BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Notice of Intent by	:	
Ohio Gas Company d/b/a Dominion East	:	Case No. **11-5843-GA-RDR**
Ohio Gas Company to File an Application	:	
to Adjust Automated Meter Reading Cost	:	
Recovery Charge	:	

MOTION FOR LEAVE TO FILE *INSTANTER*
SURREPLY OR, IN THE ALTERNATIVE, MOTION TO STRIKE OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Staff of the Public Utilities Commission of Ohio ("Staff") respectfully request that the Commission grant Staff leave to file the attached Surreply ("**Attachment A**") in this proceeding. In the alternative, Staff request that certain portions of Dominion East Ohio Gas Company's ("DEO") reply brief be stricken because the reply brief contains new arguments not raised in DEO's initial brief. A memorandum in support of this motion is attached.

Respectfully submitted,

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Ohio Attorney General
William L. Wright
Section Chief

/s/ Devin D. Parram

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MEMORANDUM IN SUPPORT

DEO argues collateral and judicial estoppel in its reply brief. It did not raise either argument in its initial brief. Thus, Staff has been deprived of an opportunity to respond to these arguments. DEO may claim that it simply raised these arguments as a "defense" to Staff's initial brief. DEO, however, planned on raising these arguments almost two months ago. DEO initially raised these arguments in its Motion to Strike filed on May 1, 2012, which was ultimately denied by the Attorney Examiners at hearing.[1] Counsel for DEO indicated at hearing that they might raise these same arguments again in DEO's post-hearing brief.[2] For some unknown reason, DEO chose to raise these arguments in its reply brief as opposed to its initial brief.

DEO is well aware a party "is forbidden to raise new arguments in its reply brief." It made this point quite clear in its own reply brief.[3] DEO's estoppel arguments are legal arguments that should have been raised by DEO in its initial brief. They should not be used as parting shots saved for reply. By waiting to include these argument s in reply brief, DEO is essentially asking Staff to guess what issues DEO may raise and preemptively argue about a potential non-issue in its initial brief. This is not how post-hearing briefs are supposed to work. Staff could only respond arguments raised by DEO once it read DEO's initial brief. It's only fair that Staff now have an opportunity to explain its position on this estoppel issue.

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1 *Motion to Strike or, In the Alternative, For A Procedural Entry Authorizing Rebuttal Testimony of the East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 11-5843-GA-RDR (May 1, 2012); Tr. at 15.

2 Tr. 13.

3 DEO Reply Brief at 27 *citing Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720, ¶ 36 n.2.

Alternatively, if the Commission does not grant Staff's request to file a surreply, then Staff requests that DEO's estoppel arguments, from pages 23-27 of its Reply Brief, be stricken. DEO could have raised these arguments in its initial brief but simply chose to wait until reply brief. In addition, these are the same exact arguments that were made in DEO's motion to strike, which was previously denied.

Attached is a short Surreply that explains why DEO's arguments should be rejected by the Commission. See **Attachment A**. For the forgoing reasons, Staff requests that the Commission grant Staff leave to file the attached Surreply.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Motion for Leave/Motion to Strike** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via electronic mail upon the following Parties of Record, this 26th day of June, 2012.

/s/ Devin D. Parram

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SURREPLY
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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June 26, 2012

ATTACHMENT A

INTRODUCTION

Staff submits this Surreply as a response to the estoppel arguments raised by DEO in its reply brief.[1] The Ohio Supreme Court has held that collateral estoppel and judicial estoppel arguments are inapplicable when there is a change in facts or circumstances. *State ex rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St. 2d 42, 45, 399 N.E.2d 81, 83 (1980)("Where...there has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of [r]es judicata nor the doctrine of collateral estoppel will bar litigation of that issue in the later action."); *see also Jacobs v. Teledyne, Inc.*, 39 Ohio St.3d 168, 171, 529 N.E.2d 1255, 1259 (1988)("While this claim may involve the same parties and similar issues, ..[b]ased on th[e] change of facts ..., we find that the doctrine of res judicata does not apply ..."). Further, while res judicata does apply to administrative proceedings, "it should be applied with flexibility" and "should be qualified or rejected when its application would contravene an overriding public policy or result in manifest injustice." *Jacobs*, 39 Ohio St. 3d at 171, 529 N.E.2d at 1259.

DEO's estoppel arguments should be rejected because the facts and circumstances have changed since the inception of the AMR program. In addition, estoppel should not be applied in this case because it would shield DEO from any criticism for its failure to timely complete the AMR program, which would be contrary to public policy and unjust for ratepayers.

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[1] DEO Reply Brief at 23-27.

ARGUMENT

1. The 2011 deadline and the meaning of the 2009 Order have never been litigated.

The main reason estoppel does not apply is because the legal requirements of the 2009 Order have not been previously litigated. Staff believes the AMR program was supposed to end on December 31, 2011 pursuant to the 2009 Order. DEO acknowledges that the 2009 Order set forth certain legal requirements for DEO.[2] DEO may disagree with Staff's reading of the 2009 Order, but the meaning of the 2009 Order has never been litigated. This is the appropriate case to litigate these issues and DEO should not be allowed to use estoppel as a way to avoid the merits of Staff's arguments.

2. The passage of time bars any estoppel claim.

Another basic reason estoppel does not apply is the passage of time. Each year presents a new stage in the AMR program and, thus, new facts. That is why there is an AMR filing every year. As discussed in more detail below, Staff could not possibly criticize DEO's failure to timely complete the program until DEO *actually* failed to timely complete the program. In addition, simply because Staff did not scrutinize and criticize every aspect of DEO's pace of deployment in previous years does not mean Staff is forever barred from pointing out DEO's failure to timely complete the program. If DEO's argument is accepted, DEO could shield itself from all criticism simply because Staff did not previously criticize all parts of DEO's execution of its AMR program. Such a result would defeat the purpose of Staff's yearly investigation, and run contrary the Commission's statutory obligation to determine just and reasonable rates.

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[2] DEO Initial Brief at 14-16; Fanelly Direct at 2.

The fact the program is at its end is a material fact that did not exist in previous AMR cases. DEO represented in prior AMR cases that customers would receive a certain level of savings near the end of the five-year program. The five-year period is over but DEO is still not done. More importantly, its failure to complete the program has led to an unjust level of O&M savings for customers. Now is the time to litigate this issue and Staff has every right to raise this it because the appropriate level of savings are still not being passed on to customers.

3. Staff's responses to specific estoppel arguments raised in DEO's reply brief.

a. DEO Argument 1: "Staff's recommendation is barred because it seeks to impute artificial, surrogate savings to DEO."

Staff's methodology is factually different than OCC's methodology, which was previously rejected by the Commission. As Staff previously discussed, it does not agree that its "approach has been ruled out as violating prior AMR case stipulations."[3] Furthermore, Staff used this methodology in order show that DEO could have completed the program earlier, which was a requirement of the 2009 Order. DEO chooses to ignore the fact the 2009 Order changes DEO's obligations in completing the program, and changed Staff's obligations in investigating DEO's execution of the AMR program.

b. DEO Argument 2: "Staff's recommendation is barred because it seeks to revise progress expectations established in the 09-1875 Order."

Staff is not seeking to revise the 2009 Order. To the contrary, it is attempting to enforce the terms of the order. That Staff and DEO disagree about the meaning of the 2009 Order is the very reason this case is ripe for litigation and not barred by estoppel.

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[3] Staff Initial Brief at 15-16; Staff Reply Brief at 12.

c. DEO Argument 3: "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."

First, Staff did comment on DEO's pace of deployment in Case No. 10-2853. It told DEO that it needed to obtain access to the hard-to-access meters earlier if DEO was going to meet the 2011 deadline.[4] DEO, however, did not complete installation of the AMRs by the end of 2011. While Staff did comment on DEO's pace in Case No. 10-2853, it could not see into the future and know that DEO's slowing pace would ultimately cause DEO to miss the 2011 deadline. Only the passage of time could show that DEO would violate the 2009 Order. Regardless, the fact that Staff did not criticize DEO's slowing pace in detail in Case No. 10-2853 does not relive DEO of its obligations under the 2009 Order. No Stipulation or argument made in any previous AMR case precludes the Commission, through its Staff, from investigating compliance with its orders and determining a just and reasonable AMR rider charge.

d. DEO Argument 4: "Staff has changed its position on deployment period."

The 2009 Order changed DEO's obligations in this case. The Commission instructed DEO to get the program done at the earliest possible time, but by the end of 2011 at the very latest. DEO may disagree with Staff's interpretation of the 2009 Order but its undeniable the 2009 Order placed obligations upon DEO that were not contained in the 06-1453 Order. Therefore, the 2009 Order created a substantial change in circumstances that prevents any claim of estoppel.

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[4] Staff Reply Brief at 5-6; DEO Ex. 9, (Staff Comments) at 7-8.

e. DEO Argument 5: "Staff has changed its position regarding cost-savings methodology."

No, Staff has not. As explained in its initial brief and reply brief, Staff's methodology is different than the methodology used by OCC in Case No. 09-1875.[5]

f. DEO Argument 6: "Staff has changed its position on DEO's pace of installation in 2010 and regarding DEO's 2011 AMR plan."

Staff should not be precluded from explaining how DEO failed to comply with the Commission's 2009 Order simply because Staff did not do so in a previous AMR case. As previous stated, Staff could not know DEO's slowing pace would cause DEO to miss the 2011 deadline until DEO actually missed the 2011 deadline. In addition, each year is a different AMR filing and different investigation. Staff is obligated to investigate DEO's implementation of the AMR program each year and must report to the Commission its position on DEO's AMR program and proposed rider amount. The Commission has the ability to consider Staff's findings and should not be precluded from ensuring a just and reasonable AMR charge just because Staff entered into a stipulation in a previous AMR case.

CONCLUSION

For the forgoing reasons, DEO's estoppel arguments are baseless and should be rejected by the Commission.

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[5] Staff Initial Brief at 15-16; Staff Reply Brief at 12.

Respectfully submitted,

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Summary: Motion Motion for Leave to file Surreply/Motion to Strike of Staff electronically filed by Mr. Devin D Parram on behalf of PUCO