

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Self Complaint of)
Suburban Natural Gas Company) Case No. 11-5846-GA-SLF
Concerning its Existing Tariff Provisions.)

ENTRY

The attorney examiner finds:

- (1) On December 1, 2011, Suburban Natural Gas Company (Suburban) filed the above-referenced self complaint requesting that the Commission approve a demand-side management (DSM) rider in its tariff.
- (2) A hearing on Suburban's self complaint was held on June 12, 2012. During the recross examination (recross) of Staff witness Stephen E. Puican, Suburban attempted to ask questions about the costs incurred by Columbia Gas of Ohio, Inc. (Columbia) in connection with its DSM program; however, counsel for Staff objected that the questions exceeded the scope of the redirect examination (redirect), and the presiding examiner sustained the objection. On June 18, 2012, Suburban filed an application for review and motion for certification of this oral evidentiary ruling.
- (3) Rule 4901-1-15, Ohio Administrative Code (O.A.C.), provides two avenues for parties who are adversely affected by an examiner's procedural ruling to file an interlocutory appeal to the Commission. First, paragraph (A) provides that an immediate interlocutory appeal may be taken to the Commission, if the ruling being appealed: grants a motion to compel discovery or denies a motion for protective order; denies a motion to intervene, terminates a party's right to participate, or requires the consolidation of examination or presentation of testimony; refuses to quash a subpoena; or requires the production of documents or testimony over an objection based on privilege. Upon review of the request for interlocutory appeal filed by the Suburban, it appears that the request does not warrant an immediate appeal to the Commission under this provision.

- (4) Secondly, paragraph (B) of Rule 4901-1-15, O.A.C., provides that, except as provided for in paragraph (A), no party may take an interlocutory appeal to the Commission, unless the appeal is certified to the Commission by an examiner. Moreover, this provision states that the reviewing examiner shall not certify an interlocutory appeal to the Commission, unless the appeal “presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the [C]ommission is needed to prevent undue prejudice or expense to one or more of the parties, should the [C]ommission ultimately reverse the ruling in question.”
- (5) According to Suburban, the line of questioning on recross, regarding the costs incurred in connection with Columbia’s DSM program, was meant to provide evidence of what Suburban’s proposed plan might cost, based on the best available methods and data. Suburban claims that there is no rule that requires limiting the scope of recross. Suburban concedes that the presiding examiner has discretion to limit the scope of recross and that Ohio courts have held that recross generally cannot exceed the scope of redirect. However, Suburban argues that it was an abuse of discretion to not allow the questioning. Suburban claims that, throughout the course of the hearing, questions were asked about the potential cost of Suburban’s proposed DSM program. Further, Suburban argues that Staff witness Puican testified that increasing throughput would reduce fixed costs resulting in benefits to nonparticipating customers and that the costs of Suburban’s proposed DSM program would have to be weighed against any benefits. According to Suburban, given these questions, it is clear that Suburban was prejudiced by not being able to offer evidence on the potential cost of its proposed DSM program. Suburban also argues that its appeal presents a new and novel question of law and policy, regarding whether there is a binding rule prohibiting recross on matters not raised on redirect.
- (6) Upon consideration of the arguments made by Suburban, the reviewing examiner finds that the issues raised on appeal by Suburban do not satisfy the requirements of a new or novel question of interpretation, law, or policy or a departure from past precedent. Rulings, such as the one questioned herein by

Suburban, are frequently made during Commission hearings. The hearing practice of examination of witnesses during Commission hearings generally follows that of the trial court, wherein the opportunity to examine a witness during recross is within the discretion of the trial court. *Emerald Estates Homeowners Ass'n v. Albert*, 5th Dist. No. 2009 CA 0072, 2009-Ohio-6627; *Weir v. Schemmel*, 3rd Dist. No. 2-79-26, 1980 WL 351966 (Mar. 26, 1980). Further, redirect and recross are normally limited to answering any new matter drawn out in the next previous examination of the adversary. *Stachura v. Doctors Hosp.*, 5th Dist. No. CA-7625, 1989 WL 75748 (June 26, 1989).

- (7) The ruling by the presiding examiner also was not a departure from past precedent, as it followed the past precedent of the Commission in disallowing questions on recross of a witness that exceed the scope of redirect of that witness. As Suburban concedes, it was within the discretion of the presiding examiner to limit the scope of recross during the hearing. As this is the general practice of the Commission, it was not error for the presiding examiner to disallow these questions of Mr. Puican on recross, since they were unrelated to a subject raised on redirect. The ruling was also consistent with Ohio case law that, generally in the course of a hearing, the scope of recross is limited to the scope of the preceding redirect. *State v. Murray*, 8th Dist. No. 46616, 1983 WL 2821 (Nov. 23, 1983); *State v. Savage*, 8th Dist. No. 55046, 1989 WL 11299 (Feb. 9, 1989); *State v. Watson*, 8th Dist. No. 90962, 2009-Ohio-2120.
- (8) Here, counsel for Suburban acknowledged that the questions he sought to ask were unrelated to questions asked on redirect.

Mr. Michael: "Well, I don't think there's any limitation that Your Honor has to put on us about...."

Hearing Officer Farkas: "Yes, there is. You can ask recross as to what was asked on redirect."

Mr. Michael: "So I'm not going to be allowed to question...."

Hearing Officer Farkas: "Unless it was directly related to what was asked on redirect."

Mr. Michael: "I don't believe it is your honor."

Hearing Officer Farkas: "Then you cannot ask it."

(Transcript at 101).

As Suburban acknowledged that its questions were unrelated to what was asked on redirect, the presiding examiner properly limited the scope of recross of Staff witness Puican by Suburban.

- (9) Suburban claims that, "In the course of questioning Mr. Puican on recross, Suburban intended to use Columbia's cost for its New Home Solutions Program, make reasonable adjustments arrived at through the course of questioning Mr. Puican to account for the difference in Columbia's and Suburban's size, and use that data as a benchmark, or yardstick, to establish a range of what Suburban's proposed DSM might cost." Suburban argues that it was prejudiced by not being able to offer evidence on the potential cost of its proposed DSM program, when it attempted to do so through the recross of Staff witness Puican. Such a claim is peculiar, as there were numerous points, both in advance of the hearing and during the hearing other than during the recross of Staff witness Puican, at which Suburban could have offered such evidence, which would have been appropriate.

In all Commission complaint proceedings, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Public Util. Comm.*, 5 Ohio St.2d 189 214 N.E.2d 666 (1996). As the complainant in this case, Suburban is the party with the burden of proof and Suburban's direct case in chief would have been the most appropriate place for such evidence. In advance of the hearing, Suburban could have prefled direct testimony of multiple witnesses, including an expert witness who could have provided testimony on the subject of the potential cost of Suburban's proposed DSM program. Suburban also could have introduced exhibits through which the testimony of those witnesses could explore such costs. In this case, Suburban prefled the direct testimony of only one witness, Mr. Pemberton, who provided no direct testimony on the subject. In addition, Suburban could have included, within Mr. Pemberton's direct testimony, information on the potential cost of Suburban's proposed DSM program; however, Suburban limited Mr. Pemberton's prefled testimony to five

pages, none of which include any information illustrating the potential cost of Suburban's proposed DSM program. Further, even though Suburban elected to not provide such evidence in its direct case in chief, it could have attempted to ask Staff witness Puican questions regarding the potential cost of Suburban's proposed DSM program during its initial cross examination of Staff witness Puican; however, Suburban chose to not attempt this line of questioning at that point in the hearing. Instead, Suburban waited until its recross of Mr. Puican to inappropriately attempt to put on the record, information that should have properly been provided much earlier in the hearing process. Lastly, notwithstanding the ruling by the presiding examiner at issue here, nothing prohibited Suburban from making a proffer of evidence on the costs of Columbia's DSM program, following the ruling. Again, Suburban made no such proffer. These procedural failings by Suburban during the hearing were the product of its own making and do not demonstrate that Suburban was prejudiced in any way during the hearing. Moreover, the ruling does not represent an abuse of discretion by the presiding examiner.

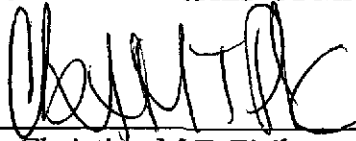
- (10) Accordingly, the reviewing examiner finds that Suburban has failed to demonstrate either that the ruling represents a new or novel question or that it is a departure from past precedent; thus, the appeal should not be certified. In light of this finding, it is not necessary to further review the arguments raised as to whether there is a need for an immediate determination to prevent prejudice or expense. Therefore, the request for certification of the interlocutory appeal filed by Suburban should be denied.

It is, therefore,

ORDERED, That Suburban's application for review and motion for certification is denied. It is, further,

ORDERED, That a copy of this entry be served all parties of record in this docket.

THE PUBLIC UTILITIES COMMISSION OF OHIO

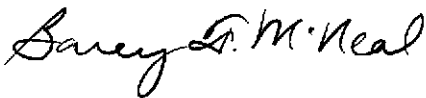


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Secretary