

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE EAST OHIO GAS COMPANY)
D/B/A DOMINION EAST OHIO,)
Appellant,)
v.)
THE PUBLIC UTILITIES)
COMMISSION OF OHIO,)
Appellee.)

Case No. 2012 - 2117

Appeal from the Public Utilities
Commission of Ohio

Public Utilities Commission of Ohio
Case No. 11-5843-GA-RDR

REPLY BRIEF OF APPELLANT
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REPLY TO THE COMMISSION

The Commission builds its response to DEO's merit brief on three major points: (1) that DEO used the AMR program to gouge its customers; (2) that the 09-1875 Order required program completion *not* some time after "the end of 2011" *but* at "the earliest possible time"; and (3) that DEO "delayed" rerouting and thus cost savings. It offers no real response to three of DEO's propositions: two regarding retroactivity, one regarding the denial of a stay. DEO can refute every serious point made by the Commission and confirm that the Order must be reversed.

A. The notion that DEO did not "live up to its end of the bargain" defies the facts.

The Commission's overall theme is that DEO was a bad actor who "failed to live up to its end of the bargain," took "the benefits of the AMR rider," but "sacrificed the accelerated . . . schedule." (PUCO Br. at 26, 2.) This is unsupported rhetoric; here are the facts.

On-time Completion. DEO originally proposed "a five-year schedule" for accelerated installation "beginning in January 2008" and thus continuing to the end of 2012. (06-1453 Appl. at 4, Supp. 122.) The Commission did not approve DEO's application until October 15, 2008, almost one year *after* the proposed start date. Nevertheless, by the end of 2011, DEO installed AMR devices on over 99-percent of its active meters—one year *ahead* of the proposed schedule.

Pace of Installation. DEO finished earlier because it worked faster. The Commission approved a pace of 250,000 installations a year. DEO went faster, *exceeding* that pace in 2008 (over 278,000), 2009 (over 332,000), and 2010 (over 257,000), leaving it with less than 250,000 meters to convert in 2011.¹ (*See* 11-5843 Staff Comments at 5 (Apr. 6, 2012).)

¹ The Commission tries to turn this faster pace against DEO. When it says DEO "slowed down" the program (*see* PUCO Br. at 28), it refers solely to the fact that DEO's peak installation year occurred in the middle of the program, as Staff's witness admitted (Tr. 259–61). The evidence shows that DEO installed more devices early in the program, not due to intentional delay, but due to its early, time-saving focus on outside meters. (*E.g.*, Tr. 48.) DEO addressed this point in great detail in its reply brief before the Commission. (*See* 11-5843 DEO Reply Br. at 10–14.)

Program Cost. When approved, the AMR program was expected to cost \$126.3 million. (DEO Ex. 1.0 at 3–4, Supp. 24–25) At over 99-percent completion, the program had cost around \$90.3 million (*id.* at 5, Supp. 26), and at completion, \$90.6 million (*see* Case No. 12-3116-GA-RDR, V. Friscic Dir. Test. at 7 (Mar. 11, 2013)). In other words, the program cost almost \$35 million less than estimated when the Commission approved it.

Meter-Reading Savings. The Commission suggests that DEO broke a promise to deliver “\$6 million in annual customer savings after the 2011 installation year.” (PUCO Br. at 6.) DEO never made such a promise, but it still delivered. In 2012, the year “after the 2011 installation year” (*id.*), DEO experienced over \$6 million in annual savings. (*See* Case No. 12-3116-GA-RDR, V. Friscic Supp. Test. at 3 (Apr. 12, 2013.)) Customers are enjoying those savings through a lower rate approved in May 2013 and are expected to continue to do so.

DEO did not just “live up to its end of the bargain,” it *surpassed* it. As DEO will show, the Commission cannot make its case that DEO fell short of expectations unless it changes them.

B. On appeal, counsel for the Commission improperly attempts to adopt a rationale not given in the Order below.

Before even reaching the merits, DEO must raise a serious issue with the Commission’s brief. How counsel for the Commission *defends* this case is *not* how the Commission *actually resolved* this case. This attempt to shift positions on appeal must be rejected out of hand, as the law of Ohio and scores of federal and state decisions show.

1. Due to the separation of powers, courts will not adopt appellate counsel’s new, *post hoc* rationalizations for an agency’s decision.

The seminal case ruling out the attempt to shift positions on appeal is *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). There, the U.S. Supreme Court held that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” *Id.* at 95. Lower *court* decisions, in contrast,

“must be affirmed if the result is correct although the lower court relied upon a wrong ground.” *Id.* at 88 (internal quotations omitted). But a legislature’s exclusive grant of jurisdiction to the agency compels a different rule: “an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” *Id.* Thus, to respect the separation of powers, an agency’s “action must be measured by what [it] did, not by what it might have done.” *Id.* at 93–94.

Among other things, this means that “courts may not accept appellate counsel’s post hoc rationalization for agency action; *Chenery* requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012) (internal brackets omitted), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). In short, an agency’s “appellate counsel cannot fill in the holes in the agency’s decision.” *NLRB v. Indianapolis Mack Sales & Serv.*, 802 F.2d 280, 285 (7th Cir. 1986).

This doctrine is not distinctive to federal law, but widely recognized among the States.² As one commentator explains, “The number of cases rejecting agency efforts to justify actions

² See, e.g., *Ala. Dep’t of Human Res. v. Dye*, 921 So.2d 421, 426 (Ala. Civ. App. 2005); *Ark. Dept. of Human Serv. v. Holman*, 96 Ark. App. 243, 247 (App. Ct. 2006); *Pacific Gas & Electric Co. v. Pub. Util. Comm.*, 85 Cal.App.4th 86, 97 (2000); *Benjamin v. Wash. Hosp. Ctr.*, 6 A.3d 263, 267 (D.C. 2010); *Dev. Serv. Alternatives, Inc. v. Ind. Family & Soc. Serv. Admin.*, 915 N.E.2d 169, 187 (Ind. Ct. App. 2009); *Cent. La. Elec. Co. v. Public Serv. Comm.*, 437 So. 2d 278, 279 fn.2 (La. 1983); *UPS v. People’s Counsel*, 336 Md. 569, 586 (1994); *NSTAR Elec. Co. v. Dept. of Pub. Utils.*, 462 Mass. 381, 387 (2012); *Ogren v. Duluth*, 219 Minn. 555, 563–64 (1945); *State ex rel. Keeven v. Hazelwood*, 585 S.W.2d 557, 561 (Mo. Ct. App. 1979); *Elizabethtown Water Co. v. Bd. of Pub. Utils.*, 107 N.J. 440, 460 (1987); *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv.*, 77 N.Y.2d 753, 758 (N.Y. 1991); *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 681 (1994); *Asbury v. Texas State Bd. of Public Accountancy*, 719 S.W.2d 680, 683 (Tex. Ct. App. 1986); *Boyd v. People, Inc.*, 596 S.E.2d 100, 108 (Va. Ct. App. 2004); *Webb v. W.Va. Bd. of Med.*, 569 S.E.2d 225, 234 (W.Va. 2002).

after the fact shows the strength of the prohibition against post hoc rationalization.” 2 Charles H. Koch, Jr., ADMINISTRATIVE LAW & PRACTICE § 8.22 (2d ed. 1997).

2. Ohio law compels the same prohibition.

To DEO’s knowledge, this rule has not been expressly articulated by this Court, although it recently suggested misgivings about the propriety of this practice. In the *In re Middletown Coke Co.* appeal, the Court noted that “[c]ounsel for the siting board” raised an “argument that the board did not mention or rely on in its orders below.” 127 Ohio St.3d 348, 2010-Ohio-5725, ¶ 17 fn.1. The Court “assume[d], without deciding, that this is appropriate,” and rejected the argument in a footnote. *Id.* (parenthesis omitted). In fact, this approach was inappropriate, and Ohio law shows that the Court should join the others who follow *Chenery*.

Most directly, R.C. 4903.13 makes clear that it is *the reasonableness and lawfulness of the order itself* being reviewed. *See id.* (mandating reversal if the Commission “order was unlawful or unreasonable”). Moreover, the Court only has jurisdiction to consider arguments that were “set forth specifically” in an application for rehearing below. R.C. 4903.10. If the Commission may substitute rationales on appeal, it could easily default the appeal through no fault of the appellant. The switch to a new rationale deprives the appellant of *any* opportunity to develop the record, present “additional evidence” under the rehearing statute, *see id.*, or preserve its appellate arguments. (All this also raises due-process concerns.)

Finally, the separation-of-powers concerns undergirding *Chenery* apply equally in Ohio. This Court has repeatedly recognized that “the General Assembly has granted the commission exclusive jurisdiction to hear and determine rate and service-related matters,” *SER Ohio Edison Co. v. Shaker*, 68 Ohio St.3d 209, 211, 625 N.E.2d 608 (1994), and thus that such matters “are best heard, in the first instance, as required by law, by the Public Utilities Commission,” *W. Res. Transit Auth. v. Pub. Util. Comm.*, 39 Ohio St.2d 16, 19, 313 N.E.2d 811 (1974).

3. The rationale on appeal is different than the rationale of the Order, and the new rationale must be disregarded.

The *Chenery* rule follows under Ohio law, and counsel for the Commission violates it, presenting a different rationale than set forth in the Order below.

a. The Order below found that the \$1.6 million reduction reflected savings that “should have been achieved by the end of 2011.”

The Commission’s rationale below was that the \$1.6-million reduction reflected “the appropriate level of O&M savings that should have been achieved by the end of 2011.” (Order at 18, Appx. 23.) This is no stray quotation; the Order sets forth this rationale again and again. For example: “DEO should have . . . achieve[d] maximum savings by the end of the 2011 project year.” (*Id.* at 17, Appx. 22.) Again: “. . . DEO’s calculation does not reflect the full level of savings that was to be achieved by the end of 2011” (*Id.* at 18, Appx. 23.) Again: “. . . DEO failed to comply by achieving maximum savings by the end of 2011.” (*Id.*) And again, and perhaps most explicitly: “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.*” (*Id.* (emphasis added).)

The entry on rehearing was no different—it continued to tie the reduction to the end of 2011. It again faulted DEO for failing to achieve “additional consumer savings” had “rerouting [been] completed by the end of the [sic] 2011.” (Entry on Rehg. at 6, Appx. 33; *see also id.* at 5, Appx. 32 (DEO failed “to fully reroute its shops by the end of 2011, maximizing customer savings”); *id.* (“DEO should have completed installation of AMR devices by the end of 2011, along with rerouting to maximize savings . . .”).)

Of course, as DEO explained in its brief, the problem with this reasoning was that the \$1.6 million reduction was *not* based on an end-of-2011 completion date. Rather, it was based on DEO’s failure to complete installations by early August of 2011 and to achieve total program

savings by October 2011. So how did counsel for the Commission resolve the obvious disconnect between the evidence and the Order?

b. A different rationale is presented on appeal.

Tellingly, counsel for the Commission abandons the rationale of the Order. Counsel argues that the Order penalized DEO for failing to “complet[e] the AMR program *earlier*” than the end of 2011. (PUCO Br. at 27 (emphasis added).) Counsel says that DEO was expected to “complete the AMR program ‘at the earliest time possible’ in order to ‘maximize savings for ratepayers.’” (*Id.* at 26.) And where the Order repeatedly invoked “the end of 2011” target date as justifying the reduction, the brief devotes *one sentence* to that date, and then only to say that DEO “dwells on the fact that the Commission stated the ‘end of 2011’ in the 2011 AMR Order.” (*Id.*) (Amazingly, this is the only thing counsel ever says regarding the end of 2011 target—that DEO “dwells on” it.) So the rationale for the reduction offered on appeal seems to be that the “end of 2011” targets specified in the 09-1875 Order meant *nothing* in light of the earliest-possible-completion, maximum-savings expectation.

DEO will respond to this position in a moment. For now, the key point is that *counsel’s rationale is plainly not the rationale of the Order below*. As the quotations above demonstrate, the Order does *not* say: “Don’t dwell on the end of 2011; the deadline was ASAP; we penalize you accordingly.” Eight times over, at least, the adopted reduction is tied to the end of 2011. To be clear, none of this is to suggest that the new rationale is any better on the merits, but simply that the Court should not even reach its merits. The Order must be evaluated on its own terms, and the Court should affirmatively disregard the substitute rationale offered by counsel.

C. Counsel for the Commission simply disregards key provisions of the 09-1875 Order.

Turning to the merits of counsel’s new rationale, it must be rejected. It depends entirely on a reading of the 09-1875 Order that simply disregards much of what that order said.

1. **The 09-1875 Order unambiguously stated that AMR program completion was “anticipate[d]” sometime *after* “the end of 2011.”**

Here, again, is the critical paragraph from page 7 of the 09-1875 Order:

[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. 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.

Whatever else this order says, it unambiguously provided that total program *completion* was not expected until sometime *after* the end of 2011. The Commission acknowledges that rerouting is the final step of program, but it was “anticipate[d]” that rerouting would be completed sometime *after* “the end of 2011.” *See id.* (“by the end of 2011, it will be possible to reroute nearly all of DEO’s communities”). “To that end,” DEO was to aim for complete installation “by the end of 2011.” *Id.* While the order does not give an exact target for total program completion, including rerouting for *all* of DEO’s communities, it was unambiguously expected after 2011.

What about the “earliest possible time” language? There is no conflict between this language and the specific-date timing requirements. The “earliest possible time” language in the topic sentence tells the reader that the paragraph will concern the speed of installation. And DEO would agree, if the paragraph stopped with the first sentence, it would communicate a very different idea. But the paragraph does not stop there; in fact, the first word of the next sentence is *Therefore*, which denotes that what comes next will clarify and explain what came before. And the following sentences set forth specific target dates, which are naturally read as fleshing out what the Commission meant by “earliest possible time.”

The order's larger context confirms this understanding. DEO's original application proposed installing AMR devices under "a five-year schedule . . . beginning in January 2008," which meant an intended completion date around the end of 2012. (DEO Ex. 3.0 at 4, Supp. 122.) The 09-1875 Order told DEO to move that target up a year, to the end of 2011. In this light, it makes sense that the Commission would *generally* tell DEO to aim for "earliest possible" completion and *specify* target dates for which to aim.

In sum, all provisions of the 09-1875 Order may naturally be read together. There is no need to read one sentence into conflict with any other. It must be read as a whole.

2. Counsel disregards the 09-1875 Order's express timing expectations.

Contrast the reading proposed by Commission counsel. That reading does *not* give effect to every provision of the 09-1875 Order but reads one phrase ("earliest possible time") to the exclusion of all others. Here is how counsel reads the earlier order:

[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. 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 [and] rerouting at the earliest possible time.~~

09-1875 Order at 7 (strikes through added). Again, if the phrase "earliest possible time" appeared by itself, DEO agrees that the order would communicate a very different idea. But the phrase does not appear by itself. It appears *in a context*, and context cannot be ignored. *See, e.g., In re Ormet Primary Aluminum Corp.*, 129 Ohio St.3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶ 32 ("the question is not what [a certain word] could mean in isolation, but what [the writing] as a whole requires"). Counsel for the Commission does not just ignore context, but effectively deletes it.

The brief proves the point. It never gives the “end of 2011” targets *any effect*. Again, the only place in the entire brief where counsel directly addresses the specific “end of 2011” targets is this sentence: “Dominion dwells on the fact that the Commission stated the ‘end of 2011’ in the 2011 AMR Order.” (PUCO Br. at 26.) What this is supposed to mean is unclear: it seems to fault DEO for finding the date significant. But whatever it means, it does not even *attempt* to give meaning to the “end of 2011” language.

3. The Commission’s reading must be rejected and the Order must be reversed.

The Court, then, has before it two readings: one (Commission counsel’s) that accounts for part of the prior order and disregards the rest, and another (DEO’s) that accounts for all of it. The Court has made clear that readings like Commission counsel’s must be rejected.

Ignoring words is an unacceptable method of textual interpretation and an error for which the Commission has been reversed before. For example, in a recent case, *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, the Court reversed an order premised on the Commission’s interpretation of a contract. It noted the basic interpretive rule that an interpreter is “required, if possible, to give effect to every provision of the contract,” which means that “[i]f one construction . . . would render a clause meaningless and it is possible that another construction would give that same clause meaning and purpose, then the latter construction must prevail.” *Id.* ¶ 54. Because the “PUCO’s construction here would render [one] phrase . . . a nullity and defeat the purpose of [another],” *id.*, the Court reversed the Commission, *id.* ¶ 67.

Likewise, in a case involving the interpretation of a statutory text, the Commission “equat[ed]” two unlike terms, making one of them redundant. *See East Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988). “In making this construction, the commission has failed to abide by a basic rule of statutory construction—that words in statutes

should not be construed to be redundant, *nor should any words be ignored.*” *Id.* (emphasis added). Accordingly, the Court reversed the Commission. *Id.* at 300; *see also, e.g., Warner v. Ohio Edison Co.*, 152 Ohio St. 303, 307, 89 N.E.2d 463 (1949) (two statutes addressing the “same subject matter” should “be so construed that effect is given to every provision of each”).

4. These principles of construction apply to an agency’s interpretation of its own orders.

These basic principles of construction must apply to the Commission’s interpretation of its own orders. These principles have no special tie to the nuances of contract law or legislation, but are simply commonsense ways to understand the meaning of a writing. Moreover, Commission orders frequently have massive economic impacts and always carry the full weight of law, *see* R.C. 4905.54, 4905.56, & 4905.99(B) (orders enforceable by criminal and financial penalties), so there is no reason to approach these texts any less seriously than any other legal authority. Surely they carry more weight than most, if not all, private contracts.

Federal courts scrutinize the interpretation of a prior order based on the same interpretive rules applicable to any other text. “In analyzing [a lower court’s earlier] order, we apply ordinary rules of construction.” *Little Earth of United Tribes, Inc. v. U.S. Dept. of Hous. & Urban Dev.*, 807 F.2d 1433, 1438 (8th Cir. 1986). Thus, an “order should be viewed as a whole, and an interpretation that gives effect to all parts of the order will be preferred over one that leaves portions of the order meaningless or insignificant.” *Id.*; *see also, e.g., DirecTV, Inc. v. Leto*, 467 F.3d 842, 847 (3d Cir. 2006) (“[The lower court] order was so direct and clear-crafted that no contrary conclusion was later conceivable. Once a District Court speaks with such clarity, any deference to its discretion [to interpret the order] falls away”).

The same principle applies to agencies: “we evaluate an agency’s interpretation [of its own order] by examining the entire context of the original order,” “bear[ing] in mind that

administrative orders, like statutes, are not to be given strained and unnatural constructions.” *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1239 (10th Cir. 2010) (internal quotation marks omitted); *see also, e.g., Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067–68 (D.C. Cir. 2005) (an agency’s interpretation of its own orders will not be upheld if “its interpretation is plainly erroneous or inconsistent with the order”); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002) (“nor can [an agency] interpret an order in a manner contrary to its terms”).

Because counsel’s interpretation of the 09-1875 Order does not even attempt to give meaning to the unambiguous provisions establishing completion targets, it must be rejected.

5. Minus target dates, the 09-1875 Order would have been impossible to satisfy.

That counsel’s reading ignores numerous terms in the earlier order is reason alone to reject it, but it is not the only reason. Counsel’s interpretation leaves an order that is both so extreme and so internally incoherent that no one could have obeyed it—or even understood it.

a. “Earliest possible completion” is an unreachable deadline.

In counsel’s eyes, the 09-1875 Order said only this: “savings will be maximized and rerouting will be made possible . . . at the earliest possible time.” What would this have meant?

The instant that doubly-superlative phrase first appeared to the public, DEO should have dropped everything; immediately transferred every member of the organization into AMR deployment; begun hiring as many new employees as it could afford; increased salaries to attract only the brightest and fastest; purchased faster service trucks and perhaps a fleet of helicopters; told all personnel working on the AMR program, “Don’t walk; run!”; and taken any other step necessary, no matter how extreme or costly, to reach the goal. And if any person failed to cut every stray nanosecond from the installation—failing to turn right on red, dialing a wrong

number, mishandling a wrench—DEO would have violated the order. If something faster were possible, DEO would not have achieved “earliest possible” completion.

If this seems excessive, that is the point: the words “earliest possible time,” by themselves, admit neither exception nor excuse. They take no account of cost, balance, practicability, or any of DEO’s other duties. If they are taken out of context and literally, as counsel insists they be, they form an impossible commandment.

b. *Earliest possible completion would not achieve maximum savings.*

But that is only one horn of the dilemma. For DEO was also to “maximize savings.” But to comply with the “earliest possible” standard, DEO would surely have violated the “maximum savings” standard. That is because savings are not *merely* a function of released meter readers, but of *total* program costs. (See DEO Ex. 1.0 at 6:1–9, Supp. 27.) Cutting every “possible” second from the installation would have cost exorbitant sums, sums that would have been collectable from customers. Taken literally, “earliest possible” completion and “maximum savings” cannot coexist.

To see how useless such an order would have been, imagine you were told to get from Seattle to Miami “at the earliest possible time, for as little money as possible.” One plane ticket gets you there tomorrow and costs \$2,000. Another ticket is \$500 less, but gets you there a day later. A bus fare is only \$50, but it will take two weeks. And so on. Which option gets you there “at the earliest possible time, for as little money as possible”? It is an unanswerable question. If someone told you this, you would ask for more guidance; in fact, you would probably ask when you need to get there. *Going faster* and *saving money* do not necessarily correlate; in fact, the opposite is often true.³

³ This is common sense, but it is also confirmed in the record. (See Tr. 275 (Staff witness agreeing that “it would cost more to install 330,000 devices than it would to install 250,000

Practically speaking, had the Commission told DEO to complete the program at the earliest possible time, maximize savings, *and nothing else*, it would have given no guidance on when to actually complete the program. The impossibility and impracticability of counsel's alternate reading is another reason to reject it.

In sum, the interpretation of the 09-1875 Order proffered by counsel on appeal not only was not given below; not only disregards that order's specific and unambiguous "end of 2011" timing guidance; but renders the order practically meaningless.

D. The numerous arguments related to allegedly delayed rerouting are incorrect.

The Commission devotes a great deal of its merit brief to the position that DEO delayed rerouting and thereby delayed savings to customers. There are many problems with its position.

1. Counsel's lead argument was never mentioned below and lacks merit.

To begin with, counsel's lead point (once again) was never mentioned in the Order. Counsel does not contest DEO's showing that it achieved full staffing reductions by the first day of 2012, but assigns great import to the fact that DEO released its last few meter readers "on the first day of 2012' rather than the 'end of 2011.'" (PUCO Br. at 17.) "The difference between these two dates," counsel says, "is incredibly important to this case" as it allegedly increased the charge to customers. (*Id.*)

If the distinction between these two dates is "incredibly important"—and it is not—it is strange that the Commission never mentioned it at any point in the Order or Entry on Rehearing. This is another attempt to provide a new rationale on appeal and should be disregarded.

The new argument is also wrong. The distinction between releasing meter readers on December 31, 2011, and January 2, 2012, is demonstrably irrelevant. Releasing the last meter

devices"); Tr. 185 (DEO witness Ms. Fanelly testifying that increasing the pace of installation "would have increased the expense to get those completed at that rate due to overtime, additional truck rolls, all of those types of activities").)

readers on December 31, 2011, would have made *no difference* in the charge in this case. To see why, remember that these are annual proceedings, meaning that the charge at issue recovered only “costs incurred during calendar year 2011.” (See 11-5843-GA-RDR, Pre-Filing Notice at 1 (Nov. 30, 2011).) So whether these employees worked 1 day in 2012, or 366 days in 2012, it would have had no impact on the 2011 charge. If the January 2, 2012 release date were to pose any problems (which DEO does not concede), it would have been for the *next year’s* charge. At worst, it would have meant that an extra day or two of meter-reader costs were part of the 2012 charge.⁴ But 2012 costs are irrelevant in a 2011 case.

2. All arguments that DEO “delayed” rerouting are circular.

Most of the Commission’s merit brief argues some variation on the theme that DEO “delayed rerouting, which then delays the benefits of cost savings for customers.” (PUCO Br. at 20; *see also id.* at 23–24.) But these arguments about “delayed” rerouting are circular. They assume the very point in dispute, which is a logical fallacy. *See Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 10, 647 N.E.2d 136 (1995) (reversing order where “commission’s reasoning is circular and presumes, without record support,” the fact relied upon for decision). Saying that DEO “delayed” rerouting assumes that DEO rerouted “too late.” But this is entire point of dispute—when was DEO expected to have completed rerouting?

The 09-1875 Order gives a clear answer: “The Commission anticipates that, by the end of 2011, it will be possible to reroute nearly all of DEO’s communities.” (09-1875 Order at 7, Supp. 7.) Again, the words “nearly all” show that the Commission anticipated 2012 completion of rerouting, which DEO achieved. By the end of 2011, it had rerouted all but three of its local

⁴ For what it is worth, no one raised any issue of any kind regarding the 2012 charge; that application was filed and approved without any party filing substantive comments. (See PUCO Case No. 12-3116-GA-RDR, Finding & Order (Apr. 24, 2013).)

shops, one was in process, and it had installed enough devices that it was “possible to reroute” the other two. (DEO Ex. 2.0 at 5, Supp. 53.) DEO did not delay rerouting.

3. With respect to rerouting, the Commission continues to ignore words.

The Commission’s response to DEO’s compliance with these rerouting provisions is to mischaracterize them. For example, several times, the Commission selectively quotes this provision to omit the words “it will be possible.” (*See, e.g.*, PUCO Br. at 20 (“The Commission ordered Dominion to reroute ‘nearly all of its communities’ ‘by the end of 2011.’”); *id.* at 23 (“the Commission logically expected to see ‘nearly all of [Dominion’s] communities’ fully rerouted ‘by the end of 2011’”).) These omissions suggests recognition of a problem.

To be fair, the Commission does acknowledge the phrase “it will be possible to reroute” one time. It asserts that the phrase “indicated that rerouting . . . ‘could be done’ by the ‘end of 2011.’” (*See id.* at 24 n.3.) Frankly, DEO is not sure what *that* means, but the Commission then clarifies that it means “actual rerouting” by the end of 2011. (*See id.* at 24.) And this suggests that the parties have reached an irreconcilable difference over English usage. To DEO, the phrase “will be possible to reroute” plainly is not the same as the phrase “will have rerouted.” The tenses are different, and the word “possible” *denotes* achievability, not achievement. “Possible” is not the same as “done.”

Of course, even granting this neglect (or abuse) of the phrase *it will be possible*, the Commission still has to deal with the words *nearly all*. Whatever the 09-1875 Order wanted done, it was only to be done to “nearly all” DEO’s communities. Surely the Commission will agree that “nearly all” does not mean “all.” So how else can the order be understood, but as expecting DEO to complete rerouting sometime in 2012?

4. DEO achieved full cost savings *before* completing rerouting.

The record also refutes the Commission’s various assertions that DEO delayed rerouting to “delay[] the benefits of cost savings.” (PUCO Br. at 20; *see also id.* at 22 (DEO “inappropriately segregates rerouting from customer savings”); *id.* at 23–24.)

Again, this is demonstrably false. DEO did not wait until rerouting was complete to cut its costs. On the contrary, the undisputed evidence shows that DEO achieved full cost-saving measures *before* rerouting was complete. Heading into 2012, although rerouting was still being finished, DEO had fully reduced its meter-reading staff and hence achieved *all* cost savings expected from the program. (*See* DEO Ex. 2.0 at 8–9, Supp. 56–57.) The Commission concedes that staffing reductions are what drive cost savings. (*See* Staff Ex. 9.0 at 4:7–12, Supp. 90; *see* PUCO Br. at 18.) And the undisputed record evidence showed that “[b]y the first day of 2012, DEO had . . . *made full staffing reductions.*” (DEO Ex. 2.0 at 8 (emphasis added), Supp. 56.)

The Commission’s assertions that rerouting delayed cost savings are unsupported and unsupportable. DEO made these points with record citation in its opening brief. (*See* pp. 5–6, 11–12, & 21.) If any evidence contradicted DEO, surely the Commission would have cited it.

5. The suggestion that DEO “delayed” savings until 2013 is disingenuous.

Finally, the Commission repeatedly suggests that DEO “delay[ed] savings until 2013 despite the fact the Commission established a 2011 deadline.” (PUCO Br. at 24; *see also, e.g., id.* at 12 (“customers are forced to pay for these last few manual meter meters [*sic*] . . . until 2013 even through [*sic*] Dominion released [them] on December 31, 2011”); *id.* at 18 (“until 2013, Dominion will continue to charge customers for manual meter readers that stopped actually providing . . . services on December 31, 2011”).)

These assertions and others like them are *extremely* misleading, and verge on impropriety. It is correct that there is a roughly two-year lag between any installation work and

the *full* rate impact of that work. What is incorrect is the implication that this can or should be held against DEO. On the contrary, as the Commission knows, this two-year lag is *unavoidably* how the program works. So when the Commission told DEO to aim for complete installations by the end of 2011, it necessarily meant that *full* cost savings would not be realized in rates until 2013 at the earliest. Here is why two years always fall between the work and the full rate impact.

The first year reflects the fact that cost-saving steps taken in one year are not *fully* realized till the next. To illustrate, imagine a meter reader is released in June 2011. Costs in 2011 will reflect *partial* savings, that is, savings of half his salary (from July to December). It is not until 2012 that *full* savings will be realized; 2012 will include none of his salary. But this is just how time works—if you install new light bulbs in December 2011, you would not complain about a lack of savings on your November 2011 electric bill. So had the Commission wanted 12 months of full cost savings to be *experienced* in 2011, it should have told DEO to wrap up the program *by the end of 2010*.

So cost-cutting in 2011 only leads to a full year of savings in 2012. But there is one more unavoidable year of lag before those savings are reflected in rates. Under the procedures required by the Commission, DEO cannot even apply for approval of new rates reflecting 2012 costs *until 2013*. In 2012, DEO simply tracks its costs; it then translates those costs into a rate; and in early 2013, it files an application for review and approval of that rate. DEO *cannot* put new rates reflecting new savings into effect until the Commission approves.

So, to summarize, *staffing reductions* occur in year one; the resultant savings are *fully* experienced in year two; those savings are *reflected in rates* in year three. Applying it here, by the end of 2011, DEO fully reduced its staff. Throughout 2012, DEO's cost of service reflected

the full impact of those reductions. In 2013, DEO received approval of its new charge, which reflected the full staffing reductions *achieved* in 2011 and the full savings *enjoyed* in 2012.

The salient point is that it was an unavoidable, known fact that there would be a “delay [in] savings until 2013 despite the fact the Commission established an end of 2011 deadline.” (PUCO Br. at 24.) The Commission knows this. That it would file a brief in this Court attempting to fault DEO on this basis is remarkable.

E. DEO did not propose a five-year program beginning January 1, 2007.

The Commission also asserts that DEO is “revising the history of the AMR program” by “claiming that it originally intended the AMR program to end in 2012” and “conveniently ignor[ing]” the fact that its original application proposed 2007 installations. (PUCO Br. at 20.)

This is an audacious position. The Commission again simply ignores pertinent language whenever necessary to make its point. Note where the quotation marks begin in the following sentence from the Commission’s brief:

Dominion cites the 2006 AMR Application, stating that it planned to install “250,000 [AMR] units per year beginning in January 2008.”

(*Id.*) Here is the actual sentence from the application, with the key, omitted words italicized:

Under a five-year schedule, the Company would install 250,000 [AMR] units per year beginning in January 2008.

(06-1453 Appl. at 4, Supp. 122.) The five years beginning January 2008 are 2008, 2009, 2010, 2011, and 2012. Whoever is “revising” history, it is not DEO.

But wait, the Commission says, the original application also mentioned installations in 2007. True; but unsurprisingly, DEO did not simply contradict itself or botch counting to five. DEO mentioned certain 2007 installations *only to state that they were being excluded from the AMR program*. DEO stated that it “will commence replacement of [certain defective remote] devices in the first quarter of 2007” but “will not include the cost associated with any

defective . . . remotes . . . [in] the AMR Cost Recovery Charge.” (*Id.* at 4–5 & 4 fn.2, Supp. 122–23.) That the Commission would simply omit to inform the Court of this information is, again, remarkable.

Much more could be said (for more, *see* 11-5843 DEO Reply Br. at 15–22), but frankly, any dispute over the start date of the program is pointless. DEO agrees that the 09-1875 Order set an earlier installation target than its application proposed: “the end of 2011.” And had DEO proposed a five-year schedule beginning in 2007, that would have led to the same target: “the end of 2011.” The problem, again, is that the Commission will not even give DEO till the end of 2011; it penalized DEO for failing to install all devices by *early August of 2011*.

F. The Commission’s response on retroactivity and collateral estoppel misses the point.

The Commission’s response regarding issues of retroactivity and collateral estoppel is to assert that DEO cannot challenge “the validity of the 2009 Order.” (PUCO Br. at 30.) This is non-responsive. DEO obviously is not challenging the validity of 09-1875 Order.

G. DEO plainly did not claim that it was guaranteed money.

The Commission also asserts that DEO “claim[ed] that it had a guaranteed constitutional right to a ‘minimum amount of money.’” (*Id.* at 31.) Yet another mischaracterization. In the language quoted by the Commission, DEO was quoting a case for the proposition that a government act imposing financial consequences is substantive and may not be carried out retroactively. DEO did not say that *it* was guaranteed money.

H. The Commission offers no real defense of its denial of DEO’s motion for stay.

Regarding its denial of DEO’s motion for stay, the Commission offers hardly any defense. It relies solely on a single U.S. Supreme Court case that held stays are not automatic. That is true, but that case is not on point. It addressed an appellate court’s “power to hold an

order in abeyance” under its “inherent” authority. *See Nken v. Holder*, 556 U.S. 418, 426 (2009). DEO was not asking an appellate court to exercise such an extraordinary power.

Nken did *not* address a request for stay, pending appeal, with an offer to post bond. In that situation, federal law is like Ohio’s. *See, e.g., Arban v. West Publ. Corp.*, 345 F.3d 390, 409 (6th Cir. 2003) (federal rules “entitle[] a party who files a satisfactory supersedeas bond to a stay of money judgment as a matter of right”). Besides citing this off-point case, the Commission offers no defense for the denial of DEO’s motion for stay.

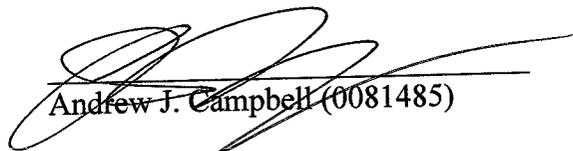
DEO would reiterate: it does not claim that a stay pending appeal is or should be *automatic*. But if the appellant can and will protect all parties from any substantial harm—as was the case here—the stay should be granted. That is Ohio law, and it is federal law, too.

REPLY TO AMICUS

The Ohio Consumers’ Counsel (“OCC”) filed an amicus brief in support of the Commission. For the most part, it offers similar arguments to those raised by the Commission, which DEO has already responded to above. It raises one additional argument, however, that the Commission “properly disallowed costs associated with AMR devices held in inventory at the conclusion of the program.” (OCC Amicus Br. at 12–13.) This pertains to a decision that DEO did not appeal, so this argument is irrelevant and may be disregarded.

Dated: May 28, 2013

Respectfully submitted,



Andrew J. Campbell (0081485)

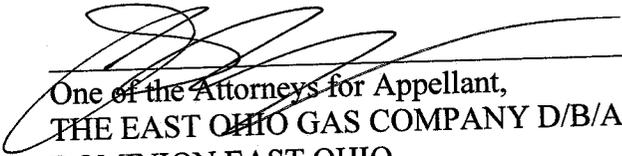
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant, DEO, was served by U.S. mail this 28th day of May, 2013, upon the following:

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