

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

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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November 2, 2012

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the approximately 1.1 million residential utility consumers of the Dominion East Ohio Gas Company ("Dominion" or "the Company"), applies for rehearing of the October 3, 2012, Opinion and Order ("O&O") issued by the Public Utilities Commission of Ohio ("PUCO" or "the Commission"). The PUCO erred in rejecting OCC's proposed reduction for what customers should have to pay for automated meter reading ("AMR") charges in the amount of \$552,270.

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the O&O was unjust, unreasonable, and unlawful in the following particulars:

- A. The PUCO Erred by Determining that OCC's Proposal to Reduce What Customers Should Pay for AMR Charges Had To Be Rejected Because OCC Did Not Present Testimony on the Issue. There is No Law, PUCO Rule or Ohio Rule that Requires an Intervenor to Make a Record with Testimony in Order to Prevail. Indeed, R.C. 4903.09 Requires the PUCO to Base its Decisions on the Record Before it, With No Requirement for Testimony. OCC, Even Without Testimony, Created a Record On The Issue With Evidence Upon Which The PUCO Could Base a Decision to Protect Ohio Customers.

- B. The PUCO Erred by Ruling that Collateral Estoppel Barred OCC from Raising the Issue of Excess Carrying Charges Related to the Carry-Over of 100,000 AMR Devices from One Year to the Next. The Stipulation in Case No. 09-38-GA-RDR that the PUCO Referenced Did Not Address the Issue of Carrying Costs Associated With the Carry-Over. (While OCC files this claim of error, it is not clear whether, on O&O page 19, the PUCO is stating its determination or merely reciting Dominion's position.)

An explanation of the basis for each of the grounds for rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the OCC's claims of error, the PUCO should grant rehearing and modify its Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Dominion initiated this case with a Pre-filing Notice (“PFN”) on November 30, 2011. The Company followed the PFN with an Application on February 28, 2012, which requested an Automated Meter Reading (“AMR”) Cost Recovery Charge Rider of \$0.54 per month, per customer.¹ On December 16, 2011, OCC filed a Motion to Intervene that was granted by Entry on March 5, 2012. Pursuant to a March 30, 2012 Entry by the Attorney Examiner in this docket² the Office of the Ohio Consumers’ Counsel (“OCC”), Ohio Partners for Affordable Energy (“OPAE”)³ and the Staff of the Public Utilities Commission of Ohio (“Commission” or “PUCO”) filed Comments on April 6, 2012.

In their Comments, OCC and OPAE specifically stated that they reserved the right “to address any issues raised by the Commission Staff or any other party in this proceeding.”⁴

¹ 11-5843-GA-RDR, DEO Ex. No. 10 (Application) (February 28, 2012) at 1.

² 11-5843-GA-RDR, Entry (March 30, 2012) at 2. (The Attorney Examiner granted OCC’s Motion for One week Continuance to the Procedural Schedule).

³ OCC and OPAE filed Joint Comments.

⁴ Id. at 2.

The parties were unable to resolve all of the issues raised, so an evidentiary hearing was held on May 2, 2012. OCC adduced evidence in the hearing through cross-examination and filed an Initial Brief (June 6, 2012) and Reply Brief (June 20, 2012).

The O&O rejected OCC's argument that the AMR cost recovery charge should be reduced by approximately \$552,270 to reflect the greater cost of carrying charges. Those carrying charges are associated with the carry-over of 100,000 AMR devices from one year to the next year compared to the savings from the bulk purchase of AMR devices.

On October 11, 2012, Dominion filed a Motion for a Stay of the O&O. OCC and OPAE filed a Memorandum Contra the Motion for Stay on October 16, 2012. On October 19, 2012, Dominion filed an Application for Rehearing. On October 29, 2012, OCC and OPAE filed a Memorandum Contra the Dominion Application for Rehearing.

Pursuant to R.C. 4903.10 and Ohio Admin. Code 4901-1-35, OCC asserts that the Opinion and Order was unjust, unreasonable, and unlawful in the following particulars and respectfully requests the Commission grant rehearing.

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10. This statute provides that within thirty days after an order is issued by the Commission "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."⁵

⁵ R.C. 4903.10.

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”⁶ If the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *.”⁷

OCC participated in this case, and thus, meets the statutory conditions that apply to an applicant for rehearing under R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

A. The PUCO Erred by Determining that OCC’s Proposal to Reduce What Customers Should Pay for AMR Charges Had To Be Rejected Because OCC Did Not Present Testimony on the Issue. There is No Law, PUCO Rule or Ohio Rule that Requires an Intervenor to Make a Record with Testimony in Order to Prevail. Indeed, R.C. 4903.09 Requires the PUCO to Base its Decisions on the Record Before it, With No Requirement for Testimony. OCC, Even Without Testimony, Created a Record On The Issue With Evidence Upon Which The PUCO Could Base a Decision to Protect Ohio Customers.

In rejecting OCC’s challenge to the carrying costs associated with the carry-over of 100,000 AMR devices from one year to the next year, the PUCO created and applied a standard or requirement for direct testimony in order to challenge a utility proposal, “Without supporting testimony from OCC, the Commission finds it inappropriate to consider whether a carrying charge should be reflected in the AMR cost recovery

⁶ R.C. 4903.10.

⁷ Id.

charge.”⁸ This PUCO’s conclusion seems to require that an Intervenor’s challenge to a utility proposal must include supporting testimony. That error should be modified on rehearing.

One problem with this conclusion is that there is no such requirement in the law, PUCO Rules, or in Ohio Rules. There is, however, a law that allows Intervenor such as OCC to adduce evidence as part of a record, with no requirement for testimony, as a basis for PUCO decisions. That law is R.C. 4903.09.

Additionally, the Ohio Rules of Evidence provide that “Cross-examination shall be permitted on all relevant matters * * *.”⁹ And the Supreme Court of Ohio has established that testimony adduced on cross-examination within proper limits and tending to establish the litigant’s case may be allowed to stand and be considered.¹⁰

There is another problem. Unlike utilities that have significant resources to call upon for litigation including for testimony, participants with more limited resources, such as the OCC and the PUCO Staff, must sometimes make their cases through cross-examination of other parties’ witnesses or through introduction of exhibits, or other means. While the PUCO must assign the appropriate weight to be afforded the evidence before it, there is no basis for it to find (as it did here) that a party cannot prevail in the absence of testimony. The Commission applied this requirement without support of authority.

The issue of cost savings from the bulk purchases of AMR devices was initially raised by Dominion witness Friscic in her Direct Testimony which was filed on April 27,

⁸ 11-5843-GA-RDR Opinion and Order (October 3, 2012) at 19.

⁹ Rule 611(B), Ohio Rules of Evidence.

¹⁰ *See Cities Service Oil Co. v. Burkett* (1964), 176 Ohio St. 449, 452; 200 N.E. 2d 314, 316.

2012 -- or 19 days after OCC filed its Comments in the case. OCC could not have raised the issue in its Comments. Thus, Dominion through Ms. Friscic's testimony opened the door on this issue. Once Dominion raised the issue, other parties should have the right to follow-up and explore the matter. In fact, Dominion acknowledged that OCC had the right to cross-examine Ms. Friscic on the issue.¹¹

As part of that cross-examination, OCC was able to establish in the record that the carrying costs for the 100,000 AMR devices (\$448,720) from one year to the next year (for three years -- \$1,346,160) exceeded the savings achieved from the bulk purchase of AMR devices (\$793,890).¹² Ms. Friscic testified that the cost of each AMR device was approximately \$39.00 or \$40.00 per unit.¹³ Thus, a carry-over inventory of 100,000 devices would have a cost of \$3,950,000 to \$4,000,000.¹⁴ Ms. Friscic acknowledged that the carrying cost to be used in a calculation is the 11.36% listed in Dominion's Application Exhibit A, Schedule 1 in this case.¹⁵ When the carrying cost rate of 11.36% is multiplied by the total cost amount of carryover inventory (100,000 AMR devices), the resulting carrying cost is \$448,720 per year. Thus, three years of carrying costs (\$1,346,160) offset the initial bulk purchase discount of 2.5% (\$793,890)¹⁶ by \$552,270. Rather than saving customers money as claimed by Ms. Friscic, the Company's actions added unwarranted costs to the AMR program.

¹¹ 11-5843-GA-RDR, Dominion Reply Brief at 29-30.

¹² 11-5843-GA-RDR, Direct Testimony of Vicki Friscic (April 27, 2012) at 10-11.

¹³ Tr. (Friscic) at 70.

¹⁴ Id.

¹⁵ Id.

¹⁶ 11-5843-GA-RDR, Direct Testimony of Vicki Friscic (April 27, 2012) at 10-11.

OCC had the right to cross-examine Ms. Friscic on the issue of the alleged benefits from the bulk purchase of AMR devices to determine if the alleged claimed benefit was real or illusory.¹⁷ The right to cross-examine, combined with OCC's reservation of right -- that was not challenged by Dominion when OCC asserted that right -- was more than sufficient to permit OCC to raise the issue of the disallowance in brief.

In short, OCC provided a record to the PUCO. R.C. 4903.09 requires the PUCO to base its decision on the record, regardless of whether a party presented testimony. The PUCO had before it a record with OCC's proposal and should have adopted that proposal to protect Ohio customers. The PUCO's determination, based as it is on a requirement for OCC to have presented testimony, is in error and should be modified.

The other effect of the PUCO's O&O which rejected OCC's issue because it was not supported by testimony is that it shifts the burden of proof from the Company to OCC. As explained below, the law establishes that in the AMR proceedings, the burden of proof rests on the utility. The Application has been filed pursuant to R.C. 4929.11. The burden of proof regarding the Application rests upon Dominion. In a hearing regarding a proposal that does involve an increase in rates, R.C. 4909.19 provides that, "[a]t any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility."¹⁸ Inasmuch as the annual AMR cases are an outgrowth of Dominion's 2007 Rate Case, Dominion in this case bears the burden of proof. Therefore, neither OCC nor any other intervenor bears any burden of proof in this case. Instead, Dominion must prove that each separate cost component in the AMR cost recovery charge is reasonable. While

¹⁷ 11-5843-GA-RDR, Dominion Reply Brief at 29-30.

¹⁸ R.C. 4909.19 (C).

Dominion may have needed to present testimony to meet its burden of proof and an Intervenor such as OCC or a participant such as the PUCO Staff need not present testimony to prevail.

In this case, OCC questioned the reasonableness of the carrying costs associated with the carry-over of 100,000 AMR devices from one year to the next. The only evidence presented by Dominion was that the purchase of AMR devices in bulk provided a 2.5% discount of \$793,890.¹⁹ In response to that claim, OCC established that the carrying costs associated with carrying-over 100,000 AMR devices from one year to the next was \$448,720 per year and that three years of carrying costs of \$1,346,160 imposed on customers exceeded the bulk purchase discount of \$793,890. Thus, Dominion failed to prove that the bulk purchase provided the benefits to its customers as claimed by Ms. Friscic.²⁰

Dominion also argued that it was denied proper notice which would have provided the Company with an opportunity to present its own evidence.²¹ This claim is unsupportable, because the evidence regarding the carrying costs and the savings from the bulk purchases was all provided by Dominion's own witness. During cross-examination or as part of re-direct examination, Ms. Friscic had the opportunity to refute OCC's argument. She did not, and Dominion had ample notice on the issue. OCC established that Ms. Friscic's claim of cost savings associated with the bulk purchase of AMR devices was not true and the PUCO should grant rehearing and reduce the AMR cost recovery charge by \$552,270.

¹⁹ 11-5843-GA-RDR, Direct Testimony of Vicki Friscic (April 27, 2012) at 10-11.

²⁰ Id.

²¹ Id.

B. The PUCO Erred by Ruling that Collateral Estoppel Barred OCC from Raising the Issue of Excess Carrying Charges Related to the Carry-Over of 100,000 AMR Devices from One Year to the Next. The Stipulation in Case No. 09-38-GA-RDR that the PUCO Referenced Did Not Address the Issue of Carrying Costs Associated With the Carry-Over. (While OCC files this claim of error, it is not clear whether, on O&O page 19, the PUCO is stating its determination or merely reciting Dominion's position.)

The O&O, on page 19, contains this sentence: "The fact that OCC signed the stipulation in that case raises collateral estoppel, judicial estoppel, due process, and the rule against retroactivity as bars against questioning DEO's bulk purchase of ERTs. (DEO Reply Br. at 30.) This statement is in error. It is not clear, however, whether the statement is that of the PUCO or a recitation of the statements of Dominion. The preceding sentence in the O&O is identified as Dominion's position and the statement at issue is followed by a cite to Dominion's reply brief, which may indicate the statement is presented as that of Dominion. If the statement is made as a determination of the PUCO, then it should be modified on rehearing.

The doctrine of collateral estoppel should not preclude OCC from raising the issue of excess carrying costs associated with the carryover of 100,000 AMR devices from one year to the next, because the issue of carrying costs was never previously litigated and not addressed by the Stipulation in 09-38-GA-RDR. Thus, collateral estoppel does not apply.

The Ohio Supreme Court has characterized collateral estoppel as precluding the re-litigation of an issue that has been "actually and necessarily litigated and determined in a prior action * * *."²² An issue of fact or law must be actually litigated and determined

²² *New Winchester Gardens, Ltd. v. Franklin County Board of Revision*, 80 Ohio St.3d 36, 41, 684 N.E.2d 312 (1997).

by a valid and final judgment, and the determination must be essential to the judgment in order for collateral estoppel to apply.²³

The O&O failed to distinguish between the actual cost of the 100,000 AMR devices that were allowed to be carried over as a cost item in the AMR charge from one year to the next, from the carrying costs associated with the carry-over of those AMR devices. The 09-38-GA-RDR Stipulation dealt with the issue of the cost of the 100,000 AMR devices that Dominion could carry-over. The Stipulation did not address the issue of carrying costs.

Although the 09-38-GA-RDR Stipulation constitutes a judicial proceeding, a review of the Stipulation demonstrates that it did not preclude a challenge of the carrying costs associated with the carryover of 100,000 AMR devices from one year to the next to the extent that the bulk purchase of AMR devices did not produce the savings benefit claimed by the Company. In fact, the Stipulation does not mention any rationale for the carry-over of 100,000 AMR devices from one year to the next, and it does not even mention carrying costs at all. The Stipulation only states that “the Application in this matter is hereby adopted in accordance with the recommendations of the Signatory Parties, subject to the modifications set forth in this Stipulation and Recommendation.”²⁴ The Staff Comments in the 09-38-GA-RDR case recommended a limited carry-over of AMR devices from one year to the next, “Based on the number of AMRs that DEO subsequently installed during the first quarter of 2009, the Staff believes it would have

²³ Restatement of the Law, Second, Judgments, Section 27.

²⁴ 09-38-GA-RDR, Stipulation (April 30, 2009) at 4.

been more reasonable to have only 100,000 of these devices in inventory at year-end 2008.²⁵

The Staff Comments also do not mention carrying costs associated with the carry-over. Thus the issue of any savings associated from the bulk purchase of AMR devices compared to any carrying costs associated with the carry-over of 100,000 AMR devices from one year to the next cost was not even mentioned let alone actually and necessarily litigated, and collateral estoppel does not apply.

The Court has rejected a claim of collateral estoppel in a PUCO proceeding where the Court determined that re-litigation did not occur:

The issue in this matter -- whether CG&E should be allowed to amend its corporate separation plan to allow it to retain generation assets through 2008 -- was not decided in the electric-transition-plan case. These cases involved different pricing plans, different time periods, i.e. the market development period, and different reasons for approving a modified corporate separation plan.²⁶

This precedent applies to the current case, because the issue of including the cost of 100,000 AMR meters carried-over from one year to the next in the cost recovery charge is different from the issue of the carrying costs associated with the carry-over of those AMR devices compared to the benefit of purchasing the AMR meter devices in bulk.

The 09-38-GA-RDR Stipulation permits Dominion to carry-over 100,000 AMR devices from one year to the next. The Stipulation does not mention or address carrying costs associated with AMR devices. OCC did not challenge the inclusion of the actual costs associated with the carry-over of AMR device in this case. Rather OCC challenged the amount of the carrying costs associated with carry-over because those carrying costs

²⁵ 09-38-GA-RDR, Staff Comments (April 10, 2009) at 7.

²⁶ *Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St.3d 300, 856 N.E.2d 213 (2006).

exceeded the alleged savings from the bulk purchase of the AMR devices. Because collateral estoppel does not apply in this case, the PUCO should grant rehearing.

IV. CONCLUSION

The PUCO should grant rehearing in this case because the O&O is based in part upon a determination that an Intervenor OCC had to present testimony to support its challenge of carrying costs associated with the carry-over of 100,000 AMR devices from one year to the next. The law, R.C. 4903.09, simply requires the PUCO to base its decision on a record, not upon a particular type of evidence such as testimony. There is no law, no PUCO Rule, and no Ohio Rule that requires an Intervenor to make a record with testimony in order to prevail. And there was no legal authority cited in, the O&O for this proposition. Indeed, the opposite is true. There is Ohio law (R.C. 4903.09) and precedent from the Supreme Court of Ohio (as referenced above) that allows for basing decisions on such evidence as cross-examination.

The O&O also erroneously applied the doctrine of collateral estoppel based on the Stipulation from the 09-38-GA-RDR case. The Stipulation in Case No. 09-38-GA-RDR only applied to the actual cost of 100,000 AMR devices and did not mention or apply to the carrying costs associated with the carry-over of the 10,000 AMR devices. OCC did not challenge the inclusion of the cost of the 100,000 AMR devices in this case. Rather OCC correctly challenged the carrying costs associated with the carry-over of the 100,000 AMR devices because the carrying costs far outweighs the alleged benefits associated with the bulk purchase of the AMR devices.

For these reasons, the PUCO should grant rehearing and reduce what customers will pay for the AMR by \$552,270.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served via electronic transmission to the persons listed below on this 2nd day of November 2012.

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Summary: Application Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Serio, Joseph P.