IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2009-CA-00053

HILL BROTHERS CONSTRUCTION COMPANY **APPELLANT**

VS.

MISSISSIPPI TRANSPORTATION COMMISSION **APPELLEE**

BRIEF OF APPELLEE

On Appeal from the Circuit Court for the First Judicial District, Hinds County, Mississippi

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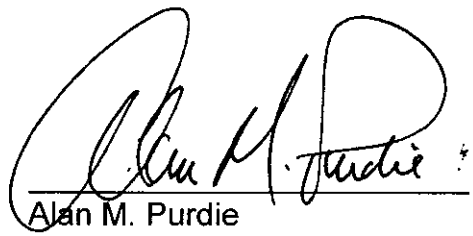
I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Plaintiff/Appellant Hill Brothers Construction
2. Defendant/Appellee Mississippi Transportation Commission.
3. Counsel for Appellee Mississippi Transportation Commission.
4. Counsel for Appellant Hill Brothers Construction



Alan M. Purdie

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IV. STATEMENT REGARDING ORAL ARGUMENT

Appellee does not think that this case raises any novel issues of law or complicated factual disputes that would require oral argument. Appellee believes that the record should be sufficiently clear and that oral argument would not be necessary. The Commission welcomes, however, any questions which the Court may have.

V. STATEMENT OF THE ISSUES

Whether the lower court correctly awarded summary judgment to Appellee, Mississippi Transportation Commission.

VI. STATEMENT OF THE CASE

A. Procedural Posture

Appellant/Plaintiff Hill Brothers Construction (hereinafter "Hill Brothers") filed its Complaint against defendant/appellee Mississippi Transportation Commission (hereinafter Commission) on February 15, 2007. (R. 4-66[1]) Although Hill Brothers lacked any privity of contract with the Commission on the construction project at issue in this case,[2] Hill Brothers asserted breach of contract claims against the Commission for alleged improper adjustments in payments by the Commission to Hill's alleged assignor, Travelers Casualty and Surety Company of America's (hereinafter "Travelers"). On March 27, 2007, the Commission filed an Answer asserting several defenses including the defense that the absence of Hill Brothers' alleged assignor Travelers from the action mandated joinder of Travelers or dismissal of this action. (R. 70-66.)

On February 8, 2008, Hill Brothers filed a motion for partial summary judgment seeking to have the lower court interpret Special Provision # 907-109-01, entitled "Measurement & Payment for Changes in Costs of Construction Materials (Fuels and Asphalt) (hereinafter the Fuel Adjustment Clause or "FAC"), a provision in state highway contract No. NH-0056-02(33)PH2/101815. (R. 90-151.) The Commission filed a cross motion for summary judgment . (R. 152-167.) A hearing

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[1] For this Brief, R. will refer to the Record and S.R. will refer to the Supplemental Record.

[2]Travelers predecessor in interest, D.B. Johnson Construction Company, contracted with the Commission for the construction project.

on Hill Brother's motion was held on September 26, 2008, and the lower court entered an order finding that the FAC provision challenged by Hill Brothers was not ambiguous. (R.2434.) The Commission's cross motion for summary judgment was heard on November 21, 2008, and the lower court entered its findings of fact and conclusions of law on December 12, 2008, holding *inter alia,* (1) that the Fuel Adjustment Clause was not ambiguous on its face or as interpreted and applied by the Commission; (2) that Appellant had standing to bring the action against the Commission; (3) that the Commission's application of the Fuel Adjustment clause was not contrary to the enabling and authorizing legislation for the Commission, found at Section 31-7-13(l) and, (4) that application of the Fuel Adjustment clause to Hill Brothers was not unconscionable. In so ruling, the lower Court determined there were no genuine issues of material fact and that the Commission was entitled to judgment as a matter of law. (R. 2520-2524.) Hill Brothers filed a notice of appeal on January 9, 2009. (R. 2528.)

B. Facts

On or about October 10, 2000, the Mississippi Transportation Commission ("MTC") awarded State Highway Contract No. NH-0056-02(33)PH2/101815 to D. B. Johnson Construction Company, Inc. (hereinafter "Johnson") for the construction of approximately 6.25 miles of Mississippi Highway 25 in Winston and Oktibbeha Counties. Per the terms of the contract, the contract completion date was set at October 13, 2003. Johnson defaulted on the contract, and the Commission called

upon Johnson's surety, Travelers to complete the contract. Travelers then became the prime contractor on the project. (R. 2193.)

Hill Brothers is a construction company that has been awarded numerous state highway construction contracts in the past. Prior to September 16, 2003, Travelers solicited pricing from Hill Brothers and other construction companies to complete the highway project. Hill Brothers (which had actually been a subcontractor on this same project for the prime, Johnson[3]) was ultimately successful in the bidding process and, on September 16, 2003, Hill Brothers and Travelers entered into an agreement to complete the project which incorporated all contract documents and special provisions contained in the Johnson contract with the Commission, including the FAC.

The FAC operates to adjust fuel compensation during the life of the contract in a straightforward manner. In the month that the contract is awarded, the market wholesale rate for gasoline, diesel and materials is determined using an industry index of bulk fuel monthly prices, for this project, Platt's Oilgram PAD 2 and PAD # 3 ("Platt's"). Once the base price is established per the applicable monthly index price, for each month thereafter up until the "completion date," Platt's rates for gasoline, diesel and materials is consulted to determine whether the contractor should be reimbursed at a higher or lower rate. According to long established practice and protocol, the State Construction Engineer sends out a monthly report of the price of gasoline and diesel that reflects the bulk fuel prices at that point in

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[3]*See* R. 2227. When Johnson was terminated, 67% of the contract had expired and 68% "of the work called for by the progress schedule had elapsed." *Id.*

time per the Platt's index regardless of the actual price at the pump. (R. 2192-99.) If there is a 5% or more increase[4] in the market rate from the previous month, the contractor is entitled to a fuel adjustment (upward or downward) that month. (R. 2196.)

If the contractor is still working on the project after passage of the completion date, there is no longer a month to month adjustment. Instead, the contractor continues to be paid at the rates set forth in Platt's index as it existed on the completion date, and there are no further adjustments in the gasoline, diesel and materials cost since:

> [a]fter the expiration of contract time, including all extensions, adjustments will be computed using fuel and material prices that are in effect at the expiration of the contract time.

(R 10-11.)

For the relevant time periods, the adjustments worked as follows: In October, 2000, the base price for gasoline was set at $1.3585/gallon and the base price for diesel at $1.2977/gallon. (R.129.[5]) In September, 2003 when Hill Brothers entered into the completion agreement, the applicable price for gasoline was $1.3541/gallon and the price of diesel $1.2595/gallon. On the completion date (March 12, 2004), the applicable price for gasoline was $1.5015/gallon and the price of diesel $1.4469/gallon. Thus, for the time period, September 2003 until

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[4]If the difference is less than 5%, there is no fuel adjustment.

[5]Prior to being terminated from the project, Johnson never complained about the FAC provision nor the adjustments made pursuant thereto.

March, 2004 (adjusted completion date), Hill Brothers billed and MDOT made price adjustment payments in the amount of $92,486. (R. 100.) When Hill Brothers completed the project, the applicable price for gasoline was $2.2033/gallon and the price of diesel $2.3425/gallon. (R. 2194.) For a period of time after Hurricane Katrina, gasoline and diesel prices spiked thereby increasing the cost to Hill Brothers to complete the project. Although Hill Brothers has been a party to at least nine (9) previous contracts with the Commission that contained the same FAC at issue in this appeal, Appellant contends it should have been paid $466,795 instead of the $92,000 MDOT paid Appellant for fuel adjustments during their tenure on the project, the difference reflecting the additional costs incurred as a result of Katrina-induced increased gasoline and diesel prices. (R. 100.)

The completion agreement between Appellant and Travelers is detailed and specified in particular what compensation would be paid to Hill Brothers up to a Guaranteed Maximum Price of $14,006.826.00. (R. 27-40.) That price could in turn be adjusted for various project occurrences to include additional costs incurred by the contractor in a variety of settings. *Id.* Under the cost-plus agreement, Travelers was also obligated to pay Hill Brothers whatever amounts it received from the MDOT for estimate pay items and for adjustment factors in the Johnson Contract, to include the FAC. In light of the original completion date, Hill Brothers negotiated for a different completion date with Travelers, moving the original date of October 2003 to June, 2006, over two years later. (R. 185; 2459.) This stratagem insured

that Appellant would be insulated from liquidated damages.[6] Notably, while Hill Brothers could have also negotiated for a separate fuel adjustment provision with Travelers, (as it did the original completion date) it chose not to do so, having found by experience, that "the dollar amount of the difference" between past fuel adjustments made by the Commission (using the exact methodology challenged in this case) and what it believed to be the proper adjustments were not "significant enough to pursue." (R. 100.[7])

VII. SUMMARY OF THE ARGUMENT

The current appeal concerns the Commission's interpretation of the last sentence of the FAC provision of the Johnson contract. Contrary to over twenty years of consistent application of the provision by the MDOT and the Commission, once Hill Brothers and/or its accountants determined that the settled view of the Commission as to the meaning of this provision resulted in payments less than optimal after completion of the project post Katrina, Hill Brothers offered an alternative interpretation of the provision. The provision Hill Brothers found objectionable, reads as follows:

> After the expiration of contract time, including all extensions, adjustments will be computed using fuel and material prices that are in effect at the expiration of the contract time.

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[6]As it turned out, Travelers ended up paying over $400,000.00 in liquidated damages while Appellant only paid approximately $12,400.00 or 3%. (R. 179; 2428.)

[7]In point of fact, Appellant even acknowledged that the methodology used by the Commission "were sometime favorable to Hill Bros." (R. 187.)

(R. 10-11.) After all is said, Appellant offers this Court only a myriad of alternative interpretations and/or more contractor- favorable applications of the provision, alleged to be equal or greater than the Commission's interpretation in plausibility and a better fit with the statutory authorization. As demonstrated herein, the FAC is clear on its face as to when and in what manner it applies, and the Commission's interpretation fits rationally with the legislation authorizing its inclusion into the construction contract at issue here.

VIII. ARGUMENT AND AUTHORITIES

A. Standard of Review

The standard of review of a lower court's grant of summary judgment allows this Court to review the record de novo to determine if there was error on the part of the trial judge in granting the motion. *Mallet v. Carter*, 803 So.2d 504, 509 (Miss. 2002). As courts of this state do not have the power to make contracts where none exist, unless a contract is ambiguous, interpreting its meaning is a question of law, not fact. *A & F Props., LLC v. Madison County Bd. of Supervisors*, 933 So. 2d 296, 301 (Miss. 2006); *Citizens National Bank of Meridian v. L. L. Glascock, Inc.*, 243 So. 2d 67 (Miss. 1971),[8] and summary judgment will be affirmed if there is no genuine issue of material fact present as to the meaning of the contract. Miss. R.

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[8] *See also Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So. 2d 765, 769) (Miss. 2005) (Court "will not rewrite or deem a contract ambiguous where the language is clear and indicative of its contents");*UHS-Qualicare, Inc. v. Gulf Coast Community Hospital Inc.*, 525 So.2d 746, 754 (Miss. 1987) ("the words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy"). *Ross v. Western Fidelity Ins. Co.*, 872 F.2d 665, 668 (5th Cir. 1989) ("interpretation of a contract is a question of law, including the question whether the contract is ambiguous")

Civ. P. 56[c] Both the trial and appellate courts must "accept the plain meaning of a contract as the intent of the parties where no ambiguity exists." *Ferrara v. Walters*, 919 So. 2d 876, 881 (Miss. 2005)). Canons of construction are irrelevant where the court finds the contract unambiguous. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 752-53 (Miss. 2003) (unless court finds contract ambiguous, it will not "go beyond the text to determine the parties' true intent.")

ARGUMENTS

Argument I: The FAC Is Clear and Unambiguous on its Face and the Lower Court Did Not Err in Granting Judgment as a Matter of Law to the Commission

The lower court determined on two separate occasions that the provision at issue was clear and unambiguous both as read by and as applied by Appellee. Inasmuch as the clause was free of ambiguity, judgment on behalf of the Commission followed as a matter of course. *See Pursue Energy Corp. v. Perkins* , 558 So. 2d 349, 352 (Miss. 1990) (instrument that is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity, must be given effect); *Gaston v. Mitchell* , 4 So. 2d 892, 893 (Miss. 1941) ("construction aids are available only to interpret ambiguity [and] ambiguity may not be created in order to make available a rule of construction").

Without a doubt, the parties disagree about the meaning of the FAC as well as the scope of its application after expiration of contract time. The Commission contends that Special Provision 907-109-10 is capable of clear understanding from

its plain reading. Fuel adjustments are made between contract letting and the completion date but become fixed or locked during the month of completion once the contract time expires. Essentially, Hill Brothers' entire position may be properly viewed as a disagreement about the meaning of this provision. Such disagreement will not make the provision ambiguous, however. *Turner v. Terry*, 799 So. 2d 25, 32 (Miss. 2001); *Cherry v. Anthony*, 501 So.2d 416, 419 (Miss. 1987) Appellant has taken two alternate routes below (and now here) to have the court validate its request for some half a million dollars additional compensation: (1) that the provision is either clear and unambiguous but wrongly interpreted by the Commission; or, alternatively, (2) that the provision is ambiguous on its face and/or as applied by the Commission. These positions are addressed in the order presented by Appellant's brief.[9]

Alternative I: ***The Commission's interpretation is contrary to its plain language and contrary to the provision's "stated principal purpose ."***[10]

Appellant's initial tact is to argue that the provision is actually unambiguous, and the Appellee's construction is merely wrong. (Brief of Appellant at pp.17-13;20-28) Appellant urges the Court to find that there actually is a "plain meaning" to the

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[9]Stated succinctly, the order of argument presented by Appellant in its brief is as follows: (1) that the *interpretation* of the FAC provision by Commission is contrary to its plain meaning and stated purpose; (2) that the provision is ambiguous and thus may be construed against the Commission by application of the doctrine of *contra proferentem* and (3) if the provision is found unambiguous and consistent with the Commission's interpretation, it exceeds the statutory authority of the Commission. (See Brief of Appellant at p. 5.)

[10]*See* Brief of Appellant at p. 1; 12-14.

words employed in Special Provision 907-109-10 and that the real and objective intent of the contracting parties may be ascertained by the "four corners" of the document (contract) at issue. (*See* Brief of Appellant at pp. 17-19 citing cases.) According to this argument, the provision's plain meaning is that once the contract time expires, fuel prices will continue to be adjusted using Platt's index of prices for the month that the contract expired as a baseline for periodic adjustment until the end of the project. To reach this "plain" reading of the provision, Appellant proffers its own special vocabulary involving "Factor I" and "Factor 2." (Brief of Appellant at pp. 20-22.) This argument's validity hinges solely on the phrase "adjustments will be computed" in the last sentence of the special provision. According to Appellant, the Commission's construction renders this phrase nonsensical and inconsistent with the stated purpose of the provision. In pertinent part, the contract provision provides as follows:

> 907-109-07 – Changes in Material Costs. Because of the uncertainty in estimating the costs of petroleum products that will be required during the life of a contract, adjustment in compensation for certain materials is provided as follows:
>
> Bituminous products – each month the Department will acquire unit prices from producers or suppliers who supply the State highway construction industry with bituminous products. The average of all quotes for each product will serve as the base price for contracts let in the subsequent month.
>
> Fuels- Selected case price quotations for bulk gasoline and diesel fuel will be taken from Platt's Oilgram PAD 2 and PAD 3. The appropriate adjustment per gallon for gasoline and diesel fuel will be added to the quotations to allow for taxes and markups. The prices thus determined will serve as the base prices for contracts let in the subsequent month.

The established base price for bituminous products and the fuels will be included in the contract documents under a Notice to Bidders entitled "Petroleum Products Base Prices for Contracts let in the (Month and Year)."

> Each month thereafter the Engineer will be furnished with the current monthly prices. Adjustments for change in cost will be determined from the difference in the contract base prices and the prices for the period that the work is performed and for the quantities completed provided the price change in a products more than five percent. Adjustments may increase or decrease compensation depending on the difference between the base prices and the prices for the estimated period.
>
> The Adjustments will be determined for the quantities of bituminous products and the average fuel requirements for processing a unit of work as set forth below.
>
> * * * *
>
> After the expiration of contract time, including all extensions, adjustments will be computed using fuel and material prices that are in effect at the expiration of the contract time.

As is clear from the provision's text, during the life of the contract, adjustments are based on Platt's index. After the contract expiration, there is no further recourse to monthly variations in Platt's indices. Adjustments in compensation are then based on the index price "in effect at the expiration of the contract time," in this case March, 2004. Appellant's argument regarding whether "adjustments" are actually made at the expiration of contract time is nothing more than semantics. [11] Compensation to the contractor goes up or down throughout the life of the contract, and adjustments are made if the threshold of 5% is reached; the only difference is that at the end of the contract time, the adjustment is based on Platt's Oilgram index

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[11] As the lower court correctly perceived. *See* Suppl. R. Vol. 1 of 1, p. 23 ("That's still an adjustment is it not? It's an adjustment from the base price.")

price in effect at that time. Of note, even if the petroleum prices go down by 5 % or more, Appellee still adjusts the payment to the contractor based upon the price in effect at the expiration of contract time.

The adjustment of fuel prices is a stated purpose of the provision. Beyond that, in the absence of directly relevant history as to the provision, little else can be said. Appellant's argument that the Commission's interpretation runs counter to a more specific purpose–reducing uncertainty "during the life of a contract" – proves too little. Appellant has argued from the inception of this dispute that the phrase "contract time" is not ambiguous and has a meaning upon which all parties can agree – the "time allowed in the Contract for completion of the work (herein referred to as the 'Contract Time')."[12] The "life of a contract" extends only to its expiration. While the project may continue on, the life of the contract ends at an appointed time.

The completion agreement between Travelers and Hill Brothers did continue the project's life beyond the contract between the Commission and Johnson which ended in 2004. However, Appellee was not a party to that agreement, and the Commission did not extend the contract time by action upon its Minutes. The fact that the Travelers-Hill Brothers' completion agreement allowed Hill Brothers until 2006 to complete its work and allowed Hill Brothers to continue to receive fuel adjustments does not require the Commission to offer the same adjustments as before the contract time expired.

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[12]R. 98.

Appellee would be remiss at this point in not calling attention to Appellant's "gambling" argument or the notion that uncertainty is created by the agency's interpretation of the FAC. But for pure chance, the FAC could have worked to the detriment of Appellee. (Brief of Appellant at pp. 22-26.) The record shows that at times the agency's interpretation of the plain meaning of Special Provision 907-109-07 has favored Appellee and, at other times, Appellant.[13] Whether this interpretation may do mischief to other overdue contractors in the future or, alternatively, the Commission is completely irrelevant.[14] Appellee agrees that the purpose of the provision during the life of the contract is clearly set forth–the reduction of uncertainty "during the life of the contract." (Brief of Appellant at p. 24.) Yet, whatever its laudatory purpose during the life of the contract, that purpose cannot be revived and injected into the expired contract ("after the expiration of contract time") because the plain meaning of the provision actually forbids such an extrapolation. Ill advised or not, this is the only reasonable reading of the language used--its "plain meaning." Provided with at least two opportunities to determine that

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[13]R. 187 (adjustments favorable to Appellant); R. 159 (adjustments favorable to the Appellee)

[14]Appellant's argument here suggests some overbreadth analysis. Whatever its merits in the First Amendment arena, this doctrine is not a canon of contract construction and adds nothing to Appellant's argument. Appellant presents this argument under the heading "Laws and Public Policy." Brief of Appellant at p. 24. Yet, Appellant's presentation here actually runs contrary to the analytical framework of the "four corners" approach espoused here. *See Landry v. Moody Grishman Agency, Inc.*, 181 So. 2d 134, 139 (Miss. 1965) (what the parties may have meant or intended not relevant) *Mississippi State Highway Commission v. Patterson Enterprises, Ltd.* 627 So.2d 261, 263 (Miss 1993) (courts 'concerned with what the contracting parties have said to each other"); *IP Timberlands Operating Co. V. Denmiss Corp.*, 726 So. 416 (Miss. 1987) (same).

the language at issue meant something else entirely, the lower court was correct in holding that the agency's interpretation was consistent with the provision's plain meaning, and its holdings should be affirmed.

The second thrust of the "plain meaning" argument is that the agency's interpretation runs contrary to the statutory mandate that all fuel adjustments be made "with relation to the cost to the contractor." (Brief of Appellant at pp. 24-25.) Miss. Code Ann. § 31-7-13(I) authorizes the Commission to include in highway construction contract documents, provisions allowing price adjustments. The legislation neither limits the time period of those adjustments nor describes in any temporal way in what manner they should operate. When adjustments are made, they need only be "based upon an industry-wide cost index of petroleum products." Both during the life of the contract, as well as after expiration of contract time, an industry-wide cost index" is consulted. Miss. Code Ann. § 31-7-13(I). Moreover, should the Commission choose to include a FAC, the statute itself provides the Commission unfettered latitude as to "the basis and methods of adjusting unit prices." *Id.* In short, this argument has no merit.

The remainder of Appellant's arguments directed toward the agency's alleged misinterpretation of the "plain meaning " of the provision (Brief of Appellant at pp. 26-27) is merely a rehash of the previous arguments and requires little response. To briefly sum up, neither the statutory authorization for inclusion of the FAC nor the language of the clause itself support the proposition that the clause is intended to protect against uncertainty in petroleum prices for the life of the construction project. By its plain meaning, the protection afforded is limited in scope

and time–"the life of the contract." Appellant's attempt to now equate the phrase "life of the contract" with some ill defined "life of the project" ("until the work has been completed and finally accepted") proves the fallacy of its approach. (Brief of Appellant at pp. 27.)

Under Appellant's approach, adjustments could continue interminably as one prime contractor is replaced by another, thereby increasing the attendant costs to the state in overseeing the project. The Commission's approach instead provides a workable "expiration of contract time" bright line. Successor contractors may always shift the risk of uncertainty to the bonding company that engages them as it sees fit , thereby avoiding further waste to the state.[15] The cardinal rule of construction of a contract is to ascertain the mutual intentions of the parties. *Hoerner v. First Nat'l Bank of Jackson*, 254 So.2d 754, 759 (Miss. 1971). *See also Rubel v. Rubel*, 75 So.2d 59 (1954); *Cooper v. Crabb*, 587 So.2d 236, 239, 241 (Miss. 1991). For better or worse, the intent of these parties is clear from an objective reading of the words employed in the FAC and the lower court should be affirmed.

Alternative II: ***The fuel adjustment provision is ambiguous as it is unclear "which of two price adjustment factors is being changed "after expiration of contract time"***[16]

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[15]They did it in this case. *See* Completion Agreement.

[16]*See* Brief of Appellant at p. 1. In light of Appellant's constant recourse to extra-contractual terminology, it bears pointing out that neither the FAC provision nor the enabling legislation, speaks of "price adjustment factors." While it may have merit as a cognitive tool for organizing Appellant's thoughts, it seems just as great a distraction to the court's task in determining whether the provision is ambiguous.

Here and in the Court below, Appellant argued the FAC was actually vague and ambiguous, a position mutually exclusive to its argument that the Commission simply does not know how to apply its plain meaning. To arrive at this conclusion, Appellant deploys a multi-step approach. First, Appellant describes the price of fuel at contract letting as an "adjustment factor." (*See* Brief at p. 29.[17]) Respectfully, inasmuch as the baseline never adjusts, it is not an "adjustment factor."[18] Plainly put, the baseline price never changes. To suggest that the Commission changes the baseline at the expiration of contract time is creative but not correct. Next, Appellant describes the MDOT monthly price indices as the second "adjustment factor." *Id.* From there, Appellant forms the premise of its entire ambiguity argument–

> When the allowable contract time runs out, the last sentence of the petroleum price adjustment provision replaces one of these factors with the prices in effect at the expiration of contract. However, the petroleum price adjustment provision does not specify whether this new criterion replaces original Factor 1 or Factor 2. The Commission argues for Factor 2 but, for reasons previously given, Factor 1 is more logical. If arguments can be made for either Factor, then the provision must be regarded as ambiguous.

(Brief of Appellant at p. 29.) There are numerous problems with this formulation.

First, "the last sentence of the petroleum price adjustment provision" does not "replace one of these factors" when the contract expires. The "established base

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[17][T]he Commission . . . before expiration of contract time, employs two adjustment factors: Factor 1 being baseline pricing established in the bid notice and resulting contract. . .

[18]"The established base price for bituminous products and the fuels will be included in the contract documents under a Notice to Bidders entitled 'Petroleum Products Base Prices for Contracts let in the (Month and Year)'"

price" is operative at contract bid and letting. (Special Provision 907-109-07.) The "last sentence of the petroleum price adjustment provision" is operative at "expiration of contract time." *Id.* One provision operates at the beginning of the contract; the other at its end. The Commission has not argued that the prices in effect and adjusted monthly during the contract (Appellant's "Factor 2") are "replaced" by anything at the expiration date. The monthly adjustments simply cease at contract's end. Properly understood, Appellant's approach here really is no more than an attempt to make "project time" equal "contract time." Neither the contract language nor the parties' past experience warrant such a reading of the document. *See Gaston, supra.*, 4 So. 2d at 893 ("ambiguity may not be created in order to make available a rule of construction"). Finally, whatever merit Appellant's approach may have as an equitable argument derived from special pleading, it is certainly not a logical one.

Further, the Court should not disregard every well established canon of contract construction in favor of *contra proferentem*, a doctrine which "does not assist in determining the meaning that the two parties gave to the words," but instead is "a rule of policy, generally favoring the underdog." 5 Corbin on Contracts, § 24.27. *See, e.g., Klapp v. United Insurance Group Agency, Inc.*, 663 N.W.2d 447, 456-57 (Mich. 2003) (reasoning that *contra proferentem* "is only to be applied if the intent of the parties cannot be discerned through the use of all conventional rules of interpretation, including an examination of relevant extrinsic evidence" because

"a method of construing a contract that helps ascertain the intent of the parties should be preferred over one that does not")[19]

Thus, though Appellant articulates a host of construction aids recognized in the jurisprudence of this state (Brief of Appellant at pp. 17-19), it chooses to ignore all of them in favor of this doctrine. While Appellee believes that the contract obligations in this case are clear and that the parties' intentions can be ascertained solely from the wording of the contract itself, *Barnett v. Getty Oil Co.*, 266 So.2d 581, 586 (Miss. 1972), Appellee would be remiss in not pointing the Court to the undisputed post-formation evidence that evinces "the construction which the parties themselves have given to a contract in the course of their life together under it" *UHS-Qualicare, Inc. supra*, 525 So.2d at 754 (*citing* Restatement (Second) of Contracts § 202(4) (1981))[20] as well as the acknowledged course of performance of both parties to this dispute on past highway construction projects.

The time allowed to complete the contract was extended to March 13, 2004 by the Commission. From the time that Hill Brothers took over the project in September, 2003, until March 16, 2006, when Hill Brothers completed the contract, application of the FAC was uncontested. Moreover, it remains undisputed that Hill

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[19]See also Restatement (Second) of Contracts, § 206 (doctrine provides that "[i]n choosing among reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.")

[20]Under the Restatement, "any course of performance accepted or acquiesced in without objection *is given great weight in interpretation of the agreement.*" Restatement (Second) of Contracts § 202(4) (emphasis supplied)

Brothers has been aware of this contract provision for years, it has known how it operated and without objection, accepted its benefits when it suited its purposes. The only difference in now and then is that the contractual term never operated to Appellant's detriment in the past. The fact that it did here lends no legal merit to any of Appellant's present arguments in this case. Again, while Appellee steadfastly contends there is neither patent nor latent ambiguity in this contract whatsoever, this undisputed evidence is relevant in ascertaining the intent of the parties long before the Court arrives at the last resort rule of *contra proferentem.*[21]

Additional reasons exist for rejecting the *contra proferentem* alternative, however. For example, the record shows Hill Brothers is a sophisticated vendor. It has participated in numerous highway construction projects and has demonstrated that level of sophistication with its contract with Travelers. Under such circumstances the rule should not be applied. *See e.g Beanstalk Group, Inc. v. AM General Corp.*, 283 F.3d 856, 858 (7th Cir. 2002) (doctrine does not apply where parties are commercially sophisticated); *Pacifico v. Pacifico*, 101 AD2d 709 (N.J. 2007) (same). In sum, Appellant's arguments for ambiguity in this contract have no merit, and the lower court's decision should be affirmed in all particulars.

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[21]See also *Mississippi State Highway Commission v. Dixie Contractors, Inc.*, 375 So.2d 1202, 1205-06 (Miss. 1979) (construction against the drafter rule should not be used to resolve an ambiguous meaning without consideration of the drafting party's evidence)

Argument II. Application of the clause to Hill Brothers does not violate Miss. Code Ann. § 31-7-13(l)

Pursuant to Miss. Code Ann. § 65-1-8(l)(e), the Mississippi Transportation Commission has broad general powers to "take such actions [as are] necessary and proper to discharge its duties pursuant to . . .law. " One such action taken long ago by the Commission was the promulgation of fuel and material adjustment provisions in its contracts pursuant to the statutory authority contained in Miss. Code Ann. § 31-7-13(l), which, in pertinent part, reads as follows:

(l) Road construction petroleum products price adjustment clause authorization

> Any agency or governing authority authorized to enter into contracts for the construction, maintenance, surfacing or repair of highways, roads or streets may include in its bid proposal and contract documents a price adjustment clause with relation to the cost to the contractor, including taxes, based upon an industry-wide cost index, of petroleum products including asphalt used in the performance or execution of the contract or in the production or manufacture of materials for use in such performance. . . The price adjustment clause shall be based on the cost of such petroleum products only and shall not include any additional profit or overhead as part of the adjustment. The bid proposals or document contact shall contain the basis and methods of adjusting unit prices for the change in the cost of such petroleum products.

Miss. Code Ann. § 31-7-13(l). As the lower court determined, the enabling legislation does not mandate that the Commission include a FAC, much less any particular variety. Unless the agency's interpretation is repugnant to the plain meaning of the statute, this Court should defer to the agency's construction of the provision, *Mississippi State Tax Comm'n v. Lady Forest Farms, Inc.*, 701 So.2d 294, 296 (Miss.1997); *Kerr-McGee Chem. Corp. v. Buelow*, 670 So.2d 12, 16

(Miss.1995) and that interpretation given deference. *Williams v. Puckett*, 624 So.2d 496, 499 (Miss.1993); *Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So.2d 586, 593 (Miss.1990); *Melody Manor Convalescent Ctr. v. Mississippi State Dept. of Health* , 546 So. 2d 972, 974 (Miss. 1989).

Appellants' argument that the agency's construction of Special Provision 907-109-07 is repugnant of Miss. Code Ann. § 31-7-13(l) is a nonstarter for a number of reasons. First, Appellants' very argument has been rejected almost twenty-five years ago by this Court in the case of *Farrish Gravel Co., Inc. v. Mississippi State Highway Comm.*, 458 So.2d 1066, 1068-69 (Miss. 1984.) It states in pertinent part, to wit:

> On April 28, 1981, the Commission adopted a new provision, viz, "After the expiration of contract time, including all authorized extensions, adjustments will be computed using fuel and material prices that are in effect at the expiration of contract time."
>
> * * * *
>
> Appellants contend that the Mississippi State Highway Commission was not required by statute to include the petroleum adjustment in its contracts and, since the Commission made the decision to do so, the petroleum adjustment could not be limited just to the work done during the contract period. The Commission contends that the determination of how to implement the petroleum adjustment clause was a function within the policy-making powers of the Commission. We recognize that government agencies have only such powers that are expressly granted to them, or necessarily implied in their grant of authority. Any acts which are not so authorized are void. *Strong v. Bostick*, 420 So. 2d 1356 (Miss. 1982); *Golding v. Salter*, 234 Miss. 567, 102 So. 2d 348 (1958).
>
> We have not been cited cases by the parties dealing with the petroleum adjustment clause and the Commission's implementation of it. In his opinion, the chancellor said:

The Highway Department had written the provision into the fuel adjustment portion or provisions of its contracts without any stated authority in the minutes of the Commission a clause which provided that the fuel adjustment provisions would not be applicable to the period of time falling after the stated completion date of the contract. In the case at bar, as I understand the evidence, the price of fuels continued to go up after the date of the bid letting or the acceptance by the Highway Department, and these that are involved here went into overtime or past the contract due date. The provision in the contract had provided that there would be no price escalation or des-escalation [sic] up or down on the fuels for the period beyond the date specified for the completion of the contract. These claims were for the period of time which did go past completion dates. The testimony was, then, that the clause eliminating the fuel adjustment for the period of time falling past the contract date was eliminated itself from the Highway Department contracts, again without any written minutes authorizing that. Later, the fuel adjustment clause was, to a modified extent, put back in, pegging the price of fuels as of the time that the contract expired or the time for completion of the contract expired, no matter how long it took to complete it thereafter.

It is the opinion of the Court that the Highway Department had the right to put the clause which eliminated fuel escalation for the period after the contract completion date into the contracts as being under the permissive authority granted by the Legislature in I believe the '75 Act. The Court is not saying it thinks that was a wise decision. I don't know that it is required to be wise or that everybody agrees that it is. I have not really understood the objection to the Highway Department, that the Highway Department has had, to the fuel escalation clause as anything other than really what amounts to a further penalty, but then I think they had the right to do it. If the fuel escalation clause is not properly drawn, then it ought to be redrawn, the whole fuel escalation, so as to do what was intended, and that was simply to vary the price of the contract to fit the currect [sic] price of fuel. That way, I certainly agree with Mr. Dunn that it was not designed to be a profit or loss of profit in that sense, but it was within the scope of authority, I think, of the Highway Commission to do. It was put into the contracts. The contracts were examined. Pre-letting sessions were held in which no one protested that. All of the contractors knew or should have known what the provisions were. They all accepted that, and as Mr. Dunn pointed out, the price could have gone down as well as up, and if it had gone down, then the Highway Department would in the view of this Court have been required to take that into just as much consideration as they would if the price went up, since it was a contractual part of the contract.

* * * *

Witnesses for appellants, principally contractors, were frank to state that, if they felt they could not complete a job on time, they would not bid on it.

We are of the opinion that there is no merit in this assignment. *Farrish Gravel Company, Inc. v. Mississippi State Highway Comm.*, 458 S.2d 1066, 1068-69. (Miss. 1984). Accordingly, this argument should be rejected and the lower court affirmed simply on the basis of *stare decisis.*

Secondly, it is well settled that agencies like the Commission may act within the authority expressly granted to them by the legislature and exercise that authority "necessarily implied" from the applicable statutes to effectively carry out its duties and responsibilities. *See, e.g. Wilkerson v. Mississippi Employment Sec. Comm'n* , 630 So. 2d 1000, 1001 (Miss. 1994); *State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n* 538 So. 2d 367, 373 (Miss. 1989); *Mississippi Milk Comm'n v. Winn-Dixie Louisiana, Inc.* , 235 So. 2d 684, 688 (Miss. 1970). The Commission's right to determine how price adjustments for fuel consumed during a construction project will be made is "necessarily implied" from Miss. Code Ann. § 31-7-13(l)'s proviso that the Commission determine "the basis and methods of adjusting unit prices for the change in the cost of such petroleum products" as set forth in the "bid proposals." The Commission, no doubt, has the statutory authority to determine how the fuel adjustments are made and to "lock in" those adjustments at the end of contract time. In short, there is simply nothing in this record to support Appellant's argument that the Appellee exceeded its statutory authority.

XI. CONCLUSION

Special Provision 907-109-07 is clear on its face as to when and how it applies. The Commission's interpretation of that provision fits rationally with the

legislation authorizing the FAC's and in particular the one here. This same provision has been consistently applied for over twenty years by the MDOT and the Commission. Appellant's statutory argument was rejected decades ago. Appellant offers no good reason to reject the long settled interpretation of this fuel adjustment clause. Aside from that, there is no ambiguity whatsoever in the provision that would create the need for construction or, alternatively, rejection of the well settled meaning on public policy grounds under the doctrine of *contra proferentem.*[22] The lower court should be affirmed on all bases and this matter dismissed. Appellee requests any further relief the Court may find warranted.

Respectfully submitted, this the 30th day of October, 2009.

MISSISSIPPI TRANSPORTATION COMMISSION

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[22] *See Farrish Gravel Company*, 458 S.2d at 1070 ("If the Courts should sustain the position of the appellants, then there would be a new day in Mississippi contract law and chaos in the interpretation and enforcement of contracts")

CERTIFICATE OF SERVICE

I, Alan M. Purdie, do hereby certify that I have caused a true and correct copy of the above and foregoing document, pleading or instrument to be served via United States mail, postage prepaid, upon the following:

Honorable William F. Coleman
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This, the 30th day of October, 2009.

Alan M. Purdie