BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY BRIEF OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
Melissa L. Thompson
WHITT STURTEVANT LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3911
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
thompson@whitt-sturtevant.com

ATTORNEYS FOR THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

TABLE OF CONTENTS

I. INTRODUCTION

This case ultimately comes down to the following issue: Can the Commission retroactively revise an order and then penalize a party for its past failure to comply? To ask that question should be to answer it. The Commission cannot change the rules after the game is over.

But that is exactly what the Commission would have to do to adopt Staff's recommendation that Dominion East Ohio ("DEO" or "Company") violated the order in Case No. 09-1875-GA-RDR ("the 09-1875 Order"). In 2010, the Commission told DEO to demonstrate in its 2011 filing for 2010 costs how it would achieve complete installation "by the end of 2011." 09-1875 Order at 7. And it set forth a single definitive timing requirement: the Commission "anticipate[d] that, by the end of 2011, it will be possible to reroute nearly all of DEO's communities." *Id*. DEO relied on the order, planned as ordered, and met the goal—in fact, it exceeded it.

Come 2012, however, Staff recommends that the Commission hold DEO to a different, more stringent standard: "complete[] the AMR installations by August 2011" and have completely rerouted its system and achieved full staffing reductions by October 2011. (Staff Br. at 15; *see* Adkins Dir. at 19 n.8.) These deadlines are at least several months earlier than the expectations set forth in the 09-1875 Order, and those lost months form the *entire* basis of Staff's proposed $1.6 million penalty: "three months of full meter reading savings for the last three months of 2011." (Staff Br. at 15.)

So how does Staff get around the fact that its recommendation directly contradicts the 09-1875 Order's definite timing requirements? Staff does *not even mention* the problem. To read Staff's brief, one would never know that these provisions of the Order—directly applicable to the issue at hand—were even there.

Staff may be willing to ignore directly applicable legal authorities to reach a desired end, but the Commission does not have that luxury. The Commission cannot change the past. Penalizing DEO for failing to meet standards that did not exist at the time would violate the law. The Commission has no authority under Ohio law to retroactively modify its orders, and doing so would deny DEO due process of law under both the state and federal constitutions.

This is not the only problem with Staff and the intervenors' case—far from it—but it is clear and fatal.

II. ARGUMENT

Staff, with the support of OCC and OPAE, raises one ground for reducing DEO's AMR Charge, and OCC raises a few additional issues on its own. None of their arguments have merit, and DEO's application should be approved as filed. But before turning to the intervenors' arguments, DEO would correct their misstatements concerning the burden of proof in this case.

A. The intervenors have the burden of proof concerning the issues they have raised.

OCC and Staff both misstate the burden of proof in this case.

DEO, of course, bears the burden of proving that its application is reasonable. *See, e.g.*, 09-1875 Order at 13 ("DEO's application to adjust its AMR charge is reasonable and should be approved"). DEO carried that burden here. It submitted its application supported by appropriate supporting data and schedules, answered discovery, presented the responsible witnesses, and offered them for cross-examination at an evidentiary hearing. No one has questioned whether DEO accurately tracked its *actual* costs or savings, or whether it accurately calculated the charge based on actual figures. Unless the issues raised by the intervenors provide a reasonable and lawful basis for reducing DEO's recovery, the Company has met its burden of proof.

OCC and Staff, however, try to take this point several steps further. For example, Staff suggests that it has no burden to prove its own case: "Staff recommends an adjustment . . .

because it does not believe DEO's proposed savings level is just or reasonable. It is upon DEO to prove otherwise." (Staff Br. at 4.) And OCC asserts that "neither OCC, OPAE nor the Staff bear any burden of proof in this case." (OCC Br. at 3.)

Given the cases they presented, it is understandable that the intervenors would try to avoid "any burden of proof." But they offer no support for that proposition, which is plainly wrong. "[A]s we have noted before, once a party raises an issue the burden of proof then falls upon the party who raised that issue." *In re Purchased Gas Adjustments Clause of the E. Ohio Gas Co.*, Case No. 82-87-GA-GCR, 1983 Ohio PUC LEXIS 73, Opin. & Order, at *20 (Apr. 13, 1983) (rejecting party's recommendations where "there is insufficient evidence of record to support any of [them]"); *see also, e.g.*, *In re Complaint of River Gas Co.*, 87-232-GA-CSS, Entry, 1990 Ohio PUC LEXIS 163, at *33 (Feb. 13, 1990) ("once complainant had set forth sufficient evidence to prove the elements of its claim . . . the burden of persuasion with respect to the affirmative defenses asserted by respondents properly shifted to the respondents"); *In re Application of Columbia Gas*, 89-616-GA-AIR, 1990 Ohio PUC LEXIS 376, Opin. & Order at *137 (Apr. 5, 1990) ("staff bears the burden of proof as to the reasonableness of its proposal"); *cf., e.g.*, *James River Ins. Co. v. Kemper Casualty Ins. Co.*, 585 F.3d 382, 385 (7th Cir. 2009) ("It is sensible to place the burden of proof of an affirmative defense on the defendant, rather than making the plaintiff prove a negative").

OCC and Staff seem to think that all they must do is accuse DEO of imprudence, which DEO must then affirmatively rule out. But as the cases cited above show, this is not true. The intervenors must put on evidence in support of the issues they raise. If the rule were otherwise, an intervenor could simply develop an impossible-to-disprove theory, and the burden-bearing party would always lose. *See, e.g.*, *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995)

(upholding agency decision rejecting interpretation of "burden of proof [that] would be virtually impossible for an applicant to meet, as it requires the proof of a negative proposition").

The intervenors' misapprehension of this basic procedural point actually goes a long way to explaining their long-on-assertion, short-on-proof approach to this case. To their recommendations DEO now turns.

III. RESPONSE TO STAFF'S ARGUMENTS

Staff's only recommendation that has any financial consequence is that DEO violated the 09-1875 Order.[1] The Commission must reject this recommendation. It requires retroactively revising the 09-1875 Order, lacks any record support, and is barred by collateral and judicial estoppel. Staff's other recommendation—that DEO's authority to install AMR devices began on January 1, 2007—is equally unmeritorious, unsupported, and barred by past orders and conduct. It is also pointless; it has no bearing on any other issue in this case.

Finally, notably absent from Staff's brief is any reference to its earlier recommendation to remove from the revenue requirement the cost of AMR devices held in inventory in 2011 but not yet installed. (Staff Comments at 7.) That issue must now be considered abandoned.

A. Staff has not met its burden of showing that DEO violated the 09-1875 Order.

Staff's position is that DEO "violated the 2009 Order by not completing the AMR program by the end of 2011 and not installing the AMRs at the earliest time possible." (Staff Br. at 10.) As DEO explained in its initial brief, this is not a tenable position.

1. The 09-1875 Order directly contradicts Staff's recommendation.

In Staff's view, DEO violated the 09-1875 Order because it did not install all devices by August 2011 and did not complete rerouting by October 2011. Its recommended $1.6 million

[1] OCC and OPAE make the same arguments as Staff; for the sake of brevity, DEO will refer to these arguments as Staff's, but DEO's response applies to all three parties.

penalty depends *entirely* upon DEO having missed the alleged October 2011 rerouting target. (*Id*. at 15–16 (recommending $1.6 million reduction to reflect "three months of full meter reading savings for the last three months of 2011"); *see also* Adkins Dir. at 19 (DEO should have achieved "fully rerouted remote readings in October [2011]").)

But the 09-1875 Order contains express, definite timing requirements that directly contradict Staff's recommendation. Staff wants complete rerouting by October 2011. But the 09-1875 Order states, "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 (emphases added). This does not state that the rerouting must be completed by the end of 2011, but rather that it should be possible to reroute "nearly all of DEO's communities," which necessarily implies that rerouting will be completed *at the earliest in 2012*. Likewise, Staff wants complete installation by early August 2011. But the order told DEO to demonstrate how it plans to complete installations not by August 2011, but "by the end of 2011." 09-1875 Order at 7.[2] So Staff's penalty depends entirely on deadlines well in advance of those set forth in the 09-1875 Order.

How does Staff respond to these provisions of the Order that directly contradict its proposal? It does not even *mention* them. It simply does not acknowledge that the issue exists. "The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (Posner, J.) (internal quotations omitted). This is a major, indeed, fatal problem for Staff, and pretending it is not there does not make it go away.

[2] As DEO explained in its initial brief, the Order did not *require* complete installations by the end of 2011, but merely planning and effort to that end. DEO obeyed that instruction. (DEO Br. 15–16.)

2. Adopting Staff's recommendation would be impermissibly and unfairly retroactive and would constitute reversible error.

Staff may be willing to ignore facts or authorities that are in the way of its recommendation. But the Commission must abide by the law. The Commission gave DEO explicit timing instructions, and DEO relied on them. Staff seems to believe that it may ignore or change what that Order required. But while the Commission may revisit past decisions and "modify [them] prospectively," *In re Columbus Southern Power Co.*, 129 Ohio St. 3d 568, 2011-Ohio-4129, ¶ 8, not even it, much less Staff, can change an order retroactively.

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

Moreover, the Commission may not deprive "any person of . . . property without due process of law." U.S. CONST, amend. XIV; see *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 544 (holding that the Ohio due-process clause is "considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment). Due process demands basic fairness. *State ex rel. Ormet Corp. v. Indus. Comm.* (1990), 54 Ohio St. 3d 102,

104; *City of Cincinnati v. Cincinnati Gas & Elec. Co.*, Case No. 91-377-EL-CSS, 1991 Ohio PUC LEXIS 798, Finding & Order at *9–10 (June 27, 1991) ("the Commission . . . recognizes its obligation, as a quasi-judicial body, to conduct its hearings in a manner that comports with the elements of fundamental fairness and due process"). And it prohibits the government from changing standards and retroactively applying them to the harm of persons who had relied upon them. *See, e.g.*, *State v. Elmore*, 122 Ohio St. 3d 472, 2009-Ohio-3478, ¶ 14 ("judicial enlargement of a criminal statute, applied retroactively, violated the Due Process Clause because it was unforeseeable"); *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, ¶ 37 ("a change . . . akin to a statutory penalty . . . . affects a substantive right, and its retroactive application would violate due process").

Staff runs squarely into these prohibitions. It recommends penalizing DEO for not completing installations by August 2011 and rerouting by October 2011. But that requirement appeared for the first time in April 2012, and the Commission had already told DEO to plan for complete installation "by the end of 2011" and to finish rerouting sometime thereafter. 09-1875 Order at 7. The Commission cannot rely on a requirement imposed in April 2012 to penalize DEO for obeying its order in 2011.[3] Doing so would impose a "new dut[y] and obligation[] upon [DEO's] past conduct and transactions," *E. Ohio Gas*, 26 Ohio St.3d at 65, would "alter[] the legal significance of [DEO's] past conduct," *Discount Cellular*, 112 Ohio St.3d 360, ¶ 51, and would therefore be illegal.

[3] That the penalty would be *paid* prospectively would not avoid any retroactivity problems. Case No. 08-917-EL-SSO, Order on Remand at 36 (Oct. 3, 2011) ("order[ing] a prospective adjustment to account for past rates" violates the rule against retroactive ratemaking); *see In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, ¶ 10. Such an exception would swallow the rule against retroactivity—without a time machine, penalties can only be paid going forward.

3. The 09-1875 Order cannot be read as instituting two conflicting timing requirements.

Staff reads the 09-1875 Order as imposing two different deadlines for the completion of the AMR program: complete "the AMR program by the end of 2011"[4] *and* "at the earliest time possible." (Staff Br. at 10.) But this is not a plausible reading of the Order.

a. Staff's reading fails to give effect to all the provisions of the order.

Staff's penalty relies solely on the general instruction contained in the 09-1875 Order: namely, 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." 09-1875 Order at 7. Staff does not attempt to provide a comprehensive reading of the order's critical paragraph; apparently, it views this sentence as creating an overriding duty to get the program done at the earliest possible moment, regardless of any other dates set forth in the order.

But Staff's reading does an injustice to the actual text. The general instruction *expressly* is not to be taken by itself, and not to be put into conflict with the remainder of the order. The word that immediately follows that instruction is "Therefore." This *denotes* that whatever comes next will clarify and explain the preceding sentence. And the following sentences plainly contemplate full program completion sometime after 2011.

The use of the word "therefore" simply confirms one of the most basic interpretive canons: "We must give effect to the words used, not delete words used or insert words not used." *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830, ¶ 22 (internal quotations and ellipses omitted); *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720, ¶ 54 ("If one construction of a doubtful condition written in a contract would render a clause

[4] Again, DEO disagrees that "end of 2011" was a deadline per se. The 09-1875 Order only instructed DEO to *demonstrate how it plans to* complete installations by the end of 2011—that is not the same thing as a hard and fast deadline. The order did not threaten penalties if DEO had not hit 100 percent by then. (*See* DEO Br. at 15–16.)

meaningless and it is possible that another construction would give that same clause meaning and purpose, then the latter construction must prevail") (internal quotations and brackets 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 should be upheld "unless 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").

The Order must be read to give effect to all its parts. Staff's reading does not even accomplish that modest task.

b. Staff's reading would make the 09-1875 Order impossible to obey.

Staff takes from the Order what it can work with, and throws out what it cannot. This is improper in itself, and moreover, what is left of the order after Staff picks it over is impossible to obey. As DEO explained in its initial brief, without context, the general instruction is impossible to obey, because achieving literal "earliest possible" rerouting would be so costly it would not literally "maximize savings." (*See* DEO Br. at 18–20.)

Can there be any doubt which way the wind would blow had DEO unleashed the checkbook, completed installations well before "the end of 2011," and upset the cost-and-savings balance implicit in the 09-1875 Order? Again, speed and savings are *in tension* with one another; they do not necessarily correlate. The Commission could have ordered any number of time frames, each carrying its own balance of cost and savings. But the Commission *approved* just one: a five-year deployment period. And in 2010, based on DEO's progress to date, the Commission revised the target: aim to complete installations "by the end of 2011" and complete rerouting some time thereafter. *See* 09-1875 Order at 7. Again, that implied a certain balance between cost and savings.

The point, which Staff fails to grasp, is that by establishing timing expectations applicable to DEO, the Commission necessarily accepted a certain balance between cost and savings. By reading the specific timing instructions out of order, Staff leaves an order that literally would have given DEO *no* guidance.

B. Staff has not met its burden of providing evidence in support of its recommendation.

In addition to the fatal legal problems triggered by its recommendation, Staff also fails to provide necessary record support. First, it has no evidence of any imprudence or intentional "slow down" on the part of DEO. Second, its proposed reduction is egregiously incomplete.

1. Staff provided no evidence that DEO slowed down the AMR Program.

Staff's basis for faulting DEO is actually a single fact: namely, that DEO's peak installation year was 2009. Based on this single premise, Staff then *assumes* that DEO *must* have intentionally and unreasonably "slowed down" installations thereafter. (*See* Staff Br. at 15.) But Staff has no evidence—period—that the installation of less devices in 2010 than 2009 reflected any imprudence on the part of the Company.

a. Staff merely assumed that DEO intentionally slowed down its program.

The following exchange with Staff witness Adkins makes clear that Staff does not actually know why there was any difference in installation numbers:

> Q. [H]ave you seen, has any information come to light that you're aware of that shows a specific deficiency by the Company which would indicate that it wasn't working as hard as it could to get the installations complete?
>
> A. It showed its deployments.[5]
>
> * * *

[5] It is not clear whether Mr. Adkins said "showed" or if this is a transcription error for "slowed." Either way, it does not affect the meaning of the sentence as pertinent here.

> Q. But you are not able to tell us what [DEO] should have done differently other than do it quicker?
>
> A. Don't slow down. Other than that.
>
> Q. . . . you say that the Company did not accelerate installations in response to the Commission's 09-1875 order; is that right?
>
> A. I state, based on the deployment that was in 2009, the Company, in effect, took its foot off the gas and installed fewer AMRs in 2010 and fewer still in 2011, leaving 9,530 uninstalled.

(Tr. 259–61.)

This is all Staff has: bare "total annual deployment" figures. But its conclusion—that DEO "took its foot off the gas"—does not follow. There are many reasons that the peak year could have occurred in 2009 besides a sudden, irrational collapse of Company initiative. Every installation is different, and countless factors affect the pace of deployment. Contrary to Mr. Adkins' simplistic viewpoint, the meters on which AMR devices are to be installed do not just roll down an assembly line. DEO had to penetrate hundreds of diverse communities and neighborhoods and schedule thousands of appointments with individual customers. All things being equal, areas with many inside meters take longer to complete than areas with outside meters; areas with lower densities of customers take longer than areas with higher densities; areas with more "hard-to-access" customers take longer than those with less. And each community presents its own array of features.

There is simply no evidence for Staff's conclusion that the difference in numbers reflected an intentional slow down on the Company's part.

b. The evidence affirmatively proves that DEO installed devices as fast as it cost effectively could.

The record, in fact, refutes the proposition that DEO intentionally slowed down the program. First, to keep things in perspective, DEO installed more than 250,000 devices in 2010,

which is the accelerated pace it promised in the 06-1453 AMR application. (*See* 06-1453 Appl. at 4.) Likewise, DEO witness Fanelly explained that she could not think of "anything . . . the Company could have done differently that would have resulted in a faster deployment." (Tr. 188.) She also explained numerous additional steps and enhancements that DEO took after the 09-1875 Order to speed installations. (Tr. 145–46.) And DEO witness Friscic explained that "the number of installations in 2009 was greater because Dominion East Ohio was able to install AMR units on meters that were outside the customer premises and were readily accessible, so we got the low hanging fruit, if you will." (Tr. 48.) As DEO explained in its initial brief, plucking the low hanging fruit first was necessary to maximize savings and achieve rerouting at the earliest possible time. (*See* DEO Br. at 12–14.)

Staff tries to brush away this evidence by stating that "DEO knew for years about its trouble with accessing 'inside' and 'hard-to-access' meters." (Staff Br. at 13.) This response reflects little if any thought. First, DEO already explained that seeking out hard-to-access meters first would only have slowed down or increased the cost of the program. (*See* DEO Br. at 12–14.) Likewise, *knowing about the trouble* with hard-to-access meters is not the same as *knowing where they are*, particularly which customers would not cooperate with DEO's requests to schedule an installation appointment. (*See id*.) Obviously, hard-to-access meters do not come grouped in discrete places or in named subdivisions. Finally, leaving all that aside, Staff cannot possibly dispute that it just takes longer to convert inside meters than outside. Inside meters require appointments to be scheduled; those appointments must then be kept and not rescheduled by the customer; and the customer then must be at home and let the Company in when it arrives for the installation. Outside meters just require DEO to show up. "Knowing about" inside meters does not make them any easier to access.

In short, different deployment rates were inevitable. They do not contradict the unrebutted evidence that DEO "made its best efforts to deploy AMR systemwide in a cost effective manner." (Tr. 188.)

c. DEO had no incentive to slow down installations, but a duty to manage the program cost effectively.

Finally, when Staff suggests that DEO should be penalized for "slowing down," it demonstrates a basic ignorance of DEO's incentives and duties.

DEO's financial incentives were *not* to "take its foot off the gas." If DEO had a blank check, and cost was no concern, the incentive would be "pedal to the metal." The sooner DEO installed AMR devices, the sooner it began recovering the investment, and the more overtime, the better. But DEO did not have a blank check. It had an obligation to its customers to keep costs under control. Indeed, DEO's cost management has been superlative; although the program is coming in well ahead of the original proposed schedule, it has cost millions of dollars less than originally estimated. (*See* Friscic Dir. at 3–5.) This provides no basis for penalizing DEO; controlling costs directly benefitted customers.

The question could be raised: if DEO slowed down, wouldn't it benefit by not having to pass back O&M cost savings? Not at all. Any reduction to the AMR charge would be made up for by a reduction in DEO's actual expenses. As DEO witness Friscic explained, "To the extent we are not generating O&M savings, that means we are spending more money than was built into base rates for meter reading expense, and spending more money reduces earnings generated for our shareholders." (Friscic Dir. at 21.) DEO gains nothing by avoiding O&M savings.

It makes no sense to talk about slowing down, speeding up, saving more, or saving less without considering what those things would have cost. But Staff has ignored that relationship from start to finish in its recommendation.

2. Staff's recommendation does not take into account the increased costs of completing installation in less time.

Finally, even assuming all the foregoing legal and evidentiary problems did not bar Staff's recommendation, there is an egregious blunder in its execution. Staff has made *no attempt* to account for how much more it would have cost for DEO to hit the early target imposed by Staff. It penalizes DEO with additional imputed savings without crediting DEO for additional imputed costs.

Staff recognizes this problem, but its response is near-delusional. In Staff's eyes, it is "suspect" whether it even "would have cost customers more" to install an additional 80,000 AMR devices per year. (Staff Br. at 17.) The devices, of course, do not install themselves, so this is astounding. Not surprisingly, Staff cites no evidence that corroborates its suspicion, and of course the evidence is to the contrary. Staff witness Adkins agreed that "it would cost more to install 330,000 devices than it would to install 250,000 devices." (Tr. 275.) And Ms. Fanelly testified that increasing the pace of installation "would have increased the expense to get those completed at that rate due to overtime, additional truck rolls, all of those types of activities." (Tr. 185.)

Trying to avoid the problem of its lopsided recommendation, Staff points out that a faster pace would have increased savings as well as costs. (*Id*.) This merely restates the objection without answering it. Mr. Adkins needed to do the work of accurately reconstructing what it would have cost DEO to meet Staff's massive 32-percent acceleration—but he left that work undone. Mr. Adkins "did not consider the expense required to generate [the three months of O&M] savings." (Tr. 277.)

* * *

Staff must take leave from reality and the rule of law to make its recommendation. And even taking it on its own terms, it is unfairly incomplete. In sum, Staff's recommendation to reduce DEO's AMR Charge must be rejected. As this is the only issue of any financial consequence, DEO's application should be approved as filed.

C. There is no need to resolve whether and when the Commission approved a definitive five-year deployment period.

Staff also argues that DEO had a hard-stop five-year deployment period that started on January 1, 2007, which was about two weeks after DEO filed its AMR application and nearly two years before the Commission approved it. DEO will explain why Staff is wrong. But it would first reemphasize that there is no need for the Commission to waste its time resolving this question because it does not affect the outcome of any other issue raised in this case.

1. The issue of whether and when DEO had a five-year deployment authorization is a red herring.

First, despite the intervenors' apparently irresistible urge to re- and pre-litigate issues from past and future years, this case only covers the year ending December 31, 2011. So even accepting the intervenors' selection of facts, there is no question that DEO had authority to deploy devices throughout the entire year under review. And even if that authority had ended, Staff would support renewing it in 2012. (Tr. 202–03.)

Likewise, Staff has abandoned its recommendation to remove from the revenue requirement the cost of AMR devices held in inventory in 2011 but not yet installed. (*See* Staff Comments at 7.) That recommendation relied on the notion that DEO's authority to install AMR devices expired. But Staff does not mention this issue in its initial brief.

Nor does Staff's recommendation that DEO violated the 09-1875 Order turn one way or the other depending on whether and when a five-year deployment period started. Staff's proposed reduction depends *entirely* on the assumption that DEO should have "completed the

AMR installations by August 2011" and finished the program in October 2011. (Staff Br. at 15.) As Staff would now give DEO *less than* five years from January 1, 2007, to complete installing AMR devices, the question is irrelevant.

Finally, even if the AMR program did self-destruct at 12:00 a.m., January 1, 2012, the undisputed evidence shows that DEO had already achieved all available cost savings available through that point in time. Staffing reductions—not installations per se—move the cost-savings needle. (*See* Staff Br. at 12 ("The vast majority of the meter reading cost is comprised of salaries paid to meter readers").) But "[b]y the first day of 2012, DEO had already . . . made full staffing reductions." (Fanelly Dir. at 8.) This was because, although DEO had not completed rerouting, it *had* eliminated all walking routes. (*See* Tr. 72; *see also, e.g.*, Tr. 99-100 (the "two shops for which rerouting had not taken place . . . were being read with AMR devices and [DEO] eliminated the walking routes"; Friscic Dir. at 11.) Indeed, the fact that Staff must invent an August 2011 deadline to find any basis for penalizing DEO tacitly admits that DEO hit an "end of 2011" target. As far as cost savings are concerned, it made no difference whether a handful of installations or none at all remained at the end of 2011. The unrebutted evidence shows that there is no relationship between the 9,530 unconverted meters and Staff's recommended penalty.

The takeaway from all this? Resolving whether January 1, 2007, started a five-year AMR countdown leads nowhere. For all the intervenors' sound and fury, it is a non-issue. If the Commission agrees, it could skip to page 23 of this brief. To protect its interests, however, DEO will respond to this point on the merits.

2. There was no hard-stop five-year deployment period.

Before Staff filed its comments in this case, no one—not the Commission, not Staff, not OCC, not OPAE, not DEO—ever stated or even suggested that there were definitive dates on which DEO's authority to install AMR devices began and ended. Indeed, Staff admits that "the

Company does not need permission from the Commission to install [AMR devices]" and that DEO could have "installed AMR devices under whatever schedule it wanted to without seeking Commission approval." (Tr. 245–46.) So the question whether a particular date commenced DEO's authority to install AMR devices is something of an oxymoron.

If there *was* a definitive program start date, one would expect Staff could simply point to some statement to that effect from the Commission or, failing that, the date the Commission issued program approval. The Commission, after all, "speaks through its published opinions and orders." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, ¶ 43. So where is the order in which the Commission required a January 1, 2007 start date? One will not find reference to it in Staff's brief. The most natural place to look would have been the order approving the program—except that that order was issued on October 15, 2008, almost two years *after* January 1, 2007. *See* 06-1453-GA-UNC Order 15 (Oct. 15, 2008). Not surprisingly, it does not provide for a retroactive, almost-two-year-old start date, which would have been controversial to say the least.

Lacking an actual order creating its alleged start date, Staff cobbles together what it calls "evidence" of the alleged start date. (Staff Br. at 5.) DEO will turn to it in a moment, but the very fact that Staff must attempt to *prove* an alleged force-of-law start date with "evidence" shows that it does not exist. If the start date was not provided by a law, regulation, or order, it cannot be held against DEO. There is and was no specified start date.

Is DEO suggesting that there were *no* timing expectations applicable to the installation of AMR devices? Of course not. DEO represented in its application that it would accelerate installation "[u]nder a five-year schedule . . . beginning in 2008." (06-1453 Appl. at 4.) Staff cannot rely on this, however, because it is exactly what DEO did: it installed more than 250,000

devices in 2008, 2009, and 2010, leaving it with less than 250,000 to go in 2011. Likewise, the Commission expressed certain timing requirements in the 09-1875 Order. DEO complied with those, too, as explained in its initial brief. (*See* DEO Br. at 10–16.)

Nevertheless, Staff promises that it possesses three items of "evidence unequivocally proving" a five-year deployment period beginning January 1, 2007. (Staff Br. at 5.) Staff does not deliver.

3. Staff has no evidence of a January 1, 2007 start date and December 31, 2011 end date.

a. DEO's application expressly proposes beginning accelerated installation "beginning in January 2008."

Staff's first item of evidence does not get it off to a good start. It says that DEO's application "indicates that the AMR Program would take five years and would begin in early 2007." (*Id*.) This is a surprising statement.

The application states, quote, "Under a five-year schedule, the Company would install 250,000 ERT units per year beginning in January 2008." (06-1453 Appl. at 4.) The words "beginning in January 2008" do "unequivocally" suggest a start date—just not January 1, 2007. Why Staff cites the application yet does not even acknowledge this sentence, which so directly addresses the disputed point, is unclear. What is clear is that ignoring it does not make it go away.

Staff points out that the application also discussed certain installations to occur in 2007. (Staff Br. at 6–7.) That is true; and if Staff wants to count those installations, too, fair enough. But counting them makes it a *six-year* proposal—the "five-year schedule . . . beginning in January 2008," plus the installations proposed in 2007. (06-1453 Appl. at 4.) Staff cannot have it both ways.

b. DEO's waiver application in a different docket did not propose a January 1, 2007 start date.

Staff's second bit of evidence for a definitive January 1, 2007 start date is that "[t]he time period for the AMR Program coincided with the waiver of MGSS rules, which ended on December 31, 2011." (Staff Br. at 7.) Staff is referring to DEO's waiver application in Case No. 06-1452-GA-UNC. According to Staff, "DEO's AMR Program was supposed to coincide with its waiver of certain . . . rules, which ended on December 31, 2011." (*Id*.)

Staff either misreads or misrepresents DEO's waiver application. But first, note just how far afield Staff must go to find its alleged force-of-law start date: between the lines, in a company application, in *another* docket. And it does this even though (*1*) there is an express proposed start date in DEO's AMR application, and (*2*) the Commission's order in the waiver case expressly severed any possible relationship with the AMR case. 06-1452 Order at 5 (May 24, 2007) ("grant[ing] DEO's waiver . . . in this case in no way binds us with regard to our consideration of DEO's cost recovery request in 06-1453").

Nevertheless, Staff says that DEO requested a five-year waiver ending December 31, 2011. No, it did not. Here is what DEO said:

> The waiver [in question] would apply *from* the effective date of the MGSS rules *until* such time as DEO completes the deployment of AMR devices throughout its system, which the Company estimates will take five years.

(06-1452 Appl. at 2 (emphases added).) The waiver starts when the rules start: January 1, 2007. (*See id*. at 1.) The waiver ends at "such time as DEO completes the deployment of AMR devices through its system." (*Id*. at 2.) When is that? The waiver application estimates it "will take five years."[6] (*Id*.) And DEO's AMR application, filed the same day, states when that five-year

[6] The relative pronoun "which" (in the phrase "*which* the Company estimates will take five years") cannot be read as referring to the period of the waiver. "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent."

deployment was to begin: January 2008. (06-1453 Appl. at 4.) Together, all this means the requested waiver was to last about six years—from January 1, 2007, until the deployment ended around the beginning of 2013.

Even if it were somehow relevant here, DEO simply did not ask for a five-year waiver. So the start date of its waiver request does not suggest anything about the start date of the AMR program.

c. DEO's labor agreement with Gas Workers Local G 555 did not create a definitive AMR program end date of December 31, 2011.

Staff's last piece of evidence "unequivocally prov[ing]" that DEO's program terminated on December 31, 2011, is the fact that DEO's "Project Employee Meter Reading Agreement" with Gas Workers Local G 555 terminated on that date. (Staff Br. at 9–10; *see* Fanelly Dir. at 9–10.) Here, for once, last *is* least. What unlikely places Staff must go to find its force-of-law deployment period.

Almost all the responses to Staff's point seem to go without saying. Fundamentally, DEO's agreement with Local G 555 could not possibly establish what the Commission required DEO to do with respect to the AMR program. Whether or not the Commission ordered a start or stop date, DEO's agreement with Gas Workers Local G 555 is irrelevant.

That is it for Staff's evidence. The only thing it "unequivocally proves" is that Staff has no evidence of a January 1, 2007 start date. "Ruling on an issue without record support is an abuse of discretion and reversible error," *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, ¶ 29, so the Commission cannot adopt Staff's position. Maybe there is a possible world in which extrinsic evidence could create a legally enforceable Commission

---

Wohl v. Swinney, 118 Ohio St. 3d 277, 2008-Ohio-2334, ¶ 12 (brackets, ellipses, and internal quotations omitted). Moreover, the sentence that results if Staff connects the two ("the waiver . . . will take five years") is at best awkward and certainly less plausible than the alternative reading ("the deployment will take five years").

deadline despite (*a*) having never been set forth or implied in a Commission order, (*b*) predating by almost two years the Order approving the application, and (*c*) occurring only two weeks after the filing of an application that proposed a much later start date.[7] But this is not it.

4. The fact that DEO installed devices in 2007 provides no basis for reducing DEO's recovery.

Staff also mentions that DEO installed 132,000 AMR devices in 2007, and it asserts that DEO "recovered for the installation of the vast majority of [them] through the AMR Rider." (Staff Br. at 7.) "Vast majority" is an unsupported exaggeration; any installations before March 31, 2007, were not recovered, nor were any replacements of 54,000 defective remote-read devices. (06-1453 Appl. at 4–5.)

Still, it is true that DEO did recover some costs through the AMR charge for installations occurring in 2007. But how does this further Staff's argument for a hard 2007 start date—or for that matter, for any reduction? DEO has as already shown that it did not need authority to install AMR devices. Nor was there anything wrong with recovering the costs, which the Commission approved in Case No. 09-38-GA-UNC.

Installing devices in 2007 did nothing but move the program forward to the benefit of customers. DEO would have been well within its rights to wait until it had Commission approval before it commenced installation. Had DEO waited, a five-year installation would have started late in 2008 and ended in late 2013. But the Company took a risk and performed around 132,000 installations in 2007 and 270,000 in 2008 with no assurance of cost recovery for most of them. That decision is the reason why installation was 99.2 percent complete at the end of 2011.

[7] And this takes no account of the fact that Staff recommended *2007* as the baseline for determining program savings. (*See* 06-1453 Staff Report at 43.) Using a year of the program as a year to which compare the program would have been an odd choice.

This choice and outcome did not harm customers. Far from it. Getting the program done faster delivered the benefits of AMR faster, and those "important" benefits are why the Staff recommended approval of the program:

- AMR "obtain[s] more frequent actual meter readings on all of its customer meters."
- AMR "provide[s] accurate bills in its volatile pricing environment."
- AMR "is a cost effective way to achieve more frequent actual meter readings and avoid inconveniencing . . . customers."
- AMR "would virtually eliminate the very labor intensive process to gain access and read meters located inside a customer's premise."
- AMR would avoid "estimated [billing] until an actual meter reading occurs, and long-term estimates can result in large back-billings, which may cause an unexpected strain to the customer's budget."
- AMR "would also enable the Company to easily obtain actual meter readings at the initiation and termination of service."
- AMR "avoids questions about how to allocate usage between the new and old customer at the same premise."

(06-1453 Staff Report at 42.)

Installing the devices cost money, of course, but it was going to cost money no matter when DEO started. Despite the substantial delay in the review and approval of DEO's application, the Company's risk allowed it to deliver the benefits of full AMR deployment *well ahead* of the original schedule. There is no reason to hold DEO's 2007 installations against it. Staff is truly looking (or hitting) a gift horse in the mouth by recommending that DEO suffer a $1.6 million penalty for not getting the program done five months earlier.

DEO would return to the point with which it started—there is no reason to even get into the issue of whether and when a five-year AMR deployment period began and ended. It is a red herring. But even if the issue mattered, Staff's position must be rejected.

D. Staff's position is barred by both collateral and judicial estoppel.

For all these reasons, Staff's recommendations are unlawful, unreasonable, and unsupported by the record. They must be rejected on the merits. But the Commission need not even reach the merits, as Staff should be estopped from presenting its recommendation on two grounds.

First, there is a collateral-estoppel problem: in prior cases, the Commission definitively ruled out *both* the broader imputed-savings approach *and* several factual positions that Staff now takes. Second, there is a judicial-estoppel problem: to make its present case, Staff must repudiate numerous positions that it successfully urged upon the Commission in prior proceedings. DEO should not be forced to relitigate issues that have already been settled and ruled upon—in some cases numerous times—and the Commission should not tolerate Staff's willingness to change official legal positions on the same matter whenever it finds it convenient.

1. Collateral estoppel bars Staff from taking its present position.

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

Staff's case runs into numerous collateral estoppel problems.

a. Staff's recommendation is barred because it seeks to impute artificial, surrogate savings to DEO.

The first goes to the savings method proposed by Staff. In the 09-1875 Order, the Commission specifically ruled that "imputed or surrogate savings" do not comport with the stipulations governing this case. 09-1875 Order at 7. Nevertheless, as DEO has explained in detail in its initial brief (*see* DEO Br. at 20–22), Staff now advances a method of cost savings that imputes artificial savings to DEO. As Mr. Adkins agreed, "what [his] calculation is, is assuming a 100 percent completion four months before the end of the year, doing some math and adding that on to 2011 savings." (Tr. 284.) That approach has already been ruled out as violating prior AMR case stipulations.

b. Staff's recommendation is barred because it seeks to revise progress expectations established in the 09-1875 Order.

The 09-1875 Order also established certain milestones concerning the progress DEO would attempt to achieve in 2011. As DEO has already shown, Staff unashamedly moves those targets in order to reach a result that penalizes DEO. But the time for arguing those deadlines is long past. Staff "lost its only opportunity to challenge [those decisions], when it failed to appeal or to request a rehearing of the [09-1875] order. This question was directly at issue in the prior proceeding and was passed upon by the commission. [Staff] cannot now attempt to reopen the question." *See Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9, 10 (Ohio 1985).

c. Staff's recommendation is barred because DEO's pace of deployment in 2010 and plan for deployment in 2011 could have been challenged in Case 10-2853.

Finally, Staff now challenges as unreasonable DEO's pace of deployment in 2010 and its plan for deployment in 2011. Both of these issues were up for review in Case 10-2853 (*see* 10-

2853 Staff Comments), but they were not raised. If Staff really had issues with either one, the time to address it was last year. The arguments are barred now.

Staff is attempting to reopen and relitigate every year of the AMR program, but these issues have been settled. They cannot be relitigated every year and past orders cannot be revised. Collateral estoppel prohibits such waste and bars Staff's position.

2. Judicial estoppel bars Staff from taking its present position.

There is a second, independent basis for estopping Staff from taking these positions. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). "The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. Courts apply judicial estoppel in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 330 (2007) (internal quotations, citations, and brackets omitted); *Fish v. Bd. of Commrs.*, 13 Ohio St. 2d 99, 102 (1968) (a party that "elected to assert one of two inconsistent substantive rights" and was "successful in the assertion of that right in a judicial proceeding, cannot now assert the other inconsistent right in a judicial proceeding").

As the following discussion shows, Staff cannot take its position in the present case without reversing numerous positions it took in past cases.

a. Staff has changed its position on deployment period.

In Case 06-1453, Staff recommended approving a five-year deployment period (06-1453 Staff Rep. at 42–43), and the Commission adopted this recommendation, 06-1453 Order at 10. Even accepting the earliest alleged start date (*i.e.*, January 1, 2007), Staff now faults DEO for failing to complete the deployment in roughly four-and-a-half years (by early August 2011).

b. Staff has changed its position regarding cost-savings methodology.

In Case 09-1875, Staff took the position that "imput[ing] artificial savings. . . . is not appropriate" and that the Commission should apply the methodology set forth in the original rate-case stipulation. (09-1875 Staff Post-Hrg. Br. at 5.) The Commission specifically noted Staff's position and ruled in accordance with it. 09-1875 Order at 6–7. As discussed above, Staff now proposes that the Commission ignore actual savings in favor of imputing artificial savings to DEO.

c. Staff has changed its position on DEO's pace of installation in 2010 and regarding DEO's 2011 AMR plan.

In Case 10-2853, Staff reviewed DEO's installation progress throughout 2010 and its plan for deployment in 2011. It noted DEO's pace of deployment in its comments, and it raised no issues. (10-2853 Staff Comments at 4.) Nor did it have "any specific statements that the [2011 AMR] plan was deficient in the . . . comments that were filed [in Case 10-2853]." (Tr. 266–67.) Staff, OCC, and OPAE then signed a stipulation "resolving all of the issues in the . . . proceeding" (10-2853 Stip. at 1), and supported it with testimony from Mr. Adkins that "the Stipulation benefits ratepayers and the public interest" and "does not violate any important regulatory principle or practice" (10-2853 Adkins Dir. at 3 (Apr. 8, 2011)). The Commission approved the Stipulation, specifically noting Staff's testimony. 10-2853 Order at 7. Staff now

asserts that DEO's progress in 2010 and plan for 2011 both harm ratepayers and violate prior orders. (Staff Br. at 11–14.)

All of these arguments should be thrown out. As to each point, Staff and the other intervenors took a position in a prior AMR case and now "argu[e] the opposing [position] to suit an exigency of the moment." *Greer-Burger*, 116 Ohio St. 3d at 330. While the Commission is not a court, it exercises quasi-judicial power when it presides over hearings, and it is under the same obligation to protect the integrity of its proceedings. *East Ohio Gas Co. v. Pub. Util. Comm.*, 45 Ohio St. 2d 86, 91 (1976) (recognizing the importance of preserving "the integrity of the administrative process"); *see also In re Complaint of Pietrangelo v. Columbia Gas of Ohio, Inc.*, Case No. 99-694-GA-CSS, 1999 Ohio PUC LEXIS 243, Entry at *7 (Sept. 22, 1999) ("it is well within the Commission's authority to protect the integrity of the proceedings before" it).

The Commission should protect the integrity of its proceedings, and those parties who abide by its stipulations and orders, and reject Staff's arguments out of hand.

E. Staff has abandoned its second recommendation.

Finally, as DEO alluded to earlier, Staff's brief makes no reference to what had been its second recommendation, namely, to remove from the revenue requirement the cost of AMR devices held in inventory in 2011 but not yet installed. (Staff Comments at 7.) This issue should be considered abandoned.

If, however, Staff raises an argument in favor of its second recommendation in its reply brief, that argument should be struck. *See, e.g.*, *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720, ¶ 36 n.2 (a party "is forbidden to raise new arguments in its reply brief"); *In re Appl. of DP&L Co.*, Case No. 82-358-EL-AAM, 1982 Ohio PUC LEXIS 18, Opin. & Order at *6 (Aug. 25, 1982) ("At no time did OCC indicate any problem or concern about the

method of publication until it submitted its reply brief . . . . We must agree with DP&L that OCC has waived its right to challenge the method of publication").

IV. RESPONSE TO OCC ARGUMENTS

OCC raises a few points not also found in Staff's brief. DEO responds to them in the order raised.

A. Unsupported, irrelevant recommendations should be rejected.

OCC mentions two recommendations at the outset of its argument, but it never develops any argument or factual support in their favor. Nor does it show how they are relevant in this case.

According to OCC, the Commission "should clarify" that certain figures in a discovery response from DEO's 2007 rate case "are annual amounts and not cumulative amounts." (OCC Br. at 5.) It also says that the "Commission should notify Dominion that the O&M cost savings reported in next year's AMR proceeding should reflect maximum cost savings." (*Id*.) As discussed above, OCC bears the burden of justifying its own recommendations, and it has not even attempted to carry that burden, making no argument in support of its recommendations. And neither point is relevant to any issue in this case—whether they are relevant in next year's AMR case remains to be seen. There is no point to wasting any additional time on these matters.

DEO would note, however, that it responded to both points in its Motion to Strike OCC and OPAE's Comments filed on April 10, 2012, and it would incorporate that response here.

B. OCC has forfeited any arguments that DEO's AMR program should not have been approved in 2008.

Based solely on the fact that DEO installed 132,000 AMR devices in 2007, OCC states that it "now appears" that DEO's statement (in its 2006 application) that it would take 15 to 20 years to deploy AMR without a rider "may have been exaggerated." (OCC Br. at 14.) Based on

this news, OCC recommends that the Commission should "re-evaluate the reasonableness of the AMR program" and consider "whether accelerating deployment from a 10-year period to a five-year period justified the AMR Rider." (OCC Br. at 15 (unmatched left quotation mark omitted).)

Is it just not possible to put *any* issues to rest? OCC now wants to revisit the original, 2008 approval of the program, based on facts that have been known since *before* the program was approved. None of this is news. The rough number of 2007 installations has been known to OCC since late 2007. (*See, e.g.*, Staff Ex. PB 2 (dated Nov. 2, 2007 and listing 122,000 installations scheduled in 2007).) A good time for OCC to have raised this issue would have been any time before August 2008, when OCC signed a stipulation approving the program. (*See* 06-1453 Stip. at 14.) Collateral estoppel, judicial estoppel, due process, and the rule against retroactivity all bar this claim.

By the time the order in this case issues, DEO may have completed *all* AMR installations. It is patently senseless even to ask to revisit "the reasonableness of the AMR program" when it is almost over.

C. OCC has forfeited any issues relating to DEO's bulk purchases of AMR devices.

Finally, OCC states, "At issue in this case is a question of whether the Company saved customers money by purchasing the 1.2 million Encoder-Receiver-Transmitter ('ERT') devices in bulk rather than on an as-needed basis." (OCC Br. at 16.)

On the contrary, this is not "[a]t issue in this case." This issue was never raised by any party in comments or direct testimony filed in this case. The Company mentioned the bulk discount in its direct testimony, and OCC explored the issue on cross examination. OCC had every right to do that; but that does not make it a potential ground for reducing DEO's recovery. OCC could have explored this issue through discovery, filed comments, and sponsored direct

testimony. Doing so would have preserved DEO's rights to notice of the recommended reduction and an opportunity to present its own evidence. OCC forfeited this issue.

This issue *does* keep with the intervenors' theme of relitigating past issues and penalizing DEO for complying with signed stipulations and Commission orders. As OCC acknowledges, DEO has been "authorized to carry an inventory of 100,000 units as agreed to"—by OCC among others—"in Case No. 09-38-GA-UNC." (*Id*. at 17.) If OCC had a problem with DEO carrying this inventory, it should not have signed the stipulation in that case. Collateral estoppel, judicial estoppel, due process, and the rule against retroactivity all bar this claim.

And since there will be no further bulk purchases, there are no grounds for considering this issue going forward.

V. CONCLUSION

The only thing Staff, OCC, and OPAE have proved in this case is that they will argue and assert anything to reach a desired end, regardless of the law, regardless of the record, regardless of past promises, and regardless of the demands placed on others.

No party has raised anything approaching a meritorious objection to DEO's application. It should be approved as filed.

Dated: June 20, 2012

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
Melissa L. Thompson
WHITT STURTEVANT LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3911
Facsimile: (614) 224-3960

whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
thompson@whitt-sturtevant.com

ATTORNEYS FOR THE EAST OHIO
GAS COMPANY D/B/A DOMINION
EAST OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of DEO's Reply Brief was served by electronic mail to the following persons on this 20th day of June, 2012:

Devin D. Parram
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
devin.parram@puc.state.oh.us

Joseph P. Serio
Larry S. Sauer
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
serio@occ.state.oh.us
sauer@occ.state.oh.us

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, Ohio 45839-1793
Cmooney2@columbus.rr.com

/s/ Andrew J. Campbell
One of the Attorneys of The East Ohio Gas Company d/b/a Dominion East Ohio

Summary: Reply Brief electronically filed by Mr. Andrew J Campbell on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio