

IN THE SUPREME COURT OF OHIO

ORIGINAL

Pilkington North America, Inc.)	
)	
Appellant,)	Case No. 2013-0709
)	
v.)	
)	Appeal from the Public Utilities
The Public Utilities Commission of Ohio,)	Commission of Ohio
)	Case No. 08-255-EL-CSS
Appellee.)	
)	

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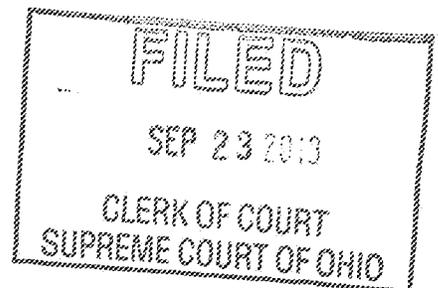


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I. INTRODUCTION

Neither the Commission, nor Toledo Edison offers any meaningful refutation of the foundational principle of administrative law which dictates that Pilkington is, indeed, entitled to relief from the Judgment. That is, the Commission—a creature of statutory law whose power is wholly circumscribed by it—acted not merely in error, but unlawfully, when it allowed the early termination of the special contracts. *Martin Marietta Magnesia Specialties v. Public Utilities Commission of Ohio*, 129 Ohio St. 3d 485, 2011-Ohio-4189, 954 N.E.2d 104

The flaws in the Commission and Toledo Edison’s positions emerge from the same fundamental error. They take Pilkington’s “60(B) motion” designation as the only salient procedural fact of this appeal. However, the specific procedural rule(s) to which Pilkington seeks relief is immaterial because the Judgment itself is an *ultra vires* act.

None of the arguments offered by the Commission or by Toledo Edison addresses this central proposition on its merits and nothing they have argued provides this Court with any means of reconciling the unlawful and void nature of the Judgment. The Commission’s Judgment was *ultra vires* and void the moment *Martin Marietta* was decided. Accordingly, the Judgment must be vacated.

II. ARGUMENT

Proposition of Law No. 1: WHEN A DECISION OF THE PUCO IS FOUND BY THE SUPREME COURT TO BE IN ERROR, THAT DECISION IS *ULTRA VIRES*, AND A FAILURE OF THE PUCO TO VACATE IT, EVEN WITH RESPECT TO PERSONS NOT PARTY TO THE APPEAL, CANNOT STAND.

Through their silence, the Commission and Toledo Edison effectively concede Pilkington’s argument that this Court’s decision declaring the Commission’s Judgment unlawful, rendered it *ultra vires* and void as a matter of law. Instead, they simply repeat the mantra that a 60(B) motion is procedurally inappropriate and Pilkington should not be permitted to make the

ultra vires argument before the Commission or this Court. Both fail to recognize the transformational impact the unlawful, *ultra vires* nature of the Judgment has on the efficacy of the procedural arguments they raise. Toledo Edison makes three arguments in response to Pilkington's assertion that the Judgment is *ultra vires* and therefore void.¹ Not a single argument, however, directly addresses this issue on the merits. First, Toledo Edison asserts that Pilkington waived the argument. Second, Toledo Edison argues that the Supreme Court's decision in *City of Arlington, Texas, et al. v. Federal Communications Commission, et al.*, ___ U.S. ___, 133 S. Ct. 1863, 1868-69, 185 L.Ed.2d 941 (2013), does not apply to Commission decisions. And third, Toledo Edison asserts that recognizing the procedural implications of the *ultra vires* nature of an unlawful Commission decision would destroy the "statutory framework for taking appeals from Commission decisions...." As addressed below, all three arguments are baseless.

A. Pilkington did not waive its *ultra vires* argument.

According to Toledo Edison, Pilkington waived the argument that the Commission's Judgment was rendered *ultra vires* by this Court's decision in *Martin Marietta*. Toledo Edison Brief, pp. 12-13. As an initial matter, Pilkington is not required to preserve the argument that the Commission lacked the power to render the unlawful order that this Court reversed, precisely because it is an assertion that the Judgment is void. It is within the inherent power of Ohio courts, not least of all this Court, to vacate void judgments. *Patton v. Diemer*, 35 Ohio St. 3d 68, 70, 518 N.E.2d 941 (1988).

¹ The Commission effectively ignores the *ultra vires* argument altogether, instead merely asserting in passing (and incorrectly) that this Court only determined the Judgment was "erroneous," and therefore the Judgment is only voidable, not void. Commission Brief, p. 11. The Commission offers no support for these assertions and fails to address any of the specific reasons set forth in detail in Pilkington's Brief as to why an "unlawful" Commission decision, which this Court found it to be, is fundamentally different from a decision of a lower court that is merely in error.

Moreover, as *City of Arlington* makes clear, the argument that the Commission's Judgment is *ultra vires* and void is an argument that the Commission lacked jurisdiction. Attacks on subject matter jurisdiction, and specifically assertions that an underlying judgment is void because of a lack of jurisdiction, cannot be waived. *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 75, 701 N.E.2d 1002 (1998) (citing *In re Byard*, 74 Ohio St. 3d 294, 658 N.E.2d 735 (1996)). They may be raised at any time even for the first time on appeal. *Id.*

Pilkington did, in fact, preserve its *ultra vires* argument. Toledo Edison essentially argues that if the words "*ultra vires*" did not appear in Pilkington's Application for Rehearing or Notice of Appeal, then Pilkington may not make its argument. This is not the rule, even for issues that must be preserved. Toledo Edison fails to distinguish between the "ground for reversal" or "errors complained of" and the argument(s) supporting those assertions. *See*, Toledo Edison Brief, p. 12.

Pilkington clearly stated in its Application for Rehearing that the Commission was incorrect in denying its motion due to Pilkington's failure to seek rehearing of the original Judgment and the prohibition of using Civ.R. 60(B)(5) as a substitute for appeal. *See*, Appellant's Appendix, p. 18, ¶¶ 1, 4. Pilkington also argued that the Commission's failure to vacate the Judgment resulted in an unlawful rate charge as a result of this Court's decision in *Martin Marietta*. *Id.* at pp. 20, 22. Similarly, in its Notice of Appeal, Pilkington specifically assigned as error the Commission's failure "to follow and comply with the decision issued by this Cour [*sic*] in *Martin Marietta Magnesia Specialties v. Pub. Util. Comm'n*, (2011) 129 Ohio St. 3d 485, 490." *Id.*, p. 18, ¶ 2.

These statements leave no doubt that the "ground for reversal" and the "errors complained of" are the Commission's failure to vacate the Judgment after *Martin Marietta*

rendered the Judgment unlawful and void. Pilkington’s framing of its arguments on appeal in the language of *City of Arlington* (i.e., using the term “*ultra vires*”) does not constitute the assertion of a new basis for rehearing or appeal. The underlying argument remains the same.

B. The principle set forth in *City of Arlington* applies to Commission decisions.

The only argument offered by either Toledo Edison or the Commission that even touches on the merits of the *ultra vires* argument is Toledo Edison’s assertion that the principle cited in *City of Arlington* does not apply to Commission decisions because the Commission is not a creature of federal law.² Toledo Edison Brief, p. 13. This is a meaningless distinction.

City of Arlington provides a clear statement of a fundamental principle of administrative law: for quasi-judicial bodies there is no difference between getting a decision right and having the authority to render the decision. This principle is neither dependent upon nor limited to a particular vertical separation of powers, e.g., a federal system of government (as Toledo Edison would have it), but rather is an expression of the relationship between the spheres of authority across a horizontal separation of powers, i.e., the legislative, judicial and executive.

Thus, “a jurisdictionally proper but substantively incorrect judicial decision is not *ultra vires* [But] when [administrative agencies] act improperly, no less when they act beyond

² Toledo Edison also makes the strange argument that if the *ultra vires* principle in *City of Arlington* applies, then so does the requirement that agency decisions be given *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) deference. Toledo Edison Brief, pp. 14-16. The argument is a *non sequitur*. *City of Arlington* was cited for its statement of the general, foundational principle of administrative law, i.e., that there is no difference between the power to act and the power to act correctly or lawfully when it comes to administrative, quasi-judicial bodies. It was not cited as binding decisional authority or for its resolution of the legal question concerning degrees of deference. Recognizing that unlawful agency decisions are *ultra vires* and not merely in error, does not—by law or logic—require one to embrace the *Chevron* framework for determining whether a decision was wrong in the first place. Moreover, even if it did, Toledo Edison’s argument is nothing more than a rehash of its earlier arguments concerning Civ.R. 60(B) that have no application here. And in any event, this Court already declared the underlying Judgment to be unlawful, and the Commission did not deny Pilkington’s present Civ.R. 60(B) motion based on any assessment of the limited scope of its own jurisdiction.

their jurisdiction, what they do is *ultra vires*.” *City of Arlington*, 133 S. Ct. 1863, 1868-69. This principle is as much a part of the fabric of Ohio law as it is of federal law:

Although the commission does exercise quasi-judicial powers, it is not a court. In fact . . . the Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.

Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm. of Ohio, 155 Ohio App.3d 46, 2003-Ohio-5395, 798 N.E.2d 1202 (1st Dist.). It is the reason the Commission is the defending party in this appeal, not merely the lower tribunal whose decision is being reviewed.

It is no coincidence, then, that this Court declared in *Martin Marietta* that “the Commission **unlawfully** and unreasonably allowed Toledo Edison to terminate the special contracts in February 2008.” *Martin Marietta*, at ¶46 (emphasis added). The Commission’s decision purported to permit a state of affairs the law governing the Commission did not allow. See, e.g., *The Cincinnati Gas & Electric Co. v. Joseph Chevrolet*, 153 Ohio App.3d 95, 2003-Ohio-1367; 791 N.E.2d 1016, ¶27 (1st Dist.). Therefore, the Judgment was not just “erroneous,” as the Commission incorrectly asserts, but was an “unlawful” act. *Id.*; Commission Brief, p. 11. Indeed, this Court based the *Martin Marietta* decision, in part, on an explicit finding that the Commission failed to invoke, and thus acted outside, the statutory grant of authority in R.C. 4905.31, which the Commission argued on appeal as a basis for its decision. *Martin Marietta*, at ¶31; see also *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2001-Ohio-2720, 953 N.E.2d 285, ¶64 (finding that the Commission’s interpretation of special contracts was unlawful because the Commission had not relied on its statutory authority).

It simply cannot be (nor has it been) genuinely disputed that when the Commission’s decision was reversed in *Martin Marietta*, the Judgment was declared unlawful and constituted

an *ultra vires* act of the Commission. It was therefore void, not just with respect to the appealing parties, but void *simpliciter*, because the Commission had no legal authority to issue it.

C. Granting Pilkington relief will not adversely affect the integrity of the appeals process.

Toledo Edison makes one additional policy argument in opposition to Pilkington's appeal. Specifically, Toledo Edison claims that acknowledging the *ultra vires* nature of Commission decisions will "upend Ohio's statutory framework for taking appeals from Commission decisions" and will "create an environment in which free riders can avoid the cost of an appeal in the hope that another party obtains reversal...." Toledo Edison Brief, p. 14. This argument misses the mark for two reasons.

First, it ignores the distinction between a voidable, errant decision of a lower court and a void, unlawful and *ultra vires* decision of the Commission. The practical concerns of judicial finality have never constrained the "inherent power possessed by Ohio courts" to "vacate a void judgment." *Patton*, 35 Ohio St. 3d at 70 .

Second, the argument overstates the circumstances in which the principles advanced by Pilkington (and set forth in *City of Arlington*) will have an impact on the appeal of Commission decisions. Toledo Edison ignores the fact that the question before the Court is not whether Pilkington should be permitted to deviate from the statutory procedures for *direct appeal* of a Commission decision, but rather, in light of this Court's decision declaring the Judgment to have been unlawful, whether Pilkington may seek relief from it by motion.

Pilkington specifically conceded in its initial brief that, had none of the other parties appealed and the Commission's decision stood undisturbed, then absent some other invalidating legal event, there would be no grounds for Pilkington's present motion. Pilkington Brief, p. 2. It would be a mere "relitigation of a point of law or fact that was at issue in a former action...."

See, *Office of Consumers' Counsel v. Public Utilities Commission of Ohio*, 16 Ohio St. 3d 9, 10, 475 N.E.2d 782 (1985)³. But Pilkington is not questioning the unlawfulness of the Judgment—the unlawfulness of the Judgment was already determined by this Court. Pilkington now simply seeks relief from it.

Thus, only where: (a) multiple parties present identical factual and legal issues for resolution that are resolved adversely to the parties by the Commission; (b) some but not all of the parties appeal the Commission decision; and (c) this Court declares the Commission's disposition of the issues was unlawful, will the *ultra vires* nature of the Commission's decision give rise to a right of the non-appealing party to seek relief. The correct application of foundational principles of administrative law will not "upend" the appeal procedures. To the contrary, granting Pilkington the relief it seeks is absolutely required to uphold the law that governs the Commission's authority.

³ Not coincidentally, such circumstances (*i.e.*, the relitigation of an adverse decision, not a request for relief from a decision already found to be unlawful) are the only circumstances in which the principles of *res judicata* and collateral estoppel have been applied to Commission decisions. Toledo Edison conflates the direct appeal procedural requirements with the substantive law governing collateral attacks on void judgments when it cites *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360 (2007) in support of its assertion. Toledo Edison Brief, pp. 6-7. The declaration that the Commission had "acted beyond its statutory authority" was made in the direct appeal proceeding itself, to which *Discount Cellular* was a party. As Pilkington has repeatedly emphasized, nothing in its position alters the procedural rules of direct appeal, which is precisely why it has followed those procedures to place the present issues before this Court now and why the appealing parties in *Martin Marietta* also had to follow those procedures in order to obtain a decision by this Court that the Commission's Judgment was unlawful. The only question now facing this Court is whether, in this procedurally proper appeal, to grant Pilkington the relief that its prior decision requires.

Proposition of Law No. 2: A MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO CIV.R. 60(B) IS A PROPER PROCEDURE FOR SEEKING TO VACATE A DECISION OF THE PUCO THAT THE SUPREME COURT HAS FOUND TO BE UNLAWFUL.

Each argument advanced by the Commission and Toledo Edison challenging the propriety of Pilkington's motion from a procedural standpoint rests on two faulty premises: (1) that the formal designation of the motion as one brought under Civ.R. 60(B) is somehow legally dispositive; and (2) that the Judgment was merely in error, as opposed to unlawful and *ultra vires*. From these two incorrect statements of the law, the Commission and Toledo Edison argue that the Commission lacks the authority even to entertain a Rule 60(B) motion for relief from judgment; that a Civ.R. 60(B) motion cannot serve as a substitute for a proper appeal; and that Pilkington failed to satisfy Civ.R. 60(B)(5)'s criteria, all preventing judgment in Pilkington's favor. The Court should not embrace these legal errors as its own.

A. The Commission had the authority (and the obligation) to grant Pilkington's motion.

1. Designation of the motion as a Civ.R. 60(B) motion does not preclude Pilkington from obtaining relief.

The Commission had the authority to review and grant Pilkington's motion, regardless of whether it was styled as a Civ.R. 60(B) motion. Toledo Edison asserts that (a) the Civil Rules do not apply to the Commission and (b) the Revised Code does not authorize the Commission to consider a motion brought under Civ.R. 60(B). But neither argument precludes the Commission or this Court from granting Pilkington the relief sought.

It is well-established that "where a party attempts to vacate a void judgment through a Civ.R. 60(B) motion, courts treat the motion as a common law motion to vacate or set aside the judgment, finding that it is 'not significant' that the motion has been styled as a Civ. R. 60(B) motion." *In re S.A.*, 2013-Ohio-3047, ¶ 34 (2nd Dist) (Froelich, J., concurring). Moreover, "[a]

void judgment is a nullity. It may be collaterally attacked at any time, and the party attacking the judgment need not meet the requirements of Civ.R. 60(B).” *Plant Equip., Inc. v. Nationwide Control Serv.*, 155 Ohio App. 3d 46, 51, 2003-Ohio-5395; 798 N.E.2d 1202 (1st Dist.). Toledo Edison’s argument amounts to an assertion that because Pilkington designated its motion as one brought under Civ.R. 60(B), it must lose on the merits. This is not the law.

Moreover, Toledo Edison also ignores the clear Commission authority (and obligation), recognized by this Court and established by the General Assembly, both with respect to the power to revisit its own orders and with respect to the adoption of procedural rules in its own proceedings. “The Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error....” *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St. 3d 49, 51, 461 N.E.2d 303 (1984). See also, *Office of the Ohio Consumers’ Counsel v. Pub. Util. Comm. of Ohio*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶14; *State ex rel. Automobile Machine Co. v. Brown*, 121 Ohio St. 73, 75-6, 166 N.E. 903 (1929). This authority exists even in the absence of any motion before the Commission at all. *Office of Consumers’ Counsel v. Pub. Util. Comm. of Ohio*, 61 Ohio St.3d 396, 575 N.E.2d 157 (1991) ([T]he Commission may find a rate or tariff provision unlawful, unjust, unreasonable, or discriminatory, whether that issue is raised by the complaint or sua sponte by the Commission.” (emphasis added).

In addition, the absence of an explicit application of the Civil Rules to the Commission does not preclude the Commission from considering the motion for relief. See, e.g., R.C. 4901.03; Ohio Adm. Code 4901-1-38 (authorizing the Commission to adopt rules governing proceedings and to prescribe the procedures to be followed in a given case). Indeed, the Commission implicitly authorized the use of the Civ.R. 60(B) motion by considering it on

the merits below and notably does not argue in its own brief on appeal that it lacks the authority to consider Pilkington's motion, but rather only that it was right to deny it. See Commission Brief, pp. 3-6 (arguing only that a Civ.R. 60(B) motion cannot substitute direct appeal, not that the Commission lacks authority to consider a Civ.R. 60(B) motion).

Thus, contrary to Toledo Edison's bald assertion that "[a]ny 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," the procedural vehicle for Pilkington's arguments is not dispositive. Toledo Edison Brief, p. 7 (emphasis added). As the Commission recognizes, it clearly had the authority to consider Pilkington's motion; however, because the Judgment was declared unlawful and void by this Court, the Commission did not have the authority to deny the motion.

2. The declared *ultra vires* status of the Judgment and its continuing violation of existing law satisfies Rule 60(B)(5).

Even if Pilkington was required to meet the Civ.R. 60(B)(5) elements in order to be entitled to relief, Pilkington met that burden, and its motion clearly is not serving as a substitute for a timely appeal as a result. Indeed, Pilkington does not quarrel with Toledo Edison and the Commission's statement of well-established law prohibiting the use of Civ.R. 60(B)(5) motions as alternatives to the timely appeal of a judgment. But not one of the cases cited or the arguments made by either party dealt with a collateral challenge to a Commission Judgment already declared by this Court to be unlawful, (which, coincidentally belies the Commission's inaccurate assertion that "Pilkington's situation is not unique or extraordinary"). Commission Brief, p. 8. Pilkington is not asking the Commission or the Court to evaluate the correctness of the Commission's Judgment, which is the very purpose of a timely appeal. It does not have to. This Court already declared that the Judgment is unlawful.

In essence, the “no substitute for a timely appeal” rule is a practical application of the doctrines of *res judicata* and collateral estoppel, which as Pilkington noted above, only apply to Commission decisions, if at all, to preclude the “relitigation of a point of law or fact that was at issue in a former action...,” not to prevent relief from a Judgment on those issues already declared to be void. *See, Office of Consumers’ Counsel v. Public Utilities Commission of Ohio*, 16 Ohio St. 3d 9, 10. *See also, Patton*, 35 Ohio St. 3d at 70. This is also why it cannot be genuinely disputed that Pilkington has met the Civ.R. 60(B)(5) elements, since there is no dispute that the motion was timely and clearly set forth a meritorious defense. This Court’s finding that the Commission’s Judgment constituted an unlawful, *ultra vires* act certainly amounts to substantial grounds under Civ.R. 60(B)(5) justifying the exercise of this Court’s “inherent power” to “relieve a person from the unjust operation of a judgment.” *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St. 3d 64, 66, 448 N.E. 2d 1365 (1983).

That the Commission’s Judgment, even now, violates the “filed rate doctrine” and the statutory prohibition on the creation of a discriminatory rate structure further supports the finding that Civ. R. 60(B)(5) has been satisfied, since continued application of the Judgment perpetuates an unlawful state of affairs. Toledo Edison errantly asserts that these arguments have been waived, since they could have been raised on direct appeal of the Judgment. Toledo Edison Brief, pp. 16-17. But the arguments on appeal are being advanced not to attack the Judgment’s correctness, which has already been determined, but rather to show the unique circumstances justifying relief from it under Civ.R. 60(B)(5), if such a showing were required. That is, refusing to vacate the Judgment constitutes a new and continuing unlawful act of the Commission.

Pilkington could have filed (and still could file) a petition to enforce the 2011 decision of this Court or a new complaint seeking to compel Toledo Edison to apply the lawful rate. The

Commission has acknowledged that it “has the authority to hear a complaint to vacate a Commission order upon finding of reasonable grounds for complaint.” *In the Matter of the Complaint of the City of Cincinnati v. The Cincinnati Gas and Electric Company*, 1991 Ohio PUC LEXIS 798 (1991). This authority was recognized by the Ohio Supreme Court in *Western Reserve Transit v. Pub. Util. Comm’n*, 39 Ohio St. 2d 16, 313 N.E.2d 811 (1974). There, the Court concluded that R.C. 4905.26 (complaints as to utility service) is extremely broad such that it gives the Commission authority to review matters previously considered in a prior proceeding. In later decisions, the Supreme Court affirmed its decision holding that issues may be raised before the Commission “which might strictly be viewed as ‘collateral attacks’ on previous orders.” *Allnet Communications v. Public Utilities Commission of Ohio, et al.*, 32 Ohio St. 3d 115, 512 N.E.2d 350 (1987).

Toledo Edison mistakenly asserts that the discriminatory pricing argument is simply a restatement of Pilkington’s Complaint before the Commission. But Pilkington’s argument on appeal is not that *Toledo Edison’s* conduct runs afoul of R.C. 4905.35, but rather that *the Commission’s Judgment* does. That is, if the Judgment now only applies to Pilkington, it is itself a violation of R.C. 4905.35, because it produces a discriminatory rate structure as between the appealing parties and Pilkington that the Commission has no authority to impose, even for procedural reasons.

Notably, neither Toledo Edison nor the Commission disputes that allowing the Judgment to stand with respect to Pilkington violates the “filed rate doctrine” and the rule against discriminatory pricing. Instead, Toledo Edison asserts incorrectly that the “filed rate doctrine” precludes Pilkington from obtaining a refund even if it were to prevail here. Toledo Edison Brief, p. 17. This is a misunderstanding of the law. The prohibition on refunds in the context of

the “filed rate doctrine” applies only when this Court declares that the lawful rates previously approved by the Commission must be changed, not when this Court has to reverse a decision of the Commission that allowed a utility to charge rates other than the lawful rates. *See, e.g., Webb v. Chase Manhattan Mortgage Corp.*, 2008 U.S. Dist. LEXIS 42559, *58-59 (S.D. Ohio, May 28, 2008) (“The filed rate doctrine does not preclude recovery of amounts paid in excess of the filed rate, but it completely forecloses any claim that a payment of the filed rate is excessive”) (citing *Keogh v. Chi. & N.W. Ry. Co.*, 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922)).

Here, this Court did not have to change unreasonable or unlawful rates set by the Commission. Rather, the Commission allowed Toledo Edison to charge rates other than the lawful, “filed” rates, as approved by the Commission via the special contracts. This Court declared that allowing such charges via early termination—not the setting of the special contract rates themselves—was unlawful. Thus, Pilkington is entitled to recover “the amounts paid in excess of the filed [special contract] rate.”

B. Public policy and the equities favor reversal of the Commission’s decision.

Finally, both Toledo Edison and the Commission highlight the judicial preference for finality in litigation; they argue that it would be unfair for Pilkington to benefit from the work of the appealing parties. In other words, Pilkington made a “deliberate choice not to appeal,” and it “must now be made to live with the price of that choice.” Toledo Edison Brief, p. 18; Commission Brief, p. 12. Although Pilkington disagrees with this assessment of the equities, it agrees with Toledo Edison that the Commission lacked authority to consider the equities when deciding Pilkington’s motion. Toledo Edison Brief, p. 18. This is the fundamental reason the law governing the Commission and the *Martin Marietta* decision are all this Court needs to grant Pilkington the relief sought.

While Pilkington is happy to address the fairness of allowing a utility to keep \$2 million in illegally collected funds (as determined by this Court), Pilkington's entitlement to relief is a matter of law, not fairness. The Commission acted unlawfully, not just in error, when it permitted Toledo Edison to prematurely terminate the special contracts. Whether fair or not, the Judgment cannot stand, regardless of whether Pilkington participated in the appeal that now dictates its right to relief.

IV. CONCLUSION

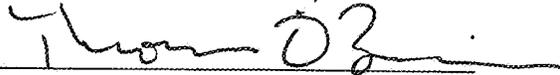
Assume that a public utility enters into a contract with an energy supplier that includes an agreement that the utility will not provide electric service to any racial minority-owned business. Five minority-owned businesses file complaints challenging the discriminatory agreement, all of which the Commission dismisses, finding that the contract is proper and legally valid. Four of the businesses appeal the dismissal to this Court, and this Court properly reverses the decision, declaring that the Commission acted unlawfully in permitting the discriminatory utility/supplier contract. The fifth business, which did not appeal, then files a motion for relief from the judgment, seeking to be relieved of the Commission's unlawful order as well and claiming that the discriminatory contract is void and cannot be a basis for denying it electric service any more than it could the four appealing businesses.

According to Toledo Edison and the Commission, this Court "cannot and should not reward [the fifth minority-owned business's] choice not to participate in the appeal," because the fifth business "gave up its right" to challenge the discriminatory contract and "must now be made to live with the price of that choice." Commission Brief, pp. 3, 12; Toledo Edison Brief, p. 11. According to Toledo Edison and the Commission, the utility could contractually agree to refuse to provide service to the fifth minority-owned business, simply because it had failed to join the appeal, even though the decision upholding the discriminatory contract was an unlawful

act of the Commission. Obviously, this position is an absurd construction of the law. *See, The Cincinnati Gas & Electric Co. v. Joseph Chevrolet*, 153 Ohio App.3d 95, 2003-Ohio-1367; 791 N.E.2d 1016, ¶27 (1st Dist.). But it is precisely the position Toledo Edison and the Commission take now, because they fail to recognize the significant difference between an erroneous decision of a lower court and an unlawful decision of the Commission. The Commission's decision permitting Toledo Edison's unlawful early termination of the special contracts can no more be left to stand as to Pilkington, simply because it failed to join the appeal, than could an unlawful Commission decision permitting contracts for racially discriminatory electric service.

This appeal is not about Civ.R. 60(B) – it is about the law governing the Commission as declared by this Court in *Martin Marietta* and the obligation of the Commission to abide by it. For the foregoing reasons, and the reasons stated more fully in Pilkington's initial brief, Pilkington respectfully requests that this Court REVERSE the Commission's Entry and Entry on Rehearing denying its Civ.R. 60(B) motion, and ORDER that the original Judgment be VACATED and that the Commission be instructed to order Toledo Edison to return to Pilkington the unlawfully awarded sums.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellant was served by regular mail, postage prepaid, this 23rd day of September 2013.


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