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.	)	

MEMORANDUM CONTRA OF COLUMBIA GAS OF OHIO, INC. TO APPLICATION FOR REHEARING OF SUBURBAN NATURAL GAS COMPANY

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1. Introduction

Suburban Natural Gas Company's Application for Rehearing accuses the Public Utilities Commission of Ohio ("Commission") of undue favoritism towards large natural gas companies.[1] But Suburban is seeking protectionism, not an even playing field. To forestall the "end of days" for small LDCs,[2] Suburban asks the Commission to ignore the state policies to "[p]romote effective competition" and energy conservation,[3] overturn decades of precedent,[4] and affirmatively *protect* smaller natural gas companies like Suburban from competition. The Commission properly concluded that Ohio's statutes and Commission precedent do not grant the Commission the authority that Suburban would provide it. The Commission should affirm its prior rulings and reject Suburban's invitation to remake state policy to Suburban's benefit.

2. Response to Suburban's Statement of Facts

Suburban's Application for Rehearing offers a three-page fact section to provide "context."[5] That abbreviated summary of facts does not reflect a balanced or accurate depiction of the record. It ignores the evidentiary conflicts between Mr. Thompson's deposition transcript and Donna Young's hearing testimony concerning the "amount of the incentives"[6] and Pulte's reasons for choosing Columbia over Suburban.[7] Suburban also cites to hearing testimony that does not support its assertions, including testimony about Columbia's cost-benefit study and Suburban's allegation that Columbia made "false claims" about Sub-

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[1] *See* Suburban Application for Rehearing ("App. for Reh.") at 9 ("the Commission will gladly hear claims alleging unfair or anticompetitive conduct if alleged *by* large LDCs, but *** these claims are meritless when alleged *against* large LDCs.").

[2] *Id*. at 2.

[3] R.C. 4929.02(A)(8) and (12).

[4] *See* Opinion and Order ¶ 52, citing, *inter alia*, *In re Columbia Gas of Ohio, Inc.*, Case No. 87-1528-GA-ATA, Opinion and Order (Dec. 8, 1987).

[5] App. for Reh. at 10.

[6] *Compare id.* at 12, n. 21, citing Suburban Ex. 5 at 24 (Mr. Thompson's deposition testimony that the incentives were "in the 'six figures'") to Vol. II Tr. 343: 14-25, 344: 1-14 (Ms. Young's hearing testimony that she never talked to Mr. Thompson about DSM builder incentives for Glenross south, much less about any six figure amount).

[7] *Compare id.* at 11, n. 20, citing Suburban Ex. 5 at 46, to Order at ¶¶42, 60, n. 14.

urban.[8] Columbia's initial post-hearing brief offered its own statement of facts,[9] however, and Columbia will not repeat that statement here.

Columbia will only note, and briefly rebut, the two false premises that underlay Suburban's Application: first, that Pulte Homes was Suburban's customer,[10] and second, that "Suburban was already serving Glenross."[11] Suburban served the *earlier phases* of Glenross, but Pulte Homes was never a Suburban customer for those phases. Pulte Homes moved into Ohio after acquiring Dominion Homes in 2014.[12] Before coming to Ohio, it was already a customer of Columbia's affiliates in other states.[13] And by the time Pulte considered Columbia's proposal to serve Glenross South – Pulte's first development at Glenross – Columbia was already working with Pulte on 27 projects across central Ohio.[14]

In other words, Columbia did not "raid [Suburban] and rob it of its customers."[15] Columbia sought new business from a long-time customer for that customer's new development, and the customer ultimately selected Columbia to serve that new development. What Suburban describes as "cut-throat tactics"[16] is simple competition, nothing more.

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[8] *See, e.g.*, App. for Reh. at 12, nn. 24 and 26.

[9] *See* Columbia Initial Brief at 1-6.

[10] *See* App. for Reh. at 2 ("The Opinion and 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.").

[11] (Emphasis omitted.) *Id.* at 7. *See also id.* at 36 (asserting that "*Suburban was already serving this development").*

[12] Suburban Ex. 5, J. Thompson Deposition Tr. 7: 11-24; Vol. I Tr. 80 (Roll).

[13] Columbia Ex. 5, McPherson, p. 4: 15-17; Order at ¶42.

[14] *Id*. at p. 4: 20-23; Order at ¶42.

[15] App. for Reh. at 4.

[16] *Id*. at 6.

3. Law and Argument

3.1. The Evidence of Record Supports Each of the Commission's Factual Findings Challenged by Suburban

3.1.1 The Commission Did Not Determine Why Pulte Homes Chose Columbia Over Suburban.

Suburban begins by criticizing the Commission for not unequivocally accepting the deposition testimony of Pulte land superintendent Jeff Thompson. Mr. Thompson opined that Columbia's EfficiencyCrafted℠ Homes Program was the deciding factor for Pulte in selecting Columbia.[17] However, Mr. Thompson admitted he was not the decision-maker in Pulte's selection of a natural gas supplier and was not present at the meeting where Pulte selected Columbia.[18] Mr. Thompson relied upon his supervisor, Steve Peck, to weigh in on the selection of Columbia over Suburban.[19] Mr. Peck told Ms. Young that Columbia's builder incentive program was *not* a factor in Pulte's decision.[20] The Commission cited Ms. Young's hearing testimony about her meeting with Mr. Peck "that, based on discussions with Pulte around September 2017, Columbia was led to believe that the builder incentive program was not a factor in Pulte's decision."[21]

Regardless, this evidentiary conflict offers no basis for rehearing because the Commission explicitly "refrain[ed] from making a finding as to this particular issue *** ."[22] The Commission held, instead, that "even if the record had conclusively shown that the EfficiencyCrafted℠ Homes Program incentives were the factor that led Pulte to choose Columbia over Suburban, the outcome of this proceeding remains the same." Because the Commission made no finding of fact on this issue, it cannot have made a reversible error warranting rehearing.

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[17] *Id*. at 14-16.

[18] Suburban Ex. 5, J. Thompson Deposition Tr. 30: 8-18 and 67:6-10.

[19] *Id*. at 29:11-21.

[20] Vol. II Tr. 338: 13-16 (Young).

[21] Order at ¶ 26.

[22] *Id* at ¶ 60.

3.1.2. Substantial Evidence Supports the Commission's Finding that Columbia Performed a Cost-Benefit Study for its Main Extension.

Second, Suburban exclaims that there is "zero evidence that Columbia performed a cost-benefit study" and accuses the Commission of "making up facts."[23] Suburban is wrong on both counts.

Columbia presented witness Zach McPherson to testify about the economic analysis Columbia conducts in every case to determine if a main extension requires a deposit from the developer. Mr. McPherson explained each step of the process and how different Columbia departments are responsible for inputs:

> For subdivisions, the process involves several key steps. First, we collect the details regarding the property from the builder or developer. The plans are then reviewed by our engineering department, which determines what facilities would be required to serve the new homes. The engineers also put together a full estimate of the investment required of Columbia to construct the facilities. From that point, the sales team uses a proprietary model that compares the cost—the engineer's estimated construction costs—with the benefit—the revenues expected to be generated by the additional customers. This is how we conduct the cost-benefit analysis required by the tariff. Our accounting department is responsible for this model to ensure the analysis is consistent and appropriate. The only variables inputted by the engineering and sales departments are the revenues and the costs.[24]

For Glenross South, Mr. McPherson testified that Columbia "determined we could economically extend our mains based on our cost-benefit analysis, given the scope of the development."[25] Mr. McPherson "approved and was on the approval path related to the economic model for the Glenross development."[26] He testified that he personally "did look at the outputs" of the analysis because it is "a requirement for [him] to approve the project."[27] "In this particular case," he testified, "the study determined that no contribution in aid of construction would be required. *** At that point, we were able to offer our service to Pulte without

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[23] App. for Reh. at 16.

[24] Columbia Ex. 5, McPherson Direct, p. 7: 16-27.

[25] *Id.*, pp. 5: 39 to 6: 1-2.

[26] Vol. III Tr. 396: 16-18.

[27] Vol. III Tr. 397: 13-14.

requiring a contribution."[28] And, although Ms. Young had not "seen a study for Glenross," she made clear that one was done.[29] She also confirmed that Columbia applied this model to Pulte's Glenross South development the same way it applies it to all other residential subdivisions requiring main extensions.[30]

These are not "made-up" facts. The Commission observed that "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."[31] The Commission then found:

> 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 *** and the project could not have been granted approval internally without the study *** . Furthermore, *** Ms. Young testified that Columbia adhered to its standard guidelines in obtaining and inputting the needed information in the cost-benefit analysis model in this case, just as it does in every other case where a development requires a main extension ***.[32]

This witness testimony was particularly compelling because it stood up to wave after wave of cross-examination by Suburban. Suburban attempted to exploit Columbia's decision not to introduce its proprietary economic model for Glenross South into evidence. Suburban decried the absence of a print-out of the study as evidence that no such study existed. When motions to strike and cross-examination failed to support its theme, Suburban resorted to frivolous allegations of discovery violations, even though it never requested the study during discovery, much less moved to compel production. Now Suburban faults the Commission for not permitting it to introduce its discovery requests at hearing to prove that the cost-benefit study was responsive and should have been produced.[33] While Columbia knows this to be another example of Suburban trying

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[28] Columbia Ex. 5, McPherson Direct, p. 6: 24-27.

[29] Vol. II Tr. 334: 16-17.

[30] Vol. II Tr. 316: 25, 317: 1-2, 318: 1-5, 342: 22-25, 343: 1-13 (Young).

[31] Order at ¶25, citing Tr. Vol. II at 317-318 and Columbia Ex. 5 at 6.

[32] *Id.* at ¶62 (record citations omitted).

[33] *Id*. at 21.

to make up facts, the Commission properly rejected Suburban's attempted side-show:

> As a final matter, the Commission reminds Suburban that we expect a certain level of decorum in our evidentiary proceedings, as well as the discovery process. We are particularly troubled by Suburban's unfounded allegations regarding the discovery process ***. The only discovery issue that was ever raised to the attorney examiners prior to the scheduled hearing was a motion to compel that was later resolved between the parties and withdrawn (Tr. Vol. I at 9). No additional motions to compel were ever filed ***. We cannot rule on motions or disputes that are not brought before us.[34]

Columbia witness McPherson described the cost-benefit analysis and its results in his pre-filed testimony, which Columbia filed on March 16, 2018.[35] The hearing in this proceeding began on April 3, 2018. If Suburban believed the analysis was responsive to its discovery requests, it should have brought the issue to Columbia's attention and (if those efforts were unsuccessful) filed a written motion to compel.[36] Instead, it did nothing. Suburban has failed to identify any reversible error warranting rehearing.

3.1.3 The Record Supports the Commission's Conclusion that Columbia Did Not Deploy its DSM Program In an Abusive or Anti-Competitive Manner.

Third, Suburban challenges the Commission's finding that there was "no indication that Columbia has deployed its DSM program in an abusive or anti-competitive manner in order to expand its service territory."[37] The Commission found, instead, that the "evidence presented during the hearing demonstrates that the EfficiencyCrafted[SM] Homes Program is continuing to effectively incentivize energy-efficient home development in Ohio, consistent with the 2016 DSM Case, R.C. 4905.70, and 4929.02."[38]

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[34] Order at ¶64.

[35] Columbia Ex. 5, McPherson Direct, p. 6: 20-26.

[36] *See* Ohio Adm.Code 4901-1-23(C).

[37] Order at ¶ 60.

[38] *Id.*

Suburban's Application for Rehearing suggests the Program's effects are irrelevant.[39] Instead, Suburban argues, the Commission should have determined whether Columbia used Program incentives "for an unlawful purpose or to achieve an unlawful result, in violation of R.C. 4905.35(A)."[40] Specifically, Suburban accuses Columbia of "us[ing] the EfficiencyCrafted Homes program as a competitive response tool," and asserts that "exercis[ing] its competitive advantages to win business *** in areas where another provider is already serving subjects the incumbent to 'undue or unreasonable prejudice or disadvantage.'"[41]

Suburban did not assert this claim in its Complaint, instead suggesting that Columbia's homebuilder incentives violated R.C. 4905.35 because they constitute an "undue or unreasonable preference or advantage" offered "for the purpose of destroying competition."[42] Suburban also did not discuss this argument in its initial post-hearing brief, and mentioned it only passingly in its reply brief.[43] It is no surprise, then, that the Commission did not directly address this argument in its Opinion and Order.

If Suburban has not already waived this argument by failing to develop it,[44] the Commission should reject it clearly now. It is true that "one competitor may maintain a Section 4905.35, Revised Code, complaint against another ***."[45] The Commission further held, in a 1992 complaint case brought by Suburban, that a natural gas distribution company's "allegations of unreasonable competition, competition *** which subjects local distribution companies*** to an undue or unreasonable prejudice or disadvantage, as set forth in Section 4905.35, Re-

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[39] App. for Reh. at 23.

[40] *Id.*

[41] *Id.* at 24, 26.

[42] Verified Complaint ¶¶ 50, 52.

[43] Suburban Post-Hearing Reply Brief at 19 ("Evidence abounds that these incentives have been offered to destroy competition. If the Commission finds this to be true, then R.C. 4905.33(B) and 4905.35 have been violated as well.").

[44] *See Toliver v. Vectren Energy Delivery of Ohio, Inc.*, Case No. 12-3234-GA-CSS, Opinion and Order at 16 (July 17, 2013) (declining to consider arguments that "the complainant has failed to sufficiently develop").

[45] *Sprint Comms. Co. v. Ameritech Ohio,* Case No. 96-142-TP-CSS, Opinion and Order, at 28 (Sept. 11, 1997), citing *Allnet Comms. Serv., Inc. v. Pub. Util. Comm.*, 38 Ohio St.3d 195, 196 (1988).

vised Code, is sufficient grounds for complaint as required by Section 4905.26, Revised Code."[46]

But Suburban has not demonstrated that any competitive disadvantage it might face from the EfficiencyCrafted℠ Homes Program is "undue or unreasonable."[47] Suburban has not identified a single entry, opinion, or order in which the Commission held that an approved energy-efficiency incentive becomes "unreasonable competition" when it is offered to a potential customer that a smaller company would prefer to serve.[48] Nor could it be unreasonable competition. Ohio's state policy supports "[p]romot[ing] an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation."[49] It also supports "provid[ing] *** retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs"; "giving consumers effective choices over the selection of [natural gas] supplies and suppliers"; and "[p]romot[ing] effective competition."[50] What Suburban is asking the Commission to do is elevate Suburban's interests *above* consumer interests in energy efficiency and choice, in violation of state policies.

The Commission properly rejected Suburban's argument in its Opinion and Order, finding that "Columbia has not competed inappropriately by providing innovative products that help foster energy efficiency for its existing and potential customers."[51] The Commission elaborated that, even if one assumes that offering incentives under the EfficiencyCrafted℠ Homes Program provides a competitive advantage, that "advantage should not be stripped away simply because the other competing company does not offer such an incentive."[52] Columbia requests that the Commission confirm that conclusion on rehearing.

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[46] *Suburban Natural Gas Co. v. Kalida Natural Gas Co., Inc.*, Case Nos. 92-1876-GA-CSS *et al.*, 1993 Ohio PUC LEXIS 736, *13 (Aug. 26, 1993).

[47] R.C. 4905.35(A).

[48] *See* App. for Reh. at 26 (asserting, without citation, that Columbia violates R.C. 4905.35(A) if its "exercise[s] its competitive advantages to win business in areas where *** another provider is already serving").

[49] R.C. 4929.02(A)(12).

[50] R.C. 4929.02(A)(2), (3), and (8). Several Suburban customers filed public comments in Case No. 18-1205-GA-AIR expressing their desire for other choices of natural gas suppliers.

[51] Opinion and Order ¶ 52.

[52] *Id.* at ¶ 60.

3.1.4. The Commission's "Suggestion that Columbia's Main Does Not Duplicate Suburban's Main" Is Neither a Finding of Fact Nor a Basis for Rehearing.

Fourth, Suburban complains that the Commission failed to determine that the Columbia main serving Glenross South duplicated Suburban's main.[53] Again, Suburban cannot argue that the Commission's finding on this point was unsupported or against the manifest weight of the evidence, because Suburban fails to point to any explicit finding on this issue. The Commission did not make a factual determination on this point because it found no basis in Ohio law for precluding duplication of natural gas facilities.[54] As discussed below, the Commission's legal conclusion was correct. Given the legal irrelevance of this point, the Commission was justified in omitting any determination on this point.

3.2. The Commission's Conclusions of Law Were Correct and Should Be Upheld on Rehearing.

3.2.1. The Commission properly dismissed Count 5 of Suburban's Complaint.

Suburban's first legal argument returns to a "catch-all" provision in Suburban's Verified Complaint and attempts to find new claims in it. Count 5 of Suburban's Complaint asserted that Columbia had violated R.C. 4905.32, 4905.33, 4905.35, and 4929.08 through five specified actions: "[1] extending DSM programs to ineligible entities, [2] seeking cost recovery of ineligible costs through Rider DSM, [3] waiving deposits and fees under its Main Extension Tariff, [4] duplicating the existing gas distribution facilities of Suburban, and [5] otherwise extending preferences and advantages for the purpose of destroying competition ***."[55] Those allegations mirrored the allegations in the first four counts of Suburban's Complaint:

(1) Count 2 alleged that Columbia had "offer[ed] and extend[ed] DSM programs and incentives to entities located outside its service territory ***."[56]

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[53] *See* App. for Reh. at 26.

[54] Opinion and Order ¶ 55.

[55] Verified Complaint ¶ 52.

[56] *Id.* ¶ 36.

(2) Count 3 alleged that Columbia had recovered, or would "attempt to recover[,]" "[t]he cost of programs extended to entities not located in or within Columbia's service territory *** through the DSM Rider."[57]

(3) Count 4 alleged that Columbia had offered or agreed "to waive deposits or other charges required under [its] Main Extension Tariff."[58]

(4) Count 1 alleged that "Columbia's intended duplication of [Suburban's] facilities" by "extending its mains and proposed distribution lines into Suburban's operating area" violated the parties' 1995 Stipulation.[59]

(5) Count 1 further alleged that "offering financial incentives to builders" was a "destructive competitive practice[ ]" that violated the 1995 Stipulation.[60]

When Columbia originally moved to dismiss Suburban's Complaint, Columbia argued that Count 5 "relies on the same flawed allegations as Counts 1 through 4, and fails for the same reasons those counts fail."[61] Suburban's response declined to elaborate on the claims in Count 5 or distinguish them from the other counts, but it insisted Count 5 "properly *alleged* violations of these statutes, and resolving these claims is inherently fact-intensive."[62] A few months later, Suburban's post-hearing brief confirmed that all five Counts primarily rest on the same allegations.[63] Suburban explicitly told the Commission that "[t]he same proofs that demonstrate the violations alleged in Counts 1-4 also prove these statutory violations" alleged in Count 5.[64]

But Suburban also attempted to add a new claim not in its Complaint: that Columbia's "builder incentives" were "not authorized by any tariff."[65] And in its reply brief, Suburban repeated that new claim and added yet another new one:

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[57] *Id.* ¶¶ 40-41.

[58] *Id.* ¶ 45.

[59] *Id.* ¶ 29.

[60] *Id.*

[61] Columbia Motion to Dismiss at 8.

[62] Suburban Memo Contra Motion to Dismiss at 16.

[63] *See* Suburban Initial Post-Hearing Brief at p. 35.

[64] *Id.* at p. 15.

[65] *Id.* at p. 35.

that offering "builder incentives *** to destroy competition" violates R.C. 4905.35.[66] Yet Suburban again failed to clarify or elaborate on either new claim.

Suburban now argues, as it did before, that Count 5 "alleges an independent legal theory of relief" that "stand[s] on [its] own."[67] But, as before, Suburban does not clarify what that theory of relief *is.* Suburban appears to argue that Columbia engaged in unfair business practices, in violation of R.C. 4905.35, by duplicating Suburban's main and telling "untrue and disparaging statements about Suburban" to Pulte in 2017.[68] Columbia discusses the duplication theory below. But the Commission could not have erred by rejecting the remainder of this new claim, because Suburban never previously asserted it. It does not appear in Suburban's Complaint. Indeed, the only mention of these comments in Suburban's post-hearing brief was relegated to a footnote.[69]

As with its other arguments, Suburban offers no legal support for the proposition that two isolated misstatements could rise to the level of "unfair business practices" warranting a finding of "undue or unreasonable prejudice" under R.C. 4905.35. Nonetheless, the evidentiary record does not support the premise of the claim. Ms. Young did *not* "admit[ ] she had no basis for telling Pulte, 'Suburban asked for a rate increase recently *** or that customers had asked Columbia to take over for Suburban's 'lack of service.'"[70] Ms. Young testified that she obtained her information from Mr. Codispoti—the Columbia employee whose assigned region of responsibility includes Glenross (and Suburban).[71] Suburban did not pose these questions to Mr. Codispoti at the evidentiary hearing. Again, Suburban has failed to meet its burden of proof. And for that reason, Suburban has failed to identify any ground for rehearing based on the Commission's dismissal of Count 5 of the Complaint.

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[66] Suburban Post-Hearing Reply Brief at 19.

[67] App. for Reh. at 28, 29.

[68] *Id.* at 29-30.

[69] Suburban Initial Post-Hearing Brief at 12 n.63.

[70] *Id.*, citing Vol. II Tr. 302-03.

[71] Vol. II Tr. 303, 330.

3.2.2. The Commission properly concluded that it lacks the authority to prevent or remedy duplication of natural gas distribution facilities.

Suburban's second purported error of law asserts that the Commission erred when it concluded it lacked the authority to prevent one natural gas company from duplicating another natural gas company's facilities. Suburban asserts that the Commission's authority is inherent in its "general regulatory authority under R.C. 4905.04."[72] Suburban also raises the new argument, mentioned above, that installing a natural gas main across the street from another natural gas company's main, to serve a new phase of a residential subdivision that the other company would prefer to serve, "inflict[s] 'undue or unreasonable prejudice or disadvantage' on others" in violation of R.C. 4905.35(A).[73] Neither of these arguments finds support in the numerous cases Suburban cites to support them.

Suburban begins by asserting that "[t]he Ohio Supreme Court considers the Commission's authority to prohibit duplication of *any public utility service* 'unquestioned in law and reason.'"[74] The 1955 opinion that Suburban cites for that proposition, *Northern Ohio Telephone Co. v. Putnam*, says nothing of the sort.

Northern Ohio Telephone involved a dispute between The Northern Ohio Telephone Company and The Nova Telephone Company over the right to serve a group of customers who "resided within the claimed exchange area of Northern, as shown on" an exchange boundary map that the Commission had approved in 1940.[75] In 1952, Nova filed an application with the Commission to "correct[ ]" the map to reflect that Nova had the right to serve those customers.[76] The Commission denied the application.[77] However, in a parallel action in the Ashland County Court of Appeals, the court enjoined Northern from serving the cus-

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[72] App. for Reh. at 30-31 (citation omitted).

[73] *Id*. at 33-34. *See also id.* at 8.

[74] (Emphasis added.) App. for Reh. at 6-7, *quoting N. Ohio Tel. Co. v. Putnam*, 164 Ohio St. 238, 245-46, 130 N.E.2d 91 (1955).

[75] *See N. Ohio Tel. Co.*, 164 Ohio St. at 239.

[76] *See id.*

[77] *See id.* at 240.

tomers in question, refused to dissolve the injunction following the Commission's ruling, and ultimately found Northern in contempt for serving them.[78]

The parties appealed the contempt order and the Commission's orders to the Supreme Court of Ohio.[79] On appeal, the Court affirmed this Commission's jurisdiction over the dispute and its conclusion that "the disputed area lies in that territory agreed to be the operating area of Northern ***."[80] It is in this context that the Court held the Commission's "authority to determine a boundary between the service areas of adjoining telephone companies *** would appear unquestioned both in reason and in law[,]" even though there was "no statute which specifically gives the *** Commission authority" to do so.[81] Suburban interprets that statement to mean that the Commission had an inherent power to *select* separate service areas for adjoining telephone companies – *i.e.*, to prohibit duplication of facilities – even in the absence of a statute authorizing it to do so. But that is not what the Court said.

In the 1950s, the Commission *had* explicit statutory authority to prevent unnecessary duplication of telephone company facilities, under Section 614-52 of the General Code (later recodified as R.C. 4905.24 in 1953). The statute, which was repealed in 2010, required telephone companies to obtain a certificate of public convenience from the Commission before furnishing telephone service in an area where another telephone company was already "furnishing adequate service."[82] The Supreme Court of Ohio explained this authority in 1921:

> The general assembly says that when a public is being served by telephone, and the company so serving is furnishing adequate service, no other company shall exercise any permit, right, license or franchise, unless it first secures a certificate that the public convenience will be served, the manifest intent being to insure to the public a higher or better character of service.[83]

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[78] *See id.* at 240-243.

[79] *See id.* at 244.

[80] *Id.* at 246.

[81] *Id.* at 245.

[82] R.C. 4905.24 (2009).

[83] *Celina & Mercer Cty. Tel. Co. v. Union-Center Mut. Tel. Ass'n.*, 102 Ohio St. 487, 498-499, 133 N.E. 540 (1921).

The Court confirmed, that same year, that the statute authorized the Commission to prevent a telephone company from unnecessarily duplicating another incumbent telephone company's facilities.[84]

That issue was not before the Court in *Northern Ohio Telephone*. The question there, as stated explicitly by the Court, was whether the Commission had the authority to answer the threshold question of "whether the disputed area is *in* the service or operating area of Nova."[85] That is the power that the Court found to be inherent in the Commission's authority to regulate public utilities – not to determine whether Northern should be prohibited from offering duplicative service in Nova's service area, but to determine whether Nova actually provided "service *** in the disputed area" to begin with.[86] The power to prevent duplication was statutorily provided.

For the same reason, the Commission's recognition of "the harm caused by duplicating facilities" in the context of water utilities[87] does not prove the Commission has inherent authority to prevent duplication of all utility facilities. Suburban argues that, like natural gas companies, "[w]ater utilities do not have statutory service territories either, yet the Commission has consistently denied certificates to operate in areas where another provider serves."[88] But, as Suburban previously acknowledged in this case back in October 2017, water utilities *do* effectively "have service 'territories,'" because they are "required to obtain certificate[s] of public convenience and necessity" under R.C. 4933.25.[89] R.C. 4933.25 authorizes the Commission to "adopt rules prescribing requirements" for applying for such certificates.[90] Under those rules, applications for a certificate of public convenience and necessity to operate a waterworks system (or to expand a system into a new area) must include "[a] statement evidencing that no existing agency *** would or could economically and efficiently provide the facilities and services needed by the public in the area which is the subject of the application."[91] That is why the Commission considered "duplication of facilities" in *Aq-*

[84] *See Citizens' Exch. Tel. Co. v. Pub. Utils. Com.*, 102 Ohio St. 570, 132 N.E. 59 (1921).

[85] *N. Ohio Tel. Co.*, 164 Ohio St. at 245.

[86] *Id.*

[87] App. for Reh. at 33.

[88] *Id.* at 6.

[89] Suburban Mot. for Emerg. Relief at 4-5.

[90] R.C. 4933.25.

[91] Ohio Adm.Code 4901:1-15-05(D)(19).

ua Ohio[92] and in other cases – because the Commission's rules governing water utility applications for a certificate of public convenience and necessity require it.

Suburban also cites a number of cases involving the natural gas industry. None of those cases demonstrates that the Commission has inherent authority to prevent duplication of facilities. The "1986 complaint case involving these very same parties"[93] principally held that Columbia could not waive charges required by its tariff to obtain new business, not that Columbia could not duplicate Suburban's facilities.[94] In *Atwood Resources* (1989), Columbia did not "sue[ ] competitors for bypassing its system to serve load Columbia believed it had the right to serve."[95] It brought a complaint case against a natural gas producer for "making retail sales of natural gas" without first being certified as a natural gas company and submitting to regulation as a public utility.[96] And in *Duke Energy Ohio* (2018), Duke did "sue the City of Hamilton for providing gas service to an area Duke believes it alone has the right to serve."[97] But Duke based its claim on its tariffs, not on R.C. 4905.35(A), and the court did not reach the merits of Duke's claim, instead finding that the Commission had proper jurisdiction over the claim.[98] None of the cases Suburban cites endorse the theory that duplication of facilities can constitute "an 'unjust or unreasonable prejudice or disadvantage' in violation of R.C. 4905.35(A)."[99]

The Commission's Opinion and Order in this case correctly recognized that Suburban's theories have no basis in Ohio law.[100] Suburban attempts to distinguish one of the opinions the Commission relied on, *Suburban Natural Gas Co.*

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[92] *See* App. for Reh. at 33, quoting *In re Application of Aqua Ohio, Inc. to Amend the Masury Water Division's Certificate of Public Necessity to Expand the Territory to Which the Masury Water Division Provides Water Service*, Case No. 06-51-WW-AAC, Opinion and Order, at 11 (Mar. 28, 2007).

[93] App. for Reh. at 8, citing *Suburban Fuel Gas, Inc. v. Columbia Gas of Ohio, Inc.*, Case No. 86-1747-GA-CSS, Opinion and Order (Aug. 4, 1987).

[94] *See Suburban Fuel Gas, Inc.*, Case No. 86-1747-GA-CSS, Opinion and Order, 1987 Ohio PUC LEXIS 67, *61-64 (Aug. 4, 1987).

[95] App. for Reh. at 8, citing *Atwood Res., Inc. v. Pub. Util. Comm.*, 43 Ohio St.3d 96 (1989).

[96] *See Atwood Res.*, 43 Ohio St.3d at 97.

[97] App. for Reh. at 8-9. citing *Duke Energy Ohio, Inc. v. City of Hamilton*, 117 N.E.3d 1, 2018-Ohio-2821 (12th Dist.).

[98] *See Duke Energy Ohio*, 2018-Ohio-2821, ¶¶ 25-26.

[99] App. for Reh. at 8.

[100] *See* Opinion and Order ¶ 52.

v. Kalida Natural Gas Co., Inc. (1993),[101] arguing that the opinion's apparent endorsement of competition between natural gas utilities was simply a "summar[y of] the respondent's argument" that [t]he Commission *rejected* ***."[102] That reading of the opinion cannot be squared with its text, which clearly shows the Commission *adopted* the respondent's argument:

> Respondent argues that Ohio law does not prohibit competition between suppliers of natural gas service. *We agree.* Not only does the statutory scheme setting forth the regulation of gas and natural gas companies permit reasonable competition, the rules of this Commission and those of the Federal Energy Regulatory Commission positively encourage it.[103]

And Suburban simply ignores the second opinion on which the Commission relied in rejecting Suburban's theory. In that 1987 proceeding, Columbia sought approval for several amendments to its tariff sheets, including its main extension tariff.[104] DP&L intervened and made many of the same arguments Suburban makes now. Here, Suburban laments (without evidence) that a "small LDC" cannot compete if "large LDCs are permitted to duplicate facilities, siphon away customers, confound its system design plan, and drive the small company to financial ruin."[105] In the 1987 proceeding, DP&L similarly argued that the tariff amendment would "allow Columbia to bypass other gas utility facilities," causing "needless duplication of gas facilities"; that such bypasses would "impose[ ] serious financial and operational problems for the bypassed utility and its remaining captive customers"; and that the "about-to-be-bypassed utility" should have a "reasonable opportunity to avoid the bypass" if it wants to "retain or attach the customer ***."[106] The Commission rejected DP&L's proposals, finding them "inappropriate" even though "the effects of competition can be significant ***."[107] The Commission instead held that "there are no certified gas service terri-

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[101] *Suburban Natural Gas Co. v. Kalida Natural Gas Co., Inc.*, Case Nos. 92-1876-GA-CSS *et al*., Entry, 1993 Ohio PUC LEXIS 736 (Aug. 26, 1993).

[102] App. for Reh. at 33, n. 77.

[103] (Emphasis added.) *Suburban Natural Gas Co.*, 1993 Ohio PUC LEXIS 736, *12.

[104] *See In re Application of Columbia Gas of Ohio, Inc. to Amend its Rules and Regulations Governing the Distribution and Sale of Gas*, Case No. 87-1528-GA-ATA, Opinion and Order, 1987 Ohio PUC LEXIS 184 (Dec. 8, 1987).

[105] App. for Reh. at 7.

[106] *In re Columbia Gas*, 1987 Ohio PUC LEXIS 184 at *20-22.

[107] *Id.* at *27.

tories in Ohio, and *any gas company may serve any customer in any part of the state*."[108] Suburban has given the Commission no reason to deviate from this clear precedent.

3.2.3. The Commission properly concluded that the 1995 Stipulation does not support Suburban's claims.

Next, Suburban chastises the Commission for not making "[any] attempt to interpret or apply the express language of the Stipulation."[109] It is difficult to imagine what more the Commission could have done. It thoroughly reviewed the 1995 Stipulation and the Commission order approving it, found no ambiguity, and easily concluded that *nothing* in the language supported Suburban's claims.[110] To 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."[111]

Undeterred, Suburban repeats its unsubstantiated argument that the "1995 Stipulation settled claims arising from the same type of conduct at issue in Glenross."[112] Suburban introduced no evidence describing the pre-1995 builder programs (such as "the Buckeye Builder program"), and thus cannot demonstrate that the EfficiencyCrafted[SM] Homes Program is substantially similar to those programs. More significantly, the Commission determined "that nothing in the 1995 Stipulation * * * prohibits Columbia, in perpetuity, from offering any kind of incentives to homebuilders."[113]

Suburban next accuses the Commission of misunderstanding Suburban's claims.[114] It faults the Commission for not applying the "express terms of the Stipulation" to the "key fact *** *that Suburban was already serving this develop-*

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[108] (Emphasis added.) *Id.* at *26.

[109] App. for Reh. at 37.

[110] Order at ¶¶ 53-54.

[111] Order at ¶ 54.

[112] App. for Reh. at 35.

[113] Order at ¶ 53. Suburban at p. 35 of its Application for Rehearing also mischaracterizes ¶17 of the Commission Order where the Commission actually recounted that the parties negotiated the 1995 Stipulation to avoid the 1993 self-complaint case becoming another situation similar to the 1986 complaint case.

[114] App. for Reh. at 35-37.

ment."[115] Suburban generously clarifies that Columbia is free to compete with Suburban for customers in southern Delaware County but *only* in "pockets within this area that do not have gas service."[116] This argument fails for the same reason as Suburban's other interpretations of the 1995 Stipulation—the language of the Stipulation offers no support.

Suburban complains that the Commission's Order "essentially renders the Stipulation void ***."[117] This is facially untrue. The Stipulation helped to settle the Commission proceeding in which it was introduced. But the 1995 Stipulation is irrelevant here because its terms do not apply to Suburban's claims in this case. Columbia satisfied all terms of the Stipulation long ago. Upon the parties' completion of the three actions – "(1) the transfer of certain customers and facilities * * *[,] (2) the modification of certain * * * provisions * * * in the Parties' [then-filed] tariffs," [118] and (3) the exchange of "mutual releases and covenants not to sue"[119] – compliance was achieved and the 1995 Stipulation resolved all contested issues and terminated proceedings in Columbia's self-complaint case.[120]

In short, Suburban has failed to identify any ground for rehearing based on the 1995 Stipulation. Suburban's continued insistence that the 1995 Stipulation prohibits Columbia's actions in Delaware County is belied by the Stipulation's plain language, and the Commission properly recognized that fact.

3.2.4. The Commission properly concluded that Columbia acted in accordance with its tariffs.

Count 3 of Suburban's Complaint alleges that Columbia violated its DSM Rider by recovering or attempting to recover costs for energy efficiency incentives extended to entities outside Columbia's service territory. Count 4 alleged that Columbia had violated its main extension tariff by waiving required deposits or charges. The Commission rejected the allegations in both of these counts. Now, Suburban's final legal argument conjures three entirely different claims found nowhere in its Complaint: that Columbia's offering of energy efficiency

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[115] (Emphasis in original.) *Id*. at 36.

[116] *Id*. at 36

[117] *Id*. at 34.

[118] 1995 Stipulation at p. 2.

[119] *Id*. at p. 9, ¶C.1.

[120] *Id*. at p. 2.

incentives to homebuilders, its recovery of costs related to its incentives for homebuilders, and its policy of not requiring written line extension agreement when no contribution in aid of construction is required all violate Columbia's tariff. Again, the Commission should reject these tariff-based arguments.

Suburban first asserts that the Commission's orders expressly authorizing Columbia to offer energy efficiency incentives to homebuilders are "not enough for Columbia to lawfully exercise this authority ***."[121] According to Suburban, energy efficiency incentives are a "privilege" that must be specified in a filed tariff under R.C. 4905.32.[122] Of course, Columbia's Demand Side Management Rider does specify that Columbia implements "comprehensive, cost-effective energy efficiency programs [for] residential and commercial customers."[123] And Suburban's tariff sheets describe its DSM program in roughly the same level of detail as Columbia's tariff.[124] Suburban does not cite to any case law or Commission precedent imposing a need for more detail in the tariff sheet, and does not point to any other public utility whose tariff sheets include more detail than Columbia's and Suburban's do. And the Supreme Court of Ohio's recent opinion in *In re Ohio Edison Co.* (2018) stands only for the proposition that the Commission cannot order refunds of collected rider charges absent rider language specifying a refund process[125] – not that everything the Commission authorizes must be reflected in a filed tariff sheet.[126] The filed rate doctrine and Ohio's longstanding "no-refund rule" have no application to this proceeding.[127]

The Commission also clearly authorized Columbia to recover the costs of its homebuilder incentives through Rider DSM. Over a decade ago, the Commission authorized Columbia "to establish a Demand Side Management Rider ('Rider DSM')" to "provide for the recovery of costs incurred in the implementation of

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[121] App. for Reh. at 39.

[122] *Id.*

[123] *See, e.g.*, P.U.C.O. No. 2, Fifteenth Revised Sheet No. 28.

[124] *See* P.U.C.O. No. 3, Section V, Forty-Second Revised Sheet No. 3 (referencing Suburban's "cost-effective weatherization measures made available to high usage residential Percentage of Income Plan Program (PIPP) customers").

[125] *See In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, at ¶ 19.

[126] *See* App. for Reh. at 38-39.

[127] *See In re Ohio Edison Co.*, 2018-Ohio-229, at ¶ 18.

DSM programs" approved by the Commission.[128] And the Commission has approved Columbia's annual applications to adjust Rider DSM every year since 2009.[129] Suburban asserts that Columbia may not actually recover the costs of the builder incentives through Rider DSM, because the relevant tariff states that Rider DSM recovers "costs associated with the implementation of *** energy efficiency programs *made available to residential and commercial customers*."[130] But, pursuant to the EfficiencyCrafted[SM] Homes Program's Implementation Manual, Columbia will not process incentive payments under that program unless the homes have gas meters and Columbia "confirm[s] the meter numbers are in the Columbia Gas system."[131] In other words, a builder cannot receive a DSM incentive for a new home unless the home's owner or resident is a Columbia customer. Columbia's recovery of costs for the EfficiencyCrafted[SM] Homes Program is fully consistent with the language of the Rider DSM tariff.

Lastly, Suburban attempts to expand Count 4 of its Complaint to raise a new challenge to Columbia's compliance with its main extension tariff. It argues for the first time that Columbia's business practice of not requiring a written line extension agreement when no contribution in aid of construction ("deposit") is

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[128] *In re Application of Columbia Gas of Ohio, Inc., for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case Nos. 08-72-GA-AIR et al., Opinion and Order, pp. 6, 10, 26 (Dec. 3, 2008).

[129] *See In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 09-1036-GA-RDR, Opinion and Order, at 10 (Apr. 28, 2010); *In re Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates to Recover Costs Incurred in 2010*, Case No. 10-2353-GA-RDR, Opinion and Order, at 9 (Apr. 27, 2011); *In re Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates to Recover Costs Incurred in 2011*, Case No. 11-5803-GA-RDR, Opinion and Order, at 9 (Apr. 25, 2012); *In re Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 12-2923-GA-RDR, Opinion and Order, at 9 (Apr. 24, 2013); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 13-2146-GA-RDR, Opinion and Order, at 7 (Apr. 23, 2014); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 14-2078-GA-RDR, Finding and Order, at 5 (Apr. 22, 2015); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 15-1918-GA-RDR, Finding and Order, ¶ 20 (Apr. 20, 2016); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 16-2236-GA-RDR, Finding and Order, ¶ 20 (Apr. 26, 2017); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 17-2374-GA-RDR, Finding and Order, ¶ 39 (Apr. 25, 2018).

[130] (Emphasis in original.) App. for Reh. at 39-40.

[131] Order at ¶41, citing Suburban Ex. 41-HC, EfficiencyCrafted Implementation Manual (9/25/2017 update), at 20.

required violates the tariff.[132] This allegation is nowhere to be found in Suburban's Complaint,[133] its hearing testimony, or its post-hearing briefs. Moreover, Suburban concedes that the Commission's findings that the cost-benefit study was performed and that it established the main extension was economically justified at Columbia's expense would "provide a complete defense to Count 4" of Suburban's Complaint.[134] In addition to being procedurally improper, Suburban's questioning of Columbia's business practice in this regard is hypocritical, given that Suburban *never* requires a written line extension agreement despite its virtually identical tariff language.[135] Both Companies' main extension tariffs state that the Company "may" enter into a line extension agreement and require a deposit when the main extension is not deemed justified at the Company's expense.[136] Nowhere do the tariffs mandate a line extension agreement for every new customer-requested main placed into service. As with Suburban's other new legal arguments, the Commission should reject Suburban's unsupported tariff claims and confirm that Columbia is acting in compliance with Commission orders and its approved tariff.

3.3. The Commission Should Disregard Suburban's Objections to the Commission's Evidentiary and Procedural Rulings

Suburban ends its Application for Rehearing by raising three procedural issues, none of which is directly relevant to the central issues in this case. Suburban does not request a reversal of any of the Commission's procedural rulings; it simply asks the Commission to "remove[ ]" certain critiques of Suburban's ac-

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[132] App. for Reh. at 40.

[133] Suburban challenges Columbia's compliance with its main extension tariff only in Count 4 of the Complaint. Suburban pleaded that Columbia has *either:* (1) "offer[ed] * * *or* * * * agreed to waive" (2) "deposits *or* other [required] charges" for (3) "builders *or* others," at some time and in some place.

[134] App. for Reh. at 18.

[135] *See* Suburban Ex. 1.0 (Roll Testimony) at Q&A 12, 15 (noting that "If a residential subdivision has gas service, it is typically because the developer arranged for a main extension," and explaining that a developer needs only "make a request" for service, at which point Suburban sends the developer "a 'service availability commitment letter' indicating that Suburban is prepared to serve."). *See also* Vol. I Tr. 74: 9-12 (confirming Suburban does not request any written commitment from the developer to take service from Suburban), 59: 3-18 (Roll).

[136] *See* Columbia Tariff, P.U.C.O. No. 2, Section III, Part 12, Third Revised Sheet No. 9 (referencing "Plots of lots or real estate subdivisions"), quoted in pertinent part in the Order at ¶44. *See also* Suburban P.U.C.O. No. 3, Sec. III, First Revised Sheet No. 4 and Original Sheet No. 5.

tions "from the order on rehearing."[137] Columbia will address these requests only briefly.

3.3.1. The Commission properly excluded Suburban's rebuttal testimony and then struck the improperly filed testimony.

During the hearing of this proceeding, Suburban requested permission to file rebuttal testimony. The Hearing Examiners denied its request.[138] Suburban did not explain on the record the topics for which it sought to introduce rebuttal testimony; it simply protested the Examiners' decision.[139] Subsequently, in an Application for Certification of Interlocutory Appeal, Suburban explained that it sought to introduce rebuttal testimony to explain certain exclusive easements recorded by Suburban in Delaware County.[140] Columbia witness Melissa Thompson had previously introduced testimony demonstrating that Suburban has filed over a dozen easements and exclusive service agreements in Delaware County, which give Suburban "the sole and exclusive right to construct a natural gas distribution system" on the subject properties.[141] Suburban Vice President Aaron Roll testified that Suburban uses these agreements to expand its service territory, and obtains them by paying owners of undeveloped farm property $100 or more per-acre.[142] When the Commission rejected Suburban's Application for Certification, Suburban went ahead and attached the rebuttal testimony to its post-hearing reply brief. Columbia moved to strike that testimony, and the Commission granted the motion to strike.[143]

Suburban now argues, again, that the Commission should have allowed it to offer rebuttal testimony. As Columbia has previously argued and the Commission held, Suburban failed to preserve its objections by properly proffering its rebuttal testimony at hearing.[144] For the reasons provided in Columbia's Memo-

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[137] App. for Reh. at 42.

[138] Vol. III Tr. 516: 13-23.

[139] *Id.* at 517: 1-25.

[140] Suburban App. for Cert. of Interlocutory Appeal at 4.

[141] Columbia Ex. 6, M. Thompson, p. 11: 21-38 and p. 12: 7-14, and Thompson Attachments H, I.

[142] Vol. I. Tr. 96: 18 – 97: 1, 103: 16-20, 106: 2-6. As indicated in prior briefing, such agreements are contrary to public policy and unenforceable. *See* Columbia Initial Brief at 24 n, 142, citing *Orwell Nat. Gas Co. v. Fredon Corp.*, Lake App. No. 2014-L-026, 2015-Ohio-1212, at ¶¶71-72.

[143] Opinion and Order at ¶ 51.

[144] *Id.*

randum Contra Suburban's Application for Certification of Interlocutory Appeal and Columbia's Motion to Strike Exhibit A of the Complainant's Reply Brief, the Commission should affirm its prior decision to disallow Suburban's rebuttal testimony.

3.3.2. The Commission properly held that Suburban waived its objections to Columbia's confidentiality designations.

Next, Suburban asserts that the Commission erred when it failed to rule on Suburban's mid-hearing complaints about Columbia's designations of certain documents as confidential.[145] Suburban suggests that Columbia failed to support its designations properly and that the Hearing Examiners should have allowed Suburban to challenge those designations at hearing. Suburban further asserts that there were "several instances" at hearing where "Suburban made clear that it did not agree with the designation."[146]

But Suburban cites only two pages of the hearing transcript that show supposed disagreements – pp. 233 and 488[147] – and neither supports Suburban's objection. On p. 233, Suburban's counsel says simply: "I will indicate that the document is marked 'Confidential.' I'm not sure that we've had to address this yet." On p. 488, Suburban's counsel informs the Hearing Examiners that he has resolved a disagreement with Columbia over a "Highly Confidential" designation by partially redacting and redesignating the document. Absent evidence of any true, unresolved disputes over the confidentiality of Columbia's documents, the Commission should disregard Suburban's generalized objection as moot.

3.3.3. The Commission properly held that Suburban waived its objections to Columbia's discovery responses.

Suburban ends by asking the Commission to "remove" its reference to "Suburban's unfounded allegations regarding the discovery process"[148] from its Opinion and Order. Suburban admits it "*could* have kept filing motions to compel," but instead chose the "more practical route" of leveling accusations at Columbia at hearing.[149] Suburban then doubles down, accusing Columbia yet again

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[145] *See* App. for Reh. at 44-46.

[146] *Id.* at 44-45.

[147] *Id.* at 45 n. 100.

[148] Opinion and Order ¶ 64.

[149] App. for Reh. at 47.

of withholding responsive documents from two Columbia witnesses and suggesting the Commission should have sanctioned Columbia.[150]

As indicated above and in the Commission's Opinion and Order, the proper way to resolve discovery disputes in Commission proceedings is to attempt an informal resolution and then, if unsuccessful, file a motion to compel. Suburban filed a motion to compel, but ultimately withdrew it.[151] It did not threaten, much less file, another motion to compel. Suburban's attempt to reopen its discovery compromise agreement with Columbia at hearing was bad faith and procedurally improper, and the Commission rightfully refused to entertain it. The Commission should similarly refuse to entertain the renewed aspersions on Columbia in Suburban's Application for Rehearing.

4. Conclusion

Suburban's request for Commission protection from competition from larger natural gas companies flies in the face of thirty years of Commission precedent and contravenes explicit state policies. And its belated attempt to refashion R.C. 4905.35(A) as a tool to penalize otherwise lawful main extensions and energy-efficiency incentives is entirely unsupported by legal precedent. For the reasons provided above, the Commission should deny Suburban's Application for Rehearing.

[150] *Id.* at 48.

[151] Vol. I Tr. 9: 6-11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document is being served via electronic mail on the 20th day of May, 2019, upon the parties listed below:

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Summary: Memorandum Contra Application for Rehearing of Suburban Natural Gas Company electronically filed by Mr. Eric B. Gallon on behalf of Columbia Gas of Ohio, Inc.