BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Suburban Natural Gas Company,	)	
	)	Case No. 13-1216-GA-CSS
Complainant,	)	
	)	Case No. 93-1569-GA-SLF
v.	)	
	)	Case No. 94-938-GA-ATR
Columbia Gas of Ohio, Inc.,	)	
	)	Case No. 94-939-GA-ATA
Respondent.	)	

SUBURBAN NATURAL GAS COMPANY'S
MEMORANDUM CONTRA
COLUMBIA GAS OF OHIO, INC.'S MOTION TO DISMISS

> [T]he Commission, through meetings conducted by its Attorney Examiner and Staff, has *actively supervised* the Parties' resolution of their *competitive dispute and rationalization of their distribution systems* (in Delaware and Franklin Counties) *in the public interest* by means of agreement rather than adversary procedure[.][1]

I. Introduction

Recognizing that it has violated the Stipulation and the Commission's Order adopting it, Columbia Gas of Ohio, Inc. ("Columbia") in its Motion to Dismiss seeks to relitigate matters that were already decided by the Commission, selectively and erroneously quotes from the Stipulation and Order, and asks the Commission to decide matters over which it has no

[1] *In the Matter of the Self-Complaint of Columbia Gas of Ohio Concerning its Existing Tariff Provisions*, Case No. 93-1569-GA-SLF; *In the Matter of the Joint Petition of Columbia Gas of Ohio, Inc. and Suburban Natural Gas Company for Approval of an Agreement to Transfer Certain Facilities and Customers*, Case No. 94-938-GA-ATR; *In the Matter of the Joint Application of Columbia Gas of Ohio, Inc. and Suburban Natural Gas Company for Approval of Certain Tariff Modifications*, Case No. 94-939-GA-ATA, Second Amended Joint Petition, Application, and Stipulation and Recommendation of Columbia Gas of Ohio, Inc. and Suburban Natural Gas Company ("Stipulation"), p. 2 (italics added).

jurisdiction. Additionally, in an apparent effort to mask its violation of the Stipulation and Order's plain language, Columbia fervently – and erroneously – argues that Suburban Natural Gas Company's ("Suburban") interpretation of the Stipulation and Order creates exclusive service territories when, put simply, Suburban is arguing no such thing, nor would such an argument be supported by the Stipulation and Order's plain language.

Instead, Suburban has alleged (and, as demonstrated in its Motion for Judgment on the Pleadings filed simultaneously herewith, shown as a matter of law) that Columbia has violated a specific provision of the Stipulation, which was adopted by the Commission as its Order. Applying the Stipulation's plain language, and as described more fully below, the Commission has already decided, as noted above, that the Stipulation is in the public interest. There is no doubt but that Columbia may not use the Northern Loop for anything other than transporting gas from existing and future sources of supply to Columbia distribution systems in southern Delaware and northern Franklin Counties to points outside southern Delaware and northern Franklin Counties. Since Columbia has used the Northern Loop for other purposes, it has violated the Stipulation and Order adopting it. Further, the Commission should reject outright Columbia's invitation to delve into matters over which it unquestionably has no jurisdiction.

II. Argument

A. Standard of Review

A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown Mgmt.*, 125 Ohio St. 3d 494, 497 2010 (citation omitted). The factual allegations of the complaint and items properly incorporated therein must be accepted as true. *Id.* (quotations and citation omitted). Suburban must be afforded all reasonable inferences possibly derived therefrom. *Id.* (citation omitted). Columbia's

motion to dismiss must be denied unless it appears beyond doubt that Suburban can prove no set of facts entitling it to relief. *Id.* (citations omitted).

Applying this standard, Columbia's motion to dismiss should be denied.[2]

B. Reasonable Grounds Exist For Suburban's Complaint

1. Suburban Has Made Specific Allegations That Columbia Has Violated A Specific Provision Of A Commission Order

On January 18, 1996, the Commission journalized its Finding and Order in *In the Matter of Self-Complaint of Columbia of Ohio Concerning its Existing Tariff Provisions*, Case No. 93-1569-GA-SLF; *In the Matter of the Joint Petition of Columbia Gas of Ohio, Inc. and Suburban Natural Gas Company for Approval of an Agreement to Transfer Certain Facilities and Customers*, Case No. 94-938-GA-ATR; and *In the Matter of the Joint Application of Columbia Gas of Ohio, Inc. and Suburban Natural Gas Company for Approval of Certain Tariff Modifications*, Case No. 94-939-GA-ATA. In the Finding and Order, the Commission adopted as its Order the Stipulation. *See* Finding and Order at p. 6. In relevant part, the Stipulation provides:

> Nothing in this stipulation shall be construed as preventing Columbia from installing, in any of the areas described, a high-pressure natural gas pipeline, *the purpose of which is to be limited to* transporting gas from existing and future sources of supply to various gas distribution systems owned and operated by Columbia

[2] Paragraph C.5 of the Stipulation provides that "[t]he Commission shall retain continuing jurisdiction in this matter to supervise and assure the Parties' compliance with this Joint Stipulation and Recommendation of the Parties." Stipulation at para. C.5. Before the instant matter, Suburban had filed a Motion to Reopen in the dockets for Case Nos. 93-1569-GA-SLF, 94-938-GA-ATR, and 94-939-GA-ATA. *See* December 11, 2007 docket entries in those cases. When Suburban sought to file its Motion to Reopen in the instant matter in those same dockets, it was informed that it could not do so because they were "archived." Suburban cited to paragraph C.5 of the Stipulation and was informed that the Motion could be filed to begin the case and that the attorney examiner responsible for such matters would contact Suburban's General Counsel to discuss to which docket(s) it would be assigned. No such contact was made, but the Motion was assigned to the CSS docket. In light of paragraph C.5, addressing the matters herein should properly be done in the context of reopening Case Nos. 93-1569-GA-SLF, 84-938-GA-ATR, and 94-939-GA-ATA. Putting this matter in the proper procedural posture is alone reason to deny Columbia's motion to dismiss.

> in southern Delaware and northern Franklin Counties to points outside of said areas, . . .

Stipulation at para. A.10 (italics added).

In its Motion to Reopen and for Enforcement of Finding and Order Entered January 18, 1996 in Subject Proceedings Approving Joint Stipulation and Recommendation ("Motion to Reopen"), Suburban specifically alleges that Columbia has violated a specific provision of the Stipulation and Order and provides specific factual allegations in support. *See* Motion to Reopen at pp. 4-6. Such allegations must be accepted as true, and all reasonable inference derived therefrom must be afforded Suburban. *See* Section II A., *supra.* Suburban's allegations – specific allegations of a specific violation of a specific provision of a specific Commission Order – are more than enough to state reasonable grounds to proceed under O.R.C. sec. 4905.26.

2. The Stipulation's Plain Language Does Not Create Exclusive Territories, And Suburban Does Not Argue Otherwise

Columbia's attempt to convince the Commission that Suburban's reliance on the Stipulation's plain language creates exclusive territories is misguided – the Stipulation creates no such exclusive territories and Suburban has not argued, and is not arguing, that it does. Instead, as Columbia itself acknowledges, the Stipulation involves a restraint ancillary to a legitimate business purpose – the sale and transfer of customers and facilities. *See* Columbia's Motion to Dismiss at 7; *id.* at 1 (quoting the Stipulation and noting that Columbia and Suburban agreed to transfer certain customers and facilities).[3] The restraint ancillary to the parties' legitimate

[3] Importantly, the sale and transfer of facilities and customers was *not* the impetus for the dispute that ultimately gave rise to the Stipulation and Order. Rather, as the Stipulation makes clear, the impetus for the dispute was controversy surrounding methods of competition Columbia employed. *See* Stipulation at 2, first and fourth whereas clauses. The sale and transfer of customers between Columbia and Suburban was, as stated in the Stipulation, part of the resolution of the parties' competitive dispute. *See id.* at fourth whereas clause. The parties emphasized in the Stipulation that it "represents a compromise and settlement of *any and all* existing disputes between the Parties concerning competition between said Parties." Stipulation at p. 9, para. 1 (italics added). As part of that omnibus compromise and settlement, Columbia agreed to the limitation on the Northern Loop's use discussed herein. Columbia here is simply trying to relitigate what it already agreed to and what the Commission found was in the

business purpose at issue in this case – a specific provision in the Stipulation adopted as a Commission Order – relates to the Northern Loop's use. Paragraph A.10 of the Stipulation states:

> Nothing in this stipulation shall be construed as preventing Columbia from installing, in any of the areas described, a high-pressure natural gas pipeline, *the purpose of which is to be limited to* transporting gas from existing and future sources of supply to various gas distribution systems owned and operated by Columbia in southern Delaware and northern Franklin Counties to points outside of said areas, . . .

Stipulation at para. A.10 (italics added).[4] Paragraph A.10's plain language does not restrict Columbia's ability to compete in southern Delaware and northern Franklin Counties (and Suburban is not arguing that it does) – Columbia may install mains, service lines, and any other infrastructure necessary to compete with Suburban in southern Delaware and northern Franklin Counties. Under paragraph A.10, Columbia may not, however, use the Northern Loop to supply gas to such facilities or to customers. It has done so and, thus, has violated the Stipulation and Order adopting it.

3. Columbia's Spin On The Stipulation's Plain Language Is Patently Wrong

As the old saying goes, if the law is on your side, argue the law; if the facts are on your side, argue the facts; if neither is on your side, resort to name-calling and diversion. That Columbia knows that it has not complied with the Stipulation's plain language is confirmed by its repeated, unsupported assertions that Suburban is "purposely misreading" paragraph A.10; that Suburban has made a "false representation" of the Stipulation; and its effort to divert the

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public interest – limiting the use of the Northern Loop as part of an omnibus settlement to resolve the parties' competitive dispute.

[4] Columbia has existing sources of supply, and may have future sources of supply, for its distribution systems in southern Delaware and northern Franklin Counties. Consistent with paragraph A.10, Columbia may pipe gas using the Northern Loop from such sources of supply to points outside southern Delaware and northern Franklin Counties.

Commission from what the Stipulation actually says to what it inaccurately asserts is the parties' "description" of the Stipulation and the Commission's "characterization" of it. *See* Columbia's Motion to Dismiss at 3.

Columbia's tactics are reflected in its assertion that paragraph A.10 is not "prohibitive," but "sheltering." *See id.* It stretches credulity beyond any reasonable bounds to conclude that paragraph A.10's provision stating explicitly that "the purpose of [the Northern Loop] is to be *limited to* transporting gas" from current and future supply sources to points outside southern Delaware and northern Franklin Counties is anything but prohibitive. Stipulation at para. A.10 (italics added). Columbia's lack of confidence in the Commission's willingness to stretch credulity beyond any reasonable bounds is reflected in its "even if" argument – even if the Stipulation limits Columbia's use of the Northern Loop, the Stipulation does not create exclusive territories. *See* Columbia's Motion to Dismiss at 4. Obviously, if Columbia had any confidence in its "sheltering" versus "prohibitive" argument, its "even if" argument would be unnecessary. In any event, as noted earlier, the Stipulation does not create, and Suburban is not arguing that it creates, exclusive territories. Instead, Suburban asserts that the Commission should enforce what the Stipulation says – Columbia can use the Northern Loop only to transport gas from current and future sources of supply to its distribution systems in southern Delaware and northern Franklin Counties to points outside those areas. Stipulation at para. A.10.

Contrary to Columbia's assertion that Suburban has ignored a "key phrase" in paragraph A.10, it is Columbia in its "even if" argument that ignores and twists the paragraph's language.[5] Paragraph A.10 acknowledges that Columbia, consistent with the Stipulation, may install a high-pressure natural gas pipeline in "*any* of the areas described, . . ." *Id.* Clearly, "any" of the areas

[5] Not surprisingly, Columbia neglects to mention that Suburban explicitly noted that it was quoting paragraph A.10 "in relevant part." *See* Suburban's Motion to Reopen at 4. Here, paragraph A.10's relevant part is the limitation on Columbia's use of the Northern Loop, not where the Northern Loop may be installed.

described includes Delaware and Franklin Counties, as Columbia and Suburban by way of the Stipulation reached a "resolution of their competitive dispute and rationalization of their distribution systems (in Delaware and Franklin Counties) in the public interest by means of agreement . . . ." Stipulation at 2. Contrary to Columbia's assertion, "any of the areas described" is not the "said areas" to which the restriction on the Northern Loop's use applies. *See* Motion to Dismiss at 4. Instead, the destination to which Columbia may transport gas consistent with the Stipulation is "points outside of said areas," "said areas" being defined immediately before such phrase as "southern Delaware and northern Franklin Counties[.]" Stipulation at para. A.10. In short, Columbia may use the Northern Loop, consistent with the Stipulation, to transport gas from current and future sources of supply to points outside southern Delaware and northern Franklin Counties. It may not use the Northern Loop to transport gas to southern Delaware and northern Franklin Counties or to serve customers there. It has done so and, thus, violated the Stipulation.[6]

Columbia next asks the Commission to dismiss Suburban's case because Suburban's interpretation of paragraph A.10's use of "southern Delaware and northern Franklin counties is too ambiguous to be enforceable." Columbia's Motion to Dismiss at 4.[7] It is well-settled that the Commission will only address the issues before it. *See, e.g., In the Matter of the Complaint of The Suburban Fuel Gas, Inc. v. Columbia Gas of Ohio, Inc.*, 1987 Ohio PUC Lexis 1542, *13

[6] Columbia offers no support, other than mere assertion, that "areas" as used in paragraph A.10 are those described in paragraphs 4 and 5 of the Stipulation. *See* Columbia's Motion to Dismiss at 4. This is not surprising, as there is no such support, as evidenced by Columbia dropping the "any" from "any of the areas described" as it relates to where it may install a high-pressure natural gas pipeline. "Any areas described" and "said areas" are two very different things, particularly given that "said areas" is immediately preceded by and thus defined by "southern Delaware and northern Franklin Counties." More importantly, paragraphs 4 and 5 describe the facilities to be transferred and have nothing whatsoever to do with "areas" served or to be served by the parties within the manner provided for in the stipulation (that is, Columbia may not use the Northern Loop as stated in the Stipulation).

[7] This assertion is rather ironic given that, in the paragraph immediately preceding the one in which Columbia makes it, Columbia itself relies on "southern Delaware County" as a recognized geographic area. *See* Columbia's Motion to Dismiss at 4 (saying that a certain geographic area is "within southern Delaware County").

(1987) (declining to address an issue not before it, the Commission affirmed that "[i]n the context of a complaint case, the Commission need only decide the issues before it."). Columbia does not argue that Jaycox Road is not in southern Delaware County.[8] Thus there is no dispute but that Jaycox Road is in southern Delaware County.[9] The Commission should not indulge Columbia's assertion about "ambiguity" regarding the meaning of southern Delaware County when the issue is not before it.[10]

Resorting to more unsupported assertions, Columbia says that Suburban's "interpretation of paragraph A.10 as allocating portions of the Delaware and Franklin counties market to it exclusively" renders the Stipulation unenforceable because it is the result of fraud or Suburban is estopped from pursuing its case. *See* Columbia's Motion to Dismiss at 5. Again, as discussed earlier, Suburban has not argued, and is not arguing, that the Stipulation creates exclusive territories – just that the restraint ancillary to Suburban's and Columbia's legitimate business

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[8] In fact, Jaycox is south of either of the northern boundaries of southern Delaware County raised by Columbia in its rhetorical questions. *See* Columbia's Motion to Dismiss at 4 (asking if the northern boundary of southern Delaware County is Home Rd./Lewis Center Rd or State Route 37).

[9] In fact, the Commission may take administrative notice of geography, and thus that Jaycox Road is in southern Delaware County. *See State v. Burkhalter*, 2006 Ohio 1623, para. 18 (Lucas 2006) ("We may take judicial notice of facts easily ascertainable from a reasonably reliable source, such as a map. The judge may inform himself as to the facts of geography, such as . . .the location of a given place within the jurisdiction, by resort to * * * public documents, maps, etc.") (citation and quotations omitted); *State v. Davis,* 2004 Ohio 5680, para. 22 (Pickaway 2004); *Hafer v. C., H. & D. R. R. Co.,* 4 Ohio Dec. 487, 492 (C.P. Hamilton 1892) ("The court takes judicial notice of the geography and the general commercial relation of cities and regions."); *see also In the Matter of Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues,* 2006 Ohio PUC Lexis 9, *10 (2006) (Commission took judicial notice); *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of the Ohio Edison Company and Related Matters,* 1983 Ohio PUC Lexis 49, *24 (1983) (acknowledging ability to take administrative notice and explaining that "the guidelines for determining whether administrative notice should be taken are the same as those set forth for judicial notice in Ohio Evidence Rule 201.").

[10] Further, Columbia's invitation to the Commission to simply throw up its hands and not enforce the Stipulation due to a (nonexistent and, here, immaterial) ambiguity is contrary to law. The Commission's Finding and Order adopting the Stipulation itself confirms that it is a "settlement agreement." *See, e.g.,* Finding and Order at para. 10. As such, the settlement agreement is a contract – like any other contract. *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St. 3d 605, 613 (2004) (citations omitted); *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St. 3d 559, 564 (2004). "A settlement agreement is a contract to which general rules of contract law apply." *Huffy Corp. v. MRED Properties*, 1993 Ohio App. LEXIS 5620, *6 (Mercer 1993). "The purpose of contract construction is to discover and effectuate the intent of the parties. The intent of the parties is presumed to reside in the language they chose to use in their agreement." *Graham v. Drydock Coal Co.*, 76 Ohio St. 3d 311, 313-14 (1996) (internal citations omitted).

purposes in connection with the transfer of customers and facilities in paragraph A.10 that prohibits Columbia from using the Northern Loop to serve customers in southern Delaware County should be enforced.[11] Further, and contrary to Columbia's assertion, Suburban's position regarding paragraph A.10's meaning is not at odds with the Commission's "characterization" of the Stipulation, as the Commission itself emphasized in that portion of its Finding and Order relied on by Columbia that "[*p*]*ursuant to the terms of the second amended stipulation,*" Columbia and Suburban were transferring customers and facilities. *See* Columbia's Motion to Dismiss at 2 (quoting the Finding and Order at 2-3, para. 6).

C. The Commission Does Not Have Jurisdiction To Hear, Or Even Entertain, Columbia's Arguments Under Federal And State Antitrust Law

Columbia is wrong in asserting that Suburban seeks to enforce exclusive territories. And Columbia itself acknowledges that restraints ancillary to legitimate business purposes, such as the sale or transfer of property at issue in the Stipulation, are completely legitimate. Further, the Commission itself acknowledged that it "actively supervised" Columbia's and Suburban's resolution of their competitive dispute and rationalization of their distribution systems in Delaware and Franklin Counties and has already decided that such resolution is *in the public interest.* Stipulation at 2.

Not only is Columbia wrong on such matters, it is asking the Commission to delve into them under federal and state antitrust laws – areas over which the Commission has no jurisdiction. *See* 15 U.S.C. secs. 15 and 26 (federal courts have exclusive jurisdiction over federal antitrust laws); O.R.C. secs. 1331.08 and .11 (courts have jurisdiction over Valentine Act); *In re Matter of Commission Review of the Capacity Charges of Ohio Power Company and*

[11] It bears repeating that Columbia itself acknowledges that restraints ancillary to legitimate business purposes, such as the sale or transfer of property, are perfectly legitimate. *See* Columbia's Motion to Dismiss at 7.

Columbus Southern Power Company, 2012 Ohio PUC Lexis 666, *19-20 (2012) (Commission has no authority under Valentine Act). Indeed, contrary to the implications of Columbia's argument, the Commission cannot address, evaluate, or otherwise even entertain issues related to which, in Columbia's words, of "two analytical approaches" are used to determine if an agreement unreasonably restrains trade as such is a question of law within the exclusive jurisdiction of federal courts and Ohio's courts, respectively. *See* Columbia's Motion to Dismiss at 6; *see also Bassett v. NCAA*, 528 F.3d 426, 432 (6th Cir. 2008) (which mode of analysis to apply to purported restraint of trade question of law); *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336, 342 (6th Cir. 2006) (same).

Conclusion

Paragraph A.10 of the Stipulation is clear and unambiguous – it limits, in relevant part, Columbia's use of the Northern Loop to "transporting gas from existing and future sources of supply to various gas distribution systems owned and operated by Columbia in southern Delaware and northern Franklin Counties to points outside of said areas, . . ." Stipulation at para. A.10. Columbia has used the Northern Loop for other purposes in violation of the Stipulation. In its Motion to Reopen, Suburban has asserted reasonable grounds to pursue its claims and, for the reasons stated herein, Columbia's Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Suburban Natural Gas Company's Memorandum Contra Columbia Gas of Ohio, Inc.'s Motion to Dismiss was served upon the following counsel of record by regular U.S. mail, postage prepaid, this 25 day of June 2013.

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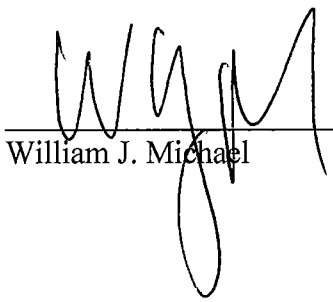

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Summary: Memorandum Suburban Natural Gas Company's Memorandum Contra Columbia Gas of Ohio, Inc.'s Motion to Dismiss electronically filed by Brandi L. Kayser on behalf of Suburban Natural Gas Company