IN THE SUPREME COURT OF OHIO

In the Matter of Martin Marietta Magnesia Specialties, LLC,	:	Case Nos. 09-1064
Appellant,	:	
v.	:	Appeal from the Public Utilities Commission of Ohio
The Public Utilities Commission of Ohio,	:	Public Utilities Commission of Ohio: Case No. 08-0893-EL-CSS
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT, MARTIN MARIETTA MAGNESIA SPECIALTIES, LLC.

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NOTICE OF APPEAL OF APPELLANT, MARTIN MARIETTA MAGNESIA SPECIALTIES, LLC.

Appellant, Martin Marietta Magnesia Specialties, LLC ("Martin Marietta"), pursuant to R.C. § 4903.11, R.C. § 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notices to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Commission") of this appeal to the Supreme Court of Ohio. The appeal is from Appellee's Opinion and Order entered on February 19, 2009, and the Entry on Rehearing entered on April 15, 2009, in the above captioned case. The Commission consolidated this case against The Toledo Edison Company ("Toledo Edison") with other similar complaints against Toledo Edison brought by Kraft Foods Global Inc. (Case No. 08-146), Worthington Industries (Case No. 08-67), The Calphalon Corporation (Case No. 08-145), Pilkington North America, Inc. (Case No. 08-255) and Brush Wellman, Inc. (Case No. 08-254).

On March 20, 2009, Appellant timely filed an Application for Rehearing from the Commission's Opinion and Order dated February 19, 2009, pursuant to R.C. § 4903.10. The Commission denied the Application for Rehearing with respect to the issues being raised in this appeal by an Entry on Rehearing entered April 15, 2009.

Appellant files this Notice of Appeal, complaining and alleging that both the February 19, 2009, Opinion and Order and the April 15, 2009, Entry on Rehearing, are unlawful and unreasonable, and that the Appellee erred as a mater of law in the following respects as raised in the Appellant's Application for Rehearing:

1. The Commission erred in permitting Toledo Edison to unilaterally terminate its special contract for electric services with Appellant (the "Special Contract") in February 2008 by failing to apply the clear and unambiguous language of the 2001 amendment to the Special Contract, which extended the term of the Special

Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

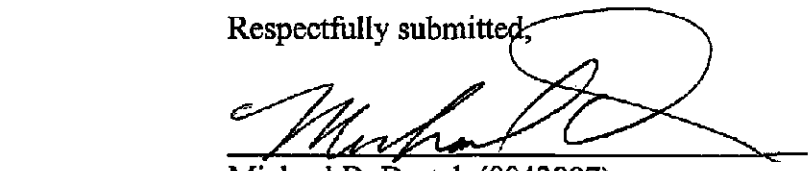
2. The Commission erred by using parol evidence to interpret, and then modify, the clear and unambiguous language in the 2001 amendment to the Special Contract that extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

3. The Commission erred in permitting Toledo Edison to unilaterally modify the clear and unambiguous language of the 2001 amendment to the Special Contract by failing to invoke, but nonetheless *sub silentio* exercising, its "extraordinary" power under RC 4905.31 to change, alter or modify the termination date of the Special Contract.

4. In violation of Appellant's constitutional right to due process of law, the Commission erred in permitting Toledo Edison to rely on regulatory decisions in proceedings, to which Appellant was not a party, did not receive adequate notice, and lacked an opportunity to be heard on the subject, to modify the clear and unambiguous language in the 2001 amendment to the Special Contract, which extended the term of the Special Contract through December 31, 2008, the date on which Toledo Edison ceased collection of its Regulatory Transition Charges.

WHEREFORE, Appellant respectfully submits that Appellee's February 19, 2009 Opinion and Order, and the April 15, 2009 Entry on Rehearing are unreasonable or unlawful and should be reversed. This case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,



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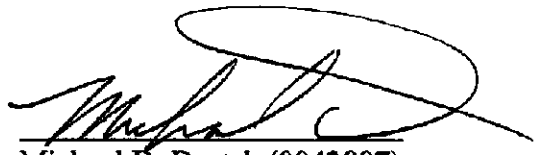
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Martin Marietta Magnesia Specialties, LLC was served upon the Chairman of the Public Utilities Commission of Ohio by delivering a copy at the office of the Chairman at 180 East Broad Street, Columbus, Ohio 43215, and upon the parties of record listed below by regular U.S. Mail, this 12 day of June 2009.



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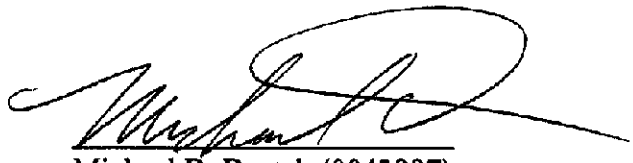
CERTIFICATE OF FILING

I certify that a Notice of Appeal has been filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



Michael D. Dortch (0043897)
Trial Attorney for Appellant,
Martin Marietta Magnesia Specialties, LLC

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,	)	Case Nos. 08-67-EL-CSS
	)	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.		

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, hereby issues its opinion and order.

APPEARANCES:

Mark A. Hayden, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Calfee, Halter & Griswold, LLP, by James F. Lang and Tracy Scott Johnson, 1400 KeyBank Center, 800 Superior Avenue, Cleveland, Ohio 44114, on behalf of The Toledo Edison Company.

Bricker & Eckler, LLP, by Thomas J. O'Brien and Matthew W. Warnock, 100 South Third Street, Columbus, Ohio 43215, on behalf of Worthington Industries, Brush Wellman, Inc., and Pilkington North America, Inc.

Waite, Schneider, Bayless & Chesley, Co., LPA, by D. Michael Grodhaus, 107 South High Street, Suite 450, Columbus, Ohio 43215, on behalf of The Calphalon Corporation.

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Kraft Foods Global, Inc.

Kravitz, Brown & Dortch, LLC., by Michael D. Dortch and Richard R. Parsons, 145 East Rich Street, Columbus, Ohio 43215, on behalf of Martin Marietta Magnesia Specialties, LLC.

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

The Toledo Edison Company (TE) is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and a public utility as defined in Section 4905.02, Revised Code. TE, along with Ohio Edison Company and The Cleveland Electric Illuminating Company, are wholly-owned subsidiaries of FirstEnergy Corporation (jointly these subsidiaries will be referred to herein as FirstEnergy). Worthington Industries (Worthington), The Calphalon Corporation (Calphalon), Kraft Foods Global, Inc. (Kraft), Brush Wellman, Inc. (Brush), Pilkington North America, Inc. (Pilkington), and Martin Marietta Magnesia Specialties, LLC (Martin), are customers of TE.

Worthington, Calphalon, Kraft, Brush, and Pilkington (collectively, complainants) filed complaints against TE between January 23, 2008, and March 24, 2008. On March 14 and 24, 2008, Calphalon and Worthington, respectively, filed amended complaints. As explained in further detail below, the underlying facts set forth by the complainants are similar. Generally, the complainants allege 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 (O.A.C.). TE filed its answers to the complaints and the amended complaints between February 13, 2008, and April 3, 2008. By entries issued March 13, 2008, and April 7, 2008, the attorney examiner, *inter alia*, consolidated these five complaints. On July 17, 2008, Martin filed a complaint against TE, along with a motion requesting that its case be consolidated with the other five cases. The attorney examiner granted Martin's motion for consolidation at the hearing held in these matters on July 23, 2008 (Martin is also referred to as a complainant).

An evidentiary hearing was held in these matters on July 23, 2008. Briefs and reply briefs were filed by TE and the complainants on August 26, 2008, and September 23, 2008, respectively. At the request of the parties, the reply brief deadline was extended to September 26, 2008.

II. APPLICABLE LAW

The complaints in these proceedings were filed pursuant to Section 4905.26, Revised Code, which provides, in relevant part, that the Commission will hear a case:

> [u]pon complaint in writing against any public utility . . . that any rate . . . charged . . . is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law . . ..

In complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667 (1966). Thus, in order to prevail, the complainants must prove the allegations in their complaints, by a preponderance of the evidence.

III. DISCUSSION AND CONCLUSIONS

A. Joint Stipulations of Facts

At the hearing, TE, Worthington, Calphalon, Kraft, Brush, and Pilkington presented a joint stipulation of facts. Likewise, TE and Martin submitted a joint stipulation of facts. These two documents shall be jointly referred to as the stipulations of fact. According to the stipulations of fact, the parties agree, *inter alia*, to the following facts:

(1) The complainants individually entered into initial special contracts with TE between 1990 and 1997, whereby TE agreed to provide them electric service with the individual contracts expiring between 1995 and 2006.

(2) These initial special contracts were approved by the Commission pursuant to Section 4905.31, Revised Code.

(3) The complainants individually entered into special contracts with TE to extend the termination date of their initial special contracts.

(4) By order issued July 19, 2000, the Commission approved an electric transition plan (ETP) stipulation, in Case No. 99-1212-EL-ETP (*ETP Case*).[1]

(5) The ETP stipulation authorized TE to give its special contract customers a "one-time right through December 31, 2001 to extend their current contracts through the date at which the RTC

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1 *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).

charges cease for TE." As required by the ETP stipulation and the ETP order, TE gave notice to each special contracts customer that it could terminate, leave unchanged, or extend the term of its contract. The complainants received the notifications. Each complainant elected to extend its special contract. The individual contracts defined RTC to mean regulatory transition charges.

(6) The ETP order determined for TE its total allowable transition costs, including the costs for regulatory transition assets, pursuant to Section 4928.39, Revised Code, at $1,366,034,515. The transition charges for customer classes and rate schedules are the charges established under Section 4928.40, Revised Code. Under the ETP stipulation, regulatory transition costs would be collected until TE's cumulative sales, after January 1, 2001, reached 71,613,718[2] kilowatt hour (kWh) or until June 30, 2007, whichever occurred earlier. The sales level and date could be adjusted as provided for in the ETP stipulation.

(7) On October 21, 2003, FirstEnergy filed an application for approval of a rate stabilization plan (RSP) in Case Nos. 03-2144-EL-ATA, et al. (*RSP Case*).[3]

(8) On February 11, 2004, FirstEnergy, Ohio Hospitals Association, Cargill Incorporated, Industrial Energy Users-Ohio (IEU-Ohio), Ohio Energy Group (OEG), and Ohio Partners for Affordable Energy filed a stipulation in the *RSP Case*.

(9) On February 24, 2004, FirstEnergy filed a Revised RSP in the *RSP Case* that included language from the RSP stipulation. The Revised RSP provided that TE's collection of RTC charges would continue until the earlier of (a) the last bills rendered reflecting July 2008 usage for TE or (b) when kWh distribution sales after January 1, 2004, reached 44,032,303,000 kWh.

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2 The Commission notes that, while the stipulations in these cases references 71,613,718 kWh as the sales level set forth in the ETP stipulation, the ETP stipulation utilizes the sales level of 71,613,788,718 kWh.

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).

(10) By order issued June 9, 2004, the Commission approved the Revised RSP, with modifications and conditions. The RSP order also provided for recovery of shopping credit incentive deferrals and other deferrals created by the Revised RSP through an Extended RTC. By entry on rehearing in the *RSP Case*, the Commission approved a reduction in TE's distribution sales target to 42,748,303,000 kWh.

(11) On September 9, 2005, FirstEnergy filed an application in Case Nos. 05-1125-EL-ATA, et al. (*RCP Case*)[4] requesting approval of a rate certainty plan (RCP) as set forth in a stipulation signed by FirstEnergy, OEG, IEU-Ohio, and a number of municipalities.

(12) The RCP provided, in part, for adjustment of the 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 Commission through usage as of December 31, 2008, for TE.

(13) Paragraph 12 of the RCP stipulation states as follows:

> The special contracts that were extended under the RSP shall continue in effect for each Company until December 31, 2008 for...Toledo Edison.... The special contracts that were extended as part of the ETP case, but not the RSP case, shall continue in effect until the special contract customers' meter read date in the following months (which are consistent with the ETP's method of calculation of the contract end dates):...Toledo Edison - February 2008;....

(14) By order issued January 4, 2006, the Commission approved, with modifications, the RCP and the RCP stipulation. The RCP order authorized TE to recover RTCs through December 31, 2008, and TE has continued to recover RTCs after complainants' February 2008 billing dates.

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4 *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).

(15) Between February 2006 and September 2007 TE informed each of the complainants that their special contract would terminate at the complainant's meter read date in February 2008.

(16) The February 2008 termination dates of the complainants' special contracts, as set out in the RCP stipulation, were consistent with the RTC kWh targets adopted in the *ETP Case* and the *RSP Case*. TE did not directly rely on the accounting for, and of, regulatory assets, and whether recovery of the regulatory transition charge ceased, as the basis for terminating the complainants' special contracts. On March 1, 2008, TE's cumulative sales after February 1, 2001, were 74,146,556,221 kWh, and cumulative sales after January 1, 2004, were 43,810,526,741 kWh. TE projects its regulatory transition charge will cease on or before December 31, 2008.

(17) The RSP filed in the *RSP Case* on October 21, 2003, provided, in part, that the "[p]lan does not affect the termination dates for special contracts as such dates would have been determined under Case No. 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008." The approved Revised RSP expanded that RSP language to read as follows:

> This Plan does not affect the termination dates for special contracts as such dates would have been determined under Case No. 99-1212-EL-ETP, but in no event shall such contracts terminate later than December 31, 2008, provided that, upon request of the customer, or its agent, received within 30 days of the Commission's order in this case, the Company may extend the term of any such special contract through the period that the extended RTC charge is in effect for such Company, if doing so would enhance or maintain jobs and economic conditions within its service area.

(18) There were 46 TE special contract customers that were eligible to further extend their special contracts as provided for in the Revised RSP; nine of these 46 customers requested that TE extend the term of their special contracts within the required 30

days after issuance of the RSP order. None of the nine had intervened in the *RSP Case*.

(19) No special contract customer that requested an extension during the 30-day period authorized by the RSP order was refused. No special contract customer requested an extension pursuant to the process set forth in the Revised RSP before or after the 30-day period. Complainants did not submit a request to TE to extend the terms of their special contracts during the 30-day period.

(20) FirstEnergy published notice of the December 3, 2003, hearing and the local public hearings in the *RSP Case* as set forth in the Commission's October 28, 2003, entry in the *RSP Case*. TE did not directly notify each special contract customer through direct mailings or bill inserts of the opportunity for special contract customers to extend their contracts after filing the RSP stipulation, Revised RSP, or after the RSP order.

(21) The parties requested that administrative notice be taken of various filings in the *ETP Case*, *RSP Case*, and *RCP Case*.

(Jt. Ex. 1; Martin/TE Jt. Ex. 1).

In addition, TE has entered into escrow agreements with Worthington, Calphalon, Kraft, Brush, and Pilkington pursuant to which each complainant will pay into escrow account the difference between what each complainant and TE allege should be the cost for electric service between their February 2008 billing date and December 31, 2008. The escrow agreements provide that, unless the parties agree otherwise, the funds will be disbursed upon receipt by the escrow agent of a final, non-appealable order of the Commission ordering the amount of the escrowed funds and interest to be disbursed (Jt. Ex. 1 at 11). At the hearing, witnesses for Worthington, Calphalon, Kraft, Brush, and Pilkington estimate that the following has or will be deposited in the escrow account: Pilkington, $1 million from March through December 2008; Worthington, $1 million from March through December 2008; Brush, $2 million from March through December 2008, which represents a 40 percent increase in costs; Kraft, $300,000 to $650,000 from March through December 2008, which represents a 20 to 43 percent increase in costs; Calphalon, $166,595.73 for the three months after TE said the contract was terminated in February 2008, which represents a 54 percent increase in costs (Tr. at 28, 43, 55; Kraft Ex. 1 at 4; Calphalon Ex. 1 at 5). Furthermore, from its February 2008 meter read date through June 2008, Martin spent approximately $442,407 more on electricity than it would have spent had the contract continued in effect; the difference represents an increase of 24.2 percent in Martin's electricity costs (Martin/TE Jt. Ex. 1 at 9).

B. Complainants' Factual Arguments

By way of background, witnesses for the complainants state that: Pilkington has a plant in Rossford, Ohio with approximately 300 employees and the largest operation at that plant is float glass production; Worthington has a Delta, Ohio steel processing facility with 170 employees; Brush has a facility in Elmore, Ohio with approximately 600 employees that produces high performance copper, nickel, and beryllium alloys; Kraft has a flour milling plant in Toledo, Ohio with 95 employees; Calphalon has a cookware and accessories plant, and distribution center in Perrysburg, Ohio with 250 employees; and Martin has a limestone facility in Woodville, Ohio that has 175 employees (Pilkington Ex. 1 at 2; Worthington Ex. 1 at 1-2; Brush Ex. 1 at 1; Kraft Ex. 1 at 1 and 2 at 4; Calphalon Ex. 1 at 2-3; Comp. Br. at 6-7).

The witness for Calphalon asserts that, with the enormous increase in electricity costs, it will be difficult for the company to remain economically competitive and viable in Ohio compared to the costs of similar products from China (Calphalon Ex. 1 at 6). Since the Pilkington facility is an automotive manufacturing facility, its witness submits that it is the "most at-risk of business specie." According to the witness for Pilkington, to successfully compete in the global automotive market, its facility must have access to competitively priced electricity (Pilkington Ex. 1 at 2-3). Worthington's witness points out that electricity accounts for 5.95 percent of the total variable operating cost for its Delta facility, "which is a significant percentage for any single input to production costs." Worthington's witness states that the increased electric rates resulting from termination of the special contract by TE will reduce employee profit sharing by $237,000. Moreover, Worthington's witness submits that, in a globally-competitive market, an increased electricity expense on the magnitude noted above is a serious burden (Worthington Ex. 1 at 2).

The complainants submit that their initial special contracts with TE were approved by the Commission in accordance with Section 4905.31, Revised Code. Furthermore, the complainants explain that the complainants and TE modified the initial special contracts from time to time, including an amendment in 2001, as approved by the Commission. However, the complainants allege that TE unilaterally modified the initial contracts, as amended in 2001, without direct notice to the complainants and without the complainants' consent (Comp. Br. at 1, 9-10).

Mr. Eddy, testifying on behalf of Kraft explains that the initial contracts were amended in 2001 pursuant to a written offer made by TE in conjunction with the *ETP Case* which set forth options, one of which would extend the special contract until the collection of regulatory transition charges cease for TE (Kraft Ex. 2 at 3). However, witnesses for the complainants submit that no one from their companies was made aware of the opportunity in 2004 to extend their contracts with TE. Had the companies been aware that

they could lock in their contract rate until December 31, 2008, the witnesses contend that the complainants would have done so (Kraft Ex. 2 at 5; Calphalon Ex. 1 at 6).

Mr. Yankel, testifying on behalf of all the complainants[5], set forth the complainants' position with regard to the issues surrounding the special contracts entered into between the complainants and TE. He points out that the primary focus of these complaints is on the 2001 amendments to the complainants' special contracts, which were put in place in response to the ETP stipulation. Within these 2001 amendments, witness Yankel notes that the terms "regulatory transition costs," "regulatory transition charges," and "RTC" are used in such a way that they may be confusing. The witness points out that the "regulatory transition costs," which are incurred by TE, and the "regulatory transition charges," which are paid by customers, are not the same thing and that the focal point of these cases is the "regulatory transition charges," not the costs. According to witness Yankel, in the 2001 contracts, the term "RTC" refers to "regulatory transition charges," not costs. Furthermore, he points to the language in the 2001 contract amendments which specify that TE desired to extend the existing contracts "through the date which RTC ceases," which he believes refers to when the regulatory transition charges cease (Comp. Ex. 1 at 3-4).

Witness Yankel begins his analysis stating that the *ETP Case* set a recovery period for TE's regulatory transition costs via the regulatory transition charges based upon specific energy consumption levels, and the ETP stipulation contemplated that the revenue collected in the RTC charge would cease for TE by June 30, 2007. The witness explains that, under the terms of the approved ETP stipulation, special contracts customers were given the option of extending their contracts through the date the RTC charge ceases for TE. Thus, he explains that, in accordance with the stipulation and order in the *ETP Case*, special contracts customers, including the complainants, were sent written notice from TE in 2001 of the possibility to terminate or extend the term of their contracts. Of those special contracts customers, Yankel stated that 46, including the complainants, opted to extend their contracts (Comp. Ex. 1 at 5-6, 21; Comp. Br. at 11).

According to the complainants, in the *ETP Case*, the recovery of the regulatory transition costs was tracked in order to ensure that the dollars specified for eventual recovery were, in fact, recovered; but the termination of the complainants' special contracts under the 2001 amendments were dependent on the date that TE ceased collection of the RTC charges, not the cost recovery. The complainants argue that, while the ETP order determined the total allowable transition costs that TE could recover, the order did not tie the termination dates of the complainants' special contracts to tracked recovery of the regulatory transition costs (Comp. Br. at 12). Pilkington's position is that the special contract should continue until December 31, 2008, or whenever TE's collection

5 Martin is not sponsoring Yankel's testimony (Tr. at 10).

of the RTC charges ceases (Pilkington Ex. 1 at 3). Kraft's witness Eddy agrees, stating that the 2001 agreement with TE was that TE had to cease collecting its RTC charges before the special contract ended; however, the witness points out that TE cancelled the special contract rate arrangements to start charging higher contract rates, while TE continues to collect RTC charges from Kraft and other customers (Kraft Ex. 1 at 3).

Subsequent to the *ETP Case*, witness Yankel explains that the Commission considered the *RSP Case*. The witness notes that none of the complainants in the instant cases were parties in the *RSP Case* (Comp. Ex. 1 at 21). Witness Yankel points out that the newspaper notice published by TE in the *RSP Case*, which was based on the application in that case, stated that "[t]his Plan does not affect the termination dates for special contracts as such dates would have been determined under [the *ETP Case*]" (Comp. Ex. 1 at 10).

Mr. Yankel states that the RSP stipulation: contemplated that the regulatory transition costs would end for TE in July 2008, rather than June 2007, as set forth in the *ETP Case*; provided for an Extended RTC charge after July 2008, to recover the regulatory transition costs; and, in Paragraph *VIII(8)*, provided that "upon request of the customer...received within 30 days of the Commission's order in this case, the [c]ompany may extend the term of any such special contract through the period that the extended RTC charge is in effect...if doing so would enhance or maintain jobs and economic conditions within its service territory" (Comp. Ex. 1 at 11, 24). According to the complainants, the Extended RTC charge was designed to go into effect after the RTC charge ended in order to allow for recovery of certain deferrals created by the RSP stipulation; however, TE was required to file for Commission approval of the Extended RTC charge before it could become effective and TE never made that filing. As a result, the complainants argue that the RTC charge never ended and the Extended RTC charge never became effective (Comp. Br. at 17-18). Therefore, according to the complainants, the *RSP Case* and Paragraph VIII(8) of the Revised RSP left undisturbed the termination date of the 2001 amendments to the contracts that were approved through the *ETP Case* for those customers who did not extend their contracts within the 30-day window; accordingly, the termination date is the date on which the RTC charge ceases for TE (Comp. Br. at 13, 25-26; Comp. Ex. 1 at 14).

In response, TE submits that the Revised RSP specifically provided that the Extended RTC charge would become effective when the RTC charge was no longer effective; thus, no additional filing was necessary. TE explains that the RCP transformed the RTC charge that had been in place since the *ETP Case* into RTC components (comprised of both the RTC and the Extended RTC) that took on a new role in recovering costs that were not contemplated by the parties in 2001 when the contract extensions were tied to TE's collection of the RTC charges. According to TE, the only reason the RTC charge would not end in late 2007 or early 2008 as contemplated by the parties in 2001 was because TE agreed in the *RSP Case* and the *RCP Case* to stabilize rates and accept

additional deferrals through 2008. Therefore, in order "to ensure that the termination of the [c]omplainants' 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" (TE Rep. Br. at 4-5).

According to witness Yankel, while the stipulation in the *RSP Case* gave special contract customers the right to request a contract extension when the RTC charges cease, it inappropriately placed the full burden of knowing about the extensions and timely requesting an extension on the customers. The witness goes on to note that, while copies of the stipulation in the *RSP Case* were served on the intervenors, unlike in the *ETP Case*, TE provided no notice, via written or verbal communication, informing the complainants regarding the need for or opportunity to extend their contracts. Witness Yankel further notes that the limited 30-day window from the issuance of the order in the *RSP Case* for special contracts customers to act to extend the contracts placed a burden on those who did not participate in the *RSP Case* because the offer to extend the contracts was only available publically through the Commission's docketing system. He asserts that only the special contracts customers that were members of IEU-Ohio or OEG, which intervened in the *RSP Case*, were aware of the 30-day window to request an extension (Comp. Ex. 1 at 12-13). Therefore, according to the complainants, the concept of equitable estoppel prohibits TE from arguing that the complainants should have known of the opportunity to extend their contracts because, due to the fact that the complainants received direct notification pursuant to the *ETP Case* even though they did not intervene in that case, the complainants reasonably relied on TE to provide future notices concerning their contracts (Comp. Br. at 36). TE submits that the complainants' equitable estoppel argument does not apply, stating that the complainants have not shown that TE "intentionally or negligently induced [c]omplainants to believe that Toledo Edison would directly notify them of the opportunity. . .to amend their special contracts" (TE Rep. Br. at 13).

In the subsequent *RCP Case*, none of the complainants in the instant cases were parties (Comp. Ex. 1 at 21). Witness Yankel submits that, in the *RCP Case*, the use of the term Extended RTC charge was nullified, because TE "never implemented the accounting treatment contemplated under the revised RSP [s]tipulation and Revised RSP"; and TE projected that the RTC charge would continue in effect until it ceases on December 31, 2008. Consequently, according to the witness, the terms of the complainants' contracts continue in effect, as long as TE collects the RTC charge, the RTC charge has never ceased, and the Extended RTC charge was never put in place (Comp. Ex. 1 at 11, 15, 19). The complainants emphasize that the terms of the 2001 amendments to the special contracts do not refer to or depend on any calculation; the termination of the 2001 amendments only depend on when TE ceases the RTC charge. However, the complainants acknowledge that the ETP stipulation, the 2001 amendments, and the RCP order all contemplated that TE would cease recovery of its RTC charges when certain kWh targets had been achieved,

which they believe is why the RCP stipulation provides that the special contracts would terminate in February 2008; but, now TE projects that its RTC charges will cease at the end of December 2008 (Comp. Br. at 19). Furthermore, Yankel submits that the RCP stipulation provided for lower rates and maintaining the historic base distribution rates (Comp. Ex. 1 at 16). In the witness' view, there is no basis for treating the nine customers that exercised the option provided for in the Revised RSP any differently than the complainants that extended their contracts pursuant to the ETP stipulation, because all 46 customers had 2001 amendments that continued through the date that the RTC charges cease for TE (Comp. Ex. 1 at 19-20).

C. TE's Factual Arguments

TE's witness Norris submits that the February 2008 termination date of the complainants' special contracts, as set forth in the RCP, is consistent with the regulatory transition cost kWh targets adopted in the *ETP Case* and the *RSP Case*. The witness explains that, according to the ETP stipulation, special contract customers were given the right to extend their contracts through the date at which the RTC charges cease for TE. He goes on to note that the ETP stipulation provided for two options for terminating TE's collection of the RTC charges: when the kWh distribution sales met 71,613,788,718 kWhs; or June 30, 2007. Norris further explains that, in a March 2003 compliance filing made in Case No. 02-2877-EL-UNC,[6] TE estimated that it would cease recovering RTC, based on the RTC kWh target, in February 2008; the estimated date was later adjusted to March 2008. According to the witness, using updated information, and assuming the kWh method set out in the *ETP Case* of calculating when TE would cease recovering the RTC, the date would now be in May 2008 (TE Ex. 1 at 3-4, 6). TE submits that the 2001 amendments entered into between TE and each of the complainants changed the termination date of the contracts from a fixed date to one that was based on formulas involving distribution sales (TE Br. at 8).

Mr. Norris then turned to the *RSP Case* stating that, in accordance with the Commission's order, TE's collection of the RTC charges would cease on the earlier of the last bills rendered in July 2008 or when the kWh distribution sales after January 1, 2004, reached 42,748,303,000 kWh; it was estimated that the kWh target would be reached by the end of 2007. According to the witness, using updated information and assuming the kWh method used in the *RSP Case* of calculating when TE would cease recovering RTC, the date would now be in January 2008 (TE Ex. 1 at 5).

With regard to the *RCP Case*, witness Norris explains that, whereas the *ETP Case* and the *RSP Case* were conditioned upon RTC recovery and the kWh sales targets, the RCP established specific dates for special contracts, notwithstanding any collection of the RTC

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6 *In the Matter of the Application of FirstEnergy Corp. on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Tariff Adjustments.*

charges. The witness notes that, pursuant to the *RCP Case*, special contracts that were extended under the *RSP Case* continued until December 31, 2008; however, contracts that were extended as part of the *ETP Case*, but not the *RCP Case*, such as the complainants' contracts, continued in effect until the customer's meter read date in February 2008 for TE (TE Ex. 1 at 6). Thus, according to TE, the RCP order modified each special contract extended under the *ETP Case*, but not the *RSP Case*, and established a definite, easily understood termination date. In TE's view, the February 2008 termination date was consistent with the parties' original expectations, with the distribution sales targets set forth in the ETP order, as well as the distribution sales targets in the RSP order (TE Br. at 7-8, 11-12). The complainants contend that Norris' "testimony asserting that TE has met its RTC kWh targets using the ETP and RSP tracking methods before terminating [c]omplainants' special contracts on the February 2008 meter read dates is irrelevant...contract termination remained tied to TE's continuing collection of RTC charges" (Comp. Br. at 24).

TE points out that each of the complainants are sophisticated purchasers of electric service that have employees who are responsible for purchasing electricity for their Ohio facilities and that they have obtained discounted rates from TE for many years. TE asserts that the complainants were given the same opportunity as all other special contracts customers in 2004 to extend the duration of their special contracts; however, the complainants did not request an extension during the 30-day window authorized in the *RSP Case*. TE points out that TE was not required either by rule or order of the Commission to provide notice of the opportunity to extend the complainants' contracts pursuant to the Revised RSP; instead contract customers received notice via the Commission's docket in this case (TE Br. at 4-7).

D. Parties' Legal Arguments

The complainants argue that, by terminating the special contracts ten months before the termination date, TE is violating Section 4905.22, Revised Code, by demanding unjust and unreasonable charges for electric service in excess of that allowed by the Commission in the *ETP Case* and the Commission-approved 2001 amendments (Comp. Rep. Br. at 10). Contrary to the complainants' assertions, TE avers that it has not violated Section 4905.22, Revised Code, pointing out that the complainants admit that they are being charged pursuant to a tariff that has been deemed just and reasonable by the Commission. Moreover, TE notes that the complainants' now-terminated contracts, which were authorized by Section 4905.31, Revised Code, are an exception to Section 4905.22, Revised Code. According to TE, when the Commission approved the February 2008 termination date for the complainants' contracts, the complainants "defaulted to the just and reasonable Commission-approved tariff rate" (TE Br. at 15).

Furthermore, the complainants maintain that TE is violating Section 4905.31 and Section 4905.32, Revised Code, by charging unjust and unreasonable rates because "those rates are significantly higher tariff/market rates rather than those approved in the special contracts" (Comp. Rep. Br. at 10). TE contends that it has not violated Section 4905.31 or Section 4905.32, Revised Code, by not charging special contract rates between February 2008 and December 2008. According to TE, Section 4905.31, Revised Code, does not apply because the Commission fixed the termination date on the contracts for February 2008 as authorized by Section 4905.31, Revised Code; furthermore, a utility cannot violate the non-discrimination requirements of Section 4905.32, Revised Code, by charging in accordance with its tariff (TE Br. at 16).

The complainants also argue that TE has mischaracterized the Commission's power to amend, alter, or modify contracts under Section 4905.31, Revised Code. The complainants point to Commission precedent for the proposition that the Commission's power to modify special contracts is an extraordinary power and exercising this power is subject to a "burden of the highest order."[7] The complainants submit that, in order to satisfy this burden, TE must show that the contract adversely affects the public interest. According to the complainants, the Commission's public interest test[8] incorporates the federal *Sierra-Mobile Doctrine*,[9] which provides that a utility contract can only be modified if it adversely affects the public interest by: impairing the financial ability of the utility to render service; creating an excessive burden on other customers of the company; or resulting in unjust discrimination. The complainants insist that TE has not, and cannot, produce any evidence that would satisfy this test and show that the special contracts adversely affect the public interest (Comp. Br. at 27-28). TE responds saying that the *Sierra-Mobile Doctrine* is a presumption of contract validity applied by the Federal Energy Regulatory Commission and federal appellate courts, which applies when a contracting party seeks to terminate its contract because the rates in the contract are unjust and unreasonable; however, according to TE this presumption is not applicable in these cases (TE Rep. Br. at 9).

Furthermore, the complainants submit that basic common law principles of contract law prevent TE from unilaterally changing the terms of the special contracts that were approved pursuant to Section 4905.31, Revised Code (Comp. Br. at 31). The complainants also contend that the 2001 amendments clearly memorialized a definitive termination date for the contracts to be the date the RTC charges ceased, and that TE can not attempt to use Paragraph VIII(8) of the RCP stipulation to modify the termination date of the contracts to make indefinite and already certain term (Comp. Br. at 34-35). TE argues that the

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7 *In the Matter of the Application of Ohio Power Company to Cancel Certain Special Power Agreements and for Other Relief*, Case No. 750161-EL-SLF, Opinion and Order (August 4, 1976).

8 *Id.*

9 *United Gas Pipe Line Co., v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

complainants have failed to sustain their burden of proving that TE has violated any laws, rules, or orders of the Commission. TE submits that, as contracts approved by the Commission pursuant to Section 4905.31, Revised Code, TE's contracts with the complainants are subject to "the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission" (TE Br. at 3-4).

According to the complainants, if the Commission did, in fact, unilaterally modify the special contracts, TE violated Section 4905.35, Revised Code, because "it discriminated in the highly divergent types of notice provided to its special contracts customers regarding the opportunity to extend their special contracts in the RSP Case" (Comp. Rep. Br. at 10). Furthermore, the complainants argue that TE violated Section 4905.35, Revised Code, by giving undue and unreasonable preference or advantage to nine of TE's special contract customers, while unduly prejudicing or disadvantaging the remaining 37 contracts customers, including the complainants. In support of their argument, the complainants note that, in accordance with the *ETP Case*, TE treated each of the special contract customers similarly by giving them direct notice and the same opportunity to extend their contracts. However, in the *RSP Case*, the complainants argue that TE unreasonably disadvantaged the complainants because TE failed to provide those special contracts customers who did not participate in the *RSP Case*, including the complainants, the same notice to extend the contracts that was received by special contracts customers who were represented by active participants in the *RSP Case* (Comp. Br. at 37-38). In response, TE states that it has not violated Section 4905.35, Revised Code, in that all customers were given the same opportunity to extend their contracts under the RSP order and no special contract customer that submitted a request for extension within the 30-day window was refused (TE Br. at 18).

The complainants assert that TE violated Rule 4901:1-1-03(B), O.A.C., because it failed to provide direct notice to the complainants describing the change in criteria or terms involving the opportunity for the complainants to extend their special contracts under the revised RSP. According to the complainants, the Revised RSP is a reasonable arrangement approved pursuant to Section 4905.31, Revised Code, and is a rate schedule that is publicly filed and enforceable; therefore, failure to provide notice to the complainants of the right to extend their contracts violates Rule 4901:1-1-03(B), O.A.C. (Comp. Br. at 39-40). Conversely, TE states that it has not violated Rule 4901:1-1-03, O.A.C., because: this rule only applies to tariffs and does not apply to special contracts under Section 4905.31, Revised Code; the extension opportunity provided for in the RSP order was not a change or modification to the terms on the special contracts; and, since disclosure under this rule is required within 90 days after the effective date of the new or modified rates schedule, the fact that the extension opportunity was limited to the 30-day window, renders the disclosure requirements moot (TE Br. at 20).

TE insists that the complainants cannot be permitted to collaterally attack the Commission's RCP order which, in effect, fixed the "date which RTC ceases" for purposes of the complainants' special contracts as each of the complainants billing dates in February 2008 (TE Br. at 10). According to TE, if the Commission were to find in favor of the complainants, it would be: putting into question the certainty of the Commission's orders; violating the unambiguous terms of the RCP order; and unreasonably benefitting the complainants by retroactively eliminating their risk of participating in competitive energy markets. TE asserts that the time for the complainants to extend their contracts was during the 30-day window in 2004, which is the same opportunity afforded to the other special contract customers, not in 2008, which benefits the complainants by eliminating their market risk entirely because the 2008 market prices are now known (TE Br. at 2, 13). TE submits that, given that this issue turns on an allocation of risk with regard to future market pricing, the only reasonable time to contest the termination dates that were fixed in the RCP order would have been at the time of the RCP order; however, TE points out that no party filed an application for rehearing or an appeal on this issue. Therefore, the Commission should reject the complainants' collateral attack on the RCP order, according to TE (TE Br. at 10-11). In response, the complainants state that, even if the complaints are considered collateral attacks on the RCP order as TE claims, the Ohio Supreme Court has recognized the use of complaints filed pursuant to Section 4905.26, Revised Code, "as a means of collateral attack on a prior proceeding"[10] (Comp. Rep. Br. at 9).

E. Conclusion

The complainants are seeking a determination by the Commission in these cases that the rates set forth in the special contracts entered into between the complainants and TE, as amended in 2001, should continue through December 31, 2008. The complainants insist that the 2001 amendments extend the special contracts through the date on which TE ceases collecting the RTC charge, which the complainants submit is December 31, 2008. On the other hand, TE insists that the special contracts terminate on the complainants' billing dates in February 2008, as provided for in the RCP, which is consistent with the ETP's method of calculating the end dates for the special contracts. Our consideration of the arguments raised by the parties in support of their positions requires a review of the stipulations and our orders in the *ETP Case*, the *RSP Case*, and the *RCP Case*. None of the complainants were parties in the *ETP Case*, the *RSP Case*, or the *RCP Case*, or members of an industrial group that was a party to those cases.

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 kWh sales level. In

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10 *Alinet Comm. Services, Inc., v. Pub. Util. Comm.*, 1 Ohio St.3d 22, 24 (1982); *Western Reserve Transit v. Pub. Util. Comm.*, 39 Ohio St.2d 16, 18 (1974).

response to this offer, the complainants opted to extend their initial special contracts and entered into the 2001 amendments with TE.

Next came the *RSP Case*. Of particular importance to the cases at hand is Paragraph VIII(8) from the Revised RSP stipulation, which reads as follows:

> This Plan does not affect the termination dates for special contracts as such dates would have been determined under [the *ETP Case*], but in no event shall such contracts terminate later than December 31, 2008, provided that, upon request of the customer, or its agent, received within 30 days of the Commission's order in this case, the Company may extend the term of any such special contract through the period that the extended RTC charge is in effect for such Company. . ..

The complainants did not request to extend their special contracts in accordance with the Revised RSP. As noted previously, the ETP stipulation required that TE provide notice to its special contracts customers that they had the option to extend their contracts; however, no such notification requirement was set forth in the Revised RSP stipulation or the order in the RSP Case approving the stipulation. Nonetheless, without specific language in the Revised RSP stipulation or order approving the stipulation, the complainants would have the Commission conclude in the instant cases that TE had an obligation to notify the complainants of the option pursuant to the Revised RSP to extend their special contracts beyond the termination date provided for in the 2001 amendments. The Commission disagrees. Essentially, we are being asked to find almost five years after our order in the RSP Case that TE should have provided written or oral notice to the special contract customers of the provision in the Revised RSP even though no such notice was required by the stipulation or any Commission order. Such a finding would clearly be inappropriate at this point in time. The Commission cannot determine, in hindsight, that TE should have provided notice when, in fact, neither the RSP stipulation nor the order required such notice. Additionally, the Commission cannot now require a modification to an approved stipulation to require the addition of such notice. Furthermore, the complainants acknowledged that the initial newspaper publication of the RSP Case referenced the RTC charge as an issue in the case. Moreover, the Commission finds no merit in the complainants' argument that equitable estoppel prohibits TE from arguing that the complainants should have known of the option in the RSP Case to extend the contracts because, due to the fact that TE notified them of this option in the ETP Case, the complainants reasonably relied upon TE to notify them in subsequent cases. It is undisputed on the record in these cases that, unlike the subsequent cases, the stipulation and the order in the ETP Case required TE to notify its special contract customers of the extension option. As TE notes, there is no evidence in the record in these cases that would lead to the conclusion that TE in any manner caused the complainants to believe, absent a

directive in a specific case such as the one in the ETP Case, that TE would provide notification to the complainants in subsequent cases.

In addition, as TE points out, the complainants have experts under their employ that are responsible for purchasing electricity for their Ohio facilities and they could have followed the *RSP Case* through the Commission's docketing system (Tr. 21, 34-35, 46-47, 61-62, 110-112). In fact, given that their special contract termination dates had been at issue in a similar prior proceeding before the Commission, i.e., the *ETP Case*, the Commission would imagine that the complainants' experts would follow subsequent related cases, such as the *RSP Case*. All 46 of TE's special contract customers had the same opportunity to participate in the *RSP Case* and all 46 of them were given the same opportunity under the Revised RSP stipulation to extend their contract. Therefore, contrary to the assertions of the complainants, there is no evidence that TE provided any preference or advantage to any of the 46 special contracts customers or that TE treated the nine special contracts customers that opted to extend their contracts within the 30-day window any differently than it treated the 37 special contracts customers that did not extend their contracts. In fact, to allow the complainants to collaterally attack our decisions in the *RSP Case* and the *RCP Case* at this late date may actually be viewed as providing the complainants with an unfair advantage over the nine contract customers who followed the cases and took the risk to extend their contracts at a time when today's market rates were not known to them.

Turning now to the provisions in the *RCP Case*, Paragraph 12 from the RCP stipulation is pertinent to our decision in these complaint cases and it states:

> The special contracts that were extended under the RSP shall continue in effect for each Company until December 31, 2008 for...Toledo Edison.... The special contracts that were extended as part of the ETP case, but not the RSP case, shall continue in effect until the special contract customers' meter read date in the following months (which are consistent with the ETP's method of calculation of the contract end dates):...Toledo Edison – February 2008;....

The complainants believe that 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 the RTC charges. However, as we stated previously, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level; thus, the February 2008 termination date was consistent with the ETP's method of calculation of the termination dates for the contracts. Furthermore, as pointed out by TE, the extension of the RTC collection through December 2008 did not affect the termination of the special contracts. As expressed by TE, we understand that part of the reason the RTC did not end earlier, as contemplated by the

parties to the 2001 amendments, was to stabilize rates by allowing TE to defer costs through 2008; the fact that the RCP enumerated the termination date of the special contracts for TE as February 2008, in accordance with the original method of calculation agreed to by TE and the complainants in the 2001 amendments, ensured that the special contracts were not disturbed by the extension of the RTC. Therefore, the Commission believes the record clearly reflects that, regardless of the sales calculation, no scenario results in continuation of the special contracts through December 2008. Thus, given the applicable language which addresses the termination date of the special contracts, we do not believe that the complainants could have reasonably relied on their contracts extending through December 2008. Moreover, the Commission notes that, similar to the arguments raised in the discussion of the *RSP Case*, the RCP stipulation likewise did not require notification of customers.

Accordingly, upon consideration of the evidence of record, the Commission finds that the complainants have not sustained their burden of proof and shown that 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, O.A.C. Furthermore, the Commission finds that any arguments made by parties and not addressed in this opinion and order are denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) TE is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code.

(2) The complainants individually entered into initial special contracts with TE between 1990 and 1997, whereby TE agreed to provide them electric service with the individual contracts expiring between 1995 and 2006.

(3) The complainants filed complaints against TE between January 23, 2008, and July 17, 2008.

(4) An evidentiary hearing was held in these matters on July 23, 2008. Briefs and reply briefs were filed by TE and the complainants on August 26, 2008, and September 26, 2008, respectively.

(5) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

(6) The complainants have not provided sufficient evidence to demonstrate that TE has violated any applicable order, statute, or regulation; thus, the complainants have not sustained their burden of proof.

ORDER:

It is, therefore,

ORDERED, That the complaints be dismissed. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

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

FEB 19 2009

Reneé J. Jenkins
Secretary

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

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

[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

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.	)	

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