BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

SUBURBAN NATURAL GAS COMPANY,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 17-2168-GA-CSS
	)	
COLUMBIA GAS OF OHIO, INC.,	)	
	)	
Respondent.		

APPLICATION FOR REHEARING OF SUBURBAN NATURAL GAS COMPANY

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APPLICATION FOR REHEARING

The Opinion and Order of April 10, 2019 (Order) finds it perfectly acceptable for the largest gas local distribution company (LDC) in the state to duplicate a competitor's supply mains and claim the competitor's customers as its own. If the decision stands, it marks the end of days for any small LDC serving an area that a large LDC covets.

Suburban Natural Gas Company (Suburban) respectfully requests an order granting rehearing and finding that Suburban has met its burden of proof as to Counts 1, 3, 4 and 5 of the Complaint. The contrary findings in the Order are unreasonable and unlawful because:

1. Certain factual findings are unsupported or against the manifest weight of the evidence and therefore contrary to R.C. 4903.09:
    a. A Pulte representative testified that Columbia was asked to serve because it offered EfficiencyCrafted Homes rebates. The suggestion that these rebates were not material to Pulte is unsupported and contrary to record evidence.
    b. None of the four Columbia witnesses who testified at hearing have ever seen a cost-benefit study for the Glenross project. The finding that such a study was "presumably" performed and that the results justified waiving a main extension deposit for the Glenross project flatly contradicts the record.
    c. The finding that there is "no evidence to support a claim that Columbia used the EfficiencyCrafted Homes program for anticompetitive purposes ignores evidence to the contrary.
    d. Columbia built a new main on the other side of the street from Suburban's existing main for express purpose of substituting service that would otherwise

be provided by Suburban. The suggestion that Columbia's main does not "duplicate" Suburban's main is erroneous.

2. Certain conclusions of law are unsupported and contrary to Revised Code Title 49:
    a. The Order fails to apply the record evidence to the claims asserted under Count 5 for violation of R.C. 4905.32, R.C. 4905.33 and R.C. 4905.35. These claims are independent of the claims asserted under Counts 1 through 4.
    b. The Order erroneously concludes that the Commission has no authority under Title 49 to prevent or remedy the duplication of a gas LDC's facilities.
    c. The Order fails to apply the plain language of the 1995 Stipulation or otherwise interpret or enforce this stipulation.
    d. The Order fails to consider the plain language of Columbia's DSM tariff or main extension tariff, as well as the plain language of R.C. 4905.32 and 4905.33.
        i. Commission approval of the EfficiencyCrafted Homes program does not excuse Columbia from filing a tariff authorizing the payment of rebates under this program. No such tariff has been filed.
        ii. The plain language of Columbia's main extension tariff requires a written line extension agreement for all projects, regardless of whether a deposit is waived.
3. Certain evidentiary and procedural rulings violate Suburban's right to due process:
    a. The refusal to allow Suburban to submit rebuttal testimony violates R.C. 4905.26 and constitutes reversible error as a matter of law.

b. The refusal to rule on Columbia's "confidential" designations violates R.C. 4901.12 and 4905.07.

Accordingly, as authorized by R.C. 4903.10, Suburban respectfully requests that the Commission vacate the Order, grant rehearing, and issue an order on rehearing finding that Suburban has met its burden of proof as to Counts 1, 3, 4 and 5 of the Complaint.

MEMORANDUM IN SUPPORT

This case arises from Columbia's decision to extend a main through an area it has never served into a multi-phase residential development Suburban has served since 2002. As the Order sees it, "[a]t the foundation of this case is the issue of what constitutes a service territory."[1] The Order reasons that because electric utilities have statutory, certified territories and gas LDCs do not, Columbia is entitled to serve wherever it wants—including areas where another LDC is already serving.

What constitutes a "service territory" is actually the *least* important issue in the case. Title 49 authorizes complaints by and against public utilities, but utility regulation exists primarily for the benefit of the public. "The protection given the utility is incidental*." State ex rel. Elec. Co. of Missouri v. Atkinson*, 275 Mo. 325, 204 S.W. 897, 899 (1918). The public interest is "at the foundation" of every Commission case, but has been ignored here. The public interest demands that the Commission take action when an LDC duplicates a competitor's facilities to raid the competitor and rob it of its customers.

The public interest requires consideration of certain economic realities. Four large LDCs, 21 small LDCs, and a handful of municipal systems and co-ops provide gas service throughout

[1] Order at ¶ 52.

the state.[2] Economies of scale give large LDCs the ability to spread fixed costs among a larger customer base. A $1 million main extension project has a much different rate impact for a company with less than 18,000 customers (like Suburban) than it does for a company with 1.2 million customers (like Columbia). The same laws of math prevent small LDCs from offering builder incentives—whether funded by investors or by the utility's retail customers—anywhere near the scale offered by large LDCs.[3] Nonetheless, years ago Suburban requested approval to offer incentives in areas where Columbia also offered them, but the Commission denied the request.[4] (The Order invites Suburban to try again, but that would be pointless for the reason just explained.)[5] Columbia marketing employees have acknowledged that its ability to offer incentives, coupled with Suburban's inability, gives Columbia a competitive advantage.[6] This advantage flows in part from the Commission's regulatory decisions, and is funded by Columbia's customers through Rider DSM.

Having a competitive advantage does not violate the law. What violates the law is having a competitive advantage and abusing it. The likes of AT&T, Microsoft, and numerous other corporations did not get in trouble for acquiring market power or becoming *de facto* monopolies; they got in trouble for abusing market power lawfully acquired.[7] This is not an antitrust case, but the analogy still holds. The underlying issues involve Columbia's abuse of its competitive advantage, not how it acquired this advantage or the mere fact that it has one.

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[2] https://www.puco.ohio.gov/emplibrary/files/Util/GIS/Gas_Maps/Natural_Gas_Distribution_Companies.pdf

[3]

[4] *In re Self-Complaint of Suburban Natural Gas Co.*, Pub. Util. Comm. No. 11-5846-GA-SLF, Opinion and Order (Aug. 15, 2012).

[5] Order at ¶ 59.

[6]

[7] *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) [will substitute case]

The fact that Ohio LDCs do not have certified service territories does not exempt LDCs from statutes prohibiting free or reduced rate service, discrimination, and unauthorized preferences or advantages. *See, e.g.,* R.C. 4905.32, 4905.33, 4905.35. The lack of statutory "service territories" only means no LDC has the exclusive right to serve because of a customer's location on a map. The absence of statutory service territories only heightens the importance of the statutes just mentioned. Competition inevitably provokes conduct to dominate contested markets. Title 49 is a check on this conduct.

The regulatory landscape in Ohio permits "*reasonable* competition" among LDCs. *Suburban Natural Gas Co. v. Kalida Natural Gas Co., Inc.*, Case No, 92-1876-GA-CSS et al., 1993 WL 542801, at ¶ 8 (Aug. 26, 1993) (emphasis added). Reasonable competition serves the public interest. Cut-throat tactics that destroy competition and violate Chapter 4905 are not reasonable. "[A]s the Supreme Court of Ohio has recognized, inter-utility competition should be based on such things as management efficiency, superiority of service, technological improvements, and control of costs. Artificial price reductions undertaken simply to win customers carry none of the benefits of true competition; it is nothing more than price warfare." *In re Cincinnati Gas & Elec. Co*., Pub. Util. Comm. No. 91-410-EL-AIR, 1992 WL 12797181 (May 12, 1992) (internal citation omitted).

The Order approaches this case as if the status of the parties as public utilities were merely incidental. It suggests that any public utility without a statutorily-defined "service territory" is not really a "public utility." Water utilities do not have statutory service territories either, yet the Commission has consistently denied certificates to operate in areas where another provider serves. The Ohio Supreme Court considers the Commission's authority to prohibit

duplication of any public utility service "unquestioned in law and reason." *N. Ohio Tel. Co. v. Putnam*, 164 Ohio St. 238, 245-46, 130 N.E.2d 91 (1955)

The Order ignores the most important fact in this case: *Suburban was already serving Glenross*. This is *not* a case where Columbia won a race to bring gas service to a previously unserved area. Suburban has served Glenross from a main running parallel to Cheshire Road since the early 2000s. When Pulte asked Suburban to connect a new phase to this main, Suburban had little choice in the matter:

> *A public utility is bound to serve to the extent of its capacity those of the public who need the service and are within the field of its operations*, at reasonable rates and without discrimination; this duty does not permit such a public service corporation to pick out good portions of a particular territory, serve only select customers under private contract and refuse service (which it alone can give) to the remaining portions of territory and to other users. (Emphasis added.)
>
> *Indus. Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 408–09, 21 N.E.2d 166 (1939) (emphasis added).

A public utility's right to serve is the corollary of its duty to serve. The Court has recognized, in the specific context of gas service, that once service is made available, "the utility thereby, for the first time, became obligated to serve without discrimination all applicants within its area with its type of service at the rates fixed by the schedule." *Cookson Pottery v. Pub. Util. Comm*, 161 Ohio St. 498, 506, 120 N.E.2d 98, 103 (1954). A small LDC cannot fulfil this duty in an environment where large LDCs are permitted to duplicate facilities, siphon away customers, confound its system design plan, and drive the small company to financial ruin.

On the facts of this case, Columbia's construction of a duplicate main subjects Suburban to "unfair or unreasonable prejudice or disadvantage," in violation of R.C. Chapter 4905. The fact that neither party has a statutory "service territory" is irrelevant. Columbia's statutory

violations are clear—regardless of whether it also violated the 1995 Stipulation (which it did), regardless of whether the DSM tariff allows builder incentives to be funded with ratepayer money (which it doesn't), and regardless of whether construction of the duplicate main at no cost to the developer was economically justified (which it wasn't). Even if Columbia had never offered incentives and charged full-freight on a deposit, duplicating Suburban's main to serve a development Suburban was already serving imposed an "unjust or unreasonable prejudice or disadvantage" in violation of R.C. 4905.35(A).

The Order approaches Suburban's argument as if the underlying theory were something Suburban made up. "Suburban has not cited to any Commission precedent in which we have held, or even suggested, that a natural gas company should be precluded from serving a new customer if such service would result in the duplication of facilities."[8] Never mind that duplication of facilities was one of the central issues in the 1986 complaint case involving these very same parties.[9] Some principles are so obvious that no one bothers to question them. For the Order to suggest the Commission lacks authority to prevent or remedy the duplication of facilities (which is really what the Order is saying) is profoundly mistaken.

The Order not only finds that Columbia did nothing wrong, but that Suburban is the bad actor for even suggesting wrongdoing. The Order implies that previous cases were frivolously pursued, and that this case is just more of the same. The back-of-the-hand treatment of Suburban's claims is unjustified. Columbia has sued competitors for bypassing its system to serve load Columbia believed it had the right to serve. *Atwood Resources, Inc. v. Pub. Util. Comm.*, 43 Ohio St.3d 96, 538 N.E.2d 1049 (1989). Duke recently sued the City of Hamilton for

[8] Order at ¶ 55.
[9] *Suburban Fuel Gas, Inc. v. Columbia Gas of Ohio, Inc.*, Pub. Util. Comm. No. 86-1747-GA-CSS, Opinion & Order (Aug. 4, 1987).

providing gas service to an area Duke believes it alone has the right to serve. *Duke Energy Ohio, Inc. v. City of Hamilton,* 117 N.E.3d 1, 2018-Ohio-2821 (12th Dist.). Suburban has done nothing wrong by asserting its rights—in this proceeding or any other.

Should the Order stand, it will have a chilling effect on all small utilities. The Order suggests that the Commission will gladly hear claims alleging unfair or anticompetitive conduct if alleged *by* large LDCs, but that these claims are meritless when alleged *against* large LDCs. The Commission is the exclusive forum for most complaints against utilities. Resort to the Commission under Title 49 is the only remedy available. The Order forces a Hobson's choice on small utilities: bring a claim and risk chastisement by the Commission, or do not bring a claim and waive all rights afforded under Title 49.

The Order's lack of comprehension of fundamental regulatory principles explains why this case has been handled from the beginning as if it were a dispute between two car dealers fighting over a lost sale. It explains why evidentiary rulings failed to appreciate the significance of some facts and insignificance of others. And it explains why the Order plays fast and loose with record evidence—the Order does not reflect an understanding of which facts are important. The failure to grasp the underlying principles also explains the Order's inability to articulate clear statements of law or reasoned legal analysis.

The Order is unreasonable, unlawful, and indefensible on appeal. The Commission must grant rehearing.

I. FACTS

Suburban's initial brief provides a detailed fact summary. The following is only for context.

In the early 2000s, a developer asked Suburban to serve a new residential subdivision, bisected to the north and south by Cheshire Road, in southern Delaware County.[10] Suburban already had a main in the right-of-way north of Cheshire Road, so it readily agreed.[11] Suburban has served each new phase along Cheshire Road since the first home was built.[12]

In late 2016, Pulte's Jeff Thompson informed Aaron Roll, Suburban's Operations Director, that Pulte planned to break ground on a new phase south of Cheshire Road sometime in 2018.[13] Mr. Roll confirmed that service was available. Over the next several months, Suburban and its subcontractors designed the distribution system for the new phase and incorporated the increased load requirements into Suburban's capacity plan.[14] By mid-2017, Suburban was ready to move forward when Pulte needed it to.[15]

When Fall 2017 rolled around and Suburban still had not heard from Pulte, Mr. Roll decided to give Mr. Thompson a call. Mr. Thompson announced that Suburban's services would not be needed after all. Columbia would be serving the new phase, as well all future phases south of Cheshire Road.[16] Soon thereafter, Columbia began to lay around 6,700 feet of 8-inch distribution main in the south right-of-way along Cheshire Road—in other words, directly across

[10] Suburban Ex. 1 at 2-3, 7; Suburban Ex. 1.1.
[11] Suburban Ex. 1 at 7.
[12] Suburban Ex. 1.2.
[13] Suburban Ex. 5 at 20.
[14] Suburban Ex. 1 at 5-8.
[15] *Id.* at 8.
[16] *Id.*; *see also* Suburban Ex. 1.4.

the street from Suburban's main.[17] Columbia doubled-up crews to complete the project sometime in December 2017.[18]

Suburban had a good relationship with Pulte.[19] What happened? Why the change of heart? Mr. Thompson explained the "what" and the "why" to Mr. Roll, who made a contemporaneous note:

> Called Jeff Thompson ... to ask about Glenross and if [Suburban] was serving the south side of Cheshire Road and if had heard about Columbia coming down Cheshire Road. He explained to me yes he knew they were coming and they would serve the south side of Cheshire Road. I asked if there was a reason why and Jeff told me there was an incentive program with Columbia. I told him thank you and I understand what he had told me. Also, Jeff said he really liked working with [Suburban] and the incentive was the reason [Suburban] wouldn't be used on the south side of Cheshire.[20]

Mr. Thompson vouched for this account:

> Q. Does the memorandum I've handed you, marked as Exhibit 10, accurately reflect your discussion with Mr. Roll?
>
> A. Yes.
>
> Q. Are any important details of that discussion left out of this memo?
>
> A. When he called me, he just discussed that there was issues, that this was probably going to be a legal case since Columbia was there.
>
> Q. Okay. Anything else?
>
> A. No.[21]

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18

19 Mr. Thompson indicated, "Aaron [Roll] and I have worked together for 17 years and he's a great guy." Suburban Ex. 5 at 57-58.

20 Suburban Ex. 1.4.

21 Suburban Ex. 5 at

Mr. Thompson did not recollect the exact amount of the incentives, but believes it was in the "six figures."[22] The "incentives" discussed throughout this case refer to energy efficiency rebates paid under Columbia's EfficiencyCrafted Homes program. The parties have also referred to these rebates as "builder incentives."

Columbia did not prepare a written main extension agreement for the Glenross project.[23] Nor did it require Pulte to pay a deposit.[24] And although Columbia witnesses testified that the company always prepares a written cost-benefit study for every project, none of these witnesses have seen a cost-benefit study for the Glenross project.[25]

The parties' history with each other provides additional context for their current dispute. The companies also compete in western Ohio. In the mid-1980s, Suburban brought and won a case against Columbia for offering free main extensions, appliance rebates, and other discounts not allowed by its tariffs.[26] Tensions flared again when Suburban moved into central Ohio. Those tensions were temporarily abated by the 1995 Stipulation—an agreement that would have prevented this dispute had its terms been honored. Columbia's reintroduction of incentives went hand-in-hand with false claims about Suburban's "higher rates and lack of service."[27]

Donna Young and Joseph Codispoti were the Columbia sales representatives who worked on the Glenross project. Oddly, Columbia did not present testimony from these witnesses. Suburban called these witnesses as part of its case-in-chief. When asked, "Who at Columbia was really the contact person that met regulatory with Pulte," Mr. Codispoti responded, "That would

[22] Id. at
[23] Id. at
[24] Id. at
[25] Tr.
[26] Same as footnote 10? YES
[27] Tr. 303, Suburban Ex. 26.

be Donna Young."[28] But Ms. Young testified, "I didn't handle the Glenross project" and "I don't' work in Suburban's territory."[29] Columbia witnesses Melissa Thompson and Zachary McPherson had no involvement in the project at all.

The Order finds for Columbia and against Suburban on each of the five counts of the Complaint. Suburban is not seeking rehearing of Count 2.[30]

II. ARGUMENT

Following a contested hearing, "a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." R.C. 4903.09. Rehearing is appropriate where "the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed [.]" R.C. 4903.10.

The Court will reverse a Commission order that is "unreasonable or unlawful." R.C. 4903.13. "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A PUCO order is unlawful if it is inconsistent with relevant statutes or with the state or federal constitutions." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 44.

Part A below addresses findings of fact that are unsupported and against the manifest weight of the evidence. Part B addresses legal conclusions devoid of sound reasoning and in

[28] Tr. at 272, 303. *See also* Tr. at 282 (Ms. Young was the "day-to-day contact" with Pulte).
[29] Tr. 313.
[30] Count 2 of the Complaint involves an interpretive question concerning the meaning of "service area" or "service territory" as used in Columbia's DSM applications. The Order lands on a definition that puts Glenross in the "service territory" of both litigants.[30] To avoid any further confusion, Suburban will not be seeking rehearing of Count 2. Each count of the Complaint stands on its own, and none of the other four counts are impacted by the ruling on Count 2.

violation of applicable law. Part C addresses the Order's misdirected criticism of the way Suburban handled certain procedural and evidentiary issues.

A. Certain factual findings are unsupported or against the manifest weight of the evidence.

R.C. 4903.09 requires the Commission to render decisions based on record evidence. The Commission commits reversible error if it renders factual findings that have no record support, or the finding is manifestly against the weight of the evidence. *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485 2011-Ohio-4189, ¶ 20.

1. Pulte chose Columbia because of EfficiencyCrafted Homes incentives.

The record is abundantly clear on why Pulte chose Columbia. The Order grossly mischaracterizes the record:

> After learning that Columbia had been selected, Suburban witness Aaron Roll requested an explanation from Pulte's Jeff Thompson, to which Mr. Thompson *allegedly* responded Columbia's "incentive program" was the reason (Suburban Ex. 1.4). *Despite the fact that there is some dispute as to whether Mr. Thompson accurately recalled the reason for Pulte's choice of Columbia for the Glenross South development*, Suburban filed the above- captioned complaint case. (Emphasis added.)

These were not "allegations"; nor was there any dispute of the accuracy of the witness's recollection. Mr. Thompson explained how Columbia highlighted its builder incentive program from the very beginning:

> Q. At some point, Columbia came into the picture, correct?
>
> A. Yes.
>
> Q. Tell me how that arose.
>
> A. Just over the years, any projects, Columbia Gas will discuss with me their availability. So I host a Monthly Utility Meeting with Columbia Gas, and during one of our discussions they asked to see

if they could put some stuff together, some numbers together for us that might help us use Columbia Gas in that area.

***

Q. And someone raised the topic with you of potentially serving Glenross at one of these meetings?

A. Yes.

Q. Who was that person?

A. Donna Young.

Q. What did she tell you, as best you can recall?

A. She just mentioned she would like a courtesy look at the community and wondered if we would entertain that.

Q. And obviously you did. What happened next?

A. Then she provided us with some numbers because of the rebate that the closings generate.

Q. Do you understand the rebates to be part of Columbia's EfficiencyCrafted Homes program?

A. Yes.

Q. Did Ms. Young give you this information about the rebates in writing?

A. It was in writing.

Q. Was it in an e-mail? Tell me about the format.

A. Just on a legal pad. Just wrote down some figures.

Q. Handwritten?

A. Handwritten, yes.

Q. What did the figures indicate?

A. I—I don't have those.

Q. When you say she provided figures, what was she trying to show you? The rebates that had been paid or –

> A. What the potential rebate would be in that section phase of the community or at build-out of that side of the road.
>
> Q. Do you recall generally what that figure was?
>
> A. Just from e-mails, but I don't -- I gave that to senior management for their decision.
>
> Q. Was it a six-figure amount?
>
> A. Yes, I believe it was.[31]

Mr. Thompson testified that these incentives *were* material to Pulte's decision:

> Q. Is it the case then that builder rebates or incentives were a deciding factor for Pulte in choosing Columbia?
>
> A. Yes.[32]

Mr. Thompson did not "allegedly" tell Mr. Roll that Pulte chose Columbia because of the incentive offer. This is *exactly* what Mr. Thompson said. No one from Columbia was present during his conversation with Mr. Roll; no one from Columbia is in a position to question whether Mr. Thompson "accurately recalled the reason for Pulte's choice."

Columbia's blanket denial that incentives had anything to do with Pulte's decision is not "evidence." Moreover, it is simply not credible. The explicit purpose of the program is to create incentives for builders, so to deny that Pulte acted on these incentives not only contradicts the record, but is disingenuous. Pulte knows the reason for its decision, and the record is abundantly clear on what that reason was.

2. There is zero evidence Columbia performed a cost-benefit study.

The Order rules against Suburban on Count 4 by making up facts and then shifting the burden of proof to Suburban to disprove those made-up "facts." This is plain error. "Suffice it to

[31] Suburban Ex. 5 at
[32] Id. at

say, some factual support for commission determinations must exist in the record, an obligation which the commission itself has recognized in its orders." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89–90, 706 N.E.2d 1255 (1999).

Columbia's main extension tariff requires written line extension agreements and the collection of a deposit:

> Where a main extension is necessary to provide service availability to plots of lots or real estate subdivisions and such main extension is not deemed justified at the Company's expense, the owners, developers or promoters of such plots of lots or real estate subdivisions may enter into a line extension agreement and deposit with the Company the estimated cost of that portion of the main extension which is not deemed justified at the Company's expense.
> ***
> Where a main extension is deemed economically justified at the Company's expense, based upon a cost-benefit study, no deposit shall be required.[33]

Suburban made out a prima facie case under Count 4 for two violations. First, the plain language of the tariff requires a written main extension agreement whether or not a deposit is required. Columbia admits no written main extension agreement exists.[34] Second, Columbia failed to prove its defense—that waiving the deposit was economically justified. The only inference with any record support is that Columbia either did not perform the study, or performed the study but is unwilling to share the results.

a. No witness has seen a cost-benefit study for Glenross.

Columbia witnesses testified that the company performs a cost-benefit study for every project, and that these studies are necessary to determine whether a deposit is required.[35] If Columbia followed the process as its witnesses described at hearing, a cost-benefit study should

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35 Tr.

exist for the Glenross project. The problem is, none of the Columbia witnesses have ever seen such a study for this project.

The Order simply assumes that a cost-benefit must exist. It decides that a cost-benefit study "was *presumably* conducted prior to Columbia's determination that no deposit or line extension agreement would be required[.]"[36] After willing a cost-benefit study into existence, the Order invents another "fact": that not one but two Columbia employees looked at it and determined no deposit would be required:

> Columbia witnesses Donna Young and Zach McPherson both confirmed that the analysis yielded the same result for the Glenross South expansion: the main extension was economically justified at Columbia's expense because the net present value of the project was positive, thereby allowing Columbia, through its tariff, to extend its main to the new area without requiring any contribution from Pulte.[37]

The Order not only invents "facts" from nothing, but ignores record evidence disproving them. Ms. Young *denied ever even seeing* a cost-benefit study for Glenross:

> Q. Have you seen a study for Glenross?
>
> A. No, I haven't.[38]

If a cost benefit study existed, and *if* it justified waiving the deposit, the study would provide a complete defense to Count 4. Mr. McPherson would have attached it to his testimony. He did not. His testimony is carefully worded to describe Columbia's *process* for cost-benefit studies.[39] He does not and cannot know whether this process was followed because he was not involved in the Glenross project:

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[36] Order at ¶ 62 (emphasis added).
[37] Order at ¶ 25.
[38] Tr. 313.
[39] *See generally* Suburban Post-Hearing Reply Brief at 11-13 (comparing testimony of Columbia's alleged process to the lack of evidence that of these processes were followed).

> Q. Did you have any role in determining whether a contribution or deposit would be required for Glenross?
>
> A. No.[40]

If he ever saw a cost-benefit study at all, it was not until *after* Suburban filed the Complaint:

> Q. Would a document like Exhibit 4 ordinarily be completed as part of the review of a project and whether its economically justified?
>
> A. Yes.
>
> Q. Have you seen a document like Exhibit 4 that references Glenross?
>
> A. I may have as part of this case, this complaint, but I can't say for sure.[41]

If Columbia allegedly performs a cost benefit study for *every* project, where is the cost-benefit analysis for Glenross? The Order finds its absence of no importance:

> While we agree that having a print out copy of the computerized cost-benefit analysis would have resolved much of the speculation as to whether a violation occurred, we find the testimony of Mr. McPherson, Ms. Young, and Mr. Codispoti to be compelling in that Columbia had all of the requisite information to conduct the cost-benefit analysis for Phases 11-15 of the Glenross South development and the project could not have been granted approval internally without the study.[42]

The testimony is indeed "compelling," but for exactly the opposite conclusion drawn by the Order. Having "all of the requisite information to conduct the cost-benefit analysis" and *actually*

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[42] Order at ¶ 62 (citations omitted).

conducting an analysis are totally separate questions. Evidence of the former does not prove the latter.[43]

Mr. McPherson should not have been permitted to testify about a cost-benefit study in the first place. He lacked any personal knowledge of whether the process was followed. Suburban's motion to strike his testimony for this very reason was denied.[44] As predicted, the Order draws the very inference that should have excluded his testimony. *See Wiley v. United States*, 257 F.2d 900, 909 (8th Cir. 1958) ("Secondary evidence of a document may consist of a copy proved to be correct, or, when the absence of the primary evidence is *satisfactorily accounted for*, oral evidence of the contents *by one who has seen it and knows its contents*.") (Emphasis added.).

b. Suburban does not bear the burden of production of a cost-benefit study.

If all of this were not enough, the Order finds that it was "Suburban's responsibility, during the discovery process, to request a print out from the computer model used to conduct the cost-benefit analysis."[45] Columbia bore the burden of proving that a document it claims to exist actually exists, but the Order erroneously shifts this burden to Suburban. "Generally, a lower court error in allocating the burden of proof, including the burden of going forward with evidence, requires a reversal and remand for a new hearing in which the burden is properly allocated." *Chari v. Vore*, 91 Ohio St.3d 323, 327, 744 N.E.2d 763 (2001).

If the record demonstrates anything, it demonstrates that Suburban availed itself of the discovery process to get its hands on the cost-benefit study. As already discussed, every witness

[43] Nowhere in the record does Mr. Codispoti testify that he performed a cost-benefit study. Mr. McPherson said the "inputs" for the study "would be" entered by Mr. Codispoti *or the engineer*. McPherson Testimony at 44. This of course is all speculation; again, Mr. McPherson was not involved in the project or in preparing a cost-benefit study.
[44] Tr. 386-91.
[45] Order at ¶ 62.

was asked about it; no witness has ever seen it. Suburban moved to introduce interrogatories and document requests which, among other things, would prove the study was responsive to discovery but not produced. The Attorney Examiners refused to admit this discovery.[46] This too was error. "Certainly, answers to interrogatories, being statements under oath by a party are admissible in evidence." *Saum v. Venick*, 33 Ohio App. 2d 11, 14, 293 N.E.2d 313, 316 (Ohio Ct. App. 1972).

Suburban cannot introduce a document that was responsive to discovery but never produced. The Order cites no authority for "presuming" that Columbia performed a study for Glenross—*especially since the very existence of the study is in dispute*. Suburban cannot have the burden of producing direct evidence of a document's non-existence. Columbia asserts that the document exists; Columbia bears the burden of proving the document's existence. *See State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 23 (12th Dist.)("The term 'burden of production' tells a court which party must come forward with evidence to support a particular proposition, whereas 'burden of persuasion' determines which party must produce sufficient evidence to convince a judge that a fact has been established."). Columbia's refusal or inability to produce the study—or even give one single clue about its contents--cr--eates an inference that cannot be ignored.

There is other evidence supporting the non-existence of a cost-benefit study as well. These studies are populated with data from a completed load form.[47] Mr. Thompson has completed this load form for other projects, but *not* for Glenross.[48] A completed cost-benefit

[46] Tr. 293 (Suburban Ex. 21-HC), Tr. 486-87, 516 (Suburban Ex. 45).
[47]
[48] Suburban Ex. 5 at

study also generates a confirmation letter to the builder.[49] Pulte received a confirmation letter for its Autumn Woods project the same day Columbia confirmed it would serve Glenross. Yet *no* confirmation letter exists for the Glenross project.[50]

Although Columbia produced no emails in discovery, Pulte did. One e-mail by Ms. Young boasts how "[o]ver the last 6 years I have repeatedly pushed management beyond our guidelines to including future phases to help get rid of deposits on many subdivisions."[51] Another e-mail explains the machinations used "to get the deposit reduced to $11,452.33" from the original amount of $40,000.[52] While Ms. Young dismisses these admissions as "salesman speak,"[53] this salesmanship is entirely consistent with waiving the deposit at Glenross.

Additionally, the draft chain of the main extension agreement for Pulte's Woodland Creek subdivision shows the creative math used to reduce a deposit at this subdivision. Mr. Codispoti testified about these drafts, Columbia's counsel stipulated to their authenticity, yet the Attorney Examiner refused to admit them for lack of "relevancy."[54] It is hard to imagine what could be more relevant that evidence tending to show that the decision to waive the deposit at Glenross was part-and-parcel of efforts to "push management beyond our guidelines."

The issue about the cost-benefit study could immediately be put to bed by requiring Columbia to produce the study. There is no question the Commission may order Columbia to do so. Suburban will happily certify that it hereby waives any and all objections to the filing of the study as a late-filed exhibit, subject only to proof of the date it was prepared.

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[49] *See, e.g.,* Suburban Ex. 7.
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[51] Tr. 302; Suburban Ex. 26.
[52] Tr. 311; Suburban Ex. 29.
[53] Tr. 322.
[54] Tr. 247-252 (discussing Exhibits 13C, 18C, 19C, 20C); Tr. 293 (refusing admission of the documents Mr. Codispoti had just talked about "on the basis of relevancy.").

3. The Order ignores evidence that Columbia used builder incentives in an unfair and anticompetitive manner.

The Order claims "[t]here is no indication that Columbia has deployed its DSM program in an abusive or anticompetitive manner in order to expand its service territory."[55] The only evidence the Order considers on this point was evidence about the *purpose* of the program. The evidence demonstrating Columbia's improper *use* of the program was erroneously ignored (and in some cases erroneously excluded).

As noted earlier, Suburban is not seeking rehearing of Count 2. Whether Columbia was authorized to make EfficiencyCrafted Homes rebates available to Pulte or whether Pulte was eligible to receive these rebates is no longer at issue. But there is still the issue of whether Columbia used a lawful program for an unlawful purpose or to achieve an unlawful result, in violation of R.C. 4905.35(A). The Order does not even consider this issue. The Commission must "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence" in order to fulfil its duty under R.C. 4903.09. *In re Application of Columbus S. Power Co.*, 2011-Ohio-1788, ¶ 30, 128 Ohio St. 3d 512, 519.

The Order never advances past abstractions and generalities. It defends Columbia's "DSM Program" and the Commission's "energy policy objectives" where no defense is needed.[56] Suburban's Complaint involves only one of eleven programs in Columbia's DSM portfolio, and none of them implicate any "energy policy objective" that Suburban is aware of. The Order focuses on the purpose of the "DSM Program," Suburban's failure to intervene in the proceedings approving Columbia's program, and measures the Commission has taken or will take to "ensure Columbia is in compliance with the Commission's applicable rules and orders

[55] Order at ¶ 60.
[56] Order at ¶ 56.

[.]"[57] None of this discussion addresses whether it is appropriate to package builder incentives with a free main extension to win business in a development already being served by an incumbent provider. If that is how the Commission believes EfficiencyCrafted Homes rebates should be spent, it should say so expressly.

Columbia's use of the incentives must be considered in context. This is not a case where the topic of EfficiencyCrafted Homes rebates never came up until after Columbia had installed its duplicate main. Columbia used the incentives to influence Pulte from the very beginning.[58] Pulte was not on-the-fence about whether to build homes heated by gas versus electric. Mr. Thompson had already asked Suburban to serve the new phase in Glenross.[59] Columbia dangled incentives to get Pulte to reverse this decision. Mr. Thompson testified that the incentive offer had its intended effect.[60]

There is no question Columbia uses the EfficiencyCrafted Homes program as a competitive response tool. The "energy efficiency" benefits are merely incidental, at least as far as the sales force is concerned. The sales force knows very little about the program—other than it provides a way for Columbia to put ratepayer money into builders' pockets.[61] This is the first thing Columbia tells prospects, not the last. When Mr. Codispoti was attempting to displace Suburban from the Berlin Manor subdivision, the first paragraph of his e-mail to the developer made sure to note: "[T]hose rebates can average anywhere from a few hundred dollars per home to $800 per home, depending on the equipment that is being installed."[62]

[57] Order at ¶ 60.
[58] Suburban Ex. 5 at
[59] Id. at
[60] Id. at
[61] *See, e.g.*, Tr. 283 (Mr. Codispoti unaware of whether incentives paid before or after a home is built); Tr. 326-27 (Ms. Young obtained information from program consultant to forward to Pulte).
[62] Suburban Ex. 11.

Mr. Codispoti also used the builder incentive trump card to lure the Woodland Creek subdivision to Columbia. He knew that Columbia did not have existing mains to serve this development, but that a nearby cooperative did. Mr. Codispoti "felt it was important to remind Romanelli & Hughes of the EfficiencyCrafted Homes program" and that he "wanted the developer to know that any deposit they might have to pay would be at least partially offset by EfficiencyCrafted Homes rebates [.]"[63] The cooperative impacted by this conduct filed a letter in this docket but the concerns raised have not been acknowledged.[64]

The Columbia sales force have described EfficiencyCrafted Homes rebates as "useful to the sales team to compete against Suburban."[65] According to Mr. Codispoti:

> Q. Does Columbia's EfficiencyCrafted Homes rebates give Columbia a competitive advantage over Suburban?
>
> A. Yes.[66]

The advantage Columbia enjoys has been conferred upon it by the Commission. The Order finds "that advantage should not be stripped away simply because the other competing company does not offer such an incentive."[67] Suburban does not offer incentives because the Commission rejected Suburban's request to offer them.[68] The Order dismissively suggests that Suburban try again.[69] Suburban has already explained why this would be futile, and the Order offers little encouragement that a new request would be granted. Nor would authorization to offer rebates in the future make up for the inability to offer them in the past, or otherwise remedy Columbia's unlawful conduct.

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[63] Tr.
[64] National Gas & Oil Cooperative d/b/a the Energy Cooperative, letter to Pub. Util. Comm. Dated April 2, 2018.
[65] Tr.
[66] Tr.
[67] Order at ¶ 60.
[68] *Suburban Natural Gas Co.*, No. 11-5846-GA-SLF, Opinion and Order (Aug. 15, 2012).
[69] Order at ¶ 59.

Columbia is free to exercise its competitive advantages to win business in areas where no other provider is serving. But exercising these advantages in areas where another provider is already serving subjects the incumbent to "undue or unreasonable prejudice or disadvantage." R.C. 4905.35(A). Just as possessing a concealed-carry permit is not a defense to armed robbery, merely obtaining Commission authorization for the EfficiencyCrafted Homes program is not a defense to violating R.C. 4905.35(A). The Commission may continue to allow DSM programs and *also* impose reasonable limits on their use.

While the Commission ordinarily enjoys deference in the interpretation of prior orders, "no deference is necessary when an agency has set forth an interpretation of a prior order that is contrary to the order's express terms." *In re Application of E. Ohio Gas Co.*, 2014-Ohio-3073, ¶ 31, 141 Ohio St. 3d 336, 344, 24 N.E.3d 1098, 1105 (finding that Commission erroneously interpreted its own order). The prior DSM orders do not govern Suburban's claims in any way.

4. There is no question Columbia is substituting service that would otherwise be provided by Suburban.

The Order questions whether Columbia's main extension actually constitutes "duplication":

> DCFs witness Chief Deputy Engineer Robert Riley testified that, although Columbia completed installing its gas main on Cheshire Road to serve the Glenross South area in December 2017, he was not currently aware of any unnecessary duplication of natural gas facilities in Delaware County and even acknowledged that some duplication may be necessary or unavoidable.[70]

This is yet another area where the Order gets caught up in semantics. Columbia's new main extension serves customers Suburban's existing main was installed to serve. But for Columbia's main extension, Suburban would be serving customers Columbia is now (or will be)

[70] Order at ¶ 55 citing Tr. Vol. I at 20-21, 27; Columbia Ex. 5 at 5-7.

serving. The presence of Columbia's main extension causes "undue or unreasonable prejudice or disadvantage" to Suburban. No formal finding of "duplication" is needed to find that whatever Columbia did—duplicate, copy, substitute, whatever—violates R.C. 4905.35(A).

The Order unfairly and unreasonably minimizes the concerns expressed by Delaware County. Chief Riley testified that he reviewed the Complaint and was concerned by the allegations:

> Q. Of the allegations contained in the Complaint, do any particular allegations impact the interests of the Delaware County Engineer and Delaware County Board of Commissioners and, if so, which ones?
>
> A. First, Delaware County is a natural gas customer, and as such, Delaware County is concerned that increased costs due to the recovery of construction costs and ongoing monitoring and maintenance will be passed on to all users, including Delaware County. If the allegation in the complaint regarding incentives is true, then Delaware County would also be subsidizing the incentive program. Second, Delaware County is concerned about the unnecessary duplication of natural gas facilities.[71]

Chief Riley did not inspect Cheshire Road to root-out possible duplication. The point of his testimony was to explain that *if* duplication occurred—he wasn't saying that it did—then the Commission should address this activity because duplicate utility facilities causes problems for the county.

When asked at hearing what he would consider "unnecessary" duplication, Chief Riley explained: "I would consider unnecessary any length or any area being served that there's not a legitimate engineering purpose for having that duplication."[72] Columbia has not and cannot offer a legitimate engineering purpose for extending a main into an area where a competitor's main already existed.

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[72] Tr. 27.

B. Certain legal conclusions are unsupported and contrary to R.C. Title 49.

"R.C. 4903.09 requires the commission to set forth the reasons for its decisions and prohibits summary rulings and conclusions that do not develop the supporting rationale or record." *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 55. The Order fails to provide sufficient reasoning on numerous issues.

1. The Order summarily dismisses the statutory violations alleged in Count 5.

Count 5 alleges that the conduct complained of in Counts 1 through 4 also violates R.C. 4905.22, 4905.30, 4905.32, 4905.33 and 4905.35. The Order finds that Suburban's alleged failure to carry the day with Counts 1 through 4 renders any substantive analysis of Count 5 unnecessary:

> We agree with Columbia in that the claims set forth in Count 5 of Suburban's complaint, generally alleging various statutory violations, cannot stand on their own in the event that we find Suburban has fallen short of demonstrating the other allegations made in its complaint. Given that we have found Suburban has failed to meet its burden of proof, there is no reason to address the requested relief Suburban seeks in its complaint.[73]

While all counts of the Complaint arise from the same occurrence, each count alleges an independent legal theory of relief. Whether Columbia violated the statutes listed in Count 5 requires different legal and factual analyses than whether Columbia violated the 1995 Stipulation (Count 1), the DSM Order or DSM Tariff (Counts 2 and 3), or its Main Extension Tariff (Count 4). The summary disposition of the statutory claims will not withstand appeal. "PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded." *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 312, 513 N.E2d 337 (1987). *See also In re Application of Duke*

[73] Order at ¶ 63.

Energy Ohio, Inc., for Approval of its Fourth Amended Corp. Separation Plan, 2016-Ohio-7535, ¶ 19, 148 Ohio St. 3d 510, 515, 71 N.E.3d 997, 1002 (reversing order where Commission "failed to explain a material matter.")

Contrary to the summary conclusion in the Order, the statutory violations *do* stand on their own. As discussed below, Count 1 is fundamentally a contractual claim. The Order finds that Columbia's activities (offering incentives and duplicating facilities) are *not* covered by the 1995 Stipulation. The Order cannot have it both ways by suggesting these activities are immune from R.C. Chapter 4905 because the Stipulation affirmatively permits them. If the Stipulation does not govern these activities, then they are subject to challenge under R.C. Chapter 4905. A finding that the Stipulation covers these activities, and that Columbia violated the Stipulation, would merely establish a *prima facie* violation of the controlling statutes. But the statutes do not *require* Suburban to show that Columbia violated the 1995 Stipulation to prevail on the these claims.

The same is true for the violations alleged regarding the DSM Tariff and Main Extension Tariff at issue in Counts 3 and 4. A finding that these tariffs were violated would constitute *prima facie* violations of R.C. 4905.32, .33 and .35, but tariff violations are not a required element of a claim under R.C. 4905.33 or .35.

The Order also fails to consider evidence concerning the untrue and disparaging statements about Suburban. Ms. Young admitted she had no basis for telling Pulte, "Suburban asked for a rate increase recently" (remember, this is back in 2017) or that customers had asked Columbia to take over for Suburban's "lack of service."[74] These facts must also be taken into

[74] Tr. 302-03.

account in determining whether Suburban has been subjected to "undue or unreasonable prejudice or disadvantage."

"R.C. 4905.35 prohibits a public utility from giving any undue or unreasonable preference or disadvantage to any corporation. The common-law claim of unfair business practices echoes this statutory language." *Westside Cellular, Inc. v. N. Ohio Cellular Tel. Co.*, 100 Ohio App. 3d 768, 771, 654 N.E.2d 1298, 1300 (1995). On the record of this case, Columbia's construction of a duplicate main subjects Suburban to "undue or unreasonable prejudice or disadvantage." R.C. 4905.35(A). A finding that Columbia also violated the 1995 Stipulation and its tariffs, or engaged in "unfair business practices," would merely compound this underlying violation.

2. The Order erroneously concludes that the Commission may neither prevent nor remedy duplication of facilities.

Suburban cited ample precedent for the proposition that regulatory policy disfavors duplication of utility facilities. The Order does not address these cases. It merely assumes that because the public utility involved was not a gas company, the cases do not control: "Suburban has not cited to any Commission precedent in which we have held, or even suggested, that a *natural gas company* should be precluded from serving a new customer if such service would result in the duplication of facilities." (Emphasis added.)[75]

"Although there is no statute which specifically gives the Public Utilities Commission authority to determine a boundary between the service areas of adjoining telephone companies, its power to do so would appear unquestioned both in reason and in law." *N. Ohio Tel. Co. v. Putnam*, 164 Ohio St. 238, 245-46, 130 N.E.2d 91 (1955). R.C. Chapter 4905 applies to *all* "public utilities." If the Commission's general regulatory authority under R.C. 4905.04 is

[75] Order at ¶ 55.

sufficient to regulate telephone service areas (as found in *Northern Ohio*), it is sufficient to regulate gas utility service areas. A public utility is a public utility; gas companies are not a special breed of public utility exempt from R.C. Chapter 4905.

This case does not require the Commission to draw a map of "service areas" or territories. In an analogous dispute involving water companies, a federal court determined: "There is no operative definition under Kentucky law of the phrase "service area" to delineate North Shelby's territory. Although the parties devoted a great deal of time and effort to disputing whether or not North Shelby had a "service area" or had reliably established any "boundaries" to delineate its territories, any factual findings in this regard are unnecessary." *N. Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n*, 803 F. Supp. 15, 21 (E.D. Ky. 1992). The case involved a federal statute prohibiting any municipal corporation or other public body from duplicating the services and facilities of entities receiving certain federally-backed loans for infrastructure improvements. *See* 7 U.S.C. § 1926. The court recognized it could not decide the case by applying the facts to a non-existent legal definition. The encroaching utility threatened the financial viability of an entity to whom the federal government had loaned money (and from whom the government expected to be paid back). The facts of the case were sufficient to prove a violation of the federal statute.

Federal policy is not novel. Regulation is a substitute for competition, so the right to serve and duty to serve are opposite sides of the same coin. Duplication of facilities is not in the public interest because it compromises an incumbent's duty to serve:

> The policy established by legislation for the regulation of public utilities is to provide the public with efficient service at a reasonable rate, by compelling an established public utility occupying a given field to provide adequate service, and at the same time to protect it from ruinous competition. By the adoption of this act it became the public policy of the state that free competition among public utilities

> did not promote the public service. Whether this policy is sound rests with the legislative department of the government, and not with the judiciary.
> *Illinois Power & Light Corp. v. Commerce Comm'n,* 320 Ill. 427, 429–30, 151 N.E. 236, 237 (1926)

The consequences that inevitably flow from duplication of facilities are harmful to the public interest, and this case presents a textbook example why. Suburban invested capital to bring gas service to an area no other provider was serving. It spends money to repair and maintain its facilities. It plans for future growth.[76] Adding new customers to an existing main allows fixed costs to be spread among more customers, benefitting both current and future customers alike. Now that the area in and around Glenross is booming (thanks in no small part to Suburban bringing gas service to the area), Columbia has decided it wants to serve the area. The addition of 500 or so customers has a negligible financial impact to Columbia, but the loss of these customers is material for Suburban.[77] The presence of a duplicate main positions Columbia to expand into other areas currently served by Suburban as well. The continued loss of load that Suburban serves or planned to serve will eventually drive the company to ruin. Suburban's customers will receive a dramatically lower level of service—if they receive service at all. (If Columbia were right and its duties were measured by the extent of its "service area," then the lack of a defined "service area" would not require Columbia to serve these customers, either.)

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give." *United Fuel Gas Co. v. R.R. Comm'n of*

[76] Suburban Ex. [Roll testimony]
[77] Cite Sonderman/Roll direct

Kentucky, 278 U.S. 300, 309 (1929). Columbia's attempt to pick and choose where it may serve flies in the face of these principles.

Suburban's concerns are not make-believe. In *Atwood*, Columbia sued a competitor whose sales "had displaced, or would displace, its sales . . . causing Columbia lost revenues and injury to its remaining customers who will ultimately pay higher rates because of the displaced sales." 43 Ohio St.3d at 97. The Commission found for Columbia and the Court affirmed. The Commission has recognized the harm caused by duplicating facilities in other contexts as well. *See Aqua Ohio, Inc.*, Pub. Util. Comm. No. 06-51-WW-AAC, Opinion and Order at 11 (Mar. 28, 2007) ("When considering whether a water utility should be permitted to expand its boundary, sound public policy dictates that the Commission should consider whether such expansion would result in duplication of facilities already located in the area. This would be a waste of resources and would prove to be uneconomical, inefficient, and contrary to good public policy.").

As explained in the introduction of this brief, the fact that LDCs do not have certified territories makes it even more important for the Commission to police anticompetitive activity and enforce R.C. Chapter 4905. To the extent Commission and FERC rules "positively encourage"[78] competition, then Columbia's anti-competitive conduct necessarily violates these rules.

R.C. 4905.35(A) is broadly-worded for a reason. The statute does not list specific, prohibit activities because the legislature could not have predicted all the various ways a utility might inflict "undue or unreasonable prejudice or disadvantage" on others. The United States Supreme Court relied on the exact same language—"undue or unreasonable prejudice of

[78] Order at ¶ 52. The Order borrows this language from a passage in the *Kalida* decision summarizing the respondent's argument. The Commission *rejected* this argument, finding that the complainant stated a claim for relief under R.C. 4905.35 despite new policies promoting competition.

disadvantage"—to find that a railroad violated an analogous federal statute by racially segregating passenger trains. *Henderson v. United States*, 339 U.S. 816, 818, 70 S. Ct. 843, 844, 94 L. Ed. 1302 (1950). What is "undue" or "unreasonable" must necessarily depend on the facts of each case. To suggest the Commission cannot prevent or remedy the duplication of service or facilities under *any* facts is quite an extreme view.

Columbia will undoubtedly conjure all sorts of hypotheticals to argue that "duplicating facilities" is too vague and unworkable to establish liability under R.C. 4905.35(A). Perhaps this could be so under imaginary facts, but not on the facts here. "The Public Utilities Commission must base its decision in each case upon the record before it." *Tongren v. Pub. Util. Comm.*, 1999-Ohio-206, 85 Ohio St. 3d 87, 91, 706 N.E.2d 1255, 1258. The facts are that Columbia installed nearly 7,000 feet of 8' main that parallels Suburban's main by the width of a road. Suburban's ability and capacity to serve have not been questioned. Suburban *would be* serving but for Columbia's actions. Regardless of whether a violation of R.C. 4905.35(A) would be sustained under any hypothetical spun by Columbia, the violation is apparent here.

The Commission's authority to prevent duplication of Suburban's facilities is "unquestioned both in reason and in law." The Order is mistaken to conclude otherwise.

3. The interpretation of the 1995 Stipulation is unsupportable.

In addition to Suburban's statutory right to operate free of "undue or unreasonable prejudice or disadvantage," the 1995 Stipulation confers this right contractually. A stipulation is a contract and contract interpretation presents an issue of law. *Crosier v. Ohio Dept. of Rehab. and Corr.*, 2018-Ohio-820, 108 N.E.3d 226, at ¶ 27 (10th Dist.) ("The construction of written contracts . . . is a matter of law.") The Order essentially renders the Stipulation void, which the Commission has no authority to do. *See Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 2011-Ohio-

2720, ¶¶ 57-58, 129 Ohio St. 3d 397, 409, 953 N.E.2d 285, 296 (finding Commission interpretation of contract unreasonable).

The 1995 Stipulation settled claims arising from the same type of conduct at issue in Glenross. Columbia had offered cash, per-lot incentives to builders and duplicated Suburban's supply mains.[79] The parties resolved this "competitive dispute" by doing two things: (1) exchanging certain customers and facilities to separate their systems, and (2) file new tariffs for main extensions and new services. The new tariffs do not authorize incentives, and Suburban reserved the right to bring future claims if the incentives were re-introduced in areas served by Suburban.[80] The Order acknowledges the Stipulation was intended not only to settle the pending controversy, but "avoid another situation similar to that in the 1986 Suburban Complaint Case [.]"[81]

Columbia violated the express terms of the 1995 Stipulation in two ways: first, by offering EfficiencyCrafted Homes rebates for competitive purposes; second, by duplicating Suburban's main on Cheshire Road. In fact, Columbia's extension into Glenross connects to a main that was originally installed by Suburban in the late '80s and transferred to Columbia under the 1995 Stipulation.[82]

The Order cites the controlling language in the 1995 Stipulation, but then applies this language to claims that Suburban did not make:

> We agree with Columbia that neither the 1995 Stipulation nor the subsequent Commission order approving the agreement includes any language prohibiting Columbia from offering Commission-approved DSM incentives to builders of energy- efficient homes or from competing for customers in southern Delaware County. To

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81 Order at ¶ 17.

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> find otherwise would ignore the express words chosen and used by the parties in the 1995 Stipulation and, instead, replace them with Suburban's unsubstantiated and speculative arguments.[83]

Suburban hasn't argued that the 1995 Stipulation prohibits "offering Commission approved-DSM incentives to builders of energy-efficient homes[.]" The Stipulation applies to a small area within one of 61 counties Columbia serves. What Columbia does outside this area is irrelevant, so far as the Stipulation is concerned. Even within this area, the stipulation does not prohibit Columbia from "competing for customers." If there are pockets within this area that do not have gas service, Columbia and Suburban may compete to provide this service. The Order misrepresents Suburban's claim.

Suburban's claims do not arise from the mere fact that Columbia is paying builder incentives to a development within the geographic area covered by the 1995 Stipulation. They key fact is that *Suburban was already serving this development*. The Order simply fails to apply the express terms of the Stipulation to the relevant facts.

Moreover, it is the Order that ignores the "express words chosen" in the stipulation, not Suburban. The tariffs filed with the 1995 Stipulation do not authorize the payment of per-lot incentives, for "energy efficiency" purposes or otherwise. There has been no material change to these tariffs; they *still* do not authorize payment of builder incentives, nor does any other tariff. (The lack of tariff authority to pay DSM incentives is also addressed in Count 3.) These incentives are not authorized by any tariff and therefore violate the express terms of the Stipulation.

"When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. We will examine the contract as a whole and presume

[83] Order at ¶ 54.

that the intent of the parties is reflected in the language of the contract." *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37 (reversing Commission's erroneous contract interpretation). The 1995 Stipulation required the parties to exchange certain customers and facilities. Why did the parties do that? Just because? They did it to un-duplicate duplicate facilities. Thus, "the intent of the parties is reflected in the language of the contract." *Id*. Mr. Pemberton and Mr. Sonderman should know; they negotiated the agreement.[84] Their interpretation is neither "speculative" nor "unsubstantiated."[85]

The Order makes no attempt to interpret or apply the express language of the Stipulation. If the 1995 Stipulation were subject to a credible, good-faith alternative interpretation, Columbia would have offered one. All Columbia can say is that the stipulation "speaks for itself."[86] "We agree with Columbia" does not satisfy the Commission's obligation to "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30.

4. The Order ignores the plain language of the DSM tariff and main extension tariff.

Tariffs have the force and effect of a statute. *In re Complaint of City of Reynoldsburg*, 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 41 ("That is, once approved, a tariff has the same binding effect as a law."). The Commission's interpretation of tariff language is subject to the same standard of review as its statutory interpretations. "We generally defer to the commission's statutory interpretation, but only if it is reasonable." *In re Application of Ohio*

[84] Suburban Ex.
[85] Order at ¶ 54.
[86]

Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 28 (finding commission's statutory interpretation unreasonable).

a. The DSM tariff does not permit the payment of incentives or ratepayer funding of the incentives.

The Order provides inconsistent and mutually exclusive reasons for finding against Suburban on Count 3. On one hand, the Order suggests Suburban forfeited its arguments about the DSM Rider because it failed to intervene in prior DSM proceedings to raise these issues.[87] But the Order also claims these prior DSM cases "thoroughly address a majority of the issues raised by Suburban," and Suburban "alleges nothing new or different for the Commission's consideration."[88] The Order cannot have it both ways. The Commission could not have "thoroughly addressed" issues that were not raised because of Suburban's absence from the proceedings.

The Order does not cite any part of the record of any prior DSM proceeding to support its conclusion that the issues raised in Count 3 of the Complaint were addressed *at all*, let alone "thoroughly." This alone invalidates the Commission's finding. "Suffice it to say, some factual support for commission determinations must exist in the record [.]" *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d at 89–90. Even if those issues had been raised, Suburban is not barred from re-litigating them. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 1 Ohio St.3d 22, 24, 437 N.E.2d 586 (1982) ("This court has previously recognized the use of R.C. 4905.26 as a means of collateral attack on a prior proceeding.")

There are two tariff-related problems with the EfficiencyCrafted Homes program. First, the program is not authorized under any tariff. The Supreme Court of Ohio recently made clear

[87] Order at ¶ 58 ("Notably, Suburban failed to intervene or voice its concerns regarding the DSM Program in the 2016 DSM Case or earlier DSM approval case.")
[88] Order at ¶ 58.

that permissible rates and charges are governed by the utility's tariffs, *not* by a Commission order authorizing a tariff. *In re Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1. This is why the Court reversed an order directing FirstEnergy to refund $43 million in improper REC purchases. The applicable Commission order plainly contemplated refunds. But the tariff filed under the authority of that order contained no refund language. The tariff controlled, not the Commission's order, so the subsequent order directing the issuance of refunds was deemed unlawful. "All the commission had to do was require a refund clause to be part of the tariff pursuant to R.C. 4905.32." *In re Ohio Edison Co.*, 153 Ohio St.3d at ¶ 66 (Kennedy, J., concurring).

The same principle applies here. The 2016 DSM Order authorizes Columbia to pay rebates to builders. But this order is not enough for Columbia to lawfully exercise this authority; Columbia must also file a tariff. Columbia has never done so. R.C. 4905.32 requires a filed tariff for "any rate . . . rule, regulation, privilege, or facility" extended "directly or indirectly" to "any person, firm, or corporation." The statute makes no exception for privileges and special advantages tied to energy efficiency programs.

This leads to the second problem. The DSM Rider authorizes a charge to fund DSM programs made available to "customers":

> An additional charge, for all gas consumed, to recover costs associated with the implementation of comprehensive, cost-effective energy efficiency programs *made available to residential and commercial customers*. (Emphasis added)

As explained in post-hearing briefs, builders are not Columbia's "customers."[89] The Order finds that EfficiencyCrafted Homes is "not a traditional DSM Program."[90] Consequently, funds

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[90] Order at ¶ 56 citing Columbia Ex.6 at Attach. D.

collected under Rider DSM may be used to fund DSM programs made available to *customers*, but not energy efficiency rebates given to *builders*. If Columbia or the Commission intended a different outcome, "all the Commission had to do was require" enabling language "to be part of the tariff pursuant to R.C. 4905.32." *Ohio Edison*, 153 Ohio St.3d at ¶ 66.

The issues raised by Count 3 of the Complaint have not been previously considered. The Commission must grant rehearing to consider them.

b. The main extension tariff requires written main extension agreements in all cases, not just those in which a deposit is required.

Columbia covered its tracks by not putting a main extension agreement in writing. Under the main extension tariff, a *deposit* may be waived if justified by a cost-benefit study. The tariff does not say that a proper waiver of a deposit *also* waives the requirement for a written agreement. The finding that no written line extension was required ignores the plain language of the governing tariff.

The Order also disregards evidence showing that Columbia's excuse for not putting a main extension in writing—because the deposit had been waived—is contrary to its actual practice. Mr. Thompson, who has worked with Columbia "on 27 projects across central Ohio,"[91] seemed shocked at the notion Columbia would perform a main extension without a written agreement:

> Q. Okay. Is there a Line Extension Agreement between Columbia and Pulte Homes for the main extension on Cheshire Road?
>
> A. Yes.
>
> Q. You've seen that?

[91] Order at ¶ 42.

> A. I've not seen it, but for them to be moving forward I'm sure there is one, but I haven't seen it.[92]

Suburban offered into evidence several main extension agreements showing a deposit amount of $0, but the Attorney Examiners refused to admit them.[93]

Nor does Columbia's excuse jibe with common sense. A deposit gives Columbia some measure of financial security for a developer's performance. A written agreement provides additional security. If a developer paid nothing up front, any subsequent dispute would leave Columbia with nothing to enforce the developer's performance. A verbal line extension agreement will not pass "go" under the Ohio statute of frauds.[94] Columbia is savvy enough to know that.

In discussing the tariff violations alleged in Counts 2 and 3, the Order assures that it will continually audit Columbia's builder incentive program to make sure everything is above-board.[95] Audits are useless if the Commission has no written records to look at. That is why Commission rules and utility tariffs require important things to be documented, and the failure to document is itself a violation. If Commission staff were to audit Columbia today, Columbia's alleged policy of not documenting main extensions when a deposit is waived would deprive Staff of the very information it needs to perform such an audit: written documentation of projects where no deposit was required.

Had Columbia followed its main extension tariff, Count 4 would not even be an issue. The attorney examiners would have had a written line extension agreement and copy of the cost-benefit study; the Commission could review these materials to see if Columbia's story checks

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94 *See* R.C. 1335.05.

95 Order at ¶60.

out. These materials are within Columbia's exclusive possession, and to suggest that Suburban is somehow at fault for Columbia's failure to prepare or disclose these materials is utterly groundless.

C. Certain evidentiary and procedural rulings deprived Suburban of due process.

The Order criticizes Suburban over three procedural issues. The first two relate to allegedly "unfounded allegations regarding the discovery process and its disagreement with certain confidential determinations on responsive discovery documents."[96] The third issue pertains to the proffer of rebuttal testimony. These criticisms are misdirected and should be removed from the order on rehearing.

1. Suburban was entitled to present rebuttal testimony.

Suburban asked to submit rebuttal testimony. The request was denied. Columbia's initial brief addressed the very topic Suburban would have addressed in rebuttal. Suburban proffered rebuttal testimony with its reply brief. Suburban gave the Commission every opportunity to correct the reversible error injected in this proceeding by refusing the opportunity for rebuttal.

R.C. 4905.26 states that parties "shall be entitled to be heard." The right to be heard includes the right to present rebuttal testimony. "A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief." *Phung v. Waste Management*, 71 Ohio St. 3d 408, 410 (1994).

Suburban was not only denied the right to rebuttal, but is now being chastised for preserving error in the denial of this right. According to the Order, "the Commission and its attorney examiners have provided clear guidance as to how parties should proffer disputed

[96] Order at ¶ 64.

evidence, which is both consistent with our administrative rules and the Ohio Rules of Evidence."[97] The Order cites three sources (a rule and two cases) for this "clear guidance," yet none of the material cited offers any clue what "guidance" the Order is talking about.

Rule 4901-1-27(D) provides: "Formal exceptions to rulings or orders of the presiding hearing officer are unnecessary *if, at the time the ruling or order is made,* the party makes known the action which he or she desires the presiding hearing officer to take, or his or her objection to action which has been taken and the basis for that objection." (Emphasis added.) This is basically what Evid. R. 103 says. The Order does not explain how Suburban allegedly violated Evid. R. 103 or the Commission's rule.

Neither of the two cases cited involved a proffer of rebuttal testimony. The discussion in the *FirstEnergy ESP IV Case*, Fifth Entry on Rehearing at 376 (Oct. 12, 2016) deals with administrative notice of materials already in the Commission's possession. No proffer was necessary, nor was one made. The hearing in *Toledo Edison Co*., Pub. Util. Comm. No. 16-481-EL-UNC, et al. (Feb. 8, 2019, Tr. 176-180) took place over a year *after* the hearing in this case, and the cited portion of the hearing transcript does not say one word about any rule of evidence or the Commission's rules, let alone claim the Commission has issued "clear guidance" on proffers or any other procedures.

Whatever this unknown and unexplained procedure supposedly is, the Order claims Suburban "has acted inconsistently with the procedure" and "fails to cite to any case law, let alone a Commission proceeding, where a party has successfully attached unsworn testimony or other evidence to a reply brief as part of a purported proffer."[98] Suburban cited both Commission rules and the Ohio Evidence Rules to support its proffer, and the Order never explains how the

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[98] Order at ¶ 51.

proffer violated these rules. Additionally, Suburban *did* cite caselaw informing the Commission that its decision to preclude rebuttal constituted reversible error.

2. The Commission's failure to rule on Columbia's confidential designations violates R.C. 4901.12 and 4905.07.

The Order finds that Suburban's decision to not file a pre-hearing discovery motion precludes any complaints about confidential designations.[99] The Order completely glosses over the Commission's responsibilities in ruling on confidential designations.

Any discussion about confidentiality must start from the premise that Commission proceedings are public proceedings, and all documents in its possession are public records. R.C. 4901.12 ("all proceedings of the public utilities commission and all documents and records in its possession are public records."); R.C. 4905.07 ("all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys."). Additionally, "absent a protective order, parties to a lawsuit may generally disseminate discovered materials as they wish." *Byrd v. U.S. Xpress, Inc.*, 2014-Ohio-5733, ¶ 22, 26 N.E.3d 858, citing *Jepson Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir.1994).

Suburban and Columbia signed a protective agreement allowing either party to designate information produced by it as "confidential" or "highly-confidential."[100] As discussed earlier, Suburban asked Columbia to reconsider some of its designations. Columbia refused.

Throughout the hearing, Suburban offered exhibits that Columbia had stamped confidential or highly-confidential. In several instances, Suburban made clear that it did not

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100 Tr. at

agree with the designation.[101] It appears that this is what the Order finds fault with. The Order suggests that issues about confidential designations must be addressed before hearing, or not at all. This is simply not so.

The purpose of a protective agreement is to facilitate the exchange of discovery between the parties. A protective agreement among the *parties* does not bind the *Commission*. The Commission must independently determine whether exhibits and filings presented to it are entitled to confidential treatment. Otherwise, parties could simply designate everything "confidential" and deprive the public of its right to open proceedings—in other words, do what the Order has allowed Columbia to do here.

Confidential status can never be presumed. "Judges must guard against any notion that the issuance of protective orders is routine, let alone automatic, even when the application is supported by all the parties." *Solar X Eyewear, LLC v. Bowyer*, No. 1:11-CV-763, 2011 WL 3921615, at *3 (N.D. Ohio Sept. 7, 2011), citing *Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L.Rev. 427, 492 (1991).

Columbia had the burden of proving that the materials it had stamped confidential or highly confidential were entitled to this designation; Suburban had no burden to prove that they did not. "Where a protective order permits parties to designate discovery materials as '[c]onfidential' without a showing of good cause, and one party challenges a designation made by another, the challenging party is not seeking to modify the protective order and therefore does not bear the burden of demonstrating that the confidentiality designations should be lifted." *Ashmore v. CGI Grp. Inc.*, 138 F. Supp. 3d 329, 351 (S.D.N.Y. 2015)(citation omitted). *See also State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400, 732 N.E.2d 373 (2000) ("An

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entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy.").

The Court reminded the Commission of its responsibility just two months before the hearing in this case. *In re Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1, at ¶ 35 *reconsideration denied sub nom. In re Ohio Edison Co.*, 152 Ohio St.3d 1449, 2018-Ohio-1600, 96 N.E.3d 302 (Table). The Commission found that certain information about FirstEnergy's REC purchases was entitled to confidential treatment. But "the commission (and the attorney examiners) failed to explain how this supplier information, if disclosed, would have affected future REC auctions." *Id*. at ¶ 36. The absence of record evidence to support the designations resulted in a remand. "On remand, the commission must either cite evidence and explain its order or publicly disclose the information that has been protected." *Id*. at ¶ 39.

No motion for protective order has been sought nor granted for any material Columbia designated "confidential" or "highly confidential." Confidential treatment has been afforded to information for no other reason than Columbia has asked for it. Even if Suburban *could* have challenged these designations prior to the hearing it was not *required* to do so—under any rule of evidence, procedure, or Commission rules. Even if the parties had *agreed* to all confidential designations, the Commission was *still* required to make this determination independently. It has not done so to this day.

Suburban should not be faulted for pointing out irregularity in the record.

3. The Order's criticism of Suburban's response to discovery violations is unfounded.

Suburban's discovery concerns were anything but "unfounded."[102] This entire discussion should be removed from the Order on rehearing.

The motion to compel filed in January 23, 2018, memorializes Columbia's refusal to answer simple, basic questions or to produce one single document. This evasiveness and gamesmanship continued:

> MR. WHITT: I don't have further questions, but I do want to make an on-the-record request for a Line Extension Agreement for the Glenross extension, if such an agreement exists. If we don't have it by noon tomorrow, we'll assume that it doesn't exist. This material was requested in January. We have looked at a number of e-mails with the witness today that we received for the first time from Pulte. We've received not one single e-mail from Columbia.
>
> I would also ask, now for the fourth time, for Columbia to reconsider the "Highly Confidential" designations that I've discussed verbally and by e-mail on certain material that was provided, and I've not been given an answer on that either. We have testimony due this Friday and we need to hear from Columbia on that.
>
> MR. STEMM: Okay. Well, I can answer those on the record if you'd like.
>
> MR. WHITT: Okay.
>
> MR. STEMM: There is not a Line Extension Agreement, as you've described, and that's why one was not produced.
>
> And we've talked with the client and we decline to remove the "Highly Confidential" designation on the data spreads.

Perhaps Suburban *could* have kept filing motions to compel, but a more practical route was chosen. Suburban subpoenaed documents from Pulte. Pulte's compliance with lawful discovery obligations does not excuse Columbia's non-compliance.

[102] Order at ¶ 64.

Columbia's non-compliance caught up with the company at hearing. During cross-examination, Mr. Codispoti referenced documents Columbia had not produced.[103] Follow up questions about whether the documents had been turned over to counsel were shut down.[104] The Order implies that the Attorney Examiners heard arguments to get to the bottom of whether documents had been withheld, but that is simply not true:

> EXAMINER ADDISON: Well, I don't want to go down this road either. There's no indication that either party has violated any sort of discovery rule from the Commission. So let's -- with that assumption in mind, let's just move on, please.
>
> MR. WHITT: Well, that's the problem, your Honor, is it's an assumption.
>
> EXAMINER ADDISON: Well, there's no issue before the Bench right now, so we will move forward.[105]

The same scenario played out when Ms. Young later took the stand, only this time the witness spilled the beans:

> Q. Ma'am, am I to understand that you were never asked by anyone to gather documents or emails that you might have related to this case?
>
> A. No, I was not.[106]

Suburban could not have filed a discovery motion *before* hearing to address violations revealed *at* hearing. The Commission should investigate and sanction discovery abuses, not criticize parties who call attention to them.

Had Columbia employed these tactics in state or federal court, it would have been on the receiving end of sanctions. The Commission's discovery rules are modeled after analogous state

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[106] Tr. 345

and federal court rules, and judges have articulated clear standards for parties' discovery obligations:

> The Court expects that any trial attorney appearing as counsel of record in this Court who receives a request for production of documents in a case such as this will formulate a plan of action which will ensure full and fair compliance with the request. *Such a plan would include communicating with the client to identify the persons having responsibility for the matters which are the subject of the discovery request and all employees likely to have been the authors, recipients or custodians of documents falling within the request. The plan should ensure that all such individuals are contacted and interviewed regarding their knowledge of the existence of any documents covered by the discovery request, and should include steps to ensure that all documents within their knowledge are retrieved*. All documents received from the client should be reviewed by counsel to see whether they indicate the existence of other documents not retrieved or the existence of other individuals who might have documents, and there should be appropriate follow up. Of course, the details of an appropriate document search will vary, depending upon the circumstances of the particular case, but in the abstract the Court believes these basic procedures should be employed by any careful and conscientious lawyer in every case.
>
> *Bratka v. Anheuser-Busch Co.*, 164 F.R.D. 448, 461 (S.D.Ohio 1995) (emphasis added).

Ms. Young was the "day-to-day contact with Pulte."[107] If anyone was likely to have discoverable information, it was her. Columbia did not even *attempt* to fulfil its discovery obligations by asking her about potentially responsive documents.

III. CONCLUSION

The Commission is not being asked to decide which of two providers has the right to serve a previously-unserved area. Suburban was asked to serve the Glenross community. Suburban installed a main along Cheshire Road to render this service. Suburban cannot withdraw service to those presently connected to its main, nor refuse service to those who wish to connect.

[107] Tr. 282.

If Columbia's mile-plus extension of a main to substitute Suburban's does not impose an "undue or unreasonable prejudice or disadvantage," it is hard to imagine what does.

The Order should be vacated and rehearing granted.

Date: May 10, 2019

Respectfully submitted,

/s/ *Mark A. Whitt*

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document is being served via electronic mail this 10th day of May, 2019, upon the following:

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