IN THE SUPREME COURT OF MISSISSIPPI

CASE NUMBER 2009-CA-00053

HILL BROTHERS CONSTRUCTION COMPANY, INC.,

Appellant

vs

MISSISSIPPI TRANSPORTATION COMMISSION,

Appellee

Appeal from Final Judgment of Hinds County Circuit Court, First Judicial District (Hon. William F. Coleman, Circuit Judge) on Appellee's Motion for Complete Summary Judgment

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REPLY BRIEF

ORAL ARGUMENT REQUESTED

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November 12, 2009

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REPLY BRIEF

Pursuant to the applicable Mississippi Rules of Appellate Procedure, Appellant Hill Brothers Construction Company ("Hill Bros.") files its Reply Brief in response to the Brief of Appellee, Mississippi Transportation Commission ("Commission").

I. <u>The Commission's Interpretation of the Petroleum Adjustment Provision Is Not Reasonable</u>

A. Case Studies

At issue before the Court is the correct interpretation and proper application of Special Provision No. 907-109-01, dated 12/4/97, entitled "Measurement and Payment for Changes in Cost of Construction Materials (Fuels and Asphalt) (R.E. 9, R. 2189) promulgated by the Mississippi Department of Transportation ("MDOT"), as the operating agency for and on behalf of the Commission. This Special Provision was incorporated in the highway construction contract *sub judice* and is commonly included in all of the Commission's highway construction contracts. Hill Bros. refers to this Special Provision as the "petroleum price adjustment provision". The Commission calls it the "Fuel Adjustment Clause" or "FAC".

Specifically at issue is the last sentence inserted by MDOT into the petroleum price adjustment provision. This sentence states:

> 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.

(R.E. 11, R. 2191). The Commission claims its interpretation "fits rationally with the legislation authorizing" such adjustment provisions (Brief of Appellee at 25-26), whereas the Commission brands Hill Bros.' interpretation as "more contractor-favorable". (Id. at 9).

Because of conflicting characterizations made of the petroleum price adjustment provision at issue, Hill Bros. offers the following case studies and illustrations in hopes of clarifying the operation and effect of the Commission's interpretation of the provision at expiration of allowable contract time as contrasted with what Hill Bros. believes is the proper and logical interpretation.

Contractors are instructed by MDOT's bid documents to estimate the cost of gasoline and diesel fuel usage based upon set prices which are established by MDOT for each project being bid and which are incorporated by MDOT in the bid and contract documents. For the examples in the case studies hereafter, it is assumed that MDOT has established in the bid documents an original petroleum baseline price of $2.50 per gallon of gasoline for a contract which is scheduled by MDOT to last two and one-half years. This means contractors are obligated to price the work assuming gasoline usage at $2.50 per gallon, expecting MDOT to adjust pricing during performance to account for fluctuations, up or down, for actual prices paid for gasoline.

Further assume for these case studies that it takes the contractor three years actually to finish the work and to get MDOT's acceptance. Both parties agree on how the petroleum price adjustment provision operates during the two and one-half years of allowable contract time: MDOT pays with each monthly progress payment, or "estimate", a fuel adjustment for each gallon consumed in the work based upon the difference between (1) MDOT's baseline price, here $2.50 per gallon, and (2) the fluctuating monthly market price, as reflected in Platt's Oilgrams, which are the industry-wide indices used for establishing prevailing market prices for petroleum products. Thus, if Platt's Oilgram for a month lists gasoline at $2.60 per gallon, the contractor would receive with his monthly payment an adjustment of an added 10¢ per gallon ($2.60 per gallon actual - $2.50 baseline) for all gallons of gasoline consumed that month, but if the Platt's Oilgram had gasoline at $2.45 per gallon, the contractor's monthly pay would be decreased by a nickel ($2.45 - $2.50) for every gallon of gasoline the contractor consumed for the month. In this manner, the petroleum price adjustment provision makes the price of fuel completely neutral to a contractor's profit or loss. The contractor has figured $2.50 per gallon in its bid. If gasoline prices go up, the contractor is made whole for the incremental increase. If gasoline prices go down, the lower index figure approximizes the savings realized by the contractor in his actual purchases and this differential is subtracted from MDOT's pay estimate for the month.

The difference in interpretations lies with what happens when the contractor must work past allowable contract time to finish the job. In the example given, a duration of two and one-half years is estimated by MDOT and made a condition of the contract. This is referred to as the "allowable contract time". However, in the example, it takes the contractor three years to complete the work, which is six months past expiration of allowable contract time. The additional duration is sometimes referred to as the "penalty period" because MDOT assesses liquidated damages against the contractor for each day it takes the contractor to finish the job after allowable contract time has expired.

To illustrate what occurs with respect to fuel adjustments, two cases are postulated. In one, gasoline just happens to be $2.75 per gallon at expiration of contract time. In the other case, gasoline just happens to be $2.30 per gallon at expiration of contract time. Obviously, where gasoline prices happen to land at expiration of contract time could not possibly have been predicted reliably two and a half years earlier when the $2.50 per gallon price was established by MDOT as the contract baseline price. The actual price at expiration of contract time is utterly fortuitous, completely beyond the ability of either MDOT or the contractor to influence.

Case 1: **$2.50 per gallon baseline price**
$2.75 per gallon at expiration of allowable contract time

Commission's Interpretation

Under the Commission's interpretation, after expiration of allowable contract time, MDOT pays a fixed differential of an additional 25¢ per gallon, ($2.75 - $2.50), regardless of the contractor's actual costs of gasoline purchases thereafter. Prices do not adjust, so the price of $2.75 is locked in. Remember that the contractor has already factored in $2.50 per gallon because of the baseline pricing stipulated in the bid documents. However, under the Commission's interpretation, MDOT would actually pay $2.75 per gallon for every gallon of gasoline consumed by the contractor's entire fleet of equipment assigned to the job for the extra six month duration given in the example for the contractor to finish the project. If prices go down after expiration of contract time, the contractor still receives a fixed payment of $2.75 per gallon, reaping a completely fortuitous windfall by the amount prices actually decrease below $2.75 per gallon. This oddity is admitted by the Commission: "Of note, even if 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." Brief of Appellee at 14.

Hill Bros.' Interpretation

Under Hill Bros.' interpretation of how the petroleum price adjustment provision should be applied at the expiration of contract time, the price of $2.75 per gallon becomes the new baseline for figuring further price adjustments. If prices rise after the expiration of contract time, the contractor is paid only the incremental difference of the additional amount by which actual purchase prices exceed $2.75 per gallon. If prices decline after expiration of contract time, the amount by which prices fall below $2.75 per gallon would be subtracted from the contractor's payment.

To explain further, assume for Case 1 that actual prices rose to $2.90 per gallon after expiration of contract time. What would be the effect on payments to the contractor under each interpretation?

At $2.90 per gallon, under the Commission's interpretation, there is no adjustment in price and MDOT would pay the contractor the locked-in price of $2.75 per gallon.

In contrast under Hill Bros.' interpretation, at $2.90 per gallon, MDOT would pay the contractor $2.65 per gallon (i.e. bid price of $2.50 per gallon incorporated in unit pricing, plus 15¢ per gallon fluctuation between actual price of $2.90 per gallon being paid by the contractor above new baseline of $2.75 per gallon). In other words, the Commission's interpretation results in a higher payment per gallon ($2.75) than does Hill Bros.' interpretation ($2.65).

What if actual prices fall from $2.75 per gallon, at expiration of contract time, to $2.60 per gallon? Under the Commission's interpretation, there is no adjustment in price and MDOT would continue to pay the locked-in price of $2.75 per gallon. This produces a windfall to the contractor of 15¢ per gallon, in that the contractor is purchasing gasoline at \$2.60 per gallon, but is getting paid the locked-in price of \$2.75 per gallon by MDOT.

At \$2.60 per gallon, under Hill Bros.' interpretation, MDOT would pay the contractor \$2.35 per gallon (i.e. bid price of \$2.50 per gallon included in contract pricing, less the 15¢ per gallon differential between actual price of \$2.60 per gallon and new baseline of \$2.75 per gallon). Once again, the Commission's interpretation results in a higher payment per gallon (\$2.75) than Hill Bros.' interpretation (\$2.35).

Rather than being a "contractor-favorable" application, as alleged by the Commission, Hill Bros.' interpretation would result in lower payments to the contractor in each of these examples. These examples further expose the Commission's mischaracterization that under Hill Bros.' approach, the state's attendant costs would be ever increasing. Brief of Appellee at 17. As shown, in periods of gradually rising petroleum prices (surely, the most common situation), Hill Bros.' interpretation would actually result in lower fuel adjustments than the Commission's locked-in price at expiration of contract time.

<u>Case 2</u>: **\$2.50 per gallon baseline price**
\$2.30 per gallon at expiration of allowable contract time

<u>Commission's Interpretations</u>

Under the Commission's interpretation, MDOT would subtract from a contractor's pay after expiration of contract time the amount of 20¢ per gallon for every gallon consumed regardless of the fluctuation in petroleum prices after expiration of contract time. This price does not adjust thereafter but is locked-in at \$2.30.

Dramatic increases in petroleum prices could be ruinous to a contractor, in view of the thousands of gallons of fuel per month that could be consumed by a fleet of earthmoving equipment on a highway job. For example, if gasoline prices went up to \$3.00 per gallon in the example given, MDOT would still *subtract* 20¢ per gallon (from the original baseline of \$2.50) to maintain the static equivalent of \$2.30 per gallon after expiration of contract time. This creates an artificial loss to the contractor of 70¢ per gallon solely because of fluctuations in oil markets.

In contrast, under Hill Bros.' interpretation, the price of \$2.30 per gallon at expiration of contract time becomes the new baseline and, like the Commission, requires subtraction of 20¢ per gallon from the original baseline of \$2.50 incorporated in the bid pricing. Thus, the starting point of \$2.30 per gallon is the same under both the Commission's and Hill Bros.' interpretation. However, unlike the Commission's interpretation, the construction given by Hill Bros. to the last sentence of the petroleum price adjustment provision would continue to permit adjustments for fluctuations in petroleum prices. If prices dropped to \$2.00 per gallon, the Commission's interpretation required MDOT to pay the locked-in price of \$2.30 per gallon, a windfall of 30¢ per gallon to the contractor. Under Hill Bros.' interpretation, payments to the contractor would be reduced by another 30¢ per gallon (\$2.30 - \$2.00) to reflect the decrease in the contractor's actual costs.

However, Hill Bros.' interpretation protects the contractor from the disastrous consequences of rapid and significant increases in world oil market prices. If the price of gasoline rose to \$3.00 per gallon, under the Commission's interpretation, prices do not adjust after expiration of contract time and MDOT would continue to pay the locked-in price of \$2.30 per gallon. Under Hill Bros.' interpretation, MDOT would pay a net increase of 50¢ per gallon (the -20¢ per gallon for the revised baseline of \$2.30 plus a

70¢ increase from $2.30 to $3.00). Consequently, Hill Bros.' interpretation would allow a contractor to be saved from ruin by fluctuating oil prices and to recover its actual incremental increases in cost incurred by the contractor for petroleum products as envisioned by the authorizing statute, *Miss. Code Ann.* §31-7-13(i) and by the wording of MDOT's own petroleum price adjustment provision.

In the matter before the Court, Hill Bros. was caught in just such a period of rapidly rising petroleum prices. The applicable petroleum prices were as follows:

	Gasoline	**Diesel**
Bid Baseline Price (Sept. 2003)	$1.3585/gal.	$1.2977/gal.
Price at Expiration of Contract Time (March 2004)	1.5015/gal.	1.4469/gal.
Price at Completion of Contract (March 2006)	2.2033/gal.	2.3425/gal.

Brief of Appellee at 6-7. This meant that once contract time expired, under the Commission's interpretation, Hill Bros. was eventually being penalized 70¢ per gallon on every gallon of gasoline being consumed (the difference between $2.2033 and $1.5015 per gallon) and 89½ ¢ per gallon of diesel fuel consumption ($2.3425 - $1.4469).

The penalty was actually much greater shortly after Hurricane Katrina hit in August 2005 when gasoline prices shot up north of $4.00 per gallon. The resulted in a penalty to Hill Bros. of over $2.00 per gallon ($4.00 - $1.5015), solely because of a complete fortuity of what gasoline prices just happened to be when contract time happened to expire. Conversely, if contract time just happened to have been set years earlier at September or October 2005, the month or two after Katrina, the price would have been locked-in at $4.00 per gallon and Hill Bros. would have enjoyed a windfall on the order of $2.00 per gallon for the remainder of the contract. Does such a wide variation of result based solely on unpredictable and uncontrollable fluctuations in petroleum prices constitute the "rational fit" and sound public policy as touted by the Commission? See Brief of Appellee at 9, 25.

According to the Commission, MDOT actually paid Hill Bros. $92,000 in fuel adjustments over the course of the project. Id. at 7. However, Hill Bros. actually experienced losses in excess of $350,000 in out-of-pocket costs spent for petroleum products to complete MDOT's work over and above the $92,000 paid by MDOT under the Commission's interpretation of the petroleum price adjustment provision. Id. How many contractors can stand a hit of $350,000 to their bottom line and still be in business? This penalty is particularly egregious because it was imposed based upon the unpredictability and timing of oil prices, which are beyond anyone's ability to control, except perhaps sophisticated manipulators and speculators. This is not a risk that should be visited upon Mississippi contractors.

This problem of volatile oil prices is not limited to the post-Katrina phenomenon. Instead, in the years following that hurricane to the present, Mississippi has seen turbulent economic times, in which oil market prices have fluctuated between $2.00 a gallon to over $3.00 per gallon. Such swings of a $1.00 per gallon or more within a short period, under the Commission's interpretation, put Mississippi contractors at great risk depending upon whether they are lucky enough to have their allowable contract time expire at a high spike (in which they will enjoy a windfall) or unfortunate enough to see time expire at a low spike (in which they could face financial disaster). Hundreds of thousands of gallons of fuel can be consumed on a big highway project, especially one with large earth moving requirements. If a contractor is penalized a $1.00 a gallon because of the utter fortuity of the Commission's locked-in price, a contractor could go broke simply on the luck of the draw of what world oil prices just happened to be when allowable contract time just happened to expire. Hurricane Katrina merely exacerbated a problem which continues to this day, and beyond, with every award of a MDOT highway construction contract containing the petroleum price adjustment provision at issue.

As shown, depending upon the utter fortuity of when allowable contract time expires relative to upward or downward spikes in petroleum prices, the result under the Commission's interpretation could just as easily have been a windfall to the contractor of several hundred thousand dollars. Despite the Commission's disparaging remarks (Brief of Appellee at 15), Hill Bros. submits that the Commission's interpretation of the petroleum price adjustment provision indeed does make the contracting parties unwitting gamblers, forced perhaps to bet the contractor's business on how oil prices may fluctuate two years or more after a contract is awarded.

The Commission can hardly complain about the characterization of the "gambling" nature of the Commission's interpretation whereby, completely by chance, either MDOT will "win" and the contractor will "lose" or vice-versa when the roulette wheel of fluctuating oil prices comes to a stop at the expiration of contract time and MDOT locks in the price. Indeed, the Commission itself acknowledges: "the agency's interpretation . . . has favored Appellee and, at other times, Appellant." Brief of Appellee at 15. Why does a clause in a public contract "favor" either party based upon pure happenstance? Isn't this "gambling"? At least in some card games, a player's skill comes into play. Here, a contractor has no control over the price MDOT initially sets, the allowable contract time MDOT prescribes, or what the price of oil will be on the world market two or three years down the road when allowable contract time ends.

B. Inconsistent Application

The Commission asserts, repeatedly, that there has been "over twenty years of consistent application of the provision by the MDOT and the Commission" and that "it remains undisputed that Hill Brothers . . . had known how it operated" for years. Brief of Appellee at 8, 20-21, and 26. These assertions are pure hyperbole, without citation to the Record or other authority. To begin with, the provision at issue has not been in existence for "over twenty years". It was promulgated in 1997. (R.E. 9, R. 2189).

While Hill Bros. certainly has been aware of the petroleum price adjustment provision itself, Hill Bros. has actually experienced inconsistent interpretations and diverse applications of it by MDOT's own personnel varying "from one MDOT District to another, within the same MDOT District at different times, and even with regard to the same MDOT contract." Affidavit of John F. Hill, Jr., dated December 12, 2007, at ¶25 (R.E. 29, R. 100). Hill Bros. had never challenged these variations in interpretations, because, in the past, the resultant dollar difference from one interpretation to another had been relatively insignificant and not worth the effort and expense to Hill Bros. of fighting MDOT about the inconsistent treatment. Id. at ¶26.

However, contrary to the Commission's representation that Hill Bros. did not contest MDOT's application of the petroleum price adjustment clause in this case "[f]rom the time that Hill Brothers took over the project in September, 2003 until March 16, 2006, when Hill Brothers completed the contract" (Brief of Appellee at 20), Hill Bros. in fact raised objections about MDOT's underpayments of petroleum price adjustments by letter dated January 4, 2006. (R. 120-134). This letter came soon after the impact of severe underpayments had been experienced in the fall months of 2005 following the effects of Hurricane Katrina (landfall August 29, 2005).

C. Inapplicability of *Farrish Gravel*

In an effort to bolster its contention that interpretation of the petroleum price adjustment provision is "well-settled" (Brief of Appellee at 26), the Commission cited *Farrish Gravel Co., Inc. v. Mississippi State Highway Commission*, 458 So. 2d 1066 (Miss. 1984). *Farrish Gravel* has nothing to do with the case. The question in *Farrish Gravel* was not the meaning and application of the petroleum price adjustment provision but rather whether the Commission could be held liable for adjustments plainly prohibited by the provision actually inserted in the highway contract.

Moreover, the Court in *Farrish Gravel* had before it a clause entirely different from the last sentence of the petroleum price adjustment provision *sub judice*. The special contract provision in *Farrish Gravel* stated as follows:

> Adjustments herein provided shall not apply to fuels consumed or materials incorporated into the work during any monthly estimate period falling wholly after the expiration of contract time as determined by checked final quantities.

458 So. 2d at 1067. As shown, this restrictive paragraph that appeared in Farrish Gravel's contract prohibited any adjustment whatsoever - - not even a locked-in price - - after expiration of contract time. This is the clause being interpreted by the chancellor which is quoted by the Court and which is misleadingly reprinted in the Commission's brief. Brief of Appellee at 23-24. The *interpretation* of that restrictive paragraph was not

at issue, only whether it could be *enforced*. The Court held that the contractors were bound by the terms of the clause as written in the contract they bid, essentially on the principle that "if you bid it, then you buy it." 458 So. 2d at 1070. At no point did the Court delve into the proper interpretation of the language of either the petroleum price adjustment provision before it in *Farrish Gravel* and certainly not the different language, later adopted, which is currently before this Court in this appeal.

However, the chancellor's commentary quoted by the Court in *Farrish Gravel* is instructive in this respect:

> 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 current [sic] price of fuel.

458 So. 2d at 1069. Indeed.

The issue before this Court is entirely different, based upon entirely different language. Hill Bros. contends that the Commission has incorrectly interpreted and improperly applied the language of its own provision, not that some other language should have been used. Furthermore, we do not have the benefit of the full text of the entire petroleum price adjustment provision actually included within Farrish Gravel's contract so as to know what other dissimilarities might exist with the provision before this Court in this case. In this regard, it should be noted that *Farrish Gravel* was decided in 1984 concerning a contract apparently bid sometime in 1980, whereas Special Provision No. 907-109-10, at issue in this case, was not promulgated until December 4, 1997. (R.E. 9, R. 2189). Clearly, *Farrish Gravel* is totally inapplicable to the issues and to the provision now before this Court.

II. The Commission's Interpretation Contravenes the Stated Purpose of the Adjustment Provision Itself

As Hill Bros. discussed in its initial brief, the Commission's interpretation is contrary to the purposes and intent stated in the Commission's petroleum price adjustment provision itself. Brief of Appellant at 26-27. In making this point, Hill Bros. stressed that the Commission's interpretation is at odds with three fundamental principles set forth in the introductory statement of purpose for the provision, as follows:

> Because of the *uncertainty in estimating the costs of petroleum products* that will be required *during the life of the contract, adjustments in compensation for certain materials* is provided . . . .

(R.E. 9, R 2189) (emphasis added). Discussion follows as to each.

A. "during the life of the contract"

In order to contend that its interpretation of the petroleum price adjustments provision is consistent with its own introductory statement of purpose, the Commission makes a novel argument, to wit: "[w]hile the project may continue on, the life of the contract ends at an appointed time"! Brief of Appellee at 14.

This is certainly a new concept. The Commission actually contends that a contract "expires" when MDOT's allowable time ends, even though the contractor's work proceeds, and even though MDOT continues contract payments, albeit with assessment of liquidated damages for late completion, until such time as the contract work has been completed and accepted by MDOT. The Commission's argument is contradicted by its own affidavit of Marvin O. Vanderford, who served as MDOT's Project Engineer for the subject project. See Affidavit of Marvin O. Vanderford at ¶3 (R. 2225).

Mr. Vanderford states that "[e]very month during *the life of the contract*" he and his staff prepared a Monthly Estimate of the work performed during that period. Id. at ¶6 (R. 2226) (emphasis added). Mr. Vanderford goes on to explain that "when a project is finally completed, a Final Estimate is worked up to finalize all payments" and to provide a final accounting. Id. at ¶7 (R. 2226). Attachment 2 to Mr. Vanderford's Affidavit in MDOT Monthly Estimate No. 59, for the period ending September 14, 2006 (R. 2232-2264). This Final Estimate established when Mr. Vanderford considered the "life of the contract" to be over.

In his Affidavit, Vanderford further states that "[t]hroughout *the life of the contract*" MDOT make adjustments in fuel costs. Affidavit of Marvin O. Vanderford at ¶13 (R. 2228) (emphasis added). Attachment "2" to Mr. Vanderford's Affidavit shows a schedule of fuel adjustments starting with Monthly Estimate No. 1 and continuing through the Final Estimate. (R. 2253 - 2254). The "life of the contract" certainly did not end two years earlier in March 2004 (Estimate No. 30), when the allowable contract time expired. Instead, the contract "lived on" until the work was finished and accepted by MDOT in 2006 (Estimate No. 59 - Final).

Additionally, MDOT has put into the Record twelve volumes of Mr. Vanderford's daily inspection reports for the subject project, spanning a period from January 1, 2004 (R. 318) through December 31, 2005 (R. 2147). There is a report for March 12, 2004 (R. 465) when the Commission contends the allowable contract time ended and the contract "expired". Brief of Appellee at 6, 15. Yet, the Commission has inserted another eleven volumes with 1,680 pages of additional inspection reports for work being performed after March 12, 2004 when, according to the Commission, the contract expired. (Record volumes 4-15; R. 468 - R. 2147). If the "life of the contract" had expired in March 2004, as claimed by the Commission, why were MDOT's inspectors on the job for all this time afterwards and what were they looking at?

Clearly, the Commission's contention makes no sense. The "life of the contract" extends from (a) the date of execution and notice to proceed with the work until (b) that work has been completed and accepted by MDOT. *See, e.g., Mississippi State Highway Commission v. Patterson Enterprises, Ltd.*, 627 So. 2d 261 (Miss. 1993) (Commission's highway contract remains "alive" and "open" until final payment).

The Commission has had to resort to such a strained interpretation of "life of the contract" in hopes of bringing its application of the last sentence of the petroleum price adjustment provision into line with the stated purpose that adjustments in certain material prices will be made for the "life of the contract" to protect contractors from the uncertainties of estimating petroleum prices far out into the future. In truth, the Commission's interpretation of the provision fails to fulfill this principal purpose by arbitrarily ending material price adjustments at the expiration of allowable contract time, which is often well before the end of the "life of the contract".

In contrast, Hill Bros.' interpretation does allow for continued adjustments in petroleum prices after the expiration of contract time "for the life of the contract", albeit on a different basis after allowable time has run than before. This is consistent with the purpose as stated in the Commission's own petroleum price adjustment provision.

B. "adjustment in compensation for certain materials is provided"

The Commission next attempts to justify its interpretation of the petroleum price adjustment provision by accusing Hill Bros. of engaging in "nothing more than semantics" over the meaning of "adjustments". Considering that "semantics" is defined as "relating to the meaning of language", Hill Bros. confesses that all of its arguments, as well as all of those advanced by the Commission, are exercises in semantics.

Hill Bros. focuses on the promise contained in the Commission's own petroleum price adjustment provision that adjustments will be made for the life of the contract. As pointed out in Hill Bros.' initial brief, two different counsel for the Commission, including the Commission's current attorney of record, both acknowledged in open court that under the Commission's interpretation, at the expiration of allowable contract time, petroleum prices became "locked-in" and are no longer adjusted either up or down. Brief of Appellant at 12-13. Hill Bros. contends this locked-in price is inconsistent with the stated intention of the provision to "provide adjustments for the life of the contract".

Now, the Commission changes its tune to argue that it misstated (twice) at the lower court what it really meant to say and instead asserts that "adjustments" should be construed to refer to the contract price as a whole. Brief of Appellee at 13 n. 11, quoting a comment from the trial judge. The problem with the Commission's new approach is that it fails to consider the language of the adjustment provision itself which does not merely state "an adjustment is provided" or even "an adjustment to the contract price will be made". Instead, the phrase actually used by the Commission in its own statement of purpose is "an adjustment in *compensation for certain materials* is provided . . . ." (R.E. 9, R. 2189) (emphasis added). Thus, the clause promises for the life of the contract an adjustment in the designated petroleum prices.

Manifestly, the Commission's interpretation of the provision does not accomplish this fundamental purpose after the expiration of contract time. Instead, as the

Commission's counsel have acknowledged (twice) and again in its Brief of Appellee, the Commission's interpretation locks-in the price of petroleum products at the expiration of contract time and no longer provides an adjustment in compensation for the fluctuating costs of petroleum products after that time. Indeed, as observed, the Commission's interpretation can exact a severe penalty on contractors, like Hill Bros., simply by the luck of the draw of what petroleum prices happen to be when allowable contract time happens to expire. This is hardly consistent with a fair reading of the promise of providing "an adjustment in compensation of certain materials" (i.e. petroleum prices) "during the life of the contract".

C. "uncertainty in estimating the costs of petroleum products"

As to this element, the Commission offers no argument, only denial. The illogic of the Commission's position is embodied in its contention to this Court that **nothing in "the language of the clause itself support the proposition that the clause is intended to protect against the uncertainty in petroleum prices for the life of the construction project."** Brief of Appellee at 16 (emphasis added). This is the essence of the Commission's interpretation at issue and argument before this Court. Compare the Commission's bold assertion to the actual language of the clause itself:

> **Because of the uncertainty in estimating the costs of petroleum products that will be required during the life of a contract, an adjustment in compensation for certain materials is provided as follows.**

(R.E. 9, R. 2189) (emphasis added). Hill Bros. respectfully submits that the Commission's position in the appeal cannot stand in light of the above quoted language the Commission itself wrote as the statement of purpose for its provision.

III. The Commission's Interpretation Violates the Authorizing Statute

In its principal brief, Hill Bros. explained how the Commission's interpretation of the last sentence of the petroleum price adjustment provision violates *Miss. Code Ann.* §31-7-13(i), entitled "Road construction petroleum products price adjustment clause authorization." Brief of Appellant at 32-36. This is the statutory authority for agencies and governing authorities, like the Commission, to include such adjustment provisions in its highway construction contracts.

The Commission acknowledges that its "promulgation of fuel and material adjustment provisions in its contracts" was done "pursuant to the statutory authority contained in *Miss. Code Ann.* §31-7-13(i)." Brief of Appellee at 22. However, the Commission does not challenge Hill Bros.' arguments that the Commission's interpretation violates the statutory requirements that (1) there will be adjustments in "unit prices for the change in cost of such petroleum products", (2) "used in the performance" of highway contracts, (3) "with relation to the cost to the contractor". Brief of Appellant at 32-34. Instead, the Commission contends that it is not restrained by what it admits is the "statutory authority" for the provision.

The Commission claims "unfettered latitude" to decide how adjustments will be made or not made. Brief of Appellee at 16. The Commission further contends that its unilateral right to determine how price adjustments will be made is "necessarily implied" from what the Commission characterizes as the statute's "proviso that the Commission determine 'the basis and methods of adjusting unit prices for change in the cost of such petroleum products' as set forth in the bid documents." Id. at 25. Further, the

Commission seems to be saying that the broad general powers granted to it by *Miss. Code Ann.* §65-1-8(1)(e) give the Commission the right to do whatever it pleases. Id. at 22.

The "proviso" cited by the Commission is misconstrued. Instead, *Miss. Code Ann.* §31-7-13(i) very specifically states that if an agency chooses to include a petroleum price adjustment provision, it must follow the basic principles set forth in the Legislature's authorization. The exact wording of the provision is not stated, hence the requirement that the basis and methods for adjustment be set forth in the bid documents. Hill Bros. respectfully submits that the Commission has the discretion whether or not to include an adjustment provision at all, but once the Commission exercises its discretion and decides to include a petroleum price adjustment provision, such provision must comply with the key principles of the authorizing statute. The Commission's interpretation of the last sentence of the provision that prices are locked-in at expiration of allowable contract time does not comply with the adjustment principles of the statute, whereas Hill Bros.' interpretation does so comply.

The Commission also contends that this issue was conclusively resolved by *Farrish Gravel Co., Inc. v. Mississippi State Highway Commission*, 458 So. 2d 1066 (Miss. 1984). As previously observed, the adjustment provision at issue in *Farrish Gravel* was totally different than the one before this Court with regard to price adjustments after expiration of contract time. In *Farrish Gravel*, adjustments were prohibited for fuels consumed after expiration of contract time. 458 So. 2d at 1067. In this case, MDOT's locked-in price applies to fuels consumed after expiration of contract time. Whereas in *Farrish Gravel*, the statutory authorization was made *inapplicable* to periods after expiration of contract time, here, the locked-in price methodology according to the Commission's interpretation is *contrary* to the statutory authorization. There is a big difference between (1) choosing not to apply the statute and (2) imposing a provision which contravenes the statute. Even the Commission concedes that its interpretation cannot be repugnant to the plain meaning of the statute. Brief of Appellee at 22.

As shown, the "luck of the draw" can make the Commission's methodology ruinously punitive on contractors based upon fluctuations in oil markets over which the contracting parties have absolutely no control. This is certainly repugnant to the ameliorative purposes of both the authorizing statute and of the statement of purpose set forth in the Commission's own provision.

As for MDOT's statutory grant of broad general powers, pursuant to *Miss. Code Ann.* §65-1-8(1)(e), such general statutes must give way to particular statutes like *Miss. Code Ann.* §31-7-13(i) which are controlling as regards their subject matter. *McCaffrey's Food Market, Inc. v. Mississippi Milk Commission*, 227 So. 2d 459, 463 (Miss. 1969) (citations omitted); *see also Doe ex rel. Brown v. Pontotoc County School District*, 957 So. 2d 410, 419 (¶24) (Miss. App. 2007) ("when trying to decide whether a specific or more general statute should apply to a case, the longstanding and well-established rule of statutory construction dictates that the more specific statute will always control over the general one.") Nor will an agency be permitted to adopt rules under the guise of "implied powers" which exceed or conflict with applicable statutes. *See Mississippi Public Service Commission v. Mississippi Power & Light Company*, 593 So. 2d 997, 1004 (Miss. 1991). So, while the Commission may have a broad power to do many things, it cannot promulgate a petroleum price adjustment provision which is repugnant to *Miss. Code Ann.* §31-7-13(i), the special authorizing statute for same.

IV. The Provision Is Ambiguous and Should Be Construed against the Commission as Drafter

Hill Bros. contends that its interpretation of the last sentence of the petroleum price adjustment provision is at least reasonable. Even if the Court should find that the Commission's interpretation is also reasonable, then the last sentence of the provision is, by definition, ambiguous, since it is susceptible to two reasonable interpretations. In such instance, the provision should be construed most strongly against the Commission, as drafter, and Hill Bros.' interpretation should prevail. Brief of Appellant at 28-31.

The Commission asserts that "Hill Brothers is a sophisticated vendor", implying that Hill Bros.' bargaining power was on a par with the Commission's. Brief of Appellee at 21. Of course, the Commission's contracts are not subject to any negotiation. Any contractor that performs a large highway contract certainly must have a degree of sophistication. However, that fact has not prevented this Court from applying the doctrine of *contra proferentum* against the Commission with respect to provisions in its highway construction contracts. *Mississippi Transportation Commission v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1085 (¶23) (Miss. 2000).

V. Hill Bros. Deserves Relief

There is an undercurrent in the Commission arguments that somehow Hill Bros. got what it deserved. The Commission suggests, inaccurately and improperly, that Hill Bros. well understood the Commission's "consistent application" of the petroleum price adjustment provision "for over twenty years". As shown, this is completely untrue. What Hill Bros. had actually experienced was an inconsistent interpretation and application by MDOT, the Commission's subordinate agency. See *supra* at 11-12. If

MDOT's own personnel do not uniformly apply the provision, doesn't this itself prove that the subject language is unclear and ambiguous?

The Commission also takes pains to state the Hill Bros. "lacked privity" with the Commission, because when Travelers Casualty & Surety Company of America ("Travelers") took over the contract defaulted by its principal, D.B. Johnson Construction Company ("Johnson"), Hill Bros. was effectively Travelers' subcontractor, and that the Commission asserted defenses based upon "the absence of Hill Brothers' alleged assignor Travelers". Brief of Appellee at 3. One wonders about the Commission's motivations in these assertions. The trial court found that Hill Bros. was a valid assignee of Travelers rights and had proper standing to bring the claims at issue. Findings of Fact and Conclusions of Law at ¶8 (R.E. 6, R. 2555). There was no cross-appeal of this ruling.

The Commission also makes the misleading observation that when Johnson was terminated, 67% of the allowable contract time had expired and 68% of the required work had been performed. Brief of Appellee at 5 n.3. This leaves the impression that subsequent project delays must have been Hill Bros.' fault. However, when Johnson was terminated in February 2003, contract time continued to run with no work being performed until Travelers entered into its completion agreement with Hill Bros. in September 2003. At that point, there was only a month left in allowable contract time (before extensions were subsequently granted) while the work completion percentage remained not just frozen but was greatly diminished because of erosion and decay in the several months the earth work was left unattended. See Brief of Appellant at 7.

The Commission acknowledges that pursuant to its completion agreement with Hill Bros., "Travelers was also obligated to pay Hill Bros. whatever amounts it received from MDOT for estimate pay items and for adjustment factors in the Johnson Contract, to include the FAC" (i.e petroleum price adjustment provision). Brief of Appellee at 7. Having said that, the Commission then criticizes Hill Bros. for not negotiating a separate fuel adjustment provision with more liberal payment features. Id. at 8. Why would Hill Bros. do that? There was already a petroleum price adjustment provision in Johnson's contract, being completed by Hill Bros. for Travelers as Johnson's surety, which promised adjustments in the costs of petroleum products during the life of the contract. What more could Hill Bros. want? It never occurred to Hill Bros. that the Commission would apply such a punitive interpretation of the petroleum price adjustment provision to cause Hill Bros. to lose hundreds of thousands of dollars out-of-pocket in purchasing petroleum products during the life of the contract in order to complete the subject project for the Commission.

VI. Conclusion

The petroleum price adjustment provision promises that adjustments in petroleum prices will be provided for the life of the contract. Under the Commission's interpretation, at the expiration of contract time, prices no longer adjust but are locked-in. Thereafter, MDOT is exposed to the risk of falling prices and the contractor is exposed to the risk of rising prices, either circumstance being completely beyond the control of the contracting parties. Hill Bros. respectfully submits that the Commission's interpretation of the petroleum price adjustment provision is unreasonable, contrary to the language and stated purpose of the provision itself, violative of the statute authorizing such adjustment provisions, and beyond the Commission's power. Alternatively, Hill Bros. submits that the last sentence of the provision as regards adjustments after expiration of contract time is, at a minimum, ambiguous and should be construed against the Commission, as drafter.

Hill Bros. requests the Court to reverse the trial court's judgment in favor of the Commission, to render judgment as a matter of law in favor of Hill Bros. as to the Commission's liability (either based upon Hill Bros.' interpretation or, alternatively, based upon striking the last sentence, thereby providing for the same adjustments after expiration of contract time as before), and to remand for assessment of damages.

This the 12th day of November, 2009.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, William R. Purdy, hereby certify that I have this date mailed by first, class United States mail, postage pre-paid, a true and correct copy of the foregoing Reply Brief of, Hill Brothers Construction Co., Inc. to:

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This the 12th day of November, 2009.

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