

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The East)	
Ohio Gas Company d/b/a Dominion East)	
Ohio for Approval of Tariffs to Adjust its)	Case No. 11-5843-GA-RDR
Automated Meter Reading Cost Recover)	
Charge and Related Matters.)	

**MOTION TO STRIKE OR, IN THE ALTERNATIVE,
FOR A PROCEDURAL ENTRY AUTHORIZING REBUTTAL TESTIMONY
OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) hereby files this motion to strike portions of the testimony filed by Staff witness Mr. Kerry Adkins on April 27, 2012. As discussed herein, Staff is estopped from taking its current position thus requiring the exclusion of Mr. Adkins’ entire testimony with the exception of the portion pertaining to the filing of testimony with applications (page 3, line 1, to page 4, line 2). Alternatively, and at a minimum, due process requires that the Commission strike the following portions of his testimony:

- Page 12, line 8, through page 13, line 13; and
- Page 16, line 17, through the end, including exhibits.

In the event this motion is denied, DEO respectfully requests issuance of a procedural order that accommodates a schedule for the Company to file rebuttal testimony.

Reasons for granting the motion are set forth in the attached memorandum in support.

Dated: May 1, 2012

Respectfully submitted,

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EAST OHIO

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MEMORANDUM IN SUPPORT

I. BACKGROUND

The purpose of the March 30, 2012 procedural entry is fairly plain: first, narrow down the issues concerning DEO’s application; then, provide notice of those issues to all parties; and finally, give all parties a fair opportunity to support or respond to those issues through the presentation of evidence. *See id.* at 2–3. The March 30 entry gave Staff approximately five weeks from the time DEO filed its application to investigate and develop its comments. After Staff and others filed their comments, the entry gave DEO and Staff one week to determine “whether the issues raised in the comments” could be resolved. *Id.* at 2. The parties met, but Staff and DEO could not resolve the issues, so the parties were entitled to file expert testimony a few days later. *Id.* At this point, Staff sought a two-week continuance to draft testimony, representing that a delay was needed to resolve scheduling conflicts. Testimony was filed last Friday.

DEO drafted its testimony to respond to the issues raised in Staff’s comments. But when DEO opened the testimony of Kerry Adkins, it discovered that Staff had a pulled a fast one. Mr. Adkins raises new critiques and makes altogether new recommendations—not only new, but more harmful to DEO than the issues raised before, and many seeking to reopen issues conclusively settled in prior cases. DEO’s testimony does not address these new issues and recommendations. There was no way that it could have. The first time the issues appeared was

April 27, over three weeks after Staff was to notify DEO of any issues it had with the application.

II. ARGUMENT

There are at least three problems with Staff's presentation of Adkins' testimony. First, Staff withheld issues that it was required to have disclosed and thus deprived DEO of fair notice and an opportunity to present its own evidence on those issues. Second, Staff is estopped from taking the position that it is now attempting to take, both by earlier orders and by its past litigation positions. Finally, Staff, by and through counsel, appears to have made material misrepresentations to DEO and to the Commission to gain the opportunity to present the problematic testimony. For all of these reasons, the Commission should strike the portions of Adkins' testimony described in this motion.

A. The admission of Adkins' testimony would violate DEO's right to due process and a fair hearing.

The point of the prehearing process is not to hide the ball, but to tee it up. Issues were to be identified and presented for DEO's consideration; if they could not be resolved, the parties were entitled to present evidence addressing those issues. In addition to fostering an efficient resolution of this case, the procedural entry (if observed) would provide a fair hearing that comports with due process, ensuring that the party whose property is at stake received notice and an opportunity to present its own side of the dispute.

The Ohio Supreme Court has recognized that hearings afforded by the Commission "must be 'fair and open.'" *Office of Ohio Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St. 3d 244, 248–49 (1994), *quoting Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292 (1937); *see also, e.g., Forest Hills Utility Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 1, 3 (1974) (reversing Commission and agreeing denial of due process occurred); *Cincinnati v. Pub. Util. Comm.*, 55

Ohio St.2d 168, 170–71 (1978) (recognizing that due process applies to Commission hearings; no violation in that case). DEO is entitled to due process here because the Commission has ordered a hearing and, if Staff’s recommendation is followed, DEO will be deprived of property. In *Office of Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 61 Ohio St. 3d 396, 402 (1991), the Court upheld an order against a due-process challenge, but its reasoning is instructive here: the appealing party both “had advance notice” of the issue to be resolved and “was allowed the opportunity to introduce evidence” concerning that issue. This is consistent with the Court’s counsel that “each side of the controversy must be given an opportunity to present its case.” *Motor Service Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 5, 10 (1974).

By withholding issues until it filed its direct testimony, Staff not only violated the March 30 procedural entry, but it deprived DEO of a fair opportunity to present its case. That Staff withheld issues is clear. In its Comments, Staff’s recommendation was that DEO should “recalculate its O&M savings as if it had” done three things “by the end of 2011”:

- “fully complied with the 09-1875 Order”;
- “fully rerouted all of its Local Shops”; and
- “was remotely reading all active meters via drive-by collection.”

(Staff Comments 12.) Staff did *not* recommend a specific reduction to DEO’s charge, but recommended additional proceedings to determine that reduction. (*See id.*)

In its testimony, however, Staff presents entirely new issues and critiques, some directly contradictory to its earlier comments. For example, in its comments, Staff asserted that DEO should have completed installation “by the end of 2011” (*id.*); now it asserts that this should have occurred respectively “in early August of 2011.” (*See Adkins Dir. 19; see also id.* at 17.) For the first time, Staff asserts that DEO failed to accelerate its program *two years ago*. (*Id.* at 12.)

For the first time, Staff asserts that DEO failed to “modif[y] its installation practices” *two years ago*. (*Id.* at 13.) For the first time, Staff asserts that DEO should have installed the same amount of AMR devices the past two years as it did in the peak installation year. (*Id.*) Finally, although Staff’s comments recommended that DEO be ordered to recalculate its savings, Adkins now for the first time proposes a specific \$5,008,960 million reduction to DEO’s recovery, replete with spreadsheets and four pages of attempted justification. (*See id.* at 16–20.)

By withholding these recommendations until now, Staff deprived DEO of the notice and opportunity to present its own evidence in rebuttal that the procedural entry required. Accordingly, if the Commission allows Staff’s maneuver to stand, it will deprive DEO of due process. The remedy is to strike any and all testimony that sets forth issues and recommendations additional to those provided in Staff’s April 6 comments.

B. Adkins’ position is barred by both collateral and judicial estoppel.

This is not the only fatal problem with Staff’s approach; it should also be estopped from presenting Adkins’ testimony on two grounds. First, there is a collateral-estoppel problem: in a prior case, the Commission definitively ruled out *both* the broader approach that Staff now takes *and* several of the key assumptions Adkins relies upon. Second, there is a judicial-estoppel problem: to make its present case, Staff must repudiate a position that it successfully urged upon the Commission in a prior proceeding. DEO should not be forced to relitigate an issue that has already been settled and ruled upon—twice—and the Commission should not tolerate Staff’s willingness to change official legal positions on the same matter whenever it finds it convenient.

1. Collateral estoppel bars the position set forth in Adkins’ testimony.

“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).

a. The Commission has already settled numerous issues related to cost savings and program schedule.

The governing standard for how to calculate O&M savings was established years ago in the Opinion and Order in Case No. 07-829-GA-AIR. It required the parties “to develop an appropriate baseline from which meter reading . . . savings will be determined and *such quantifiable savings* shall be credited to amounts that would otherwise be recovered through the AMR costs recovery charge.” Case No. 07-829-GA-AIR, Opin. & Order 13 (Oct. 15, 2008) (emphasis added). This should be simple enough: compare the baseline year’s expense with the actual year’s expense, and one has the savings.

In Case No. 09-1875-GA-RDR, however, OCC sought to relitigate the issue of how to calculate meter-reading O&M savings. In that case, OCC argued “that, 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.” Case No. 09-1875-GA-RDR, Opin. & Order 5 (May 5, 2010). The Commission rejected OCC’s argument *and* reaffirmed that the simple, baseline-to-actual comparison established in the original stipulation would set cost savings:

[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 stipulation].

Id. at 7. (DEO will refer to this order as “the Case 09-1875 Order.”) The Order also contemplated that DEO would attempt to complete installations “by the end of 2011” and that “by the end of 2011, it will be possible to reroute nearly all of DEO's communities.” *Id.*

Staff was party to both Case No. 07-829-GA-AIR and Case No. 09-1875-GA-RDR, so it cannot argue that it lacked opportunity to litigate any issues there. The stipulations adopted and interpreted by the Commission in those cases have not changed, and they govern here. Nor (obviously) has the language of either order changed. Staff's current position ignores all this and in fact runs into two collateral-estoppel problems. First, the Commission has already decided on *the method* by which savings must be calculated, but Adkins departs from that method. Second, the Case 09-1875 Order established certain *milestones* to govern the progress of the program, but Adkins seeks to retroactively move those markers.

b. As to *method*, Adkins' recommendation is barred because it seeks to impute artificial, surrogate savings to DEO.

As to method, the Commission specifically ruled that “imputed or surrogate savings” do not comport with the stipulations governing this case. Case 09-1875 Order at 7. Yet Adkins has abandoned actual savings in favor of imputing surrogate savings to DEO. To be sure, Adkins uses a different *method* of imputation than OCC did in Case 09-1875, but the same error afflicts him—he makes up a mathematical proxy to impute savings, instead of using actual results. For instance, look at the question introducing Adkins' recommendation on what DEO should have saved and note the dates: “How did Staff use the estimate of DEO's expected 2013 minimum meter reading savings based on 36 meter readers throughout 2012 to arrive at the . . .

recommended meter reading savings . . . ?” (Adkins Dir. 18 (emphases added).) Estimated savings in *2013*? Assumed staffing in *2012*? This case is about 2011; it is odd (but telling) that Adkins hardly discusses the events of the actual year under review.

This is not an isolated example of Adkins ignoring actual events and replacing them with proxies. Adkins also “assumed that DEO kept the same AMR installation pace that it employed in 2009” to derive when DEO *should have* completed AMR installation. (Adkins Dir. 19.) (Never mind that 2009 was a year of low-hanging fruit, so to speak, and never mind that Adkins’ theory would require DEO to have completed installation almost half a year *earlier* than contemplated in the Case 09-1875 Order.) To figure out how much to ding DEO for each month of 2011 that it was purportedly late, Adkins did not analyze actual figures but “estimated meter reading savings *expected to be reported in 2013*.” (*Id.* (emphasis added).) Indeed, even when Adkins ventures back to time periods that have actually occurred and to facts that are knowable, he *still* uses proxies—to determine how much it costs to employ meter-reading personnel in a given year, he simply divides O&M expense by the number of personnel, with no regard for what items O&M expense actually contains and how much those employees actually cost. (*Id.* at 18.)

More could be said, but these examples should suffice to show that Adkins has abandoned facts in favor of his own imagination.

c. As to *milestones*, Adkins’ recommendation is barred because it seeks to revise progress expectations established in the Case 09-1875 Order.

And this is not the only way Adkins ignores the Case 09-1875 Order. That order also established certain milestones concerning the progress DEO would attempt to achieve in 2011. Adkins unashamedly changes those targets, by months at a time, in order to reach a result that penalizes DEO.

For instance, DEO's filing last year was to show "how [DEO] will achieve the installation of the devices on the remainder of its meters *by the end of 2011*." Case 09-1875 Order 7 (emphasis added). Yet Adkins penalizes DEO for failing to complete installation by "early August of 2011." (Adkins Dir. 19.)

Again, the Case 09-1875 Order anticipated "that, by the end of 2011, it will be *possible* to reroute *nearly all* of DEO's communities"—this contemplates completion of rerouting in 2012. Order 7 (emphases added). Yet Adkins penalizes DEO for failing *complete* rerouting by the end of 2011. (Adkins Dir. 19 n.8.)

Not even the Commission can retroactively rewrite its orders, much less Adkins, and both Adkins' method and many of his assumptions have already been ruled out. "[I]mputed or surrogate savings" do not comport with the stipulation; complete installation was *not* required by early August 2011; rerouting was contemplated to continue into 2012. Case 09-1875 Order 7. These are the same issues, with the same program, concerning the same stipulations, involving the same parties. Enough is enough—these issues cannot be relitigated every year and past orders cannot be revised. Staff is attempting to lead the Commission down a dead-end path; there is no reason to start down it. Collateral estoppel bars the primary issue supported by Adkins' testimony, and that testimony should accordingly be struck.

2. Judicial estoppel bars Staff from taking its present position.

There is a second independent basis for estopping Staff from taking this position. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). "The doctrine of judicial estoppel forbids a party from taking a

position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. Courts apply judicial estoppel in order to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.” *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 330 (2007) (internal quotations, citations, and brackets omitted); *Scioto Memorial Hosp. Assn. v. Price Waterhouse*, 74 Ohio St. 3d 474, 481 (1996) (Douglas, J., dissenting) (“The doctrine of judicial estoppel prevents a party from staking out a position in a subsequent action that is inconsistent with a position taken in a prior action”); *Fish v. Bd. of Commrs.*, 13 Ohio St. 2d 99, 102 (1968) (a party that “elected to assert one of two inconsistent substantive rights” and was “successful in the assertion of that right in a judicial proceeding, cannot now assert the other inconsistent right in a judicial proceeding”).

The doctrine applies to the orders of administrative agencies as well as courts. *Trustees in Bankruptcy of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1354 (Fed. Cir. 2010); *Lampi Corp. v. Am. Power Prods., Inc.*, 228 F.3d 1365, 1377 (Fed. Cir. 2000) (“The [judicial estoppel] doctrine also applies to administrative proceedings in which a party obtains a favorable order by making an argument that it seeks to repudiate in a subsequent judicial proceeding”). And the fact that the prior case—here, Case 09-1875—resulted in a settlement is no obstacle to application of the doctrine. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (“obtaining a favorable settlement is equivalent to winning a judgment for purposes of applying judicial estoppel”). That is particularly so in this case, where the stipulation was a public matter, carefully analyzed and approved by the Commission.

In the prior case, Staff took the position that “imput[ing] artificial savings. . . . is not appropriate” and that the Commission should apply the methodology set forth in the original rate-case stipulation. (Case No. 09-1875-GA-RDR, Staff Post-Hrg. Br. 5.) Staff asserted this position on brief and urged the Commission to adopt it. The Commission specifically noted Staff’s position and ruled in accordance with it. *See* Case 09-1875 Order 6–7; *cf. Gens v. Resolution Trust Corp.*, 112 F.3d 569, 572 (1st Cir. Mass. 1997) (noting that “[j]udicial estoppel is not implicated unless the first forum accepted the legal or factual assertion alleged to be at odds with the position advanced in the current forum”). Now, through Adkins’ testimony, Staff “argu[es] the opposing [point] to suit an exigency of the moment.” *Greer-Burger*, 116 Ohio St. 3d at 330.

Adkins’ entire testimony (besides that which supports the filing of testimony with applications) depends on Staff’s reversal of its earlier position, and his testimony should be struck to that extent. While the Commission is not a court, it exercises quasi-judicial power when it presides over hearings, and it is under the same obligation to protect the integrity of its proceedings. *East Ohio Gas Co. v. Pub. Util. Comm.*, 45 Ohio St. 2d 86, 91 (1976) (recognizing the importance of preserving “the integrity of the administrative process”); *see also In re Complaint of Pietrangelo v. Columbia Gas of Ohio, Inc.*, Case No. 99-694-GA-CSS, 1999 Ohio PUC LEXIS 243, Entry at *7 (Sept. 22, 1999) (“it is well within the Commission’s authority to protect the integrity of the proceedings before” it); *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) (“Aside from its authority under the complaint statute, the Commission also 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.”).

Again, Adkins is leading the Commission down a dead-end road. There is no point to trying this issue at hearing. Adkins' testimony should be struck.

C. Staff, by and through counsel, appears to have relied upon misrepresentation to present Adkins' testimony.

Finally, DEO would note that it has grave concerns regarding the conduct of Staff and its counsel in this case. Soon after the settlement conference in this case, Staff represented to DEO that it would like to seek a continuance of the testimony filing date due to scheduling conflicts among its witnesses—no mention was made of an intent to issue additional discovery and pursue new case theories if the continuance was granted. DEO relied on this representation in agreeing that it would not object to a continuance. Staff filed its motion on Monday, April 16, and the Attorney Examiner granted it the next day. The very next morning, April 18, counsel for Staff contacted DEO's counsel to advise that Staff intended to issue additional discovery, which it submitted soon after. Now that Adkins' testimony is public, it is plain that Staff used the extra time not simply to draft testimony to support its comments, but to formulate an entirely new theory of error.

All this raises, at a minimum, a serious implication that counsel for Staff obtained DEO's consent to a continuance through misrepresentation. Had Staff informed DEO, on the eve of hearing, that it intended to take new discovery and develop a new case theory, DEO would not have consented. Staff would have been free to file a motion to that end, and DEO would have been free to object. Of course, it is one thing to honestly disagree about and litigate an issue—that is part of the practice of law, and DEO does not reproach Staff for litigating. But it is another thing entirely to mislead and deceive.

If counsel for Staff knowingly misled DEO (and the facts support that inference), a serious line was crossed. Ohio Rule of Professional Responsibility 4.1(a) states that “a lawyer

shall not knowingly . . . make a false statement of material fact or law to a third person.”

(Emphasis omitted.) The commentary to that rule makes clear that “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” Rule 8.4(c) likewise states, “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

(Emphasis omitted.)

D. In the alternative, the Commission should issue an order providing DEO an opportunity to file rebuttal testimony.

DEO has shown that, one way or another, the bulk of Adkins’ testimony must go. In the event the Commission disagrees and allows Adkins to present his testimony, it still leaves a due-process problem. The Commission entry governing this case granted DEO the right to present testimony concerning the issues raised by Staff, but Staff’s stratagem deprived DEO of that opportunity. Therefore, if the Commission denies the motion to strike, DEO requests that the Commission issue an entry allowing DEO to file testimony rebutting the new issues and recommendations contained in Adkins’ testimony.

III. CONCLUSION

For the foregoing reasons, DEO requests that the Commission strike the portions of Adkins’ testimony described in the motion above. In the alternative, DEO requests that the Commission issue an entry allowing DEO to file testimony rebutting the new issues and recommendations contained in Adkins’ testimony.

Dated: May 1, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of DEO's Motion to Strike or in the Alternative to Continue and for Leave to File Supplemental Direct Testimony and Memorandum in Support was served by electronic mail to the following persons on this 1st day of May, 2012:

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Summary: Motion to strike or, in the alternative, for a procedural entry authorizing rebuttal testimony and memorandum in support electronically filed by Ms. Melissa L. Thompson on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio