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FILE**PUCO**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.,)	Case Nos. 08-67-EL-CSS
and Martin Marietta Magnesia Specialties, LLC,)	08-145-EL-CSS
)	08-146-EL-CSS
Complainants,)	08-254-EL-CSS
)	08-255-EL-CSS
v.)	08-893-EL-CSS
)	
The Toledo Edison Company,)	
)	
Respondent.)	

REPLY BRIEF OF RESPONDENT THE TOLEDO EDISON COMPANY

Although Worthington Industries ("Worthington"), The Calphalon Corp. ("Calphalon"), Kraft Foods Global, Inc. ("Kraft"), Brush Wellman, Inc. ("Brush"), Pilkington North America, Inc. ("Pilkington") and Martin Marietta Magnesia Specialties, LLC ("Martin Marietta") (collectively, the "Complainants") have filed complaints against The Toledo Edison Company ("Toledo Edison") alleging violations of several Revised Code provisions and one Commission rule, they wait until page 37 of their Joint Post-Hearing Brief to discuss one such Revised Code provision – R.C. § 4905.35 – and then simply mention on the Brief's last page the duty imposed by O.A.C. 4901:1-1-03 to disclose changes in tariff schedules. Most of Complainant's Brief is devoted to a misleading reshaping of the undisputed facts with the obvious goal of confusing the

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Commission into believing that Toledo Edison violated the RCP Order,¹ which approved Toledo Edison's Rate Certainty Plan ("RCP"), by terminating Complainant's special contracts on their applicable billing dates in February 2008 as expressly authorized by the RCP. As explained in detail in Toledo Edison's Post-Hearing Brief and as further discussed below, Complainants have failed to muster any proof that Toledo Edison violated any provision of Ohio's public utility laws or rules by adhering to a Commission order. Thus, the Commission should find against Complainants on all counts of their respective complaints.

I. Complainants' Statement of Facts Lacks Record Support

When Complainants lack evidence in the record – either from the joint stipulations or from the hearing testimony of individuals with personal knowledge – they invariably resort to citations to their “expert” witness, Mr. Yankel. Of course, as made clear in Toledo Edison's Motion to Strike filed July 21, 2008 and as confirmed in the cross-examination of Mr. Yankel at hearing, he brings no special expertise to this matter that would make him an expert witness and lacks any direct personal knowledge of any actual facts so as to qualify him as a lay witness. *See* Trans. at 134-37, 146-56. Yet not all misinformation can be traced to Mr. Yankel, as a review of Complainants' brief makes clear.

For example, Complainants fail to cite any authority for the statement that, unlike in the ETP Case, Toledo Edison “chose in the RSP Case to provide no direct notice” of the opportunity afforded special contract customers to extend their contract term. Brief at 15. There is no evidence that Toledo Edison chose to provide notice in the ETP Case and chose not to provide notice in the RSP Case. Instead, the facts are that Toledo Edison was required to provide notice in the ETP Case and was not required to do so in the RSP Case. Stip. ¶¶ 34, 55. Similarly, when

¹ Opinion and Order issued on January 4, 2006 in Case No. 05-1125-EL-ATA.

Complainants cite the Joint Stipulation as support for the statement that Complainants did not submit a request to extend their special contracts under the terms of the RSP “[f]or the simple reason that they were unaware of the offer” (Brief at 16), a review of the paragraph cited quickly reveals that the reason for Complainants’ failure to act cannot be found in the Joint Stipulation.

Mr. Yankel is relied upon by Complainants as support for the statement that only special contract customers who were members of IEU-Ohio or OEG actually had direct notice of the contract extension opportunity provided in the RSP Case. Brief at 16 (citing 10 pages of Yankel Testimony). Of course, Mr. Yankel’s testimony doesn’t actually say this, and he admitted at hearing that he never talked to anyone employed by any of the Complainants who had direct knowledge of what actually happened regarding the RSP Stipulation. Trans. at 168, ln. 1-19. Complainants’ statement is doubly surprising given that Pilkington’s hearing witness admitted that he had direct notice of the RSP Stipulation in the Spring of 2004. Trans. at 22, ln. 11 to 23, ln. 2. Complainants apparently prefer the testimony of a witness with no personal knowledge to that of a witness who actually knew something.

Complainants also contend in their Brief that non-participants in the RSP Case “were not alerted to be on watch for an opportunity to further extend their special contracts” because the newspaper notice published in early November 2003 preceded the development of this opportunity in February 2004. Brief at 17. However, the newspaper notice, which is attached to the Joint Stipulation as Exhibit N, specifically states that Regulatory Transition Charges are at issue. Given that the term of each Complainant’s special contract depended upon the Commission’s continuing oversight of Toledo Edison’s collection of Regulatory Transition Charges, the legal notice gave Complainants and their energy management departments and outside energy consultants sufficient incentive to follow the course of the RSP Case. If

Complainants actually failed to pay attention – the record is unclear whether they did or not – they have only themselves to blame.

Complainants also misinterpret a reference in the Revised RSP to “the effective date of the extended RTC charge” as creating an obligation to file for Commission approval of this charge before it could become effective. Brief at 17. *See also* Brief at 35 (“TE did not file its tariffs to provide for the recovery of Extended RTC Charges”). Complainants jump from this reading of the Revised RSP to a conclusion that the extended RTC charge never became effective because Toledo Edison never made that filing. *Id.* Yet Section II.8. of the Revised RSP and Appendix F thereto state that the “effective date” of the extended RTC charge would be the date when the RTC charge was no longer effective. Revised RSP at p. 10; Appx. F (“The Extended Regulatory Transition Charge shall take effect upon termination of the Regulatory Transition Charge”). No additional filing was necessary. When the RCP, as approved by the RCP Order, adjusted the RTC and extended RTC recovery periods and rate levels to be collected through RTC rate components (Stip ¶ 42; RCP ¶ 2), again, no additional filing was necessary. Complainants’ entire argument is a red herring.

Complainants’ misunderstanding of how the extended RTC charge was intended to work is compounded in their discussion of how the RCP and RCP Order changed how RTC and extended RTC would be recovered. *See* Brief at 18-20. Under the Revised RSP as approved in 2004, new deferrals created new regulatory costs that would be recovered by Toledo Edison through an “extended RTC charge” after the regulatory costs created by the ETP Order were recovered through the “RTC charge.” Stip. ¶ 40; Revised RSP § II.8 and Att. 7. In 2006, the RCP adjusted these recovery periods by requiring that Toledo Edison concurrently recover all regulatory costs, including those created in the Revised RSP and RCP, through “RTC rate

components (RTC and Extended RTC)” that would not extend beyond December 31, 2008. Stip. ¶ 42; RCP ¶¶ 2-4. Thus, the RCP transformed the RTC Charge that had been in place since the ETP Case into RTC rate components that took on a new character and new role in recovering costs that were not contemplated by the parties in 2001 when their contract extensions were tied to Toledo Edison’s collection of RTC charges.² The only reason the RTC Charge would not end in late 2007 or early 2008 as contemplated by the parties in 2001 was because Toledo Edison had agreed with the Commission in the RSP and RCP Cases to stabilize rates, and accept the burden of additional deferrals, through the end of 2008. Thus, to ensure that the termination of the Complainants’ special contracts was not affected by this transformation in the purpose of the RTC charges/components, the RCP fixed the termination date for Toledo Edison’s special contract customers during the month when the RTC charge, as originally formulated, would most-likely have ended – February 2008.

As such, the RCP correctly stated that termination was consistent with the ETP’s method of calculation of the contract end dates. Complainants’ objection to this simple fact is odd, given that they stipulated that the “February 2008 termination date of Complainants’ ESAs as set out in the RCP Stipulation was consistent with the RTC kWh targets adopted in the ETP and RSP Cases.” Stip. ¶ 50. Complainants’ contention that “the RCP Order also contemplated that TE actually would cease recovery of its RTC Charges when certain kilowatt targets had been achieved” (Brief at 19) also is odd, given that the RCP Order does not contain and did not approve kilowatt targets. Instead, the RCP Order approved the termination of Complainants’ special contracts on the date when the RTC charge would have terminated consistent with the

² Complainants concede that the RTC Charge in place after January 1, 2006 was not the same charge referenced in the 2001 amendments to their special contracts. See Brief at 20 (“The RTC Charge would continue so as to recover both TE’s RTC and its ‘extended RTC’ beginning January 1, 2006.”).

kWh targets approved in the ETP and RSP Cases, and it also approved new RTC rate components to be charged through December 31, 2008.

Complainants are struggling to find a complex answer to what is a very simple issue – collection of the RTC Charges anticipated by the parties in 2001, if left unchanged, would have ceased in early 2008 (if not earlier), so the Commission acted reasonably in fixing a specific termination date in February 2008 for contracts tied to those RTC Charges.

II. Law and Argument

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

Complainants' first argument is that their special contracts were improperly terminated because Toledo Edison has continued to collect RTC Charges. Even if we ignore the obvious issue that Toledo Edison acted pursuant to Commission order in terminating these special contracts, Complainants' argument itself is disingenuous. As explained above, the RTC charges/components currently in place are yet a faint shadow of the RTC Charges upon which the termination of Complainants' special contracts was based. If Complainants truly intend that the Commission should be as literal as they appear to argue here, then Complainants' contracts should have been terminated on January 1, 2006, which was the effective date of new RTC components implemented to replace the RTC Charges referenced in the 2001 contract amendments. Toledo Edison respectfully suggests that such literal interpretations of contract language, which ignore all context and subsequent events, benefit no one.

B. The RCP Provision Fixing the Termination Date of Complainants' Special Contracts Is Not Ambiguous, and Toledo Edison Has Never Argued that It Is.

Complainants' second argument is based on a false premise: "TE contends, however, that this Commission's orders create ambiguity concerning the end date of the Complainants'

‘special contracts.’” Brief at 23. Toledo Edison makes no such contention. Instead, Toledo Edison contends that the RCP Order³ clearly and unambiguously fixed the date on which each of the Complainants’ special contracts would terminate. Those termination dates in February 2008 were consistent with the parties’ intentions in 2001 that the contracts would terminate “with the bill rendered for the electric usage through the date which RTC ceases” for Toledo Edison. Remarkably, Complainants’ “expert” said that he does not think the RCP is ambiguous but believed that his employers might think otherwise. Trans. at 173, ln. 6-13.

The “highly significant and reasonable distinction” attempted by Complainants is neither significant nor reasonable. *See* Brief at 24. Complainants’ claimed distinction is that the ETP Order authorized recovery of Regulatory Transition Costs, not collection of RTC charges, and that the kWh sales targets relate only to recovery of Regulatory Transition Costs. Thus, conclude Complainants, the kWh sales targets have nothing to do with the Regulatory Transition Charges referenced in the 2001 contract amendment. Yet, under the ETP Stipulation, RTC charges were tied directly to RTC recovery periods, which in turn would continue until the earlier of June 30, 2007 or when a specific kWh sales target was met. ETP Stip. VIII.1., IX.1 and IX.3; Stip. ¶ 35.⁴ As described by the Commission in the RSP Order (using the abbreviation “RTC” to refer to the Regulatory Transition Charge): “The ETP stipulation provided that the RTC would be collected until company specific cumulative sales after January 1, 2001 were reached, or until a company-specific date, whichever came earlier.” RSP Order at p. 25.

³ Toledo Edison does not understand Complainants’ repeated references to Toledo Edison’s reliance upon Commission orders other than the RCP Order. It is Complainants who are seeking to distract and confuse by repeatedly referencing a case (the RSP Case) which only benefited Complainants by eliminating the June 30, 2007 cut-off in the ETP Order for collection of RTC charges.

⁴ It should be noted that RTC charges are “collected,” while Regulatory Transition Costs are “recovered” through the revenues collected as a result of the RTC charge.

Complainants' distinction is simply a false distortion of what the Commission actually authorized in the ETP Case and later in the RSP Case.

Complainants' claim that Toledo Edison is "tortuously" interpreting Paragraph 12 of the RCP to support the February 2008 termination date is confusing given that the February 2008 termination date is crystal clear. Paragraph 12 initially addresses special contracts extended under the RSP Case, which Complainants admit is not applicable to them. Paragraph 12 then fixes the termination date for special contracts that were extended as part of the ETP Case but not the RSP Case. Complainants again admit that they extended their contracts as part of the ETP Case but not the RSP Case. Thus, the termination date for each of their contracts was their various meter read dates in February 2008. Stip. ¶¶ 43, 45-49.

What Complainants actually may believe is "tortuous" is the Commission's approval of these termination dates in February 2008 for Toledo Edison special contract customers when Toledo Edison would continue to collect RTC charges/components through 2008. However, when Complainants in 2001 agreed to a termination date for their special contracts that depended upon the date when Regulatory Transition Charges, as defined in the ETP Case, ceased for Toledo Edison, they adopted a moving target, as it depended upon both a distribution sales target and the amortization of deferrals. ETP Stipulation at IX.1., IX.3., and Attach. 7. Thus, by adopting a termination date that depended specifically upon continuing Commission jurisdiction over and review of Toledo Edison's ETP, Complainants accepted that the termination date of their special contracts would depend upon, and could be altered by, future actions of both Toledo Edison and the Commission. Of course, under R.C. § 4905.31, the Commission retained continuing jurisdiction over all of Complainants' special contracts. When the RTC Charge

originally selected as the target for termination was altered effective January 1, 2006,⁵ the Commission acted reasonably in setting the termination date of each of Complainants' contracts based on the parties' original agreement. The Commission did not add new terms to the special contracts but, instead, merely enforced the contracts pursuant to their original terms.

C. The *Mobile-Sierra* Presumption Is Not Applicable.

Complainants' third argument is that the Commission's RCP Order failed to satisfy the *Mobile-Sierra* test and, thus, that the Commission erred in modifying the end date of the special contracts without a showing that the contracts adversely affected the public interest. Complainants' argument constitutes a collateral attack on a final order of the Commission and, thus, should be disregarded. However, Complainants' reliance on the *Mobile-Sierra* presumption is also terribly misguided.

What Complainants refer to as the "Sierra-Mobile Doctrine" is actually a presumption of contract validity applied by the Federal Energy Regulatory Commission ("FERC") and federal appellate courts when reviewing claims that rates in wholesale power contracts are not "just and reasonable" under the Federal Power Act. See *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 128 S. Ct. 2733, 2739-40 (2008). When one party to the contract challenges the rates being charged as unjust or unreasonable and the parties have not otherwise negotiated the application of a different standard of review, the FERC will consider whether setting aside the contract is in the public interest. *Id.* In short, *Mobile-Sierra* applies when a contracting party seeks to terminate its contract because the rates therein are unjust and unreasonable. Only one PUCO decision has ever referenced the *Mobile-Sierra* presumption, and

⁵ Although Complainants attempt to make much of the fact that Toledo Edison continues to collect RTC Charges (Brief at 27), Complainants ignore that what is being collected today is not what was being collected in 2001 when the parties tied the termination of their contracts to the date when Toledo Edison ceases collecting RTC Charges. Technically, The "RTC" referenced in the 2001 amendment ceased being collected on December 31, 2005.

that case, as with the FERC decisions it references, involved a utility seeking to set aside a contract because the rates were alleged to be unjust and unreasonable. *See In the Matter of the Application of Ohio Power Company to Cancel Certain Special Power Agreements and For Other Relief*, Case No. 75-161-EL-SLF, 1976 Ohio PUC LEXIS 6 (Aug. 4, 1976).

Mobile-Sierra has no application here. When the Commission fixed the termination date of Complainants' special contracts in the RCP Order, it was not acting because rates in the special contracts were unjust or unreasonable. Instead, it was simply fixing what was up until then a moving target so as to ensure that the parties' intentions were satisfied. No party sought to set aside the contract in a manner that would be subject to the public interest standard of review. To the contrary, because the RCP Order materially altered the process for collecting RTC charges/components, the Commission necessarily had to decide when special contracts that were tied to the original RTC Charge would terminate. Importantly, if the *Mobile-Sierra* presumption were to be applied under circumstances such as those presented here, then the Commission's continuing jurisdiction under R.C. § 4905.31 essentially would be eliminated. The Commission clarified what was ambiguous so as preserve the contracts in the form originally agreed to by the parties; it did not set aside these contracts as unjust or unreasonable. Thus, the Commission should reject the Complainants' reliance on *Mobile-Sierra*.⁶

D. The Commission's RCP Order Did Not Extinguish the Complainants' Special Contracts and Create New Ones.

Complainants' fourth argument is actually two unrelated claims. First, Complainants contend that the fixing of the termination date of their special contracts constituted a unilateral

⁶ Although Complainants' attempt to apply the *Mobile-Sierra* elements to the circumstances is a wasted and irrelevant effort, Toledo Edison is compelled to object to Complainants' impairment "analysis" at the top of page 29 of their Brief. The assumption made regarding Toledo Edison's annual revenue increases is not supported by the record or by logic, and the out-of-context reliance upon FirstEnergy financial statements is irrelevant given that the party here is Toledo Edison.

novation contrary to Ohio law. Brief at 32. A novation involves a mutual agreement to extinguish a contract and substitute a new contract with new terms and new consideration in its place. Thus, a “unilateral novation” is an oxymoron. Nevertheless, nothing of the sort occurred here. As explained above, not only were the special contracts subject to continuing Commission jurisdiction under R.C. § 4905.31, but the parties knew in 2001 that, by choosing a termination provision that lacked a definite end date and was tied in part to a calculation subject to further Commission review, the Commission could have a say in when the special contracts would terminate. Indeed, without Commission intervention via the RSP Order, the special contracts would have terminated effective June 30, 2007 as required by the terms of the ETP Case. *See* Stip. ¶ 35. The Commission’s RCP Order did not extinguish the Complainants’ special contracts and create new ones. It simply determined what the duration of each special contract was so as to protect the original intentions of all parties to the 2001 amendments.

Complainants also appear to argue that they lost the opportunity to effect a novation of their special contracts in 2004 because they lacked knowledge of this opportunity. Brief at 33. Although Complainants’ knowledge or lack thereof, and the reasons for any claimed lack of knowledge, are unclear from the record, what is clear is that Complainants did not submit a request to Toledo Edison to extend the term of their special contracts during the 30-day period authorized by the RSP Order. Stip. ¶ 54. Thus, Toledo Edison agrees with Complainants that they never intended to change the terms of their special contracts by failing to take advantage of the opportunity to do so under the RSP Order. *See* Brief at 34. Thus, no novation occurred, and Complainants’ argument is irrelevant.

E. The Commission Did Not Improperly Modify Complainants' Special Contracts.

Complainants' fifth argument is once again a collateral challenge to the Commission's RCP Order that can and should be rejected. Complainants also again erect a straw man by claiming that Toledo Edison is relying upon Section VIII(8) of the Revised RSP to create a new termination date for the special contracts. Brief at 34. Toledo Edison must once again state that it is not relying in any way on Section VIII(8) of the Revised RSP. Complainants failed to request an extension of their contracts as they could have done under Section VIII(8) of the Revised RSP. Thus, except for the benefit Complainants obtained from the Revised RSP's elimination of the ETP Stipulation's June 30, 2007 end date for RTC collection, Complainants' contracts were not affected in any way by the Revised RSP.

More telling is Complainants' statement that Toledo Edison is attempting "to unilaterally modify the termination dates of Complainants' special contracts from an event certain date to an uncertain and unidentifiable date in the future by misreading Section VIII(8)." Brief at 35. Putting aside the obviously mistaken reference to the Revised RSP, the irony should be obvious. The Commission's RCP Order took a contract term that was ambiguous and could no longer be executed (given that the RTC referenced in the 2001 amendment no longer existed after January 1, 2006),⁷ and fixed an event certain date for termination in order to carry out the parties' intent as could be discerned from the 2001 amendment and the ETP Stipulation. The Commission did not act improperly in doing so.

⁷ Although Complainants contend that Toledo Edison is ignoring Paragraph 4 of the RCP Stipulation (Brief at 35), Toledo Edison suggests that any reasonable reading of Paragraph 4 of the RCP Stipulation reveals the obvious point that the RTC referenced in the 2001 amendment cannot easily be found in Paragraph 4.

F. Equitable Estoppel Does Not Apply.

Complainants' equitable estoppel argument is lacking any factual support. Indeed, none of Complainants' complaints contains an equitable estoppel claim, which is reasonable given that complaints filed with the Commission are expected to allege violations of Ohio's public utility law and rules, not common law claims.

Regardless, Complainants have not produced any evidence proving that Toledo Edison intentionally or negligently induced Complainants to believe that Toledo Edison would directly notify them of the opportunity made available in the RSP Case to amend their special contracts. Nor have Complainants demonstrated that they changed their position in reasonable reliance upon any alleged inducement. See *Glidden Co. v. Lumbersmens Mut. Cas. Co.*, 112 Ohio St. 3d 470, 479 (2006). As explained in *Glidden*, proof of actual or constructive fraud is required (*id.*), and no such proof exists here. To the contrary, Complainants did not detrimentally rely on any inducement offered by Toledo Edison and did not amend their contracts in 2004.

G. Toledo Edison Did Not Violate R.C. 4905.35 By Allowing Nine Special Contract Customers to Extend the Term of Their Contracts As Authorized by the RSP Order.

Toledo Edison rebutted in detail at pages 16 through 18 of Toledo Edison's Initial Brief the basis for Complainants' R.C. 4905.35 claim. As Complainants offer nothing new in their Brief, Toledo Edison will not belabor the point.

However, Toledo Edison is compelled to correct two misstatements of fact in Complainants' Brief. First, Complainants allege that non-participants in the RSP Case would have to learn of the extension opportunity during the 30-day period in which this opportunity was available. Brief at 38. This, of course, is false. Pilkington's witness, for example, learned of this opportunity in the Spring of 2004, and the 30-day window did not open until after the RSP Order was issued on June 9, 2004. Second, Complainants again refer to Toledo Edison

waiving its "right to put into effect the Extended RTC Charges" (Brief at 39), which is contrary to the RCP's adoption of RTC rate components that included Extended RTC.

H. Toledo Edison Did Not Violate O.A.C. 4901:1-1-03 By Failing to Provide Direct Notice of the Revised RSP to Complainants.

Toledo Edison's Initial Brief at pages 19-20 responds to Kraft's claim in its Complaint (only Kraft's Complaint included this claim) that Toledo Edison violated O.A.C. 4901:1-1-03. Complainants' Brief alleges that the Revised RSP is a "rate schedule" for which Toledo Edison was obligated to give Complainants direct notice. Brief at 39-40. However, the Revised RSP is clearly not a rate schedule. Instead, the Revised RSP gave special contract customers the opportunity to amend the duration term of their special contracts. Because, among other things, the Revised RSP did not change the terms of Complainants' special contracts, Toledo Edison was not obligated by O.A.C. 4901:1-1-03 to provide notice to all special contract customers of the Revised RSP. Complainants' Brief treads no new ground, so Toledo Edison will rely upon the briefing of this issue submitted on August 26, 2008.

III. Conclusion

For the foregoing reasons, Toledo Edison respectfully asks that the Commission deny Complainants' complaints and issue an Opinion and Order finding in favor of Toledo Edison on all issues presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

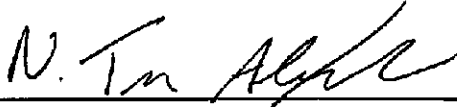
The foregoing Reply Brief of Respondent was served via regular U.S. Mail, postage pre-paid, on this 26th day of September, 2008, upon the following:

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