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

ENTRY ON REHEARING

The Commission finds:

(1) Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC, (collectively, complainants) filed complaints against The Toledo Edison Company (TE) between January 23, 2008, and July 17, 2008. These complaints were consolidated, due to the fact that the underlying facts set forth by the complainants are similar. Generally, the complainants alleged that TE attempted to unilaterally amend the special contracts it entered into with the complainants. According to the complainants, TE's actions are unjust, unreasonable, and unlawful and in violation of Sections 4905.22, 4905.31, 4905.32, 4905.35, Revised Code, and Rule 4901:1-1-03, Ohio Administrative Code.

(2) By opinion and order issued February 19, 2009, the Commission dismissed the complaints finding that the complainants had not provided sufficient evidence to demonstrate that TE had violated any applicable order, statute, or regulation. The Commission noted that the complainants are seeking a determination by the Commission that the rates set forth in the special contracts entered into between the complainants and TE, as amended in 2001, should continue

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through the date on which TE ceases collecting the RTC charges, which the complainants submit is December 31, 2008. The Commission further noted that TE, on the other hand, insists that the special contracts terminate on the complainants' billing dates in February 2008, as provided for in the rate certainty plan (RCP),[1] which is consistent with the method set forth in the electric transition plan (ETP)[2] for calculating the end dates for the special contracts. In arriving at its conclusion, the Commission reviewed the stipulations and orders in the *ETP Case*, the *RSP Case*,[3] and the *RCP Case*.

Initially, the Commission took note of the fact that the stipulation approved in the *ETP Case* required TE to notify its special contract customers that they could extend their current contracts through the date on which the RTC charges cease for TE; further, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kilowatt hour (kWh) sales level. In response to this offer, the complainants opted to extend their initial special contracts and entered into the 2001 amendments with TE.

Next, the Commission noted that the stipulation approved in the *RSP Case* did not require that TE provide notice to its special contracts customers that they had the option to extend their contracts. However, based on the arguments in the cases, the Commission believed the complainants were looking to the Commission to conclude, almost five years after the order in the *RSP Case*, that TE should have provided written or oral notice to the special contract customers of the option to extend the provisions of the contract even though no such notice was required by the Commission's order in the *RSP Case*. The

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1 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case Nos. 05-1125-EL-ATA, et al., Opinion and Order (January 4, 2006) (*RCP Case*).

2 *In the Matter of the Application of First Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000) (*ETP Case*).

3 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case Nos. 03-2144-EL-ATA, et al., Opinion and Order (June 9, 2004) (rate stability plan [*RSP*] *Case*).

Commission concluded in these cases that such a finding would be inappropriate and found no merit in the complainants' arguments on this point.

Turning to the provisions in the *RCP Case*, the complainants believed that no language in the stipulation approved in the *RCP Case* relieved TE of its obligation under the 2001 amendments to perform those agreements until it ceased collection of the RTC charges. However, the Commission, in its conclusion in these cases, reiterated the point that the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level and, therefore, the February 2008 termination date approved in the *RCP Case* was consistent with the ETP's method of calculation of the termination dates for the contracts. The Commission concluded that the record in these cases clearly reflects that, regardless of the sales calculation, no scenario results in continuation of the special contracts through December 2008.

(3) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On March 20, 2009, the complainants filed an application for rehearing of the Commission's February 19, 2009, order in these cases.[4] The complainants set forth three grounds for rehearing.

(5) On March 30, 2009, TE filed a memorandum in opposition to the complainants' joint application for rehearing stating that the request simply reiterates arguments that were considered and rejected by the Commission in its order in these cases.

(6) In their first ground for rehearing, the complainants assert that the Commission failed to apply the clear and unambiguous termination language in the 2001 amendments to the special contracts. According to the complainants, the language in the 2001 amendments provides that the contracts will terminate on

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[4] The Commission notes that the February 19, 2009, order addressed the above captioned complaints, as well as the complaint filed by Pilkington North America, Inc. (Pilkington), in Case No. 08-255-EL-CSS. However, Pilkington did not file an application for rehearing of the Commission's order.

the date that TE stops collecting RTC charges. TE stopped collecting RTC charges on December 31, 2008; therefore, complainants' argue that the termination date for the contracts is December 31, 2008. Contrary to the Commission's conclusion, the complainants insist that the termination provisions of their contracts are not based on the attainment of defined kWh sales levels as suggested by the stipulations in the *ETP Case*, *RSP Case*, and the *RCP Case*. Furthermore, the complainants argue that it is irrelevant that the RTC charges continued beyond the date the defined kWh sales were achieved, because the only legally relevant fact is that the termination provisions in the 2001 amendments are tied to the cessation of the RTC charges, and anything outside of the 2001 amendments (i.e., the parol evidence contained in the stipulations in the *ETP Case*, *RSP Case*, and the *RCP Case*) is irrelevant.

(7) In response to the complainants' first ground for rehearing, TE states that the Commission applied the correct termination date, February 2008, to the contracts. According to TE, the Commission rightly determined that the ETP stipulation, under which the complainants extended their contracts, provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh level. Subsequently, the *RSP Case* gave the complainants the opportunity to further extend their contracts; then the *RCP Case* held that contracts extended under the ETP, but not the RSP, would continue until the meter read date in February 2008. TE points out that, without reference to the definition of RTC charges in the various Commission orders and the associated stipulations, the termination language contained in the special contracts would have no meaning. TE submits that the complainants continue to ignore the fact that what is being collected today in the RTC charge is not what was collected in 2001. Moreover, TE states that, since the Commission has the express authority to modify the contracts at issue, the complainants' argument relating to the issues that the Commission may consider, whether parol evidence or not, must fail. TE reasons that the complainants did not extend their agreement under the *RSP Case* and now they are attempting to collaterally attack the Commission's decision in the *RSP Case* for their own failure to act.

(8) With regard to the complainants' first ground for rehearing, the Commission finds that they have raised no new issue that we did not already consider at length in our order. The complainants are essentially asking us to ignore the language in the stipulation approved in the *ETP Case* which ties the calculation of the RTC charges to kWh sales, even though it was the *ETP Case* that formed the basis for the 2001 amendments. As we recognized in our order, the ETP stipulation specifically provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level; the February 2008 termination dates for the complainants' contracts were consistent with this method for calculating the termination dates. Furthermore, the complainants were given an opportunity in the subsequent *RSP Case* to extend their contracts. The fact that the complainants did not follow the *RSP Case* and extend their contracts cannot now be cured by redefining the meaning of RTC charges as set forth in the *ETP Case*. Therefore, we conclude that the complainants' request for rehearing on this issue is without merit and should be denied.

(9) In their second ground for rehearing, the complainants assert that the Commission erred by modifying the terms of the complainants' special contracts without requiring TE to meet the burden imposed by Section 4905.31, Revised Code, and show that modification of the termination date was needed to protect the public interest. According to the complainants, the Commission's conclusion that the termination date of the contracts is tied to the kWh sales level is not legally supportable because it ignores the language of the special contracts entered into by TE and the complainants, in favor of language contained in a stipulation to which only TE, and not the complainants, is a party.

(10) Contrary to the assertions by the complainants in their second assignment of error, TE submits that neither the Commission nor TE improperly modified the contracts in any way. TE believes that, when the Commission fixed the termination date of the complainants' contracts in the RCP order, the Commission was not acting because the rates in the contracts were unreasonable or unjust, but the Commission "was simply fixing what was up until then a moving target so as to ensure that the parties' intentions were satisfied." Furthermore, TE

offers that no party sought to set aside the contracts in a manner that would be subject to the statutory public interest standard of review. Rather, TE posits that, because the RCP order materially altered the process for collecting RTC charges, the Commission had to decide what the termination date would be for those contracts that were tied to the original RTC charge.

(11) To clarify, through our order, the Commission did not modify the terms of the complainants' special contracts. What the Commission did was review, in detail, the evidence and arguments in these cases, which included consideration of our previous orders in the *ETP Case*, *RSP Case*, and the *RCP Case*. As we stated previously, based upon our review, we concluded that the ETP stipulation specifically provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level and the February 2008 termination dates for the complainants' contracts were consistent with this method for calculating the termination dates. The fact that the Commission disagrees with the complainants' interpretation of the contract does not mean that we modified the contract; rather, we are appropriately interpreting our previous orders. Accordingly, we find that the complainants' second ground for rehearing is without merit and should be denied.

(12) The complainants contend, in their third ground for rehearing, that the Commission's order violates the complainants' right to due process. In support of this argument, the complainants note that none of them were parties to the *ETP Case*, *RSP Case*, or the *RCP Case*, and TE never brought an action against any of them under Section 4905.26, Revised Code, to obtain a determination that the special contract termination provisions were unreasonable or unlawful under Sections 4905.22 or 4905.31, Revised Code, or any other statutory provision. Therefore, the complainants posit that they were never given adequate notice or the opportunity to be heard on the subject of TE's efforts to modify the termination provisions in the contracts.

(13) TE responds to the complainants' third ground for rehearing by pointing out that the issue of whether the complainants were required to join as parties to the *RSP Case* and the *RCP Case* was "extensively considered by the Commission" in the order in

these cases. According to TE, the Commission appropriately acknowledged that: neither the stipulation nor the order in the *RSP Case* required TE to provide notice to special contracts customers; the newspaper publication in the *RSP Case* referenced the RTC charge as an issue in that case; the complainants have experts in their employ that could have tracked the *RSP Case*; and that all of TE's special contracts customers, including the complainants, had the same opportunity to participate in the *RSP Case*.

(14) Upon consideration of the complainants' third assignment of error, the Commission finds that it is without merit. Again, contrary to the complainants' position, the Commission did not modify the termination provisions of the special contracts. Moreover, as TE points out, we thoroughly reviewed and considered all of the evidence and arguments raised in these cases. The complainants took advantage of the opportunity presented by virtue of the *ETP Case* to extend their contracts; however, they then wish to submit that their rights to due process were violated because they were not parties to the case. Similarly, the complainants could have either been parties to the *RSP Case* and the *RCP Case* or they could have had their experts follow the cases. In any event, the record in these cases clearly indicates, as reflected in our order, that the complainants were properly afforded due process. Accordingly, we conclude that the complainants' third ground for rehearing should be denied.

ORDER:

It is, therefore,

ORDERED, That the complainants' joint application for rehearing be denied. It is, further,

ORDERED, That copies of the entry on rehearing be served upon all interested persons of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

APR 15 2009

Reneé J. Jenkins
Secretary

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Respondent.	)	

CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

I am concerned by the lack of specific notice to contract parties in the RCP case that their contracts would be subject to interpretation or potential modification in that proceeding. However, based on the record in these cases, I am not persuaded, considering anew the terms of the 2001 agreements, that a different result from that reached in the RCP case is appropriate. I therefore concur in the result of the Commission's Entry on Rehearing.

Paul A. Centolella