

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Annual Application of)	
Columbia Gas of Ohio, Inc. for an Adjustment)	Case No. 19-1940-GA-RDR
to Rider IRP and Rider DSM Rates.)	

BRIEF OF
SUBURBAN NATURAL GAS COMPANY

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
bojko@carpenterlipps.com
(willing to accept service by e-mail)
Counsel for Suburban Natural Gas Company

I. INTRODUCTION

The Public Utilities Commission of Ohio (“Commission”) should enforce its orders approving Columbia Gas of Ohio, Inc.’s (“Columbia”) Demand Side Management (“DSM”) Program, its DSM rider, and Columbia’s tariff, and prohibit Columbia from administering its builder incentive program in a manner that is inconsistent with the stated purpose of the program as it was approved by the PUCO in Case Nos. 08-833-GA-UNC, 11-5208-GA-UNC, and 16-1309-GA-UNC.¹ Columbia should be barred from administering its builder incentive program that is paid for by Columbia’s current customers in areas outside of Columbia’s existing service area for the purpose of expanding its existing service area and using financial incentives as a competitive tool.

On February 28, 2020, Columbia submitted an application to the Commission to adjust its Rider DSM to recover costs associated with administering its DSM Program in 2019.² The Commission approved Columbia’s current DSM Program on December 21, 2016.³ The DSM Program includes a program that offers direct financial incentives to homebuilders for each energy efficient home that they build that exceeds state energy code minimum levels.⁴ Columbia’s customers pay for the incentives through a Commission-approved alternative rate plan authorizing

¹ See *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a Demand Side Management Program for Residential and Commercial Customers*, Case No. 16-1309-GA-UNC, et al., Opinion and Order at ¶¶ 6, 115 (December 21, 2016) (2016 DSM Case); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a Demand Side Management Program for Residential and Commercial Consumers*, Case No. 08-0833-GA-UNC, Finding and Order at ¶¶ 2, 6 (July 23, 2008) (2008 DSM Case); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a Demand Side Management Program for Residential and Commercial Customers and the Application for Approval to Change Accounting Methods*, Case No. 11-5028-GA-UNC, et al., Finding and Order at ¶¶ 3, 15 (December 14, 2011) (2011 DSM Case).

² *In the Matter of the Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 19-1940-GA-RDR, Application (February 28, 2020).

³ 2016 DSM Case, Order at ¶¶ 1, 135.

⁴ *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a Demand Side Management Program for Residential and Commercial Customers*, Case No. 16-1309-GA-UNC, et al., Application at 11-12 (June 10, 2016).

Columbia to establish Rider DSM.⁵ The Commission specified that Columbia was only to offer builder incentives under its approved DSM Program to builders and existing customers “*in Columbia’s service territory.*”⁶ Columbia has since disregarded the Commission’s Order and used its DSM Program to stifle competition within Delaware County, Ohio by using the builder incentive program outside of its current service area for the purpose of expanding its service area, not for the intended purpose of “encourag[ing] the construction of energy efficient home[s] in Columbia’s service territory.”⁷ In addition, Columbia’s use of the builder incentive program as a competitive tool is contrary to the DSM Rider, tariffs, statutory authority, and the Commission’s own policy prohibiting the use of such programs for competitive purposes that customers pay for but do not benefit from.⁸

The Commission has previously determined that the case before it is the proper forum to raise concerns regarding the implementation of Columbia’s DSM Program during the term of the Program, including the builder incentive program, and to ensure that Columbia is implementing its DSM Program (and all programs that were approved as part of its DSM Program) in a manner consistent with the stated purpose of the programs, the PUCO orders approving the programs, and Columbia’s tariffs implementing the programs. In a prior annual rider proceeding, over the objections of Columbia and citing to the 2016 DSM Case, the Commission clarified that “[it] may

⁵ 2016 DSM Case, Order at ¶¶ 119, 123, 125.

⁶ 2016 DSM Case, Order at ¶115.

⁷ Id.

⁸ *In the Matter of the Self-Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Opinion and Order at 10 (August 15, 2012) (Suburban’s Self-Complaint Case) (“Furthermore, we agree with Staff that, while Suburban claimed its proposal is a DSM program, such a claim is inaccurate because it is a competitive response program and only intended to help Suburban compete with other natural gas companies for new load. This is especially true, in light of the fact that Suburban’s customers would pay for its proposed DSM program, yet are unable to benefit from it, albeit unless it is considered within the context of increased load to Suburban in conjunction with a future rate case.”).

also consider additions, revisions, or amendments to Columbia's DSM Program as part of Columbia's DSM Program renewal application or the annual DSM rider proceedings. 2016 DSM Case, Second Entry on Rehearing (Apr. 10, 2019) at 19.”⁹ Therefore, the Commission has explained that it “may elect to review individual DSM programs in the annual rider update proceedings.”¹⁰

Additionally, in a prior complaint proceeding, the Commission appeared to determine that Suburban Natural Gas Company’s (“Suburban”) objections to Columbia’s DSM Program were untimely or misplaced since Suburban had not participated in any of the DSM proceedings before the Commission.¹¹ Accordingly, Suburban is raising its concerns with regard to the administration of Columbia’s DSM Program during the term of the Program in this annual rider update proceeding, which has been deemed an appropriate forum by the Commission.¹²

For the reasons stated herein, Suburban respectfully requests that the Commission enforce its Order in the 2016 DSM Case and limit the use of Columbia’s builder incentive program to that which it was designed and approved to do as explained in that Order approving the program:

The Commission finds that Columbia’s EfficiencyCrafted Homes program is an effective method to encourage the construction of energy efficient home **in Columbia’s service territory** and the customer is served by Columbia. Homes can exist for decades, if not longer, and installing energy efficient and conservation measures during construction can provide long-term savings for the resident. The **key factor** is that the home is **located within Columbia’s service territory and the customer is served** by Columbia.¹³

⁹ See also *In the Matter of the Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 18-1701-GA-RDR, Opinion and Order at ¶39 (April 24, 2019).

¹⁰ *Id.*

¹¹ See *In the Matter for the Complaint of Suburban Natural Gas Company*, Case No. 17-2168-GA-CSS, Order at ¶58 (April 10, 2019).

¹² *Id.* at ¶ 60.

¹³ 2016 DSM Case, Order at ¶115 (emphasis added).

II. FACTS

Suburban is a natural gas distribution utility primarily serving residential customers in Delaware County, Ohio. As Delaware County has developed over the past few decades, so too has Suburban, growing from its first customer in 1989 to approximately 13,910 customers today, and investing over \$32.4 million in new plant and equipment in Marion and Delaware Counties.¹⁴ Despite facing disadvantages in its smaller size and more limited resources, Suburban has successfully competed against Columbia for years.¹⁵

The Commission first approved Columbia's DSM Program, now known as the EfficiencyCrafted Homes program in July 2008.¹⁶ The builder incentive program was re-approved in Case No. 11-5028-GA-UNC, and more recently in Case No. 16-1309-GA-UNC. Although given a different name at different times and funded at different levels, the basic concept underlying the program has remained the same. The DSM Program was authorized to allow Columbia to issue incentive payments to builders who build homes to certain levels of energy efficiency. The incentives are funded through a rider charged to Columbia's existing customers.

More specifically, in its initial 2008 application for approval of its builder incentive program, Columbia indicated the program would provide incentives to "builders of new, gas-heated single—family homes built in the Columbia service territory."¹⁷ Upon renewal of the builder incentive program in 2011, a similar statement appeared in Columbia's application, reiterating that "[b]uilders and buyers of new, gas-heated, single family homes built in the Columbia

¹⁴ Suburban Ex. 1 (Pemberton) at 5.

¹⁵ Id. at 4-5.

¹⁶ 2008 DSM Case, Order at ¶¶ 2, 6.

¹⁷ 2008 DSM Case, Application at 8 (July 1, 2008).

service territory will be the target market for the program.”¹⁸ And emphasizing that the stated purpose of the program was to “seek to maintain participation by existing builders participating in the Energy Star program, as well as increase participation by Affordable Housing developers and “value” builders currently building to code minimum.”¹⁹ In its most recent 2016 application, Columbia stated that it would “continue” the program, implying that the target market is homes built in the Columbia service territory as referenced in the prior applications approved by the Commission.²⁰ Columbia’s current DSM Program, including the builder incentive program, was approved on December 21, 2016 “to encourage the construction of energy efficient home **in Columbia’s service territory.**”²¹ Columbia spent \$2,483,167.56 on its EfficiencyCrafted Homes Program from January through September 2019 to provide incentives to builders to build 3,163 homes, which is an average of approximately \$785.67 in builder incentives per home.²²

Suburban has operated and invested in the area now known as the Glennross subdivision in southern Delaware County.²³ Suburban has been serving the Glenross subdivision since the first phase began in the early to mid-2000s, serving the first ten phases of the Glenross subdivision, north of Cheshire Road, in Berlin Township.²⁴ Suburban serves over 500 customers within the subdivision and has invested in its system to support its customers within this service area. A gas main built by Suburban in 1988 provides service to the subdivision. The gas main runs along the

¹⁸ 2011 DSM Case, Application at 28 (emphasis added) (September 9, 2011).

¹⁹ Id.

²⁰ 2016 DSM Case, Application at 11-12 (June 10, 2016).

²¹ 2016 DSM Case, Order at ¶115 (emphasis added).

²² See Testimony of Andrew S. Metz on Behalf of Columbia at 4, ln 33-26 (February 28, 2020); see also Suburban Ex. 1 (Pemberton) at Ex. F (Columbia Discovery Response to OCC-INT-02-004 (March 4, 2020) (Columbia identifies the EfficiencyCrafted Homes Program as the New Home Solutions Program)); see also Suburban Ex. 1 (Pemberton) at Ex. G (Columbia Discovery Response to Staff Data Request No. DSM-12 (December 23, 2019)).

²³ Suburban Ex. 1 (Pemberton) at 12-13

²⁴ Id.

north side of Cheshire Road, from Braumiller Road on the west to S. Old State Road on the east.²⁵ The builder, Pulte Homes (Pulte), continues to build homes in several phases on the north side of the development, and Suburban serves those homes as they are completed. Despite Suburban's existing gas main, Pulte selected Columbia to serve future phases on the south side of Cheshire Road. At the time, Columbia did not have exiting facilities constructed to serve the development and was not currently serving the Glenross subdivision.²⁶ Columbia has offered incentives to builders to build 3,163 homes during the first nine months of 2019 in areas that are not within Columbia's existing service area.²⁷

III. ARGUMENT

A. Columbia's DSM Program Directly Violates Commission Orders.

When the Commission authorized Columbia's DSM Program, it repeatedly did so with the directive that the program be implemented "in" or "within" Columbia's service territory.²⁸ The Commission went as far as to state that "the **key factor** is that the home is **located within Columbia's service territory and the customer is served by Columbia.**"²⁹ Despite the Commission's clear directive, the evidence in this case demonstrates that Columbia has offered the builder incentive program approved as part of Columbia's DSM Program to new home builders in areas that are not now, nor have they ever been, part of Columbia's service territory as required by the Commission.

²⁵ Id. at 12-13.

²⁶ Id. at 13.

²⁷ See supra n.22.

²⁸ 2016 DSM Case, Order at ¶ 115.

²⁹ Id. (emphasis added).

As explained above, since the early to mid-2000s, Suburban has served the Glenross subdivision in Southern Delaware County, supplying natural gas to residents and operating a gas main to the subdivision that was constructed in 1988.³⁰ Since its construction, this subdivision has been part of Suburban's service territory, not Columbia's.³¹

However, despite the fact that Suburban served the Glenross subdivision, and Columbia did not, and despite the fact that the Glenross subdivision fell into Suburban's service area, and not Columbia's, and despite the fact that Columbia did not have exiting facilities constructed to serve the development, the evidence demonstrates that Columbia improperly offered incentives from the builder incentive program to the builder, Pulte, in order to unfairly compete with Suburban and expand its service area. As explained by Suburban's witness, Columbia agreed to pay a six-figure sum for builder incentives; build an almost 7,000-foot line extension at no cost to Pulte; and pipe all future phases on the south side of Cheshire Road at no cost to Pulte.³² Pulte selected Columbia over Suburban because of the incentive program Columbia offered.³³

Additionally, the evidence demonstrates that Columbia has also improperly offered builder incentives outside of its service territory to representatives of the builders and/or developers for the Berlin Manor development.³⁴ Correspondence from Columbia documents a promise of builder incentives to a representative of Berlin Manor, located in Berlin Township, to switch to Columbia. Berlin Manor is located farther east from Glenross along Cheshire Road where Suburban has

³⁰ Suburban Ex. 1 (Pemberton) at 12-13.

³¹ Id. at 12.

³² Suburban Ex.1 (Pemberton) at 13-14, and Ex. B (Record of Regularly Conducted Activity dated October 13, 2017).

³³ Suburban Ex. 1 (Pemberton) at 14, ln 3-5 and Ex B (Record of Regularly Conducted Activity dated October 13, 2017).

³⁴ Suburban Ex. 1 (Pemberton) at 14-15, Ex. C (Columbia email dated April 6, 2017), and Ex. D (Record of Regularly Conducted Activity dated January 2018).

existing supply mains installed and is already serving customers.³⁵ Columbia offered builder incentives (up to \$800 per lot) to this developer who Suburban had been serving in southern Delaware County.³⁶ Moreover, the evidence demonstrates that Columbia has also improperly offered builder incentives outside of its service territory to representatives of the builder Romanelli & Hughes, describing Columbia's use of the DSM Program as a marketing tool.³⁷

Columbia's extension of facilities and its plans to further extend its existing facilities into areas already served by Suburban evidences that Columbia is disregarding the Commission's authority and using financial incentives to builders as a competitive tool instead of an energy efficiency tool. Therefore, in direct contradiction to the authority granted to it by the Commission, Columbia is improperly administering the builder incentive program to offer builder incentives outside its service territory in order to enlarge its own existing service area. This use of the builder incentive program flies in the face of Columbia's applications for the program, as well as the Commission's orders approving the program, which directed Columbia to use the builder incentive program exclusively within its existing "service territory."³⁸

Furthermore, as explained by Suburban's witness, "service territory," as used in the DSM cases, clearly refers to areas currently served by a provider.³⁹ Columbia's applications and the Commission orders adopting the requested builder incentive program clearly distinguished between Columbia's "service territory" and the service territory of other natural gas providers. Those

³⁵ Id.

³⁶ Id.

³⁷ Suburban Ex. 1 (Pemberton) at 14-15 and Ex. E (Record of Regularly Conducted Activity dated October 25, 2016) (Please note that there is a typographical error in the subject line of the Memorandum as the meeting occurred on October 24, 2016).

³⁸ 2016 DSM Case, Order at ¶115.

³⁹ Suburban Ex. 1 (Pemberton) at 9-11.

applications and orders unequivocally explained (and put the public on notice) that the Commission was approving Columbia's builder incentive program as a program that would be offered only in Columbia's service territory and for the limited purpose of encouraging the construction of energy efficient homes.

Importantly, as cited to by Suburban's witness, Columbia has previously recognized gas company service territories and the importance of the established service areas, committing that "Columbia will not provide service to customers within the current service area of Suburban," but instead "will install facilities where necessary that enable it to service customers beyond the current Suburban service areas."⁴⁰ Additionally, the Commission itself recognizes over three dozen other natural gas local distribution companies, some regulated and some not, as having delineated service areas or service territories within Ohio.⁴¹

Furthermore, the Commission has expressed concerns on incentive programs designed to give the applicant a competitive edge or respond to competition. In 2011, Suburban submitted a request to offer builder incentives if necessary to counter Columbia's DSM Program. The Staff witness in that case, Steve Puican, testified that "Suburban's program is strictly a competitive response program. It is intended to compete with Columbia for new load."⁴² According to Mr. Puican, "the Commission has never before approved a rider with that intended purpose."⁴³ He further explained "that Staff has never recommended approval, and the Commission has never approved a rider with the intended purpose of a standalone program, that was not directed to a

⁴⁰ Suburban Ex. 1 (Pemberton) at 11 and Ex. A (Columbia Letter from John W. Partridge, Jr., President of Columbia, to David L. Pemberton, Sr.).

⁴¹ See OCC Ex. 2 (Shutrum), Attachment CLS-6 (Public Utilities Commission of Ohio, Natural Gas Distribution Service Providers as of March 15, 2017, available at https://www.puco.ohio.gov/emplibrary/files/Util/GIS/Gas_Maps/Natural_Gas_Distribution_Companies.pdf).

⁴² Suburban Self-Complaint Case, Direct Testimony of Stephen E. Puican at 5 (June 6, 2012).

⁴³ Id.

utility's existing customers, but was charged to those customers. (Tr. at 93-95.)”⁴⁴ The Commission accepted Mr. Puican’s recommendation, and denied Suburban’s application in that case as a purely competitive tool.⁴⁵ The Commission recognized that just because a program is a DSM program, if the only intended purpose is to help a company compete with other natural gas companies for new load, it is not a DSM program, but, instead, is an inappropriate competitive response tool.⁴⁶ The Commission added: “This is especially true, in light of the fact that Suburban's customers would pay for its proposed DSM program, yet are unable to benefit from it, albeit unless it is considered within the context of increased load to Suburban in conjunction with a future rate case.”⁴⁷ Similarly, Columbia should not be authorized to use its builder incentive program as a competitive tool outside of Columbia’s service territory that its customers pay for but do not benefit from.

B. Columbia’s DSM Program Violates the DSM Rider and Tariff.

On December 21, 2016, the Commission authorized Columbia to recover certain DSM Program costs through the DSM Rider, including costs associated with the builder incentive program.⁴⁸ Existing Columbia customers pay this DSM Rider which Columbia then uses to fund its incentives under the DSM Program.⁴⁹ Costs that are incurred to provide incentives to builders for homes not located within Columbia’s service territory are not recoverable through the DSM Rider. Columbia, however, is using the builder incentive program under the DSM Program to

⁴⁴ Id., Order at 4.

⁴⁵ Id., Order at 10.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ 2016 DSM Case, Order at ¶¶ 119, 123, 125.

⁴⁹ 2016 DSM Case, Order at ¶¶ 119, 123, 125; Suburban Ex. 1 (Pemberton) at 6-7.

incentivize homebuilders outside of its service territory.⁵⁰ Furthermore, Columbia is using the DSM Rider to recover those costs for extending the Program outside of Columbia's service territory. By providing funds for purposes outside the stated scope and purpose of the builder incentive program, Columbia is recovering ineligible costs through its DSM Rider and is, therefore, violating the DSM Rider provisions. Columbia is also, therefore, collecting costs that are not specified by its authorizing tariff because Columbia's tariff does not enable Columbia to recover costs for the unauthorized use of the builder incentive program through the DSM Rider. As a result, Columbia is using the DSM Rider as a competitive tool to expand its service territory and to recover costs not authorized by the Commission when it approved the DSM Program and the cost recovery mechanism for the Program.⁵¹ Columbia's cost recovery of unauthorized costs violates the DSM Rider and authorizing tariff and should be prohibited.

C. Columbia's Actions Violate the Ohio Revised Code.

Columbia's administration of its DSM Program directly violates legislative authority. R.C. 4905.32 dictates that, "no public utility shall charge or receive a rate or charge for any service rendered, except as specified in its tariff." Under R.C. 4905.33, public utilities are prohibited from charging less compensation than what is specified in their tariffs. As explained above, Columbia is violating its tariff by providing builder incentives beyond the scope and purpose that was authorized, and is unlawfully collecting the costs associated with providing those improper incentives from its customers under the DSM Rider in violation of Ohio law.

Similarly, R.C. 4905.35 makes it unlawful for a utility to "make or give any undue or unreasonable preference to any person or corporation." Exceeding the authority provided to it and

⁵⁰ Suburban Ex. 1 (Pemberton) at 12-13.

⁵¹ See 2016 DSM Case, Order; 2011 DSM Case, Order; 2008 DSM Case, Order.

using its builder incentive program as a competitive tool to expand its service territory violates R.C. 4905.35.

Lastly, Columbia is precluded from expanding the scope and purpose of its builder incentive program three and half years after the 2016 DSM Program was approved under the doctrines of res judicata and collateral estoppel.⁵² The issue of geographic scope of the builder incentive program and the purpose of the program to incentivize energy efficient homes were determined in the 2016 DSM Case. A Commission order establishing the parameters of the builder incentive program cannot be disregarded or expanded after the fact simply because Columbia chooses to implement its builder incentive program for other purposes outside its service territory (i.e., competitive tool to expand its service area). Columbia is obligated to comply with the scope and mandates of the Commission's Order in the 2016 DSM Case. Clearly, the geographic scope and purpose of the builder incentive program was considered and decided by the Commission in its Order in the 2016 DSM Case.

⁵² Res judicata and collateral estoppel, also known as claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings. See *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381, 653 N.E.2d 226; *Girard v. Trumbull Cty. Budget Comm.* (1994), 70 Ohio St.3d 187, 193, 638 N.E.2d 67. An administrative proceeding is quasi-judicial for purposes of res judicata if “the parties have had an ample opportunity to litigate the issues involved in the proceeding.” *Set Prods., Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 263, 31 OBR 463, 510 N.E.2d 373, quoting *Superior's Brand v. Lindley* (1980), 62 Ohio St.2d 133, 16 O.O.3d 150, 403 N.E.2d 996, syllabus; cf. *State ex rel. Wright v. Ohio Bur. of Motor Vehicles* (1999), 87 Ohio St.3d 184, 186, 718 N.E.2d 908.

IV. CONCLUSION

For the foregoing reasons, Suburban respectfully requests that the Commission enforce its orders approving Columbia's builder incentive program as part of its DSM Program, its DSM rider, and Columbia's tariff, and prohibit Columbia from implementing its builder incentive program in a manner that is inconsistent with the stated purpose of the program as it was authorized by the PUCO.⁵³ Columbia should be barred from administering the builder incentive program that is paid for by Columbia's current customers in areas outside of Columbia's existing service area for the purpose of expanding its existing service area and using financial incentives as a competitive tool. Simply put, Columbia's administration and use of the builder incentive program violates the Commission's orders, the DSM Rider, tariff, statutory authority, and the Commission's own policy prohibiting the use of such programs for competitive purposes.

Respectfully submitted,

/s/ Kimberly W. Bojko_____

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
bojko@carpenterlipps.com
(willing to accept service by e-mail)

Counsel for Suburban Natural Gas Company

⁵³ 2016 DSM Case, Opinion and Order at ¶115; see also, 2008 DSM Case, Order at ¶¶ 2, 6 and 2011 DSM Case, ¶¶ 3, 15.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on May 4, 2020 upon the parties listed below.

/s/ Kimberly W. Bojko

Kimberly W. Bojko

Counsel for Suburban Natural Gas Company

josephclark@nisource.com

andrew.shaffer@ohioattorneygeneral.gov

thomas.lindgren@ohioattorneygeneral.gov

christopher.healey@occ.ohio.gov

amy.botschner.obrien@occ.ohio.gov

ccox@elpc.gov

mnugent@igsenergy.com

ballen@igsenergy.com

joliker@igsenergy.com

Attorney Examiner:

matthew.sandor@puco.ohio.gov

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