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

APPLICATION FOR REHEARING OF
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

In accordance with R.C. 4903.10 and Rule 4901-1-35, Ohio Adm. Code, The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") hereby files its Application for Rehearing of the Opinion and Order issued in the above-captioned case on October 3, 2012 ("the Order") and if applicable, any entry or order denying DEO's Motion for Stay filed on October 11, 2012. The Order is unlawful and unreasonable for the following reasons:

— In violation of R.C. 4903.09, the Order contains no acknowledgement of most of the arguments and issues raised by DEO.

— The Order is substantively unreasonable.

— Numerous findings and conclusions in the Order lack record support.

— The Order unlawfully alters the legal significance of DEO's past conduct and deprives DEO of due process.

— The Order retroactively changes the requirements of past orders, which is barred by collateral estoppel.

— If the Commission denies DEO's Motion for Stay, it erred because DEO showed that it could secure all parties from any substantial harm.

— If the Commission denies DEO's Motion for Stay, it erred to the extent that it found that DEO did not satisfy the four-part test articulated in *In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co.*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009).

— If the Commission denies DEO's Motion for Stay, it erred to the extent that it failed to give DEO an opportunity to address any harm for which DEO had not already accounted.

For these reasons, as explained in detail in the attached Memorandum in Support, the Commission should grant this Application for Rehearing and approve the AMR Cost Recovery Charge proposed by DEO in its application in this case.

Dated: October 19, 2012

Respectfully submitted,

/s/ Mark A. Whitt

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Stakeholders before the Commission should be able to rely on the Commission's prior orders. Commission orders have the full compulsory power of law, *see, e.g.*, R.C. 4905.54, and once they have passed through rehearing and appeal are conclusively final. A person subject to a Commission order cannot treat it lightly. The other side of that coin is that stakeholders should be able to rely on prior orders. For utilities, these orders create settled expectations and requirements of what the company needs to do. They inform companies how to plan, where to invest, on what they should focus, and (no less critically) *when*.

So Commission orders must serve as firm foundations for each company's reliance and investment. Prior orders cannot be treated like rugs to be pulled out from under a company's feet. Unfortunately, in this case, the Commission has treated its prior orders in precisely this way.

Two years ago, the Commission told DEO to aim for complete installation of AMR devices "by the end of 2011." Case No. 09-1875-GA-RDR, Opin. & Order at 7 (May 5, 2010) ("the 09-1875 Order"). DEO relied on this order, structured its program accordingly, and by the end of 2011 had come within tenths of a percentage point of the goal. At no point between May 5, 2010, and October 3, 2012, did the Commission ever suggest that DEO had to complete its installations by early August of 2011.

Two years later, the Commission takes $1.6 million from DEO. Why? Because a Staff witness calculated that this is what DEO would have saved had it completed installation of AMR devices "by early August of 2011." (Adkins Dir. at 19; *see* Order at 18 ("Staff's proposed level of O&M savings is reasonable").) Of course, DEO never had any notice of an early August of

2011 deadline, so it could not have planned on meeting it. But because DEO did not meet this deadline, it suffers a seven-figure penalty.

The Order does not represent some disagreeable exercise of discretion; it represents flat disregard for fundamental legal norms. If the Commission follows this course through, consequences will follow. The Commission's indifference regarding the past instruction it gave DEO, its unwillingness to protect its own prior orders, and its almost-complete refusal to engage DEO's concerns—all these have already sent a shiver into this Company. If this Order portends Commission indifference towards basic due-process requirements going forward, it is hard to predict what the larger chilling effect might be.

II. MOST OF THE ISSUES RAISED BY DEO WERE SIMPLY NOT MENTIONED IN THE ORDER

If one compares the Order and DEO's post-hearing briefs, one will find that almost every argument raised by DEO goes *unmentioned* in the Order—not *rejected on grounds DEO does not agree with*, but *unmentioned*.

This, in itself, is a violation of law. Under R.C. 4903.09, the Commission must provide "a reasoned explanation" for its decisions, and it is required to "respond to contrary positions." *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, ¶ 30 & 71. Yet the Order provides no evidence that the Commission was even aware of most of DEO's arguments.

A. The Order ignored all but one of DEO's arguments opposing the $1.6 million reduction.

The Order contains a section that purports to discuss the arguments raised by DEO against the $1.6 million reduction. *See* Order at 16–17. Between its initial and reply briefs, DEO presented to the Commission roughly 27 pages of argument that provided numerous grounds favoring approval of its application and directly opposing the $1.6 million reduction. (*See* DEO Init. Br. at 10–22; DEO Reply Br. at 4–14; *id*. at 23–27.) Yet the Order acknowledges only one argument raised by DEO, namely, that the 09-1875 Order prohibited imputed or surrogate savings. *See* Order at 16–17. This argument covered about two-and-a-half pages of DEO's initial brief. (*See* DEO Init. Br. at 20–22.) Although this is an important issue, it was not DEO's lead argument.

So, with respect to the $1.6 million reduction, the Commission *did not even mention* the following arguments raised by DEO in the remaining 25 pages that addressed the issue:

- That DEO complied with all the timing requirements contained in the 09-1875 Order. (DEO Init. Br. at 10–17.)
- That Staff's recommendation contradicted and mischaracterized the text of the 09-1875 Order. (*Id*. at 17–20; DEO Reply Br. at 4–5.)
- That adopting Staff's recommendation would be impermissibly and unfairly retroactive. (DEO Reply Br. at 6–7.)
- That Staff's reading of the 09-1875 Order failed to give effect to all of its provisions and would make it impossible to obey. (*Id*. at 8–10.)
- That the reduction lacked necessary record support. (*Id*. at 11–13.)
- That the reduction failed to account for the increased costs of completing installations by early August of 2011. (*Id*. at 14.)
- That collateral estoppel barred the reduction. (*Id*. at 23–25.)
- That judicial estoppel barred Staff from taking its position. (*Id*. at 25–27.)

DEO supported all of these positions with detailed argument, including extensive citation and discussion of the pertinent evidence and legal authorities. No party suggested that DEO's arguments were so insubstantial or lacking in good faith that they could be summarily dismissed. And the arguments were not even summarily dismissed. They were not even *mentioned*.

B. The Order ignored DEO's primary argument with respect to the AMRs-in-inventory reduction.

The other reduction pertained to AMR devices held in inventory at the end of 2011. *See* Order at 13. And once again, the Order simply did not mention the primary argument that DEO had raised in both of its briefs.

DEO's lead argument against this reduction was that Staff had apparently abandoned it on the stand and had supported all the findings and rulings necessary to support cost recovery. Staff witness Fadley had recommended removing from the revenue requirement the cost of AMR devices held in inventory in 2011 but not yet installed. He premised his recommendation on the notion that DEO's authority to install AMR devices had ceased at the end of the year. But Mr. Fadley, in a welcome display of reasonableness and candor, testified that he supported DEO "continuing to install [AMR devices] into 2012." (Tr. 202.) And that being the case, he testified that he supported recovery of the value of these devices *in this case* if the Commission either ruled that DEO's "authorization to install AMR devices had continued through 2012," or stated "in its order *in this case* . . . that DEO does have authorization to continue [through] 2012." (Tr. 203 (emphasis added).) After this testimony, nothing of substance divided the parties, which should have settled the issue.

DEO explained all this in its briefs and asserted that there was no longer a dispute. (*See* DEO Init. Br. at 9–10; DEO Reply Br. at 27–28.) Staff, in its briefs, neither contradicted DEO's assertion nor continued to pursue the issue. Once again, however, the Order contains *no mention* of any of this. So it follows that the Commission offered no explanation of why the Commission did not simply authorize the continued installation of AMR devices in 2012 and allow recovery of the costs. DEO supported this outcome; so did Staff's witness; no one is arguing that DEO should not install the last 9,530 devices. So there was no good reason to have refused this permission and reduced DEO's cost recovery. Why the Commission refused is unknown. It failed even to mention the issue.

In short, DEO cannot readily understand the Order's repeated and notable silences in response to DEO's arguments. But it is an objective fact that the large majority of arguments that DEO raised, and certainly the primary ones, make no appearance in the Order. Having noted up front this serious procedural concern, DEO would continue and address the substantive merits of this case.

III. FACTUAL AND PROCEDURAL BACKGROUND

The decision made by the Commission in this case requires a look back to 2006, at the end of which DEO filed its original application for approval of an AMR cost recovery charge.

A. DEO's AMR Application

In 2006, the Commission adopted a number of minimum gas service standards; one of them required DEO to obtain an actual meter read once each year. *See* Ohio Adm. Code 4901:1-13-04(G)(1). This rule presented unique difficulties for DEO. It had over half a million customers with inside meters, and the Commission would not count readings from standard remote-read devices as "actual reads." The Company determined that the installation of AMR devices represented the most cost-effective way to comply with the new rule. (*See* DEO Ex. 1.0 ("Friscic Dir.") at 1–2.) Accordingly, on December 13, 2006, DEO filed its AMR application.

The AMR application did not request approval to install AMR devices. Staff agrees that the Company could have "installed AMR devices under whatever schedule it wanted to without seeking Commission approval." (Tr. 246.) As explained in the application, however, DEO's "normal capital budgeting process" would only "accommodate a fifteen- to twenty-year systemwide deployment." (06-1453 Appl. at 4.) The purpose of the application, therefore, was to seek approval of a cost recovery mechanism that would allow DEO to recover the costs of accelerated, systemwide deployment over a five-year period, "beginning in January 2008." (*Id*.) To this end, the application requested approval of two things: (*1*) "tariffs to recover, through an automatic adjustment mechanism, costs associated with the deployment of [AMR] equipment" and (*2*) "accounting authority . . . to permit the deferral of those costs." (*Id*. at 1; *see also id*. at 8.)

DEO also proposed crediting against the charge meter-reading savings resulting from the program. These would be calculated by "compar[ing DEO's] annual meter reading operating and maintenance . . . expense to a 2006 base year." (*Id*. at 6.) The evident purpose of the base year was to establish what meter-reading costs were being incurred prior to accelerated deployment so that any savings generated during the deployment process could be quantified and credited to customers in subsequent AMR Charge proceedings.

January 1, 2007 dawned about two weeks after DEO filed its application.

B. Case 06-1453-GA-UNC

The original AMR docket reveals no Commission action for almost a year and a half after the application was filed. In September 2007, DEO filed a motion to consolidate the AMR application with its then-pending rate case, and another seven months passed before this motion was granted in April 2008. In May 2008, Staff issued its report recommending that the Commission approve the AMR application, with a few modifications. Staff agreed that savings should be calculated "by comparing future annual meter-reading Operation and Maintenance (O&M) expense against a 2006 baseline year," but recommended that "2007 . . . is a more appropriate baseline." (06-1453 Staff Report at 43 (May 23, 2008).) Staff recommended 2007 as the baseline year because DEO had "not yet begun to realize the savings resulting from the AMR installations, and its total Meter Reading O&M expense was higher in 2007 than it was in 2006." (*Id*.)

The AMR application was litigated through the end of the hearing in the summer of 2008, but the parties ultimately reached a stipulation recommending approval in accordance with the Staff Report. The Commission approved the stipulation on October 15, 2008. *See* 06-1453 Order at 10. In approving the AMR application, the Commission required DEO to "work with staff and OCC to develop an appropriate baseline from which meter reading . . . savings will be determined and such quantifiable savings shall be credited" to the AMR charge. *Id*.

The Commission's approval of rider recovery was one year and ten months after the date DEO filed the application and ten-and-a-half months after DEO had originally intended to accelerate deployment. (*See* 06-1453 Appl. at 4.) Nevertheless, while the rate case was being litigated, DEO had begun to install AMR devices. In 2007, as it had said it would in its application, DEO began replacing certain defective remote-read devices with AMR devices, but these replacements were *not* to be included in the proposed charge. (*Id*. at 4–5.) DEO performed other conversions that year, too, but did so without any assurance of rider recovery. But the total number of AMR devices installed in 2007 (about 132,000) was much less than the 250,000 installations that DEO had estimated for an accelerated year. (*See id*. at 4 *and* Staff Comments at 5.) And in 2008, despite lacking any assurance of rider recovery for most of the year, DEO commenced accelerated installation of AMR devices, installing 278,582 units that year. (Staff Comments at 5.) DEO exceeded 250,000 installations in 2009 and 2010 as well. (*Id*.) It fell slightly below 250,000 units in 2011, but only because nearly all of the devices had been installed by the end of that year.

C. Case No. 09-1875-GA-RDR

In Case No. 09-1875-GA-RDR, the Commission issued an order that shapes much of the present proceeding. As pertinent here, the 09-1875 Order did two things.

First, the 09-1875 Order reaffirmed the cost-savings methodology proposed in the 06-1453 application, recommended in the staff report, agreed to in the stipulation, and ordered by the Commission in approving the stipulation. The 09-1875 Order confirmed that DEO was to compare its actual meter-reading expense to the baseline expense in 2007, and "*such* quantifiable savings" would then reduce the AMR charge. 06-1453 Order at 10; *see* 09-1875 Order at 7.

The cost-savings issue arose in Case 09-1875 because OCC proposed a different method of quantifying savings: in its view, "because the AMR program has been deployed to approximately 58 percent of the meters in DEO's territory, savings should be imputed to equal 58 percent of the savings DEO projected would result from the AMR program." 09-1875 Order at 5 (describing OCC position). The Commission rejected OCC's argument *and* reaffirmed that the simple, baseline-to-actual comparison approved in the original order would establish cost savings to be credited to the AMR Charge:

> [T]he Commission finds that OCC's argument that the meter reading and call center savings reported by DEO be replaced by imputed or surrogate savings based on the percentage of the total AMR installations completed lacks merit. The stipulation in the DEO Distribution Rate Case clearly states that AMR installation costs would be offset only by quantifiable savings. OCC's proposal in favor of imputed savings does not comport with either the stipulation approved in the rate case or [another earlier AMR cost recovery stipulation].

Id. at 7. The order rejected OCC's "surrogate" savings calculation because the approach of "imputed savings" did "not comport with [the applicable] stipulation[s]." *Id*.

The second thing the 09-1875 Order did was explain the Commission's expectations for the next two years of the program. In a paragraph that essentially forms the law of this case, the Commission provided a general instruction fleshed out by three specific instructions:

> While the evidence in this case supports DEO's calculation, [***1***] the Commission finds that DEO should be installing the AMR devices such that savings will be maximized and rerouting will be made possible in all of the communities at the earliest possible time. [***2***] Therefore, the Commission expects that DEO's filing in 2011, for recovery of 2010 costs, will reflect a substantially greater number of

> communities rerouted. [*3*] The Commission anticipates that, by the end of 2011, it will be possible to reroute nearly all of DEO's communities. [*4*] To that end, the Commission finds that, in its 2011 filing, DEO should demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will maximize savings by allowing rerouting at the earliest possible time.

Id. The first and third specific requirements expressly applied to "DEO's filing in 2011, for recovery of 2010 costs"—meaning *last* year's filing in Case No. 10-2853-GA-RDR. *Id*. The other requirement applies this year: the order required that "by the end of 2011" it would "be possible to reroute nearly all of DEO's communities." *Id*.

D. Case No. 10-2853-GA-RDR

As noted, two requirements from the 09-1875 Order applied to the next year's case, which was eventually docketed as Case No. 10-2853-GA-RDR. First, DEO's filing in that case was to "reflect a substantially greater number of communities rerouted." 09-1875 Order at 7. The Commission did not find that DEO failed in this. In fact, DEO had achieved a ten-fold increase in rerouting: it "had rerouted 310,721 accounts or 671 routes by the end of 2010, as compared to 25,284 accounts or 63 routes by the end of the previous year." (DEO Ex. 2.0 ("Fanelly Dir.") at 2–3.)

The other requirement was forward-looking: DEO was to "demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will maximize savings by allowing rerouting at the earliest possible time." 09-1875 Order at 7. DEO provided this demonstration with its 2011 AMR Plan, attached as Exhibit B to its application in Case 10-2853. Staff reviewed that plan and noted the specific "demonstration" requirement of the previous year's order, but it did not allege that DEO had failed to make the required demonstration. (*See* 10-2853 Staff Comments at 6–10.) Staff did not have "any specific statements that the plan was deficient in the . . .

comments that were filed [in Case 10-2853]." (Tr. 266–67.) The Commission did not find that DEO had failed to "demonstrate how" it planned to complete installation and achieve rerouting. *See* 10-2853 Order (April 27, 2011). In fact, DEO, Staff, OCC and OPAE agreed to the savings calculation presented in Case 10-2853 and signed a stipulation to that effect, which the Commission later approved.

E. Current Proceeding

That leads to the current proceeding. DEO filed its application in this case on February 28, 2012. The application showed that DEO has installed AMR devices on over 99 percent of its active meters and realized approximately $3.5 million in meter-reading cost savings compared to the 2007 baseline year. Only Staff filed comments regarding the application. It raised three, none of which were resolved, and a one-day hearing on the application and comments was held on May 2, 2012.

Five months later, the Commission issued its Order. It confirmed that DEO's target date for completing installations was December 31, 2011. Order at 17–18. It adopted Staff's recommendation to reduce DEO's charge by $1.6 million, *id*., which represented "three months of full meter reading savings for the last three months of 2011." (*See* Staff Br. at 15.) And although Staff appeared to have ceased pursuing it, the Commission ordered a further reduction premised on the conclusion that the "definitive" five-year term of the AMR program commenced on January 1, 2007, which was two weeks after DEO filed its application and almost two years before the Commission approved it. *See* Order at 13.

IV. ARGUMENT

The Order is unreasonable and unlawful for the reasons that follow.

A. The Order is substantively unreasonable.

Commission orders must be reasonable, and unreasonable orders are to be reversed. *See* R.C. 4903.13; *see In re Columbus S. Power Co.*, 129 Ohio St. 3d 271, 2011-Ohio-2638, ¶ 15 (recognizing that an unreasonable order is one that "fails to accord with reason"). The $1.6 million reduction ordered by the Commission does not meet this basic standard, because the Commission's reasoning simply does not make sense.

The Order clearly states that the Commission expected DEO to have completed its program by "the end of 2011." In the paragraphs justifying the $1.6 million reduction in DEO's charge, the Commission states no less than nine times that DEO was to have completed its program by that time. Order at 17–18. Thus, the Commission described its task as determining "the appropriate level of O&M savings that should have been achieved *by the end of 2011*." Order at 18 (emphasis added).

Despite describing its task in this way, the Commission adopted a reduction premised on completion by an *earlier* target date. Staff's recommended reduction of $1.6 million was based on the assumption that DEO should have "completed installation of AMRs on all active meters in its system in early August of 2011" and achieved full program savings that "October." (Adkins Dir. at 19; Staff Ex. 9(a) ("Errata" to Adkins Dir.) at 1.) It should go without saying that "the end of 2011" does not fall in "early August of 2011" or "October." The Commission apparently failed to grasp that Mr. Adkins *was not even trying* to estimate what the Order found: "the appropriate level of O&M savings that should have been achieved by the end of 2011." Order at 18.

So there is a fundamental mismatch at the heart of the order. The Commission *expressly* held that DEO had until "the end of 2011" to complete the program, but then adopted a reduction *expressly* designed to estimate what DEO would have saved had it met an "early August of

2011" completion date. (Adkins Dir. at 19.) Lest there be any doubt, Staff—in its own words—characterizes the $1.6 million reduction as "three months of full meter reading savings for the last three months of 2011." (Staff Br. at 15.) But the target date was not somewhere in the middle of 2011; as the Order states nine times, it was "the end of 2011." *See* Order at 17–18.

The Order simply does not make sense.

B. Numerous findings and conclusions in the Order lack record support.

Not only is the Order unreasonable, but a number of its findings also lack record support. The Revised Code instructs the Supreme Court to reverse a Commission order "if, *upon consideration of the record*, such court is of the opinion that such order was unlawful or unreasonable." R.C. 4903.13 (emphasis added). Accordingly, "factual support for commission determinations must exist in the record." *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 90 (1999). Indeed, the Commission "abuses its discretion when it renders an opinion on an issue without record support." *Id.*; *see also Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St. 3d 1, 26–33 (1995) (reversing Commission order in part because no record evidence supported its conclusions); *Conrail v. Pub. Util. Comm.*, 47 Ohio St. 3d 81, 84–85 (1989) (reversing Commission order where conclusions were based on speculation and "unsupported by the record"). Likewise, where "the manifest weight of the evidence contradicts the commission's conclusion," its order will be reversed. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788, ¶ 29.

Together, all this means that the Commission cannot reduce a charge without a clear evidentiary basis. Despite these clear legal requirements, numerous findings of the Commission either lack any record support or are against the manifest weight of the evidence.

1. The undisputed record evidence precluded *any* reduction premised on excess meter-reading salaries in 2011.

The Commission reduced DEO's annual recovery by $1.6 million, finding that this was "the appropriate level of O&M savings that should have been achieved *by the end of 2011*." Order at 18 (emphasis added). In support of this finding, the Commission solely relied on Staff's O&M savings calculation, which (the Order said) was based on "the reduction in the number of meter readers *once the program is fully deployed, which was to be by the end of 2011*." *Id.* (emphasis added).

The Commission's characterization of this evidence—the only evidence it relies upon—is incorrect. Staff did not even attempt to estimate the O&M savings "that should have been achieved by the end of 2011." *Id*. And its calculation did not assume full deployment "by the end of 2011." *Id*. On the contrary, Staff's calculation was *expressly* premised on an "early August of 2011" completion date. (Adkins Dir. at 19.) This is not a debatable point.

So the relied-upon evidence does not support the Commission's finding. More than that, the undisputed record evidence refutes it. DEO witness Carrie Fanelly explained that by the end of 2011, DEO had achieved *all* possible savings associated with staffing reductions. (Fanelly Dir. at 8–9.) Staff concedes that salaries avoided by staffing reductions are *the* driver of meter-reading cost savings (Adkins Dir. at 5), but "[b]y the first day of 2012, DEO had . . . *made full staffing reductions*." (Fanelly Dir. at 8 (emphasis added).) No one can dispute these facts. No evidence in the record contradicts Ms. Fanelly's testimony on this point, which is confirmed by Mr. Adkins' adjustment of the target date. Thus, the undisputed evidence shows that, heading into 2012, whatever savings could be achieved through staffing reductions *had been achieved*.

The Commission lacked any evidentiary basis for reducing DEO's cost recovery based on excess meter-reading salaries associated with the completion of the program by the end of 2011.

2. The $1.6 million recommendation does not account for the increased costs of completing installation by early August of 2011.

Any reduction based on excess meter-reading salaries would have been improper. But even if one had been proper, DEO showed that the reduction was improperly calculated. Staff's witness made *no attempt* to account for how much more it would have cost for DEO to install all of its AMR devices by early August of 2011. To fairly impute accelerated O&M cost savings (assuming there were no other legal problems), one would also need to accurately reconstruct the cost of meeting the accelerated target. No one can reasonably dispute that it would have cost more to install devices at a faster pace. 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 . . . due to overtime, additional truck rolls, all of those types of activities." (Tr. 185.) But Staff's witness "did not consider the expense required to generate [the three months of O&M] savings." (Tr. 277.) Thus, the reduction penalizes DEO with additional imputed savings but does not give DEO credit for additional imputed costs.

This evidence shows that the $1.6 million reduction (even had it been appropriate) is necessarily overstated and lacked evidentiary support.

3. The Commission's characterization of rerouting is incorrect and lacks record support.

Another serious error appears early in the "background" section of the Order. In a footnote on page two, the Order states, "Rerouting is the conversion of walking meter reading routes to drive-by meter reading routes." It is not clear to what extent the Order depended on this error; it might explain why the Commission counterfactually found that DEO had not achieved full staffing reductions by the first of 2012. But the finding is certainly incorrect.

The record makes clear that rerouting is not the same thing as "the conversion of walking meter reading routes to drive-by meter reading routes." *Id*. Rerouting is one of the last steps in the conversion to AMR and is essentially a final fine-tuning of the meter-reading routes. (*See* Fanelly Dir. at 5–6; Tr. 74 ("rerouting is done after the meters are read electronically"); Tr. 155–58 (describing multiple steps antecedent to and necessary to complete rerouting).) One of the steps that occurs *before* rerouting is the conversion to drive-by routes. They are not the same things.

The following exchange on cross-examination clearly shows that rerouting and the conversion to driving routes are not the same thing, as the un-rerouted shops were receiving drive-by meter reads:

> Q. So that means that the 320,000 meters in Western and Youngstown [which had not been rerouted, *see* Tr. 72] could not be read automatically at the end of December 31st, 2011?
>
> A. That's incorrect. We're saying that those shops were not rerouted as of the end of 2011, but all accounts which had an AMR device installed were, in fact, being read using the AMR device on a monthly basis as of the end of the year.
>
> Q. So for Youngstown and Western, a meter reader could sit in the car, drive up and down the street and get the meter reads, correct?
>
> A. That's my understanding, yes.
>
> Q. There was no manual meter reading going on in Youngstown or Western after December 31, 2011?
>
> A. That's my understanding.

(Tr. 73 (emphases added).) The following testimony clearly makes the same point:

> Now, as of December 31, 2011, there were two shops for which that rerouting had not taken place yet, hadn't been initiated, but those shops were being read with the AMR devices and Dominion East Ohio eliminated the walking routes, the meter readers going house to house. So even though we hadn't done the rerouting, we,

> in essence, have done what we needed to do to get that full level of savings then in 2012.

(Tr. 99 (emphases added).) These are clear examples, and they are not the only ones. (*See also, e.g.*, Friscic Dir. at 11 (by the end of 2011, "DEO has eliminated walking routes" and "only two local shops remained to be fully rerouted"); Tr. 108 ("once they're installed, then there's additional steps that need to be taken; one being the move to monthly meter reading, and the other being rerouting").)

Thus, contrary to the Order, this evidence shows that rerouting and the conversion from walking to driving routes are not the same thing. No evidence contradicts the foregoing. The Commission cited pages 98 and 155 to 156 of the transcript in support of its finding. But neither section defines rerouting or states that rerouting is the conversion of walking routes to driving routes.

More to the point, no evidence showed that rerouting is a major driver of meter-reading O&M savings; as all parties agree, the major driver of meter-reading O&M is salaries avoided by staffing reductions. (*See* Adkins Dir. at 5.) Yet no party has presented evidence showing that any non-rerouted communities prevented DEO from achieving any staffing reductions. Nor has any party presented evidencing tying any O&M savings reduction to any failure to reroute.

In sum, the Commission's characterization of rerouting is without record support.

4. The Commission's finding that DEO was subject to "a definitive five-year period beginning on January 1, 2007" in which to install AMR devices is against the manifest weight of the evidence.

The Commission also held that "DEO's AMR program was approved for a five-year period ending December 31, 2011" and that DEO had "a definitive five-year period beginning on January 1, 2007" in which to install AMR devices. Order at 13.

There is not a single document in the record that sets forth this start date. And the manifest weight of the evidence shows that the AMR program *cannot* have begun at that time:

- DEO filed its original AMR application on December 13, 2006. (06-1453 Appl. at 1.)
- That application proposed a five-year accelerated deployment "beginning in January *2008*." (*Id*. (emphasis added).)
- The application was not approved until October 15, 2008. 06-1453 Order at 10.

These documents, and their dates, show that it is not possible that DEO's program began on January 1, 2007. The program was not proposed to begin at that time, and it had not been approved at that time.

None of the three documents cited by the Commission in its Order set forth or establish a "a definitive five-year period beginning on January 1, 2007." Order at 13. Perhaps these documents could *coexist* with a January 1, 2007 start date—but that is a far cry from *establishing* such a date. And the documents where an authoritative 2007 start date could have been established either proposed a later date (the 06-1453 Application) or approved that application without modifying the proposed start date (the 06-1453 Order).

The Commission's finding is against the manifest weight of the evidence and is another reversible error.

C. The Order unlawfully alters the legal significance of DEO's past conduct and deprives DEO of due process.

The Order also poses several retroactivity and fairness problems. 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 due process 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").

All this means that the Commission cannot retroactively increase the requirements of past orders when a person has reasonably relied on those requirements and has lost any chance of complying with the newly heightened requirements. And the Commission certainly cannot do this in order to impose a financial penalty on that party. Notwithstanding these prohibitions, the Order expressly or implicitly alters the standards that DEO relied upon and then penalizes DEO for failing to satisfy the retroactively modified standard.

1. The Order either mischaracterizes or retroactively changes the 09-1875 Order's rerouting requirement.

The most blatant example of changing a past requirement after the fact has to do with rerouting. The Order contains the following sentence: "The Commission does not believe that DEO's failure to reroute over a quarter of its customers constitutes rerouting of nearly all of its communities by the end of 2011, as we mandated in the *2009 AMR Case*." Order at 18. Thus, according to the Commission, the earlier order "mandated" that DEO "rerout[e] nearly all of its communities by the end of 2011." *Id.*

That is *not* what the 09-1875 Order said. At page seven of that order, the Commission stated, "by the end of 2011, *it will be possible* to reroute nearly all of DEO's communities." (Emphasis added.) The present Order plainly omits and ignores the italicized words. But those words necessarily imply that DEO could permissibly have been unprepared to reroute at least one community at the beginning of 2012.

DEO satisfied the standard actually set forth in the 09-1875 Order. At the beginning of 2012, the undisputed record evidence shows that it was *possible* to reroute *all* of DEO's communities. "DEO had initiated or completed the rerouting of . . . all of the communities in its service area except for those serviced by the Western and Youngstown shops." (Fanelly Dir. at

5.) And by the end of 2011, it was possible to reroute *all* of DEO's communities, not "nearly all" of them. (*Id*.)

The Commission can only fault DEO's performance by changing the standard.

2. The Order depends on a recommendation that retroactively adjusted the target dates established in the 09-1875 Order.

This is not the only retroactivity problem. As discussed above, the Commission effectively penalized DEO for failing to achieve full staffing reductions by October 2011. (*See* Adkins Dir. at 5; Staff Init. Br. at 15.) The Order does not address the definite mismatch between its finding (what DEO should have done by the end of 2011) and the basis of Staff's recommendation (what DEO should have done by early August of 2011). But if the Commission adopted (or adopts) Staff's reasoning as given, it will have violated the rules against imposing retroactive penalties and it will have denied DEO due process.

Even now, in October 2012, the early August of 2011 and October 2011 deadlines relied upon by Staff (*see* Adkins Dir. at 19) still have not been adopted by the Commission. DEO cannot be fairly penalized for failing to comply with a deadline that was not announced until over a year after it had passed. The fact that the Commission expressly told DEO to aim for a *later* target in the 09-1875 Order would only make the unfairness worse.

Again, the Commission can only penalize DEO if it first changes the standard.

3. The Order retroactively created a new legal obligation arising on January 1, 2007 and imposed detrimental legal consequences based on it.

The Commission also informed DEO, for the first time in October 2012, that it had a "definitive five-year period beginning on January 1, 2007" in which to install AMR devices. Order at 13. DEO would ask the Commission to consider this matter further.

a. The dates proposed and adopted in the 06-1453 application and order make a January 1, 2007 start date impossible.

DEO filed its original AMR application on December 13, 2006. (06-1453 Appl. at 1.) That application proposed a five-year accelerated deployment "beginning in January *2008*." (*Id.* (emphasis added).) The application was not approved until October 15, 2008. 06-1453 Order at 10. But the Commission is now saying that only two weeks after filing, on January 1, 2007, a legal obligation came into existence that required DEO to immediately begin accelerating AMR installations or risk disallowance five years later.

How was DEO to know on New Years Day 2007 that "a definitive five-year period" had commenced? DEO had not proposed this start date. The Commission did not tell DEO about it. Indeed, the Commission did not rule on DEO's application for over twenty months. So the entire year of 2007 came and went without DEO having any opportunity to make use of it as one of the approved, accelerated program years. But the Commission now penalizes DEO based on this date.

b. None of the evidence relied upon by the Commission sets forth a January 1, 2007 start date—and none of it existed on January 1, 2007.

None of the support adduced by the Commission provides any answer to this problem. Notably, the Order makes no attempt to reconcile its holding with the evidence discussed above, namely, (*1*) the filing date of DEO's AMR application, (*2*) that application's proposed January 2008 start date, or (*3*) the 06-1453 Order which issued in October 2008. These are not even mentioned in the Commission's analysis. DEO's arguments are simply labeled "not persuasive" and rejected without discussion.

None of the items cited by the Commission set forth a January 1, 2007 start date. More problematically, *none of them existed on January 1, 2007*. The primary bit of evidence relied on by the Order (namely, the Staff Report) was not issued until May 2008. And anyone can read it and see that it does not recommend holding DEO to a January 1, 2007 start date. But even had it done so, it provided DEO with no notice of the start date *before* January 1, 2007.

The 09-1875 Order was also issued well after 2007. DEO can agree that the 09-1875 Order established an "end of 2011" target date for installations, but that Order did not state that DEO's AMR approval would simply *end* at that time, such that further extension of the program would be necessary. Given that the Commission had already approved DEO's AMR application *without* modifying its proposed end date (that is, December 2012), a clear statement to this effect would have been necessary.

Finally, the Commission points to the end date of one of DEO's privately entered employment agreements. Order at 13. DEO is simply at a loss to see how an agreed term for one of its labor agreements had any effect whatsoever on DEO's legal authorization with respect to the AMR program. And again, the Commission did not show that this document had established a start date that was in effect *before* January 1, 2007.

Yet again, the Commission cannot penalize DEO without changing the standard.

D. The Order retroactively changes the requirements of past orders, which is barred by collateral estoppel.

The retroactive changes discussed above also violate the doctrine of 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).

The Order runs into numerous collateral estoppel problems.

1. Collateral estoppel bars adoption of "a definitive five-year period beginning on January 1, 2007" applicable to the AMR program.

First, the Commission ruled that "DEO's AMR program was approved for a five-year period ending December 31, 2011," meaning that "a definitive five-year period [began] on January 1, 2007." Order at 13. This holding is barred by collateral estoppel.

The January 2008 start date was approved by the Commission in the 06-1453 Order. In the original AMR application, DEO proposed an accelerated installation of AMR devices "[u]nder a five-year schedule . . . beginning in 2008." (06-1453 Appl. at 4.) The Staff Report recommended approving the application, and while it made several modifications, it did not modify the proposed start date. (*See* 06-1453 Staff Report at 41–43.) The 06-1453 Order adopted "staff's recommendations with regard to the AMR application." 06-1453 Order at 10. Thus, the 06-1453 Order approved a January 2008 start date.

Nevertheless, four years after approving a January 2008 start date, the Commission revisited this issue and held that DEO's "definitive" start date was January 1, 2007. Order at 13. This is barred by collateral estoppel.

2. The imputation of artificial, surrogate savings is barred by the 09-1875 Order.

Likewise, the savings reduction adopted by the Commission is also barred by collateral estoppel. 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, the Commission reduced DEO's AMR charge based on an imputation of savings that DEO would have achieved had it completed the program about five months before the end of 2011. The record confirms that Staff's "calculation . . . 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.

3. The reduction ordered by the Commission is barred because it effectively revises the target dates 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, the Order adopted Staff's reduction, which openly moved those targets (from "end of 2011" to "early August of 2011") in order to penalize DEO. But those deadlines were conclusively set in the 09-1875 Order. The "question [of target dates] was directly at issue in the prior proceeding," it "was passed upon by the commission," and no party challenged the target dates through rehearing or appeal. *See Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9, 10 (1985). Those dates cannot be revised now that they have past.

4. The present Order revises the rerouting expectations established in the 09-1875 Order.

The 09-1875 Order also established the Commission expectation that, "by the end of 2011, it will be possible to reroute nearly all of DEO's communities." *Id*. at 7. No party challenged this expectation on rehearing or appeal.

Nevertheless, in late 2012, the Commission revised this requirement. The Order holds DEO to the standard of "rerouting . . . nearly all of its communities by the end of 2011." Order at 18. But by omitting the phrase "it will be possible to reroute," the Commission changed the standard. The Commission did not require DEO to reroute nearly all of its communities by the end of 2011; it held only that it should "be possible" to do so by then.

All of these requirements were conclusively established in past orders, and all of them were revisited and substantially revised by the Commission in the present Order. This is yet another ground on which the Order should be reversed.

V. ARGUMENTS PERTAINING TO MOTION FOR STAY

DEO also filed a motion for stay of the Order on October 11, 2012. The Commission has not ruled on that motion as of the date of this filing. If the Commission grants the motion, the remaining arguments need not be considered. But to allow the Commission to resolve all issues in a single entry on rehearing, DEO will readdress its stay arguments to the Commission.

A. If the Commission denies DEO's Motion for Stay, it will have erred because DEO showed that it could secure all parties from any substantial harm.

Denial of a stay would be inappropriate where the party seeking a stay can protect all parties from any substantial harm. DEO can protect all parties.

Under Ohio law, courts are required to grant stays of disputed orders, so long as the party seeking the stay can provide adequate financial security. "Pursuant to [Civ.R. 62], defendants-appellants are entitled to a stay of the judgment *as a matter of right*. The lone requirement of Civ.R. 62(B) is the giving of an adequate supersedeas bond." *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 571 (2000) (brackets sic; emphasis added); *see also, e.g.*, *State ex rel. Geauga Cty. Bd. of Comm'rs v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, ¶ 17 (same). The public utilities statutes are entirely consistent with this rule and support its application. R.C. 4903.16 permits a stay by the Ohio Supreme Court with the single requirement that "the appellant shall execute an [adequate] undertaking."

This makes abundant sense. Decision-makers sometimes get cases wrong. So long as the aggrieved party can secure the other parties from any harm, no worthy interest is served by forcing the aggrieved party to suffer irreparable damage while the case winds its way through further proceedings.

DEO can protect all other parties from harm. With the Commission's approval, DEO will (*1*) maintain an account tracking the difference between DEO's current charge ($0.57) and the charge the Commission ordered ($0.42) from the date that the rate would have become effective based on the Order, (*2*) apply carrying charges to the accrued amount at DEO's cost of short-term debt, and (*3*) refund this amount to customers in the event the Order is ultimately upheld. If the Commission denies the motion for stay, DEO will do the same. And should DEO prevail in approval of its proposed $0.54 rate, the difference between the currently effective rate and the approved rate will similarly be refunded to customers. Although DEO's financial wherewithal makes it unnecessary, DEO is willing and able to provide reasonable financial security in a form ordered by the Commission, including payment of the accrued amount into escrow or provision of a supersedeas bond. And if these provisions have failed to account for a particular interest or harm, DEO is willing to explore additional ways to eliminate such harm and would take any reasonable steps to do so.

The Commission can fairly rely on the representations by DEO's undersigned counsel, but to ensure that there are no questions, DEO has provided an affidavit to the same effect from its Senior Vice President and General Manager, Anne Bomar. (*See* Attachment A to Mot. for Stay (Oct. 11, 2012).) Because DEO can and will ensure that no party suffers harm if a stay is granted, the motion should be granted.

B. If the Commission denies DEO's Motion for Stay, it will have erred to the extent that it relied upon and found that DEO did not satisfy the four-part test articulated in *In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co.*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009).

The Commission has looked to a different, four-factor test to determine whether a stay should be granted:

1) "whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits";
2) "whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay";
3) "whether the stay would cause substantial harm to other parties"; and
4) "where lies the public interest."

In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co., Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009). The only authority that DEO is aware of in support of this test is a one-justice dissent in *MCI Telecom. Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 605 (1987) (Douglas, J., dissenting), that to DEO's knowledge has never been cited by a single court.

This test is primarily used to determine whether a trial court should grant a preliminary injunction. *See, e.g.*, *Battelle Mem. Inst. v. Big Darby Creek Shooting Range*, 192 Ohio App.3d 287, 2011-Ohio-793, ¶ 21; *Ulliman v. Ohio High Sch. Athletic Assn.*, 184 Ohio App.3d 52, 2009-Ohio-3756, ¶ 35–36; *see also Int'l Diamond Exch. Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc.*, 70 Ohio App.3d 667, 674 (1991) (applying test to motion to dissolve preliminary injunction before adjudication of the merits). This is the wrong test. A preliminary injunction applies the law's compulsive force before there is a full merits determination, so the test is understandably stringent on the merits question. It is not the test for granting a stay—as noted above, stays are available to would-be appellants *as a matter of right*.

To see how ill-fitting the Commission's inquiry is, consider the first factor—whether the moving party is likely to prevail on the merits. The would-be appellant seeking a stay of an order will usually have lost on the merits. Yet to gain a stay (and thus protect itself from irreparable harm), the losing party must convince the same tribunal that just ruled against it on the merits that it was wrong on the merits. The effect of this rule is that a stay, available as a matter of right in the courts, will virtually never be granted by the Commission.

The Commission should apply the correct standard, as set forth in the preceding section. Nevertheless, even if it applied the incorrect standard, the Commission should still have stayed the Order. DEO will address each factor in the order given above, and it would note at the outset that Ohio law provides that "[n]o one factor in the analysis is dispositive" and that all "four factors must be balanced." *Great Plains Exploration v. Willoughby*, 2006-Ohio-7009, ¶ 11 (Ohio Ct. App. Dec. 29, 2006).

1. DEO can make a strong showing that it is likely to prevail on the merits.

First, DEO can make a strong showing that it is likely to prevail on the merits, as set forth in all of the foregoing arguments. There is no need to again set them forth here.

DEO would note that regardless of whether the Commission agrees with DEO's position, it should not deny a stay on the basis of the first factor. At a minimum, DEO has *bona fide* reasons to challenge the Order, and a fair-minded observer would grant that there are reasonable grounds for dispute. And again, as a matter of law, the Commission is to balance *all four* factors, and no single factor is determinative. *See, e.g.*, *Great Plains Exploration v. Willoughby*, 2006-Ohio-7009, ¶ 11 (Ohio Ct. App. Dec. 29, 2006). Regardless of the first factor, the remaining three factors strongly favor granting a stay, so the Commission should stay the order.

2. DEO would suffer irreparable harm if the order is not stayed.

The second factor considered by the Commission is whether the party seeking the stay would suffer irreparable harm absent the stay. "Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *1st Natl. Bank v. Mountain Agency, LLC*, 12th Dist. No. CA2009-05-056, 2009-Ohio-2202, ¶ 47. This "means that the legal remedy must be as efficient as the indicated equitable remedy would be; that such legal remedy must be presently available in a single action; and that such remedy must be certain and complete." *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, ¶ 81.

This factor cuts in DEO's favor. Because Ohio law does not generally allow refunds of charges that prove either too high or too low, DEO will suffer irreparable harm if the Commission does not grant a stay. *See, e.g.*, *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997). Indeed, the stay is the specific remedy provided by law to protect a party, like DEO, who is aggrieved by a rate order. *See, e.g.*, *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 17. Consistent with this case law, the Commission has found that irreparable harm would occur where the affected party "may not be entitled to a refund" of the alleged incorrect charge. *NOPEC v. Ohio Edison Co.*, 2009 Ohio PUC LEXIS 481, at *8–9.

Because refunds are generally not available under Ohio law, if the Commission does not grant a stay, DEO's "legal remedy" (of an appeal and later stay by the Court) would be necessarily incomplete. Thus, the second factor also favors granting a stay.

3. No other party would suffer any harm, much less substantial harm, if the Order were stayed.

The third factor that the Commission has considered is whether the stay would cause substantial harm to other parties. A stay would cause no harm to other parties. DEO will keep track of the difference between the charge currently in effect and (*1*) the charge proposed by DEO and (*2*) the charge the Commission ordered, will apply carrying charges to these amounts, and will refund the entire applicable amount to customers. DEO is also willing and able to provide reasonable financial security as deemed necessary by the Commission, including the payment of the agreed amount into an escrow account or the provision of a supersedeas bond. And if DEO has failed to account for any harm that would result from a stay, it is willing to explore ways of eliminating such harm and will take any reasonable step to do. (*See* Attachment A to Mot. for Stay.)

4. The public interest favors granting a stay.

As for the final factor, the public interest supports granting a stay. Granting a stay will guarantee that customers pay and DEO collects no more and no less than a just and reasonable charge, as determined by law. If the Order is ultimately overturned, DEO will have received what was due. If the Order is ultimately upheld, the stay will be dissolved, and customers will get back the difference with interest. In short, granting a stay will assure that no party receives a windfall in this case, and that every party gets only what is deserved.

That the public interest will be furthered by granting a stay is confirmed by Ohio law. As discussed above, Ohio law *requires* the granting of stays, so long as the party benefiting from the stay can provide adequate financial security. *State ex rel. Geauga Cty. Bd. of Comm'rs v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, ¶ 17. As set forth in Attachment A to the Motion for Stay and as described above, DEO will do whatever is necessary to ensure that its customers receive a full refund of any difference in the AMR charge (plus carrying charges) if the Order is ultimately upheld.

C. If the Commission denies DEO's Motion for Stay, it will have erred to the extent that it failed to give DEO an opportunity to address any harm for which DEO had not already accounted.

DEO made clear in its motion for stay that if it had failed to account for any harm that would be caused by a stay, it was willing to explore ways of eliminating such harm and would take any reasonable step to do. If the Commission identifies such a harm and rejects the stay on that basis without giving DEO any opportunity to cure, this would be unreasonable and violate the standards applicable to stays that DEO has discussed above.

VI. CONCLUSION

For the foregoing reasons, the Commission should grant rehearing, reverse its decision to reduce DEO's proposed AMR Cost Recovery Charge from $0.54 to $0.42, and grant DEO's application as filed. If the Commission denies DEO's application for rehearing, it nevertheless should stay the Order.

Dated: October 19, 2012

Respectfully submitted,

/s/ Mark A. Whitt

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that a copy of DEO's Application for Rehearing was served by electronic mail to the following persons on this 19th day of October, 2012:

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