

IN THE SUPREME COURT OF OHIO

PILKINGTON NORTH AMERICA, INC.,)	
)	CASE NO. 2013-0709
Appellant,)	
)	On Appeal From
v.)	The Public Utilities
)	Commission of Ohio
THE PUBLIC UTILITIES COMMISSION)	
OF OHIO,)	Public Utilities Commission of Ohio
)	Case No. 08-255-EL-CSS
Appellee.)	

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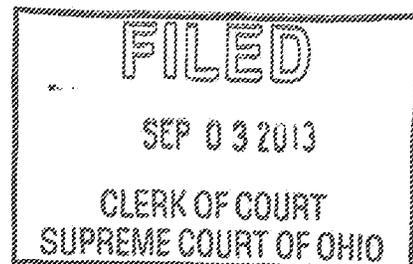
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I. INTRODUCTION

In March 2009, Pilkington North America, Inc. (“Pilkington”) made a choice not to seek rehearing and then take an appeal from a February 2009 Order of the Public Utilities Commission of Ohio (“Commission”) determining that Toledo Edison properly terminated a special contract with Pilkington in February 2008. Pilkington made this choice deliberately, having watched every other complainant in related cases file applications for rehearing as required by R.C. § 4903.10 and then appeal to this Court pursuant to R.C. § 4903.13. Now, in hindsight, Pilkington believes that its choice was a mistake, as the Court overturned the February 2009 Order as to those parties that appealed.

Pilkington’s Rule 60(B) motion, its application for rehearing, and this appeal are nothing more than attempts to avoid the consequences of its choice. But the law is clear: when a party chooses not to appeal, it is not entitled to Rule 60(B) relief on those issues that it could have raised in an appeal. A Rule 60(B) motion cannot be used as a substitute for a timely appeal, and the Commission has no legal authority to allow a party to use a Rule 60(B) motion to circumvent the statutory appeal process. Pilkington could have properly raised each of its arguments on appeal. It chose not to. The Commission correctly determined in its January 23, 2013 Entry that this choice precluded Pilkington from relief under Rule 60(B). The Court should affirm the Commission’s January 23, 2013 Entry and reject Pilkington’s attempt to game the system.

II. STATEMENT OF FACTS

In 2008, Pilkington, Worthington Industries, the Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC (collectively, the “Complainants”) filed separate complaints with the Commission challenging Toledo Edison’s termination of its special contracts with each of the Complainants in February of 2008. (*See Appx. 35.*) Toledo Edison provided electric service to manufacturing facilities operated by

the Complainants according to the terms of special contracts separately entered into at various time with each of the Complainants and approved by the Commission pursuant to R.C. 4905.31. (June 17, 2008 Joint Stipulation of Facts (“Stip.”) ¶¶ 5-32.)

A key element of the complaints filed by Complainants against Toledo Edison was that Toledo Edison had failed to give them proper notice of an opportunity during Commission proceedings in 2004 to further extend the term of their contracts until December 31, 2008. (*See* Mar. 14, 2008 Complaint of Pilkington, ¶¶ 15-28, 45-47, 58-62.) In mid-2004, the Commission approved Toledo Edison’s application for approval of a market-based standard service offer in the form of a Rate Stabilization Plan (“RSP”), which would take effect on January 1, 2006. (Stip. ¶¶ 36-39.) One provision of the RSP authorized Toledo Edison, upon request of a special contract customer received within thirty days of the RSP Order, to extend the term of a special contract through December 31, 2008. (Stip. ¶ 51.) Unlike the other Complainants, Pilkington had an energy consultant monitoring this proceeding who was aware of the RSP’s terms. (Tr. 18, 22.) Thus, contrary to the allegations in Pilkington’s Complaint, Pilkington had notice through its agent of this opportunity to extend the term of its special contract. However, Pilkington elected not to request an extension of its contract within the thirty-day period authorized by the Commission. (Stip. ¶ 54.)

In early 2006, in Case No. 05-1125-EL-ATA, *et al.* (the “RCP Case”), the Commission ordered Toledo Edison to terminate in February 2008 the special contracts of those customers who had not extended their special contracts as provided in the RSP Order. (Appx. 38; Stip. ¶¶ 43-44.) On or before September 5, 2007, Toledo Edison informed Pilkington that its special contract would terminate on February 29, 2008 as mandated by the Commission’s order in the RCP Case. (Stip. ¶ 49.) Although Complainants alleged that they were entitled to special

contract pricing through December 31, 2008, Pilkington's witness admitted at hearing that the Commission had authority to change, alter or modify its special contract with Toledo Edison pursuant to R.C. § 4905.31. (Tr. 18:9-14.) Pilkington filed its Complaint on March 14, 2008 to contest the February 2008 termination of its special contract.

While the complaints were pending, Toledo Edison entered into agreements with each of the Complainants (except Martin Marietta) under which the difference between the special contract price and regular tariff price was escrowed. (Appx. 40.) After consolidating Pilkington's Complaint with five other actions and conducting an evidentiary hearing, the Commission issued the February 2009 Order, finding that the special contracts did in fact terminate as of February 2008 as provided in the RCP Order. (Appx. 5-6, 49-52.) The Complainants *except for Pilkington* (the "Appealing Customers") filed an application for rehearing pursuant to R.C. § 4903.10 on March 20, 2009, which the Commission denied on April 15, 2009. (Appx. 54-61.)

On June 12, 2009, each of the Appealing Customers filed a notice of appeal from the February 2009 Order with the Ohio Supreme Court pursuant to R.C. § 4903.13. *See Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104, ¶ 1 (hereinafter "*Martin Marietta*"). As found by the Commission, Pilkington consciously chose not to join in or participate at any stage of the appeal. (Appx. 8). Pilkington also consented to the release of all escrowed amounts to Toledo Edison, since the Order was final as to Pilkington. (Supp. 5.) As a result, Toledo Edison received payment from Pilkington in an amount equal to what every other standard tariff customer paid for service.¹ On

¹ Although Pilkington suggests Toledo Edison "hit the lottery" when Pilkington agreed to release the escrowed amounts (Brief, p. 22), this ignores the fact that Pilkington merely paid the Commission-approved tariff rate and that Toledo Edison in 2008 was an Electric Distribution Utility that owned no generation assets. Toledo Edison paid third parties for the generation provided to Pilkington.

August 25, 2011, the Ohio Supreme Court reversed the February 2009 Order, holding that the special contracts in fact terminated in December, rather than February of 2008. *Martin Marietta* at ¶¶ 46, 48. The decision thus entitled the Appealing Customers to receive their escrowed payments. (See Appx. 7.)

Pilkington filed its Motion for Relief Under Rule 60(B) on January 5, 2012, and Toledo Edison opposed the motion on January 20, 2012. (Supp. 1-10, 52-60.) The Commission issued its Entry denying Pilkington's Motion on January 23, 2013 (hereinafter "January 2013 Entry"). (Appx. 5-10.) Pilkington filed its Application for Rehearing on February 22, 2013, which was denied on March 20, 2013. (Appx. 11-17, 18-25.) Pilkington appealed to this Court on May 6, 2013. (Appx. 1-4.)

III. ARGUMENT

Proposition of Law No. 1: The Commission has no authority under Ohio law to consider or grant relief to a party pursuant to Rule 60 of the Ohio Rules of Civil Procedure.

The Commission correctly determined in its January 2013 Entry that Pilkington was not entitled to Rule 60(B) relief. The Ohio Rules of Civil Procedure are binding only on Ohio courts, Civ.R. 1(A), and are, therefore, not binding on administrative agencies such as the Commission. Further, nothing in the Ohio Revised Code permits the Commission to grant Rule 60(B) relief as an alternative to following the statutory appeal provisions.

A. The Commission Correctly Denied Pilkington Rule 60(B) Relief from the February 2009 Order Because the Civil Rules Do Not Apply to the Commission.

The Commission correctly denied Pilkington's motion for Rule 60(B) relief because such relief is not within the Commission's jurisdiction. Ohio Rule of Civil Procedure 1(A) states "[t]hese rules prescribe the procedure to be followed in all *courts* of this state in the exercise of civil jurisdiction at law or in equity" Civ.R. 1(A) (emphasis added). Therefore, the Ohio

Rules of Civil Procedure do not apply to administrative agencies such as the Commission. *See Meadows Dev., L.L.C. v. Champaign Cty. Bd. of Revision*, 124 Ohio St.3d 349, 2010-Ohio-249, 922 N.E.2d 209, ¶ 14 (complainant denied benefit of Civ.R. 5(B) in BTA proceeding); *Yoder v. Ohio State Bd. of Edn.*, 40 Ohio App.3d 111, 112, 531 N.E.2d 769 (9th Dist. 1988); *Midwest Ents. v. Cuyahoga Cty. Bd. of Revision*, 8th Dist. Cuyahoga Nos. 67203, 67565, 1995 WL 32873, *1 (Jan. 26, 1995).

Pilkington argues that Rule 60(B) is not binding on the Commission, but may be applied by the Commission in its discretion. Brief of Appellant (“Brief”) at 15. This is not the case. Using the Commission and the Board of Tax Appeals as examples, both have established procedures for contesting final determinations that apply separate and apart from the civil rules. The Commission’s rules in O.A.C. 4901-1-35 and 4901-1-36 govern applications for rehearing and appeals to this Court, consistent with Sections 4903.10 through 4903.13 of the Revised Code. Appeals from BTA decisions are governed by R.C. 5717.04 and R.C. 5717.05. In neither case is provision made for the administrative body to apply Rule 60(B) of the Civil Rules. Thus, in an appeal analogous to the instant proceeding where an appellant was challenging the BTA’s denial of its Rule 60(B) motion, the Eighth District Court of Appeals held that the BTA “properly denied the motion for relief from judgment made under Civ.R. 60(B).” *Midwest Ents.*, 1995 WL 32873, at *1. The Commission has no discretion to apply Rule 60(B) of the Civil Rules, as it is inapplicable to Commission proceedings.

Because Civil Rule 60(B) does not apply to the Commission, the Commission acted reasonably and lawfully in denying Pilkington’s Motion.

B. No Provision of the Ohio Revised Code Authorizes the Commission to Grant Rule 60(B) Relief.

The Ohio Revised Code explicitly lays out the procedure Pilkington should have followed to appeal a decision by the Commission. Under R.C. 4903.10, a party who wants to challenge a decision by the Commission may apply for rehearing within 30 days of the entry of the Commission's order. Parties who want to challenge the Commission's denial of an application for rehearing must do so within 60 days of the denial of rehearing by appealing the denial to the Ohio Supreme Court. R.C. 4903.11. Nothing in the Revised Code grants the Commission jurisdiction to hear appeals of its decisions outside of this process, much less after the time for filing an appeal has passed.

Pilkington admits that the Commission's "powers derive exclusively from and are circumscribed entirely by the law that created it." Brief at 8 (citing *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51 ("The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.")). In the absence of contrary statutory authority, administrative agencies lose authority to reconsider their decisions after the filing of an appeal or expiration of time for appeal. *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), syll. para. 3. Because Pilkington failed to seek rehearing and then file a notice of appeal within the requisite time frame, any authority the Commission had to reconsider the Order as applied to Pilkington expired in March of 2009.

In *Discount Cellular*, this Court held that "the PUCO acted beyond its statutory authority" in denying the appellant's application for rehearing. *Discount Cellular* at ¶ 65. Thus, if one accepts the *ultra vires* argument made by Pilkington, the Commission's entry challenged in *Discount Cellular* should be considered *ultra vires*. However, the Court found that the

appellant “failed to preserve this issue in an application for rehearing” and “failed to set forth the alleged errors in its notice of appeal.” *Id.* at ¶ 66. Because the appellant in *Discount Cellular* did not seek rehearing of the Commission’s entry on rehearing and then appeal the specific claimed error to this Court, the Court lacked jurisdiction to consider the assignment of error and the appellant “lost the right to question the unlawfulness of the PUCO’s orders.” *Id.* at ¶ 66. Similarly, because Pilkington failed to follow the mandated statutory procedure for challenging a Commission order, it also lost the right to question the lawfulness of the Commission’s February 2009 Order.

Any challenge to the Commission’s February 2009 Order must be pursued following the procedure set forth in sections 4903.10 through 4903.13 of the Revised Code. Indeed, this process was followed by every party to the original proceedings *except* Pilkington. The record does not show why Pilkington elected not to appeal when the other parties did. The answer could be that Pilkington’s hearing witness admitted to having notice of the opportunity to extend its contract term through December 31, 2008, and of not acting to take advantage of that opportunity. (Tr. 18-19, 22.) The answer also could be that Pilkington’s hearing witness agreed that the Commission had authority under R.C. 4905.31 to modify Pilkington’s special contract. (Tr. 18; Stip. ¶ 54.) Regardless, by failing to initiate the rehearing process within thirty days of the February 2009 Order, Pilkington’s time to challenge the Commission’s decision expired, as did the Commission’s authority to consider such a challenge.

Pilkington lost its right to question the unlawfulness of the Commission’s order by not following the prescribed process for challenging such an order within the period laid out in the Revised Code. As the Commission correctly stated, “[i]n essence, Pilkington is asking [the Commission] to waive the statutory requirements requiring a party to appeal a Commission order

if it wants to be relieved from a judgment. . . . The fact that Pilkington failed to follow the process laid out in the Ohio Revised Code cannot now be cured by asking the Commission to ignore those requirements and the policies behind them.” (Appx. 15.) Therefore, the Commission was correct to deny Pilkington’s Rule 60(B) Motion and application for rehearing.

Proposition of Law No. 2: A party to a Commission proceeding cannot use a Rule 60(B)(5) motion as a substitute for a timely appeal.

Even if the Court decides that the Commission may consider Rule 60(B) motions generally, such relief is not available where a party attempts to use Rule 60(B)(5) as an escape from a failure to properly appeal.² Although the catchall provision of Ohio Civ. R. 60(B)(5)³ does allow courts to grant relief in “extraordinary circumstances,” such as a fraud on the court, **“the failure of a party to appeal does not equate to an extraordinary circumstance justifying relief merely because the judgment is erroneous or the law has changed.”** *Reitz v. U.S.*, 37 Fed.Cl. 330, 333 (Fed. Cl. 1997); *See* Appx. 83-84 (staff notes to Civ.R. 60). “A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal or as a means to extend the time for perfecting an appeal from the original judgment.” *State ex rel. Richard v. Cuyahoga Cty. Commrs.*, 89 Ohio St.3d 205, 206, 729 N.E.2d 755 (2000) (quoting *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643, 689 N.E.2d 548). *See also State ex rel. Durkin v. Ungaro*, 39 Ohio St.3d 191, 192, 529 N.E.2d 1268 (1988); *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), syll. para. 2. “A party generally

² Pilkington argued below that it was entitled to relief under either Rule 60(B)(4) or 60(B)(5). In its Brief to this Court, Pilkington relies only on Rule 60(B)(5). *See* Brief, p. 18. As the Commission found, Rule 60(B)(4) is not applicable because Pilkington could not point to a “prior judgment” on which the February 2009 Order was based that had been reversed or otherwise vacated, and Pilkington failed to appeal from the February 2009 Order. (Appx. 8.) Rule 60(B)(1)-(3) cannot apply because Pilkington sought relief more than one year after the February 2009 Order.

³ This catch-all provision is Rule 60(b)(6) in the Federal Rules of Civil Procedure.

may not raise issues in seeking relief from judgment under Civ.R. 60(B) that could have been raised upon appeal, and error that a timely appeal could have corrected cannot form the predicate for a motion under this rule.” *Asherton Woods Homeowners’ Assn. v. Olujoba*, 10th Dist. Franklin No. 13AP-84, 2013-Ohio-3546, ¶ 5. The Commission did not err in finding that Pilkington’s Rule 60(B) motion was an improper substitute for a timely appeal.

Case law universally supports the proposition that a Rule 60(B) motion cannot substitute for a timely appeal. For example, in *Ackermann v. United States*, the non-appealing defendants based their claim for relief, as Pilkington does here, solely on the reversal of the district court’s decision as to the appealing defendant. However, the United States Supreme Court held that it would not relieve a party of a calculated and deliberate choice not to appeal, “because hindsight seems to indicate to him that his decision not to appeal was probably wrong There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.” 340 U.S. 193, 198, 71 S.Ct. 209, 95 L.Ed. 207 (1950). Pilkington attempts to distinguish *Ackermann* on the basis that it involved immigration and not public utility matters. Brief at 20. But Ohio courts have applied this rule to, among others, a habeas petitioner in *Key*, a relator challenging a civil service determination in *Ungaro*, and a complainant challenging a court decision in favor of a public utility in *Kohli v. Dayton Power & Light Co.*, 3d Dist. Nos. 8-85-26, 8-85-27, 1987 WL 27131, *6 (Nov. 27, 1987). The rule is generally applicable to any attempt by parties to circumvent the normal appeal process.

The only Ohio court decision Pilkington cites as suggesting that relief from judgment can be granted under Rule 60(B)(5) is *Ohi-Rail Corp. v. Barnett*, 7th Dist. No. 09-JE-18, 2010-Ohio-1549, which Pilkington claims to have “entertained” as a matter of law the argument that Civ. R. 60(B)(5) could be met when a decision was rendered by a judge who unlawfully failed to recuse

himself. Brief at 19. However, the court of appeals in that case concluded that “a party cannot use a Civ.R. 60(B) motion for relief from judgment as a substitute for a timely appeal or as a means to extend the time for filing an appeal from the original judgment.” *Id.* ¶ 19 (citing *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 689 N.E.2d 548 (1998)). Because the appellants in *Ohi-Rail* had failed to appeal in a timely manner, their Rule 60(B)(5) motion was denied. *Id.* ¶ 56 (“In sum, the filing of their motion for relief from judge [sic] four months after they first appeared in court and nine months after they refused service of the complaint was an attempt to substitute for a direct appeal of the judgment and did not present substantial grounds for relief”). Pilkington is not entitled to reap the benefits resulting from an appellate reversal procured by other independent parties. *See Federated Dep’t Stores v. Moitie*, 452 U.S. 394, 400 (1981).

Further, Pilkington misreads this Court’s holding in *Wigton v. Lavender*, 9 Ohio St.3d 40, 457 N.E.2d 1172 (1984), as permitting the use of Rule 60(B) in situations “where error permeates the entire case” and where “the justice of the case requires the reversal . . . of the judgment as to nonappealing parties.” Brief at 19-20. What Pilkington cites are decisions from other states that have permitted the benefits of an appeal to inure to a non-appealing party on remand. *See Wigton*, 9 Ohio St.3d at 42. But this Court’s holding in *Wigton* is what governs the outcome here:

Where one party appeals from a judgment, a reversal as to him will not justify a reversal against other non-appealing parties unless the respective rights of the appealing party and non-appealing parties are so interwoven or dependent on each other as to require a reversal of the whole judgment.

Id. at syllabus. Absent a showing of interwoven or dependent rights requiring a reversal, it is irrelevant that error may permeate a case or that justice “requires” reversal. *See, e.g., Continental Cas. Co. v. Phoenix Const. Co.*, 46 Cal.2d 423, 440 fn.8, 296 P.2d 801 (Cal. 1956) (approving reversal as to all parties when non-appealing excess insurer’s liability was dependent

upon primary insurer's liability). Indeed, in *Wigton*, the Court refused to allow non-appealing parties to benefit from an insurance company's separate appeal because the non-appealing parties had separate claims and the insurance company's claim could proceed on remand without in any way affecting the rights of the other parties. *Id.* at 43. *See also Hildebrand v. Civil Service Comm.*, 1st Dist. No. C-940256, 1995 WL 577554 at *2 (Sept. 29, 1995) (rejecting a *Wigton* argument because "it is clear that appellants have no interest in the earlier appeal except as to have the judgment reversed as to themselves").

Pilkington's rights are not so interwoven and dependent on those of the Appealing Customers as to require reversal. Pilkington's claim depended upon its own contract with Toledo Edison, and Pilkington's arguments to the Commission were based upon the specific facts of Pilkington's on-going contractual relationship with Toledo Edison. Pilkington's claim did not depend upon the contractual rights of any of the Appealing Customers. Unlike in the cases cited in *Wigton* from other states, there is no remand proceeding in which a hearing on the the successful appellant's claims could impact the non-appealing parties' rights. Pilkington's only interest in the Appealing Customers' appeal is to have the Commission's February 2009 Order reversed as to itself. Thus, the limited exception afforded by *Wigton* cannot be applied here.

The Court cannot and should not reward Pilkington's choice not to participate in the appeal by granting Rule 60(B) relief. Failure to follow the appeal procedure is a bar to seeking the same relief through a Rule 60(B) motion, and therefore, even if the Commission could grant Pilkington Rule 60(B) relief, it is not entitled to such relief.

Proposition of Law No. 3: Even if a decision of the Commission is found to be in error, the decision stands with respect to parties who choose not to appeal.

Pilkington cherry picks language from a recent U.S. Supreme Court decision to claim, for the first time on appeal, that the Commission's February 2009 Order is *ultra vires*, and that the Commission cannot continue to enforce it as to Pilkington. Because Pilkington did not make this *ultra vires* argument in its Application for Rehearing or Notice of Appeal, it is not properly before this Court. Regardless, a correct reading of the case relied on by Pilkington actually supports the Commission's decision to deny Pilkington Rule 60(B) relief.

A. Pilkington Did Not Preserve Its *Ultra Vires* Argument for Appeal.

Pilkington argues that the February 2009 Order was *ultra vires*, of no legal effect and, thus, must be vacated as to Pilkington. Brief at 7-10. However, Pilkington did not raise this issue in its Application for Rehearing or in its Notice of Appeal. Thus, this argument is not properly before this Court.

R.C. 4903.10 requires:

Such application [for rehearing] shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

R.C. 4903.10. Setting forth specific grounds for rehearing is a jurisdictional prerequisite for review by the Court, which has strictly applied the specificity requirement. *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247-248, 638 N.E.2d 550 (1994) (rejecting substantial compliance argument); *Agin v. Pub. Util. Comm.*, 12 Ohio St.2d 97, 98, 232 N.E.2d 828 (1967). As the Court has explained, "by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question." *City of Cincinnati*

v. Pub. Util. Comm., 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949). No assignment of error in Pilkington’s Application for Rehearing raises this *ultra vires* argument.

Moreover, Pilkington also failed to raise this argument in its Notice of Appeal. A notice of appeal must set “forth the order appealed from and the errors complained of.” R.C. 4903.13. The Court lacks jurisdiction to consider specific issues not set forth in a notice of appeal. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 349, 2007-Ohio-4276, 872 N.E.2d 269; *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 211, 2007-Ohio-4790, 874 N.E.2d 764. Pilkington did not include this *ultra vires* argument in its Notice of Appeal. Thus, the Court lacks jurisdiction to consider it.

B. *City of Arlington* Is Not Applicable Here.

Pilkington cites to *City of Arlington, Texas v. Fed. Communications Comm.*, 133 S.Ct. 1863, 1868-69 (2013), for the proposition that there is a “fundamental . . . difference between an incorrect decision of a court and an incorrect decision of an administrative agency acting in a quasi-judicial capacity.” Brief at 8. The proposition Pilkington advances is that an erroneous administrative decision is *ultra vires* and, thus, can have no legal application to a non-appealing party. *City of Arlington* is distinguishable on a number of grounds. First, despite Pilkington’s assertion that the Supreme Court’s analysis is applicable here, the statements Pilkington quotes apply only to those agencies whose authority comes from Congress. The language cited by Pilkington is neither binding on the Ohio Supreme Court nor directly applicable because the Supreme Court does not extend its opinion to agencies governed by state law. Pilkington admits as much by recognizing that, under Ohio law, in contrast to federal law, Commission decisions

have *res judicata* effect. Brief at 9.⁴ In fact, but for that *res judicata* effect, Pilkington would have had no need to file a Rule 60(B) motion.

Second, adoption of Pilkington's argument would upend Ohio's statutory framework for taking appeals from Commission decisions (as well as appeals from other state agencies and commissions). Pilkington seeks to create an environment in which free riders can avoid the cost of an appeal in the hope that another party obtains reversal of an administrative decision. This has never been Ohio law, and a U.S. Supreme Court decision involving *Chevron* review of federal agencies does not provide a sound basis for radically altering Ohio law. It cannot provide a basis for reversing the Commission's decision here.

C. *City of Arlington* Supports the Commission's Denial of Pilkington's Motion for Rule 60(B) Relief.

The U.S. Supreme Court's opinion in *City of Arlington* supports the Commission's denial of Rule 60(B) relief to Pilkington. The question the Supreme Court faced in *City of Arlington* was whether courts must "apply *Chevron* to . . . an agency's determination of its own jurisdiction." *City of Arlington*, 133 S.Ct. at 1867-68. The *Chevron* framework applies to situations where "a court reviews an agency's construction of the statute which it administers." *Id.* at 1868. In this situation, the court must ask two questions: (1) has Congress spoken on the question at issue; (2)(a) if so, the court "must give effect to the unambiguously expressed intent of Congress"; or (2)(b) if not, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The U.S. Supreme Court held that courts must

⁴ Pilkington's reliance on *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.2d 9, 475 N.E.2d 782 (1985), for the proposition that *res judicata* applies only if a Commission decision is unchallenged is misplaced. The Court did reference "decisions of administrative bodies which are left unchallenged," but this was not a controlling aspect of the Court's decision. It was simply recognition of the fact that, in that case, none of the parties appealed.

apply the *Chevron* framework when an agency interprets a statutory ambiguity regarding its jurisdiction. *Id.* at 1869.

For federal agencies, therefore, the determination of whether an agency's action is *ultra vires* depends upon the application of the *Chevron* framework. This is true if the question is whether the agency acted beyond its jurisdiction or whether the agency correctly interpreted a statute that it administers. *Id.* at 1867-68. Thus, application of the *City of Arlington* holding to Ohio state agencies would likewise require application of the *Chevron* framework. Yet, because Pilkington makes no argument that the Commission's February 2009 Order violated that framework, *City of Arlington* carries no weight here.

Moreover, application of the *Chevron* framework under the circumstances presented in the instant appeal leads to the conclusion that the Commission properly denied Pilkington's Rule 60(B) Motion in its January 2013 Entry. To apply the *Chevron* framework, this Court would first have to consider whether the Ohio legislature has spoken on whether the Commission has jurisdiction to decide a Rule 60(B) motion or how the Commission is to decide such a motion. If the Court finds that the Ohio legislature has spoken, it must follow the "unambiguously expressed intent" of the Ohio legislature. If the Court finds that the Ohio legislature has not spoken, it must determine whether the Commission's answer to whether or how it can decide a Rule 60(B) motion "is based on a permissible construction of the statute."

1. The Ohio legislature has not authorized the Commission to grant Rule 60(B) motions.

The General Assembly has spoken on whether the Commission may consider a Rule 60(B) motion. It laid out an explicit statutory procedure for parties to challenge Commission opinions. That procedure does not include Rule 60(B) motions. The appeal process is unambiguous, as is the fact that the Civil Rules are not binding on the Commission. As a result,

if the *Chevron* framework is to be applied here, this Court must give effect to the General Assembly's intent and affirm the Commission's decision.

2. The Commission's decision not to grant Pilkington's Rule 60(B) Motion was a permissible construction of the statutes governing its authority.

Further, even if this Court finds that the Ohio legislature has not spoken on the issue of whether the Commission may consider a Rule 60(B) motion, the Commission's February 2009 Order is based on a permissible construction of the statutes governing its authority. As laid out above, the legislature has prescribed a specific appeals procedure for parties to follow. It is reasonable for the Commission to interpret its statutory authority as limiting its jurisdiction to reconsider a Commission order based on arguments that could have been raised through the statutorily-mandated appeal process.

While Pilkington seeks to collaterally attack the Commission's February 2009 Order, the issue before this Court is whether the Commission's January 2013 Entry was unreasonable or unlawful. An application of the *Chevron* framework to that decision results in the conclusion that it is not *ultra vires*. Therefore, the Commission was within its authority to deny the Rule 60(B) motion.

D. The Court Should Not Consider Pilkington's Arguments that the Commission's Failure to Vacate the Order Violates the Filed Rate Doctrine and R.C. 4905.35 Because These Are Issues Pilkington Could Have Raised on Appeal.

Pilkington alleged in its Complaint that Toledo Edison's termination of its special contract in February 2008 as mandated by the Commission's Order violated, *inter alia*, R.C. 4905.22 and R.C. 4905.35. The claim under R.C. 4905.22 was that Toledo Edison was charging a rate higher than authorized by the Commission – i.e., the filed rate doctrine. (Complaint ¶¶ 48-50.) The claim under R.C. 4905.35 was that Toledo Edison was discriminating against

Pilkington and in favor of a subset of special contract customers by terminating Pilkington's contract in February 2008 but allowing those other customers to extend their contracts until December 2008. (Complaint ¶¶ 55-62.) Pilkington recycles these same claims in its Brief at pages 12-14, despite the fact that it could have raised these claims on appeal. By failing to appeal in a timely manner, Pilkington waived these arguments because, as discussed above, "[a] party generally may not raise issues in seeking relief from judgment under Civ.R. 60(B) that could have been raised upon appeal." *Asherton Woods Homeowners' Assn.*, 2013-Ohio-3546, at ¶ 5.

An additional problem for Pilkington is that, even if it were correct, the filed rate doctrine would prevent it from obtaining a refund. The rate Toledo Edison charged Pilkington between February 2008 and December 2008 was the standard tariff rate. The Commission ordered in the RCP Case that Toledo Edison charge this rate to Pilkington. "The rates published with PUCO are the lawful rates until the Ohio Supreme Court sets them aside as being unreasonable or unlawful." *Cincinnati Gas & Elec. v. Joseph Chevrolet Co.*, 153 Ohio App.3d 95, 2003-Ohio-1367, 791 N.E.2d 1016, ¶ 17 (citing *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957)). Toledo Edison complied with the Commission's order, and Pilkington paid the standard tariff rate. Under Ohio law, even if a Commission order approving a rate is later found to be in error, losses resulting from that rate cannot be recouped. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶¶ 9-16. Ohio law "does not allow refunds in appeals from commission orders." *Id.* ¶ 16. *See also Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957) ("a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so

collected.”). Thus, Pilkington has no remedy for the Commission’s alleged error in refusing to grant it relief from the February 2009 Order.

Proposition of Law No. 4: Public policy and equity considerations do not support reversal of the Commission’s denial of Rule 60(B) relief to Pilkington.

Pilkington argues that the Commission’s denial of relief is against public policy and the equities because the equities and public policy that would affect Toledo Energy are “exceedingly limited and rare,” while those that would affect Pilkington are “so overwhelmingly in Pilkington’s favor.” Brief at 22. However, Pilkington’s deliberate choice not to appeal the Commission’s decision and subsequent quest for relief from its choice that, in hindsight, was wrong does not entitle it to relief where the procedure for obtaining such relief is explicitly outlined in statutes governing proceedings before the Commission. Permitting the February 2009 Order to stand as to Pilkington not only is supported by the procedure set forth in the Ohio Revised Code, it is also supported by precedent of the U.S. Supreme Court and this Court. As the U.S. Supreme Court has explained in rejecting the same argument now made by Pilkington, “[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.” *Moitie*, 452 U.S. at 401 (quoting *Baldwin v. Traveling Men’s Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931)). Sound policy supports enforcing Ohio statutes governing appeals from Commission orders.

In addition, Pilkington’s call for the Commission to apply the “equities” in a manner favoring Pilkington ignores that the Commission does not have equitable jurisdiction. The Commission may exercise no jurisdiction beyond that conferred by statute, and the granting of equitable relief is not within the Commission’s jurisdiction. *See Penn Central Transp. Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 587 (1973), syllabus paras. 1, 3. *See also*

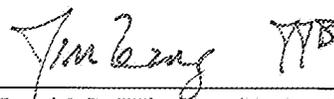
HealthSouth Corp. v. Levin, 121 Ohio St.3d 282, 2009-Ohio-584, 903 N.E.2d 1179, ¶ 24 (BTA does not have equitable jurisdiction); 1985 Ohio Op. Atty. Gen. No. 85-027 (“an administrative agency has no inherent or equitable powers, but only those powers and duties which are conferred by statute.”). The Commission did not act unreasonably or unlawfully in refusing to grant Pilkington’s Motion.

Allowing Pilkington to avoid the effect of the February 2009 Order without following Ohio law would create a result inconsistent with applicable case law and encourage parties to sit back and wait to reap the fruits that their co-defendants or co-plaintiffs may achieve on appeal.

IV. CONCLUSION

For the foregoing reasons, Toledo Edison respectfully requests that the Court affirm the Commission’s January 2013 Entry.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following by regular U.S. Mail, postage prepaid, this 3rd day of September, 2013:

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