrangement" in the vernacular of R.C. 4905.31 – is, in the usual course of business, not a *contract*. Had the General Assembly intended a system in which "special electric rates" are dictated by the Commission, rather than a system in which "reasonable arrangements" may be negotiated by the parties subject to the approval of the Commission, it could have passed legislation stating as much. That is not the system it crafted.

As Appellants pointed out in their opening brief, the Commission has long recognized that its statutory authority to unilaterally modify a special contract is an "*extraordinary power*" that may only be exercised "in circumstances of *unequivocal public necessity*." *See* Jt. Merit Br.

of Appellants' at 23-24 (quoting (first) *In the Matter of the Application of Ohio Power Company to cancel special power agreements and for other relief*, Aug. 4, 1976 Opinion & Order, Case No. 75-161-EL-SLF (emphasis added), and (second) *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment*, Sept. 12, 2007 Entry on Rehearing, Case No. 07-478-GA-UNC (citation omitted) (emphasis added).

Not surprisingly, Toledo Edison ignores these cases in its Motion and supporting memorandum. Instead, Toledo Edison contends that, because the Commission can only act in regard to special contracts under its R.C. 4905.31 authority, the Commission necessarily had the power to modify, and did modify, the terms of the 2001 Amendments in the RCP Order; and, then argues that the Court "erred by second guessing . . . the Commission's Opinion and Order below." Memo in Support at 4. Even putting aside Toledo Edison's dim view of the sanctity of contract in Ohio, this Court's understanding of principles of contract interpretation, and this Court's authority to review Commission actions, Toledo Edison's argument fails because: (1) the Commission did not invoke "public necessity" as the basis for its action; and (2) the Commission expressly denied modifying the terms of Appellants' special contracts. *See* Opinion ¶ 32.

In the end, Toledo Edison's Motion continues to ignore the fact (or even acknowledge) that this is a simple case involving the interpretation of a simple term out of a simple contract. Its position has always presumed that, if only it can describe enough convoluted regulatory history, cite to enough Commission decisions to which Appellants were not parties, and appeal enough times to concepts of agency expertise and deference, this Court will conclude that the issue is so complex that it should defer to the Commission. This Court, however, understood the

controversy at hand, and informed Toledo Edison that its presumptions were misguided when it issued its decision in this matter. Toledo Edison's Motion, which merely repeats these themes, provides no basis whatsoever for reconsideration.

IV. CONCLUSION

Because Toledo Edison has identified neither an obvious error in this Court's August 24, 2011 decision, nor an issue that the Court should have, but did not, consider, the Motion for Reconsideration should be denied.

Respectfully submitted,

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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, postage prepaid, this September 16, 2011, upon the following parties.

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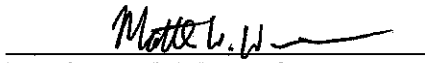

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