

**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)	Case No. 11-5843-GA-RDR
Automated Meter Reading Cost Recovery)	
Charge and Related Matters.)	

**MEMORANDUM CONTRA
MOTIONS FOR LEAVE TO FILE SURREPLY AND MOTION TO STRIKE
OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

I. INTRODUCTION

On June 26, 2012, Staff filed an unauthorized surreply to DEO’s reply brief. Wafting in just ahead of the surreply was an insubstantial one-and-a-quarter page memorandum in support, containing as its only legal authority a citation to DEO’s reply brief. Is this a *bona fide* motion premised on some procedural abuse by DEO and supported by careful argument and appropriate research? Or is it a transparent effort to get in an extra round of briefing with a throwaway “motion for leave” label stuck on page one? That label, it bears noting, gives DEO only three days to muster a response to the new briefing. *See* Entry 3 (March 5, 2012).

Staff is trying to steal a march on DEO, but while all may be fair in love and war, this is neither. It is a proceeding subject to duly enacted rules, constitutional guarantees of fairness, and the fundamental dictates of reason. Staff has been ignoring all three in this case, and it has done so again here. The only thing that should be struck is Staff’s unauthorized surreply.

II. DISCUSSION

A. Staff’s has articulated no meritorious basis for filing a surreply or for striking any portion of DEO’s initial brief.

Staff asks the Commission either to strike DEO’s estoppel arguments or to allow Staff to file a surreply. The only basis for its requested relief is that “DEO could have raised these

arguments in its initial brief but simply chose to wait until [sic] reply brief.” (Staff Memo. in Support at 3.)

1. The point of a reply brief is to make responsive arguments.

Contrary to Staff assertions, the test here is not simply whether the arguments in the reply brief “could have [been] raised in its initial brief.” (*Id.*) That is overbroad; if that were the test, the Commission should strike every reply brief filed in this case in its entirety.

A reply brief has its name for a reason. *Reply* means “to respond in words or writing,” and accordingly, “[t]he purpose of a reply brief is to respond to matters raised by an opponent’s brief.” *Cincinnati Ins. Co. v. Colelli & Assocs.*, No. 97CA0042, 1998 Ohio App. LEXIS 2708, at *10 (Wayne Cty. June 17, 1998), *rev’d on other grounds by Cincinnati Ins. Co. v. Colelli & Assocs.*, 95 Ohio St.3d 325, 2002-Ohio-2214, ¶ 1; *see also, e.g., State v. Mitchell*, 10th Dist. No. 10AP-756, 2011 Ohio 3818, ¶ 47. (“A reply brief affords an appellant an opportunity to respond to an appellee’s brief”); *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1356 (Fed. Cir. 2001) (the “purpose of [a] reply brief is to respond to arguments presented by appellee”).

So the proper standard is whether the challenged argument is both (1) new and (2) *non-responsive* to arguments raised in the opposing party’s brief. *See, e.g., Schmitz v. Xenia Bd. of Educ.*, Case No. 2002-CA-69, 2003-Ohio-213, ¶ 22 (Greene Cty. Jan. 17, 2003) (“we decline to consider” “a completely new argument [in a reply brief] which is not responsive to any argument made by the Board of Education in its brief”); *Cincinnati Ins. Co.*, 1998 Ohio App. LEXIS 2708, at *10 (affirming trial court’s grant of motion to strike arguments in a reply brief that “were not raised in response to any arguments made by appellees”); *cf., e.g., ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1106 (9th Cir. 2003) (denying motion to strike noting that “[t]he ‘new’ arguments raised in the . . . reply brief were a reasonable response to points made in the . . . answering brief”); *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1040 (9th Cir. 2003) (noting

that a certain “argument was ‘raised for the first time in the reply brief,’ because [the party] was responding to [a certain] argument”); *Baker v. GMC*, 209 F.3d 1051, 1054 (8th Cir. 2000) (“We deny this motion [to strike] because we find the arguments are a fair response to arguments advanced in the Bakers’s brief”).

If it were otherwise, parties would face an unworkable, impossible rule. They would be required to make all possible responsive arguments in their initial brief, lest they be waived. Indeed, Staff recognizes that requiring a party to make its responsive arguments in an initial brief “is essentially asking [it] to guess what issues [its adversary] may raise and preemptively argue about a potential non-issue in its initial brief.” (Memo. in Support at 2.) But this point cuts against Staff, not DEO—DEO is not the party asking the Commission to strike responsive arguments from a reply brief.

2. The arguments that Staff seeks to strike or for which it seeks a surreply are responsive arguments.

The only arguments Staff seeks to strike are DEO’s collateral and judicial estoppel arguments. These arguments are plainly responsive.

Indeed, could any argument be *more* responsive than an estoppel argument? By their very nature, judicial and collateral estoppel are responsive, defensive arguments. Estoppel in general is recognized as an affirmative defense that belongs in responsive pleadings. *See, e.g., Greene v. Am. Bankers Ins. Co.*, No. 66091, 1994 Ohio App. LEXIS 4617, at *28 (Cuyahoga County Oct. 13, 1994) (Sweeney, J.) (noting under the Civil Rules that “estoppel [is] an affirmative defense which must be raised in a responsive pleading”). And judicial and collateral estoppel, if applicable, do not *support* a proponent’s legal position but *bar* an opponent’s. It is a purely defensive tool, used to parry opposing arguments.

Of course, one cannot contend that an argument is estopped until it has been made. Here, Staff argued several positions in its brief. DEO reviewed those arguments and then pointed out that they both contradicted past positions taken by Staff and pertained to issues that were resolved (or could have been resolved) in prior cases. Both estoppel arguments depend critically on a comparison of the *presently taken* position with the *past* position or case. (See DEO Init. Br. at 24–27.) But until DEO knew precisely what Staff was arguing, it could not make these arguments. It could not compare the present positions with the past.

DEO’s estoppel arguments belong in the reply brief; they should not be struck, and a surreply is inappropriate.

3. Staff’s conduct only underscores the rule that responsive arguments belong in reply briefs.

This rule that responsive arguments are permissible in reply briefs is true regardless of Staff’s conduct in this case. But its conduct only adds force to the rule. Every time Staff had an opportunity to articulate its position in this case, its position changed. As DEO pointed out in its motion to strike, Staff considerably revised its theory between the filing of its comments and the filing of direct testimony. It then ratcheted up its recommendation again at “ten till 6” on the evening of the hearing. (Tr. 244.) And it dropped one of its recommendations altogether (the proposed reduction for AMRs held in inventory at the end of 2011) between the conclusion of the hearing and the filing of its brief.

Indeed, while DEO was certainly amenable to this last change, it confirms that there was no guarantee Staff would see through every issue on which it presented a witness. It would have wasted both DEO’s time and the Commission’s had DEO brainstormed every possible argument that Staff could have made in favor its recommendation and then raised every possible argument

in response. Given the fact that the Commission had provided for a reply brief, DEO had no reason to include every possible responsive argument up front.

4. DEO could have omitted all responsive arguments from its initial brief; that it did not only benefited Staff.

For that reason, DEO could have fairly omitted *any* responsive arguments from its initial brief. DEO devoted the bulk of its initial brief to laying out the procedural history, pointing out that its application was unchallenged on most points, and showing that it had complied with the 09-1875 Order. (*See* pp. 1–17.) DEO could have stopped there, but it chose to highlight a few problems with Mr. Adkins’ recommendation. (*See* pp. 17–22.) This placed DEO under no obligation to include every possible argument against whatever position Staff would ultimately take.

Whatever else this did, DEO’s action certainly did not hurt Staff procedurally. In fact, any responsive arguments that DEO raised in its initial brief gave Staff a procedural *benefit* it would otherwise have lacked—in effect, a surreply to responsive arguments.

5. The fact that DEO moved to strike portions of Mr. Adkins’ testimony after it was filed does not help Staff.

Staff points out that DEO raised these estoppel arguments in its motion to strike portions of Mr. Adkins’ testimony. How does the fact that Staff had advance notice of these arguments help its position? If, as Staff asserts, it was clear that DEO “planned on raising these arguments almost two months ago” (Staff Memo. in Support at 2), then Staff has only itself to blame for not anticipating these arguments, along with others it anticipated.

Moreover, the timing of DEO’s motion to strike is entirely consistent with the timing of its reply brief. Once Mr. Adkins’ testimony was made available, DEO reviewed it, identified the offending sections, and filed a defensive motion. Here, once Staff’s legal arguments were available for review, DEO reviewed them, identified the offending sections, and filed its

defenses. That is proper timing—really, the only reasonable timing—in both instances. Any earlier and DEO is guessing.

6. If the Commission strikes DEO’s defensive arguments, it would deny DEO due process of law.

In short, Staff has provided no basis for striking DEO’s estoppel arguments or for allowing a surreply. Granting its motion would not only be baseless and procedurally improper, it could deny DEO due process and a fair hearing. DEO must have notice of Staff’s arguments and an opportunity to respond. “The principle is elemental that, upon any hearing, each side of the controversy must be given an opportunity to present its case.” *Cent. Ohio Lines v. Pub. Util. Comm.*, 123 Ohio St. 221, 227 (1931); *see, e.g., Forest Hills Utility Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 1, 3 (1974) (“prior to decision,” an agency conducting hearings must give “interested parties . . . an opportunity to explain and rebut”); *cf. New York C. R. Co. v. Pub. Util. Comm.*, 130 Ohio St. 548 (1936), syllabus para. 4 (“When the . . . company is accorded a reasonable opportunity to be heard in such matter, there is no denial of due process of law”). Depriving DEO of its opportunity to present defensive arguments because it failed to respond to Staff’s arguments *before* they were made would be anything but fair. And giving Staff an extra opportunity to weigh in on issues unopposed would further call the fairness of these proceedings into question.

B. If the Commission does not deny Staff’s motion, it should give DEO a full opportunity to file a responsive argument.

Staff was under no deadline in developing the arguments in its surreply. While it could have avoided any “unringing of the bell” problem by allowing the Commission to rule on its motion before filing the unauthorized brief, Staff went ahead and put it into the record. Now, under the accelerated response times applicable in this case, DEO only has three days to respond—not just to the motion, but to the brief as well.

Take this all together: Staff was able to take whatever time it wanted to draft an additional eight-part brief and then to file it on whatever day it chose. But by slapping a “motion” label on top, it could therefore force DEO to respond to *two* pleadings, the motion and the brief, under a very short briefing schedule. This is simply unfair. If the Commission does not deny Staff’s motion, it should grant DEO one week to file a response to the unauthorized surreply.

C. A cursory reading of Staff’s surreply shows that it misstates the law applicable to estoppel.

Under the time constraints Staff has placed upon it, DEO will offer only a couple brief comments to the legal arguments contained in Staff’s surreply.

1. Estoppel applies to all issues that were or could have been resolved by the 09-1875 Order (and to all issues that were or could have been resolved in any case).

Staff says that estoppel does not apply because the “meaning of the 2009 Order” has “never been litigated.” (Staff Sur. at 3.) There are two major problems with this argument.

First, this defense would completely swallow the estoppel doctrine. Any time one party claimed an issue had been previously settled by an order, and was thus *res judicata*, the other party could always say, “Ah, but we have not litigated what *that* order meant,” and so on, *ad infinitum*. The idea that the “meaning of the order” is a separate issue for litigation misses the point. Is additional litigation really necessary to establish that a phrase like “end of 2011” does not mean “August 2011”? (*Compare* 09-1875 Order 7 *with* Staff Init. Br. at 15.) Or that the phrase “by the end of 2011, rerouting will be possible for nearly all of DEO’s communities” does not mean “fully rerouted remote readings by October [2011]”? (*Compare* 09-1875 Order 7 *with* Staff Init. Br. at 15 *and* Adkins Dir. at 19.) Further litigation will not change those plainly established dates.

Moreover, whether the meaning of this language was *actually* litigated, collateral estoppel still applies if it *could have* been. *See, e.g., State ex rel. Ohio Water Service Co. v. Mahoning Valley Sanitary Dist.*, 169 Ohio St. 31, 36 (1959) (“res judicata . . . is conclusive as to all matters . . . that were or could have been raised”). So if Staff wanted an order that included the conspicuously absent phrase “the end of 2011 at the very latest” (*see* Staff Sur. at 5), it should have filed a motion for clarification or application for rehearing and perhaps an appeal. It did not then, so it is too late the change the language of the order now.

2. The entire purpose of estoppel is to put an end to otherwise endless litigation—it does not dissolve with the passage of time.

Staff states that “[t]he passage of time bars any estoppel claim.” (Staff Sur. at 3.) This statement is exactly opposite the law.

Under the doctrine of collateral estoppel, if a party does not raise an issue at the proper time, it will “be *forever* barred from asserting it.” *National Amusements v. Springdale*, 53 Ohio St.3d 60, 62 (1990) (emphasis added). The entire point of the doctrine is to “ensur[e] repose,” *Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 490 F.3d 86, 92 (1st Cir. 2007), and prevent the “drain [on] the resources of an adjudicatory system [caused by] disputes resisting resolution,” *Astoria Fed. Savings & Loan Assn. v. Solimino*, 501 U.S. 104, 107–08 (1991). Saying the passage of time is a bar to estoppel is nonsensical; if an issue is estopped, no amount of time can change that.

This black-letter law is very problematic for Staff because its position amounts to a denial that previous cases settle *anything*. Staff recognizes that “there is an AMR filing every year” (*id.*), but it apparently believes that it can simply sign stipulations resolving each filing without losing *any* right to raise issues later. DEO is not exaggerating Staff’s position—in its own words, “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." (*Id.* (emphasis added).) What was the point of those proceedings then, or the stipulations or orders they produced? Which "aspects" of those cases from "previous years" was Staff barred from relitigating, and which remained open? DEO should not be penalized for Staff's failure to scrutinize and timely raise issues with its AMR program.

Staff asserts that allowing DEO to rely on issues settled in prior orders "would defeat the purpose of Staff's yearly investigation." (*Id.*) DEO is not sure what "purpose" Staff means to imply. One would think the purpose of a "yearly investigation" in this context would be to identify issues pertaining to the program year under review (*e.g.*, if DEO filed an AMR plan in 2010, scrutinize that plan; if DEO "slowed down" deployment in violation of an order in 2010, raise that issue). But apparently there was another purpose—ambushing DEO?—and one that would be foiled if DEO's reliance interests are respected.

The fact that Staff must openly contend a legal implausibility—that Commission orders do not settle anything—is telling. Staff might have a point were DEO suggesting that Staff should have raised 2011 issues in an *earlier* proceeding—that would have been impossible and unfair to expect. But Staff cannot do the inverse, either: raising issues in this case that it settled in prior cases. That is equally unfair. DEO has already explained this in detail in its previous briefing. Despite one more, ill-gotten bite at the apple, Staff has provided no legal basis for adopting its patently unfair recommendation.

III. CONCLUSION

Staff has offered no basis for striking responsive arguments from DEO's reply brief nor for allowing a surreply to those arguments. Its motion should be denied.

Dated: June 29, 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 Memorandum Contra Motion for Leave to File

Surreply was served by electronic mail to the following persons on this 29th 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/ Melissa L. Thompson
One of the Attorneys of The East Ohio Gas
Company d/b/a Dominion East Ohio

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/29/2012 5:04:55 PM

in

Case No(s). 11-5843-GA-RDR

Summary: Memorandum Contra Motions for Leave to file Surreply and Motion to Strike
electronically filed by Ms. Melissa L. Thompson on behalf of The East Ohio Gas Company d/b/
a Dominion East Ohio