IN THE SUPREME COURT OF OHIO

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.	)	
	)	

BRIEF OF APPELLANT

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I. INTRODUCTION

It is undisputed the Commission erred when it permitted Toledo Edison to wrongfully charge Pilkington and other Customers an improper rate, by allowing Toledo Edison to prematurely terminate its special contracts in a manner this Court found unlawful. *Martin Marietta Magnesia Specialties v. Public Utilities Commission of Ohio,* 129 Ohio St. 3d 485, 2011-Ohio-4189, 954 N.E.2d 104 (hereinafter *"Martin Marietta").* At issue in this Appeal, is whether the Commission further erred by denying Pilkington's Civ. R.60(B) motion for relief.

The sole basis for the Commission's decision (and the sole grounds for Toledo Edison's opposition) is the Commission's perceived procedural unfairness or impropriety of allowing Pilkington a supposed "windfall" from the successful appeal prosecuted by other parties. There are at least two fatal flaws in the Commission's (and Toledo Edison's) position.

First, the Commission fails to recognize its decisions are fundamentally different, as a matter of law, from those of a court or other quasi-judicial body. A decision of the Commission declared by this Court to be in error is, by definition, an unlawful, *ultra vires* act that cannot stand. The procedural posture of the underlying dispute is irrelevant. The only question is whether Civ.R. 60(B) is an appropriate (or even necessary) mechanism to compel the Commission to vacate its unlawful decision.

Second, despite Toledo Edison's and the Commission's alleged concerns regarding a potential windfall, the equities and public policy are overwhelmingly in Pilkington's favor. Under the status quo, it is Toledo Edison who is illegally enjoying a windfall of nearly two million dollars in overcharges obtained from Pilkington. Both fundamental

fairness and public policy dictate that Toledo Edison's unlawful retention of those sums should be disallowed and that Pilkington be compensated for the discrepancy.

This case presents a rare circumstance. The issue is not whether Pilkington is permitted to deviate from the statutory procedures for direct appeal of a Commission decision. Rather, the issue is whether in light of this Court's decision declaring the very Order[1] in question to have been unlawful, Pilkington's use of Civ.R., 60(B) is an appropriate procedure to collaterally attack the unlawful Order.

Indeed, Pilkington concedes that if no other Customers filed an appeal, then absent some independent basis undermining the validity of the decision no grounds would exist for Pilkington's present motion. *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 16 Ohio St. 3d 9, 10, 475 N.E.2d 782 (1985) (observing that res judicata and collateral estoppel apply where "[n]either OCC,..., *nor any other party*, filed an application for rehearing or appealed" and noting a preference for finality of administrative decisions "which are left *unchallenged*") (emphasis added).

Here, the Commission's decision was challenged. The other Customers appealed, arguing the exact factual and legal issues dispositive of Pilkington's claims, and this Court affirmatively declared the Commission's decision unlawful. Pilkington now seeks merely to vacate the unlawful decision as it applies to Pilkington given the Court's clear statement of the law.

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[1] See, *In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., Pilkington North America, Inc., and Martin Marietta Magnesia Specialties, LLC,* Pub. Util. Comm. Nos. 08-67-EL-CSS, 08-145-EL-CSS, 08-146-EL-CSS, 08-254-EL-CSS, 08-254-EL-CSS, 08-255-EL-CSS and 09-893-EL-CSS 2008 Ohio PUC LEXIS 2032 (February 19, 2009) (hereinafter "*Joint Complaint*"). Appellant's App. p. 34. References to Appellant Pilkington's Appendix to this Merit Brief will be designated by "Appellant's App." followed by the page reference in the Appendix.

Accordingly, the Commission's denial of Pilkington's Civ.R. 60(B) motion should be reversed, the Order as to Pilkington vacated, and Toledo Edison ordered to immediately return the sums it unlawfully obtained.

II. STATEMENT OF FACTS

This case has a complex history that dates back to early 2008 when Appellant, Pilkington North American, Inc. ("Pilkington") and five (5) other large industrial companies (Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Materials, LLC) (collectively the "Customers") separately filed complaints with Appellee, the Public Utilities Commission of Ohio (the "Commission") against the Toledo Edison Company ("Toledo Edison") alleging violations of statutory, regulatory, and contractual duties relating to the provision of electric service under certain electric services agreement filed with, and approved by, the Commission under R.C. 4905.31.[2] This section provides the relevant background facts and a brief summary of the procedural history.

A. Pertinent Background Facts.

Pilkington's electric service agreement with Toledo Edison relates to its manufacturing facility located in Wood County, Rossford, Ohio (the "Pilkington Facility"). Appellant's Supp. p. 03.[3] The Pilkington Facility primarily focuses on float glass production in which raw materials, such as sand, are turned into glass. Appellant's Supp. p. 03. Approximately 300 people are employed at the Pilkington Facility, where

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[2] *Id.*

[3] References to Appellant Pilkington's Supplement to this Merit Brief will be designated by "Appellant's Supp." followed by the page reference in the Supplement.

approximately 100 million kilowatt hours of electricity are consumed in a typical year. Appellant's Supp. p. 03.

Pilkington's electric service agreement with Toledo Edison for the Pilkington Facility originally was entered into between Toledo Edison and Pilkington's predecessor-in-interest, Libbey-Owens-Ford Co., on May 22, 1990 (also referred to as the "Pilkington ESA"). The Pilkington ESA represents a reasonable arrangement under R.C. 4905.31 that was filed with, and approved by, the Commission.[4] Toledo Edison and Pilkington later entered into three additional amendments to the Pilkington ESA, each of which was also approved by the Commission. The modification most relevant to this case occurred in 2001 as part of FirstEnergy's Electric Transition Plan Proceeding, Case Nos. 99-1212-EL-ETP et al. (the "ETP Case"). Appellant's Supp. p. 4.

In the ETP Case, Toledo Edison notified each of its special contract customers of a one-time opportunity to terminate, leave unchanged, or extend the term of their special contracts. Pilkington and each of the Customers timely elected to extend their special contract through the date on which Toledo Edison ceased collection of its regulatory transition charges ("RTC"). In doing so, Pilkington and the Customers duly executed an amendment (the "2001 Amendments") to their special contract as prepared by Toledo Edison. Appellant's Supp. p. 4.

The operative language in the 2001 Amendments was identical for all Customers. It expressly stated that the special contracts would "terminate with the bill rendered for the electric usage through the date which RTC ceases for the Company." The 2001

[4] See *In Re the Matter of the Application of The Toledo Edison Company for Approval of a Contract with Libbey-Owens-Ford Company, Rossford Manufacturing Plant*, Pub. Util. Comm., Case No. 90-1016-EL-AEC 1990 Ohio PUC LEXIS 880 (August 8, 1990). Appellant's App. p. 26.

Amendments defined "RTC" as "Regulatory Transition Charges." *Martin Marietta* at ¶10, 954 N.E.2d 104. It is undisputed that Toledo Edison continued to collect its RTC through December 31, 2008. Appellant's Supp. p. 4.

Upon the filing of the complaints with the Commission, Toledo Edison entered into an escrow agreement with Pilkington and each of the Customers (except for Martin Marietta). Under the escrow agreements, Pilkington and the Customers continued to pay Toledo Edison at the special contract rates, while paying the difference between their special contract rate and the higher tariff rates into separate escrow accounts at the Bank of New York. This continued from the February 2008 meter read date through December 31, 2008. Appellant's Supp. pp. 4-5.

B. Procedural History.

The Commission consolidated the Customers' complaints, including Pilkington, by its Entry dated April 7, 2008[5], and at the evidentiary hearing on July 23, 2008. From this point on, the six complaints were treated as one because the termination language in each of the special contracts (and based upon the 2001 Amendments) was identical.

On February 19, 2009, the Commission issued an Opinion and Order denying the relief sought by Pilkington and the other Customers.[6] On March 20, 2009, an Application for Rehearing from the Opinion and Order dated February 19, 2009 was timely filed by

[5] See *Joint Complaint,* 2008 Ohio PUC LEXIS 2032 (April 7, 2008). Appellant's App. at 29.

[6] See *Joint Complaint*, Ohio PUC LEXIS 126 (February 19, 2009). Appellant's App. p. 34.

each of the Customers. Pilkington did not file an application for rehearing. The Application for Rehearing was denied by Commission Entry dated April 15, 2009.[7]

On June 12, 2009, a Notice of Appeal was filed with the Ohio Supreme Court by the Customers. Appellant's Supp. p. 70. Pilkington chose not to join the Ohio Supreme Court appeal. As a result, Pilkington was forced to release the escrowed billing amounts, a total of $1,852,160. Appellant's Supp. p. 05. This amount represented the difference between Pilkington's special contract rates and the higher tariff rates.

On August 25, 2011, this Court issued a unanimous ruling in favor of the Customers. The Court's ruling reversed the Commission's decision allowing Toledo Edison to unilaterally and prematurely terminate the Customers' special contracts in February 2008, while continuing to collect an unlawful tariff rate through December 31, 2008. *Martin Marietta* at ¶46, 954 N.E.2d 104. The Court concluded that, by allowing Toledo Edison to terminate the Customers' special contracts in February 2008, the Commission failed to apply the clear and unambiguous language terminating those contracts (and the more favorable special contract rates) on December 31, 2008. The 2001 Amendments tied the termination of the special contracts solely to Toledo Edison's collection of the RTC, thus the contracts "remained in effect until December 31, 2008, when the utility ceased collecting regulatory-transition charges." *Id.* at ¶25, 954 N.E.2d 104. The difference between the special contract rates and what the Customers actually paid due to the unlawful and premature termination totaled approximately $2.8 million. This amount did not include the wrongfully collected amount of $1,852,160, which Toledo Edison unlawfully required Pilkington to pay.

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[7] See *Joint Complaint,* Entry on Rehearing (April 15, 2009). *NOTE: No Lexis citation is available for this entry.* Appellant's App. at 54.

On January 5, 2012, Pilkington filed a Motion for Relief Under Civ.R. 60(B) with the Commission. Appellant's Supp. p. 01. Over a year later, on January 23, 2013, the Commission issued its Entry denying Pilkington's motion for relief. Appellant's App. p. 05. On February 22, 2013, pursuant to R.C. 4903.10, Pilkington timely filed its Application for Rehearing from the Entry dated January 23, 2013. Appellant's App. 18. The Application for Rehearing was denied by Commission Entry dated March 20, 2013 (the "Entry on Rehearing"). Appellant's App. p. 11. Accordingly, Pilkington timely filed its Notice of Appeal with this Court on May 6, 2013. Appellant's App. p. 01.

III. ARGUMENT

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

This Court's reversal in *Martin Marietta* constitutes a finding that the Commission acted *ultra vires*. As a result, the decision as to Pilkington, identical in every respect to the decision in *Martin Marietta*, must be vacated as unlawful with respect to all parties, regardless of the procedural posture or the particular parties to the appeal because the Commission has a statutory obligation to ensure that Toledo Edison adheres to the lawfully approved rates. (*See generally City of Columbus v. Public Utilities Commission of Ohio*, 62 Ohio St.3d 430, 584 N.E.2d 646 (1992); *see also Kazmaier Supermarket, Inc., v. Toledo Edison Co.*, 61 Ohio St.3d 147, 152-153; 573 N.E.2d 655 (1991) .

A. Decisions of the Commission found by the Supreme Court to be in error, are unlawful and therefore *ultra vires*.

Just two months ago, the Supreme Court of the United States clarified the fundamental—and in this case essential—difference between an incorrect decision of a court and an incorrect decision of an administrative agency acting in a quasi-judicial capacity:

> In the judicial context, there is a meaningful line [between the jurisdictional and non-jurisdictional]: Whether the court decided *correctly* is a question that has different consequences from the question whether it had the power to decide *at all*. * * * A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect. Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires.
>
> That is not so for agencies charged with administering congressional statutes. Both their power to act and how they are to act is authoritatively prescribed by Congress, so that ***when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires***.

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) (bold emphasis added).

The United States Supreme Court's analysis is equally applicable to state agency decisions, like that of the Commission here. This Court has routinely held that the Commission is a creature of statute whose powers derive exclusively from and are circumscribed entirely by the law that created it. See, e.g., *Discount Cellular, Inc. v. Public Utilities Commission of Ohio*, 112 Ohio St. 3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶51 ("The Commission, as a creature of statute, has no authority to act beyond its statutory powers"); *City of Columbus v. Public Utilities Commission*, 103 Ohio St. 79, 108, 133 N.E.

800 (1921) ("[T]he Commission is a creature of the statute and...it has no authority except such as is invested in it by statute").

When the Commission issues a decision that this Court finds to be unlawful, it acted *ultra vires*—and the decision is "of no legal effect." *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 491, fn. 13, 104 S.Ct. 1936; 80 L.Ed.2d 480 (1984). Such *ultra vires* decisions are not entitled to *res judicata* effect in the same way that an errant decision of a court is entitled to protection from collateral attack. *City of Arlington*, ___ U.S. ___, 133 S. Ct. 1863, 1868, 185 L.Ed.2d 941. Ohio courts, including this Court in *Martin Marietta*, have drawn the same conclusion as to Ohio law with respect to the Commission, recognizing that collateral attacks on unlawful Commission decisions are appropriate. *Martin Marietta* at ¶41, 954 N.E.2d 104 ("Contrary to the Commission's findings, its prior orders can be collaterally attacked..."). See also, *In re Complaint of City of Reynoldsburg*, 134 Ohio St.3d 29, 2012-Ohio-5270; 979 N.E.2d 1229, ¶65; *In re Complaint of Wilkes v. Ohio Edison Co.*, 131 Ohio St.3d 252, 2012-Ohio-609; 963 N.E.2d 1285, ¶13 (observing that Ohio precedent holds that the Commission may revisit its own orders, though not the orders of a court); *Western Reserve Transit Auth. v. Public Utilities Commission of Ohio*, 39 Ohio St.2d 16, 18-19, 313 N.E.2d 811 (1974) (rejecting the argument that a collateral attack amounted to an untimely application for rehearing and reversing the Commission's dismissal of a complaint on those grounds).

While the doctrines of collateral estoppel and *res judicata* may apply to Commission decisions, this Court has recognized that their application is generally limited to "the decisions of administrative bodies *which are left unchallenged*," it being significant whether or not "*any other party*" to the proceedings sought rehearing or appeal. *Office of*

the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985) (emphasis added). Even in such instances where the decisions are left unchallenged, however, the Commission is always free to "change or modify earlier orders as long as it justifies any changes." *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 114 Ohio St.3d 340, 2007-Ohio-4276; 872 N.E.2d 269, ¶14 ; *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 10 Ohio St.3d 49, 51, 461 N.E.2d 303 (1984) (explaining that "the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error" (citation omitted). The Commission is obligated to disregard an errant decision when "judicial construction" of a legal question at odds with a decision of the Commission "makes it imperative to do so." *State ex rel. Automobile Machine Co. v. Brown*, 121 Ohio St. 73, 75-6, 166 N.E. 903 (1929) (citation omitted).

The Commission and Toledo Edison fail to acknowledge that a decision of the Commission subsequently found by this Court to be unlawful can be of no legal effect. This legal reality fundamentally alters the significance of this Court's decision in *Martin Marietta*, and ultimately dictates that Pilkington is, in fact, entitled to relief from the judgment in question pursuant to Civ.R. 60(B), regardless of whether it sought rehearing of the original decision or joined in its appeal.

B. The Supreme Court's decision in *Martin Marietta* rendered the Commission's decision *ultra vires*, even as to Pilkington.

It is undisputed that *Martin Marietta* disposed of the very factual and legal issues presented in Pilkington's own complaint before the Commission. The litigants in the consolidated actions presented complaints based on the exact same issues of law and fact leading to their consolidation. See, e.g., The Toledo Edison Company's Memorandum in

Opposition to Pilkington North America, Inc.'s Motion for Relief Under Civil Rule 60(B) [hereinafter "Toledo Edison's Opp. to 60(B)"], pp. 1, 7 (Appellant's Supp. p. 52, 58) (recognizing the "the Order" applying to all parties was at issue on appeal, that the contracts "contained the same language," and basing its arguments against relief solely on the procedural impropriety of allowing Pilkington to "reap the benefits of its co-parties efforts"); *Martin Marietta* at 489, 954 N.E.2d 104 ("the appeals share identical facts and legal issues").

There is also no dispute that this Court specifically held that the Commission acted "unlawfully and unreasonably [by allowing] Toledo Edison to terminate the special contracts in February 2008." *Id.* at ¶46, 954 N.E.2d 104. Therefore, according to Toledo Edison and the Commission, Pilkington's only roadblock preventing recovery of the sums it was unlawfully charged is its failure to have joined in the appeal. See, Toledo Edison's Opp. to 60(B), pp. 3, 4-7 (Appellant's Supp. pp. 54, 55-58); Entry, ¶¶ 7, 9 (Appellant's App. pp. 08-09).

In light of the law set forth in section 1(A) above, the decision in *Martin Marietta* rendered the Commission's decision with respect to *all parties*, not just those that had joined in the appeal, *ultra vires*. The impact of this Court's decision declaring the legal invalidity of the Order does not depend upon Pilkington's presence before this Court. It depends only upon this Court's jurisdiction over the Commission and the fact that the Order in question was the *exact same Order* that deprived Pilkington of the sums to which it was entitled. In other words, the Commission's Order that permitted Toledo Edison to terminate the special contracts, whether with respect to Pilkington or the appealing parties, (or even of a non-party entity who suffered from the same unlawful conduct of Toledo

Edison), became "of no legal effect" the moment this Court's decision in *Martin Marietta* was issued. See, *ITT World Communications, Inc.*, 466 U.S. at 491, fn. 13. As a result, the failure of the Commission to vacate its Order awarding Toledo Edison almost two million dollars from Pilkington was itself an unlawful act (or failure to act) by the Commission.

The Commission does not even have to wait for Pilkington to collaterally attack the Order, whether via Civ.R. 60(B) motion or via a new complaint filed with the Commission, in order to vacate its unlawful decision. The refusal to immediately vacate the Order even as to Pilkington was wrong not only because it unlawfully permitted early termination of the special contract, as this Court held, but also because the result of maintaining the Order as to Pilkington now produces additional violations of the law, further rendering the Commission's actions *ultra vires*. As Pilkington argued in support of its Motion, the present problem with permitting the Commission's decision to stand and with permitting Toledo Edison to retain the sums unlawfully obtained is twofold: It violates the filed rate doctrine and violated Ohio law against discriminatory pricing.

First, failing to vacate the Order amounts to a violation of the filed rate doctrine, because the Commission is effectively ordering payment by Pilkington for utility service at a rate different from the legally ratified filed rate. See R.C. 4905.22. Appellant's App. p. 74. See also, *The Cincinnati Gas & Electric Co. v. Joseph Chevrolet*, 153 Ohio App.3d 95, 2003-Ohio-1367; 791 N.E.2d 1016, ¶27 (1st Dist.) (citing *Coss v. The Public Utilities Commission of Ohio*, 101 Ohio St. 528, 130 N.E. 937 (1920) and noting that the Commission lacks jurisdiction to enforce specific performance of a contract for utility services at a rate different from the scheduled rate).

Toledo Edison has a statutory obligation to impose a lawful, approved rate. The operative Ohio statute provides that: "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." R.C. 4905.32 (Appellant's App. p. 80). Likewise, the Commission has a statutory obligation to ensure that regulated electric utilities adhere to the lawful approved rates. As the Ohio Court of Appeal for the Tenth District has stated:

> The Ohio General Assembly has created a comprehensive statutory system for regulating the business activities of public utilities. Contained within Title 49 of the Ohio Revised Code is the framework for the regulation of utility service, and the fixation of rates charged by utilities to their customers. In order to administer this system, the General Assembly created the Public Utilities Commission ("PUCO") and bestowed upon it the authority to administer and enforce the provisions of R.C. Title 49.
>
> As part of this regulatory scheme, every public utility in the state is required to apply for PUCO approval of tariff schedules that detail the rates, charges, and classifications of their services. R.C. 4905.30. This requirement has given birth to what is known as the "filed rate doctrine." The filed rate doctrine, embodied in R.C. 4905.33, mandates that a public utility must charge the tariff rates approved by the PUCO. Further, deviation from those rates is not permitted except under the supervision of the PUCO.

Gary Phillips & Assoc. v. Ameritech Corp., 144 Ohio App.3d 149, 759 N.E.2d 833 (10th Dist. 2001); *see generally Ohio Edison Company v. Public Utilities Commission of Ohio*, 78 Ohio St. 3d 466, 678 N.E.2d 922 (1997). Ultimately, a regulated public utility may not grant rebates or discounts to favored ratepayers without Commission approval. R.C. 4905.32 (Appellant's App. p. 80). Nor may a public utility overcharge any individual ratepayers; the utility must apply the approved rate. *Id.* If the Commission cannot order

specific performance of an unlawful contract, then it is unable to sustain an unlawful order based on an errant interpretation of a contract.

Second, allowing the decision to stand as to Pilkington results in the creation of discriminatory rate structure in violation of R.C. 4905.35. Appellant's App. p. 81. The law does not permit either result. And even if these additional problems did not emerge as a result of the Commission failing to vacate its Order—but especially because they do—the Supreme Court's decision in *Martin Marietta* obligated the Commission to vacate the Order in its totality, regardless of Pilkington's involvement in the appeal.

There is no dispute that this Court's decision in *Martin Marietta* renders the Commission's decision against Pilkington incorrect as a matter of law. Thus, there can be no dispute that the Commission's "incorrect" decision against Pilkington is *ultra vires* and of no legal effect. The only question remaining is whether, in light of that fact, the Commission should have granted Pilkington's Civ.R. 60(B) motion for relief. As the analysis below demonstrates, the answer to that question clearly is in the affirmative.

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 COMMISSION DECISION THAT THE SUPREME COURT FOUND UNLAWFUL.

The propriety of the present appeal is not in question. Pilkington filed a Civ.R. 60(B) motion, sought rehearing after denial, and properly appealed the denial to this Court. The only question is whether the Civ.R. 60(B) motion should have been granted in light of the Supreme Court's decision in *Martin Marietta*. As demonstrated below, not only is Civ.R. 60(B) an appropriate procedural mechanism to be used under the unique circumstances of this case, but it is also beyond dispute that Pilkington satisfies the criteria of Civ.R. 60(B), thereby entitling it to relief. But even if a motion under Civ.R. 60(B) is

not formally appropriate, the equities and public policy considerations dictate that Pilkington is entitled to and should be granted by this Court full relief from the Commission's unlawful decision. Any other result would defeat the statutory purpose behind the creation of the Commission and perpetuate a manifest injustice.

A. A Civ.R. 60(B) motion is an appropriate procedure to seek vacatur of an unlawful Commission decision.

As an initial matter, Civ.R. 60(B) is an appropriate means of asking the Commission to vacate an unlawful decision, which the Commission notably does not dispute categorically. In fact, the Commission implicitly conceded that a Civ.R. 60(B) motion is an appropriate proceeding when it decided against Pilkington on the merits, rather than dismissing the request as a matter of jurisdiction. See, Entry, ¶¶ 7-10, Appellant's App. pp. 08-09. Moreover, the cases cited by Toledo Edison for the proposition that a 60(B) motion cannot be heard by the Commission are consistent with Pilkington's position, as they merely hold that civil rules are not *binding* on adjudicative bodies other than courts. *Yoder v. Ohio St. Bd. of Ed.*, 40 Ohio App.3d 111, 112, 531 N.E.2d 769 (9th Dist. 1988) (board of education); *Midwest Enterprises v. Cuyahoga County Board of Revision*, 8th Dist. No. 67203 and 67565, 1995 Ohio App. LEXIS 220, *3 (January 26, 1995) (board of tax appeals).

In neither case did the court make a reasoned decision as to why an administrative agency *could not* consider a Civ.R. 60(B) request before the Commission specifically. And as Pilkington pointed out in its reply brief, the Commission itself indicated that assessing the merits of a collateral attack on a prior judgment is appropriately done via 60(B) review, even if the attack was initiated by a new complaint before the Commission. *In the Matter of the Complaint of the City of Cincinnati v. The Cincinnati Gas & Electric*

Company, et al., Pub. Util. Comm. No. 91-377-EL-CSS, 1991 Ohio PUC LEXIS 798, at *8-11 (June 27, 1991). Appellant's App. pp. 65-66.

The statutory procedures cited by Toledo Edison and the Commission apply only to attempts by a party to obtain direct reversal of a decision by the Supreme Court itself, not attempts to get the Commission to vacate or modify its own decision that has been deemed by this Court to be unlawful—an action that is within the Commission's clear authority, indeed obligation, to change prior Orders that are shown to be in error. See, *OCC*, 114 Ohio St.3d at ¶14, 872 N.E.2d 269; *OCC*, 10 Ohio St.3d at 51, 461 N.E.2d; *Brown*, 121 Ohio St. at 75-6, 166 N.E. 903.

Thus, whether or not the Civil Rules strictly bind the Commission, a request for relief from an unlawful decision is entirely proper and Civ.R. 60(B) is an appropriate means of placing that request before the Commission. Indeed, at worst, the Rule's specific limitations (and Pilkington's corresponding obligation to make a showing of each of Civ.R. 60(B)'s requirements) do not apply. But that does not mean Pilkington's request should be denied summarily. Particularly given that, as demonstrated above, the Commission's decision was shown to be unlawful and *ultra vires*, even as to Pilkington, as soon as this Court decided *Martin Marietta*, it was entirely proper for Pilkington to request that the Commission undo its unlawful action via motion pursuant to Civ.R. 60(B).

The Commission's misguided jurisdictional theory that it could not grant Pilkington's petition because it was unable to waive statutory rehearing and appeal requirements is also unavailing. First, the Commission has inherent authority to correct errors in its prior decisions. *See generally Citizens Against The Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416-418 (M.D.Tenn. 2004) ("'the general rule is

Allnet Communications v. Public Utilities Commission of Ohio, et al., 32 Ohio St.3d 115, 512 N.E.2d 350 (1987). *See also Martin Marietta* at 494, 954 N.E.2d 104.

In fact, "the [Commission] has used, and in some case been directed by the Ohio Supreme Court to use, its general supervisory powers over utilities and R.C. 4905.26 to review matters considered in prior orders." *See City of Cincinnati Complaint, supra,* 1991 Ohio PUC LEXIS 798. Appellant's App. p. 69. This power is not limited to complaints raised by others; the Commission itself has the authority to initiate complaints under R.C. 4905.26, and to investigate the continuing reasonableness of rates which it had previously established as just and reasonable. *Id., citing Ohio Utilities Co. v. Public Utilities Commission of Ohio*, 58 Ohio St.2d 153, 389 N.E.2d 483 (1979).

B. Pilkington clearly satisfied the requirements of a Civ.R. 60(B) motion entitling it to the relief sought.

The Commission denied Pilkington's Civ.R. 60(B) motion, not because it claimed to lack jurisdiction to hear it, but because it found Pilkington failed to demonstrate a basis for relief under Civ.R. 60(B)(4) or (5). Entry, ¶¶ 7-9, Appellant's App. pp. 08-09. This finding was in error, because the *ultra vires* nature of the Commission's Order, following this Court's explication of the law in *Martin Marietta,* is a unique and extraordinary reason justifying relief under Civ.R. 60(B)(5). Importantly, there is no dispute that Pilkington's motion was both timely and set forth a meritorious claim or defense.

The sole basis for the Commission's rejection of Pilkington's Civ.R. 60(B)(5) argument is that Pilkington failed to seek rehearing or to participate in the appeal of the decision when it had the chance to do so, and that Civ.R. 60(B) is not a substitute for a proper appeal. Entry, ¶ 9, Appellant's App. p. 09. But this reasoning, as shown above, treats the Commission's decision as merely error, entitled to full *res judicata* effect, rather

than as an unlawful act of the Commission beyond its granted authority. When the Commission's decision is properly viewed from the perspective of an unlawful act, rather than a mere judicial error, then it is clear why, pursuant to Civ.R. 60(B)(5), the decision constituting that unlawful act should be vacated. See, e.g., *Ohi-Rail Corp. v. Barnett*, 7th Dist. No. 09-JE-18, 2010-Ohio-1549, ¶ 41 (rejecting on a factual basis but entertaining 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). Certainly, such a legal reality, which is unique to Commission decisions subsequently successfully reversed on appeal by other parties, thereby rendering the underlying decision *ultra vires*, constitutes "any other reason justifying relief." See, Civ. R. 60(B)(5), Appellant's App. p. 82.

Moreover, Civ.R. 60(B) is not as open and shut as the Commission claims. In its decision, the Commission relied heavily on a single passage in this Court's decision in *Wigton v. Lavender*, 9 Ohio St.3d 40, 43, 457 N.E.2d 1172, 1175 (1984). There, this Court held that "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 and non-appealing parties are so interwoven or dependent on each other as to require a reversal of the whole judgment where a part thereof is reversed." *Id.* In adopting this general rule, however, this Court identified and approved a variety of exceptions that had been applied by other courts:

> Courts have thus permitted the benefits of an appeal to inure to a nonappealing party where a proper disposition of the case on another trial is dependent on the further presence in the case of the non-appealing parties, ... where the justice of the case requires the reversal or modification of the judgment as to nonappealing parties, ... where the non-appealing parties are minors, ... where error permeates the entire case, ... or where

> double recovery might result if the judgment against a nonappealing party is allowed to stand. [Citations omitted.]

Id. Read in context, this Court was signaling that these exceptions would be followed. These exceptions support Pilkington's position here. To start with, error certainly "permeate[d]" the entire Commission proceeding in 2009. The Commission followed Toledo Edison's lead uncritically and embraced a contractual theory that was entirely without merit. *Joint Complaint,* at pp. 18-19. Appellant's App. pp. 51-52. Additionally, the Commission has always had a statutory obligation to apply the filed rate doctrine. *Public Utilities Commission of Ohio et al. v. United Fuel Gas Co. et al.*, 317 U.S. 456; 63 S.Ct. 369; 87 L.Ed. 396 (1943). Consequently, "justice of the case" required the reversal or modification of the Commission's 2009 judgment as to Pilkington. *Wigton, supra* at 42, 457 N.E.2d 1172.

The Commission also relied heavily on *Ackerman v. United States*, 340 U.S. 193, 71 S.Ct. 209; 95 L.Ed. 207 (1950). Contrary to the Commission's assertions, the decision in *Ackerman* is not controlling here. In this immigration case, unlike the situation here, there was no credible allegation that a public utility had violated basic statutory requirements. *Id.* at pp. 195-196. Furthermore, unlike the situation here, there was no appellate ruling that directly supported the claims made by the injured party. *Id.*

The Commission further purported to rely on *California Medical Ass'n v. Shalala*, 207 F.3d 575 (C.D. Calif. 2000). That case focused solely on whether a party that has paid its adversary's attorney's fees could later petition for relief from the fee judgment under Fed.R.Civ.P. 60(b)(5). *Id.* at 576. The Ninth Circuit held that "Rule 60(b)(5) is available if a party seeks relief solely on the ground that the underlying merits judgment is reversed." *Id.* at 577. Although the party invoking Fed.R.Civ.P. 60(b)(5) (Appellant's

App. p. 85) had not appealed the award of attorney's fees to the Ninth Circuit on a timely basis, the court held that relief could be obtained in the district court under Fed.R.Civ.P. 60(b). *Id.* at 576. *California Medical Ass'n* did not involve any of the exceptions to *Ackerman* and *Wigton* available under Ohio law; nor did this case involve tariff rates or public utility regulation. For these reasons, *California Medical Ass'n* does not support the Commission's position here.

At a minimum, if Civ.R60(B)(5) is not formally satisfied in light of this Court's decision in *Martin Marietta*—and the uniquely *ultra vires* status that it assigned to the Commission's Order—then it is only because the Commission's Order was a legal nullity that was, in fact, void rather than voidable, as a matter of law. See, e.g., *State of Ohio v. Montgomery*, 6th Dist. No. H-02-039, 2003-Ohio-4095, ¶¶ 8-10 (distinguishing void and voidable judgments, noting that the former is "a legal nullity which can be attacked collaterally"). Under such circumstances, Pilkington is still entitled to a vacatur of the judgment unlawfully awarding Toledo Edison nearly two million dollars to which it is not entitled. Citing Civ.R. 60(B) as the basis for its request does not preclude that result.

C. Public policy and the equities favor reversal of the Commission's decision denying Pilkington 60(B) relief.

While the law governing the substance and procedure of Pilkington's motion and the Commission's decision(s) entitles Pilkington to the relief requested, it is noteworthy—and more than a little ironic—that the primary basis for the Commission's denial of (and Toledo Edison's opposition to) that relief is an invocation of the equities. Indeed, the Commission decided Pilkington's motion, in the final analysis, essentially based on Pilkington's failure to seek rehearing and appeal of the Commission's original order, because it would unfairly and improperly relieve Pilkington of its deliberate choice not to

challenge the order. See, Entry, ¶ 9, Appellant's App. p. 09. However, the Commission's faulty assessment of the equities and of the public policy implications of a decision in Pilkington's favor miss the mark.

First, Pilkington simply notes that the future circumstances to which a present decision in favor of Pilkington will apply are exceedingly limited and rare. Only where this Court issues a decision that unequivocally declares a Commission's order as unlawful and the Commission then fails to vacate that decision as to a non-appealing party equally bound by the Order, will a Civ.R. 60(B) motion properly brought by the non-appealing party be appropriate. Pilkington does not ask for a judicial invention of a new appeal right outside the statutory strictures, nor does Pilkington seek to utilize Civ.R. 60(B) to simply relitigate a case that it lost before the Commission. Instead, Pilkington requests that this Court recognize the uniquely *ultra vires* nature of the Commission's Order as a result of this Court's decision in *Martin Marietta*, and to acknowledge that Civ.R. 60(B) is an appropriate means of asking the Commission, in those unique circumstances, to recognize its error and correct its prior order.

Second, the equities are so overwhelmingly in Pilkington's favor that Toledo Edison's suggestion that Pilkington will enjoy a "windfall" if granted the relief it seeks— solely because it failed to appeal— is disingenuous at best. See, Toledo Edison's Opp. to 60(B), p. 7 (Appellant's Supp. p. 58); Toledo Edison's Opp. to Rehearing, p. 5 (Appellant's Supp. p. 66). As a result of the Commission's incorrect decision, Toledo Edison practically hit the lottery. It was awarded nearly two million dollars in improper charges from Pilkington, a sum Toledo Edison is not legally entitled to keep.

The status quo, therefore, continues to produce a "windfall" to Toledo Edison, while a decision in favor of Pilkington will merely permit it to retain the funds to which this Court has already declared it is entitled and to which Pilkington is legally entitled. Even more, it is noteworthy that R.C. 4903.19, which governs the disposition of moneys wrongfully collected by a utility pending an appeal, provides that such sums should be "promptly paid to the corporations or persons entitled to them," and that any funds "not claimed" according to the statutory procedures "shall be paid...into the state treasury for the benefit of the general fund." Appellant's App. p. 72. In other words, Ohio law makes clear that under ***no circumstance*** will a utility be permitted to retain sums to which it is not legally entitled, even if the party to whom the money belongs fails to claim it. Preserving the Commission's Order would contravene this clear public policy.

Finally, as a matter of judicial economy, a decision reversing the Commission's denial of Pilkington's request for Civ.R. 60(B) relief simply makes logical sense. Denial of the relief requested will merely force Pilkington to file a new complaint before the Commission, collaterally attacking the award of unlawful charges to Toledo Edison based on this Court's decision in *Martin Marietta.* Pilkington undoubtedly has "reasonable grounds" for such a complaint. See, R.C. 4905.26. Appellant App. p. 75. See also, *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio,* 110 Ohio St.3d 394, 2006-Ohio-4706; 853 N.E.2d 1153, ¶29; *Western Reserve*, 39 Ohio St.2d at 19, 313 N.E.2d 811.

By the Commission's own precedent, such a complaint will be evaluated as a Civ.R. 60(B) motion seeking to vacate the prior order in any event. See, *City of Cincinnati Complaint, supra* at *8-11. Appellant's App. p.63. Thus, there is no substantive or

procedural basis for this Court to decline Pilkington's request: The Commission's judgment is unlawful and *ultra vires*; Toledo Edison's retention of Pilkington's money is illegal and unjust; and Pilkington's Civ.R. 60(B) motion seeking relief from the judgment was procedurally proper and substantively warranted. Accordingly, the Commission's decision should be reversed.

IV. CONCLUSION

For the foregoing reasons, 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 15th day of July 2013.

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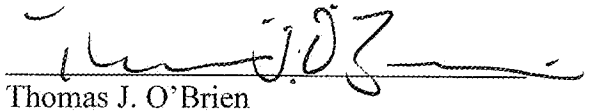

Thomas J. O'Brien

IN THE SUPREME COURT OF OHIO

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.	)	
	)	

APPENDIX TO APPELLANT'S MERIT BRIEF

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APPELLANT'S APPENDIX

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OHIO REVISED CODE

OHIO RULES OF CIVIL PROCEDURE

FEDERAL RULES OF CIVIL PROCEDURE

IN THE SUPREME COURT OF OHIO

Pilkington North America, Inc. Appellant, v. The Public Utilities Commission of Ohio, Appellee.	)	Case No. 13-0709 Appeal from the Public Utilities Commission of Ohio Case No. 08-255-EL-CSS

NOTICE OF APPEAL
OF
APPELLANT PILKINGTON NORTH AMERICA, INC.

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NOTICE OF APPEAL

Appellant, Pilkington North America, Inc. ("Appellant" or "Pilkington"), pursuant to Ohio Revised Code Sections ("R.C.") 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or the "Commission") of this appeal to the Supreme Court of Ohio from: (1) the Commission's Entry entered in its Journal on January 23, 2013 (Attachment 1); and (2) the Commission's Entry on Rehearing entered in its Journal on March 20, 2013 (Attachment 2) in the above-captioned case.

On February 22, 2013, and pursuant to R.C. 4903.10, Pilkington timely filed an Application for Rehearing from the Entry dated January 23, 2013. Pilkington's Application for Rehearing was denied with respect to the issues being raised in this appeal by an Entry on Rehearing entered in the Commission's Journal on March 20, 2013.

Appellant files this Notice of Appeal, complaining and alleging that both the Commission's January 23, 2013 Entry, and the Commission's March 20, 2013 Entry on Rehearing, are unlawful and unreasonable, and that the Commission erred as a matter of law in the following respects, each of which were raised in the Pilkington's Application for rehearing before the Commission:

1. The Commission erred in failing to ensure that The Toledo Edison Company ("TE") has charged Pilkington the lawful approved rate.

2. The Commissioner erred in failing to follow and comply with the decision issued by this Cour in *Martin Marietta Magnesia Specialties, LLC v. Pub. Util. Comm'n,* (2011) 129 Ohio St.3d 485, 490.

3. The Commission erroneously concluded that Pilkington cannot be granted relief from the entry on rehearing under Civil Rule 60(B)(4) because Pilkington was not a party to the rehearing.

4. The Commission erroneously concluded that Pilkington cannot be granted relief from the entry on rehearing under Civil Rule 60(B)(4) because Pilkington was not a party to the rehearing in an earlier phase of the proceeding.

5. The Commission erred in concluding that Civil Rule 60(B)(4) cannot be used to provide Pilkington relief from the original Commission order issued in 2009.

6. The Commission erroneously concluded that Pilkington is not entitled to relief under Civil Rule 60(B)(5). Specifically, the Commission stated that "[t]he catchall phrase in this rule cannot be read to encompass a claim of error for which appeal is the proper remedy."

7. The Commission erred in concluding that Pilkington's interests were not so interwoven with the interests of the appealing parties to justify relief based on the Ohio Supreme Court's reversal as to the other appealing parties.

8. The Commission erred in concluding that Pilkington failed to participate in multiple stages of litigation, noting that Pilkington "consciously chose not to join in the application for rehearing by the appellants or to file its own application for rehearing."

WHEREFORE, Pilkington respectfully submits that the Commission's January 23, 2013 Entry, and the Commission's March 20, 2013 Entry on Rehearing, are unreasonable and/or unlawful and should be reversed. This case should be remanded to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,

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CERTIFICATE OF FILING

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

Thomas J. O'Brien
Counsel for Appellant
Pilkington North America, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Pilkington North America, Inc. was served upon Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman at 180 East Broad Street, Columbus, Ohio 43215, and upon the parties of record listed below by regular U.S. Mail, this 6th day of May 2013.

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The Public Utilities Commission of Ohio

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Pilkington North America, Inc.,	)	
Complainant,	)	
v.	)	Case No. 08-255-EL-CSS
The Toledo Edison Company,	)	
Respondent.	)	

ENTRY

The Commission finds:

(1) By opinion and order issued on February 19, 2009, the Commission dismissed complaints filed by Pilkington and five other complainants[1] finding that the complainants had not provided sufficient evidence to demonstrate that The Toledo Edison Company (TE) had violated any applicable order, statute, or regulation. The Commission noted that the complainants were seeking a determination by the Commission that the rates set forth in the special contracts entered into between the complainants and TE, as amended in 2001, should continue through the date on which TE ceased collecting the regulatory transition charges (RTC), which the complainants submitted was December 31, 2008. The Commission further noted that TE, on the other hand, insisted that the special contracts terminated on the complainants' billing dates in February 2008, as provided for in the rate certainty plan (RCP),[2] which is consistent with the method set forth in the electric transition plan (ETP)[3] for calculating the end dates for the

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1 *Worthington Industries*, Case No. 08-67-EL-CSS, *The Calphalon Corporation*, Case No. 08-145-EL-CSS, *Kraft Foods Global, Inc.*, Case No. 08-146-EL-CSS, *Brush Wellman, Inc.*, Case No. 08-254-EL-CSS, *Martin Marietta Magnesia Specialties, LLC*, Case No. 08-893-EL-CSS.

2 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case Nos. 05-1125-EL-ATA, et al., Opinion and Order (January 4, 2006) (*RCP Case*).

3 *In the Matter of the Application of First Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and for*

special contracts. In arriving at its conclusion, the Commission reviewed the stipulations and orders in the ETP Case, the RSP Case,[4] and the RCP Case; the Commission concluded that the record in these cases clearly reflects that, regardless of the sales calculation, no scenario results in continuation of the special contracts through December 2008.

(2) On March 20, 2009, the other five complainants (hereinafter referred to as the appellants) filed an application for rehearing, pursuant to Section 4903.10, Revised Code. The appellants sought a rehearing of the Commission's order issued on February 19, 2009.[5] On March, 30, 2009, TE filed a memorandum in opposition to the appellants' joint application for rehearing. The appellants set forth three grounds for rehearing: failure of the Commission to apply the clear and unambiguous termination language in the 2001 amendments to the special contracts; Commission error in modifying the terms of the complainants' special contracts; and a violation of the appellants' right to due process. By entry on rehearing issued on April 15, 2009, the Commission denied the joint application for rehearing, finding that the three grounds for rehearing were previously considered at length and were found to be without merit.

(3) On June 12, 2009, each of the appellants filed a notice of appeal from the Commission's order with the Supreme Court of Ohio (Court), pursuant to Section 4903.13, Revised Code. On August 25, 2011, the Court reversed the Commission's decision establishing February 2008, as the termination date for the special contracts. The Court found that "the commission erred in determining that evidence of the stipulations and orders in Toledo Edison's electric-transition-plan and rate-certainty-plan cases were needed to interpret the plain language of the 2001 Amendments, which provided that appellants' special

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Authorization to Collect Transition Revenues, Case Nos. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000) (*ETP Case*).

4 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case Nos. 03-2144-EL-ATA, et al., Opinion and Order (June 9, 2004) (rate stability plan [*RSP*] *Case*).

5 As mentioned in Footnote 4 of the entry on rehearing, while the February 19, 2009, order addressed Pilkington, Pilkington did not file an application for rehearing of the Commission's order.

contracts were to continue until Toledo Edison stopped collecting the regulatory-transition charges." *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St. 3d 485, 495, 954 N.E.2d 104, 114 (2011) (*Martin Marietta*). The Court then ordered the money in escrow to be returned to the appellants.

(4) On January 5, 2012, Pilkington filed a motion for relief under Rules 60(B)(4) and 60(B)(5) of the Ohio Rules of Civil Procedure (ORCP). Rule 60(B)(4) of the ORCP grants relief from a final judgment, order, or proceeding if "a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application." Pilkington asserts it is entitled to relief under Rule 60(B)(4) of the ORCP because it would be inequitable for Pilkington to remain subject to findings in the order and entry on rehearing that were reversed by the Court. In addition, Rule 60(B)(5) of the ORCP grants relief for "any other reason justifying relief from the judgment." Pilkington asserts that this provision applies, because it would be unjust and unlawful not to return to Pilkington the escrowed funds returned to the appellants. Pilkington further asserts that failure to return its escrowed funds would result in TE collecting an unlawful rate and becoming unjustly enriched.

(5) On January 20, 2012, TE filed a memorandum contra Pilkington's Rule 60(B) motion for relief. TE asserts that the Commission lacks the authority to grant Pilkington's motion to dismiss and, alternatively, that Pilkington is not entitled to relief under Rule 60(B) of the ORCP. In response to Pilkington's Rule 60(B)(4) claim, TE asserts that the plain language of the statute states that the prior decision upon which the judgment is based must be reversed for relief under this rule. TE further states that the judgment at issue is not based on a prior decision that has been reversed. In response to Pilkington's Rule 60(B)(5) claim, TE asserts that failure to appeal does not justify relief from a final judgment.

(6) On January 27, 2012, Pilkington filed a reply in support of its motion for relief under Rule 60(B) of the ORCP. Pilkington argues that the Commission has the power to grant a Rule 60(B) motion and that the Commission has previously considered such motions in its proceedings. Pilkington further

asserts that relief should be granted under Rule 60(B)(4) of the ORCP because the Commission's entry on rehearing was based on the Commission's prior order, which was reversed by the Court in *Martin Marietta*. Pilkington reiterates that relief is warranted because TE would be unlawfully enriched if the escrowed funds were returned to the appellants, but not Pilkington.

(7) Upon consideration of the arguments made by Pilkington and TE, the Commission finds that, contrary to Pilkington's assertion, it did not participate in each step of the complaint case except for the appeal to the Court. Section 4903.10, Revised Code, provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission. Pilkington consciously chose not to join in the application for rehearing filed by the appellants or to file its own application for rehearing. By failing to file for rehearing of the Commission's order, Pilkington also consciously determined that it would not be filing an appeal with the Court, pursuant to Section 4903.13, Revised Code. Therefore, Pilkington's assertion that it fully participated at every stage is ill-advised because it failed to participate in multiple stages of the litigation.

(8) With regard to Pilkington's specific arguments pertaining to relief in Rule 60(B)(4) of the ORCP, the Commission finds that Pilkington is not entitled to relief under Rule 60(B)(4). The Commission cannot grant Pilkington relief from the entry on rehearing because, unlike the appellants, Pilkington failed to appeal the Commission order. Therefore, Pilkington was not a party to the rehearing and is not entitled to relief from the Commission's entry on rehearing. Pilkington also seeks relief from the Commission order. In applying Rule 60(b)(5) of the Federal Rules of Civil Procedure (FRCP),[6] courts have interpreted the rule as requiring a decision upon which the challenged judgment was based, as opposed to the judgment itself, to be overturned. *Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 577-578 (9th Cir. 2000). The order in Pilkington's case is not based on a prior judgment that has been reversed, vacated, or

6 Rule 60(B)(5) of the FRCP is the federal equivalent of Rule 60(B)(4) of the ORCP.

become no longer equitable enough to have prospective application. Therefore, Pilkington is not entitled to relief under Rule (60)(B)(4) of the ORCP.

(9) The Commission also finds that Pilkington is not entitled to relief under Rule 60(B)(5) of the ORCP. The catchall phrase in this rule cannot be read to encompass a claim of error for which appeal is the proper remedy. The Supreme Court of the United States stated that, when a deliberate choice not to appeal is made, the "petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong." *Ackermann v. United States*, 340 U.S. 193, 198 (1950). The Supreme Court of Ohio has stated that "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 and non-appealing parties are so interwoven or dependent on each other as to require a reversal of the whole judgment." *Wigton v. Lavender*, 9 Ohio St. 3d 40, 43, 457 N.E.2d 1172, 1175 (1984). Pilkington's interests are not so interwoven with those of the appellants to justify relief under Rule 60(B)(5) of the ORCP, because the harm suffered differed in degree and amount, and the appellants' appeal, and ultimate refund, were not interwoven with or dependent on Pilkington's participation in the appeal. Therefore, Pilkington is not entitled to relief under Rule 60(B)(5) of the ORCP.

(10) Accordingly, the Commission finds that Pilkington's motion for relief under Rule 60(B) of the ORCP should be denied in its entirety.

It is, therefore,

ORDERED, That the motion for relief filed by Pilkington be denied. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

CMTP/TJA/vrm

Entered in the Journal

JAN 23 2013

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Pilkington North America, Inc.,	)	
Complainant,	)	
v.	)	Case No. 08-255-EL-CSS
The Toledo Edison Company,	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) By opinion and order issued on February 19, 2009, the Commission dismissed complaints filed by Pilkington North America, Inc. (Pilkington) and five other complainants[1] finding that the complainants had not provided sufficient evidence to demonstrate that The Toledo Edison Company (TE) had violated any applicable order, statute, or regulation. The Commission noted that the complainants are seeking a determination by the Commission that the rates set forth in the special contracts entered into between the complainants and TE, as amended in 2001, should continue through the date on which TE ceases collecting the regulatory transition charges (RTC), which the complainants submit is December 31, 2008. The Commission further noted that TE, on the other hand, insists that the special contracts terminate on the complainants' billing dates in February 2008, as provided for in the rate certainty plan (RCP),[2] which is consistent with the method set forth in the electric transition plan (ETP)[3] for calculating the

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1 *Worthington Industries*, Case No. 08-67-EL-CSS, *The Calphalon Corporation*, Case No. 08-145-EL-CSS, *Kraft Foods Global, Inc.*, Case No. 08-146-EL-CSS, *Brush Wellman, Inc.*, Case No. 08-254-EL-CSS, *Martin Marietta Magnesia Specialties, LLC*, Case No. 08-893-EL-CSS.

2 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case Nos. 05-1125-EL-ATA, et al., Opinion and Order (January 4, 2006) (RCP Case).

3 *In the Matter of the Application of First Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and for*

end dates for the special contracts. In arriving at its conclusion, the Commission reviewed the stipulations and orders in the *ETP Case*, the *RSP Case*,[4] and the *RCP Case*; the Commission concluded that the record in these cases clearly reflects that, regardless of the sales calculation, no scenario results in continuation of the special contracts through December 2008.

(2) On March 20, 2009, the other five complainants (hereinafter referred to as the appellants) filed an application for rehearing pursuant to Section 4903.10, Revised Code. The appellants sought a rehearing of the Commission's order issued on February 19, 2009.[5] On March 30, 2009, TE filed a memorandum in opposition to the joint application for rehearing. The appellants set forth three grounds for rehearing: failure of the Commission to apply the clear and unambiguous termination language in the 2001 amendments to the special contracts; Commission error in modifying the terms of the complainants' special contracts; and a violation of the right to due process. By entry on rehearing issued April 15, 2009, the Commission denied the joint application for rehearing, finding that the three grounds for rehearing were previously considered at length and were found to be without merit.

(3) On June 12, 2009, the appellants filed a notice of appeal from the Commission's order with the Supreme Court of Ohio (Court) pursuant to Section 4903.13, Revised Code. On August 25, 2011, the Court reversed the Commission's decision establishing February 2008 as the termination date for the special contracts. The Court found that "the commission erred in determining that evidence of the stipulations and orders in Toledo Edison's electric-transition-plan and rate-certainty-plan cases were needed to interpret the plain language of the 2001

Authorization to Collect Transition Revenues, Case Nos. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000) (ETP Case).

4 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case Nos. 03-2144-EL-ATA, et al., Opinion and Order (June 9, 2004) (rate stability plan [RSP] Case).

5 As mentioned in Footnote 4 of the entry on rehearing, while the February 19, 2009 order addressed Pilkington, Pilkington did not file an application for rehearing of the Commission's order.

Amendments, which provided that appellants' special contracts were to continue until Toledo Edison stopped collecting the regulatory-transition charges." *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St. 3d 485, 495, 954 N.E.2d 104, 114 (2011) *(Martin Marietta)*. The Court then ordered the money in escrow to be returned to the appellants.

(4) On January 5, 2012, Pilkington filed a complaint for relief under Rule 60(B) of the Ohio Rules of Civil Procedure (ORCP). Pilkington asserted that it was entitled to relief under Rule 60(B), ORCP, because it would be inequitable for Pilkington to remain subject to findings in the order that were reversed by the Court. Pilkington also submitted that it was entitled to relief because it would be unjust and unlawful not to return to Pilkington the escrowed funds that the Court returned to the appellants.

(5) By entry issued January 23, 2013, the Commission dismissed Pilkington's motion, noting that Pilkington chose not to join in the application for rehearing filed by the appellants or to file its own application for rehearing; thus, by failing to file for rehearing of the Commission's order, Pilkington also consciously determined that it would not be filing an appeal with the Court. With regard to Pilkington's arguments pertaining to relief under Rule 60(B), ORCP, the Commission found that Pilkington was not entitled to relief under this rule stating that such relief of the Commission's entry on rehearing in this case cannot be granted because, unlike the appellants, Pilkington failed to appeal the Commission's order. Therefore, Pilkington was not a party to the rehearing and is not entitled to relief from the Commission's order or entry on rehearing. Moreover, the Commission found that, consistent with federal court precedent, since Pilkington's motion for relief is not based on a prior judgment that has been reversed, vacated, or become no longer equitable enough to have prospective application, Pilkington is not entitled to relief under Rule (60)(B)(4) of the ORCP. [6] The Commission also concluded that Pilkington is not entitled to relief under Rule 60(B)(5), ORCP, finding that precedent dictates that this rule cannot be read to

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6 *Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 577-578 (9th Cir. 2000).

encompass a claim of error for which appeal is the proper remedy.[7] In addition, the Commission found that Pilkington's interests are not so interwoven with those of the appellants to justify relief under Rule 60(B)(5), ORCP, because the harm suffered differed in degree and amount, and the appellants' appeal, and ultimate refund, were not interwoven with or dependent on Pilkington's participation in the appeal.[8]

(6) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(7) On February 22, 2013, Pilkington filed an application for rehearing of the Commission's January 23, 2013, order in this case essentially setting forth two arguments on rehearing.

(8) On March 4, 2013, TE filed a memorandum in opposition to the Pilkington's application for rehearing stating that the request simply reiterates arguments that were considered and rejected by the Commission in its order.

(9) In its first argument on rehearing, Pilkington contends that the Commission based its decision to deny the Rule 60(B), ORCP, motion on procedural grounds, rather than the merits of the motion. Pilkington believes the Commission ignored the point of the motion, which is: the Commission made a mistake in its decision in this case and, as a result, Pilkington was charged an unlawful rate by TE and TE was not entitled to that money. Pilkington asserts that the Commission acted unreasonably in denying its Rule 60(B), ORCP, motion on procedural grounds. According to Pilkington, Rule 4901-1-38(B), Ohio Administrative Code (O.A.C), gives the Commission authority to waive certain requirements, for good cause shown, including those contained in Rule 4901-1-35, O.A.C., regarding applications for rehearing. According to Pilkington, the Commission should exercise its authority under Rule 4901-1-

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7 Citing *Ackermann v. United States*, 340 U.S. 193, 198 (1950) (*Ackerman*).

8 Citing *Wigton v. Lavender*, 9 Ohio St. 3d 40, 43, 457 N.E.2d 1172, 1175 (1984) (*Wigton*).

38(B), O.A.C, to waive the procedural requirements that Pilkington failed to follow.

(10) In response to complainant's first argument for rehearing, TE states that the Commission did not act unreasonably or unlawfully in denying Pilkington's motion because Pilkington consciously chose not to appeal the Commission's February 19, 2009, order. According to TE, if the Commission ignores the ORCP by deciding this matter on the merits, the Commission will be encouraging future litigants in multi-party litigation to sit back and wait for other parties to work on an appeal. TE points out that Ohio courts have consistently held that a party may not use a Rule 60(B) motion as a substitute for an appeal.[9]

(11) With regard to Pilkington's first argument, the Commission finds that Pilkington has raised no new issue that we did not already consider in our order. In essence, Pilkington is asking us to waive the statutory requirements requiring a party to appeal a Commission order if it wants to be relieved from a judgment. As we recognized in our order, the Supreme Court of the United States in *Ackermann* stated that, when a deliberate choice not to appeal is made, the "petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong." 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. The Commission cannot grant a waiver of the statutory rehearing and appeal requirements under Sections 4903.10 and 4903.11, Revised Code. Therefore, we conclude that this argument by Pilkington is without merit and should be denied.

(12) In its second argument for rehearing, Pilkington asserts that the Commission violated the filed rate doctrine by forcing Pilkington to pay an unauthorized rate for electric service. According to Pilkington, this is not a situation where a rate had been determined and approved by the Commission and then later set aside by the Court. Pilkington states that the lawful rate that applied to its electric service during the period in question was the contract rate in place at that time and the

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9 *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St. 3d 128 (1986), syll. para. 2.

Court corrected the Commission's later, mistaken interpretation. Therefore, Pilkington posits that the Commission failed to uphold the correct, lawful rate for electric service as it applies to Pilkington. Failure to return the escrowed funds, according to Pilkington, would result in TE collecting an unlawful rate and becoming unjustly enriched.

(13) TE responds to the Pilkington's second argument by pointing out that Pilkington was not a party to *Martin Marietta* because Pilkington consciously chose not to appeal the Commission's order. Therefore, TE contends that the Court's interpretation of the contract does not apply to Pilkington and any inequality and injustice Pilkington claims to be suffering is a result of its own conscious choice not to appeal in the first place.

(14) With regard to the Pilkington's second ground for rehearing, the Commission finds that it is without merit. For the first time, in its application for rehearing, Pilkington summarily argues the filed rate doctrine is applicable in this situation. The Commission disagrees. Contrary to the Pilkington's position, the Court's decision in *Martin Marietta* does not apply to Pilkington, because Pilkington consciously chose not to appeal the Commission's order. The Supreme Court of the United States[10] and the Court[11] have consistently held that a ruling for the appealing parties does not entitle the nonappealing party to relief. The statute clearly sets forth the process a party must follow to reverse a Commission decision and Pilkington cannot circumvent the process mandated by statute by, in an effort to cure its noncompliance, alluding that the filed rate doctrine applies. Therefore, Pilkington is not entitled to relief because appeal was the proper route under the ORCP. Accordingly, Pilkington's argument for rehearing should be denied.

It is, therefore,

ORDERED, That the application for rehearing filed by Pilkington be denied. It is, further,

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10 *Ackermann* at 198.

11 *Wigton* at 1175.

ORDERED, That a copy of this entry on rehearing be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Lynn Slaby

M. Beth Trombold

CMTP/TJA/vrm

Entered in the Journal
MAR 2 0 2013

Barcy F. McNeal
Secretary

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Pilkington North America, Inc.	)	
Complainant,	)	
v.	)	Case No. 08-255-EL-CSS
The Toledo Edison Company,	)	
Respondent.	)	

APPLICATION FOR REHEARING OF PILKINGTON NORTH AMERICA, INC.

Pursuant to Ohio Revised Code Section ("R.C.") 4903.10, Pilkington North America, Inc. ("Pilkington") respectfully submits this Application for Rehearing of the January 23, 2013 Entry ("Entry") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned proceeding. The Commission's Entry is unreasonable and unlawful specifically with respect to the following findings and conclusions that:

1. Pilkington failed to participate in multiple stages of litigation, noting that Pilkington "consciously chose not to join in the application for rehearing by the appellants or to file its own application for rehearing."
2. Pilkington cannot be granted relief from the entry on rehearing under Civil Rule 60(B)(4) because Pilkington was not a party to the rehearing.
3. Rule 60(B)(4) does not provide Pilkington relief from the original PUCO order.
4. Pilkington is not entitled to relief under Rule 60(B)(5). Specifically, the PUCO stated that "[t]he catchall phrase in this rule cannot be read to encompass a claim of error for which appeal is the proper remedy."
5. Pilkington's interests were not so interwoven with the interests of the appealing parties to justify relief based on the Ohio Supreme Court's reversal as to the other appealing parties.

In addition, the Commission's Entry allows the continuation of a violation of the Filed Rate Doctrine by not enforcing the application of the correct, lawful rate to which Pilkington was entitled pursuant to R.C. 4905.22. The grounds supporting this Application for Rehearing are set forth in the attached Memorandum in Support.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case has, from the start, concerned the application of the appropriate rate for electric service to Pilkington during the last three months of 2008. Pilkington's contract rate unambiguously terminated on December 31, 2008. The Toledo Edison Company ("Toledo Edison") applied an unlawful rate to the services it provided to Pilkington for those three months, damaging Pilkington in the millions of dollars as a direct consequence. There is no question that the wrong rate was applied because the Ohio Supreme Court has determined what the correct rate was *during this period* when it overturned the Commission's prior, erroneous interpretation of that *specific* rate. This is not a situation where a rate had been determined and approved by the Commission and then later set aside by the Court. Rather, the lawful rate that applied to Pilkington's electric service during the period in question was the contract rate in place at that time—it is the Commission's later, mistaken interpretation of a rate that it had previously determined as lawful that was corrected by the Supreme Court. Pilkington's Rule 60(B) Motion ("Motion") to the Commission simply requested that the Commission uphold the correct, lawful rate as it applies to Pilkington. It is a simple request that the Commission "fix" its mistake and

apply the lawful rate. By denying Pilkington's Motion, the Commission erred as a matter of law by allowing the incorrect rate to be applied to Pilkington's electric service, in clear violation of the Filed Rate Doctrine, purely on technical, procedural grounds. Under Ohio law, customers are entitled to receive service at the lawful rate and that did not happen during the last three months of 2008 for Pilkington. Rather, Toledo Edison unlawfully terminated Pilkington's contract before its expiration, breaching its express terms, and violating R.C. 4905.22, 4905.31, and 4905.32. This is the situation regardless of Pilkington's procedural posture in the case below.

II. LAW AND ARGUMENT

Pilkington's Motion stemmed from the PUCO's February 19, 2009 decision dismissing complaints by Pilkington and five other complainants that Toledo Edison had wrongly terminated special contracts with the complainants. On August 25, 2011, the Ohio Supreme Court reversed the PUCO's decision.[1] In its Motion, Pilkington argued that it is entitled to relief because it would be inequitable for Pilkington to remain subject to findings by the PUCO that were reversed by the Ohio Supreme Court. Pilkington further asserted that failure to return its escrowed funds would result in Toledo Edison collecting an unlawful rate and becoming unjustly enriched. The Commission declined to address these points in the Motion.

Instead, in its denial of Pilkington's Motion, the PUCO found that Pilkington failed to participate in multiple stages of litigation, noting that Pilkington "consciously chose not to join in the application for rehearing by the appellants or to file its own application for rehearing."[2] Thus the PUCO reasoned, Pilkington cannot be granted relief from the entry on rehearing under Rule 60(B)(4) because Pilkington was not a party to the rehearing. Further, the PUCO found that

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[1] *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St. 3d 495 (2011).

[2] Entry at Finding 7

Rule 60(B)(4) does not provide Pilkington relief from the original PUCO order. In support of this finding, the PUCO stated that federal courts applying Rule 60(b)(5) of the Federal Rules of Civil Procedure—the federal equivalent of Rule 60(B)(4) of the Ohio Civil Rules—have interpreted the rule as "requiring a decision upon which the challenged judgment was based, as opposed to the judgment itself, to be overturned."[3] The PUCO stated that the order in Pilkington's case was not based on a prior judgment that had been reversed, vacated, or was no longer equitable enough to have prospective application.

The PUCO further found that Pilkington is not entitled to relief under Rule 60(B)(5). Specifically, the PUCO stated that "[t]he catchall phrase in this rule cannot be read to encompass a claim of error for which appeal is the proper remedy."[4] The PUCO found that Pilkington's interests were not so interwoven with the interests of the appealing parties to justify relief based on the Ohio Supreme Court's reversal as to the other appealing parties. This is because "the harm suffered differed in degree and amount, and the appellants' appeal, and ultimate refund."[5] Therefore, the PUCO concluded, Pilkington is not entitled to relief under Rule 60(B)(5).

Each of the bases relied upon by the Commission in denying Pilkington's motion is grounded in procedure, rather than the merits of the Motion. The Commission completely ignores the simple point of the Motion: The Commission made a mistake in its prior decision and, as a result of that mistake, Pilkington was charged an unlawful rate for its electric service and paid substantial sums of money to Toledo Edison to which Toledo Edison was not entitled. The motion was an opportunity to simply acknowledge this error.

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[3] *In the Matter of the Complaint of Pilkington North America, Inc. v. The Toledo Edison Company*, Case No. 08-255-EL-CSS *citing Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 577-78 (9th Cir. 2000).

[4] Entry at Finding 9

[5] *Id.*

The procedural considerations relied upon by the Commission in denying Pilkington's Motion should be weighed against the harm suffered by Pilkington and the legal merits underlying the situation. Ohio Administrative Code ("OAC") Rule 4901-1-38 provides that:

> (A) This chapter sets forth the procedural standards which apply to all entities participating in cases before the commission.
>
> (B) The commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case.
>
> (Emphasis added)

Despite the fact that Pilkington's motion was the proper vehicle to enable the Commission to correct a prior error and violation of law, the practical effect of OAC Rule 4901-1-38 is such that, while the Commission is generally bound by Ohio's rules of procedure, the Commission may disregard those rules if the situation so warrants.[6] Put differently, if there is a wrong that requires correction, the rules of procedure do not pose an impediment.

This case is not just a matter of contact between Pilkington and Toledo Edison, but rather a matter of the lawful rate established by the PUCO. When the Court determined the proper interpretation of the underlying special contracts, it also determined the correct rate that applied to all similarly situated customers of Toledo Edison. Viewed in this light, it is not necessary for a customer to take an appeal of the Commission's erroneous determination of the contract language. When the court determined the appropriate applicability of the Toledo Edison, the PUCO's decision notwithstanding. Under Ohio law and U.S. Supreme Court case law, utility customers, as well as regulated utilities themselves, are entitled to receive the correct rate for regulated services.

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[6] *In the Matter of the Request of Green Mountain Energy Company for a Waiver of Certain Rules in Chapters 4901:1-10 and 4901:1-21, Ohio Administrative Code, within the Distribution Service Territories of FirstEnergy Corp.*, Case No. 04-1468-EL-UNC.

By rejecting our Motion, the Commission has allowed a situation where similarly-situated customers were charged differing and unlawful rates. This situation is unprecedented in Ohio and this clear violation of the Filed Rate Doctrine was the proper subject of Pilkington's Rule 60(B) Motion.

III. CONCLUSION

For the foregoing reasons, Pilkington respectfully requests that the Commission grant its request for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Application for Rehearing was served by electronic mail this 22nd day of February 2013.

Thomas J. O'Brien

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in

Case No(s). 08-0255-EL-CSS

Summary: Application for Rehearing electronically filed by Teresa Orahood on behalf of Pilkington North America, Inc.

*1990 Ohio PUC LEXIS 880, **

In the Matter of the Application of The Toledo Edison Company for Approval of a Contract with Libbey-Owens-Ford Company, Rossford Manufacturing Plant

90-1016-EL-AEC

PUBLIC UTILITIES COMMISSION OF OHIO

1990 Ohio PUC LEXIS 880

August 8, 1990

CORE TERMS: customer, plant, usage, electrical, non-fuel, billing, load, load factor, become effective, monthly, manufacturing, fabrication, competitive, retention, off-peak, dollar, glass

PANEL: [*1]

Jolynn Barry Butler, Chair; J. Michael Biddison; Ashley C. Brown; Richard M. Fanelly; Lenworth Smith, Jr.

OPINION: FINDING AND ORDER

The Commission finds:

(1) The Applicant, The Toledo Edison Company, is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.

(2) The Applicant now petitions this Commission for approval of a contract with Libbey-Owens-Ford Co. (Customer). The Customer operates a glass manufacturing facility, primarily for the automotive industry, in Rossford, Ohio. The Customer is served on the Applicant's Large Power Rate PV-44. The Customer is currently served under the provisions of an Incentive Agreement approved by this Commission in Case No. 86-1234-EL-AEC on August 5, 1986, and an Amendment to that Agreement approved by this Commission in Case No. 88-184-EL-AEC on March 8, 1988. The proposed contract will cancel that Agreement and its Amendment.

(3) As a result of declining market conditions and lower fabrication costs at a plant in Indiana, which is owned and operated by the parent corporation, the Rossford plant is at risk of losing a portion of its fabrication activities to the Indiana **[*2]** plant. Also, due to these changing conditions, the Customer is now actively considering the installation of self-generation to serve the glass furnace load.

(4) Toledo Edison recognizes the need for electrical load similar to that provided by the Customer. The Applicant also wishes to encourage the expansion and retention of industrial manufacturing and employment opportunities in northwestern Ohio along with benefiting other

customers by providing a broader kilowatthour base.

(5) The terms of the Agreement are as follows:

(a) The Agreement provides for the establishment of an Incremental Load Incentive Adjustment. Any incremental non-fuel revenue above the Monthly Reference Revenue resulting from increased electrical usage will be credited with an incentive percentage between 25 and 35% through 1997. The Incremental Load is curtailable by the Applicant according to provisions detailed in the Agreement.

(b) The Agreement provides for a Job Incentive Adjustment designed to encourage the creation and retention of employment. The non-fuel Revenue Portion of Rate PV-44 attributed to electrical usage up to and including the Monthly Reference Level will be given a credit adjustment **[*3]** not to exceed 7% for increasing the total hourly and salaried employees at the Rossford plant.

(c) The Agreement further allows for a Load Factor Incentive Agreement designed to encourage a sustainment of a high monthly load factor. The non-fuel revenue portion of Rate PV-44 associated with monthly usage will be adjusted up to a 25% credit for an actual load factor of 90% and over.

(d) The Agreement also provides an off-peak incentive adjustment to benefit the Customer for usage during off-peak hours.

(e) If, during the term of this Agreement, and for a period of three years thereafter, the Customer elects to initiate plans for an on-site generation supply located at its Rossford plant, the Applicant shall have an exclusive first option for a period of six months from the date of the Customer's notice pursuant to this section, to make the Customer an offer to participate in the project.

(f) The Agreement shall become effective with the first bill rendered after approval by the Commission or with the bill rendered for July, 1990, whichever occurs later, but no later than the billing for October, 1990. It shall terminate after the bill rendered for December, 1997.

(6) The Applicant **[*4]** states that the approval of this Agreement will not increase any rate or charge of the Applicant, nor adversely impact other customers.

(7) The application should be approved as filed pursuant to Section 4905.31, Revised Code.

(8) The Commission will use the rate case proceeding to evaluate the appropriateness of recovery from jurisdictional customers of any revenue deficiency resulting from this Agreement. This Agreement may be categorized by the Staff as a competitive response contract. The Staff may propose a considerably greater company responsibility for any delta revenue for competitive response contracts than for economic recovery contracts.

(9) Our approval of this contract does not constitute state action for the purpose of the antitrust laws. It is not our intent to insulate the Applicant or any party to a contract approved by this Finding and Order from the provisions of any

It is, therefore,

ORDERED, That the Agreement attached to the application as Exhibit A is approved and shall become effective pursuant to its terms. Two copies of the Agreement as filed with the application shall be accepted for inclusion in this docket. It is, further,

ORDERED, That the Applicant **[*5]** report to the Staff of the Commission semi-annually, in January and July, the results of the Agreement including the increase in load and sales, the

total dollar increase in revenue due to the Agreement, the dollar difference in billing at the standard tariff schedule and the billing at the contract rates, and the number of jobs believed to have been created and/or retained due to the contract. It is, further,

ORDERED, That nothing contained in this Finding and Order shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule or regulation. It is, further,

ORDERED, That a copy of this Finding and Order be served upon the Applicant.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities Law > Electric Power Industry > Rates > Retail Rates

Energy & Utilities Law > Utility Companies > Contracts for Service

Energy & Utilities Law > Utility Companies > Rates > General Overview

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Citation: **1990 Ohio PUC LEXIS 880**
View: Full
Date/Time: Thursday, July 11, 2013 - 1:11 PM EDT

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Pilkington North America, Inc.,	)	Case Nos. 08-67-EL-CSS
	)	08-145-EL-CSS
Complainants,	)	08-146-EL-CSS
	)	08-254-EL-CSS
v.	)	08-255-EL-CSS
	)	
The Toledo Edison Company,	)	
	)	
Respondent.	)	

ENTRY

The attorney examiner finds:

(1) Between January 23, 2008, and February 15, 2008, Worthington Industries (Worthington) (Case No. 08-67-EL-CSS), The Calphalon Corporation (Calphalon) (Case No. 08-145-EL-CSS), and Kraft Foods Global, Inc. (Kraft) (Case No. 08-146-EL-CSS) filed complaints against The Toledo Edison Company (Toledo Edison). Worthington, Calphalon, and Kraft state that they each have contracts with Toledo Edison, which they maintain run through December 31, 2008, when the regulatory transition charges cease for Toledo Edison; however, Toledo Edison has notified them that their contracts expire in February 2008. If their contracts expire in February 2008, rather than December 2008, Worthington, Calphalon, and Kraft submit that their costs for electricity will increase significantly. Specifically, Kraft alleges that Toledo Edison has violated Sections 4905.22, 4905.31, 4905.32, and 4905.35, Revised Code.

(2) By entry issued March 13, 2008, the attorney examiner consolidated the Worthington, Calphalon, and Kraft cases and established the procedural schedule and processes to be followed in those cases.

(3) On March 14, 2008, and March 24, 2008, Worthington and Calphalon filed amended complaints. In addition to their initial allegations, Worthington and Calphalon state that Toledo Edison has violated Section 4905.35, Revised Code, by giving an undue or unreasonable preference to other customers. Furthermore, Calphalon submits that Toledo Edison has violated Sections 4905.22, 4905.31, and 4905.32, Revised Code, by demanding unjust or unreasonable charges, and collecting different rates than those approved by the Commission. Toledo Edison filed its answer to these amended complaints on April 3, 2008.

(4) Rule 4901-1-06, Ohio Administrative Code (O.A.C.), provides that:

> ...an attorney examiner may, upon their own motion or upon motion of any party for good cause shown, authorize the amendment of any...complaint...filed with the commission.

(5) The attorney examiner finds that, in light of the fact that these cases have been consolidated and the statutory violations alleged by Worthington and Calphalon in their amended complaints are allegations that have already been raised in the Kraft complaint, it is reasonable to allow Worthington and Calphalon to amend their complaints, at this time. However, the attorney examiner would emphasize that, if any of the complainants wish to amend their complaints in the future, they must file a motion in accordance with Rule 4901-1-06, O.A.C., requesting authorization to amend their complaints and memoranda in support of their motions.

(6) On March 14, 2008, Brush Wellman, Inc., (Brush Wellman) (Case No. 08-254-EL-CSS) and Pilkington North America, Inc., (Pilkington) (Case No. 08-255-EL-CSS) filed complaints against Toledo Edison. The underlying facts, allegations, and requests for relief set forth by these two complainants are similar and, in many respects, identical to those advocated in the Worthington, Calphalon, and Kraft cases.

(7) On April 3, 2008, Toledo Edison filed its answers to the Brush Wellman and Pilkington complaints. In its answers, Toledo Edison denies the allegations of the complaints, except to the

extent they are specifically admitted in the answers, and states that it has acted at all times in accordance with the contracts between Toledo Edison and the complainants, complied with all applicable state statutes, the Commission's rules and regulations, and accepted standards and practices of the electric industry. Furthermore, Toledo Edison states that it has breached no legal duty owed to Brush Wellman or Pilkington and that Bruch Wellman and Pilkington have failed to state reasonable grounds for complaint.

(8) Upon consideration of the complaints filed by Brush Wellman and Pilkington, as well as Toledo Edison's answer, the attorney examiner finds that the complainants have stated reasonable grounds.

(9) In light of the analogous issues raised in the Brush Wellman, Pilkington, Worthington, Calaphon, and Kraft cases, the attorney examiner finds that all five cases should be consolidated.

(10) In their complaints, Brush Wellman and Pilkington acknowledged the attorney examiner's entry issued on March 13, 2008, in the Worthington, Calaphon, and Kraft cases, and agreed to follow the procedural schedule established in that entry. Accordingly, the following procedural schedule shall apply to the Worthington, Calphalon, Kraft, Brush Wellman, and Pilkington cases:

(a) April 21, 2008 - Deadline for the service of discovery requests. Parties will respond to discovery requests within 15 calendar days.

(b) May 5, 2008 - A prehearing conference will be held at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th floor, hearing room F, Columbus, Ohio 43215-3793.

(c) May 12, 2008 - Deadline for the filing of stipulations of facts, and direct expert and non-expert testimony by the parties. If the parties stipulate to all of the facts and agree to move forward to the briefing schedule without a hearing, they must state such in the stipulation. If the parties submit a partial stipulation of facts or,

if no stipulation of facts is submitted, the attorney examiner will schedule a hearing.

(11) Response times for motions will be as follows:

(a) Any party wishing to file a memorandum contra a pending motion must do so within four business days after service of a motion.

(b) Any party wishing to file a reply to a memorandum contra a pending motion must do so within three business days after service of the memorandum contra.

(c) The parties will serve motions by electronic means.

(d) Rule 4901-1-07, O.A.C., which provides an additional three days' time, where service is made by mail, will not apply.

(12) In Commission proceedings, the complainant has the burden of proving the allegations of the complaint.

It is, therefore,

ORDERED, That, in accordance with finding (5), the amended complaints filed by Worthington and Calphalon are accepted. It is, further,

ORDERED, That the Brush Wellman, Pilkington, Worthington, Calaphon, and Kraft cases be consolidated. It is, further,

ORDERED, That the parties adhere to the schedule and processes set forth in findings (10) and (11). It is, further,

ORDERED, That a copy of this entry be served upon each party of record in these cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Christine M.T. Pirik
Attorney Examiner

gpt/vrm

Entered in the Journal

APR 7 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., Pilkington North America, Inc., and Martin Marietta Magnesia Specialties, LLC,	)	Case Nos. 08-67-EL-CSS 08-145-EL-CSS 08-146-EL-CSS 08-254-EL-CSS 08-255-EL-CSS 08-893-EL-CSS
Complainants,	)	
v.	)	
The Toledo Edison Company,	)	
Respondent.	)	

OPINION AND ORDER

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

APPEARANCES:

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

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

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

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

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

OPINION:

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

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

Worthington, Calphalon, Kraft, Brush, and Pilkington (collectively, complainants) filed complaints against TE between January 23, 2008, and March 24, 2008. On March 14 and 24, 2008, Calphalon and Worthington, respectively, filed amended complaints. As explained in further detail below, the underlying facts set forth by the complainants are similar. Generally, the complainants allege that TE attempted to unilaterally amend the special contracts it entered into with the complainants. According to the complainants, TE's actions are unjust, unreasonable, and unlawful and in violation of Sections 4905.22, 4905.31, 4905.32, 4905.35, Revised Code, and Rule 4901:1-1-03, Ohio Administrative Code (O.A.C.). TE filed its answers to the complaints and the amended complaints between February 13, 2008, and April 3, 2008. By entries issued March 13, 2008, and April 7, 2008, the attorney examiner, *inter alia*, consolidated these five complaints. On July 17, 2008, Martin filed a complaint against TE, along with a motion requesting that its case be consolidated with the other five cases. The attorney examiner granted Martin's motion for consolidation at the hearing held in these matters on July 23, 2008 (Martin is also referred to as a complainant).

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

II. APPLICABLE LAW

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

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

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

III. DISCUSSION AND CONCLUSIONS

A. Joint Stipulations of Facts

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

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

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

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

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

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

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[1] *In the Matter of the Application of First Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000).

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

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

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

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

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

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

3 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period,* Case Nos. 03-2144-EL-ATA, et al., Opinion and Order (June 9, 2004).

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

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

(12) The RCP provided, in part, for adjustment of the regulatory transition cost and extended regulatory transition cost recovery periods and the regulatory transition cost rate levels to concurrently recover all amounts authorized by the Commission through usage as of December 31, 2008, for TE.

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

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

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

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4 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case Nos. 05-1125-EL-ATA, et al., Opinion and Order (January 4, 2006).

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

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

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

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

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

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

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

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

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

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

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

B. Complainants' Factual Arguments

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

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

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

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

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

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

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

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

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

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

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

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

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

additional deferrals through 2008. Therefore, in order "to ensure that the termination of the [c]omplainants' special contracts was not affected by this transformation in the purpose of the RTC charges/components, the RCP fixed the termination date for Toledo Edison's special contract customers during the month when the RTC charge, as originally formulated, would most-likely have ended - February 2008" (TE Rep. Br. at 4-5).

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

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

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

C. TE's Factual Arguments

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

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

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

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

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

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

D. Parties' Legal Arguments

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

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

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

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

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

8 *Id.*

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

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

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

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

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

E. Conclusion

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

The stipulation approved in the *ETP Case* required TE to notify its special contract customers that they could extend their current contracts through the date on which the RTC charges cease for TE; further, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level. In

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

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

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

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

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

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

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

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

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

The complainants believe that no language in paragraph 12 of the RCP stipulation relieved TE of its obligation under the 2001 amendments to perform those agreements until it ceased collection of the RTC charges. However, as we stated previously, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level; thus, the February 2008 termination date was consistent with the ETP's method of calculation of the termination dates for the contracts. Furthermore, as pointed out by TE, the extension of the RTC collection through December 2008 did not affect the termination of the special contracts. As expressed by TE, we understand that part of the reason the RTC did not end earlier, as contemplated by the

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

Accordingly, upon consideration of the evidence of record, the Commission finds that the complainants have not sustained their burden of proof and shown that TE's actions are unjust, unreasonable, and unlawful and in violation of Sections 4905.22, 4905.31, 4905.32, 4905.35, Revised Code, and Rule 4901:1-1-03, O.A.C. Furthermore, the Commission finds that any arguments made by parties and not addressed in this opinion and order are denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

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

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

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

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

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

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

ORDER:

It is, therefore,

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

FEB 19 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC,	)	Case Nos. 08-67-EL-CSS
	)	08-145-EL-CSS
Complainants,	)	08-146-EL-CSS
	)	08-254-EL-CSS
v.	)	08-893-EL-CSS
	)	
The Toledo Edison Company,	)	
	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC, (collectively, complainants) filed complaints against The Toledo Edison Company (TE) between January 23, 2008, and July 17, 2008. These complaints were consolidated, due to the fact that the underlying facts set forth by the complainants are similar. Generally, the complainants alleged that TE attempted to unilaterally amend the special contracts it entered into with the complainants. According to the complainants, TE's actions are unjust, unreasonable, and unlawful and in violation of Sections 4905.22, 4905.31, 4905.32, 4905.35, Revised Code, and Rule 4901:1-1-03, Ohio Administrative Code.

(2) By opinion and order issued February 19, 2009, the Commission dismissed the complaints finding that the complainants had not provided sufficient evidence to demonstrate that TE had violated any applicable order, statute, or regulation. The Commission noted that the complainants are seeking a determination by the Commission that the rates set forth in the special contracts entered into between the complainants and TE, as amended in 2001, should continue

through the date on which TE ceases collecting the RTC charges, which the complainants submit is December 31, 2008. The Commission further noted that TE, on the other hand, insists that the special contracts terminate on the complainants' billing dates in February 2008, as provided for in the rate certainty plan (RCP),[1] which is consistent with the method set forth in the electric transition plan (ETP)[2] for calculating the end dates for the special contracts. In arriving at its conclusion, the Commission reviewed the stipulations and orders in the *ETP Case*, the *RSP Case*,[3] and the *RCP Case*.

Initially, the Commission took note of the fact that the stipulation approved in the *ETP Case* required TE to notify its special contract customers that they could extend their current contracts through the date on which the RTC charges cease for TE; further, the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kilowatt hour (kWh) sales level. In response to this offer, the complainants opted to extend their initial special contracts and entered into the 2001 amendments with TE.

Next, the Commission noted that the stipulation approved in the *RSP Case* did not require that TE provide notice to its special contracts customers that they had the option to extend their contracts. However, based on the arguments in the cases, the Commission believed the complainants were looking to the Commission to conclude, almost five years after the order in the *RSP Case*, that TE should have provided written or oral notice to the special contract customers of the option to extend the provisions of the contract even though no such notice was required by the Commission's order in the *RSP Case*. The

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1 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case Nos. 05-1125-EL-ATA, et al., Opinion and Order (January 4, 2006) (*RCP Case*).

2 *In the Matter of the Application of First Energy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case Nos. 99-1212-EL-ETP, et al., Opinion and Order (July 19, 2000) (*ETP Case*).

3 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case Nos. 03-2144-EL-ATA, et al., Opinion and Order (June 9, 2004) (rate stability plan [*RSP] Case*).

Commission concluded in these cases that such a finding would be inappropriate and found no merit in the complainants' arguments on this point.

Turning to the provisions in the *RCP Case*, the complainants believed that no language in the stipulation approved in the *RCP Case* relieved TE of its obligation under the 2001 amendments to perform those agreements until it ceased collection of the RTC charges. However, the Commission, in its conclusion in these cases, reiterated the point that the ETP stipulation provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level and, therefore, the February 2008 termination date approved in the *RCP Case* was consistent with the ETP's method of calculation of the termination dates for the contracts. The Commission concluded that the record in these cases clearly reflects that, regardless of the sales calculation, no scenario results in continuation of the special contracts through December 2008.

(3) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On March 20, 2009, the complainants filed an application for rehearing of the Commission's February 19, 2009, order in these cases.[4] The complainants set forth three grounds for rehearing.

(5) On March 30, 2009, TE filed a memorandum in opposition to the complainants' joint application for rehearing stating that the request simply reiterates arguments that were considered and rejected by the Commission in its order in these cases.

(6) In their first ground for rehearing, the complainants assert that the Commission failed to apply the clear and unambiguous termination language in the 2001 amendments to the special contracts. According to the complainants, the language in the 2001 amendments provides that the contracts will terminate on

[4] The Commission notes that the February 19, 2009, order addressed the above captioned complaints, as well as the complaint filed by Pilkington North America, Inc. (Pilkington), in Case No. 08-255-EL-CSS. However, Pilkington did not file an application for rehearing of the Commission's order.

the date that TE stops collecting RTC charges. TE stopped collecting RTC charges on December 31, 2008; therefore, complainants' argue that the termination date for the contracts is December 31, 2008. Contrary to the Commission's conclusion, the complainants insist that the termination provisions of their contracts are not based on the attainment of defined kWh sales levels as suggested by the stipulations in the *ETP Case*, *RSP Case*, and the *RCP Case*. Furthermore, the complainants argue that it is irrelevant that the RTC charges continued beyond the date the defined kWh sales were achieved, because the only legally relevant fact is that the termination provisions in the 2001 amendments are tied to the cessation of the RTC charges, and anything outside of the 2001 amendments (i.e., the parol evidence contained in the stipulations in the *ETP Case*, *RSP Case*, and the *RCP Case*) is irrelevant.

(7) In response to the complainants' first ground for rehearing, TE states that the Commission applied the correct termination date, February 2008, to the contracts. According to TE, the Commission rightly determined that the ETP stipulation, under which the complainants extended their contracts, provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh level. Subsequently, the *RSP Case* gave the complainants the opportunity to further extend their contracts; then the *RCP Case* held that contracts extended under the ETP, but not the RSP, would continue until the meter read date in February 2008. TE points out that, without reference to the definition of RTC charges in the various Commission orders and the associated stipulations, the termination language contained in the special contracts would have no meaning. TE submits that the complainants continue to ignore the fact that what is being collected today in the RTC charge is not what was collected in 2001. Moreover, TE states that, since the Commission has the express authority to modify the contracts at issue, the complainants' argument relating to the issues that the Commission may consider, whether parol evidence or not, must fail. TE reasons that the complainants did not extend their agreement under the *RSP Case* and now they are attempting to collaterally attack the Commission's decision in the *RSP Case* for their own failure to act.

(8) With regard to the complainants' first ground for rehearing, the Commission finds that they have raised no new issue that we did not already consider at length in our order. The complainants are essentially asking us to ignore the language in the stipulation approved in the *ETP Case* which ties the calculation of the RTC charges to kWh sales, even though it was the *ETP Case* that formed the basis for the 2001 amendments. As we recognized in our order, the ETP stipulation specifically provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level; the February 2008 termination dates for the complainants' contracts were consistent with this method for calculating the termination dates. Furthermore, the complainants were given an opportunity in the subsequent *RSP Case* to extend their contracts. The fact that the complainants did not follow the *RSP Case* and extend their contracts cannot now be cured by redefining the meaning of RTC charges as set forth in the *ETP Case*. Therefore, we conclude that the complainants' request for rehearing on this issue is without merit and should be denied.

(9) In their second ground for rehearing, the complainants assert that the Commission erred by modifying the terms of the complainants' special contracts without requiring TE to meet the burden imposed by Section 4905.31, Revised Code, and show that modification of the termination date was needed to protect the public interest. According to the complainants, the Commission's conclusion that the termination date of the contracts is tied to the kWh sales level is not legally supportable because it ignores the language of the special contracts entered into by TE and the complainants, in favor of language contained in a stipulation to which only TE, and not the complainants, is a party.

(10) Contrary to the assertions by the complainants in their second assignment of error, TE submits that neither the Commission nor TE improperly modified the contracts in any way. TE believes that, when the Commission fixed the termination date of the complainants' contracts in the RCP order, the Commission was not acting because the rates in the contracts were unreasonable or unjust, but the Commission "was simply fixing what was up until then a moving target so as to ensure that the parties' intentions were satisfied." Furthermore, TE

offers that no party sought to set aside the contracts in a manner that would be subject to the statutory public interest standard of review. Rather, TE posits that, because the RCP order materially altered the process for collecting RTC charges, the Commission had to decide what the termination date would be for those contracts that were tied to the original RTC charge.

(11) To clarify, through our order, the Commission did not modify the terms of the complainants' special contracts. What the Commission did was review, in detail, the evidence and arguments in these cases, which included consideration of our previous orders in the *ETP Case*, *RSP Case*, and the *RCP Case*. As we stated previously, based upon our review, we concluded that the ETP stipulation specifically provided that the RTC charges would be collected until TE's cumulative sales reached a defined kWh sales level and the February 2008 termination dates for the complainants' contracts were consistent with this method for calculating the termination dates. The fact that the Commission disagrees with the complainants' interpretation of the contract does not mean that we modified the contract; rather, we are appropriately interpreting our previous orders. Accordingly, we find that the complainants' second ground for rehearing is without merit and should be denied.

(12) The complainants contend, in their third ground for rehearing, that the Commission's order violates the complainants' right to due process. In support of this argument, the complainants note that none of them were parties to the *ETP Case*, *RSP Case*, or the *RCP Case*, and TE never brought an action against any of them under Section 4905.26, Revised Code, to obtain a determination that the special contract termination provisions were unreasonable or unlawful under Sections 4905.22 or 4905.31, Revised Code, or any other statutory provision. Therefore, the complainants posit that they were never given adequate notice or the opportunity to be heard on the subject of TE's efforts to modify the termination provisions in the contracts.

(13) TE responds to the complainants' third ground for rehearing by pointing out that the issue of whether the complainants were required to join as parties to the *RSP Case* and the *RCP Case* was "extensively considered by the Commission" in the order in

these cases. According to TE, the Commission appropriately acknowledged that: neither the stipulation nor the order in the *RSP Case* required TE to provide notice to special contracts customers; the newspaper publication in the *RSP Case* referenced the RTC charge as an issue in that case; the complainants have experts in their employ that could have tracked the *RSP Case*; and that all of TE's special contracts customers, including the complainants, had the same opportunity to participate in the *RSP Case*.

(14) Upon consideration of the complainants' third assignment of error, the Commission finds that it is without merit. Again, contrary to the complainants' position, the Commission did not modify the termination provisions of the special contracts. Moreover, as TE points out, we thoroughly reviewed and considered all of the evidence and arguments raised in these cases. The complainants took advantage of the opportunity presented by virtue of the *ETP Case* to extend their contracts; however, they then wish to submit that their rights to due process were violated because they were not parties to the case. Similarly, the complainants could have either been parties to the *RSP Case* and the *RCP Case* or they could have had their experts follow the cases. In any event, the record in these cases clearly indicates, as reflected in our order, that the complainants were properly afforded due process. Accordingly, we conclude that the complainants' third ground for rehearing should be denied.

ORDER:

It is, therefore,

ORDERED, That the complainants' joint application for rehearing be denied. It is, further,

ORDERED, That copies of the entry on rehearing be served upon all interested persons of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

APR 15 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of Worthington Industries, The Calphalon Corporation, Kraft Foods Global, Inc., Brush Wellman, Inc., and Martin Marietta Magnesia Specialties, LLC,	)	Case Nos. 08-67-EL-CSS
	)	08-145-EL-CSS
Complainants,	)	08-146-EL-CSS
	)	08-254-EL-CSS
v.	)	08-893-EL-CSS
	)	
The Toledo Edison Company,	)	
	)	
Respondent.	)	

CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

I am concerned by the lack of specific notice to contract parties in the RCP case that their contracts would be subject to interpretation or potential modification in that proceeding. However, based on the record in these cases, I am not persuaded, considering anew the terms of the 2001 agreements, that a different result from that reached in the RCP case is appropriate. I therefore concur in the result of the Commission's Entry on Rehearing.

Paul A. Centolella

*1991 Ohio PUC LEXIS 798, **

In the Matter of the Complaint of the City of Cincinnati, Complainant, v. The Cincinnati Gas and Electric Company, The Dayton Power and Light Company, and Columbus Southern Power Company, Respondents

Case No. 91-377-EL-CSS

PUBLIC UTILITIES COMMISSION OF OHIO

1991 Ohio PUC LEXIS 798

June 27, 1991

CORE TERMS: vacate, reasonable grounds, conversations, chairman, motions to dismiss, former chairman, ex parte, set forth, reasonableness, asserting, amply supported, settlement, prejudiced, examiner, full opportunity, possible bias, proper remedy, decision-making, requesting, vacating, vacation, tainted, movant, notice, unfair, laches, hear, public utilities commission, standing to bring, relief requested

PANEL: [*1]

Craig A. Glazer, Chairman; J. Michael Biddison; Ashley C. Brown; * Jolynn Barry Butler; Richard M. Fanelly

* Commissioner Brown has rescued himself from this Finding and Order.

OPINION: FINDING AND ORDER

The Commission finds:

1) On February 22, 1991, the City of Cincinnati (City) filed a complaint with the Commission against The Cincinnati Gas and Electric Company (CG&E), The Dayton Power and Light Company (DP&L), and Columbus Southern Power Company (CSP). The City's complaint arises out of the Commission's adoption of an October 1, 1985 stipulation filed in Case No. 84-1187-EL-UNC, being In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company and Columbus & Southern Ohio Electric Company. The purpose of that proceeding was to determine the treatment of the costs associated with the construction of the William H. Zimmer Nuclear Power Station (Zimmer), owned by the three utilities, which could not be used and useful property in the conversion to a coal-fired plant. On November 26, 1985, the Commission adopted the stipulation entered into by the three utilities, the Commission's staff, the Office **[*2]** of the Consumers' Counsel, the Industrial Energy Consumers, n1 ARMCO, Inc., and members of the Montgomery County

Coalition. n2 The only parties to the negotiations that did not join in the stipulation were the Board of County Commissioners of Hamilton County n3 and the City.

n1 Industrial Energy Consumers is an ad hoc association comprised of Anheuser-Busch, Inc., American Standard, Inc., Emery Industries, Inc., Ford Motor Company, W. R. Grace and Company, General Motors Corporation, P.P.G. Industries, and Southwestern Portland Cement.

n2 Montgomery County Coalition is an ad hoc association of local governmental entities comprised of the Boards of County Commissioners of Montgomery, Preble, Mercer, Union, Franklin, Logan, Shelby, Brown, Highland, Scioto, Warren, Miami and Clark Counties, the cities of Bellefontaine, Bradford, Fairborn, Greenfield, Huber Heights, Miamisburg, Moraine, Troy, Vandalia, West Carrollton, Union, Port Williams, Covington, Athens, Marysville, Washington Court House, Xenia, Germantown, Greenville, Kettering, New Lebanon, Sidney, Trotwood, Urbana, Oakwood, Quincy, Bellbrook, Chillicothe, Reynoldsburg, Eaton, Franklin and Waverly, the villages of Ansonia, Clayton, Fort Loramie, Riverside, Spring Valley, Lynchburg, Pitsburg, Belle Center, Dublin, Midway, Waynesville, Potsdam, Casstown, Lewisburg, South Charleston, Anna, Bowersville, Cedarville, Coldwater, Fletcher, Montezuma, Brookville, Russells Point, Pleasant Hill, Phillipsburg, Botkins, Ludlow Falls, Woodstock, Yorkshire, South Solon, Rockford and Wren, and the Townships of Randolph, Butler and Harrison.

n3 The Board of County Commissioners of Hamilton County, although participating in that proceeding, did not take a position on the stipulation. **[*3]**

In its complaint, the City alleges that ex parte conversations occurred in June of 1985 between former chairman of the Commission, Thomas V. Chema, and the chief executive officers of the three utilities regarding the merits of the case. The City asserts that, as of the date of the final Opinion and Order, it had no notice or knowledge of such conversations, and that such conversations violated Section 4903.081, Revised Code, regarding ex parte communications, which states as follows:

After a case has been assigned a formal docket number neither a member of the public utilities commission nor any examiner associated with the case shall discuss the merits of the case with any party or intervenor to the proceeding, unless all parties and intervenors have been notified and given the opportunity of being present or a full disclosure of the communication insofar as it pertains to the subject matter of the case has been made.

Failure of any assigned examiner of the public utilities commission or any commissioner to abide by this section may, at the discretion of the commissioners, lead to that examiner's or commissioner's removal from a particular case or appropriate disciplinary **[*4]** action.

Further, the City alleges that the conversations poisoned and irreparably prejudiced the impartial hearing process established pursuant to state law, to the detriment of the City and in favor of the utilities. According to the City, the conversations rendered the subsequent hearings and settlement discussions between the parties a sham, and deprived the City of its fundamental due process rights guaranteed by the state and federal constitutions. The City requests that the Commission vacate its November 26, 1985 Opinion and Order, and find that the rates proposed to be charged by the utilities will be unjust and unreasonable to the extent that they may include costs attributable to negligence, mismanagement, and imprudence of the Zimmer nuclear construction and subsequent conversion to coal, and that the accounts and records of the utilities be restated to remove all Zimmer costs which are thus unreasonable, improper, and illegal for ratemaking purposes.

2) On March 15, 1991, the utilities each filed a motion to dismiss the complaint. In support of their motions to dismiss, the utilities state that the City has not shown reasonable grounds for complaint nor set forth grounds **[*5]** which would warrant reopening the Zimmer proceeding

or vacating the Commission's November 26, 1985 order. The utilities argue, among other things, that former Chairman Chema's discussions with the utilities were attempts to promote settlement and not discussions on the merits of the case, and, therefore, not violations of Section 4903.081, Revised Code. Further, the utilities contend that, even if Section 4903.081, Revised Code, was violated, vacating the Commission's order is not the proper remedy. The proper remedy would have been the disqualification of former Chairman Chema from that case. It is the utilities' position that the City was not prejudiced by these discussions, that no fraud or undue advantage was gained by the companies, and that the Commission's decision-making process was not irrevocably tainted to make the judgment unfair. The utilities also note that at the time these discussions took place the City was not a party to the Zimmer proceeding, and that, after it was granted intervention, the City had a full opportunity to challenge the terms of the stipulation submitted by the other parties at a hearing. The utilities also argue that it would be improper for **[*6]** the Commission to vacate its order long after the time for appealing the Commission's order had expired and after the utilities have already written off their books of account certain costs associated with Zimmer. The utilities argue that the doctrine of laches should apply. DP&L and CSP also pointed out that the city is not their service customer and has no standing to challenge the Commission's order as it relates to them. For the reasons set forth above, the utilities request that the Commission dismiss the City's complaint.

3) On March 29, 1991, the City filed a memorandum contra to the motions to dismiss. The City argues that it has set forth reasonable grounds for complaint and that it has standing to bring this complaint. The City states that the Commission's Opinion and Order in Case No. 84-1187-EL-UNC purports to set an "asset value" of Zimmer, and that this determination is likely to have an affect on the City's ability to protect itself adequately in CG&E's pending rate case. Further, the City asserts that because former Chairman Chema had ex parte conversations with the utilities, he was biased in favor of the stipulation, thus affecting the City's right to **[*7]** a fair determination on the matter. With respect to its standing to bring this complaint, the City states that, at the time the discussion between the former chairman and the utilities was taking place, it had moved to intervene in other matters involving Zimmer pending before the Commission, and that it was subsequently granted intervention in Case No. 84-1187-EL-UNC. The City also argues that laches should not apply to the City, and that the City filed the present complaint soon after it was made aware of the discussions in question. None of the non-utility signatory parties to the stipulation have filed any memoranda in support of the City's complaint.

4) The utilities filed replies to the City's memorandum contra on April 5, 1991, reasserting their positions that the city has not set forth reasonable grounds for complaint, and that the Commission's November 26, 1985 order should not be vacated.

5) The Commission takes the allegations raised by the City in its complaint filed under Section 4905.26, Revised Code, seriously. The City's allegations are that the discussions between former Chairman Chema and the utilities were ex parte communications on the merits of the case **[*8]** in violation of Section 4903.081, Revised Code, and biased the Commission's determination involving the reasonableness of the stipulation in Case No. 84-1187-EL-UNC. The City is requesting a hearing on its complaint and the vacation of the Commission's November 26, 1985 order.

The first question to be answered is whether the Commission has the authority to vacate a prior Commission order through a complaint proceeding brought under Section 4905.26, Revised Code. Although Chapter 49 of the Revised Code, from which the Commission acquires its authority, does not specifically address the Commission's authority to vacate a final order outside the time for rehearing set forth in Section 4903.10, Revised Code, the Commission has used, and in some cases been directed by the Ohio Supreme Court to use, its general supervisory powers over utilities and Section 4905.26, Revised Code, to review matters considered in prior orders. In Western Reserve Transit v. Pub. Util. Comm. (1974), 39 Ohio St. 2d 16, the Supreme Court found that Section 4905.26, Revised Code, is extremely broad and gives the Commission the authority to review matters already considered in a prior proceeding. In that **[*9]** case the Court stated that the language in Section 4905.26, Revised Code,

permits what might be strictly viewed as a collateral attack in many instances. This position was followed in Ohio Utilities Co. v. Pub. Util. Comm. (1979), 58 Ohio St. 2d 153, where the Court held that the Commission has the authority to initiate complaints under Section 4905.26, Revised Code, to investigate the continuing reasonableness of rates which it had previously established as just and reasonable. Further, in Allnet Communications v. Pub. Util. Comm. (1987), 32 Ohio St. 3d 115, the Court followed the decisions in the cases cited above stating that Section 4905,26, Revised Code, is broad in scope as to what kinds of matters may be raised by complaint. Based on these cases and our statutory authority to regulate utilities, we believe that the Commission has the authority to hear a complaint to vacate a Commission order upon finding of reasonable grounds for complaint.

Aside from its authority under the complaint statute, the Commission also recognizes its obligation, as a quasi-judicial body, to conduct its hearings in a manner that comports with the elements of fundamental fairness and due **[*10]** process. In Mausoleum Corp. v. Cincinnati (1981), 1 Ohio App. 3d 107, at 110, the appellate court stated that, "Where an administrative agency grants to an individual a right to be heard, it must provide a meaningful process for asserting that right. To do otherwise is to perpetrate a sham upon the affected party and the public generally." Accordingly, the Commission finds that it does have the authority to vacate its own orders through the complaint process under the appropriate circumstances.

As noted in Allnet, however, the "reasonable grounds for complaint" requirement of Section 4905.26, Revised Code, must still be met before the Commission is required to hold a hearing. The Commission recognizes that the City's complaint has many of the same aspects as a motion for relief from judgment filed pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure in that the City is requesting the Commission vacate a prior order based upon the alleged bias of the former chairman of the Commission. To determine whether the complaint sets forth reasonable grounds, the Commission believes it is proper to consider the criteria for granting a motion to vacate under the rules of civil **[*11]** procedure.

In Volodkevich v. Volodkevich (1988), 35 Ohio St. 3d 152, at 153, the Court stated, "To prevail on a motion filed pursuant to Civ. R.60(B), the movant must demonstrate: (1) that the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); (2) that the party has a meritorious defense or claim to present if relief is granted; and (3) that the motion is made within a reasonable time." The only section in Rule 60(B) that could possibly apply in this case is the catchall provision of Rule 60(B)(5) which permits a court to relieve a party from an order for "any other reason justifying relief from judgment." The Court in Volodkevich found that a judge's participation in a case which gives rise to the appearance of impropriety and possible bias could constitute grounds for relief under Rule 60(B)(5). However, the showing of possible bias and improper ex parte communication in the instant complaint only relates to the former chairman of the Commission. There are no allegations in the complaint that any of the other four Commissioners were aware of, or took part in, improper ex parte communications. Thus, we are not able to **[*12]** find the Commission's decision-making process with regard to the stipulation was tainted so as to make the ultimate determination of the Commission unfair, either to an innocent party or to the public interest that the Commission is obligated to protect. See Patco v. Federal Labor Relations Authority (D.C. Cir. 1982), 685 F.2d 547, 564.

In addition, the Ohio Supreme Court found in a case similar to this complaint that, even if such prejudice existed on the part of the chairman of the Commission, the determination made by the three member Commission was not prejudicial where all three agreed on the facts (Ohio Transport, Inc. V. Pub. Util. Comm. [1955], 164 Ohio St. 98). In the present case, all five Commissioners on the Commission in 1985 agreed that the stipulation in question was reasonable. We find, therefore, that the allegation of actions of the former chairman, even if taken as true, would not justify the vacation of the Commission's November 26, 1985 order.

Based on the findings above, we believe the City has not raised sufficient grounds to vacate the Commission's 1985 order using the criteria set forth by the courts. Because sufficient grounds to vacate the 1985 **[*13]** order have not been stated, the Commission finds that reasonable

grounds for complaint have not been stated as required under Section 4905.26, Revised Code. Accordingly, the utilities' motions to dismiss should be granted.

6) Although, as detailed above, there are ample legal grounds to dismiss the complaint, we believe that the relief requested by the City raises an even more fundamental issue. As noted above, the Commission takes the allegations raised in the complaint seriously. The process must be fair and open and how the Commission reaches its decision can, in many cases, be as important as the ultimate decision reached. Nevertheless, we must balance whether the relief requested by the City is reasonable even if the allegations are true. To do this, we must look to the record made by the City and the other parties and determine whether sufficient evidence existed to support the decision the Commission made at the time. This legal standard is consistent with the Supreme Court's holding in Ohio Transport. In that case, the Court stated that "even if the member alleged to have been prejudiced should not have participated, this court is of the opinion that the evidence **[*14]** before the Commission amply support the order it made."

7) In order to undertake this review, we have reviewed the hearing record as it appears in Case No. 84-1187-EL-UNC to determine whether the stipulation is amply supported by the record evidence, and hereby take administrative notice of the record evidence in that proceeding and the Commission's analysis of that evidence. This is a procedure which the Commission has used before when confronted with such allegations. See e.g. Myers v. Columbus Southern Power Co., Case No. 90-1315-EL-CSS, Entry on Rehearing. In the hearing in Case No. 84-1187-EL-UNC, the City was given a full opportunity to present its case in opposition to the stipulation and did present testimony in support of its position. The City has not stated it has any additional testimony or arguments which it was prevented from asserting during the 1985 hearing. Nor have any of the other signatory parties, including representatives of consumers with a stake in the outcome of the Zimmer proceeding, sought to overturn the settlement which they negotiated. We find that the stipulation was the result of arm's length negotiations among knowledgeable parties representing **[*15]** a wide range of interests and that the evidence before the Commission at the time amply supported the order it made.

In light of these findings, we do not believe it is appropriate to relitigate the issues resolved by the 1985 order, particularly in view of the fact that the movant City has not alleged a new or different meritorious claim or defense that it was prevented from asserting during the 1985 hearing. Nor do we believe it is appropriate for the present Commission, which did not hear the witnesses' testimony, to substitute its judgment for that of the Commission members in 1985 n4 in circumstances where the evidence before the Commission at the time amply supported the 1985 Order. For these reasons, as well as the reasons noted above, we find that the City's complaint, and the relief which it seeks, does not state reasonable grounds pursuant to Section 4905.26 of the Revised Code.

n4 Four of the five Commissioners, including the Chairman of the Commission in 1985 are no longer members of the Commission. Commissioner Ashley C. Brown, who approved the original stipulation, has recused himself from participating in this case.

8) In concluding this matter, the Commission **[*16]** would also note that, pursuant to the express language of the stipulation and the order, our ruling on the motions to dismiss does not affect the City's right to challenge in CG&E's upcoming rate case proceeding the reasonableness of any decision subsequent to the decision to cancel construction of Zimmer as a nuclear plant.

It is, therefore,

ORDERED, That the motions to dismiss the City's complaint filed by CG&E, DP&L, and CSP are hereby granted. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all parties of record in this case and Case No. 84-1187-EL-UNC.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative Law > Agency Adjudication > Impartiality > Ex Parte Contacts

Administrative Law > Judicial Review > Reviewability > Standing

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

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In

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 18
*** Annotations current through April 22, 2013 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

Go to the Ohio Code Archive Directory

ORC Ann. 4903.10 (2013)

§ 4903.10. Rehearing

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application 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.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed

pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

HISTORY:

125 v 274 (Eff 10-2-53); 129 v 1610 (Eff 10-18-61); 147 v H 215. Eff 9-29-97.

NOTES:

Related Statutes & Rules

Ohio Rules

Notice of appeal from the Public Utilities Commission, SCtPracR II § 3.

OH Administrative Code

Applications for rehearing. *OAC 4901-1-35.*

Case Notes
ANALYSIS Affidavit of notice to parties Analyzation of evidentiary record by commission or examiner Applicability Application allowed for limited purpose Application for rehearing --Prerequisite to review Application must be made

TITLE 49. PUBLIC UTILITIES
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

Go to the Ohio Code Archive Directory

ORC Ann. 4903.11 (2013)

§ 4903.11. Proceeding deemed commenced

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.

HISTORY:

125 v 274 (Eff 10-2-53); 147 v H 215. Eff 9-29-97.

NOTES:

Related Statutes & Rules

Ohio Rules

Notice of appeal from the Public Utilities Commission, SCtPracR II § 3.

Case Notes
ANALYSIS Appeal --Time limitations Application for rehearing --Applicability --Prerequisite to error proceedings

TITLE 49. PUBLIC UTILITIES
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

Go to the Ohio Code Archive Directory

ORC Ann. 4903.19 (2013)

§ 4903.19. Disposition of moneys charged in excess

Upon the final decision by the supreme court upon an appeal from an order or decision of the public utilities commission, all moneys which the public utility or railroad has collected pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the corporations or persons entitled to them, in such manner and through such methods of distribution as are prescribed by the court. If any such moneys are not claimed by the corporations or persons entitled to them within one year from the final decision of the supreme court, the trustees appointed by the court shall give notice to such corporations or persons by publication, once a week for two consecutive weeks, in a newspaper of general circulation published in Columbus, and in such other newspapers as are designated by such trustee, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility or railroad, under the direction of such trustee, into the state treasury for the benefit of the general fund. The court may make such order with respect to the compensation of the trustee as it deems proper.

HISTORY:

GC § 551-1; 103 v 804(816), § 41; Bureau of Code Revision, 10-1-53; 137 v H 42. Eff 10-7-77.

Case Notes
ANALYSIS Distribution of funds Return of funds

DISTRIBUTION OF FUNDS.

Commission's decision upheld that the utility's action in nominating its winter service gas rate was imprudent, unreasonable and not in its customers' interests. Distribution of funds deposited under *R.C. 4903.19* ordered: *Columbia*

Gas of Ohio, Inc. v. P.U.C., 10 Ohio St. 3d 114, 462 N.E.2d 166 (1984).

RETURN OF FUNDS.

Return of funds deposited pursuant to *R.C. 4903.19* ordered where the reduction in the utility's CWIP allowance was upheld: *Columbus & Southern Ohio Elec. Co. v. P.U.C., 10 Ohio St. 3d 12, 460 N.E.2d 1108 (1984).*

TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

Go to the Ohio Code Archive Directory

ORC Ann. 4905.22 (2013)

§ 4905.22. Service and facilities required; unreasonable charge prohibited

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

HISTORY:

GC §§ 614-12, 614-13; 102 v 549, §§ 14, 15; Bureau of Code Revision. Eff 10-1-53.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Conditions for exemption of natural gas company from other rate provisions; jurisdiction as to noncompliance, *RC § 4929.04.*

Jurisdiction of commission upon complaint or commission initiative; arbitration of commercial disputes; alternative dispute resolution procedures, *RC § 4928.16.*

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 18
*** Annotations current through April 22, 2013 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

Go to the Ohio Code Archive Directory

ORC Ann. 4905.26 (2013)

§ 4905.26. Complaints as to service

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

HISTORY:

GC § 614-21; 102 v 549, § 23; Bureau of Code Revision, 10-1-53; 125 v 613 (Eff 10-26-53); 139 v S 378 (Eff 1-11-83); 147 v H 215. Eff 9-29-97; 153 v S 162, § 1, eff. 9-13-10.

NOTES:

Section Notes

Editor's Notes

The provisions of § 4 of 153 v S 162 read as follows:

SECTION 4. Any complaint filed pursuant to *section 4905.26 of the Revised Code* and pending on the effective date of Sections 1 and 2 of this act shall be determined by the Public Utilities Commission pursuant to the Revised Code as it existed immediately preceding that effective date.

EFFECT OF AMENDMENTS

153 v S 162, effective September 13, 2010, deleted the last three paragraph, pertaining to hearings for complaints; and made stylistic changes.

Related Statutes & Rules

Cross-References to Related Statutes

Additional jurisdiction and powers of commission concerning utility or affiliate, *RC § 4928.18.*

Alternative regulatory requirements, *RC § 4927.04.*

Assessment for commission expenses, *RC § 4905.10.*

Assessment for counsel expenses, *RC § 4911.18.*

Commission may change rules and regulations of public utilities, *RC § 4905.37.*

Complaint or commission initiative concerning transition plan, *RC § 4928.36.*

Conditions for exemption of natural gas company from other rate provisions; jurisdiction as to noncompliance, *RC § 4929.04.*

Investigation of complaints as to service, *RC § 4929.15.*

Failure of utility to respond to consumers' counsel inquiry as admissible evidence, *RC § 4911.19.*

Jurisdiction of commission upon complaint or commission initiative; arbitration of commercial disputes; alternative dispute resolution procedures, *RC § 4928.16.*

Jurisdiction over violations; remedies, penalties, *RC § 4905.73.*

OH Administrative Code

Public utilities commission: administration --

Administrative provisions and procedure. *OAC ch. 4901-1.*

Complaint proceedings. *OAC ch. 4901-9.*

Public utilities commission: motor carriers --

Complaints regarding schedule changes. *OAC 4901:2-11-23.*

Mediation of disputes against household goods carrier. OAC 4901:1-2-19-13.

Public utilities commission: utilities --

Furnishing of intrastate telecommunications service by local exchange companies. *OAC ch. 4901:1-5.*

Case Notes

ANALYSIS Constitutionality, validity Application for emergency relief --Complaints Authority of commission --Intervention Complaints --Appeal --Counterclaim --Dismissal sua sponte --Proper party --Reasonable grounds for Construction Damages Duty of utility Extended-area service Federal preemption Finding of inadequacy of service Hearings --Notice --When not entitled to --When required Insurance matters Jurisdiction Prohibition Rate changes Rate review Regulation of advertising Relocation of electrical lines Remedies Removal of tree Retroactive effect of orders Special contracts Splitting of area code Tariffs Telephone companies Termination of service Unreasonable rates

CONSTITUTIONALITY, VALIDITY.

Revised Code § 4905.26 has not been repealed by implication by Section 9 of Amended Substitute House Bill 206: *Ohio Public Interest Action Group v. Public Util. Comm., 43 Ohio St. 2d 175, 331 N.E.2d 730 (1975).*

The question of the constitutionality of every law being first determined by the general assembly, every presumption is in favor of its constitutionality, and it must clearly appear that the law is in direct conflict with inhibitions of the constitution before a court will declare it unconstitutional. (*State Board of Health v. Greenville, 86 OS 1,* followed): *Ohio Public Interest Action Group v. Public Util. Comm., 43 Ohio St. 2d 175, 331 N.E.2d 730 (1975).*

APPLICATION FOR EMERGENCY RELIEF.

Order of public utilities commission denying application for emergency relief for utility customers on ground it was proceeding as expeditiously as possible with an investigation and full public hearing under *R.C. 4905.26,* was not unreasonable or unlawful: *Consumers' Counsel v. Public Util. Comm., 55 Ohio St. 2d 30, 377 N.E.2d 796 (1978).*

--COMPLAINTS.

When the Public Utilities Commission of Ohio (PUCO) issued an order exempting cellular telephone service providers from, inter alia, the complaint procedure in *R.C. 4905.26,* it was not required to observe the formal rulemaking procedures in *R.C. 111.15* because, under *R.C. 4927.03(A)(1),* it could deregulate telecommunications services "by order," so its order granting the exemption was valid, and cellular service resellers could not pursue complaints based on *R.C. 4905.26* against cellular service providers before the *PUCO. Disc. Cellular, Inc. v. PUC, 112 Ohio St. 3d 360, 859 N.E.2d 957, 2007 Ohio LEXIS 55, 2007 Ohio 53,* (2007).

AUTHORITY OF COMMISSION.

--INTERVENTION.

The public utilities commission is empowered to determine whether reasonable grounds appear for a petition to intervene by a ratepayer: *Dworken v. Public Util. Comm., 133 Ohio St. 208, 12 N.E.2d 490 (1938).*

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 18
*** Annotations current through April 22, 2013 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

Go to the Ohio Code Archive Directory

ORC Ann. 4905.31 (2013)

§ 4905.31. Special contract law

Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees, and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in *section 4928.01 of the Revised Code* or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:

(A) The division or distribution of its surplus profits;

(B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement.

(C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;

(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;

(E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; any development and implementation of peak demand reduction and energy efficiency programs under *section 4928.66 of the Revised Code*; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate.

No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet.

Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs.

Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

HISTORY:

GC § 614-17; 102 v 549, § 19; 112 v 266; Bureau of Code Revision, 10-1-53; 136 v H 579 (Eff 12-21-75); 138 v S 88 (Eff 1-16-80); 138 v H 21 (Eff 7-2-80); 144 v S 359 (Eff 12-22-92); 145 v S 153. Eff 10-29-93; 152 v S 221, § 1, eff. 7-31-08.

Current through Legislation passed by the 130th Ohio General Assembly
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TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

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ORC Ann. 4905.32 (2013)

§ 4905.32. Schedule rate collected

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

HISTORY:

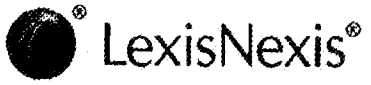
GC § 614-18; 102 v 549, § 20; Bureau of Code Revision. Eff 10-1-53.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Telecommunications; alternative method of establishing rates and charges, *RC § 4927.04.*



Current through Legislation passed by the 130th Ohio General Assembly
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*** Annotations current through April 22, 2013 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

Go to the Ohio Code Archive Directory

ORC Ann. 4905.35 (2013)

§ 4905.35. Discrimination prohibited; offer of unbundled services or goods

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(B) (1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

(2) A natural gas company that is a public utility and that offers to a consumer a bundled service that includes both regulated and unregulated services or goods shall offer, on an unbundled basis, to that same consumer the regulated services or goods that would have been part of the bundled service. Those regulated services or goods shall be of the same quality as or better quality than, and shall be offered at the same price as or a better price than and under the same terms and conditions as or better terms and conditions than, they would have been had they been part of the company's bundled service.

(3) No natural gas company that is a public utility shall condition or limit the availability of any regulated services or goods, or condition the availability of a discounted rate or improved quality, price, term, or condition for any regulated services or goods, on the basis of the identity of the supplier of any other services or goods or on the purchase of any unregulated services or goods from the company.

HISTORY:

GC § 614-15; 102 v 549, § 17; Bureau of Code Revision (Eff 10-1-53); 146 v H 476. Eff 9-17-96.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Approval of alternate rate plan, *RC § 4929.05.*

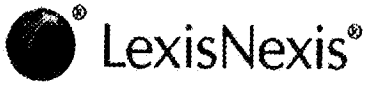
Free service or reduced rates, *RC § 4905.34.*

Mechanisms for receiving transition revenues; transition charge; itemization and disclosure, *RC § 4928.37.*

Modification of existing commission powers not intended, *RC § 4929.12.*

Separate pricing of services; itemization on bill; repackaging and offering on bundled basis, *RC § 4928.07.*

Telecomunications; alternative method of establishing rates and charges, *RC § 4927.04.*



Ohio Rules Of Civil Procedure
Title VII. Judgment

Ohio Civ. R. 60 (2013)

Review Court Orders which may amend this Rule.

Rule 60. Relief from judgment or order

(A) Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; Inadvertence; Excusable neglect; Newly discovered evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

NOTES:

Staff Notes

RULE 60(A) CLERICAL ERRORS.

Rule 60(A) gives the trial court power to correct clerical errors in the record upon the court's own motion or upon motion of one of the parties. The rule is similar to the correction of clerical errors provision set forth in *§ 2325.04, R.C.* The errors may be corrected by the court prior to appeal and during the course of appeal with leave of the appellate court.

RULE 60(B) MISTAKES; INADVERTENCE; ETC.

Rule 60(B) covers a particularly controversial area. In theory, a judgment entry, not the subject of an appeal, should be a final determination of the rights of the parties. For centuries courts have sought to protect the finality of judgments so that there might be an end to litigation. On the other hand, court decisions, rules of court, and statutes have provided for relief against the unjust operation of a voidable or void judgment. In Ohio, *§ 2325.01, R.C.*, has set forth an extensive list of grounds for vacation of a voidable judgment. In addition, it has been held that Ohio courts have inherent power to set aside a void judgment. See, *The Lincoln Tavern, Inc. v. Snader, 165 Ohio St. 61, [59 O.O. 74]* (1956). A voidable judgment is, for example, a judgment which is vitiated by fraud. *§ 2325.03, R.C.*, protects a good faith purchaser who has purchased property under a voidable judgment. In contrast, a void judgment is, for example, a judgment based on a proceeding in which the court lacked jurisdiction over the person of the defendant or jurisdiction over the subject matter of the action. One takes nothing under a void judgment. See, The Lincoln Tavern case, supra.

It should be noted that Rule 60(B), unlike Federal Rule 60(b), does not provide for vacation of a void judgment. It is obvious that if a court did not have jurisdiction that a judgment rendered when jurisdiction was not present is void. Any court has inherent power to vacate a void judgment without the vacation being subject to a time limitation. The vacation of a void judgment might be brought in the form of a motion or perhaps in the form of a procedural device such as a declaratory judgment action.

In effect then Rule 60(B) deals with vacation of voidable judgments. The rule provides that the vacation of voidable judgments "shall be by motion as prescribed in these rules." The time limitations for vacating a judgment under the rule are not affected by the expiration of a term of court. See, Rule 6(C). The time limitations under the rule run from the time of the entry of judgment sought to be vacated.

A motion to set aside a judgment on one of the first three grounds of Rule 60(B) must be made within one year of entry of judgment. The three grounds are: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." The three grounds are similar to the grounds for vacating a judgment in § 2325.01(A), (D), (G), and (J), R.C. The one-year time limit set by the rule for the three grounds is shorter than the time limit set by *§ 2325.10, R.C.*, for the similar statutory grounds in *§ 2325.01, R.C.*

The fourth ground for vacating a judgment set forth in Rule 60(B), "the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application," must be prosecuted within a reasonable time, but the provision is not limited by the one-year time limit applicable to the first three grounds. The fourth provision would most likely operate to afford relief from the operation of a prospectively operating judgment such as an injunction. Thus an injunction may restrain a person and his heirs and assigns from violating a neighborhood restrictive covenant. After a time lapse and after a radical change in the character of the neighborhood, a person bound by the judgment might seek to have the operation of the judgment set aside as to him.

The fifth ground of Rule 60(B), "any other reason justifying relief from the operation of the judgment," must be brought within a reasonable time, but the provision is not limited by the one-year time limit governing the first three grounds under Rule 60(B). The fifth ground, based upon Federal Rule 60(b)(6), is intended as a catch-all provision. The provision reflects the inherent power of a court to relieve a person from the unjust operation of a judgment.

Several words of caution concerning the operation of the five provisions for vacation of judgments under Rule 60(B) should be added. The rule provides that the motion for vacation of judgment "shall be made within a reasonable time..." The quoted language applies to all of the five grounds for vacation. Thus a party has the possible right to bring a motion to vacate the judgment on the grounds of newly discovered evidence up to one year after entry of judgment, but the motion is also subject to the "reasonable time" provision. Hence if the newly discovered evidence was discovered one month after entry of judgment and a party might have made his motion at that time but waited until the last day before the year was up, the court in its discretion might hold that the motion was brought too late because although made within one year not made within a "reasonable time." For newly discovered evidence, for example, the outside limit is one year -- or a shorter "reasonable time."

The operation of the fifth provision for vacation of a judgment under Rule 60(B) -- "any other reason justifying relief from the judgment" -- has been given very sparing application by the federal courts under the similar Federal rule provision. The federal courts have held that the provision may not be used as a substitute for one of the first three grounds for vacation of a judgment after the one-year limitation has run on one of the first three grounds. The

grounds for invoking the catch-all provision, not subject to the one-year limitation, should be substantial. Thus a court might utilize the catch-all provision to vacate a judgment vitiated by a fraud upon the court. Fraud upon the court differs from Rule 60(B)(3), fraud or misrepresentation by an adverse party. Fraud upon the court might include, for example, the bribing of a juror, not by the adverse party, but by some third person.

Finally, Rule 60(B) provides that a motion to set aside a judgment does not affect the finality of a judgment or suspend its operation during the pendency of the motion before the lower court or during pendency of the appeal of the motion.

Rule 60(B) is similar to Federal Rule 60(b). The textual analyses of the operation of Federal Rule 60 in Barron & Holtzoff and in Moore are extensive. See, 3 Barron and Holtzoff 389 et seq. (Wright ed. 1958) and 7 Moore Para 60.09, at 6, et seq. Also see, comment, Temporal Aspects of the Finality of Judgments, The Significance of Federal Rule 60(b), *17 U. Chi. L. Rev. 664* (1949-50) and Comment, Federal Rule 60(b): Relief From Civil Judgments, *61 Yale L.J. 76 (1952).*

Cross-References to Related Statutes

Bona fide purchaser unaffected by judgment, *RC § 2325.03.*

Owner of immobilized, impounded, or forfeited vehicle is party to proceeding, *RC § 4503.23.5.*

Recovery of excess amount claimed in pleading, *RC § 2325.12.*

Ohio Rules

Relief from pretrial orders in the court of claims, L.C.C.R. 7.

FEDERAL RULES OF CIVIL PROCEDURE
TITLE VII. JUDGMENT

Go to the United States Code Service Archive Directory

USCS Fed Rules Civ Proc R 60

Review Court Orders which may amend this Rule.

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 3 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.
(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:
(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
(2) grant relief under *28 U.S.C. § 1655* to a defendant who was not personally notified of the action; or
(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

HISTORY:
(Amended March 19, 1948; Oct. 20, 1949; Aug. 1, 1987; Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. *Note to Subdivision (a).* See former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich. Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 464(3); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89-2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va. Code Ann. (Michie, 1936) §§ 6329, 6333.

Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif. Code Civ. Proc. (Deering, 1937) § 473. See also N.Y.C.P.A. (1937) § 108; 2 Minn. Stat. (Mason, 1927) § 9283.

For the independent action to relieve against mistake, etc., see Dobie, Federal Procedure, pages 760-765, compare 639; and Simkins, Federal Practice, ch CXXI (pp 820-830) and ch. CXXII (pp 831-834), compare § 214.

Notes of Advisory Committee on 1946 amendments. *Note to Subdivision (a).* The amendment incorporates the view expressed in *Perlman v. 322 West Seventy-Second Street Co., Inc., 127 F.2d 716 (2d Cir. 1942)* ; 3 Moore's Federal Practice, 1938, 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram v. Safety Investment Co., 45 F. Supp. 636 (E.D. Mich. 1942);* also *Miller v. United States, 114 F2d 267 (7th Cir. 1940).*

Note to Subdivision (b). When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, Federal Relief from Civil Judgments, 1946, *55 Yale L. J. 623.* See also 3 Moore's Federal Practice, 1938, 3254 et seq.; *Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed. Rules Serv. 942, 945; Wallace v. United States, 142 F.2d 240 (2d Cir. 1944),* cert. denied, *323 U.S. 712, 89 L. Ed. 573, 65 S. Ct. 37 (1944).*

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each