

ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO POWER COMPANY,)	
)	
Appellant/Cross-Appellee,)	Case No. 2012 - 2008
)	
v.)	
)	Appeal from the Public Utilities
THE PUBLIC UTILITIES)	Commission of Ohio
COMMISSION OF OHIO,)	
)	Public Utilities Commission of Ohio
Appellee.)	Case No. 11-4920-EL-RDR and
)	Case No. 11-4921-EL-RDR
)	

**THIRD MERIT BRIEF IN SUPPORT OF
APPELLANT/CROSS-APPELLEE OHIO POWER COMPANY
ON BEHALF OF AMICUS CURIAE
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

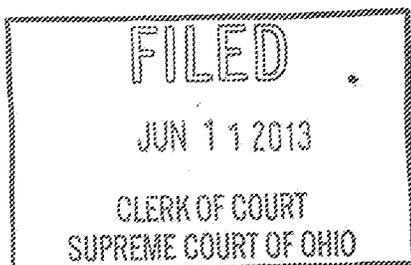
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TABLE OF CONTENTS

I. REPLY IN SUPPORT OF OHIO POWER..... 1

A. DEO’s amicus brief is properly before the Court and should be considered..... 2

**B. On appeal, counsel for the Commission improperly attempts to adopt
 a rationale not given in the Order below. 3**

**1. Due to the separation of powers, courts will not adopt appellate counsel’s
 new, *post hoc* rationalizations for an agency’s decision..... 3**

2. Ohio law compels the same prohibition. 4

**3. The rationale on appeal is different than the rationale of the Order, and
 the new rationale must be disregarded. 5**

**4. The concept of distinct deferral and collection periods is not found in
 the earlier, ESP I Order. 7**

**C. Not one of the appellees even acknowledges the existence of *Discount Cellular* or of
 the constitutional prohibition against retroactivity. 8**

**D. The only limit the Commission acknowledges on its modification power is
 no limit at all. 9**

**E. Contrary to the Commission, the general rule in Ohio is that *res judicata* and
 the rule against retroactivity *do* apply. 10**

**F. The Commission’s entire defense is rooted in a one-sided reading of
 the case law. 11**

II. CONCLUSION 13

TABLE OF AUTHORITIES

CASES

<i>Ala. Dep't of Human Res. v. Dye</i> , 921 So.2d 421 (Ala. Civ. App. 2005).....	4
<i>Amanini v. N.C. Dept. of Human Resources</i> , 114 N.C. App. 668 (1994).....	5
<i>Ark. Dept. of Human Serv. v. Holman</i> , 96 Ark. App. 243 (App. Ct. 2006).....	4
<i>Asbury v. Texas State Bd. of Public Accountancy</i> , 719 S.W.2d 680 (Tex. Ct. App. 1986).....	5
<i>Benjamin v. Wash. Hosp. Ctr.</i> , 6 A.3d 263 (D.C. 2010).....	4
<i>Boyd v. People, Inc.</i> , 596 S.E.2d 100 (Va. Ct. App. 2004).....	5
<i>Cent. La. Elec. Co. v. Public Serv. Comm.</i> , 437 So. 2d 278 (La. 1983).....	4
<i>Dev. Serv. Alternatives, Inc. v. Ind. Family & Soc. Serv. Admin.</i> , 915 N.E.2d 169 (Ind. Ct. App. 2009).....	4
<i>Discount Cellular, Inc. v. Pub. Util. Comm.</i> , 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957	10, 11
<i>Elizabethtown Water Co. v. Bd. of Pub. Utils.</i> , 107 N.J. 440 (1987).....	5
<i>Erie Brush & Mfg. Corp. v. NLRB</i> , 700 F.3d 17, (D.C. Cir. 2012)	4
<i>In re Gilbraith</i> , 32 Ohio St.3d 127, 512 N.E.2d 956 (1987).....	12
<i>In re Middletown Coke Co.</i> 127 Ohio St.3d 348, 2010-Ohio-5725, 939 N.E.2d 1210.....	5
<i>La Barbera v. Batsch</i> , 10 Ohio St.2d 106, 227 N.E.2d 55 (1967).....	13
<i>Maldonado v. U.S. Attorney General</i> , 664 F.3d 1369, (11th Cir. 2011)	13
<i>MCI Telecom. Corp. v. Pub. Util. Comm.</i> , 32 Ohio St.3d 306, N.E.2d 337 (1987)	12
<i>NLRB v. Indianapolis Mack Sales & Serv.</i> , 802 F.2d 280 (7th Cir. 1986).....	4
<i>NSTAR Elec. Co. v. Dept. of Pub. Utils.</i> , 462 Mass. 381 (2012).....	4
<i>Office of Ohio Consumers' Counsel v. Pub. Util. Comm.</i> , 16 Ohio St.3d 9, N.E.2d 782 (1985). 11	
<i>Ogren v. Duluth</i> , 219 Minn. 555 (1945).....	4
<i>Pacific Gas & Electric Co. v. Pub. Util. Comm.</i> , 85 Cal.App.4th 86 (2000)	4
<i>Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv.</i> , 77 N.Y.2d 753 (N.Y. 1991).....	5
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943).....	3, 4, 5
<i>SER Ohio Edison Co. v. Shaker</i> , 68 Ohio St.3d 209, 625 N.E.2d 608 (1994).....	6
<i>State ex rel. Keeven v. Hazelwood</i> , 585 S.W.2d 557 (Mo. Ct. App. 1979).....	4
<i>UPS v. People's Counsel</i> , 336 Md. 569, (1994).....	4
<i>Utility Serv. Partners, Inc. v. Pub. Util. Comm.</i> , 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038,	13
<i>W. Res. Transit Auth. v. Pub. Util. Comm.</i> , 39 Ohio St.2d 16, N.E.2d 811 (1974).....	6

Webb v. W.Va. Bd. of Med., 569 S.E.2d 225 (W.Va. 2002). 5

STATUTES

R.C. 4903.13 4
R.C. 4903.09 10
R.C. 4903.10 5
R.C. 4928.144 13

TREATISE

Charles H. Koch, Jr., *ADMINISTRATIVE LAW & PRACTICE* § 8.22 (2d ed. 1997) 5

I. REPLY IN SUPPORT OF OHIO POWER

In its amicus brief, The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) explained that it, like the appellant Ohio Power, had experienced a turnabout before the Commission. Both companies were given definitive orders in the past; both managed their affairs in reliance on those orders; and both suffered a direct financial penalty when the Commission later revised or disregarded the orders that they had relied upon. While the two utilities’ situations are for the most part quite different, the underlying source of harm is the same: an agency that has chosen to disregard its past, final orders to the detriment of companies that acted in good-faith reliance upon them.

DEO’s brief recognized that, while the Commission may generally change its course prospectively, its power to modify past decisions is subject to important limits. In addition to the adjudicatory limit of collateral estoppel—the issue raised by Ohio Power—DEO explained that the Commission’s modification power is also limited by the Ohio Constitution’s prohibition against retroactive laws. *See* Ohio Const., Art. II, Sec. 28. But based on the Commission’s disregard of prior orders in both cases, DEO perceived that the Commission has a “fundamental and serious misunderstanding of the limitations on [its] power.” (DEO Amicus Br. at 1.)

The Commission’s response brief has only confirmed DEO’s perception. According to the Commission, only a single condition need be satisfied before it may modify a prior order: “so long as the Commission explains its reasons for doing so.” (PUCO Br. at 14.) Things are plainly not as simple as the Commission sees them.

Ohio Power has refuted the Commission’s position in detail in its reply; DEO will here only offer a few additional points in support of the conclusion that the Order below must be

reversed. Before doing so, however, DEO would respond to the assertion made by Industrial Energy Users-Ohio (“IEU”) that DEO’s amicus brief is not properly considered by this Court.

A. DEO’s amicus brief is properly before the Court and should be considered.

IEU argues that the bulk of DEO’s amicus brief may not be properly considered in this case, on the basis that Ohio Power did not raise the arguments presented by DEO brief through an application for rehearing. (IEU Br. at 24.) On that basis, IEU argues that DEO’s amicus brief is “irrelevant to the issues presented in [Ohio Power’s] appeal.” (*Id.* at 10 fn.35.)

First, IEU misapprehends DEO’s role in this case. DEO is obviously not the appellant, but an amicus, and it is simply providing the Court with an additional perspective on the issues presented here. DEO specifically explained as much, noting that it was “limiting the scope of its amicus brief to rebuttal of the Commission’s assertions below that its powers include the power to modify orders and then apply the modified standards and decisions to past conduct.” (DEO Br. at 4.) DEO is participating to show that the Commission’s “conception [of its power] is overbroad and incorrect.” (*Id.*) DEO is not urging an independent ground of reversal on the Court, but simply rebutting the Commission’s defense.

And for that reason, contrary to IEU’s assertion, DEO’s brief is relevant. The Commission defends this case, at least in part, on the basis that it has essentially unlimited power to modify prior orders. DEO’s arguments directly respond to that assertion and show that the Commission has considerably overstated its power.

Ohio Power’s appeal is extremely important. As substantial as the direct stakes already are, measuring over one hundred million dollars, the precedent will stretch even further. If the Commission does not view itself as bound in any effective way by its prior orders, it will repeatedly act on that view. And not just the Commission—other agencies, too, could rely on the precedent set in this case to avoid final orders that later prove unwanted. The Court should

have a full understanding of the law and the issues at stake when it decides this important case.

That is why DEO is participating in this appeal, and its brief is properly considered by this Court.

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

As it turns out, a disregard for past orders is not the only common ground between Ohio Power's appeal and DEO's. As happened in DEO's appeal, IEU, OCC, and (to unclear extent) counsel for the Commission have met a serious challenge to an order by abandoning the rationale stated in the Order and attempting to supply a *new* basis for the decision on appeal. While the substitute rationale also lacks merit, the Court should not even consider it, but should limit its review to the rationale actually adopted by the Commission in the Order below.

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.¹ As one commentator explains, “The number of cases rejecting agency efforts to justify actions 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, 939 N.E.2d 1210, ¶ 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*.

¹ 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).

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 the appellees violate it, presenting a different rationale than set forth in the Order below.

a. The Commission acknowledged below that it was modifying its earlier decision.

In the Order below, the Commission plainly held that it *was* modifying an earlier order, but that this was permissible because it had authority to do so. The Order expressly stated that it had “depart[ed] from [its] approval in the ESP 1 Order of AEP-Ohio’s proposed carrying cost rate.” (4th Finding & Order at 19, OP Appx. 27.) It expressly agreed that in the earlier order, it had authorized Ohio Power to collect “carrying costs at the . . . rate of 11.15 percent,” with

“recovery . . . to commence on January 1, 2012, and continue through December 31, 2018.” (*Id.* at 17, OP Appx. 25.) And it expressly disagreed that its earlier order “cannot be modified.” (*Id.* at 17–18, OP Appx. 25–26.) If there were any doubt as to whether the Commission was modifying the phase-in plan, it entitled its discussion of this issue on rehearing as “Modification of Phase-In Plan.” (Entry on Rehearing at 10.)

Whatever else is clear, the Commission below believed itself to be modifying an earlier order.

b. Contrary to the Order below, the appellees assert that the Commission did *not* modify an earlier order.

Contrary to the Order below, however, appellees base their arguments, at least in part, on the notion that no modification occurred. IEU and OCC do so unambiguously. IEU takes the position that the Commission “did not modify a prior order” (IEU Br. at 24) or “modify a fact previously adjudicated in the ESP I Order” (*id.* at 12). OCC, too, argues that the earlier and later orders concerned different issues. It asserts that the earlier, ESP I case is “separate and distinct” from the case below, with the former concerning “the **creation** of the fuel deferrals” and the latter, “the **mechanism** for collecting the deferrals.” (OCC Br. at 37 (emphasis sic).)

The position taken in the Commission’s brief is less than clear, however, and seems to vary page by page. Its brief opens with the statement, “Change is the essence of life,” and it asserts that the Commission “embrace[d]” change in this case. (PUCO Br. at 1.) Those statements, and numerous others, seem to acknowledge that a modification did in fact occur. (*See, e.g., id.* at 6 (the Order below “was modifying the course taken in its ESP I Opinion and Order”); *id.* at 7 (“the Commission adjusted this carrying cost rate”); *id.* at 10 (the Commission “change[d] the carrying cost rate”); *id.* at 19 (“the Commission adjusted the carrying cost rate to reflect current conditions”). Numerous other statements in the Commission’s brief, however,

suggest that *no* modification occurred, but that the ESP I Order and Order below addressed different issues. (See *id.* at 4 (“the Commission did not expressly set the carrying charge rate that would apply during the recovery period”); *id.* at 7 (the earlier order only “established an *initial* carrying charge rate”) (emphasis added); *id.* at 12 (“there is no relitigation of a fact that was at issue in a prior proceeding”); *id.* (the earlier order “did not expressly address the carrying charge that would apply during the collection period”).)

Which set of assertions is intended to control is not clear to DEO. But any ambiguity in the position taken by counsel for the Commission need not be resolved. To the extent that the appellees argue that no modification occurred below, they are contradicted by the clear statements in the Order below. And it is the Order that is on review, not appellees’ arguments and representations. Appellees cannot avoid the problems posed by the Order by changing it after the fact.

4. The concept of distinct deferral and collection periods is not found in the earlier, ESP I Order.

Even if the Court considers the appellees’ new reading of the ESP I Order, it is incorrect. As discussed, to varying degrees, all three appellees assert that the ESP I Order actually contemplated *two* periods and *two* separate carrying-charge rates: a *deferral* period with carrying charges at a higher rate, and a *collection* period with a lower rate. This reading of the ESP I Order is central to their defense (that no modification occurred), but it simply does not square with the actual terms of the earlier order.

The ESP I Order expressly addressed which carrying-cost rate would be applied during “the collection of any deferrals,” and that rate can only be the weighted average cost of capital, or WACC. (ESP I Order at 23; OP Appx. 105.) In the ESP I Order, the Commission opened its discussion of this issue by describing AEP’s proposal as follows: “Any deferred FAC expense

remaining at the end of 2011 would be recovered, with *a carrying cost at the Weighted Average Cost of Capital (WACC)*, as an unavoidable surcharge *from 2012 to 2018.*” (*Id.* (emphases added).) The Commission then specifically approved the WACC rate as the proper carrying-cost rate: “the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the WACC is reasonable” (*Id.*) And it specifically found that this rate should apply during both deferral *and* collection: “we find that *the collection of any deferrals, with carrying costs*, created by the phase-in that are remaining at the end of the ESP term *shall occur from 2012 to 2018* as necessary to recover the actual fuel expenses incurred plus carrying costs.” (*Id.* (emphases added).)

No mention is made of either a separate decision to be made or a separate rate to be applied during the collection period—on the contrary, one carrying cost rate is approved, and it is expressly approved during “the collection of any deferrals.” (*Id.*) And again, if there were any doubt regarding what the ESP I Order meant, the Order below dispelled it. It specifically acknowledged that it was changing the decision on carrying costs. Appellees’ position that the ESP I Order either did not cover or deferred decision on the carrying charge rate applicable during the period of collection is simply not credible.

In short, whatever the appellees may say on appeal, the Commission has plainly modified the ESP I Order.

C. Not one of the appellees even acknowledges the existence of *Discount Cellular* or of the constitutional prohibition against retroactivity.

Notably, the appellees do not offer any substantial response to DEO’s arguments regarding the constitutional limits on retroactivity that are applicable to the Commission.

For example, in its amicus brief, DEO devoted considerable attention to *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957. This

case expressly held that the Commission generally lacks power to “alter[] the legal significance of [a party’s] past conduct.” *Id.* ¶ 51. *Discount Cellular* is undoubtedly relevant here, as it expressly sets forth a limit on the Commission’s ability to act with respect to conduct that has already occurred. Yet not one of the appellees—not IEU, not OCC, not the Commission—even cites the case in its merit brief. As the appellees do not even acknowledge the existence of *Discount Cellular*, it goes without saying that they have not dealt with the serious problems it poses for their conception of an essentially unlimited modification power.

It seems fair to say that DEO’s presentation of the law regarding retroactivity is uncontested. None of the appellees were at the page limit. The only response offered by the appellees is to note that the Order could have been *more* retroactive. That is, the Commission could not only have reduced the carrying-cost rate after Ohio Power had spent the principal, but it might also have required Ohio Power to retrospectively recalculate the deferrals already in the books. (OCC Br. at 39; IEU Br. at 24.) DEO agrees that this also would have been unlawful. But the fact that the Commission retroactively undid the ESP I Order only in part does not cure the problem.

The key problem is that Ohio Power had *already performed* under the earlier order when the Commission pulled the rug. To that problem, the appellees have no response.

D. The only limit acknowledged by the Commission on its modification power is no limit at all.

The Commission attempts to assure the Court that the modification power is subject to the limit that the Commission must explain itself. It states that it “may revisit one of its prior decisions and modify the course previously taken *so long as* [it] explains its reasons for doing so.” (PUCO Br. at 14 (emphasis added).) Even if it means reversing a prior adjudicatory

decision, even if it means imposing new duties and obligations on a person's past conduct, the Commission can do it so long as it explains its reasons for doing so.

This is not the law. Although the Commission is correct that it must explain itself, the question is whether there are *other* limits to its modification powers. And the answer to that question is unmistakably yes. The Court has recognized that collateral estoppel is a limit on revisiting past decisions, *see, e.g., Office of Ohio Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985), and it has recognized that the Commission is subject to the retroactivity prohibitions of the Ohio Constitution, *see Discount Cellular v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957. These fundamental legal protections would be imaginary shields if it only took an explanation to pierce them.

Indeed, these protections would add no protection at all: the Commission already has a standing legal duty to explain itself. *See* R.C. 4903.09; *see also, e.g., MCI Telecom. Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E.2d 337 (1987) ("In order to meet the requirements of R.C. 4903.09, . . . the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion"). If the Commission is correct, the *substantive* protections of collateral estoppel and the Constitution's prohibition against retroactive laws are entirely redundant to the *procedural* requirement of R.C. 4903.09.

E. Contrary to the Commission, the general rule in Ohio is that res judicata and the rule against retroactivity *do* apply.

The Commission also argues that when "the General Assembly wants the Commission not to change a decision already made, departing from the general rule, it says so," but that "[i]t did not say so in the situation at bar." (PUCO Br. at 17.)

The Commission cites no authority in support of the proposition that the Commission has *unlimited* power to modify past orders, unless a statute says otherwise, and DEO is not aware of any. Indeed, disproving this proposition, the protections of res judicata and the retroactivity rule are *not* rooted in statute. On the contrary, res judicata is a “judicially created doctrine.” *In re Gilbraith*, 32 Ohio St.3d 127, 129, 512 N.E.2d 956 (1987); *see also, e.g., Maldonado v. U.S. Attorney General*, 664 F.3d 1369, 1375 (11th Cir. 2011) (“Res judicata is a judicially crafted doctrine . . .”). And the prohibition against retroactivity arises under the Ohio Constitution. *See* Ohio Const., Art. II, Sec. 28.

In fact, the rule is precisely opposite what the Commission asserts. Res judicata generally *does* apply unless a statute specifically provides otherwise. *See, e.g., La Barbera v. Batsch*, 10 Ohio St.2d 106, 111, 227 N.E.2d 55 (1967) (“The General Assembly could create an exception to res judicata if it wished. The question is whether it has done so . . .”). And while the General Assembly may be able to override res judicata, it has no power to override the constitutional prohibition against retroactivity, which is a fundamental limit on the legislature’s power, as well as the Commission’s.

F. The Commission’s entire defense is rooted in a one-sided reading of the case law.

In short, the Commission’s view of its modification power is not only incorrect, but so broad it is implausible. The correct answer is also the reasonable answer: the Commission *does* have power to change course prospectively, but this power is subject to numerous requirements (including that the new course be reasonable, lawful, and explained by the Commission) and important limits (such as res judicata and the prohibition against retroactivity).

This conception of the Commission’s power harmonizes the case law. Indeed, numerous cases expressly recognize that the modification power is not without limits. “Modifying a regulatory scheme is not problematic *in itself*. Agencies undoubtedly may change course,

provided that the new regulatory course is permissible.” *Utility Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18 (emphases added). And again: if the Commission charts a new course, “it must explain why” and the “new course *also* must be substantively reasonable and lawful.” *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 52 (emphasis added).

The point of these cases, and others, is that a modification is not ruled out simply because it is a modification. That is what it means to say that modification is “not problematic *in itself*.” *Utility Service Partners*, 124 Ohio St.3d 284, ¶ 18. It does not mean that modification is *always* permissible, or permissible so long as it is explained. But the Commission essentially ignores the caveats stated by the Court, and its approach to this appeal is to acknowledge only those authorities that speak of its power, while ignoring the authorities that recognize that power’s limits.

In many of the cases relied on by the Commission, no party even raised an issue regarding retroactivity or res judicata. And that is not surprising, as most Commission orders will not typically have binding effect regarding decisions to be made in future cases. Take a rate case for example. The Commission generally does not promise that an approved rate will last for any particular period into the future. And the inputs for *past* rates are not binding regarding *future* rates: that is, the amount of rate base is tied to a specific date certain, and the cost of service is tied to a specific test year. The next time rates are analyzed, different time periods will be at issue, different rates will be approved, and no res judicata problem will be presented. The

same goes for the Commission’s general rule- or policy-making decisions—there is typically no assurance of the same treatment in the future.²

This case is different. The Commission, as required under R.C. 4928.144, specifically determined what carrying-charge rate would apply during a specific, future period. The ESP Order I approved the carrying costs to be applied to “the collection of any deferrals . . . from 2012 to 2018.” (ESP I Order at 23; OP Appx. 105.) The entire purpose of this determination was to provide incentive for Ohio Power to spend hundreds of millions of dollars and then wait years to recover. The utility did not need to accept this treatment, but it did, and it spent substantial sums in reliance on it. Ohio Power did its part; when the Commission’s turn came, it simply changed its mind.

Instead of explaining how it complied with the important legal protections Ohio Power and DEO allege it violated, the Commission relies on an impossibly overbroad notion of its powers. DEO urges the Court to make clear to the Commission that its powers are subject to real limits and that it has overstepped those limits in this case.

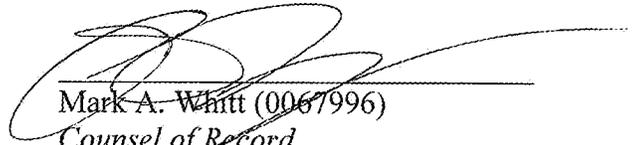
II. CONCLUSION

For the foregoing reasons, DEO supports Ohio Power’s position that the Commission erred in issuing the challenged provisions of the order.

² DEO is not suggesting that such orders *never* may present retroactivity or collateral-estoppel problems—that would be a case-by-case determination—but only that, in the main, the Commission’s past decisions do not generally bind it regarding other decisions in the future.

Dated: June 11, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark A. Whitt', is written over a horizontal line. The signature is stylized and extends to the right of the line.

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CERTIFICATE OF SERVICE

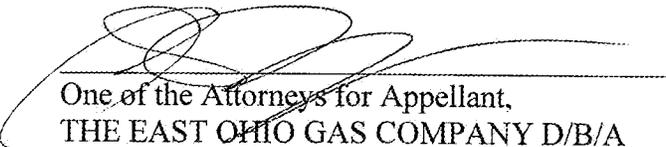
I hereby certify that a copy of the foregoing Reply Brief in Support of Appellant/Cross-Appellee Ohio Power, was served by U.S. mail this 11th day of June, 2013, upon the following:

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