ORIGINAL

IN THE SUPREME COURT OF OHIO

THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO,	)	Case No. 2012 - 2117
Appellant,	)	
v.	)	Appeal from the Public Utilities Commission of Ohio
THE PUBLIC UTILITIES COMMISSION OF OHIO,	)	Public Utilities Commission of Ohio Case No. 11-5843-GA-RDR
Appellee.	)	

APPENDIX OF APPELLANT THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

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NOTICE OF APPEAL OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

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NOTICE OF APPEAL OF APPELLANT
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

In accordance with R.C. 4903.11, R.C. 4903.13, Ohio Adm. Code 4901-1-02(A), Ohio Adm. Code 4901-1-36, and Supreme Court Rule of Practice 2.3(B), appellant, The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO"), hereby gives notice of its appeal to this Court and to the Appellee, the Public Utilities Commission of Ohio. DEO is appealing from the Commission's Opinion and Order dated October 3, 2012, and Entry on Rehearing dated December 12, 2012 (respectively, Attachments A and B). The case involved consideration of DEO's application filed on February 28, 2012, to adjust its automated meter reading ("AMR") cost recovery charge.

DEO was and is a party of record to the proceeding before the Commission, Case No. 11-5843-GA-RDR. On October 19, 2012, DEO timely filed an application for rehearing of the October 3, 2012 Opinion and Order, in which it set forth all of the grounds that it now urges and relies on for reversal, vacation, or modification of the order on appeal.

DEO complains and alleges that the Commission's October 3, 2012 Opinion and Order and December 12, 2012 Entry on Rehearing in the proceeding below are unlawful, unjust, and unreasonable in the following respects, as set forth in DEO's Application for Rehearing:

— The Commission violated R.C. 4903.09 by failing to acknowledge or provide a reasoned response to numerous arguments and issues raised by DEO.

— The Commission's decision is substantively unreasonable.

— Numerous findings and conclusions by the Commission lack record support.

— The Commission unlawfully altered the legal significance of DEO's past conduct and deprived DEO of due process.

— The Commission retroactively changed the requirements of past orders, which is barred by collateral estoppel.

— The Commission erred by denying DEO's Motion for Stay when DEO showed that it could secure all parties from any substantial harm.

— The Commission erred by denying DEO's Motion for Stay in finding that DEO did not satisfy the four-part test the Commission articulated in *In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co.*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009).

— The Commission erred by denying DEO's Motion for Stay and failing to give DEO an opportunity to address any harm for which DEO had not already accounted.

WHEREFORE, DEO respectfully submits that the Commission's October 3, 2012 Opinion and Order and December 12, 2012 Entry on Rehearing in the proceeding below are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the Commission with instructions to correct the errors complained of herein.

Dated: December 18, 2012

Respectfully submitted,

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CERTIFICATE OF FILING

I certify that the foregoing Notice of Appeal of Appellant, DEO, has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

One of the Attorneys for Appellant,
THE EAST OHIO GAS COMPANY D/B/A
DOMINION EAST OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellant, DEO, was served by regular U.S. mail and electronic mail this 18th day of December, 2012, upon all of the parties to the proceeding before the Commission:

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust its Automated Meter Reading Cost Recovery Charge to Recover Costs Incurred in 2011.	)))))	Case No. 11-5843-GA-RDR

OPINION AND ORDER

The Commission, considering the application, the testimony, and other evidence presented in this matter, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

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Mike DeWine, Ohio Attorney General, by Devin D. Parram, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Commission.

Bruce J. Weston, Ohio Consumers' Counsel, by Joseph P. Serio and Larry S. Sauer, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential utility customers of The East Ohio Gas Company d/b/a Dominion East Ohio.

Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45840, on behalf of Ohio Partners for Affordable Energy.

OPINION:

I. Background

The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) is a natural gas company as defined in Section 4905.03, Revised Code, and a public utility as defined by Section 4905.02, Revised Code. As such, DEO is subject to the jurisdiction of the Commission, pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code. DEO supplies natural gas to approximately 1.2 million customers in northeastern, western, and southeastern Ohio. (DEO Ex. 10 at 1.)

By opinion and order issued on October 15, 2008, in *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, et al. (*DEO Distribution Rate Case*), the Commission approved a stipulation that, *inter alia*, provided that the accumulation by DEO of costs for the installation of automated meter reading (AMR) technology may be recovered through a separate charge (AMR cost recovery charge). The AMR cost recovery charge was initially set at $0.00. The Commission's opinion in the *DEO Distribution Rate Case* contemplated periodic filings of applications and adjustments of the rate for the AMR cost recovery charge. The stipulation, as approved by the Commission, also provided that DEO, Staff, and the Ohio Consumers' Counsel (OCC) would "develop an appropriate baseline from which meter reading and call center savings will be determined and such quantifiable savings shall be credited to amounts that would otherwise be recovered through the AMR cost recovery charge."

By opinion and order issued on May 6, 2009, in *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Automated Meter Reading Cost Recovery Charge and Related Matters*, Case No. 09-38-GA-UNC (*Initial AMR Rider Case*), the Commission approved a stipulation entered into by DEO, Staff, and OCC establishing DEO's AMR cost recovery charge, thereby allowing DEO to recover costs incurred during 2008. In its opinion and order, the Commission noted that the stipulation provided that, *inter alia*, the signatory parties agreed to a methodology for calculating the AMR cost recovery charge. The signatory parties used calendar year 2007 as the baseline for measuring meter reading and call center expenses and savings.

By opinion and order issued on May 5, 2010, in *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Automated Meter Reading Cost Recovery Charge and Related Matters*, Case No. 09-1875-GA-RDR (*2009 AMR Case*), the Commission approved an AMR cost recovery charge of $0.47 per month, per customer, thereby allowing DEO to recover costs incurred during 2009. The Commission ordered DEO, in its next annual filing to recover AMR installation costs, to calculate its call center expenses by excluding expenses unrelated to the AMR program, as specified in the order, and to provide revised 2009 call center expenses in accordance with the order, with any resulting savings credited against DEO's recovery of AMR installation expenses incurred in 2010. In addition, the Commission ordered DEO to demonstrate in its filing how it would achieve the installation of the AMR devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that would maximize savings by allowing rerouting[1] at the earliest possible time. DEO's most recent AMR cost recovery charge was approved in *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust its Automated Meter Reading Cost*

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1 Rerouting is the conversion of walking meter reading routes to drive-by meter reading routes (Tr. 98, 155-156).

Recovery Charge to Recover Costs Incurred in 2010, Case No. 10-2853-GA-RDR, and is $0.57 per month, per customer.

In accordance with the AMR provision of the stipulation in the *DEO Distribution Rate Case*, DEO filed its prefiling notice in the present case on November 30, 2011. On February 28, 2012, DEO filed its application requesting an adjustment to the AMR cost recovery charge to recover costs incurred during 2011.

By entry issued on March 5, 2012, the attorney examiner granted motions to intervene filed by Ohio Partners for Affordable Energy (OPAE) and OCC. In addition, the attorney examiner required that Staff and intervenors file comments on the application by March 30, 2012, and that DEO file a statement by April 6, 2012, informing the Commission whether the issues raised in the comments had been resolved. In the event that issues raised in the comments remained unresolved, the entry set the hearing in this matter for April 11, 2012.

On March 28, 2012, OCC filed a motion for a one-week continuance of the procedural schedule, including changing the date of the hearing to April 18, 2012. OCC noted in its motion that DEO, Staff, and OPAE did not oppose the motion. By entry issued on March 30, 2012, the attorney examiner granted the motion for a continuance and established April 6, 2012, as the deadline for intervenors to file comments and April 13, 2012, as the deadline for DEO to file a statement informing the Commission whether the issues raised in the comments have been resolved.

On April 6, 2012, OCC and OPAE filed joint comments (OCC/OPAE Jt. Ex. 1). Staff also filed comments on April 6, 2012 (Staff Ex. 8). On April 13, 2012, DEO filed a statement informing the Commission that the issues raised in the comments had not been resolved.

On April 16, 2012, Staff moved to continue the date for filing expert testimony to April 27, 2012, and the date of the hearing to May 2, 2012. On April 17, 2012, the attorney examiner granted Staff's motion.

The hearing in this matter commenced and concluded on May 2, 2012, at the offices of the Commission. Five witnesses testified during the course of the hearing. Vicki H. Friscic (DEO Ex. 1) and Carleen F. Fanelly (DEO Ex. 2) testified on behalf of DEO. Robert P. Fadley (Staff Ex. 6), Peter Baker (Staff Ex. 7), and Kerry J. Adkins (Staff Ex. 9 and 9A) testified on behalf of the Commission. Initial briefs were filed on June 6, 2012, by DEO, Staff, OCC, and OPAE. Each party filed reply briefs on June 20, 2012.

II. Pending Motions

A. Staff's Motion to File Surreply or, in the Alternative, Motion to Strike

On June 26, 2012, Staff filed a surreply brief, as well as a motion for leave to file *instanter* the surreply or, in the alternative, a motion to strike portions of DEO's reply brief. Staff contends that DEO acted improperly by raising estoppel arguments in its reply brief where it could have done so in its initial brief. For this reason, Staff seeks an opportunity to reply to DEO's arguments.

In support of its motion, Staff argues that, contrary to DEO's assertion in its reply brief, the interpretation of the Commission's decision in the *2009 AMR Case*, regarding the time frame for the AMR program and the operations and maintenance (O&M) savings, has not been litigated. Consequently, Staff argues there is no basis for DEO to assert estoppel theories. Staff points out that each year presents a new stage in the AMR program, along with a new set of facts. Staff claims that the *2009 AMR Case* changed Staff's obligations with respect to Staff's investigation and DEO's compliance with the AMR program. Thus, because of the change in the AMR program and the need to evaluate DEO's compliance, Staff rejects the notion that there are any previously litigated issues that would be barred by estoppel theories.

On June 29, 2012, DEO filed a memorandum contra Staff's motion for leave to file a surreply. Characterizing Staff's motion as an unauthorized brief, DEO argues that Staff has no meritorious basis for filing a surreply or for striking portions of DEO's brief. DEO argues that its collateral and judicial estoppel arguments are responsive arguments and that it would be denied due process if the Commission were to strike its estoppel arguments. DEO asserts that requiring DEO to respond to Staff's arguments before they were made would be unfair. Moreover, if the Commission does not deny Staff's motion, DEO believes that it should be given an opportunity to file a responsive argument.

Furthermore, DEO contends that Staff has misstated the law that is applicable to estoppel. DEO believes that estoppel applies to any issue that was or could have been raised in the *2009 AMR Case*. DEO takes issue with Staff's comment that the meaning of the *2009 AMR Case* has not been litigated. DEO states, under Staff's theory, litigation could go indefinitely in an effort to determine the meaning of an order. DEO sees no need to litigate the plainly worded dates for milestones in the *2009 AMR Case*. Instead, DEO argues that, if Staff wished for clarification concerning the dates by which DEO needed to complete rerouting or installation, Staff could have filed a motion for clarification or an application for rehearing.

DEO also claims that Staff misstated the law when it asserted that estoppel dissolves with the passage of time. Instead, DEO asserts that estoppel works as a permanent bar. If otherwise, DEO argues, neither previous cases nor stipulations will settle anything. For this reason, DEO rejects the idea that Staff can revisit previous AMR filings to evaluate the pace of AMR installations.

The Commission initially notes that, a review of the record shows that DEO first raised the issue of estoppel in its May 1, 2012, motion to strike portions of Staff's prefiled testimony, in which DEO argued that portions of Staff's testimony should be barred by collateral and judicial estoppel. At the hearing, both DEO and Staff were given the opportunity to present their arguments on this issue (Tr. 9, 11-12). In its argument, DEO requested that, if the motion to strike was denied, it be allowed to present rebuttal testimony. In support of its motion, DEO asserted that: Staff's prefiled testimony raised issues that did not appear in Staff's comments; Staff should be estopped from taking positions that it is attempting to take in this proceeding because of positions it had taken in other proceedings; and Staff made material misrepresentations to DEO. During its argument, Staff even suggested that estoppel issues would be more appropriately addressed by brief (Tr. 12). At the hearing, the attorney examiner denied DEO's motion to strike Staff's prefiled testimony, thus, rejecting the arguments of collateral and judicial estoppel raised by DEO (Tr. 10, 15).

Given that the arguments pertaining to estoppel have clearly been at issue between the parties, the Commission finds that Staff's arguments in support of its motion for leave to file a surreply or, in the alternative, a motion to strike are without merit and should be denied.

B. <u>DEO's Motion to Strike Certain Comments Filed by OCC and OPAE</u>

On April 10, 2012, DEO filed a motion to strike, in which it challenged the April 6, 2012, comments filed by OCC and OPAE. On April 13, 2012, OCC and OPAE jointly filed a memorandum contra DEO's motion to strike. At the hearing, the attorney examiner deferred ruling on DEO's motion to strike until after the hearing (Tr. 8).

In their comments, OCC and OPAE point out that DEO, in a response to an interrogatory, had estimated meter reading O&M savings in the amount of $11.2 million between 2009 and 2012. Reviewing DEO's application, OCC and OPAE see that the company shows O&M savings in the amount of $3,511,695.32. OCC and OPAE note that this amount exceeds the estimated savings of $2,950,000 projected by the company. Now, OCC and OPAE claim that DEO has changed its position. By referring to cumulative savings of $6.2 million for the program, it appears to OCC and OPAE that DEO has reduced expected O&M cost savings from $11.2 million to $6.2 million, a reduced benefit of $5 million to customers. (OCC/OPAE Ex. 1 at 3-6.) Staff's observation of the O&M savings amounts provided by DEO in response to data requests was that they appeared to be annual because an itemized savings amount is given for each year.

Thus, Staff's states that, in making its recommendation to approve DEO's AMR cost recovery charge, subject to Staff's proposed modifications, Staff relied upon DEO's meter reading O&M savings estimates to be annual not cumulative. (Staff Ex. 7 at 2-6.) OCC and OPAE agree with Staff's recommendations (OCC Initial Br. at 5, 19; OPAE Initial Br. at 6).

In its memorandum in support of its motion to strike, DEO dismisses the argument concerning annual or cumulative O&M savings as irrelevant, being unrelated to DEO's application. For this reason, DEO moved to strike OCC's and OPAE's comments beginning with Section B on page 3 and continuing to the end of page 6. DEO denies that it made any claim that it estimated that customers would benefit from O&M cost savings of $11.2 million between 2009 and 2012. DEO believes that OCC and OPAE extrapolated the figure from a data request response DEO provided to Staff in 2007 during DEO's last base rate case. Further supporting its claim, DEO refers to the testimony of witness Friscic in the *2009 AMR Case* to show that O&M cost savings were expressed as a cumulative number, not an annual one.

The Commission does not believe it is necessary in this case to adjudicate whether DEO's O&M savings were initially estimated as annual or cumulative. As we have done in previous cases where we have considered the appropriateness of the O&M savings and DEO's AMR cost recovery charge, we will base our determination herein on the evidence of record. Accordingly, the Commission does not believe it is necessary to strike portions of the comments filed by OCC and OPAE as requested by DEO. Therefore, DEO's motion to strike should be denied.

III. Summary of the Application

In its application, DEO requests that the Commission approve an adjustment to DEO's AMR cost recovery charge from $0.57 per customer per month to $0.54 per customer per month to reflect costs associated with capital investments made from January 1, 2011 through December 31, 2011. To realize cost savings from implementation of AMR technology more quickly, DEO sought to complete AMR installations by the end of 2011. As of December 31, 2011, DEO reports that it installed a total of 1,243,358 AMR devices, representing 99 percent of the AMR devices needed for active meters. (DEO Ex. 10 at ¶1-11.)

IV. Summary of the Comments

On April 6, 2012, Staff, OCC, and OPAE filed comments. Staff made three recommendations, regarding DEO's application. In its first recommendation, Staff recommends that the Commission require DEO to file testimony to support future applications to modify the AMR cost recovery charge. Staff explains that the testimony should describe the application and accompanying schedules, detail implementation progress, and address any policy questions and issues. (Staff Ex. 8 at 6-7.)

Secondly, Staff recommends that DEO remove from its revenue requirement, the cost of AMR devices that were not installed prior to December 31, 2011. Staff points out that, in the *DEO Distribution Rate Case,* the Commission authorized DEO to implement its AMR program over a five-year period. According to Staff, DEO's AMR program began on January 1, 2007, making the final date for AMR device installations December 31, 2011. However, Staff highlights that DEO's application includes the cost of 9,530 AMR devices that were to be installed after December 31, 2011. Staff argues these devices were kept in inventory for later installation and the cost of the devices was improperly included in DEO's revenue requirement calculation in this case. To remove the uninstalled AMR devices from the revenue requirement, Staff recommends subtracting $375,200 from the cumulative plant in service, which would result in a $0.01 reduction in the proposed AMR cost recovery charge. (Staff Ex. 8 at 7-8.)

As a third recommendation, Staff urges the Commission to direct DEO to modify its O&M savings calculation to comply with the Commission's order in the *2009 AMR Case.* Specifically, in the *2009 AMR Case,* the Commission directed DEO to install AMR devices such that savings will be maximized and rerouting will be made possible in all communities at the earliest possible time. Staff explains that DEO reported installation of AMR devices on more than 99 percent of all active meters in its system and, once all rerouting is complete, there will be a reduction in meter reading routes since 2007 from 2,850 to 254, employee reductions from 116 to 36, and a reported O&M savings of $3,511,695. As of the end of 2011, DEO reports that eight of 11 local meter reading shops have been through the initial reroute process. The remaining three shops are scheduled for rerouting during the first and second quarters of 2012. By failing to reroute all its local shops by the end of 2011, Staff believes DEO has failed to comply with the Commission's order in the *2009 AMR Case.* Moreover, by failing to comply with the *2009 AMR Case,* Staff concludes that DEO has delayed the O&M savings that would reduce the AMR cost recovery charge that customers would pay. (Staff Ex. 8 at 10.)

Staff adds that DEO has asserted that a critical mass of 95 percent of the AMR installations must be attained prior to rerouting the area for drive-by collection of meter readings. However, Staff believes that DEO reached critical mass in all 11 local shops in 2011, as AMR devices have been installed on more than 99 percent of all active meters. Having achieved critical mass, Staff believes that full O&M savings should be passed on to customers now and should not be delayed for another year. Staff also relies on a DEO projection discussed in the *DEO Distribution Rate Case* that predicted the AMR program would lead to $6 million in O&M savings for ratepayers by the final year of installations. To address what it considers inadequacies in DEO's AMR deployment strategy, Staff recommends that DEO recalculate its O&M savings as if it had fully complied with the

Commission's directive in the *2009 AMR Case*, had fully rerouted its local shops, and was remotely reading all active meters by the end of 2011. (Staff Ex. 8 at 9-13.)

In their joint comments, OCC and OPAE state that they have no opposition to DEO's calculation of the AMR cost recovery charge for the 2011 costs. However, with respect to the costs for 2012, OCC and OPAE express concern with DEO's representation in the *DEO Distribution Rate Case* concerning O&M savings. OCC and OPAE note that DEO's original projection of O&M savings was $2,950,000 and DEO's present application states an O&M savings of $3,511,695.32. Therefore, for the present year, OCC and OPAE believe that DEO exceeded its projections. However, in DEO's response to OCC's discovery requests, DEO indicated that it only expected to achieve a total cumulative saving of $6.2 million due to AMR installation. OCC and OPAE explain that they previously understood that O&M savings would amount to $11.2 million between 2009 and 2012; now it appears that O&M savings will only amount to $6.2 million. OCC and OPAE express concern that DEO could deny customers approximately $5 million in rate offsets that were previously promised. (OCC/OPAE Ex. 1 at 3-5.)

V. Summary of the Evidence and Arguments on Brief

There are two main issues that were litigated at hearing and reviewed on brief: the term of the AMR program and the calculation of the O&M savings. Each of these issues are addressed and considered, in turn, below.

A. Term of the AMR Program

1. Staff and OPAE

Staff and OPAE argue that the AMR program concluded at the end of 2011 (Staff Initial Br. at 9; Tr. 91-92, 201, 205; OPAE Initial Br. at 2). In support of its argument, Staff refers to the Commission's conclusion in the *2009 AMR Case* order, which states that:

> DEO should be installing the AMR devices such that savings will be maximized and rerouting will be made possible in all of the communities at the earliest possible time. Therefore, the Commission expects that DEO's filing in 2011, for recovery of 2010 costs, will reflect a substantially greater number of communities rerouted. The Commission anticipates that, by the end of 2011, it will be possible to reroute nearly all of DEO's communities. To that end, the Commission finds that, in its 2011 filing, DEO should demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will

> maximize savings by allowing rerouting at the earliest possible time.

(*2009 AMR Case*, *Opinion and Order* at 7 (May 5, 2010); Staff Initial Br. at 11).

As a basis for challenging DEO's proposed revenue requirement, Staff argues that DEO's program concluded at the end of 2011, and, therefore, DEO cannot recover the cost of inventory remaining after its AMR program ended on December 31, 2011. According to Staff, eliminating the cost of inventory designated for installation in 2012, will result in a lower AMR rider charge for customers. Specifically, Staff contends that DEO's AMR program was scheduled for a duration of five years, beginning on January 1, 2007, and ending on December 31, 2011. In support of its position, Staff points out that DEO began the accelerated installation of AMR devices in 2007, citing a data request, wherein DEO listed 2007 through 2011 as the years for installation. (Staff Initial Br. 5, 7; Staff Ex. 7, Ex. PB-2.)

Furthermore, Staff argues that the time period for the AMR program coincided with the waiver of certain minimum gas service standards (MGSS) rules that ended on December 31, 2011. Recounting DEO witness Friscic's testimony, Staff highlights that, on December 13, 2006, DEO filed its AMR application along with a request for a waiver of the yearly actual meter reading requirement. Taking into account that the MGSS rules went into effect on January 1, 2007, and DEO had estimated that its deployment of AMR devices would take five years, Staff concludes that the five-year period would end in 2011. (Staff Initial Br. at 7-9.)

As additional evidence that the AMR program ended on December 31, 2011, Staff refers to DEO's Project Employee Meter Reading Agreement (Employee Agreement) with Gas Workers Local G-555 (Workers Local). Staff claims that a five-year period is defined by DEO having entered into the contract in 2007 and that the contract terminated on December 31, 2011. Staff believes that project employees were not needed after the completion of the AMR project. Therefore, Staff concludes that DEO did not intend that the AMR program would extend beyond the end date of the Employee Agreement. (Staff Initial Br. at 9-10.)

Since the AMR program ended on December 31, 2011, Staff takes the position that any inventory remaining after that date must be excluded from recovery through the AMR cost recovery charge. Staff reasons that DEO has no authorization to include AMR program costs beyond 2011 in this proceeding. Both OPAE and Staff agree that, to proceed with the installation of the remaining devices and recover the costs in a future AMR rider, DEO will need authorization from the Commission. To reflect its position, Staff adjusted the AMR device inventory from 9,530 to zero. The result of this adjustment reduces the additions to plant in service by $375,200 to $16,529,399 for 2011. In turn, this reduces the revenue requirement by $46,623. The ultimate effect of these adjustments would be a reduction of DEO's proposed AMR customer charge from $0.54 to $0.53. Staff is not opposed to allowing the costs of the 9,530 AMR devices in next year's filing, if the Commission approves an extension of the installation program. (Staff Ex. 6 at 4-7; Tr. 91-92, 201, 205; OPAE Initial Br. at 2.)

Relying on DEO's witness, OPAE notes that DEO began installing devices at the end of 2006 and that its date certain in its base rate case at the time was March 31, 2007. Therefore, OPAE asserts that the cost of devices installed before March 31, 2007, was included in base rates and was not part of the accelerated recovery. Costs for devices installed after March 31, 2007, were under the accelerated cost recovery plan. From this, OPAE concludes that the five-year accelerated cost recovery plan began in 2007. (Tr. 91-92, 201, 205; OPAE Initial Br. at 2.)

OPAE accuses DEO of confusing the installation of AMR devices with the accelerated cost recovery for installation of the devices. OPAE argues that, although DEO may have authority to install devices into 2012, DEO does not have authority to continue accelerated cost recovery through a rider into 2012. To support its claim that the five-year cost recovery period began in 2007, OPAE points to company testimony that reveals that costs incurred for AMR devices installed after the date certain of its base rate case, March 31, 2007, were recovered under the accelerated cost recovery rider. Although DEO is barred from recovering costs under the accelerated cost recovery rider that began in 2007, OPAE points out that other remedies, such as a base rate case or another rider, are available as means to recover the costs of installing the remaining AMR devices. (Tr. 91-92; OPAE Reply Br. at 2.)

2. DEO

DEO witness Friscic provided testimony in response to the concerns of Staff and OPAE regarding the timeliness of the completion of the AMR program. Ms. Friscic contends that DEO's AMR program is ahead of schedule, under budget, and exceeds projected savings. For background, Ms. Friscic states that the MGSS, which went into effect on January 1, 2007, require DEO to obtain actual meter readings at least once a year. Under the MGSS, readings from standard remote-reading devices would not be recognized as actual readings. To highlight DEO's difficulty, Ms. Friscic notes that approximately 370,000 of DEO's 560,000 inside meters were equipped with standard remote-reading devices. According to the witness gaining access to inside meters has always been difficult; therefore, DEO determined that an AMR program would be a cost-effective approach to comply with the MGSS requirements. Moreover, DEO believes that AMR installation would benefit customers by eliminating access issues, providing timely price signals, eliminating estimated billing, and reducing customer inconvenience. According to Ms. Friscic, in its initial application for the AMR program, DEO estimated that accelerated AMR deployment would take five years, beginning in 2008. (Tr. 24-25, 30, 87-88; DEO Ex. 1 at 1-2.)

According to DEO, the MGSS also require that DEO submit a meter reading plan that would set forth how DEO plans to comply with the MGSS meter reading requirement. DEO submitted its meter reading plan to Staff in 2007. As a component of its meter reading plan, DEO decided to accelerate the deployment of AMR devices. DEO also decided to seek accelerated recovery of the cost of deploying AMR devices through a rider. DEO, through the meter reading plan and the AMR deployment plan, sought to meet the MGSS requirements. In the interim, DEO requested a waiver of the meter reading requirements of the MGSS, which the Commission granted, effective on January 1, 2007, the same date that the MGSS went into effect. Contrary to Staff's assertions, DEO claims that it did not request a five-year waiver ending on December 31, 2011. DEO explains that it requested a temporary waiver permitting it to treat remote index equipment readings as actual readings for purposes of complying with the MGSS from the effective date of the MGSS rules until such time as DEO completes the deployment of AMR devices throughout its system, which the company estimated would take five years. Read together with the AMR application, DEO states that the actual duration of the waiver was approximately six years, from January 1, 2007, until the end of the five-year AMR program that started in January 2008. DEO stresses that it did not request a five-year waiver. (DEO Reply Br. at 19-20; DEO Ex. 1 at 3; DEO Ex. 3 at 4; Tr. 21, 87-90.)

On cross-examination, Ms. Friscic testified DEO's intent was that the program and the waiver should only generally coincide, not specifically coincide. The witness points out that both the application for AMR deployment and the waiver request were filed in December 2006. She further notes that the Commission did not approve the AMR deployment cost recovery application until October 2008, when DEO asserts that its five-year AMR plan began. (Tr. 32-36). Ms. Friscic also states that DEO began the installation of AMR meters prior to the acceleration of its AMR deployment plan, in 2007, or at the end of 2006. She adds that DEO had installed 18,000 AMR devices as of March 31, 2007, the date certain of its rate case. She clarifies that the cost of those devices were included in rate base in the *DEO Distribution Rate Case,* and was not part of the AMR deployment plan recovery. For all of 2007, Ms. Friscic states that DEO installed 132,000 units. The witness emphasizes that DEO's application specifically stated that it would install 250,000 AMR devices per year beginning in 2008. For that reason, DEO regards 2008 as the beginning year of the plan. She, however, denies that any specific dates for a five-year installation period were provided in the application, the Staff report in the *DEO Distribution Rate Case,* or in the stipulation in the *DEO Distribution Rate Case.* Consequently, DEO rejects Staff's argument that DEO is barred from cost recovery for those uninstalled devices remaining in inventory after December 31, 2011. (Tr. 22, 86, 91-94.)

Reporting on the current status of the accelerated AMR program, Ms. Friscic testified that, as of December 31, 2011, the program is essentially complete. DEO installed AMR devices on over 99 percent of its active meters. Assuming that there was a five-year period that began on January 1, 2007, DEO argues that it had already achieved all available cost savings by the end of the five-year period. With meter reading salaries comprising the bulk of savings, DEO made full staffing reductions and had eliminated all walking routes. DEO asserts that the remaining handful of 9,530 unconverted meters have no bearing on costs. The only active meters yet to receive AMR devices are those of large commercial customers that require special scheduling and hard-to-access customers who have not responded to DEO's requests for access to their premises. (DEO Ex. 1 at 5; DEO Ex. 2 at 6-7.)

DEO argues that, if the Commission intended the AMR program to commence on January 1, 2007, the Commission would have issued an order establishing a start date of January 1, 2007. However, DEO acknowledges that there were timing expectations involved with the AMR program. DEO asserts, in its application, that it would accelerate installation under a five-year program beginning in January 2008. Showing commitment to its promise, DEO points out that it installed more than 250,000 devices in 2008, 2009, and 2010, leaving less than 250,000 to go in 2011. DEO contends that it also complied with the timing requirements established in the *2009 AMR Case*. (DEO Reply Br. at 17-18.)

DEO also rejects Staff's assertion that the Employee Agreement created a definitive AMR program end date of December 31, 2011. DEO argues that its this agreement could not establish what the Commission required DEO to do with respect to the AMR program and the agreement is irrelevant to whether the Commission ordered a start or stop date for the AMR program. (DEO Reply Br. at 20.)

DEO acknowledges that it recovered some costs through the AMR cost recovery charge for installations occurring in 2007. However, DEO rejects the argument that its recovery of costs in 2007 established a hard stop or start date. Moreover, DEO believes that it should be treated favorably because it chose to install AMR devices before the approval of its application. DEO installed 132,000 units in 2007 and 270,000 in 2008. This turned out to be beneficial to customers by delivering AMR program benefits to customers sooner. The installation of AMR devices prior to the approval of DEO's application allowed it to reach 99.2 percent completion by the end of 2011. If, instead, DEO chose to wait until the approval of its application, DEO argues that the five-year installation period would have begun in late 2008 and ended late 2013. (DEO Reply Br. at 15-21.)

3. Staff Reply

In response, Staff opines that, in the *2009 AMR Case*, the Commission recognized that the longer it took DEO to complete installation of the AMR devices, the more customers would pay for meter reading services, which is why Staff believes the Commission directed DEO to complete the program by the end of 2011. Staff asserts that, when the Commission ordered DEO to file a plan for achieving installation by the end of 2011, that was not merely an academic exercise; rather, the Commission expected DEO to lay out a plan for completing installation by the end of 2011 and stick to that plan. However, Staff believes DEO is using hard to access meters and large commercial customers as an excuse for failing to comply with the Commission's directive that it complete installation by the end of 2011. (Staff Reply Br. at 8-10.)

4. Conclusion on the Term of the AMR Program

The Commission's orders in the *DEO Distribution Rate Case* and the *2009 AMR Case* clearly support Staff's position in this case that DEO's AMR program was approved for a five-year period ending December 31, 2011. In the *DEO Distribution Rate Case*, the Commission approved the stipulation between the parties in that case, which adopted the Staff's recommendation, and Staff's recommendation was based on its evaluation of costs incurred through the end of 2011. Additional support is found in the order in the *2009 AMR Case*, wherein the Commission directed DEO to demonstrate, in its 2011 filing, how it was going to "achieve the installation of the devices on the remainder of its meters by the end of 2011." Moreover, as pointed out by Staff in this case, the fact that the Employee Agreement terminated on December 31, 2011, further corroborates the conclusion that the program was to end in 2011. DEO's arguments against the recognition of a definitive five-year period beginning on January 1, 2007, are not persuasive. Accordingly, the Commission concludes that DEO should have completed the installation of all AMR devices by the end of 2011, and recovery for the 9,530 meter still in inventory should be disallowed as part of the 2011 AMR cost recovery charge. However, should DEO wish to recover the cost of the remaining meters installed in 2012, DEO may request an extension of the AMR program for the purpose of the Commission's consideration of DEO's recovery of these remaining meters as part of DEO's 2013 filing.

B. <u>O&M Savings</u>

1. Staff and OPAE

Staff urges the Commission to direct DEO to modify its O&M savings calculation to comply with Staff's interpretation of the Commission's order in the *2009 AMR Case*. Staff explains that the meter reading O&M savings are the costs for meter readers, as well as the costs for supervisors, support personnel, and related supporting items that are built into the company's base rates. O&M savings occur as a result of the reduction of meter reading costs, as the installation of AMR devices allows DEO to collect customer meter readings remotely from vehicles. However, Staff explains that the annual expenses associated with the meter readers will still be included in DEO's base rates. Thus, according to Staff, because the Company's base rates will not be reset until its next base rate case, customers would continue to pay meter reading costs, if the avoided meter reading costs are not passed back through reductions in the AMR cost recovery charge. (Staff Ex. 9 at 2, 4-5; Staff Reply Br. at 3.)

To avoid a double recovery by DEO, Staff proposes that O&M savings be recalculated. Staff notes that, in the *Initial AMR Rider Case*, the parties entered into a stipulation that established a baseline of meter reading expenses that are built into DEO's base rates. The baseline was set at $8,684,137, of which $7,747,418 was attributed to net labor, which consisted of labor expenses, plus payroll taxes and benefits, plus labor allocations. The remaining $936,719 was allocated toward other related incidentals. In its annual AMR cost recovery charge applications, DEO subtracted its annual total meter reading costs for the year from the total baseline amount. The resulting meter reading O&M savings was then used to reduce the annual revenue requirement. (Staff Ex. 9 at 5.)

Staff also notes that the timing of when O&M savings are realized and reflected in the AMR cost recovery charge is critical. Pointing to DEO's original application seeking authority to implement the AMR program and pointing to other documents, Staff highlights DEO's assertion that it must reach a critical mass, which, according to DEO, is 95 percent in AMR installations before it can begin drive-by meter readings. Accelerated installation, argues Staff, can lead to savings being magnified and passed on to customers sooner. To illustrate the effects of accelerated and delayed installation, Staff points out that AMR rates are set once per year. If critical mass is not achieved in a given year in one or more local shops, customers would continue to pay a greater rate than they otherwise would for the entirety of the succeeding year. Staff adds that this problem could compound in following years, if DEO does not catch up on delayed installations. On the other hand, Staff argues that accelerated installation can magnify savings to customers. By reaching critical mass sooner, DEO would avoid more O&M expenses sooner and would pass back more O&M savings to customers. (Staff Ex. 9 at 6-9.)

According to Staff, DEO did not complete rerouting of three of its 11 local shops by the end of 2011. Staff explains that the three shops that were not rerouted cover 345,218 meters or 27 percent of DEO's total meter population. As a result, O&M savings for 2011 were not as high as they could have been had DEO installed AMR devices in a manner that ensured it reached critical mass in its local shops sooner. To cure what it perceives to be a failure to maximize savings, Staff urges the Commission to adjust the meter reading O&M savings amount in the 2011 revenue requirement calculation.

Instead of an O&M savings amount of $3,511,695, as recommended by the Company, Staff recommends that the figure be raised to $5,139,971 to reflect that DEO should have completed AMR installations at least four months earlier in 2011. This figure would also recognize that rerouting and the transfer or release of unnecessary meter readers should have occurred at least three months earlier. (Staff Ex. 9A; Staff Ex. 9 at 18-19.)

Staff calculated $5,139,971 in meter reading savings by first estimating what DEO's annual meter reading savings would be in the 2013 recovery year for 2012 expenses. In its calculation, Staff assumed that DEO maintained its pace of AMR deployment in 2009 for the years 2010 and 2011. At such a pace, Staff estimates that DEO would have completed AMR installation on all active meters in its system by August 2011. Next, Staff allowed for a two-month transition period in August and September to convert to monthly meter readings, leaving the remaining three months of October through December in which to realize savings. To compute meter reader savings, Staff determined the annual salaries that are built into the baseline to be $74,863. Staff derived this figure by dividing the baseline meter reading expenses of $8,684,137 from the stipulation approved in the *Initial AMR Rider Case* by 116 meter readers. Assuming that the program would have been completed by August 2011, Staff determined that the company's staff of meter readers could have been reduced to 29 from a high of 116 at the beginning of the program, a reduction of 87 meter readers. According to Staff, its proposed reduction equates to a monthly savings of $542,759 or a total of $1,628,276 for the months of October, November, and December. Staff's proposed reduction translates to a $0.11 difference in the AMR cost recovery charge. Based on O&M savings, DEO recommended an AMR cost recovery charge of $0.54, whereas Staff's calculations render a charge of $0.42. Staff also predicts that delayed rerouting of local shops will lead to charges that are higher than they should be for years 2013 and 2014. (Staff Ex. 9A; Staff Ex. 9 at 17-20, 23-24.)

OPAE urges the Commission to increase DEO's O&M savings to account for DEO's failure to complete installation of AMR devices by the end of 2011. OPAE shares Staff's concern that that the annual expenses of meter readers may continue after meter readers are no longer needed, as part of base rates. To avoid this extra expense to customers, OPAE concurs with Staff's calculations, stating that, if Staff's proposal is not adopted, customers will not only pay more, but the O&M savings in 2012 will be less than its should be and customer savings could be delayed until 2014. (OPAE Br. at 6-7; OPAE Reply Br. at 7.)

OPAE disagrees with DEO's claims that Staff's cost savings disallowance is tantamount to estimated, imputed savings, a concept that the Commission has rejected. Instead, OPAE argues that the savings are those that DEO projected and that customers expected to receive. DEO's reduced expenses, OPAE claims, are real, and customers should be able to enjoy them. It is DEO's failure to complete the program on time that caused the savings not to be realized, argues OPAE. (OPAE Reply Br. at 6-7.)

2. DEO

Looking at O&M savings over the life of the program, DEO claims that it has achieved over $6.2 million in meter reading O&M savings for its customers, compared to that expense for the 2007 baseline year. Moreover, DEO proclaims that it has realized approximately $3.5 million in new savings, despite increases in labor rates and benefit costs that have occurred since 2007. From its cost savings figures, DEO concludes that customers have or are on track to reap the benefits described in its application. (DEO Ex. 1 at 6.)

To bolster claims of O&M savings, DEO points to reductions in its meter reading labor force during the accelerated deployment of AMR devices. DEO witness Fanelly, charted staffing reductions. Using 2007 as a baseline year, she states that there were 108 meter readers, eight supervisory salaried employees, and 2,850 walking routes. As of January 1, 2012, DEO reduced the number of meter readers to 27 and salaried staff to two persons. Furthermore, walking routes have been reduced to 234. Ms. Fanelly's further explains that DEO found additional ways to reduce costs, such as consolidating smaller shops and eliminating some meter reading departments. To reduce costs further, DEO entered into the Employee Agreement, which provided a lower cost labor solution by allowing DEO to reclassify and move more experienced employees to field service positions to complete AMR installations. The reclassified employees were engaged for most of the duration of the AMR project, and they received only general contract increases instead of higher progression increases which could have increased meter reading expenses. Ms. Fanelly opines that DEO could not have reduced staffing any further. However, she also notes that the Employee Agreement created one obstacle because, since it terminated on December 31, 2011, the timing of the pay period end results in the final cost of these employees being reflected in January 2012. (DEO Ex. 2 at 9-10.)

DEO opposes Staff's proposed savings calculation. DEO accuses Staff of using proxies instead of actual figures. DEO stresses that the *2009 AMR Case* requires a comparison of actual meter-reading expenses to the baseline expense in 2007. The resulting quantifiable savings would then reduce the AMR charge. DEO adds that the actual-to-baseline comparison method was affirmed in the *2009 AMR Case*, in which the Commission rejected OCC's imputed or surrogate savings as follows:

> [T]he Commission finds that OCC's argument that the meter reading and call center savings reported by DEO be replaced by imputed or surrogate savings based on the percentage of the total

> AMR installations completed lacks merit. The stipulation in the *DEO Distribution Rate Case* clearly states that AMR installation costs would be offset only by quantifiable savings. OCC's proposal in favor of imputed savings does not comport with either the stipulation approved in the rate case or the stipulation approved by the Commission in the *2008 AMR Case* (Case No. 09-38-GA-UNC).

(*2009 AMR Case*, Opinion and Order at 7 (May 5, 2010); DEO Initial Br. at 20).

Based on the Commission's reasoning in the *2009 AMR Case*, DEO concludes that Staff's proposal should be condemned for the same reason that the Commission rejected OCC's proposal. DEO interprets the *2009 AMR Case* as requiring quantifiable savings. Quantifiable savings, DEO goes on to say, means comparing DEO's actual meter-reading expense for 2011 to the baseline expense in 2007. DEO points to Staff's assumptions as the basis for rejecting its proxies. For example, DEO points to Staff's assumption that DEO could have maintained the pace that it had established in 2009. From there, Staff projects an August 2011 completion of installation. As another example, DEO refers to Staff's assumption that DEO completed 100 percent installation four months before the end of 2011 and computing the resulting savings to be added to 2011. (DEO Initial Br. at 22.)

3. Staff Reply

Staff defends its proposed O&M savings amount as reasonable and "quantifiable," and rejects DEO's claim that its methodology is in any way similar to that proposed by OCC in the *2009 AMR Case* and rejected by the Commission. Staff points out that any method of estimating savings that is not DEO's proposed O&M savings, could meet DEO's definition of imputed savings. Specifically, Staff argues that the Commission must reject DEO's position that any savings estimate is not "quantifiable," and cannot be adopted because it leads to the conclusion that the Commission can only properly adopt an amount of O&M savings that is reported by DEO. In sum, Staff requests that the Commission review DEO's O&M savings level, not just to check DEO's math, but for appropriateness, to determine if DEO met its burden of proving that its level of O&M savings is just and reasonable. (Staff Reply Br. at 12-14.)

4. Conclusion on O&M Savings

Given our conclusion above that the AMR program term ended on December 31, 2011, the Commission finds that DEO should have installed AMR devices and rerouted shops in a manner that allowed DEO to achieve maximum savings by the end of the 2011 project year. Furthermore, we note that, in the *2009 AMR Case*, the Commission directed DEO to deploy the devices in a manner that would maximize O&M savings by allowing rerouting at the earliest possible time and the Commission stated its expectation that DEO would reroute nearly all of its communities by the end of 2011. As pointed out by Staff, the three shops that DEO was unable to reroute by the end of 2011 comprised 27 percent of DEO's total meter population. The Commission does not believe that DEO's failure to reroute over a quarter of its customers constitutes rerouting of nearly all of its communities by the end of 2011, as we mandated in the *2009 AMR Case*.

Regardless of DEO's failure to comply with our directive that it achieve rerouting of nearly all communities in 2011, it is necessary and prudent for the Commission to review the evidence in this case and ensure that the appropriate level of O&M savings that should have been achieved by the end of 2011 is reflected in the customers' AMR cost recovery charge. Despite the fact that DEO did not comply with our directives regarding completion of the program by year-end 2011 and DEO's calculation does not reflect the full level of savings that was to be achieved by the end of 2011, DEO insists that the Commission accept its O&M savings calculation. DEO also argues that the Commission should reject Staff's calculation of the savings in this case, based upon the Commission's rejection of OCC's estimated savings proposal in the *2009 AMR Case*. However, we find that OCC's proposal in the *2009 AMR Case*, which estimated O&M savings based solely on DEO's initial percentage of estimated savings for the program, is not comparable to Staff's calculation in this case. Unlike OCC's *2009 AMR Case* estimate, in the record in this case, Staff supported an O&M savings calculation that is based on the actual number of meter readers and the reduction in the number of meter readers once the program is fully deployed, which was to be by the end of 2011. Staff's calculation is quantifiable and supported by calculations based on facts and not by mere estimation. If the Commission were to adopt DEO's theory on how to determine the appropriate savings, we would have to accept DEO's O&M savings calculation on its face with no consideration of the fact that DEO failed to comply by achieving maximum savings by the end of 2011. Given the record in the present case, the Commission cannot find that DEO has met its burden of proving that its proposed O&M savings is just and reasonable. Accordingly, we adopt Staff's recommendation and find that Staff's proposed level of O&M savings is reasonable and quantifiable based on the record evidence and should, therefore, be adopted. Moreover, the Commission expects DEO to demonstrate substantial consumer savings in its next filing, relating to both the call center, as well as net labor, as all shops should be fully rerouted by the end of 2012 and DEO should only be utilizing necessary employees.

C. Bulk Purchase of AMR Devices

OCC raises the issue of whether the company's bulk purchase of AMR devices saved money for customers. In its review of the evidence, OCC concludes that the bulk purchase did not save money but, in fact, added costs to customers. OCC states that DEO purchased 1.2 million Encoder-Receiver-Transmitter (ERT) devices in bulk, rather than on an as-needed basis. According to OCC, the company supports the purchase because it obtained a 2.5 percent discount, equating to a savings of $793,890. Noting that whether the discount is in fact a benefit has never been litigated, OCC points out that DEO did not take into account the carrying charges associated with 100,000 AMR devices being included in DEO's costs from year to year. In its calculation of carrying costs, OCC arrives at an annual carrying cost of $448,720. Noting that DEO carried the 100,000 unit excess inventory for three years, OCC calculates that the total carrying costs exceed savings by $552,270. OCC recommends that the AMR cost recovery charge be reduced to reflect the $552,270 difference between carrying costs and savings. (Tr. 69-71; DEO Ex. 1.0 at 10-12; OCC Br. at 16-19.)

DEO contends that OCC has forfeited any arguments concerning the bulk purchase of AMR devices. No party raised the issue of bulk purchase of ERTs either in comments or direct testimony. DEO admits that it mentioned the discount in its direct testimony and that OCC explored the issue on cross examination. Though acknowledging that OCC had the right to cross examine, DEO rejects the issue as a basis for reducing DEO's recovery. DEO suggests that OCC could have explored the issue through discovery, filed comments, and sponsored direct testimony. Doing so would have preserved DEO's rights to notice of the recommended reduction and given DEO an opportunity to present its own evidence. Lacking proper notice, DEO opines that OCC forfeited the issue. (DEO Reply Br. at 29-30.)

Moreover, in the *Initial AMR Rider Case*, DEO explains that OCC, and others agreed that DEO would be allowed to carry an inventory of 100,000 units. The fact that OCC signed the stipulation in that case raises collateral estoppel, judicial estoppel, due process, and the rule against retroactivity as bars against questioning DEO's bulk purchase of ERTs. (DEO Reply Br. at 30.)

The Commission agrees that OCC's proposal should be rejected. Although OCC explored this matter with DEO's witness, OCC did not file comments or testimony related to this issue. Without supporting testimony from OCC, the Commission finds it inappropriate to consider whether a carrying charge should be reflected in the AMR cost recovery charge.

<u>CONCLUSION:</u>

Upon consideration of the record in this case, the Commission finds that DEO's application to adjust its AMR cost recovery charge should be approved, as modified in this order. Therefore, the Commission finds that, based upon our determination above that the program ended on December 31, 2011, as well as our finding that Staff's calculation of the O&M savings should be adopted, DEO should be authorized to implement a new AMR charge of $0.42 per month, per customer in a manner consistent with this order. DEO is, therefore, authorized to file, in final form, complete copies of the final tariff page, consistent with this opinion and order, with the Commission's Docketing Division. The effective date of the new rates for the AMR cost recovery charge shall be a date not earlier than the date upon which the final tariff page is filed with the Commission.

As a final matter, the Commission agrees with Staff's proposal in its comments that, when DEO makes its application to recover costs for 2012, it should prefile its supporting testimony at the same time it files its application. Moreover, DEO should address, in its application, what efforts it has made to maximize potential customer savings during 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) DEO is a natural gas company as defined in Section 4905.03, Revised Code, and a public utility under Section 4905.02, Revised Code.

(2) DEO filed its prefiling notice of this application on November 30, 2011.

(3) On February 28, 2012, DEO filed its application in this case.

(4) By entry issued on March 5, 2012, OCC and OPAE were granted intervention.

(5) Comments on the application in this case were filed by Staff and jointly by OCC and OPAE on April 6, 2012.

(6) On April 13, 2012, DEO filed a statement regarding the disputed issues.

(7) A hearing in this matter was held on May 2, 2012.

(8) Initial and reply briefs were filed on June 6, 2012, and June 20, 2012, respectively, by DEO, Staff, OCC, and OPAE.

(9) DEO's application to adjust its AMR charge is reasonable and should be approved, with the modifications contained herein. The new charge should be $0.42 per month, per customer.

ORDER:

It is, therefore,

ORDERED, That Staff's motion for leave to file a surreply or, in the alternative, a motion to strike is denied. It is, further,

ORDERED, That DEO's motion to strike portions of the comments filed by OCC and OPAE is denied. It is, further,

ORDERED, That DEO's application to adjust its AMR charge is approved, subject to the modifications discussed herein. It is, further,

ORDERED, That DEO be authorized to file in final form complete copies of the tariff page consistent with this opinion and order and to cancel and withdraw its superseded tariff page. DEO shall file one copy in its TRF docket (or may make such filing electronically as directed in Case No. 06-900-AU-WVR and one copy in this case docket. It is, further,

ORDERED, That the new rates for the AMR charge shall be effective on a date not earlier than the date upon which complete copies of the final tariff page are filed with the Commission. It is, further,

ORDERED, That DEO shall notify its customers of the changes to the tariffs via bill message or bill insert within 30 days of the effective date of the revised tariffs. A copy of the customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability, and Service Analysis Division at least 10 days prior to its distribution to customers. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further, ORDERED, That a copy of this opinion and order be served upon each party and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

LDJ/KLS/vrm

Entered in the Journal
OCT 03 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust its Automated Meter Reading Cost Recovery Charge to Recover Costs Incurred in 2011.))))))	Case No. 11-5843-GA-RDR

ENTRY ON REHEARING

The Commission finds:

(1) The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) is a natural gas company as defined in Section 4905.03, Revised Code, and a public utility as defined by Section 4905.02, Revised Code. As such, DEO is subject to the jurisdiction of the Commission, pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

(2) In an opinion and order issued on October 15, 2008, in *In the Matter of the Application of East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, et al. (*DEO Distribution Rate Case*) the Commission approved a stipulation that allowed accumulated costs for the installation of automated meter reading (AMR) technology by DEO to be recovered through a separate charge (AMR cost recovery charge). The opinion and order contemplated periodic filings of applications and adjustments of the rate under the AMR cost recovery charge.

(3) On February 28, 2012, DEO filed the instant application supporting a rate adjustment for the AMR cost recovery charge to recover costs incurred during 2011.

(4) On March 5, 2012, the attorney examiner issued an entry granting the motions to intervene filed by the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE).

(5) By opinion and order issued on October 3, 2012, the Commission approved, with certain modifications, DEO's application to adjust the AMR cost recovery charge. Specifically, the Commission found that DEO was to have installed all AMR devices by the end of 2011, leading to the disallowance of recovery for 9,350 AMR devices in DEO's inventory that had not yet been installed. The Commission also concluded that DEO should have installed AMR devices in a manner that would have allowed all shops to be fully rerouted by the end of 2011, to achieve maximum consumer savings. Because DEO did not complete the AMR program, both installation and rerouting, by the end of 2011, and DEO's operation and maintenance (O&M) savings contained in its application did not reflect an effort by DEO to maximize savings by the end of 2011, the Commission adopted Staff's recommended calculation of O&M savings based on what DEO should have achieved. As adopted, Staff's calculations increased DEO's proposed O&M savings of $3,511,695, by $1,628,276, to $5,139,971. This recalculation reduced DEO's proposed monthly AMR cost recovery charge from $0.54 to $0.42.

(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 in the proceeding by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(7) On October 19, 2012, DEO filed an application for rehearing of the Commission's October 3, 2012, order citing four assignments of error. Specifically, DEO asserts the following assignments of error:

(a) The order is substantively unreasonable.

(b) Numerous findings and conclusions in the order lack record support.

(c) The order unlawfully alters the legal significance of DEO's past conduct and deprives DEO of due process.

(d) The order retroactively changes the requirements of past orders, which is barred by collateral estoppel.

(8) On October 29, 2012, OCC and OPAE (joint advocates) filed a joint memorandum contra DEO's application for rehearing.

(9) On October 11, 2012, DEO filed a motion for stay of the Commission's October 3, 2012, opinion and order, which we will consider herein subsequent to our consideration of DEO's application for rehearing. On October 16, 2012, OCC filed a memorandum contra DEO's motion to stay, which OPAE joined by letter filed October 17, 2012.

(10) On November 2, 2012, OCC filed an application for rehearing. OCC asserts that the Commission erred in rejecting its challenge to carrying costs accrued by DEO associated with the carryover of 100,000 AMR devices from one year to the next.

(11) On November 13, 2012, DEO filed an memorandum contra OCC's application for rehearing.

DEO's Application for Rehearing

(12) For ease of discussion, we will combine our consideration of DEO's first and second assignments of error. In its first assignment of error, DEO argues that our order in this case is substantively unreasonable. In its second assignment of error, DEO argues that the findings and conclusions in the order lack record support. DEO argues that, despite the Commission's finding that DEO should have completed the installation of AMR devices by the end of 2011, the Commission adopted a reduction premised on completion of AMR installation prior to the end of 2011. Specifically, DEO points out that the Commission adopted Staff's recommended reduction in O&M savings based on calculations assuming DEO had completed installation of the AMR devices in August 2011. Accordingly, DEO concludes that our order incorrectly required a reduction based upon the completion of installation by the end of 2011, but adopted Staff's recommendation which assumed installation

by the end of August 2011. Additionally, DEO asserts that the Commission erred in relying on Staff's O&M savings calculations based on the savings DEO should have achieved by the end of 2011, with full AMR deployment and rerouting of all shops. DEO argues that its witnesses provided that all possible savings had been achieved by the end of 2011. DEO summarily concludes that the Commission lacked any evidence supporting its decision. Moreover, DEO argues that the Commission's adoption of Staff's proposed reduction in O&M costs does not account for the potential increased costs of completing installation by early August 2011. DEO also opines that the Commission briefly defined rerouting as the conversion of walking meter reading routes to drive-by meter reading routes in a footnote in the background section of the order, which DEO argues is factually incorrect. Finally, DEO argues that the Commission's finding that the five-year period for AMR device installation commenced on January 1, 2007, is without record support.

(13) In their response, joint advocates assert that, just because DEO did not agree with Staff's testimony, it cannot choose to ignore Staff's testimony and argue a lack of record support. Joint advocates argue that the Commission properly relied on the testimony of Staff witness Kerry Adkins who testified that DEO failed to maximize cost savings by not completing installation of AMR devices and full rerouting by the end of 2011. Specifically, joint advocates point out that the failure to reroute the three remaining shops in 2011 meant DEO could not reduce the needed number of meter readers until 2012 to realize full customer savings. Joint advocates also note that the evidence points to a distinction between completion of installation by the end of 2011 and fulfilling the Commission's directive in *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Automated Meter Reading Cost Recovery Charge and Related Matters*, Case No. 09-1875-GA-RDR (*2009 AMR Case*), which required that DEO maximize consumer savings as soon as possible. In particular, joint advocates argue that the Commission language in the *2009 AMR Case* put DEO on notice that it was expected to deploy the AMR devices in a manner that would maximize savings by allowing rerouting

at the earliest possible time. Moreover, joint advocates point out that, instead of increasing the pace of AMR deployment after the issuance of the order in the *2009 AMR Case*, DEO slowed the pace of AMR device installation in 2010. Joint advocates point to the slowed pace as evidence that DEO did not take the Commission's directive seriously and argue that DEO should be held accountable for its non-action.

(14) In considering DEO's first and second assignments of error, the Commission is mindful that the record in the *DEO Distribution Rate Case*, supports Staff's position that the Commission approved the AMR program as a five-year program commencing January 1, 2007. Moreover, in the *2009 AMR Case*, the Commission reiterated its expectation that the program would terminate at the end of 2011. It is disingenuous for DEO to claim, at this late stage, that the AMR program did not commence on January 1, 2007, and end December 31, 2011. With respect to DEO's assertion that the Commission erred in concluding that installation and rerouting should have been completed in 2011, the Commission notes that DEO mischaracterizes our order, as well as prior orders of the Commission. In reaching our conclusion that DEO should have completed installation of AMR devices by the end of 2011, along with rerouting to maximize savings, we relied upon our language in the *DEO Distribution Rate Case* and also the *2009 AMR Case*. Specifically, in the *2009 AMR Case*, the Commission not only ordered DEO to demonstrate how it would achieve installation by the end of 2011, but the Commission also ordered DEO to deploy the devices in a manner that would maximize savings for ratepayers by allowing rerouting at the earliest possible time. As we pointed out in our order, DEO has represented to this Commission that a critical mass, in terms of AMR device installation, is necessary for a shop to be rerouted. DEO has represented that critical mass to be 95 percent of meters in a given shop. The Commission finds it curious that DEO has installed AMR devices on well over 99 percent of all meters, but did not manage to fully reroute its shops by the end of 2011, maximizing customer savings. With respect to the critical mass necessary to reroute, as the record reflects, Staff believed that DEO should have reached critical mass before the end of 2011, but failed to act to

maximize savings and to pass along the full savings from rerouting to customers. It appears that DEO openly disregarded the directive contained in the *2009 AMR Case*. Moreover, DEO appears to be attempting to project confusion upon the Commission regarding the distinction between completing the installation of AMR devices and rerouting the shops in DEO's territory to maximize consumer savings. In the present order, the Commission found that DEO not only did not complete the installation of AMR devices within the appropriate timeframe approved for the AMR program, but also failed to complete the program as a whole, a measure that includes full rerouting in a manner that would maximize customer savings. As a final matter, the Commission notes that, just because DEO did not find Staff's testimony more persuasive than the testimony of its own witnesses, does not mean the order is without record support. Specifically, Staff presented testimony asserting that, had DEO been mindful of the Commission's directive to maximize savings in the *2009 AMR Case*, additional consumer savings should have been realized, which would have resulted in all rerouting being completed by the end of the 2011. Accordingly, the Commission finds that DEO's first and second assignments of error raise nothing new for our consideration, are without merit, and should be denied.

(15) To simplify our consideration of DEO's arguments, its third assignment of error will be discussed both separately and in conjunction with its fourth assignment of error. In its third assignment of error, DEO argues that the order unlawfully alters the legal significance of DEO's past conduct and deprives DEO of due process. In support of its position, DEO argues that, in its October 3, 2012, opinion and order, the Commission erred in finding that DEO's failure to reroute over a quarter of its customers constitutes rerouting of nearly all of its communities by the end of 2011. Instead, DEO asserts that the *2009 AMR Case* only required that it be possible to reroute all of its customers by the end of 2011, which DEO argues is a standard it met. DEO also argues that the order penalized DEO for not achieving full staffing reductions earlier in 2011. DEO further asserts that the October 3, 2012, order retroactively adjusts the target dates

for the completion of AMR installation established in the *2009 AMR Case*. Accordingly, DEO concludes that the order imposed retroactive penalties and denied DEO due process.

(16) Joint advocates argue that, contrary to DEO's assertion, the Commission did nothing in this case that retroactively alters a prior Commission order or deprives DEO of due process. The Commission order in the *2009 AMR Case* specifically directed DEO to complete installation of AMR devices by the end of 2011 and maximize customer savings. Joint advocates conclude that, despite DEO's best attempts, it cannot deny that it was ordered to complete AMR installation at the earliest possible date and to do so in a manner that allowed for rerouting at the earliest possible time to maximize savings. In fact, joint advocates claim that, instead of responding to the *2009 AMR Case* by acting to speed up installation and maximize savings, DEO slowed down its deployment rate. According to joint advocates and Staff witness Adkins, "you definitely do not maximize savings by slowing installation." As a final matter, joint advocates opine that, if DEO had concerns regarding the Commission's directive to maximize savings in the *2009 AMR Case*, it should have filed for rehearing in that case to contest or clarify the Commission's orders.

(17) The Commission finds it disingenuous, given the language used in the *2009 AMR Case*, that DEO claims it is surprised by our finding that it was required to complete AMR installation by the end of 2011, or that our directive is somehow retroactive. When an application is filed with the Commission, our role is not simply to check DEO's calculations and approve the application. Rather, our role is to assure that DEO has administered its program prudently and in a manner that is consistent with our prior orders. The Commission put DEO on notice in our order in the *2009 AMR Case* that we expected installation to be complete by the end of 2011, and rerouting to occur in such a way that savings would be maximized. Rather than comply with our directive, DEO slowed down its installation rate throughout 2010 and 2011, and did not act to maximize savings. In light of DEO's failure to comply, the Commission had no option in this case but to adjust DEO's O&M savings accordingly.

Accordingly, DEO's third assignment of error is without merit and should be denied.

(18) As part of its third assignment of error, with respect to the five-year installation period, DEO argues that imposing a five-year installation period was impossible because the opinion and order in the *DEO Distribution Rate Case* was not issued until October 15, 2008. In its fourth assignment of error, DEO argues that the October 3, 2012, order retrospectively changed the requirements of past orders, which DEO believes is barred by collateral estoppel. DEO asserts that the Commission cannot now find that DEO's AMR program was a five-year program ending on December 31, 2011, because that position is barred by collateral estoppel. Additionally, DEO argues that the Commission erred by imputing artificial, surrogate savings, instead of relying on DEO's numbers. Finally, DEO argues that the Commission's order in this case revises the target dates and rerouting expectations established in the *2009 AMR Case*.

(19) In response, joint advocates opine that the Commission correctly adopted Staff's calculation of the savings that should have been achieved by the end of 2011. In adopting Staff's calculated level of O&M savings, joint advocates assert that the Commission properly found Staff's estimation to be quantifiable and based on facts. Joint advocates argue that the Commission properly found that DEO's proposed O&M savings were not reasonable and that DEO had not met its burden of proof with respect to the appropriate level of O&M savings.

(20) In considering DEO's final assignments of error, the Commission finds that based on our previous decisions and the evidence in this case, it is clear that the intent, since the beginning of the AMR program, was to complete installation within five years, with installation beginning in 2007. Considering the testimony of Staff witness Baker, DEO had anticipated making, and made substantial progress installing AMR devices in 2007 and 2008. There are numerous references in the record in the present case, as well as in the *DEO Distribution Rate Case*, demonstrating that DEO began accelerated installation of AMR devices in 2007,

in an effort to achieve compliance with the minimum gas service standards, which became effective January 1, 2007, and from which DEO was granted a five-year waiver. In considering DEO's argument against the adoption of Staff's O&M savings calculation, the Commission is again aware that its role in considering an application such as the one at bar should be more than just verifying DEO's math. Although DEO argues that the Commission relied on Staff's calculation of artificial, surrogate savings, instead of relying on DEO's numbers, the Commission found otherwise in its order. The Commission relied on Staff's calculated savings, based on facts, because it has no other reasonable option. DEO failed to meet its burden of proof that it complied with the *2009 AMR Case* by maximizing savings. Moreover, DEO raises nothing new in its application for rehearing with respect to our adoption of Staff's O&M savings calculation. Finally, as discussed in our disposition of DEO's third assignment of error, DEO was on notice, based on our directive in the *2009 AMR Case*, that it was expected to complete installation by the end of 2011 and maximize savings. The only party that seems surprised by this requirement is DEO. However, DEO was on notice of the Commission's expectations and cannot, now, claim that the Commission is somehow barred from enforcing those clearly communicated expectations. Accordingly, DEO's fourth assignment of error is without merit and should be denied.

<u>DEO's Motion for Stay</u>

(21) In its motion for stay, DEO argues that the Commission's decision is not supported by the record and that its execution will result in irreparable harm to DEO. In support of its motion for stay, DEO contends that it meets both the test used by the Ohio courts and the Commission when determining if a motion for stay should be granted. DEO states that, under Ohio law, courts are required to grant stays of disputed orders, so long as the party seeking the stay can provide adequate financial security. According to DEO, it can provide adequate security to protect itself and others by means of an escrow account or supersedeas bond; therefore, its motion for stay should be granted.

(22) With regard to the Commission's four-factor test for determining whether a stay is appropriate, while DEO criticizes this test stating that it is the incorrect standard, DEO claims that it, nevertheless, meets the standard. According to DEO, under the Commission's test the following criteria are considered:

(a) whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;

(b) whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;

(c) whether the stay would cause substantial harm to other parties; and

(d) where lies the public interest.[1]

DEO argues that the Commission's test is primarily used to determine whether a trial court should issue a preliminary injunction prior to considering the merits of a case. DEO asserts that it is the wrong test for deciding whether to grant a stay after a full-merits determination. DEO emphasizes that a stay is available to a would-be-appellant as a matter of right.

To highlight the inappropriateness of the Commission's criteria for a stay, DEO points to the first criterion: the losing party must convince the Commission, which has ruled against it on the merits, that its ruling is incorrect on the merits. Unlike a court, where a stay is available as a matter of right, so long as a party provides financial security, DEO concludes that the Commission's standard is so high that it is unlikely to be granted. In addition, DEO believes that it can prevail on the merits of the case because the Commission's order is unreasonable, illogical, and lacks any record support. With regard to the Commission's second criterion, DEO declares that Ohio law generally precludes

1 *Northeast Ohio Public Energy Council v. Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS (Entry issued July 8, 2009).

refunds. Consequently, in the absence of a stay, DEO claims that it would be without a complete legal remedy and would suffer irreparable harm. Taking into consideration the third criterion, DEO denies that a stay would harm any other party. To protect all interests, DEO is willing to provide financial security. Moreover, DEO offers to account for the difference between the current charge and its proposed charge, including recognition of carrying charges. To meet the Commission's fourth criterion, DEO contends that the stay is in the public interest. According to DEO, a stay will guarantee that customers pay and DEO collects no more and no less than a just and reasonable charge. If the order is reversed, DEO will collect what it is due. If the order is upheld, customers will recover the difference, with interest.

(23) On October 16, 2012, OCC filed a memorandum contra DEO's motion for stay, which OPAE joined by letter filed October 17, 2012. OCC is critical of the standard proposed by DEO for determining whether a stay is granted, because it would guarantee a stay in every case. OCC rejects the notion that a stay is an undeniable right that is contingent only upon a party providing adequate financial security. Such a standard, argues OCC, would run afoul of the equal protection clause, because customers would not be in a position to provide adequate security. Particularly troubling, according to OCC, is that a utility would use revenue drawn from customers to provide adequate security.

(24) OCC recognizes the Commission's four-part test for evaluating motions for stay. With regard to the first criterion on the Commission's test, OCC rejects DEO's contention that the Commission's decision was the result of inattention to the record and the post hearing briefs. Instead, OCC points to witness Adkins' testimony as the basis for its decision. In particular, OCC points to the failure of DEO to reroute the Western and Youngstown local offices by the end of 2011. To comply with the *2009 AMR Case,* OCC emphasizes that rerouting drives O&M savings, not installations. In its observation, OCC did not see any effort to revise its strategy to increase the pace of installations or rerouting. OCC concludes that the Commission had record

evidence upon which to base its decision. On the second criterion, OCC rejects DEO's assertions that the Commission intends to inflict irreparable harm on DEO, that the opinion and order is unreasonable and failing at the level of basic logic, and that the decision is arbitrary. In the absence of any evidence or citations to the record that the Commission intends to inflict harm, that the Commission failed to employ a "basic logic" standard, or that the Commission's decision is arbitrary, OCC concludes that DEO's claim must be denied. That the Commission relied upon Staff witness Adkins' testimony establishes that the Commission relied on the record and the weight of the evidence. For these reasons, OCC concludes that the motion for stay should be denied.

(25) Initially, the Commission agrees that DEO's criterion for a stay is self-serving and fails to take into consideration the potential harm to customers and the public interest if the Commission were to require customers to pay over one million dollars in unwarranted charges. Our established four-prong criteria is a well-balanced approach to reviewing motion's for stay and allows us to review the arguments from all perspectives, not just the one that best suits the movant. In considering DEO's request for a stay, the Commission finds that DEO's motion does not meet our four-prong standard for a stay. Specifically, and as supported by our responses herein to DEO's application for rehearing, DEO would not prevail on the merits, because it failed to carry its burden of proof in this case. DEO was on notice that it was expected to comply with our directive in the *2009 AMR Case*, and failed to act in a way that would maximize savings for consumers. Moreover, DEO has failed to substantiate that it will be irreparably harmed if it is required to comply with the Commission's conclusion in this case and implement the lower charge; in fact, the Commission is more concerned that the customers will be harmed if the stay is imposed and they are required to pay higher rates than those supported by the record in this case. Finally, it is the Commission's responsibility to closely scrutinize the record in these types of cases and ensure that the public interest is preserved and our decision herein appropriately protects the public interest by only allowing DEO to charge a rate that is supported by the record.

Therefore, the Commission finds that DEO should file its tariffs, as directed in the October 3, 2012, order. Accordingly, DEO's motion for stay should be denied.

<u>OCC's Application for Rehearing</u>

(26) In its application, OCC argues that the Commission erred in rejecting its assertion that the carrying costs associated with the carry-over of 100,000 AMR devices from one year to the next should be disallowed. OCC opines that the Commission erred in finding that its argument was unsupported by the record, because OCC failed to raise its concerns in comments or prefiled testimony. Instead, OCC argues there is no requirement that there be testimony from its own witness in the record to support its contentions. OCC argues that it adduced sufficient information in its cross-examination of DEO witness Friscic for the Commission to make a determination that the carrying costs should have been disallowed. Moreover, OCC argues that is not barred from relitigating this issue because it was previously litigated in *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Automated Meter Reading Cost Recovery Charge and Related Matters*, Case No. 09-38-GA-UNC (09-38). Specifically, OCC argues that carrying costs were not discussed or approved in 09-38.

(27) In its response, DEO explains that it has been permitted by the Commission to carry up to 100,000 AMR devices in inventory at the end of each year since 2009. DEO argues that this carry-forward arrangement was approved in 09-38, wherein the Commission approved a stipulation signed by DEO, Staff, and OCC. Further, DEO asserts that OCC failed to timely raise this issue, which it raised for the first time in a post-hearing brief. DEO avers that, if OCC intended to take issue with the carrying costs, it should have made the issue known in comments, or in prefiled testimony. In support of its argument, DEO opines that information allowing OCC to identify this issue has been available for years, yet OCC is just now raising this issue. As a final matter, DEO reiterates its belief that OCC's argument with respect to the carrying costs on the carried-forward AMR devices lacks merit. DEO explains that it carried forward devices to achieve a bulk

buying discount, and also to have inventory constantly available, which allowed the pace of AMR installations to remain stable throughout the year. Accordingly, DEO requests that OCC's application for rehearing be denied.

(28) In considering OCC's request for rehearing, the Commission does not believe that OCC properly raised this issue. OCC did not mention its concerns regarding DEO's carrying costs for the 100,000 carry-over AMR devices in its comments, nor did it do so in any prefiled testimony. Accordingly, other parties were unaware of this issue until DEO raised it in its initial brief. Although OCC chooses to focus on our statement in our order that it should have provided testimony regarding this issue, the Commission wishes to clarify that OCC failed to raise this issue in comments or in prefiled testimony, which would have put DEO on notice that OCC intended to pursue this matter at hearing. OCC had two opportunities to express its concerns with the carrying costs on the 100,000 AMR devices carried forward at the end of each year, but it failed to do so at either appropriate juncture. Moreover, inquiring of DEO's witness regarding the carrying costs did not provide notice to any of the parties that this issue would be litigated. It was only when OCC's initial brief was filed that DEO had an opportunity to respond and this was after testimony was concluded and the record closed. As OCC should be aware, briefs do not constitute record evidence in proceedings. The fact that OCC failed to present evidence on the record to support its claim and chose to raise it in its brief is clearly inappropriate. Accordingly, we reject OCC's argument that it properly raised this issue for the first time in its brief and find that OCC raises nothing new on rehearing. Therefore, OCC's application for rehearing should be denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by DEO and OCC be denied. It is, further,

ORDERED, That DEO's motion for stay of the Commission's implementation of October 3, 2012, opinion and order be denied. It is, further, ORDERED, That a copy of this entry on rehearing be served upon each party and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

KLS/LDJ/sc

Entered in the Journal

DEC 1 2 2012

Barcy F. McNeal

Barcy F. McNeal
Secretary

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 201
*** Annotations current through November 5, 2012 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE II. LEGISLATIVE

Go to the Ohio Code Archive Directory

Oh. Const. Art. II, ß 28 (2013)

ß 28. Retroactive laws

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

§ 1.48. Statute presumed prospective

A statute is presumed to be prospective in its operation unless expressly made retrospective.

§ 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.

§ 4903.13. Reversal of final order; notice of appeal

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust its Automated Meter Reading Cost Recovery Charge and Related Matters.	)))))	Case No. 11-5843-GA-RDR

APPLICATION FOR REHEARING OF
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

In accordance with R.C. 4903.10 and Rule 4901-1-35, Ohio Adm. Code, The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") hereby files its Application for Rehearing of the Opinion and Order issued in the above-captioned case on October 3, 2012 ("the Order") and if applicable, any entry or order denying DEO's Motion for Stay filed on October 11, 2012. The Order is unlawful and unreasonable for the following reasons:

— In violation of R.C. 4903.09, the Order contains no acknowledgement of most of the arguments and issues raised by DEO.

— The Order is substantively unreasonable.

— Numerous findings and conclusions in the Order lack record support.

— The Order unlawfully alters the legal significance of DEO's past conduct and deprives DEO of due process.

— The Order retroactively changes the requirements of past orders, which is barred by collateral estoppel.

— If the Commission denies DEO's Motion for Stay, it erred because DEO showed that it could secure all parties from any substantial harm.

— If the Commission denies DEO's Motion for Stay, it erred to the extent that it found that DEO did not satisfy the four-part test articulated in *In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co.*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009).

— If the Commission denies DEO's Motion for Stay, it erred to the extent that it failed to give DEO an opportunity to address any harm for which DEO had not already accounted.

For these reasons, as explained in detail in the attached Memorandum in Support, the Commission should grant this Application for Rehearing and approve the AMR Cost Recovery Charge proposed by DEO in its application in this case.

Dated: October 19, 2012

Respectfully submitted,

/s/ Mark A. Whitt
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Stakeholders before the Commission should be able to rely on the Commission's prior orders. Commission orders have the full compulsory power of law, *see, e.g.*, R.C. 4905.54, and once they have passed through rehearing and appeal are conclusively final. A person subject to a Commission order cannot treat it lightly. The other side of that coin is that stakeholders should be able to rely on prior orders. For utilities, these orders create settled expectations and requirements of what the company needs to do. They inform companies how to plan, where to invest, on what they should focus, and (no less critically) *when.*

So Commission orders must serve as firm foundations for each company's reliance and investment. Prior orders cannot be treated like rugs to be pulled out from under a company's feet. Unfortunately, in this case, the Commission has treated its prior orders in precisely this way.

Two years ago, the Commission told DEO to aim for complete installation of AMR devices "by the end of 2011." Case No. 09-1875-GA-RDR, Opin. & Order at 7 (May 5, 2010) ("the 09-1875 Order"). DEO relied on this order, structured its program accordingly, and by the end of 2011 had come within tenths of a percentage point of the goal. At no point between May 5, 2010, and October 3, 2012, did the Commission ever suggest that DEO had to complete its installations by early August of 2011.

Two years later, the Commission takes $1.6 million from DEO. Why? Because a Staff witness calculated that this is what DEO would have saved had it completed installation of AMR devices "by early August of 2011." (Adkins Dir. at 19; *see* Order at 18 ("Staff's proposed level of O&M savings is reasonable").) Of course, DEO never had any notice of an early August of

2011 deadline, so it could not have planned on meeting it. But because DEO did not meet this deadline, it suffers a seven-figure penalty.

The Order does not represent some disagreeable exercise of discretion; it represents flat disregard for fundamental legal norms. If the Commission follows this course through, consequences will follow. The Commission's indifference regarding the past instruction it gave DEO, its unwillingness to protect its own prior orders, and its almost-complete refusal to engage DEO's concerns—all these have already sent a shiver into this Company. If this Order portends Commission indifference towards basic due-process requirements going forward, it is hard to predict what the larger chilling effect might be.

II. MOST OF THE ISSUES RAISED BY DEO WERE SIMPLY NOT MENTIONED IN THE ORDER

If one compares the Order and DEO's post-hearing briefs, one will find that almost every argument raised by DEO goes *unmentioned* in the Order—not *rejected on grounds DEO does not agree with*, but *unmentioned.*

This, in itself, is a violation of law. Under R.C. 4903.09, the Commission must provide "a reasoned explanation" for its decisions, and it is required to "respond to contrary positions." *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, ¶ 30 & 71. Yet the Order provides no evidence that the Commission was even aware of most of DEO's arguments.

A. The Order ignored all but one of DEO's arguments opposing the $1.6 million reduction.

The Order contains a section that purports to discuss the arguments raised by DEO against the $1.6 million reduction. *See* Order at 16–17. Between its initial and reply briefs, DEO presented to the Commission roughly 27 pages of argument that provided numerous grounds favoring approval of its application and directly opposing the $1.6 million reduction. (*See* DEO Init. Br. at 10–22; DEO Reply Br. at 4–14; *id.* at 23–27.) Yet the Order acknowledges only one argument raised by DEO, namely, that the 09-1875 Order prohibited imputed or surrogate savings. *See* Order at 16–17. This argument covered about two-and-a-half pages of DEO's initial brief. (*See* DEO Init. Br. at 20–22.) Although this is an important issue, it was not DEO's lead argument.

So, with respect to the $1.6 million reduction, the Commission *did not even mention* the following arguments raised by DEO in the remaining 25 pages that addressed the issue:

- That DEO complied with all the timing requirements contained in the 09-1875 Order. (DEO Init. Br. at 10–17.)
- That Staff's recommendation contradicted and mischaracterized the text of the 09-1875 Order. (*Id.* at 17–20; DEO Reply Br. at 4–5.)
- That adopting Staff's recommendation would be impermissibly and unfairly retroactive. (DEO Reply Br. at 6–7.)
- That Staff's reading of the 09-1875 Order failed to give effect to all of its provisions and would make it impossible to obey. (*Id.* at 8–10.)
- That the reduction lacked necessary record support. (*Id.* at 11–13.)
- That the reduction failed to account for the increased costs of completing installations by early August of 2011. (*Id.* at 14.)
- That collateral estoppel barred the reduction. (*Id.* at 23–25.)
- That judicial estoppel barred Staff from taking its position. (*Id.* at 25–27.)

DEO supported all of these positions with detailed argument, including extensive citation and discussion of the pertinent evidence and legal authorities. No party suggested that DEO's arguments were so insubstantial or lacking in good faith that they could be summarily dismissed. And the arguments were not even summarily dismissed. They were not even *mentioned.*

B. The Order ignored DEO's primary argument with respect to the AMRs-in-inventory reduction.

The other reduction pertained to AMR devices held in inventory at the end of 2011. *See* Order at 13. And once again, the Order simply did not mention the primary argument that DEO had raised in both of its briefs.

DEO's lead argument against this reduction was that Staff had apparently abandoned it on the stand and had supported all the findings and rulings necessary to support cost recovery. Staff witness Fadley had recommended removing from the revenue requirement the cost of AMR devices held in inventory in 2011 but not yet installed. He premised his recommendation on the notion that DEO's authority to install AMR devices had ceased at the end of the year. But Mr. Fadley, in a welcome display of reasonableness and candor, testified that he supported DEO "continuing to install [AMR devices] into 2012." (Tr. 202.) And that being the case, he testified that he supported recovery of the value of these devices *in this case* if the Commission either ruled that DEO's "authorization to install AMR devices had continued through 2012," or stated "in its order *in this case* . . . that DEO does have authorization to continue [through] 2012." (Tr. 203 (emphasis added).) After this testimony, nothing of substance divided the parties, which should have settled the issue.

DEO explained all this in its briefs and asserted that there was no longer a dispute. (*See* DEO Init. Br. at 9–10; DEO Reply Br. at 27–28.) Staff, in its briefs, neither contradicted DEO's assertion nor continued to pursue the issue. Once again, however, the Order contains *no mention* of any of this. So it follows that the Commission offered no explanation of why the Commission did not simply authorize the continued installation of AMR devices in 2012 and allow recovery of the costs. DEO supported this outcome; so did Staff's witness; no one is arguing that DEO should not install the last 9,530 devices. So there was no good reason to have refused this permission and reduced DEO's cost recovery. Why the Commission refused is unknown. It failed even to mention the issue.

In short, DEO cannot readily understand the Order's repeated and notable silences in response to DEO's arguments. But it is an objective fact that the large majority of arguments that DEO raised, and certainly the primary ones, make no appearance in the Order. Having noted up front this serious procedural concern, DEO would continue and address the substantive merits of this case.

III. FACTUAL AND PROCEDURAL BACKGROUND

The decision made by the Commission in this case requires a look back to 2006, at the end of which DEO filed its original application for approval of an AMR cost recovery charge.

A. DEO's AMR Application

In 2006, the Commission adopted a number of minimum gas service standards; one of them required DEO to obtain an actual meter read once each year. *See* Ohio Adm. Code 4901:1-13-04(G)(1). This rule presented unique difficulties for DEO. It had over half a million customers with inside meters, and the Commission would not count readings from standard remote-read devices as "actual reads." The Company determined that the installation of AMR devices represented the most cost-effective way to comply with the new rule. (*See* DEO Ex. 1.0 ("Friscic Dir.") at 1–2.) Accordingly, on December 13, 2006, DEO filed its AMR application.

The AMR application did not request approval to install AMR devices. Staff agrees that the Company could have "installed AMR devices under whatever schedule it wanted to without seeking Commission approval." (Tr. 246.) As explained in the application, however, DEO's "normal capital budgeting process" would only "accommodate a fifteen- to twenty-year systemwide deployment." (06-1453 Appl. at 4.) The purpose of the application, therefore, was to seek approval of a cost recovery mechanism that would allow DEO to recover the costs of accelerated, systemwide deployment over a five-year period, "beginning in January 2008." (*Id.*) To this end, the application requested approval of two things: (*1*) "tariffs to recover, through an automatic adjustment mechanism, costs associated with the deployment of [AMR] equipment" and (*2*) "accounting authority . . . to permit the deferral of those costs." (*Id.* at 1; *see also id.* at 8.)

DEO also proposed crediting against the charge meter-reading savings resulting from the program. These would be calculated by "compar[ing DEO's] annual meter reading operating and maintenance . . . expense to a 2006 base year." (*Id.* at 6.) The evident purpose of the base year was to establish what meter-reading costs were being incurred prior to accelerated deployment so that any savings generated during the deployment process could be quantified and credited to customers in subsequent AMR Charge proceedings.

January 1, 2007 dawned about two weeks after DEO filed its application.

B. Case 06-1453-GA-UNC

The original AMR docket reveals no Commission action for almost a year and a half after the application was filed. In September 2007, DEO filed a motion to consolidate the AMR application with its then-pending rate case, and another seven months passed before this motion was granted in April 2008. In May 2008, Staff issued its report recommending that the Commission approve the AMR application, with a few modifications. Staff agreed that savings should be calculated "by comparing future annual meter-reading Operation and Maintenance (O&M) expense against a 2006 baseline year," but recommended that "2007 . . . is a more appropriate baseline." (06-1453 Staff Report at 43 (May 23, 2008).) Staff recommended 2007 as the baseline year because DEO had "not yet begun to realize the savings resulting from the AMR installations, and its total Meter Reading O&M expense was higher in 2007 than it was in 2006." (*Id.*)

The AMR application was litigated through the end of the hearing in the summer of 2008, but the parties ultimately reached a stipulation recommending approval in accordance with the Staff Report. The Commission approved the stipulation on October 15, 2008. *See* 06-1453 Order at 10. In approving the AMR application, the Commission required DEO to "work with staff and OCC to develop an appropriate baseline from which meter reading . . . savings will be determined and such quantifiable savings shall be credited" to the AMR charge. *Id.*

The Commission's approval of rider recovery was one year and ten months after the date DEO filed the application and ten-and-a-half months after DEO had originally intended to accelerate deployment. (*See* 06-1453 Appl. at 4.) Nevertheless, while the rate case was being litigated, DEO had begun to install AMR devices. In 2007, as it had said it would in its application, DEO began replacing certain defective remote-read devices with AMR devices, but these replacements were *not* to be included in the proposed charge. (*Id.* at 4–5.) DEO performed other conversions that year, too, but did so without any assurance of rider recovery. But the total number of AMR devices installed in 2007 (about 132,000) was much less than the 250,000 installations that DEO had estimated for an accelerated year. (*See id.* at 4 *and* Staff Comments at 5.) And in 2008, despite lacking any assurance of rider recovery for most of the year, DEO commenced accelerated installation of AMR devices, installing 278,582 units that year. (Staff Comments at 5.) DEO exceeded 250,000 installations in 2009 and 2010 as well. (*Id.*) It fell slightly below 250,000 units in 2011, but only because nearly all of the devices had been installed by the end of that year.

C. Case No. 09-1875-GA-RDR

In Case No. 09-1875-GA-RDR, the Commission issued an order that shapes much of the present proceeding. As pertinent here, the 09-1875 Order did two things.

First, the 09-1875 Order reaffirmed the cost-savings methodology proposed in the 06-1453 application, recommended in the staff report, agreed to in the stipulation, and ordered by the Commission in approving the stipulation. The 09-1875 Order confirmed that DEO was to compare its actual meter-reading expense to the baseline expense in 2007, and "*such* quantifiable savings" would then reduce the AMR charge. 06-1453 Order at 10; *see* 09-1875 Order at 7.

The cost-savings issue arose in Case 09-1875 because OCC proposed a different method of quantifying savings: in its view, "because the AMR program has been deployed to approximately 58 percent of the meters in DEO's territory, savings should be imputed to equal 58 percent of the savings DEO projected would result from the AMR program." 09-1875 Order at 5 (describing OCC position). The Commission rejected OCC's argument *and* reaffirmed that the simple, baseline-to-actual comparison approved in the original order would establish cost savings to be credited to the AMR Charge:

> [T]he Commission finds that OCC's argument that the meter reading and call center savings reported by DEO be replaced by imputed or surrogate savings based on the percentage of the total AMR installations completed lacks merit. The stipulation in the DEO Distribution Rate Case clearly states that AMR installation costs would be offset only by quantifiable savings. OCC's proposal in favor of imputed savings does not comport with either the stipulation approved in the rate case or [another earlier AMR cost recovery stipulation].

Id. at 7. The order rejected OCC's "surrogate" savings calculation because the approach of "imputed savings" did "not comport with [the applicable] stipulation[s]." *Id.*

The second thing the 09-1875 Order did was explain the Commission's expectations for the next two years of the program. In a paragraph that essentially forms the law of this case, the Commission provided a general instruction fleshed out by three specific instructions:

> While the evidence in this case supports DEO's calculation, [*1*] the Commission finds that DEO should be installing the AMR devices such that savings will be maximized and rerouting will be made possible in all of the communities at the earliest possible time. [*2*] Therefore, the Commission expects that DEO's filing in 2011, for recovery of 2010 costs, will reflect a substantially greater number of

communities rerouted. [3] The Commission anticipates that, by the end of 2011, it will be possible to reroute nearly all of DEO's communities. [4] To that end, the Commission finds that, in its 2011 filing, DEO should demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will maximize savings by allowing rerouting at the earliest possible time.

Id. The first and third specific requirements expressly applied to "DEO's filing in 2011, for recovery of 2010 costs"—meaning *last* year's filing in Case No. 10-2853-GA-RDR. *Id.* The other requirement applies this year: the order required that "by the end of 2011" it would "be possible to reroute nearly all of DEO's communities." *Id.*

D. Case No. 10-2853-GA-RDR

As noted, two requirements from the 09-1875 Order applied to the next year's case, which was eventually docketed as Case No. 10-2853-GA-RDR. First, DEO's filing in that case was to "reflect a substantially greater number of communities rerouted." 09-1875 Order at 7. The Commission did not find that DEO failed in this. In fact, DEO had achieved a ten-fold increase in rerouting: it "had rerouted 310,721 accounts or 671 routes by the end of 2010, as compared to 25,284 accounts or 63 routes by the end of the previous year." (DEO Ex. 2.0 ("Fanelly Dir.") at 2–3.)

The other requirement was forward-looking: DEO was to "demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will maximize savings by allowing rerouting at the earliest possible time." 09-1875 Order at 7. DEO provided this demonstration with its 2011 AMR Plan, attached as Exhibit B to its application in Case 10-2853. Staff reviewed that plan and noted the specific "demonstration" requirement of the previous year's order, but it did not allege that DEO had failed to make the required demonstration. (*See* 10-2853 Staff Comments at 6–10.) Staff did not have "any specific statements that the plan was deficient in the . . .

comments that were filed [in Case 10-2853]." (Tr. 266–67.) The Commission did not find that DEO had failed to "demonstrate how" it planned to complete installation and achieve rerouting. *See* 10-2853 Order (April 27, 2011). In fact, DEO, Staff, OCC and OPAE agreed to the savings calculation presented in Case 10-2853 and signed a stipulation to that effect, which the Commission later approved.

E. Current Proceeding

That leads to the current proceeding. DEO filed its application in this case on February 28, 2012. The application showed that DEO has installed AMR devices on over 99 percent of its active meters and realized approximately $3.5 million in meter-reading cost savings compared to the 2007 baseline year. Only Staff filed comments regarding the application. It raised three, none of which were resolved, and a one-day hearing on the application and comments was held on May 2, 2012.

Five months later, the Commission issued its Order. It confirmed that DEO's target date for completing installations was December 31, 2011. Order at 17–18. It adopted Staff's recommendation to reduce DEO's charge by $1.6 million, *id.*, which represented "three months of full meter reading savings for the last three months of 2011." (*See* Staff Br. at 15.) And although Staff appeared to have ceased pursuing it, the Commission ordered a further reduction premised on the conclusion that the "definitive" five-year term of the AMR program commenced on January 1, 2007, which was two weeks after DEO filed its application and almost two years before the Commission approved it. *See* Order at 13.

IV. ARGUMENT

The Order is unreasonable and unlawful for the reasons that follow.

A. The Order is substantively unreasonable.

Commission orders must be reasonable, and unreasonable orders are to be reversed. *See* R.C. 4903.13; *see In re Columbus S. Power Co.*, 129 Ohio St. 3d 271, 2011-Ohio-2638, ¶ 15 (recognizing that an unreasonable order is one that "fails to accord with reason"). The $1.6 million reduction ordered by the Commission does not meet this basic standard, because the Commission's reasoning simply does not make sense.

The Order clearly states that the Commission expected DEO to have completed its program by "the end of 2011." In the paragraphs justifying the $1.6 million reduction in DEO's charge, the Commission states no less than nine times that DEO was to have completed its program by that time. Order at 17–18. Thus, the Commission described its task as determining "the appropriate level of O&M savings that should have been achieved *by the end of 2011*." Order at 18 (emphasis added).

Despite describing its task in this way, the Commission adopted a reduction premised on completion by an *earlier* target date. Staff's recommended reduction of $1.6 million was based on the assumption that DEO should have "completed installation of AMRs on all active meters in its system in early August of 2011" and achieved full program savings that "October." (Adkins Dir. at 19; Staff Ex. 9(a) ("Errata" to Adkins Dir.) at 1.) It should go without saying that "the end of 2011" does not fall in "early August of 2011" or "October." The Commission apparently failed to grasp that Mr. Adkins *was not even trying* to estimate what the Order found: "the appropriate level of O&M savings that should have been achieved by the end of 2011." Order at 18.

So there is a fundamental mismatch at the heart of the order. The Commission *expressly* held that DEO had until "the end of 2011" to complete the program, but then adopted a reduction *expressly* designed to estimate what DEO would have saved had it met an "early August of

2011" completion date. (Adkins Dir. at 19.) Lest there be any doubt, Staff—in its own words—characterizes the $1.6 million reduction as "three months of full meter reading savings for the last three months of 2011." (Staff Br. at 15.) But the target date was not somewhere in the middle of 2011; as the Order states nine times, it was "the end of 2011." *See* Order at 17–18.

The Order simply does not make sense.

B. Numerous findings and conclusions in the Order lack record support.

Not only is the Order unreasonable, but a number of its findings also lack record support. The Revised Code instructs the Supreme Court to reverse a Commission order "if, *upon consideration of the record*, such court is of the opinion that such order was unlawful or unreasonable." R.C. 4903.13 (emphasis added). Accordingly, "factual support for commission determinations must exist in the record." *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 90 (1999). Indeed, the Commission "abuses its discretion when it renders an opinion on an issue without record support." *Id.*; *see also Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 26–33 (1995) (reversing Commission order in part because no record evidence supported its conclusions); *Conrail v. Pub. Util. Comm.*, 47 Ohio St. 3d 81, 84–85 (1989) (reversing Commission order where conclusions were based on speculation and "unsupported by the record"). Likewise, where "the manifest weight of the evidence contradicts the commission's conclusion," its order will be reversed. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, ¶ 29.

Together, all this means that the Commission cannot reduce a charge without a clear evidentiary basis. Despite these clear legal requirements, numerous findings of the Commission either lack any record support or are against the manifest weight of the evidence.

1. The undisputed record evidence precluded *any* reduction premised on excess meter-reading salaries in 2011.

The Commission reduced DEO's annual recovery by $1.6 million, finding that this was "the appropriate level of O&M savings that should have been achieved *by the end of 2011*." Order at 18 (emphasis added). In support of this finding, the Commission solely relied on Staff's O&M savings calculation, which (the Order said) was based on "the reduction in the number of meter readers *once the program is fully deployed, which was to be by the end of 2011*." *Id.* (emphasis added).

The Commission's characterization of this evidence—the only evidence it relies upon—is incorrect. Staff did not even attempt to estimate the O&M savings "that should have been achieved by the end of 2011." *Id.* And its calculation did not assume full deployment "by the end of 2011." *Id.* On the contrary, Staff's calculation was *expressly* premised on an "early August of 2011" completion date. (Adkins Dir. at 19.) This is not a debatable point.

So the relied-upon evidence does not support the Commission's finding. More than that, the undisputed record evidence refutes it. DEO witness Carrie Fanelly explained that by the end of 2011, DEO had achieved *all* possible savings associated with staffing reductions. (Fanelly Dir. at 8–9.) Staff concedes that salaries avoided by staffing reductions are *the* driver of meter-reading cost savings (Adkins Dir. at 5), but "[b]y the first day of 2012, DEO had . . . *made full staffing reductions*." (Fanelly Dir. at 8 (emphasis added).) No one can dispute these facts. No evidence in the record contradicts Ms. Fanelly's testimony on this point, which is confirmed by Mr. Adkins' adjustment of the target date. Thus, the undisputed evidence shows that, heading into 2012, whatever savings could be achieved through staffing reductions *had been achieved.*

The Commission lacked any evidentiary basis for reducing DEO's cost recovery based on excess meter-reading salaries associated with the completion of the program by the end of 2011.

2. **The $1.6 million recommendation does not account for the increased costs of completing installation by early August of 2011.**

Any reduction based on excess meter-reading salaries would have been improper. But even if one had been proper, DEO showed that the reduction was improperly calculated. Staff's witness made *no attempt* to account for how much more it would have cost for DEO to install all of its AMR devices by early August of 2011. To fairly impute accelerated O&M cost savings (assuming there were no other legal problems), one would also need to accurately reconstruct the cost of meeting the accelerated target. No one can reasonably dispute that it would have cost more to install devices at a faster pace. Staff witness Adkins agreed that "it would cost more to install 330,000 devices than it would to install 250,000 devices." (Tr. 275.) And Ms. Fanelly testified that increasing the pace of installation "would have increased the expense . . . due to overtime, additional truck rolls, all of those types of activities." (Tr. 185.) But Staff's witness "did not consider the expense required to generate [the three months of O&M] savings." (Tr. 277.) Thus, the reduction penalizes DEO with additional imputed savings but does not give DEO credit for additional imputed costs.

This evidence shows that the $1.6 million reduction (even had it been appropriate) is necessarily overstated and lacked evidentiary support.

3. **The Commission's characterization of rerouting is incorrect and lacks record support.**

Another serious error appears early in the "background" section of the Order. In a footnote on page two, the Order states, "Rerouting is the conversion of walking meter reading routes to drive-by meter reading routes." It is not clear to what extent the Order depended on this error; it might explain why the Commission counterfactually found that DEO had not achieved full staffing reductions by the first of 2012. But the finding is certainly incorrect.

The record makes clear that rerouting is not the same thing as "the conversion of walking meter reading routes to drive-by meter reading routes." *Id.* Rerouting is one of the last steps in the conversion to AMR and is essentially a final fine-tuning of the meter-reading routes. (*See* Fanelly Dir. at 5–6; Tr. 74 ("rerouting is done after the meters are read electronically"); Tr. 155–58 (describing multiple steps antecedent to and necessary to complete rerouting).) One of the steps that occurs *before* rerouting is the conversion to drive-by routes. They are not the same things.

The following exchange on cross-examination clearly shows that rerouting and the conversion to driving routes are not the same thing, as the un-rerouted shops were receiving drive-by meter reads:

> Q. So that means that the 320,000 meters in Western and Youngstown [which had not been rerouted, *see* Tr. 72] could not be read automatically at the end of December 31st, 2011?
>
> A. That's incorrect. We're saying that those shops were not rerouted as of the end of 2011, but all accounts which had an AMR device installed were, in fact, being read using the AMR device on a monthly basis as of the end of the year.
>
> Q. So for Youngstown and Western, a meter reader could sit in the car, drive up and down the street and get the meter reads, correct?
>
> A. That's my understanding, yes.
>
> Q. There was no manual meter reading going on in Youngstown or Western after December 31, 2011?
>
> A. That's my understanding.

(Tr. 73 (emphases added).) The following testimony clearly makes the same point:

> Now, as of December 31, 2011, there were two shops for which that rerouting had not taken place yet, hadn't been initiated, but those shops were being read with the AMR devices and Dominion East Ohio eliminated the walking routes, the meter readers going house to house. So even though we hadn't done the rerouting, we,

in essence, have done what we needed to do to get that full level of savings then in 2012.

(Tr. 99 (emphases added).) These are clear examples, and they are not the only ones. (*See also, e.g.*, Friscic Dir. at 11 (by the end of 2011, "DEO has eliminated walking routes" and "only two local shops remained to be fully rerouted"); Tr. 108 ("once they're installed, then there's additional steps that need to be taken; one being the move to monthly meter reading, and the other being rerouting").)

Thus, contrary to the Order, this evidence shows that rerouting and the conversion from walking to driving routes are not the same thing. No evidence contradicts the foregoing. The Commission cited pages 98 and 155 to 156 of the transcript in support of its finding. But neither section defines rerouting or states that rerouting is the conversion of walking routes to driving routes.

More to the point, no evidence showed that rerouting is a major driver of meter-reading O&M savings; as all parties agree, the major driver of meter-reading O&M is salaries avoided by staffing reductions. (*See* Adkins Dir. at 5.) Yet no party has presented evidence showing that any non-rerouted communities prevented DEO from achieving any staffing reductions. Nor has any party presented evidencing tying any O&M savings reduction to any failure to reroute.

In sum, the Commission's characterization of rerouting is without record support.

4. The Commission's finding that DEO was subject to "a definitive five-year period beginning on January 1, 2007" in which to install AMR devices is against the manifest weight of the evidence.

The Commission also held that "DEO's AMR program was approved for a five-year period ending December 31, 2011" and that DEO had "a definitive five-year period beginning on January 1, 2007" in which to install AMR devices. Order at 13.

There is not a single document in the record that sets forth this start date. And the manifest weight of the evidence shows that the AMR program *cannot* have begun at that time:

- DEO filed its original AMR application on December 13, 2006. (06-1453 Appl. at 1.)
- That application proposed a five-year accelerated deployment "beginning in January *2008*." (*Id.* (emphasis added).)
- The application was not approved until October 15, 2008. 06-1453 Order at 10.

These documents, and their dates, show that it is not possible that DEO's program began on January 1, 2007. The program was not proposed to begin at that time, and it had not been approved at that time.

None of the three documents cited by the Commission in its Order set forth or establish a "a definitive five-year period beginning on January 1, 2007." Order at 13. Perhaps these documents could *coexist* with a January 1, 2007 start date—but that is a far cry from *establishing* such a date. And the documents where an authoritative 2007 start date could have been established either proposed a later date (the 06-1453 Application) or approved that application without modifying the proposed start date (the 06-1453 Order).

The Commission's finding is against the manifest weight of the evidence and is another reversible error.

C. The Order unlawfully alters the legal significance of DEO's past conduct and deprives DEO of due process.

The Order also poses several retroactivity and fairness problems. The Ohio Supreme Court has made clear that the Commission lacks authority to "alter[] the legal significance of [a party's] past conduct." *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 51. "The prohibition against retroactive laws is a bar against the state's imposing new duties and obligations upon a person's past conduct and transactions, and it is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby." *E. Ohio Gas Co. v. Limbach*, 26 Ohio St.3d 63, 65 (1986) (internal quotations omitted). This prohibition applies to the Commission, which derives all of its power from the legislature. *Discount Cellular*, 112 Ohio St.3d 360, ¶ 43, 51; *see also, e.g.*, *Heckler v. Community Health Serv.*, 467 U.S. 51, 61 n.12 (1984) ("an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests").

Moreover, the Commission may not deprive "any person of . . . property without due process of law." U.S. CONST., amend. XIV; see *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 544 (holding that the Ohio due-process clause is "considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment). Due process demands basic fairness. *State ex rel. Ormet Corp. v. Indus. Comm.* (1990), 54 Ohio St. 3d 102, 104; *City of Cincinnati v. Cincinnati Gas & Elec. Co.*, Case No. 91-377-EL-CSS, 1991 Ohio PUC LEXIS 798, Finding & Order at *9–10 (June 27, 1991) ("the Commission . . . 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 process"). And due process prohibits the government from changing standards and retroactively applying them to the harm of persons who had relied upon them. *See, e.g.*, *State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478, ¶ 14 ("judicial enlargement of a criminal statute, applied retroactively, violated the Due Process Clause because it was unforeseeable"); *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, ¶ 37 ("a change . . . akin to a statutory penalty . . . . affects a substantive right, and its retroactive application would violate due process").

All this means that the Commission cannot retroactively increase the requirements of past orders when a person has reasonably relied on those requirements and has lost any chance of complying with the newly heightened requirements. And the Commission certainly cannot do this in order to impose a financial penalty on that party. Notwithstanding these prohibitions, the Order expressly or implicitly alters the standards that DEO relied upon and then penalizes DEO for failing to satisfy the retroactively modified standard.

1. The Order either mischaracterizes or retroactively changes the 09-1875 Order's rerouting requirement.

The most blatant example of changing a past requirement after the fact has to do with rerouting. The Order contains the following sentence: "The Commission does not believe that DEO's failure to reroute over a quarter of its customers constitutes rerouting of nearly all of its communities by the end of 2011, as we mandated in the *2009 AMR Case*." Order at 18. Thus, according to the Commission, the earlier order "mandated" that DEO "rerout[e] nearly all of its communities by the end of 2011." *Id.*

That is *not* what the 09-1875 Order said. At page seven of that order, the Commission stated, "by the end of 2011, *it will be possible* to reroute nearly all of DEO's communities." (Emphasis added.) The present Order plainly omits and ignores the italicized words. But those words necessarily imply that DEO could permissibly have been unprepared to reroute at least one community at the beginning of 2012.

DEO satisfied the standard actually set forth in the 09-1875 Order. At the beginning of 2012, the undisputed record evidence shows that it was *possible* to reroute *all* of DEO's communities. "DEO had initiated or completed the rerouting of . . . all of the communities in its service area except for those serviced by the Western and Youngstown shops." (Fanelly Dir. at

5.) And by the end of 2011, it was possible to reroute *all* of DEO's communities, not "nearly all" of them. (*Id.*)

The Commission can only fault DEO's performance by changing the standard.

2. The Order depends on a recommendation that retroactively adjusted the target dates established in the 09-1875 Order.

This is not the only retroactivity problem. As discussed above, the Commission effectively penalized DEO for failing to achieve full staffing reductions by October 2011. (*See* Adkins Dir. at 5; Staff Init. Br. at 15.) The Order does not address the definite mismatch between its finding (what DEO should have done by the end of 2011) and the basis of Staff's recommendation (what DEO should have done by early August of 2011). But if the Commission adopted (or adopts) Staff's reasoning as given, it will have violated the rules against imposing retroactive penalties and it will have denied DEO due process.

Even now, in October 2012, the early August of 2011 and October 2011 deadlines relied upon by Staff (*see* Adkins Dir. at 19) still have not been adopted by the Commission. DEO cannot be fairly penalized for failing to comply with a deadline that was not announced until over a year after it had passed. The fact that the Commission expressly told DEO to aim for a *later* target in the 09-1875 Order would only make the unfairness worse.

Again, the Commission can only penalize DEO if it first changes the standard.

3. The Order retroactively created a new legal obligation arising on January 1, 2007 and imposed detrimental legal consequences based on it.

The Commission also informed DEO, for the first time in October 2012, that it had a "definitive five-year period beginning on January 1, 2007" in which to install AMR devices. Order at 13. DEO would ask the Commission to consider this matter further.

a. The dates proposed and adopted in the 06-1453 application and order make a January 1, 2007 start date impossible.

DEO filed its original AMR application on December 13, 2006. (06-1453 Appl. at 1.) That application proposed a five-year accelerated deployment "beginning in January *2008*." (*Id.* (emphasis added).) The application was not approved until October 15, 2008. 06-1453 Order at 10. But the Commission is now saying that only two weeks after filing, on January 1, 2007, a legal obligation came into existence that required DEO to immediately begin accelerating AMR installations or risk disallowance five years later.

How was DEO to know on New Years Day 2007 that "a definitive five-year period" had commenced? DEO had not proposed this start date. The Commission did not tell DEO about it. Indeed, the Commission did not rule on DEO's application for over twenty months. So the entire year of 2007 came and went without DEO having any opportunity to make use of it as one of the approved, accelerated program years. But the Commission now penalizes DEO based on this date.

b. None of the evidence relied upon by the Commission sets forth a January 1, 2007 start date—and none of it existed on January 1, 2007.

None of the support adduced by the Commission provides any answer to this problem. Notably, the Order makes no attempt to reconcile its holding with the evidence discussed above, namely, (*1*) the filing date of DEO's AMR application, (*2*) that application's proposed January 2008 start date, or (*3*) the 06-1453 Order which issued in October 2008. These are not even mentioned in the Commission's analysis. DEO's arguments are simply labeled "not persuasive" and rejected without discussion.

None of the items cited by the Commission set forth a January 1, 2007 start date. More problematically, *none of them existed on January 1, 2007*. The primary bit of evidence relied on by the Order (namely, the Staff Report) was not issued until May 2008. And anyone can read it and see that it does not recommend holding DEO to a January 1, 2007 start date. But even had it done so, it provided DEO with no notice of the start date *before* January 1, 2007.

The 09-1875 Order was also issued well after 2007. DEO can agree that the 09-1875 Order established an "end of 2011" target date for installations, but that Order did not state that DEO's AMR approval would simply *end* at that time, such that further extension of the program would be necessary. Given that the Commission had already approved DEO's AMR application *without* modifying its proposed end date (that is, December 2012), a clear statement to this effect would have been necessary.

Finally, the Commission points to the end date of one of DEO's privately entered employment agreements. Order at 13. DEO is simply at a loss to see how an agreed term for one of its labor agreements had any effect whatsoever on DEO's legal authorization with respect to the AMR program. And again, the Commission did not show that this document had established a start date that was in effect *before* January 1, 2007.

Yet again, the Commission cannot penalize DEO without changing the standard.

D. The Order retroactively changes the requirements of past orders, which is barred by collateral estoppel.

The retroactive changes discussed above also violate the doctrine of collateral estoppel. "Res judicata, whether claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings." *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 29; *Ohio Consumers Counsel v. Pub. Util. Comm.*, 114 Ohio St 3d 340, 342 (2007) ("[t]he doctrine of collateral estoppel operates to 'preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction'"), *quoting Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9, 10 (1985). The doctrine protects winning litigants against those who would "impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution." *Astoria Fed. Savings & Loan Assn. v. Solimino*, 501 U.S. 104, 107–08 (1991).

The Order runs into numerous collateral estoppel problems.

1. Collateral estoppel bars adoption of "a definitive five-year period beginning on January 1, 2007" applicable to the AMR program.

First, the Commission ruled that "DEO's AMR program was approved for a five-year period ending December 31, 2011," meaning that "a definitive five-year period [began] on January 1, 2007." Order at 13. This holding is barred by collateral estoppel.

The January 2008 start date was approved by the Commission in the 06-1453 Order. In the original AMR application, DEO proposed an accelerated installation of AMR devices "[u]nder a five-year schedule . . . beginning in 2008." (06-1453 Appl. at 4.) The Staff Report recommended approving the application, and while it made several modifications, it did not modify the proposed start date. (*See* 06-1453 Staff Report at 41–43.) The 06-1453 Order adopted "staff's recommendations with regard to the AMR application." 06-1453 Order at 10. Thus, the 06-1453 Order approved a January 2008 start date.

Nevertheless, four years after approving a January 2008 start date, the Commission revisited this issue and held that DEO's "definitive" start date was January 1, 2007. Order at 13. This is barred by collateral estoppel.

2. The imputation of artificial, surrogate savings is barred by the 09-1875 Order.

Likewise, the savings reduction adopted by the Commission is also barred by collateral estoppel. In the 09-1875 Order, the Commission specifically ruled that "imputed or surrogate savings" do not comport with the stipulations governing this case. 09-1875 Order at 7. Nevertheless, the Commission reduced DEO's AMR charge based on an imputation of savings that DEO would have achieved had it completed the program about five months before the end of 2011. The record confirms that Staff's "calculation . . . is assuming a 100 percent completion four months before the end of the year, doing some math and adding that on to 2011 savings." (Tr. 284.) That approach has already been ruled out as violating prior AMR case stipulations.

3. The reduction ordered by the Commission is barred because it effectively revises the target dates established in the 09-1875 Order.

The 09-1875 Order also established certain milestones concerning the progress DEO would attempt to achieve in 2011. As DEO has already shown, the Order adopted Staff's reduction, which openly moved those targets (from "end of 2011" to "early August of 2011") in order to penalize DEO. But those deadlines were conclusively set in the 09-1875 Order. The "question [of target dates] was directly at issue in the prior proceeding," it "was passed upon by the commission," and no party challenged the target dates through rehearing or appeal. *See Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9, 10 (1985). Those dates cannot be revised now that they have past.

4. The present Order revises the rerouting expectations established in the 09-1875 Order.

The 09-1875 Order also established the Commission expectation that, "by the end of 2011, it will be possible to reroute nearly all of DEO's communities." *Id.* at 7. No party challenged this expectation on rehearing or appeal.

Nevertheless, in late 2012, the Commission revised this requirement. The Order holds DEO to the standard of "rerouting . . . nearly all of its communities by the end of 2011." Order at 18. But by omitting the phrase "it will be possible to reroute," the Commission changed the standard. The Commission did not require DEO to reroute nearly all of its communities by the end of 2011; it held only that it should "be possible" to do so by then.

All of these requirements were conclusively established in past orders, and all of them were revisited and substantially revised by the Commission in the present Order. This is yet another ground on which the Order should be reversed.

V. ARGUMENTS PERTAINING TO MOTION FOR STAY

DEO also filed a motion for stay of the Order on October 11, 2012. The Commission has not ruled on that motion as of the date of this filing. If the Commission grants the motion, the remaining arguments need not be considered. But to allow the Commission to resolve all issues in a single entry on rehearing, DEO will readdress its stay arguments to the Commission.

A. If the Commission denies DEO's Motion for Stay, it will have erred because DEO showed that it could secure all parties from any substantial harm.

Denial of a stay would be inappropriate where the party seeking a stay can protect all parties from any substantial harm. DEO can protect all parties.

Under Ohio law, courts are required to grant stays of disputed orders, so long as the party seeking the stay can provide adequate financial security. "Pursuant to [Civ.R. 62], defendants-appellants are entitled to a stay of the judgment *as a matter of right*. The lone requirement of Civ.R. 62(B) is the giving of an adequate supersedeas bond." *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 571 (2000) (brackets sic; emphasis added); *see also, e.g.*, *State ex rel. Geauga Cty. Bd. of Comm'rs v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, ¶ 17 (same). The public utilities statutes are entirely consistent with this rule and support its application. R.C. 4903.16 permits a stay by the Ohio Supreme Court with the single requirement that "the appellant shall execute an [adequate] undertaking."

This makes abundant sense. Decision-makers sometimes get cases wrong. So long as the aggrieved party can secure the other parties from any harm, no worthy interest is served by forcing the aggrieved party to suffer irreparable damage while the case winds its way through further proceedings.

DEO can protect all other parties from harm. With the Commission's approval, DEO will (*1*) maintain an account tracking the difference between DEO's current charge ($0.57) and the charge the Commission ordered ($0.42) from the date that the rate would have become effective based on the Order, (*2*) apply carrying charges to the accrued amount at DEO's cost of short-term debt, and (*3*) refund this amount to customers in the event the Order is ultimately upheld. If the Commission denies the motion for stay, DEO will do the same. And should DEO prevail in approval of its proposed $0.54 rate, the difference between the currently effective rate and the approved rate will similarly be refunded to customers. Although DEO's financial wherewithal makes it unnecessary, DEO is willing and able to provide reasonable financial security in a form ordered by the Commission, including payment of the accrued amount into escrow or provision of a supersedeas bond. And if these provisions have failed to account for a particular interest or harm, DEO is willing to explore additional ways to eliminate such harm and would take any reasonable steps to do so.

The Commission can fairly rely on the representations by DEO's undersigned counsel, but to ensure that there are no questions, DEO has provided an affidavit to the same effect from its Senior Vice President and General Manager, Anne Bomar. (*See* Attachment A to Mot. for Stay (Oct. 11, 2012).) Because DEO can and will ensure that no party suffers harm if a stay is granted, the motion should be granted.

B. If the Commission denies DEO's Motion for Stay, it will have erred to the extent that it relied upon and found that DEO did not satisfy the four-part test articulated in *In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co.*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009).

The Commission has looked to a different, four-factor test to determine whether a stay should be granted:

1) "whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits";
2) "whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay";
3) "whether the stay would cause substantial harm to other parties"; and
4) "where lies the public interest."

In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co., Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009). The only authority that DEO is aware of in support of this test is a one-justice dissent in *MCI Telecom. Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 605 (1987) (Douglas, J., dissenting), that to DEO's knowledge has never been cited by a single court.

This test is primarily used to determine whether a trial court should grant a preliminary injunction. *See, e.g.*, *Battelle Mem. Inst. v. Big Darby Creek Shooting Range*, 192 Ohio App.3d 287, 2011-Ohio-793, ¶ 21; *Ulliman v. Ohio High Sch. Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, ¶ 35–36; *see also Int'l Diamond Exch. Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc.*, 70 Ohio App.3d 667, 674 (1991) (applying test to motion to dissolve preliminary injunction before adjudication of the merits). This is the wrong test. A preliminary injunction applies the law's compulsive force before there is a full merits determination, so the test is understandably stringent on the merits question. It is not the test for granting a stay—as noted above, stays are available to would-be appellants *as a matter of right*.

To see how ill-fitting the Commission's inquiry is, consider the first factor—whether the moving party is likely to prevail on the merits. The would-be appellant seeking a stay of an order will usually have lost on the merits. Yet to gain a stay (and thus protect itself from irreparable harm), the losing party must convince the same tribunal that just ruled against it on the merits that it was wrong on the merits. The effect of this rule is that a stay, available as a matter of right in the courts, will virtually never be granted by the Commission.

The Commission should apply the correct standard, as set forth in the preceding section. Nevertheless, even if it applied the incorrect standard, the Commission should still have stayed the Order. DEO will address each factor in the order given above, and it would note at the outset that Ohio law provides that "[n]o one factor in the analysis is dispositive" and that all "four factors must be balanced." *Great Plains Exploration v. Willoughby*, 2006-Ohio-7009, ¶ 11 (Ohio Ct. App. Dec. 29, 2006).

1. DEO can make a strong showing that it is likely to prevail on the merits.

First, DEO can make a strong showing that it is likely to prevail on the merits, as set forth in all of the foregoing arguments. There is no need to again set them forth here.

DEO would note that regardless of whether the Commission agrees with DEO's position, it should not deny a stay on the basis of the first factor. At a minimum, DEO has *bona fide* reasons to challenge the Order, and a fair-minded observer would grant that there are reasonable grounds for dispute. And again, as a matter of law, the Commission is to balance *all four* factors, and no single factor is determinative. *See, e.g.*, *Great Plains Exploration v. Willoughby*, 2006-Ohio-7009, ¶ 11 (Ohio Ct. App. Dec. 29, 2006). Regardless of the first factor, the remaining three factors strongly favor granting a stay, so the Commission should stay the order.

2. DEO would suffer irreparable harm if the order is not stayed.

The second factor considered by the Commission is whether the party seeking the stay would suffer irreparable harm absent the stay. "Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *1st Natl. Bank v. Mountain Agency, LLC*, 12th Dist. No. CA2009-05-056, 2009-Ohio-2202, ¶ 47. This "means that the legal remedy must be as efficient as the indicated equitable remedy would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete." *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, ¶ 81.

This factor cuts in DEO's favor. Because Ohio law does not generally allow refunds of charges that prove either too high or too low, DEO will suffer irreparable harm if the Commission does not grant a stay. *See, e.g.*, *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997). Indeed, the stay is the specific remedy provided by law to protect a party, like DEO, who is aggrieved by a rate order. *See, e.g.*, *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 17. Consistent with this case law, the Commission has found that irreparable harm would occur where the affected party "may not be entitled to a refund" of the alleged incorrect charge. *NOPEC v. Ohio Edison Co.*, 2009 Ohio PUC LEXIS 481, at *8–9.

Because refunds are generally not available under Ohio law, if the Commission does not grant a stay, DEO's "legal remedy" (of an appeal and later stay by the Court) would be necessarily incomplete. Thus, the second factor also favors granting a stay.

3. No other party would suffer any harm, much less substantial harm, if the Order were stayed.

The third factor that the Commission has considered is whether the stay would cause substantial harm to other parties. A stay would cause no harm to other parties. DEO will keep track of the difference between the charge currently in effect and (*1*) the charge proposed by DEO and (*2*) the charge the Commission ordered, will apply carrying charges to these amounts, and will refund the entire applicable amount to customers. DEO is also willing and able to provide reasonable financial security as deemed necessary by the Commission, including the payment of the agreed amount into an escrow account or the provision of a supersedeas bond. And if DEO has failed to account for any harm that would result from a stay, it is willing to explore ways of eliminating such harm and will take any reasonable step to do. (*See* Attachment A to Mot. for Stay.)

4. The public interest favors granting a stay.

As for the final factor, the public interest supports granting a stay. Granting a stay will guarantee that customers pay and DEO collects no more and no less than a just and reasonable charge, as determined by law. If the Order is ultimately overturned, DEO will have received what was due. If the Order is ultimately upheld, the stay will be dissolved, and customers will get back the difference with interest. In short, granting a stay will assure that no party receives a windfall in this case, and that every party gets only what is deserved.

That the public interest will be furthered by granting a stay is confirmed by Ohio law. As discussed above, Ohio law *requires* the granting of stays, so long as the party benefiting from the stay can provide adequate financial security. *State ex rel. Geauga Cty. Bd. of Comm'rs v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, ¶ 17. As set forth in Attachment A to the Motion for Stay and as described above, DEO will do whatever is necessary to ensure that its customers receive a full refund of any difference in the AMR charge (plus carrying charges) if the Order is ultimately upheld.

C. If the Commission denies DEO's Motion for Stay, it will have erred to the extent that it failed to give DEO an opportunity to address any harm for which DEO had not already accounted.

DEO made clear in its motion for stay that if it had failed to account for any harm that would be caused by a stay, it was willing to explore ways of eliminating such harm and would take any reasonable step to do. If the Commission identifies such a harm and rejects the stay on that basis without giving DEO any opportunity to cure, this would be unreasonable and violate the standards applicable to stays that DEO has discussed above.

VI. CONCLUSION

For the foregoing reasons, the Commission should grant rehearing, reverse its decision to reduce DEO's proposed AMR Cost Recovery Charge from \$0.54 to \$0.42, and grant DEO's application as filed. If the Commission denies DEO's application for rehearing, it nevertheless should stay the Order.

Dated: October 19, 2012

Respectfully submitted,

/s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of DEO's Application for Rehearing was served by electronic mail to the following persons on this 19th day of October, 2012:

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Summary: App for Rehearing Application for Rehearing and Memorandum in Support electronically filed by Mr. Andrew J Campbell on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix of Appellant, DEO, was served by U.S. mail this 26th day of February, 2013, upon the following:

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