

**In The
SUPREME COURT OF OHIO**

**The East Ohio Gas Company d/b/a
Dominion East Ohio,** : Case No. 2012-2117
: :
: :
Appellant, : : On appeal from the Public Utilities
: : Commission of Ohio, Case No. 11-
: : 5843-GA-RDR, *In the Matter of the*
: : *Application of The East Ohio Gas*
v. : : *Company d/b/a Dominion East Ohio for*
: : *Approval of Tariffs to Adjust its*
The Public Utilities Commission of : : *Automated Meter Reading Cost*
Ohio, : : *Recovery Charge to Recover Costs*
: : *Incurred in 2011.*
Appellee. : :

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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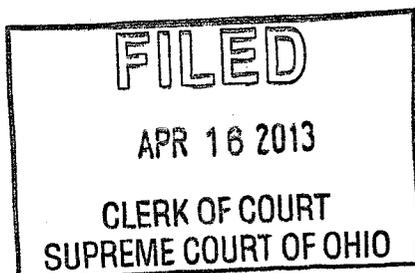


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Appellant,	:	On appeal from the Public Utilities
	:	Commission of Ohio, Case No. 11-
v.	:	5843-GA-RDR, <i>In the Matter of the</i>
	:	<i>Application of The East Ohio Gas</i>
The Public Utilities Commission of Ohio,	:	<i>Company d/b/a Dominion East Ohio for</i>
	:	<i>Approval of Tariffs to Adjust its</i>
Appellee.	:	<i>Automated Meter Reading Cost</i>
	:	<i>Recovery Charge to Recover Costs</i>
	:	<i>Incurred in 2011.</i>

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

This case challenges the Commission’s authority to establish just and reasonable rates for customers. The “rate” at issue is the automated meter reader (“AMR”) cost recovery charge (“AMR rider”) that funds The East Ohio Gas Company d/b/a Dominion East Ohio’s (“Dominion” or “DEO”) AMR deployment program (“AMR program”). Dominion benefited substantially from the AMR program. It modernized its meter reading system under an accelerated cost recovery mechanism that has allowed Dominion to recover its AMR costs from customers every year without the complexity or cost of a traditional base rate case. The AMR program also allowed Dominion to comply with the Commission’s most current gas rules.

How do customers benefit from this program? The full deployment of the AMR program substantially reduces the amount customers have to pay for manual meter reading services, which are currently being paid for through base rates. When it sought approval of the AMR rider, Dominion represented that customers would potentially see \$6 million in annual savings at the close of the program. However, if Dominion fails to install the AMRs fast enough and complete the program on time, customers will not recognize the appropriate level of savings. Rather, customers will be forced to overpay for meter reading services. They will be *paying twice* for meter reading services – once through the AMR rider and once through base rates for manual meter readers. The only way to avoid this double-recovery issue is to pass savings back to customers at the “earliest possible time.” This is why, in the 2009 Order, the Commission ordered Dominion to maximize savings for customers by completing the AMR program at the “earliest possible time.” If Dominion would have complied with this order, the problem of customers paying unreasonably high meter reading costs could have been avoided.

Unfortunately, Dominion failed to live up to its end of the bargain and failed to follow the Commission’s orders. While Dominion received the benefits of the AMR rider, it sacrificed the accelerated five-year AMR deployment schedule. This forces customers to pay more than they should for meter reading services and delays over a million dollars in customer savings for yet another year. Therefore, the Commission adjusted Dominion’s proposed AMR rider charge to reflect the appropriate level of savings that should flow back to customers.

The Commission's adjustment is not about punishing Dominion. It is about giving customers what they have paid for and ensuring they are not forced to overpay for meter reading services. It is about ensuring that Dominion charges just and reasonable rates.

STATEMENT OF THE FACTS AND CASE

The Commission's decision to adjust Dominion's proposed AMR rider charge was not made in a vacuum. It was based upon the history of the AMR program and the Commission's 2009 Order. The following provides the factual background of the AMR program that supports the Commission's decision.

1. **Dominion sought approval of the AMR rider.**

In December of 2006, Dominion filed an application seeking approval of the AMR rider. *In re Dominion East Ohio*, Case No. 06-1453-GA-UNC (Application at 1) (December 13, 2006) ("2006 AMR Application"), DEO Supp. at 119.¹ It requested ongoing, faster cost recovery to install AMRs on all its customers' meters. *Id.* at 4, DEO Supp. at 122. Dominion represented that it needed to install AMRs in order to comply with the Commission's minimum gas service standard rules ("MGSS rules"). 2006 AMR Application at 1-3, DEO Supp. at 119-121. Among other things, the MGSS rules required natural gas companies to obtain more accurate reads of customers' meters.

¹ References to appellant's appendix are denoted "DEO App. at ____;" references to appellant's supplement are denoted "DEO Supp. at ____;" references to appellee's attached appendix are denoted "App. at ____;" and references to appellee's supplement are denoted "Supp. at ____."

Because many of its customers had meters located on the inside of their premises, Dominion indicated that it would be difficult for it to obtain more accurate readings as required by the MGSS rules. Dominion represented that installing AMRs would help it comply with the MGSS rules by obtaining more accurate, electronic readings without having to physically gain access to the inside of customers' premises. *Id.*

In its AMR Application, Dominion stated that it would deploy the AMR program over a five-year period. 2006 AMR Application at 4, DEO Supp. at 122. It represented, however, that it needed accelerated cost recovery to meet this time-line. *Id.* Dominion claimed that it would take fifteen to twenty years to install AMRs throughout its territory absent expedited cost recovery rate treatment. *Id.*

Besides helping it comply with the MGSS rules, Dominion benefits from the AMR program in other ways. The AMR rider is a favorable cost-recovery mechanism that allows Dominion to recover its costs faster without undergoing a full-blown rate case. 2006 AMR Application at 1-4, DEO Supp. at 119-122. Dominion avoids regulatory lag by recovering its AMR installation costs every year, subject to annual review and adjustment by the Commission. This expedited cost-recovery mechanism allowed Dominion to recover millions of dollars from customers in a short period of time. For example, from May 2009 to December of 2011, Dominion collected over \$16 million from its customers through the AMR rider. *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 (*In re DEO 2011 AMR*) (Testimony of Vicki Friscic at 5)

(April 27, 2012), DEO Supp. at 26. Dominion will eventually collect over \$90 million in program cost from customers on an expedited basis due to the AMR rider. *Id.*

The AMR program was supposed to benefit customers as well. The program was intended to significantly reduce operation and maintenance (“O&M”) costs associated with manual meter readers, which would reduce customers’ rates. *In re DEO 2011 AMR* (Testimony of Kerry Adkins at 4-5) (April 27, 2012), DEO Supp. at 90-91. These O&M costs savings are passed back to customers through the AMR rider as a credit to customers. Traditionally, numerous meter readers would have to walk meter reading routes and manually read customers’ meters. *Id.* After Dominion installs the AMRs, meter readers will be able to electronically read entire communities’ meters while driving a vehicle rather than having to walk through communities and manually read each customer’s meter. Because it will no longer be necessary to manually walk through communities to obtain meter reads, the majority of Dominion’s manual meter readers will no longer be needed.² *Id.* Customers currently pay for manual meter readers’ salaries through base rates, which will not be reset until Dominion’s next base rate case. *Id.* Therefore, customers will be paying for manual meter reading services through base rates that may no longer be necessary. *Id.* At the same time, customers are also paying the AMR rider, which recovers the costs of AMR installations. *Id.* This means customers, for a period of

² Some of these meter readers will be transferred elsewhere in Dominion to perform other functions. Some, however, may be released by DEO. The Commission recognizes this is often an unfortunate side-effect of modernizing a utility’s system, but also must consider the potential benefits customers may enjoy from having a more accurate, electronic meter reading system.

time, would be paying twice for meter reading services: (1) once through base rates for manual meter readers and (2) once through the AMR rider for the costs of installing AMRs. *Id.* The O&M savings mechanism is designed to remedy this double-recovery issue as much as possible. However, the efficiency of the O&M savings mechanism depends largely on when savings are actually reported and delivered. Therefore, the only way to truly avoid this issue of double recovery is for Dominion to deliver savings to customers at the earliest possible time. *Id.* at 4-9 DEO Supp. at 92-95.

While the AMR Application was pending before the Commission, Commission Staff requested information regarding the amount of customer savings that would be recognized from the AMR program. *In re DEO 2011 AMR* (Testimony of Pete Baker at 3-6, Ex. PB-1) (April 27, 2012), Supp. at 15-18, 21. Dominion represented that it expected to deliver approximately *\$6 million in annual customer savings* after the 2011 installation year. *Id.* These savings would be reflected in the 2011 AMR rider, which was the subject of the case below. *Id.* These 2011 installation-year savings would be recognized in 2012, when the annual review of the 2011 AMR installation cost would occur and the 2011 AMR rider charge would be set. *Id.*

2. Dominion represented in its AMR Application and MGSS Waiver Application that the five-year AMR installation program would end in 2011.

Dominion described its “pace of deployment” for the first two years of the five-year AMR program when it sought Commission approval of the AMR program. 2006 AMR Application at 4-5, DEO Supp. at 122-123. Dominion represented that it would

start the AMR program by replacing the remote meter indexes, which were older, less accurate meter reading devices. *Id.* In its AMR Application, Dominion stated that it would “commence replacement of the [remote meter indexes] in the first quarter of 2007 with the intent of substantially completing those replacements within two years.” *Id.* Dominion admits that it replaced the remote meter indexes with AMRs during the first two years of the five-year AMR program. Tr. at 161-162, Supp. at 6-7. It also admits that 2007 and 2008 were the first two years of the five-year program. *Id.* In October of 2007, while its AMR Application was pending, Dominion represented to Commission Staff that it would install 122,000 AMRs in 2007 and 200,000 in 2008. Testimony of Pete Baker at 4-6, Ex. PB-2, Supp. at 16-18, 22.

Dominion’s Waiver Application indicated that the five-year AMR program began in January, 2007 and ended in 2011. In its Waiver Application, Dominion requested a temporary waiver of the MGSS rules. *In re Dominion East Ohio*, Case No. 06-1452-GA-UNC (Application at 1-3) (December 13, 2006) (“2006 Waiver Application”), Supp. at 32-34. Dominion admits the five-year waiver period was supposed to coincide with the five-year AMR program, and that the five-year waiver period ended on January 1, 2012. Tr. at 34-36, and 162, Supp. at 3-6, and 8. In its waiver request, Dominion stated that the waiver would begin on January 1, 2007, the effective date of the MGSS rules. 2006 Waiver Application at 1-3, Supp. at 32-34. Dominion also explained that the waiver would last as long as the five-year AMR program:

The waiver would apply from the effective date of the MGSS rules [January 1, 2007] until such time as DEO completes the deployment of the AMR devices, which the Company estimates will take five years.

2006 Waiver Application at 2, Supp. at 33.

Consistent with what it represented in the AMR Application, Dominion explained in the Waiver Application that it would begin installing AMRs in early 2007, that it would replace the remote meter indexes with AMRs during the first two years of the program, and that it would complete the AMR installations within five years:

[T]he Company... intends to replace [remote meter index equipment] with automated meter reading (“AMR”) devices over a two-year period beginning in the first quarter of 2007. The Company expects to equip all meters in its service territory with AMR devices within five years.

Id.

In November of 2007, Dominion provided Commission Staff with a projected AMR installation timeline that showed that the program would begin in 2007 and end in 2011. Testimony of Pete Baker at 4, PB-2, Supp. at 16, 22. Dominion provided this timeline in response to Commission Staff’s data request. In this data request, Commission Staff asked Dominion to provide its “current schedule for AMR installations” and to “itemize the number of planned AMR installations by year...” *Id.* Although Commission Staff did not specify the years in its data request, Dominion indicated in its response that a five-year installation period, from 2007 to 2011, was the planned installation schedule. *Id.*

While the AMR Application was pending at the Commission, Dominion started the accelerated AMR installation program. Dominion did so before the Commission approved the AMR rider. Consistent with its October 2007 installation projection, Dominion installed approximately 132,000 AMRs in 2007 and 278,582 in 2008. 2010 Meter Reading Plan at 2, DEO Supp. at 16; Tr. at 166, Supp. at 9.

After considering the costs and benefits of the AMR rider, the Commission ultimately approved the AMR rider and allowed accelerated cost recovery for the AMR program. This included recovery for substantially all of Dominion's installation costs for 2007 and 2008. Tr. at 28, 68, Supp. at 2, 6; *In re DEO 2011 AMR* (Testimony of Robert Fadley at 3) (April 27, 2012), Supp. at 26. Dominion recovered most of its 2007 and all of its 2008 AMR installation costs through the AMR rider. *Id.*

3. The 2009 AMR case – a dispute regarding the appropriate level of customer savings arises.

Although the Commission approved the AMR Application, it monitored and reviewed the AMR program annually. *In re Dominion East Ohio*, Case No. 10-2853-GA-RDR (Staff Comments at 2-3) (March 30, 2011) (emphasis added), Supp. at 43-44 (describing the AMR annual update process). Each year the AMR rider was adjusted to recognize the amount of installation costs and O&M savings associated with the prior installation year. This adjustment is performed in annual AMR cases. Each annual AMR case sets the AMR charge based on the installation cost and program-related savings from the previous year. For example, the hearing for the 2011 AMR case (the subject of

this appeal) occurred on May 2, 2012. The 2011 AMR case addressed the installation costs and customer savings related to the 2011 calendar year.

In the 2009 AMR case, a dispute arose between the Ohio Consumers' Counsel ("OCC") and Dominion regarding whether Dominion was delivering the level customer savings it previously represented it would deliver. *In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with Automated Meter Reading Deployment through Automatic Adjustment Clause, and for Certain Accounting Treatment*, Case No. 09-1875-GA-RDR (Opinion and Order at 5-7) (May 5, 2010) ("2009 Order"), DEO Supp. at 5-7. OCC argued that Dominion was delivering an inadequate amount of O&M savings based upon Dominion's initial savings projections and recommended that Dominion's proposed O&M savings amount be increased by the Commission to reflect more customer savings. *Id.* at 5-6, DEO Supp. at 5-6.

In response, Dominion claimed that customers would see substantial savings near the end of the AMR program when it was fully deployed. *Id.* Dominion stated that it needed to reach a "critical mass" of installations in particular communities before savings would be fully recognized. 2009 Order at 6, DEO Supp. at 6. A "critical mass" is reached when AMRs are installed on 95% of a community's meters. 2010 Meter Reading Plan at 2, DEO Supp. at 16; *In re DEO 2011 AMR* (Testimony of Kerry Adkins at 6) (April 27, 2012), Supp. at 92. Dominion indicated that once a critical mass was reached in a particular community, rerouting could occur. 2009 Order at 6, DEO Supp. at 6. It represented that rerouting would then lead to increased customer savings. *Id.* The Com-

mission ultimately agreed with Dominion's arguments in the 2009 case. 2009 Order at 7, DEO Supp. at 7. The Commission believed that the AMR installations alone did not automatically lead to customer savings. Rather, the Commission agreed that Dominion needed to reach a "critical mass" of installations before rerouting and significant savings would occur.

Although the Commission did not adopt OCC's proposed adjustment in the 2009 AMR case, it instructed Dominion to maximize savings for customers going forward. *Id.* To ensure that customers received the maximum amount of O&M savings, the Commission stated:

[T]he Commission finds that [Dominion] should be installing the AMR devices such that savings will be maximized and rerouting will be made possible in all communities at the earliest possible time. 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.*

Id. (emphasis added).

Dominion never filed an application for rehearing or a request for clarification regarding this aspect of the 2009 Order. Further, Dominion admits it was obligated to comply with the 2011 deadline contained in the 2009 order. Dominion Merit Brief at 1, 5.

4. The 2011 AMR case – another dispute regarding the appropriate level of customer savings.

As part of its investigation in the 2011 AMR Case (which involved the 2011 installation costs), Commission Staff noted that Dominion failed to complete its AMR program by the end of 2011 as ordered by the Commission. Testimony of Kerry Adkins at 11-13, DEO Supp. at 97-99. Dominion had not installed AMRs on all of its meters. *Id.* Despite the fact it reached critical mass in all of its communities, 27% of its communities still were not rerouted by the end of 2011. *Id.* Dominion failed to maximize savings by failing to reroute its communities and release meter readers earlier. *Id.* Instead of releasing its last few meter readers earlier in 2011, Dominion waited to release these manual meter readers until December 31, 2011. *In re DEO 2011 AMR* (Testimony of Carleen Fanelly at 10) (April 27, 2012), DEO Supp. at 58. The final costs and savings related to these last meter readers will be reflected in the 2012 AMR rider, *not the 2011 AMR rider*. *Id.* By delaying the release of these remaining meter readers, the 2011 AMR charge will be higher than necessary. Furthermore, customers are forced to pay for these last few manual meter meters through base rates until 2013 even through Dominion released these manual meter readers on December 31, 2011. Testimony of Kerry Adkins at 16, DEO Supp. at 102.

Dominion reported only \$3.5 million in annual savings by the end of 2011, which was substantially less than the \$6 million it originally projected. *Id.* at 23, DEO Supp. at 109. Commission Staff's investigation also revealed that Dominion's rate of installation steadily decreased after the Commission issued the 2009 Order. *Id.* at 12-13, DEO Supp.

at 98-99. Commission Staff found that Dominion would have been able fully deploy all its communities and would have saved customers \$1.6 million more if Dominion would have maintained its previous installation pace. *Id.* at 18-19, DEO Supp. at 104-105.

Based on the evidence presented by Commission Staff, the Commission determined that Dominion did not comply with the 2009 Order and adjusted the AMR rider amount proposed by Dominion. *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 at 17-18) (October 3, 2012), DEO App. 22-23. The Commission adjusted the AMR rider to ensure that customers, who have been subsidizing Dominion's AMR program for years, pay a just and reasonable charge.

LAW AND ARGUMENT

Dominion's failure to timely complete the AMR program and failure to deliver savings faster forces customers to overpay for meter reading services. This is why the Commission adjusted Dominion's proposed AMR rider charge. This Court has historically given the Commission considerable discretion in establishing rates and charges. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154-155, 555 N.E.2d 288 (1990) ("Our task is not to set rates; it is only to assure that the rates are not unlawful or unreasonable, and that the ratemaking process itself is lawfully carried out").

To overcome the discretion afforded to the Commission, Dominion must prove the Commission's decision was unjust, unreasonable or unlawful. *Toledo Edison Co. v. Pub. Util. Comm.*, 12 Ohio St.3d 143, 146, 465 N.E.2d 886 (1984) (quoting *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944)) ("If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry ... is at an end.")

Dominion cannot sustain its burden by merely making veiled conspiracy claims. "The Public Utilities Commission is a branch of the state government and it is to be assumed that it will act with fairness and impartiality in respect to all persons and matters coming within its jurisdiction." *Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 107, 163 N.E.2d 167 (1959). The presumption of fairness is especially applicable to Commission decisions in setting rates and charges. *Id.* ("Presumptively, at least, rates or charges as determined by the Commission are fair and reasonable, and a party who contends otherwise has the burden on appeal of showing that they are unjust, unreasonable or unlawful.") *Id.*; *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 68; *Franklin County Welfare Rights Organization v. Pub. Util. Comm.*, 55 Ohio St. 2d 1, 13, 377 N.E.2d 990 (1978) ("We conclude that [the appellant] has not shown that the Commission acted unreasonably or unlawfully in denying the proposed adjustment").

Proposition of Law No. I:

Where the Commission reasonably interprets its own order, its decision should be upheld. *Braddock Motor Freight v. Pub. Util. Comm.*, 174 Ohio St. 203, 188 N.E.2d 162, ¶ 4 of syllabus (1963).

In its 2009 Order, the Commission instructed Dominion to maximize savings for customers at the “earliest possible time.” It issued this order so that customers (1) receive the benefits of the AMR program they paid for and (2) pay reasonable charges for meter reading services.

When considering the Commission’s interpretation of the 2009 Order, the Court should give the Commission deference. The Court has historically deferred to the Commission’s interpretation so long as the interpretation is reasonable. *In re Columbus S. Power Co.*, 134 Ohio St. 3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 36; *Payphone Ass’n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 25 (“As the agency with the expertise and statutory mandate to implement the statute, the PUCO is entitled to deference”) citing *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶51. This deference has also been applied to the Commission’s “reasonable interpretation of its own regulations.” *Braddock Motor Freight v. Pub. Util. Comm.*, 174 Ohio St. 203, 188 N.E.2d 162, ¶ 4 of syllabus (1963). In addition, the Court has indicated that review of prior Commission orders is an area within the expertise of the Commission. *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144, 2012-Ohio-5445, 980 N.E.2d 996, ¶34 (“[T]he commission is

the fact-finder best suited to review and analyze various charged rates, rate designs, tariff schedules, and *commission orders*.”) (Emphasis added.) As it does with statutes and regulations governing the Commission, this Court should give deference to the Commission’s interpretation of its own order.

Decisions from courts in other jurisdictions are instructive on this issue. In various states, reviewing courts have determined that state utility regulators’ interpretations of prior orders should be given deference. *State ex rel. Laclede Gas Co. v. PSC*, Mo. App. No. WD74852, 2012 Mo. App. LEXIS 1574 (Dec. 11, 2012) (“The Commission is entitled to interpret its own orders and to ascribe to them a proper meaning.”); *Office of Pub. Util. Counsel v. Texas-New Mex. Power Co.*, 344 S.W.3d 446, 452 (Tex. App. Austin 2011) (“[W]e must give “great weight” to the Commission’s interpretation, just as we give great weight to an agency’s interpretation of its own rules and regulations.”); *Association of Bus. Advocating Tariff Equity v. PSC*, 219 Mich. App. 653, 661-662 (Mich. Ct. App. 1996) (“[T]his Court [] accords substantial deference to the PSC’s interpretation of its own orders.”); *Kan. Indus. Consumers Group, Inc. v. State Corp. Comm’n*, 36 Kan. App. 2d 83, 90 (Kan. Ct. App. 2006) (“An agency’s interpretation of the intended effect of its own orders is controlling unless clearly erroneous.”); and *W. J. Dillner Transfer Co. v. Pennsylvania Public Utility Comm.*, 175 Pa. Super. 461, 467 (Pa. Super. Ct. 1954). These courts held that state utility regulators’ interpretations of their previous orders should be upheld unless they are shown to be unreasonable.

The record supports the Commission’s interpretation of its 2009 Order. It also shows that Dominion’s failure to comply with the Commission’s 2009 Order will cause

customers to overpay for meter reading services unless the Court upholds the Commission's decision.

A. The Commission's interpretation of the 2009 Order is supported by the record and is reasonable.

1. Dominion's failure to comply with the 2009 Order forces customers to pay higher meter reading costs until at least 2013.

Dominion's failure to comply with the 2009 Order reduces customer savings and forces customers to pay twice for meter reading services. Dominion wants the Court to overlook the negative effect its failure had on customers and claims that releasing meter readers on "the first day of 2012" and the "end of 2011" are the same. Dominion Merit Brief at 11-12. The difference between these two dates, however, is incredibly important to this case. The AMR rider is based upon annual costs and savings. Testimony of Kerry Adkins at 7-9, DEO Supp. at 93-95. Only costs or savings recognized in the "2011 installation year" are incorporated into the "2011 AMR rider." *Id.* So, even though meter reader reductions may have occurred on the first day of 2012, *none* of these reductions will reduce the 2011 AMR rider amount.

Dominion may claim that it could not release these last meter readers earlier in 2011 because of a union contract it entered into with a gas workers union. It admitted, however, that nothing in this union contract precluded it from releasing manual meter readers before December 31, 2011. Tr. at 180-181, Supp. at 10-11 (Question: "So under the terms of the [union contract], nothing required Dominion to retain those employees to December 31, 2011?" - Answer of Dominion witness Fanelly: "That is correct").

Dominion chose to release these last few manual meter readers at the very last second, which delays savings for another year. Customers will not obtain the savings from these meter reader reductions until 2013 when the “2012 AMR case” occurs and the “2012 AMR rider” charge is established. Meanwhile, until 2013, Dominion will continue to charge customers for manual meter readers that stopped actually providing meter reading services on December 31, 2011. The only way to remedy this unjust result is to adjust the AMR charge, which is exactly what the Commission did.

- 2. When it ordered Dominion to maximize savings by rerouting at the earliest possible time in the 2009 AMR case, the Commission relied upon Dominion’s representations that substantial customer savings and rerouting were connected.**

Dominion downplays its failure to complete the AMR program by the end of 2011 by focusing on how allegedly close it was to installing all the AMRs. This misses the point. Deployment of the five-year AMR program involved more than simply installing the AMRs by the end of 2011 (which Dominion did not do). Testimony of Kerry Adkins at 11, DEO Supp. at 97 (explaining that Dominion failed to install 9,530 AMRs by the end of 2011). Installing AMRs, by itself, does not automatically lead to substantial customer savings. Substantial savings are only recognized when the AMR program is fully deployed, which requires rerouting and substantial reductions in manual meter readers. This is exactly what Dominion represented in the 2009 AMR case. In the 2009 Order, the Commission summarized the testimony of Dominion’s witness who explained the connection between rerouting and customer savings:

- “[S]ignificant savings cannot occur until a critical mass of AMR deployment occurs, allowing [Dominion] to consolidate and *reroute meter reading routes to improve efficiency.*”
- “Since it is not efficient to reroute a meter reading route until a sufficient number of customers on that route have AMR devices installed, the benefits from these AMR installations have yet to be realized.”
- “[Once Dominion] is able to achieve a critical mass of AMR installations in an area, *that area is rerouted to reduce meter reading expenses.*”

2009 Order at 5-6, DEO Supp. at 5-6 (emphasis added).

As evident from the 2009 Order, Dominion represented to the Commission that the cost savings of the AMR program are largely “backloaded.” *Id.* Dominion claimed that significant savings would come after a “critical mass” was reached and rerouting occurred. *Id.* The Commission, based on Dominion’s representations, believed that meter reader savings would be substantially increased as more communities were rerouted. *Id.* Dominion is now claiming that rerouting is not tied to customer savings and conveniently offers a new definition of rerouting. Dominion Merit Brief at 21. This position, however, is not consistent with Dominion’s representations regarding “rerouting” in the 2009 case. Regardless, it is evident from the 2009 Order that the Commission certainly viewed rerouting and savings as connected, and Dominion never made any effort to correct the Commission’s understanding. Based upon Dominion’s representations, the Commission articulated the following expectations regarding rerouting:

- The Commission ordered Dominion to install “the AMR devices such that savings [would] be maximized and rerouting [would] be made possible in all communities at the earliest possible time.”

- The Commission ordered Dominion to reroute “nearly all of its communities” “by the end of 2011.”
- The Commission ordered Dominion to install “the 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 at the earliest possible time.”

2009 Order at 7, DEO Supp. at 7.

The 2009 Order made it clear that the Commission expected Dominion to reroute communities and deliver savings to customers at the “earliest possible time.” Dominion did not do this. It delayed rerouting, which then delays the benefits of cost savings for customers and forces customers to pay a higher AMR charge for another year. Testimony of Kerry Adkins at 7-9, DEO Supp. at 93-95.

3. Dominion represented from the inception of the AMR program that it would complete the program by the end of 2011.

Dominion attempts to distract the Court from the unjust result of delayed customer savings by revising the history of the AMR program. Dominion accuses the Commission of moving the AMR program completion deadline to the end of 2011, claiming that it originally intended the AMR program to end in 2012. Dominion Merit Brief at 5. This claim is simply inconsistent with the record. In fact, the very document Dominion cites for support proves otherwise. Dominion cites the 2006 AMR Application, stating that it planned to install “250,000 [AMR] units per year beginning in January 2008.” 2006 AMR Application at 4, DEO Supp. at 122. But Dominion conveniently ignores the next paragraph, which describes “[t]he pace of deployment for [AMRs] in 2007” and explains

how Dominion would install AMRs in 2007 and 2008. This timeline is consistent with the Waiver Application, Dominion's original installation projection, and the amount of AMRs actually installed in 2007 and 2008. Tr. at 161-162; Supp. at 7-8 (Dominion witness Fanelly explaining that remote meter indexes were replaced with AMRs in 2007 and 2008); Testimony of Carleen Fanelly at Ex. No. 2.1, DEO Supp. at 61 (Dominion's Meter Reading plan, which states that "DEO completed removal of American and Badger remote [meter] indexes within the first two years of the AMR program."); 2010 Meter Reading Plan at 2, DEO Supp. at 16. Furthermore, Dominion represented to Staff that the AMR program would begin in 2007 and would end in 2011. Testimony of Peter Baker at Ex. PB-2, Supp. at 22. Dominion also admits that 2007 and 2008 were the first two years of the five year program. Tr. at 161-162; Testimony of Carleen Fanelly at Ex. No. 2.1, DEO Supp. at 61.

The Commission did not pull the "end of 2011" deadline out of thin air. It was based upon Dominion's various representations from the very beginning of the AMR program.

B. Dominion's interpretation of the 2009 Order is unreasonable and leads to an unjust AMR charge for customers.

Contrary to the Commission's interpretation of the 2009 Order, Dominion's interpretation leads to unreasonable and absurd results. It forces customers to pay excessive amounts for meter reading services. The Court has held that it will construe statutes or agency rules to avoid unreasonable or absurd results. *State ex rel. Asti v. Ohio Dep't of Youth Servs.*, 107 Ohio St. 3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 28 ("We must

construe the applicable statute and rule to avoid such unreasonable or absurd results.”)

Although this case does not involve a statute or agency rule, the Court should apply the same standard here in reviewing the 2009 Order.

1. Dominion’s argument that the Commission only wanted rerouting to become *possible* is unreasonable because it ignores the fact that only *actual* rerouting leads to *actual* customer savings.

Dominion’s flawed view of its rerouting obligations inappropriately segregates rerouting from customer savings. This ignores the fact that actual savings was the purpose of the 2009 Order. Dominion claims that the 2009 Order only required it to be in a position to begin rerouting its last few communities in 2012. The 2009 Order, however, does not say that. The 2009 Order undoubtedly shows that the Commission was concerned about Dominion *actually* rerouting communities, not the mere possibility of rerouting. The pertinent section of the order shows that the Commission expected Dominion to finish rerouting most if not all of its Communities by the end of 2011:

[1] [T]he 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.*

2009 Order at 7, DEO Supp. at 7 (emphasis and numbering added).

In the first sentence, the Commission stated its general expectation that Dominion would maximize savings by rerouting at the earliest possible time. In the second sen-

tence, which is more specific, the Commission stated that it expected Dominion to completely reroute a “substantially greater number of communities” by the end of 2010. In the third sentence, which is the most important, the Commission expressed the final rerouting requirement. After seeing “a substantially greater number of communities” fully rerouted in 2010, the Commission logically expected to see “nearly all of [Dominion’s] communities” fully rerouted “by the end of 2011.” This interpretation is consistent with the Commission’s order to maximize savings at the earliest possible time and consistent with the 2011 completion deadline. Dominion is also consistent with Dominion’s representations in the 2009 AMR case that conjoined rerouting with customer savings. 2009 Order at 5-6, DEO Supp. at 5-6.

2. Dominion’s interpretation of the 2009 Order is inconsistent with commonly used rules of construction and ignores the context of the 2009 Order.

Dominion’s interpretation of the 2009 Order is inconsistent with commonly used rules of construction. Unless specifically defined, words and phrases are construed “in context according to the rules of grammar and common usage.” *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 563, 2004-Ohio-5718, 817 N.E.2d 76 ¶ 23. Dominion’s interpretation of the word “possible” diminishes almost any obligation it has to reroute its communities at the “earliest possible time.” It interprets the word “possible” to mean “become possible.” Dominion Merit Brief at 22. This, however, ignores the fact that the Commission set a specific deadline (“the end of 2011”) and expected savings to be maximized earlier to avoid customers paying unjust meter reading charges. The mere

fact rerouting and attendant savings “became possible” in 2011 does not reduce the 2011 AMR rider charge one penny. Only actual rerouting and actual savings help customers avoid overpaying for meter reading services.³

Dominion’s reading of the 2009 Order is unreasonable because it would allow Dominion to delay savings until 2013 despite the fact the Commission established a 2011 deadline and ordered Dominion to deliver savings at the earliest possible time.

3. The fact that Dominion allegedly “adhered to its plan” does not mean it complied with the 2009 Order and does not mean it maximized savings for customers.

Dominion incorrectly believes that filing its AMR installation plan with the Commission somehow alleviates its violation of the Commission order. The Commission ordered Dominion to file a plan that explained how it would complete the AMR program by the end of 2011. It should go without saying that Dominion was also required to *actually* complete the AMR program by the end of 2011. Simply filing a plan was not enough. Further, the fact the Commission did not criticize Dominion’s plan does not mean the Commission modified or canceled the requirements of the 2009 Order.

Dominion cannot hide behind the fact that Commission Staff did not explicitly criticize every aspect of Dominion’s 2010 AMR plan. Moreover, after reviewing this plan, Staff stated that Dominion needed to access hard-to-access meters early if it was going to install all the AMRs “*during 2011, the final year of [Dominion’s] AMR pro-*

³ “Possible” means something that “can be” or “can be done.” *Webster’s New World Dictionary*, 1112 (2d Ed. 1984). The Commission indicated that rerouting of nearly all of the communities “could be done” by the “end of 2011”.

gram.” *In re Dominion East Ohio*, Case No. 10-2853-GA-RDR (Staff Comments at 7-8) (March 30, 2011) (emphasis added), Supp. at 48-49. Hard-to-access meters are the very excuse Dominion now uses for failing to complete the program by the end of 2011. Dominion Merit Brief at 5-6.

Dominion’s excuse, however, ignores a critical point about the history of the AMR program. The whole point of the AMR program was for Dominion to gain access to these hard-to-access meters and install AMRs within five-years. 2006 AMR Application at 1-4, DEO Supp. at 119-122. When Dominion sought approval of the AMR program, it knew how many inside-the-premises meters it had on its system. *Id.* at 2, DEO Supp. at 120 (2006 AMR Application, which indicated that Dominion had 556,000 inside-the-premises meters). Knowing this information, Dominion represented that it could complete the program in five years. *Id.* at 4, DEO Supp. 122. Near the end of the five-year program, Commission Staff issued Comments that warned Dominion about gaining access to hard-to-access meters faster in order to complete the AMR program before the end of 2011. Staff Comments at 7-8, Supp. at 48-49; Testimony of Kerry Adkins at 15-16, DEO Supp. at 101-102. Dominion cannot not now use hard-to-access meters as an excuse for failing to timely complete the program. It has only itself to blame for its violation of the 2009 Order.

4. Summary of Commission’s interpretation of the 2009 Order.

The evidence and the language of the 2009 Order support the Commission’s interpretation of the 2009 Order. While Dominion has benefited from the AMR rider, the

Commission expected it to deliver substantial savings at the end of the AMR program. Any delay in delivering full savings leads to an unjust and unreasonable AMR rider charge. Dominion failed to live up to its end of the bargain and this forces customers to overpay for meter reading services. The Commission rightfully decided to enforce the terms of its 2009 Order and adjusted the AMR charge. The Commission's interpretation of its order is reasonable and delivers the appropriate level of savings that customers have been waiting years to see.

Proposition of Law No. II:

The Commission's \$1.6 million rate adjustment is lawful and reasonable because it is supported by the record evidence and consistent with the 2009 Order. *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4.

Dominion's "evidentiary" argument can only succeed if the Court rejects the Commission's reading of its own order in favor of Dominion's strained interpretation. Dominion dwells on the fact that the Commission stated the "end of 2011" in the 2011 AMR Order. But this argument overlooks entire portions of the Commission's decision that expressed the Commission's expectation that Dominion would complete the AMR program "at the earliest time possible" in order to "maximize savings for ratepayers":

[T]he Commission directed Dominion 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. 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.

In re DEO 2011 AMR (Opinion and Order at 17-18) (October 3, 2012) (*2011 AMR Order*) (emphasis added), DEO App. at 22-23.

[T]he 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*.

In re DEO 2011 AMR (Entry on Rehearing at 5) (November 7, 2012) (emphasis added), DEO App. at 32.

The Commission found that Dominion did not install the AMRs or reroute its communities in a manner that maximized savings for customers. The Commission then made an adjustment based on Staff witness Adkins' testimony, which explained how Dominion could have achieved more savings by completing the AMR program earlier. Mr. Adkins testified that Dominion failed to reroute approximately 27% of its communities by the end of 2011. Testimony of Kerry Adkins at 11-12, DEO Supp. at 97-98. Mr. Adkins also testified that this delay in rerouting resulted in unnecessary costs related to manual meter readers. *Id.* Dominion admits that it did not release its last meter readers until December 31, 2011, which delayed any savings related to the release of these meter readers until 2012. Testimony of Carleen Fanelly at 9-10, DEO Supp. at 57-58 (admitting that "the final cost for these last Project Employees will be reflected in January 2012."). This means none of the savings related to the release of these last meter readers was recognized in the 2011 AMR rider.

Mr. Adkins recommended an adjustment to the AMR charge based on the level of savings Dominion would have achieved if it had complied with the Commission order. Testimony of Kerry Adkins at 16-20, DEO Supp. at 102-106. He explained that Dominion installed AMRs at a slower pace after 2009 and could have fully rerouted all its communities by October, 2011 had it maintained its installation pace. *Id.* at 12-14, DEO Supp. at 98-100. Mr. Adkins explained that this would have produced three full months of higher O&M savings (October, November, and December 2011). *Id.* at 16-20, DEO Supp. at 102-106. Mr. Adkins' calculation was based upon various undisputable facts, such as the meter readers' salaries and the remaining number of meter readers. *Id.*

Although Dominion disagrees with Mr. Adkins' testimony, it's undeniable that it is record evidence. What Dominion really wants the Court to do is reweigh the evidence. The Court, however, has stated repeatedly that "reweighing the evidence is outside the scope of [the Court's] function on appeal." *In re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶ 17; *Utility Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 35. The Court has held that it "will not second-guess the Commission on questions of fact absent" a showing that "the Commission's findings...are manifestly against the weight of evidence." *Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 347, 2007-Ohio-4276, 872 N.E.2d 269, 276-277.

Dominion cites three cases in its merit brief where the Court has reversed Commission decisions based on a lack of record evidence. These cases are inapposite to our facts. In *Canton Storage*, the Commission granted a number of commercial carriers'

applications to transport household goods without any testimony in support of these applications. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 26-33, 647 N.E.2d 136 (1995). This is not what happened in the case below. The Commission based its adjustment on Staff witness Adkins' testimony, which the Commission evaluated and found credible. Dominion cites *Consolidated Rail*, which is easily distinguishable also. In *Consolidated Rail*, the Commission based its decision on a limited amount of evidence that, as the Court noted, failed to support the Commission's costs allocation. *Consolidated Rail Corp. v. Pub. Util. Comm.*, 47 Ohio St.3d 81, 84-85, 547 N.E.2d 1176 (1989). In the case below, Mr. Adkins discussed the basis for his recommended adjustment and how he calculated the adjustment in detail. The Commission's adjustment is based on Mr. Adkins' testimony. The Commission's decision and Mr. Adkins' testimony are entirely consistent.

The *Columbus Southern* case does not help Dominion either. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 29. In *Columbus Southern*, the Court held that the Commission erred by approving a provider of last resort ("POLR") charge. In essence, the Commission approved and described the POLR charge as "cost-based" although there was no evidence that the charge was based on cost. Here, there was evidence regarding meter reader salaries, the historical pace of AMR installations, and the specific dollar amount customers would have saved if Dominion had maintained its prior pace of installation. This was more than enough evidence for the Commission to make an adjustment to Dominion's proposed AMR charge.

Proposition of Law No. III:

The Commission's order was not retroactive and did not violate principles of collateral estoppel.

- A. Assuming, *arguendo*, that the 2009 Order did "revise" the AMR program deadline, Dominion lost the ability to challenge this "revision" because it did not appeal the 2009 Order.**

The Commission did not retroactively modify its earlier order. It simply enforced it. As discussed above, the Commission's interpretation of its 2009 Order is reasonable and entirely consistent with the history of the AMR program. The Commission believes that Dominion understood the 2011 deadline since the beginning of the AMR program in 2007. However, to the extent Dominion now claims the Commission changed the deadline in the 2009 Order, its right to challenge this issue disappeared long ago. After the 2009 Order was issued, Dominion never filed an application for rehearing regarding this issue and never appealed it. Any complaint Dominion tries to raise now regarding the validity of the 2009 Order is a collateral attack on a valid Commission order and should not be entertained by the Court. *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 37; *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 363, 176 N.E.2d 416 (1961).

Further, assuming *arguendo* that the Commission did modify Dominion's initial AMR program schedule, this would not be unlawful. The Commission had the ability to review, monitor, and potentially modify Dominion's accelerated cost recovery program if necessary. "Modifying a regulatory scheme is not problematic in itself. Agencies undoubtedly may change course, provided that the new regulatory course is permissible."

Util. Serv. Partners v. PUC, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶

18. It is entirely within the Commission's regulatory powers to modify an accelerated cost recovery mechanism to ensure customers pay just and reasonable charges.

B. The Commission's enforcement of the rerouting requirements expressed in 2009 Order is legal and reasonable.

Dominion had the burden of proving that its proposed AMR rider charge was just and reasonable. R.C. 4909.19(C), App. at 1 ("At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.") The Commission determined that Dominion's failure to comply with the 2009 Order causes an unjust and unreasonable AMR charge. The Commission adjusted Dominion's AMR charge to remedy this problem. This was not a retroactive action. It was the Commission enforcing its prior order and ensuring that Dominion's customers pay a fair AMR charge.

Dominion cites a slew of inapplicable cases, claiming that it had a guaranteed constitutional right to a "minimum amount of money." There is no basis in Ohio law that a utility is guaranteed a "minimum amount of money." While utilities are entitled to an opportunity to earn "a fair and reasonable rate of return" on their investment, this Court has recognized that utilities are not guaranteed any particular amount of return. *Ohio Edison Co. v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 565, 589 N.E.2d 1292 (1992); *Dayton Power and Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 103, 447 N.E.2d 733 (1983) ("the Constitution no longer provides any special protection for the utility investor.") While the Commission does not have any obligation to provide Dominion

with a particular AMR rider amount, it does have the statutory obligation to ensure the AMR rider charge is just and reasonable.

The only case Dominion cites that is arguably relevant is *Discount Cellular*. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957. In *Discount Cellular*, the Commission issued an order (“1700 Order”) that retroactively deprived parties of their statutory right to file complaints against cellular wholesale providers. *Id.* at ¶ 51. The Court found that, by “applying the 1700 Order to dismiss appellants’ complaints, the PUCO altered the legal significance of the intervenors’ past conduct.” *Id.*

This case and *Discount Cellar* are dissimilar. Here, the Commission notified Dominion of its expectations regarding the AMR program by issuing the 2009 Order. Dominion had a legal obligation to comply with the 2009 Order, which Dominion admits established a 2011 deadline. Because Dominion failed to comply with the 2009 Order, the Commission adjusted the amount of O&M savings that customers should receive. This was not a retroactive act. Rather, it was the Commission performing its statutory obligation to ensure customers pay just and reasonable charges.

Dominion also argues that the Commission’s order was barred by collateral estoppel because, in Dominion’s view, it altered the installation target date and the rerouting requirements set out in the 2009 Order. This argument is baseless because, as explained above, the Commission simply enforced the terms of the 2009 Order. Principles of collateral estoppel are not applicable.

Proposition of Law No. IV:

The Commission properly denied Dominion's motion for a stay.

Dominion contends that a stay should be automatically granted where the requestor agrees to post an adequate bond. A stay is a matter of discretion, not a mechanical, ministerial act as Dominion portrays it. Ohio law provides that every Commission order "shall become effective immediately upon entry thereof," unless otherwise ordered. R.C. 4903.15, App. at 1.

Dominion ignores the significance of delayed enforcement of a Commission order. Unlike staying collection of a judgment between private parties, staying a Commission order setting a rate frustrates the end result of a long and complex process at the Commission. It also can affect the pocketbooks of over a million customers. The Commission is the agency charged by the General Assembly with establishing reasonable rates and charges for these customers. A dissatisfied party must demonstrate adequate grounds for delaying the effectiveness of a Commission decision.

The United States Supreme Court has stated that "[a] stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921, 945 (D.C. Cir. 1958) and *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). The Supreme Court further explained that "[t]he parties and the public,

while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.” *Id.*

While this Court ultimately determined that a stay was warranted, this does not mean that the Commission abused its discretion in declining to stay its own order. An abuse of discretion is “more than an error of law or judgment.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). To establish an abuse of discretion, Dominion must show that the Commission’s “attitude is unreasonably arbitrary, or unconscionable.” *J.M. Smucker, LLC v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, 865 N.E.2d 866, ¶ 16. To the contrary, the Commission carefully reviewed the circumstances and carefully scrutinized the record before determining that a stay was not warranted. The Commission appropriately exercised its discretion.

CONCLUSION

Dominion has reaped the benefits of the AMR program. It represented that customers would enjoy substantial benefits also once the program was completed. But when the five-year deployment period ended, customers were still not obtaining the appropriate level of savings, which forces them to pay unreasonable and unnecessary meter reader charges. This is not fair to customers, it is not how Dominion represented that the program would work, and it’s contrary to the 2009 Order. Therefore, the Commission properly adjusted Dominion’s proposed AMR rider charge. The Commission did so to achieve a just and reasonable result for customers. Its decision should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage pre-paid, or hand-delivered, upon the following parties of record, this 16th day of April, 2013.



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APPENDIX

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4903.15 Orders effective immediately - notice.

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

4909.19 Publication of notice - investigation.

(A) Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish notice of such application, in a form approved by the public utilities commission, once a week for two consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and directly affected by the matters referred to in said application. The notice shall include instructions for direct electronic access to the application or other documents on file with the public utilities commission. The first publication of the notice shall be made in its entirety and may be made in a preprinted insert in the newspaper. The second publication may be abbreviated if all of the following apply:

- (1) The abbreviated notice is at least one-fourth of the size of the notice in the first publication.
- (2) At the same time the abbreviated notice is published, the notice in the first publication is posted in its entirety on the newspaper's web site, if the newspaper has a web site, and the commission's web site.
- (3) The abbreviated notice contains a statement of the web site posting or postings, as applicable, and instructions for accessing the posting or postings.

(B) The commission shall determine a format for the content of all notices required under this section, and shall consider costs and technological efficiencies in making that determination. Defects in the publication of said notice shall not affect the legality or sufficiency of notices published under this section provided that the commission has substantially complied with this section, as described in section 4905.09 of the Revised Code.

(C) The commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters

set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.