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

THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO'S MEMORANDUM CONTRA THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING

In accordance with Rule 4901-1-35, Ohio Adm. Code, The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") hereby files its Memorandum Contra the Application for Rehearing filed by the Office of the Ohio Consumers' Counsel ("OCC") on November 2, 2012. The Commission should reject OCC's rehearing application for the reasons that follow.

I. INTRODUCTION

Since 2009, DEO has been permitted by the Commission to carry up to 100,000 AMR devices in inventory at the end of each year. DEO has carried this inventory to keep the program moving; by "[m]aintaining an inventory" at year-end, DEO "avoided a delay in the next year's deployment that could have resulted if only the number of units to be installed were purchased each year." (Friscic Dir. at 12.) DEO has also been permitted to apply carrying charges to this inventory. (*See* 09-38-GA-UNC Stip., Attachment 1.) DEO, Staff, *and OCC* agreed to this treatment beginning in Case 09-38-GA-UNC, and the Commission approved it.

Despite its prior agreement and recommendation to the Commission, OCC now challenges the recovery of the stipulated carrying charges. Its challenge should be rejected for numerous reasons. First, OCC failed to timely raise this issue. Moreover, even had OCC timely raised this argument, it is barred on numerous grounds, all arising from the fact that OCC recommended and the Commission approved what OCC now challenges. Finally, even if the

issue were not waived and barred, OCC simply fails to articulate any sensible reason for disallowing the carrying charges. For these reasons, as explained more fully below, the Commission should reject OCC's rehearing application.

II. ARGUMENT

A. The Commission properly rejected OCC's carrying-charge argument.

For the first time in its post-hearing brief, OCC argued for a reduction to the carrying charges on the inventory of 100,000 AMR devices that DEO is permitted to carry at the end of each program year. (OCC Post-Hrg. Br. at 16–18.) OCC admits that DEO is allowed to carry this inventory. (OCC Rehearing Appl. at 9.) That being the case, one would think there would be no issues with collecting the carrying charges—if the underlying expense is necessary and reasonable, as this one is, DEO should be entitled to appropriate compensation for its lost opportunity to use the invested funds.

During the hearing, however, OCC put together that one number (DEO's bulk discount on its purchase AMR devices) was less than another number (the carrying charges on year-end inventory). Based on this difference, OCC now seeks a reduction. There are many problems with this recommendation, however.

1. OCC forfeited its right to pursue this issue.

First, as the Commission seems to have recognized when it first rejected OCC's argument, OCC has forfeited its right to pursue this issue. All the facts needed to explore this issue and to recommend this adjustment have been available to OCC for several years. DEO has been carrying year-end inventory and applying carrying costs to that inventory at least since the 09-38 proceeding. Nothing prevented OCC from identifying this issue, pursuing it in discovery, and presenting comments and testimony. Yet, despite numerous opportunities to do so before

the hearing, OCC did not raise this issue until after the hearing concluded. So even if there were not other fatal problems, OCC failed to timely raise the issue.

This is not just a technical failing. By withholding this issue until its post-hearing brief, OCC deprived DEO of timely notice that this adjustment was being recommended. And critically, OCC denied DEO any opportunity to present its own evidence with respect to it. Adopting OCC's recommendation in these circumstances would raise serious due-process concerns. *See, e.g.*, *Liming v. Damos*, Slip Opinion No. 2012-Ohio-4783, ¶ 27 (the "procedural safeguards" required by due process include "adequate notice" and "fair opportunity *to present*, and to dispute, relevant information") (emphasis added; internal quotations omitted); *Cincinnati Bar Assn. v. Sigalov*, 133 Ohio St.3d 1, 2012-Ohio-3868, ¶ 44 ("Procedural due process requires . . . notice of the charges *before the proceedings commence* and an opportunity to be heard") (emphasis added); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, ¶ 70 (noting that the Court has reversed the Commission where a "failure to give proper notice denied the [aggrieved party] an opportunity to present evidence challenging" a proposal).

DEO believes that the Commission may have had such fairness concerns in mind when it stated that "OCC did not file comments or testimony related to this issue" and that "[w]ithout supporting testimony from OCC, the Commission finds it inappropriate to consider whether a carrying charge should be reflected in the AMR cost recovery charge." Order at 19. OCC's reading of the Order seems implausible—the Commission plainly is not articulating a rule that a party can only rely on the testimony of its own witness.

But DEO would respectfully suggest that the Order could be clearer on this point. In the interests of avoiding a possible remand for lack of a complete explanation, DEO would

recommend that the Commission clarify that OCC's argument is rejected because OCC untimely raised it and deprived DEO of a fair opportunity to respond. That is not the only reason to reject OCC's argument, however.

2. OCC is barred from making this recommendation.

Even had OCC timely presented this recommendation, the recommendation is barred on numerous grounds. Some background is necessary to see why.

In the 09-38 proceeding, Staff had raised concerns with how much inventory DEO was carrying at year-end, but it recommended that it was "reasonable" for DEO to carry "100,000 [AMR] devices in inventory at year-end." (09-38 Staff Comments at 7 (Apr. 10, 2009).) DEO, Staff, and OCC then signed a stipulation recommending that the AMR cost-recovery "methodology shall follow the methodology . . . as amended by the Comments and Recommendations submitted on behalf of the Staff," which included the recommendation that DEO could carry 100,000 AMR devices at year-end. (09-38 Stip. at 2–3.)

Not only that, but the stipulated rate methodology specifically included carrying costs on the inventory. This methodology was set forth as Attachment 1 to the stipulation. It provided for the application of carrying costs to plant additions, and the category of plant additions included inventory "purchased but not installed as of [year-end]." *See* 09-38 Staff Comments at 7–8. (This means that OCC's repeated assertion that the issue of carrying costs was not settled by the stipulation is wrong.) The Commission approved the stipulation and ordered DEO to "take all necessary steps to carry out [its] terms." 09-38 Order at 8 (May 6, 2009).

In light of OCC's prior recommendation, and the Commission's prior approval, OCC's challenge to the carrying charges is barred. The Commission cannot lawfully penalize DEO for activities taken in compliance with past stipulations and orders. This is especially true where the party who *now* recommends the penalty *previously* recommended the conduct to be penalized.

Collateral estoppel, judicial estoppel, due process, and the rule against retroactivity—all protect parties from such unfair ambush. DEO explained all this in detail in its reply brief and application for rehearing, and it incorporates that discussion again here. (*See* DEO Reply Br. at 6–7 & 23–27; DEO Rehearing Appl. at 17–25.)

In short, if OCC had a problem with DEO carrying this inventory and collecting these carrying charges, it should not have signed a stipulation that permitted both. DEO did precisely as it was ordered to do, and it cannot lawfully be penalized for it.

3. Substantively, OCC's recommendation lacks merit.

Finally, even if OCC's recommendation were not untimely raised or procedurally barred, it lacks any substantive merit. OCC has not articulated a sensible reason to disallow any part of DEO's carrying charges.

As DEO has already explained, the Company was permitted to carry the inventory *and* to apply carrying charges. OCC does not contend that DEO miscalculated the carrying charges. A permissible charge, correctly calculated, would seem to provide no basis for disallowance.

So why does OCC challenge these charges? OCC's *only* argument is that the carrying charges cumulatively exceeded a bulk purchasing discount that DEO negotiated on AMR devices. But even if true, this is irrelevant. DEO did not carry inventory at year-end so it could get a bulk discount; it carried inventory at year-end to keep the program moving. If DEO purchased only those devices needed for installation each year, and carried none in inventory for the next year, it likely would have caused substantial delays and work stoppages. That is why DEO, Staff, and OCC agreed that DEO could carry 100,000 devices at year-end—so the program would not stall every January for as long as it would take to obtain the needed AMR devices. (*See* Friscic Dir. at 12.)

In other words, DEO carried inventory at year-end for *operational*, not *financial*, purposes. While the ability to carry inventory contributed to DEO achieving a bulk discount (and thus gain a financial benefit for customers), that is not why DEO carried the inventory. Neither DEO nor its witness, Vicki Friscic, ever claimed that the bulk discount *would pay for* the carrying charges. (*See* Friscic Dir. at 12; Tr. 69–72.)

Now, OCC repeatedly attributes such a promise to DEO (*see, e.g.*, OCC Rehearing Appl. at 5), but it is simply putting words in DEO's mouth. Ms. Friscic explained that had DEO been required to purchase only those AMR devices that it could install each year, it would have caused two problems: first, it would have eliminated the opportunity to get a bulk discount, and second, it would have delayed the program. (*See* Friscic Dir. at 12.) But she plainly did *not* claim that, with a bulk discount, carrying the inventory would pay for itself.

So OCC has simply lost track of why DEO carried this inventory. The carrying charges compensated DEO for carrying the inventory necessary to keep its program moving. The bulk discount was simply one of many actions taken by DEO to defray costs. But the fact that the latter did not entirely offset the former is simply meaningless—no one ever claimed that it would. The real issue is whether the challenged costs are appropriate, but on that point, OCC has made no showing.

OCC, however, has succeeded in taking an extremely ironic position. It, of course, is one of the parties who has so vigorously urged DEO's punishment for allegedly failing to accelerate AMR deployment. And yet, without a hint of self-consciousness, this same party urges the Commission to disallow the costs necessary to keep the program moving. The only thing consistent about OCC's position is the net impact on the cost recovery charge.

B. OCC's second argument raises no new or substantial issues.

OCC's second argument is premised on an ambiguous sentence in the Order. In a paragraph apparently setting forth a description of DEO's argument against OCC's recommended adjustment, the Commission stated:

> Moreover, in the Initial AMR Rider Case, DEO explains that OCC, and others agreed that DEO would be allowed to carry an inventory of 100,000 units. 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.) [citation sic]

OCC points out that "[i]t is not clear . . .whether the [second sentence] is that of the PUCO or a recitation of the statements of Dominion." (OCC Rehearing Appl. at 8.)

DEO agrees that there is some ambiguity, but it seems mostly likely that the sentence in question is a recitation of DEO's position. But if the Commission did rule on these issues, it reached a correct result, as fully explained above, and OCC offers no reason to think otherwise.

III. CONCLUSION

For the foregoing reasons, the Commission should reject OCC's application for rehearing. To ensure that no questions may be raised by OCC on appeal, DEO respectfully recommends that the Commission clarify its reasons for doing so.

Dated: November 13, 2012

Respectfully submitted,

/s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of DEO's Memorandum Contra OCC's Application for Rehearing was served by electronic mail to the following persons on this 13th day of November, 2012:

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Summary: Memorandum Memorandum Contra the Ohio Consumers' Counsel's Application for Rehearing electronically filed by Mr. Andrew J Campbell on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio