FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., Pilkington North America, Inc., and Martin Marietta Magnesia Specialties, LLC, Complainants, v. The Toledo Edison Company, Respondent.	)	Case Nos. 08-67-EL-CSS 08-145-EL-CSS 08-146-EL-CSS 08-254-EL-CSS 08-255-EL-CSS 08-893-EL-CSS

JOINT REPLY OF COMPLAINANTS

I. INTRODUCTION

This case is really simple. Rather than ceasing the collection of its Regulatory Transition Charges ("RTC Charges"), Toledo Edison ("TE") seeks to "have its cake and eat it too." TE and Complainants separately entered into Commission-approved special contracts under Ohio Revised Code Section ("R.C.") 4905.31. In 2001, and under the terms of the ETP Order, each Complainant duly executed an amendment to their special contract (hereinafter the "2001 Amendments").[1] The clear and unambiguous language of the 2001 Amendments extended Complainants' special contracts through the date on which TE ceases the collection of its RTC Charges. It is uncontroverted that TE continues to collect its RTC Charges at the present time, and expects to continue to collect RTC Charges up through December 31, 2008. TE's conscious decision to unilaterally and prematurely terminate Complainants' special contracts, while

[1] See *Joint Post-hearing Brief of Joint Complainants* ("Joint Brief"), p. 11.

continuing to collect its RTC Charges,[2] makes this Commission's task quite clear—enforce the clear and unambiguous language of Complainants' special contracts, as extended by the 2001 Amendments. To hold otherwise would improperly allow TE to "have its cake and eat it too," and create a precedent incompatible with the Revised Code, US Supreme Court authority, and the most fundamental concepts of due process.

II. CLARIFICATION OF FACTS

Although Complainants incorporate into this Joint Reply the statement of facts from their initial brief, it remains necessary to address a series of factual mischaracterizations in TE's brief. Complainants emphasize that many of these facts are ancillary to the real issues in the case, but nevertheless need to be addressed.

Generally, TE presents its brief as if based on undisputed facts.[3] This contention is false. What is true is that the parties entered into a Joint Stipulation of Facts for incorporation into the record. The parties agreed that the stipulated facts were subject to further explanation or expansion as needed to present evidence and meet their burdens of proof.[4] Furthermore, the parties stipulated that the Commission could take administrative notice of certain filed entries and orders without waving the parties' rights to respond through testimony or briefs.[5]

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[2] Despite the clear and unambiguous language of the 2001 Amendments, TE attempts to interject ambiguity into these proceedings by claiming that the RCP Order changed the termination date of Complainants' special contracts to their February 2008 meter read dates. The Commission, however, failed to address the pertinent language of Paragraph 12 of the RCP Stipulation in its RCP Order, and hardly provided TE with a mandate for its unlawful and unilateral actions.

[3] TE Brief, p. 4.

[4] Joint Stipulation of Facts ("Joint Exhibit 1"), ¶ 3.

[5] Joint Exhibit 1, ¶ 58. The *Brief of Respondent The Toledo Edison Company* ("TE Brief") refers to the administratively noticed ETP Case, ETP Stipulation, ETP Order, RSP Case, RSP, Revised RSP, RSP Order (including rehearing entry), RCP Case, RCP, and RCP Order.

A. Complainants' special contracts with TE are Commission-approved, reasonable, electric service arrangements under R.C. 4905.31.

Contrary to TE's contentions, the rates established in Complainants' special contracts were not, and are not, "steeply discounted electric rates." Instead, the rates reflected in the special contracts were the product of arms-length negotiations between Complainants and TE—and were approved as reasonable by the Commission.[6]

Further, Commission jurisdiction over special contracts under R.C. 4905.31 is not an issue in this case.[7] Complainants do not dispute the fact that the Commission has the power under R.C. 4905.31 to change, alter, or modify special contracts. The issue, however, is whether the Commission exercised those powers—and if so, whether it was done so properly based on recognized precedent. As discussed extensively in Complainants' Joint Brief, and Section III(B) of this reply, the Commission's extraordinary power to modify special contracts was not exercised in this case.[8]

B. The extension of special contracts under the Revised RSP did not represent acceptance of the risk of potentially lower market electric rates because the RSP Cases were designed to avoid anticipated rate spikes between 2006 and 2008.

TE argues the nine special contract customers electing to extend their special contracts in the RSP Case accepted the risk of higher contract prices if the competitive market rates became lower.[9] TE's conclusion has no support, and Complainants do not know (or speculate about) the intentions of the nine special contract customers who extended. It is obvious those nine customers actually received notice of the opportunity to further extend in the Revised RSP by

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[6] See Joint Exhibit 1, ¶¶ 8, 13, 18, 25, and 30 (identifying the relevant Commission orders approving each of Complainants' special contracts as reasonable arrangements under R.C. 4905.31). See, also, Joint Stipulation between Martin Marietta Magnesia Specialties, LLC and TE ("Martin/TE Joint Exhibit 1"), ¶ 13 (identifying the Commission order approving Martin Marietta's special contract as a reasonable arrangement under R.C. 4905.31).

[7] See TE Brief, p. 4.

[8] Joint Brief, pp. 27-31.

[9] TE Brief, p. 6.

mere happenstance or through membership in the intervening industrial groups. Likewise, the record in this case does prove that none of the Complainants knew about the offer to extend their contracts. Still, TE creatively presumes that Complainants knew about and decided not to extend their contracts because of the expectation that market prices would fall below current contract rates. TE must also presume that the expectation of lower market rates caused the remaining 31 customers not to request further extensions of their special contracts.

TE unreasonably uses the argument noted above to explain why only nine of its remaining 46 special contract customers requested extensions within the required 30 days after issuance of the RSP Order. It is inherently illogical, and unsupported by the record, to conclude that Complainants and other special contract customers knew about the opportunity to extend, chose not to extend and thereby accepted the "risk that their contract price could be higher than market prices four years in the future."[10] After all, the Revised RSP came into being based on the accepted fact that undeveloped competitive markets would result in much higher rates after the end of the market development period in 2005. Complainants, as sophisticated electricity buyers, recognized that, in the foreseeable future, their special contracts would provide electric service at rates below both the adjustable Revised RSP and prevailing market rates. Sophisticated electricity purchasers, such as Complainants, would opt to further extend their special contracts as the most advantageous option in an unsettled market.

C. TE did not rely on the date on which RTC Charges cease in terminating special contracts.

Contrary to the arguments of TE, the termination dates of Complainants' special contracts were not tied to the tracking of RTC recovery. Instead, the termination date for the

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[10] TE Brief, p. 6.

Complainants' special contracts was tied to the date TE ceased collection of its RTC Charges. This is a highly significant and reasonable distinction.

TE cannot be allowed to "double dip" by continuing to collect RTC Charges through December 31, 2008 after the alleged termination of Complainants' special contracts based on the tracking of achieved kWh sales targets. It is important to remember that TE can waive the recovery of its RTC Charges at anytime, thereby canceling Complainants' special contracts. TE, however, elected the "win-win" strategy of wrongfully terminating Complainants' special contracts in order to charge higher tariff rates, while at the same time continuing to collect RTC Charges. On the other hand, and, unlike its decision to collect RTC Charges, the tracking of RTC recovery through achieved kWh sales targets is outside of TE's control. Thus, the distinction between recovery of RTCs and the cessation of RTC Charges is materially important from the perspective of both TE and Complainants.

Furthermore, there is no support for TE's conclusion that, upon reaching the kWh targets established in the ETP and RSP Cases in February 2008, it could terminate Complainants' special contracts while continuing to collect RTC Charges.[11] This is contrary to the 2001 Amendments which provide for termination of Complainants' special contracts at the time TE ceases the collection of its RTC Charges. The terms of the 2001 Amendments do not refer to, depend upon, or intend for Complainants' special contracts to terminate upon TE reaching its kWh tracking goals. Furthermore, no language in Paragraph 12 of the RCP Stipulation relieved TE of its obligation under the 2001 Amendments to perform those agreements until it ceased collection of RTC Charges. And, as part of the Joint Stipulation, TE even admits that it "did not

[11] June 23 Hearing Transcript, p. 215, lines 11-24.

directly rely upon the accounting for, and of, regulatory assets, and whether recovery of the Regulatory Transition Charge [RTC Charge] ceased."[12]

The tracking methodology was not tied to the Complainants' special contracts, but was linked to the overall administration of the ETP Stipulation approved in the ETP Order. As a result, the 2001 Amendments were not intended to terminate in mid-2007, July 2008, or on the February 2008 meter read dates unless TE also ceased the collection of its RTC Charges.[13] Under the 2001 Amendments, TE could have, but did not, end recovery of its RTC Charges upon meeting its tracked recovery of RTCs. Because TE did not, the termination date of the special contracts remains the date on which TE ceases the collection of its RTC Charges.

III. LAW AND ARGUMENT

TE ignores the clear and unambiguous language of the 2001 Amendments while at the same time pointing the proverbial finger at Complainants for: seeking to "avoid the clear and unambiguous mandate" in the RCP Order;[14] attempting to undermine Commission orders;[15] and trying to obtain unreasonable benefits by "retroactively eliminating their risk of participating in competitive energy markets."[16] In doing so, TE ignores the four fingers pointed back at itself for:

1. Unilaterally and unlawfully terminating the Complainants' special contracts ten months before said contracts were set to expire according to their plain terms;
2. Grossly overstating the Commission's stated intentions and regulatory powers;
3. Attempting to usurp, as its own, the Commission's statutory authority to modify or amend special contracts; and
4. Improperly using the RSP and RCP stipulations to change, or add ambiguity to, the terms of Complainants' special contracts.

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12 Joint Exhibit 1, ¶ 50.
13 TE Brief, p. 8.
14 Id., p. 1.
15 Id., p. 2.
16 Id.

A. The language in the 2001 Amendments clearly and unambiguously establishes the termination date of Complainants' special contracts as the date on which TE ceases its collection of RTC Charges.

Pursuant to R.C. 4905.31, Complainants separately entered into special contracts with TE.[17] With the mutual agreement of TE and Complainants, as represented by the 2001 Amendments, the original termination dates of the special contracts were modified when Complainants exercised their "one-time right *** to extend their current contracts through the date at which the RTC charges cease" for TE.[18] It is uncontroverted that TE continues to collect its RTC Charges at the present time, and expects to continue to collect RTC Charges through December 31, 2008. Thus, it is clear from the four corners of the 2001 Amendments that the terms continue in effect through at least December 31, 2008, when TE ceases the collection of its RTC Charges.

B. The Commission did not exercise its extraordinary power to modify Complainants' special contracts under R.C. 4905.31.

The 2001 Amendments entered into by Complainants clearly and unambiguously established the termination date as the "**date at which the RTC Charges cease**" for TE. The 2001 Amendments used the customary legal process involving clear memorialized mutual consent to establish the termination date for the special contracts. This legal process should have been used for the RSP or RCP Stipulations if, indeed, TE intended to change the termination date agreed to with Complainants under the 2001 Amendments. It was not. TE now argues that Paragraph 12 of the RCP Stipulation, as approved by the RCP Order, changed the mutually agreed-to termination date in the 2001 Amendments. In order to carry this argument, TE must show that the Commission's RCP Order exercised the only method by which Complainants' special contracts could be modified: through a clear memorialization of the necessary mutual

[17] Joint Exhibit 1, ¶¶ 5 through 32.
[18] Joint Exhibit 1, ¶ 34.

consent. The Commission's extraordinary power under R.C. 4905.31 to amend, alter, or modify the termination date of Complainants' special contracts simply was not exercised in this case.

Complainants' initial brief discussed the legal basis for concluding that the Commission did not exercise its extraordinary powers under R.C. 4905.31[19] in accordance with the judicial guidelines enunciated by the United States Supreme Court, and adopted by this Commission.[20]

TE's argument that the RCP Order modified the termination dates of Complainants' special contracts conveniently ignores two fundamental principles adopted by the Commission—namely that the: 1) power to modify special contracts is an "extraordinary power;" and 2) exercise of this extraordinary power is subject to a "burden of the highest order."[21] In order to satisfy this burden of the highest order, TE was required to make a "showing that the contract adversely affects the public interest."[22] As discussed extensively in Complainants' initial brief,[23] TE has not made this showing.

Indeed, TE provides no factual or legal support to meet its burden of the highest order. Without basis, TE argues that the Commission's RCP Order, which adopted Paragraph 12 of the RCP Stipulation, modified the termination date of Complainants' special contracts from the date on which TE ceased its collection of RTC Charges to the meter read date in February 2008. TE, however, chooses to ignore the fact that the RCP Order simply approved Paragraph 12 of the RCP Stipulation **without discussion or modification**.[24] Not only did the RCP Order not expressly or impliedly modify the 2001 Amendments, but it clearly lacked any indication that the

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19 Joint Brief, pp. 27-31.

20 *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 (discussed in greater detail on pages 27-28 of Complainants' Joint Brief).

21 *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.

22 Id.

23 Joint Brief, pp. 27-31.

24 Joint Exhibit 1, ¶ 44.

Commission intended to modify Complainants' special contracts. Paragraph 12 nowhere suggests that Complainants' special contracts would terminate regardless of whether TE continued collection of its RTC Charges. Significantly, TE could have terminated Complainants' special contracts at any time under the 2001 Amendments by ceasing collection of its RTC Charges. TE, however, did not.

Instead, TE avoids its bargained-for commitment—to continue Complainants' special contracts through the date on which its collection of RTC Charges cease—by hiding behind the Commission's extraordinary powers under R.C. 4905.31. The Commission not only never exercised that extraordinary power, but TE failed to satisfy its high evidentiary burden that the modification of the termination date was needed to protect the public interest.

C. TE's collateral attack argument is contrary to Ohio law and is designed to distract the Commission from the real issues in this case.

TE repeatedly characterizes these complaint proceedings as a "collateral attack" on the Commission's RCP Order. This argument, however, is wrong. First, the RCP Order is not being collaterally "attacked." The RCP Order did not modify Complainants' special contracts for the numerous reasons identified on pages 21-34 of Complainants' initial brief. Furthermore, even if the complaints in this consolidated proceeding somehow could be construed as a collateral attack on the RCP Order, the Ohio Supreme Court emphatically recognizes the "use of R.C. 4905.26 as a means of collateral attack on a prior proceeding."[25] In accordance with the Court's holdings, the complaints filed by Complainants are proper, even if they are considered "collateral attacks" on the RCP Order.

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[25] *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").

D. The statutory violations

As discussed in both of Complainants' briefs, each of the statutory violations alleged by Complainants is derivative of the unilateral actions of TE. If this Commission concludes that TE unlawfully terminated Complainants' special contracts nearly ten months before their clearly-stated termination date, then: (1) TE would be violating R.C. 4905.22 by demanding unjust and unreasonable charges for electric service in excess of that allowed by the Commission's ETP Order and the Commission-approved 2001 Amendments; and, (2) TE would be charging Complainants unjust and unreasonable rates in violation of R.C. 4905.31 and 4905.32 because those rates would be the significantly higher tariff/market rates rather than those approved in the special contracts.

On the other hand, if the Commission unilaterally modified the Complainants' special contracts, TE violated R.C. 4905.35 because it discriminated in the highly divergent types of notice provided to its special contract customers regarding the opportunity to extend their special contracts in the RSP Case.

i. TE violated R.C. 4905.22 by terminating Complainants' special contracts in violation of the ETP Order, which established (and controlled) the termination date of those contracts.

TE completely misreads the statutory protections afforded Complainants under R.C. 4905.22 that "all charges made or demanded. . . shall be just, reasonable, and not more than the charges allowed by law or order of the [Commission], and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission."

The ETP Order approved the 2001 Amendments, which extended Complainants' special contracts through the date on which TE ceased collection of its RTC Charges. TE violated R.C.

4905.22 by canceling Complainants' special contracts prior to the Commission-approved termination dates. As a result, between the dates of its unilateral termination of Complainants' special contracts in February 2008, and the date on which it ceases collection of its RTC Charges, TE continues to violate R.C. 4905.22 by charging Complainants more for electric service than allowed under the 2001 Amendments (as approved in the ETP Order). Furthermore, it is not a defense to a violation of R.C. 4905.22 that the new rates applicable after the unlawful termination of those contracts (i.e. tariff or market rates) were Commission-approved. The unjust and unreasonable action is the termination of the agreements, irrespective of the status of the "replacement" rates.

ii. TE violated R.C. 4905.31 and R.C. 4905.32 by wrongfully terminating Complainants' special contracts in February 2008 before ceasing collection of its RTC Charges.

Ohio Revised Code Section 4905.31 allows entities, such as TE and Complainants, to enter into reasonable service arrangements approved by the Commission. There is no dispute that Complainants' special contracts were reasonable electric service arrangements under R.C. 4905.31—and approved by order of this Commission. Further, R.C. 4905.32 provides that "[n]o public utility shall charge. . . or collect a different rate. . . or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the [commission] which is in effect at the time." TE claims to have terminated Complainants' special contracts in February 2008, despite the clear language of the 2001 Amendments that said contracts would continue until TE ceased the collection of its RTC Charges. By failing to charge the rates established in Complainants' special contracts from February 2008 through the date on which TE will cease the collection of its RTC Charges (December 31, 2008), TE violates this statute.

iii. TE violated R.C. 4905.35 because it failed to afford Complainants the same opportunity to extend their contracts under the RSP Order as was provided other customers involved in the RSP Case.

From the outset, it is important to remember that the alleged violation of R.C. 4905.35 becomes material only if the Commission determines, as argued by TE, that the RCP Order terminated Complainants' special contracts on their February 2008 meter read dates. Pursuant to R.C. 4905.35, "[n]o public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage." TE violated R.C. 4905.35 by choosing as part of the RSP Case to twice notify some (but not all) of its special contract customers about a new and universal opportunity to further extend their special contracts.

TE claims that all of its special contract customers had the same opportunity in 2004 to extend their special contracts as part of the RSP Case. Yet, unlike its actions in the prior ETP Case, TE deliberately chose not to directly notify all of its special contract customers in the RSP Case of the further opportunity to extend their special contracts.[26]

First and foremost, members of the intervening industrial groups (IEU-Ohio and OEG) that participated in the RSP Case were the only special contract customers to actually receive direct notice of this offer to extend.[27] Notably, none of the Complainants was a party to the RSP Case, none signed the Revised RSP, and none were members of either IEU-Ohio or OEG at that time.[28] Therefore, only the special contract customers participating in the RSP Case (as members of intervening industrial groups) directly knew about the opportunity, because their

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[26] Joint Exhibit 1, ¶ 55.

[27] Complainants Joint Exhibit 1, p. 12, lines 15-22; p. 13, lines 1-9; and p. 27, lines 3-5.

[28] By providing service copies to intervenors and other interested persons, it is clear that TE did not exclusively rely on the Commission docketing electronic system for making that offer.

agents received service copies in February 2008 of the RSP Stipulation and Revised RSP.[29] Consequently, TE unduly disadvantaged Complainants by not mailing them the same materials containing the offer as it did the intervening industrial groups and other interested persons.

For non-participants, such as Complainants, TE made the "offer to extend" by merely filing the Revised RSP in the Commission docketing system during the middle of the case. TE allegedly relied on the public docketing system to notify non-intervenors, such as Complainants, of the extension rights in Paragraph VII(8) of the Revised RSP. But, as Complainants' expert witness, Tony J. Yankel, testified, this same public docketing system has:

> *** approximately two thousand cases filed every year ***. This particular case, the RSP case, contained 12,932 pages. To monitor each one of those pages and expecting something in one paragraph to pop out at you, I think that's a severe burden ***."[30]

Kraft witness Richard Leggett also testified that he "found it rather challenging" to navigate the Commission's public docketing system.[31] Furthermore, by the time the Revised RSP finally was filed on the public docket, and the 30-day window came into existence, the period for intervention was over.[32]

To be fair, it is hardly true that TE did nothing. TE allowed the Commission to publish legal notice in November 2003 of public hearings to be held in each county in service areas affected by the RSP.[33] Unfortunately, non-participants, like the Complainants, were not alerted to the opportunity to further extend their special contracts because the newspaper notice—the only published notice regarding the case—preceded the offer to extend.[34] Furthermore, the

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29 Complainants Joint Exhibit 1, p. 27, lines 11-23.

30 June 23 Hearing Transcript, pp. 169-170.

31 June 23 Hearing Transcript, p. 92.

32 A Commission Entry dated November 7, 2003 set the deadline for intervening in the RSP Case as December 10, 2003. The Revised RSP was filed along with the Rebuttal Testimony of Anthony J. Alexander on February 24, 2004 – more than three months after the deadline for intervening.

33 Joint Exhibit 1, ¶ 55. See also, Exhibit N to Joint Exhibit 1.

34 Id. TE further compounded this problem by not informing its marketing representatives about the extension opportunity.

notice, did not describe the opportunity to further extend their special contracts, or identify any reason for Complainants to monitor, participate, or intervene in the RSP Case.[35]

In sum, TE violated R.C. 4905.35 by refusing to similarly notify all of its 46 special contract customers about the opportunity in February 2004 to further extend their special contracts. It was this chosen course of action that resulted in Complainants not knowing about, or submitting, their requests to extend the term of their special contracts.[36] And, it was this chosen course of action which disadvantaged Complainants and violated R.C. 4905.35.

F. TE had a duty to disclose tariffs under O.A.C. 4901:1-1-03.

The three justifications raised by TE for failing to comply with its duty to disclose the offer to further extend Kraft's special contracts do not apply the clear and unambiguous language of Ohio Administrative Code ("O.A.C.") Rule 4901:1-1-03.

The duty to disclose in O.A.C. Rule 4901:1-1-03 applies to "modifications or changes in criteria or terms and conditions of service or any existing tariff schedule or offering."[37] The RSP and RCP Cases modified Kraft's special contract—and, therefore, also the terms of reasonable arrangement approved by the Commission under R.C. 4905.31. The 90-day requirement is mandated by this rule,[38] meaning TE needed to provide notice immediately after the RSP Order to effectively disclose the proposed modification. This is a reasonable burden to meet—and TE did not.

III. CONCLUSION

For all of the foregoing reasons, as well as those contained in our initial brief, Complainants urge the Commission to grant the relief requested in their Complaints.

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35 Joint Exhibit 1, at Exhibit N.
36 Joint Exhibit 1, ¶ 54.
37 O.A.C. Rule 4901:1-1-1-03(B)(1).
38 Id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by electronic mail and regular mail this 26th day of September 2008.

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