

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF THE SELF-COMPLAINT)	
OF SUBURBAN NATURAL GAS COMPANY)	
CONCERNING ITS EXISTING TARIFF)	CASE NO. 11-5846-GA-SLF
PROVISIONS)	

SUBURBAN NATURAL GAS COMPANY'S POST-HEARING BRIEF

Suburban Natural Gas Company ("Suburban") filed its self-complaint under O.R.C. § 4905.26 alleging, generally, that the status quo is unjust and unreasonable since a much larger competitor, Columbia Gas of Ohio, Inc. ("Columbia"), has a demand-side management rider ("DSM") in its tariff but Suburban does not. An evidentiary hearing was held on June 12, 2012. The Attorney Examiner on June 20, 2012 granted Suburban's motion to file a post-hearing brief.

Standard Under O.R.C. § 4905.26

O.R.C. § 4905.26 provides, in pertinent part:

Upon complaint in writing against any public utility by any person, firm, or corporation, . . . that any rate, fare, charge, toll, rental, schedule, classification, or service, . . . is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, . . . and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.

O.R.C. § 4905.26. The *sine quo non* of a proceeding under O.R.C. § 4905.26 is whether the status quo is just and reasonable. *See Ohio Bell Tel. Co. v. Public Utilities Com.*, 17 Ohio St. 2d 45, syllabus ¶ 2 (1969). After finding that Suburban had stated reasonable grounds for its self-complaint, the Commission explained that Suburban's obligation here is to demonstrate "that its current rates, charges,

and tariff are unjust, unreasonable, insufficient, or inadequate and that not having a DSM rider in its tariff is inequitable and unjust to Suburban and all of its customers.” March 7, 2012 Entry, ¶ 4.

Ohio’s Policy As To Natural Gas Services

The people of Ohio, through the General Assembly, have defined Ohio’s policy as to natural gas services in O.R.C. § 4929.02. Among other things, Ohio’s policy is to:

1. Promote the availability of unbundled and comparable natural gas services that provide consumers with the supplier, price, terms, conditions, and quality options they elect;
2. Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices;
3. Encourage innovation and market access for cost-effective demand-side natural gas services;
4. Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;
5. Promote an expeditious transition to the provision of natural gas services in a manner that achieves effective competition;
6. Facilitate additional choices for the supply of natural gas for residential consumers; and
7. Promote an alignment of natural gas company interest with consumer interest in energy efficiency and energy conservation.

See O.R.C. § 4929.02 (2)-(4); (6)-(7); (11)-(12). Succinctly, Ohio’s policy is to promote competition in the natural gas industry to give consumers choice via a flexible regulatory environment. *See id.*

The Status Quo And Suburban’s Need For A DSM In Its Tariff

Columbia has over a million customers in sixty-one of Ohio’s eighty-eight counties. *See* Testimony of Stephen E. Puican (“Puican Testimony”), Tr. 84:9-13. It has a DSM program in its tariff. Columbia Gas of Ohio, Inc., Tariff, Seventh Revised Sheet No. 28.¹ Participation in Columbia’s DSM program increased in 2011 and is expected to increase in 2012. *See* Puican Testimony, Tr. 42:22-43:3. Columbia has provided \$8.8 million in rebates to residential customers. *See id.* at 42:9-17. Suburban

¹ Two other companies have DSMs, too. *See* East Ohio Gas Company Tariff, Second Revised Sheet No. DSM 1; Vectren Delivery of Ohio, Inc. Tariff, Sheet No. 46, Third Revised Page 1 of 1 (“Energy Efficiency Funding Rider”).

must compete with Columbia in this environment, as local distribution companies do not have exclusive territories and must compete for load. *See id.* at 86:19-24.

Suburban's President, David L. Pemberton, Jr., explained that since Columbia has an opportunity to provide incentives through its DSM program that Suburban cannot, Suburban may not get even an opportunity to compete for new load. Testimony of David L. Pemberton, Jr. ("Pemberton Testimony"), Tr. 10:11-18. Since customers looking to locate in an area in which Suburban and Columbia compete look first at the companies' tariffs, Suburban may not be approached to provide service since it does not have a DSM in its tariff and Columbia does. *See id.* at 22:12-16. It is therefore important for Suburban to have a DSM in its tariff because it may not even get called and given an opportunity to compete without it. *See id.* at 23:13-19. If Suburban *does* get an opportunity to compete, a builder will choose Suburban's much larger competitor – Columbia – due to the incentives it can provide that Suburban cannot. *See id.* at 10:21-24. Thus, Suburban is currently at an immediate competitive disadvantage when competing for new load. *See id.* at 12:17-21. In short, Suburban cannot effectively compete with Columbia without a DSM. *See id.* at 12:7-21.

Such is not hypothetical. Suburban has had circumstances where it has not extended facilities or made other investments to compete for new load because, once there, it is not competitive without a DSM. *See id.* at 12:25-13:10. For example, a large retailer, Menards, is building a new facility on State Route 23. *See id.* at 18:3-19. There are 388 contiguous acres in the vicinity that would include residential consumers who would benefit from a DSM. *See id.* In fact, Suburban expects a significant number of residences to be drawn to the area based on the commercial development. *See id.* at 30:10-15. But Suburban would not be competitive to serve such new builds without a DSM. *See id.* at 19:10-19. Accordingly, not having a DSM has deterred, and is a deterrent to, Suburban making investment and seeking to increase load by serving additional residential customers. *See id.* at 31:3-8.

The impact on Suburban and its customers is significant. Suburban suffers economic loss. *See id.* at 32:6. If Suburban cannot serve additional residential customers, existing customers' relative capacity charges increase. *See id.* at 31:12-18. Loss of customers, or not being able to serve additional customers, also increases existing customers' relative rates. *See id.* at 31:19-25. Existing customers benefit through lower rates when Suburban adds more customers. *See id.* at 16:6-8. Such benefits do not accrue to existing customers only upon a rate case – based on his twenty-one years of experience competing with Columbia, Pemberton explained that increasing throughput takes the need for Suburban to seek a rate-increase into the future, thereby benefiting all customers. *See id.* at 16:18-23.

Although Columbia has chosen to offer a portfolio of demand-side management programs, Pemberton explained that Columbia's New Home Solutions program is what gives it a market advantage over Suburban. *See id.* at 13:17-21; 14:5-10; 15:3-5. Suburban in its business judgment has therefore chosen to seek authority to replicate only Columbia's New Home Solutions program since that, among Columbia's portfolio of programs, is what is detrimental to Suburban's growth and competitiveness. *See id.* at 32:20-24. Under its proposed DSM program, Suburban would provide the same services that Columbia does pursuant to its New Home Solutions program. *See id.* at 27:3-4. Since it cannot forecast what precise components of its New Home Solutions program Columbia will offer on any given project, Suburban needs flexibility in connection with its proposed program – but will offer nothing more than what Columbia does. *See id.* at 29:20-30:2; 30:3-6. If Suburban cannot determine what DSM services Columbia is offering to a particular homebuilder because the homebuilder will not provide the information, Suburban will conclude that the homebuilder does not want to do business with Suburban. *See id.* at 28:3-11. Suburban wants a competitive environment – “nothing more, nothing less.” *See id.* at 27:14-15. Suburban is quite comfortable with a competitive environment because “history would show that a smaller company can equally compete with a larger company, *if given the same*

opportunities to provide the same like services.” See id. at 24:3-6 (italics added); see also id. at 14:1; 21:22-25 (Suburban wants a level playing field).

In its efforts to obtain authorization to offer its proposed DSM, Suburban is being proactive so as not to lose business that it otherwise would have competed for. *See id. at 22:6-8.* Although the housing market has been in a slump, it is picking up this year. *See id. at 20:17-21:4.* In that light, Suburban anticipates being approached about providing DSM services similar to Columbia’s. *See id.* In Suburban’s business judgment, it does not want to wait until it is harmed through loss of business due to not having a DSM – it is “wanting to be given the armor to begin with and to be on equal footing.” *See id. at 22:20-25.* Staff “can understand [Suburban’s] rational. It does appear as an isolated issue that that puts them at a disadvantage.” Puican Testimony, Tr. 38:4-7.

Staff Applies Wrong Standard In Evaluating Suburban’s Proposed DSM

As described above, the Commission explained in its March 7, 2012 Entry in this case that Suburban’s burden is to show “that its current rates, charges, and tariff are unjust, unreasonable, insufficient, or inadequate and that not having a DSM rider in its tariff is inequitable and unjust to Suburban and all of its customers.” Entry at ¶ 4; *see also* O.R.C. § 4905.26. And it is axiomatic that Commission orders must be lawful and reasonable. O.R.C. § 4903.13. Staff applied an inappropriate, arbitrary standard in reaching its recommendation on Suburban’s proposal. Staff’s recommendation, if adopted by the Commission, will therefore result in an unlawful and unreasonable order.

In opposing Suburban’s proposal, Staff explained that it is primarily concerned with the precedent that will be set if Suburban’s proposal is accepted. Puican Testimony, Tr. 54:8-9. Staff described the precedential issues as a “very big consideration.” *Id. at 55:20-21.* In fact, Staff conceded that, in their mind, the issue is not whether the status quo is just and reasonable, but the precedential issue. *See id. at 55:20-21.* Putting a gloss on the standard they are applying here, Staff explained that their charge was whether the status quo is *so* unreasonable that it requires what they believe to be

unprecedented Commission action. *See id.* at 55:13-15.² Indeed, when questioned about Staff's recommendation not comporting with O.R.C. § 4929.02, Staff explained that "the larger picture issues override the very narrow shoe-horning that [Suburban is] trying to put of this program, this competitive response program, into that particular statute" *Id.* at 69:18-70:5. Staff believes that the "larger picture overrides those considerations" in O.R.C. § 4929.02. *Id.* at 70:7-8. And according to Staff, the "larger picture" is the precedent they are concerned about setting – "[w]hether the Commission will now begin to accept competitive response proposals." *Id.* 70:9-12. In point of fact, the standard Staff applied to evaluating Suburban's proposed DSM is supported neither by the Commission's Entry, O.R.C. § 4906.26, nor any other law. Thus were the Commission to adopt Staff's views, the only result is an unlawful and unreasonable order. *See* O.R.C. § 4903.13.

That inevitable result is underscored by Staff's arbitrary, unreasonable tests. Staff asserted that they had not seen any demonstration that Suburban's lack of a DSM is an issue of such a "critical nature." Puican Testimony, Tr. 71:23-72:2.³ But Staff could not say what would be necessary to establish the "critical nature" they are looking for. *See id.* at 72:3-11. Further, Staff asserted that not enough customers will benefit from Suburban's proposal, but they could not say how many customers must benefit in order for Suburban's proposal to pass muster and they have no idea how Suburban's customers feel about the proposal. *See id.* at 89:11-20; 79:20-23. And while asserting that only a small

² No legal precedent has been cited by Staff. Staff did mention a matter involving an application filed by Dominion East Ohio Gas that Staff did not support. But Dominion withdrew its application. Tr. at 54:23-25. Thus, the outcome there has no precedential value here. And although Staff asserted that the Commission has never approved a rider proposed, in their mind, to meet competition, they do not know if the Commission has ever addressed a circumstance where, as here, its own regulations have given one natural gas company an advantage over another. *See id.* at 94:2-11. In fact, if anything is unprecedented, it is Staff's opposition to Suburban's proposed DSM. Staff has never submitted testimony opposing a natural gas company's proposed DSM program. *See id.* at 93:23-94:1.

³ This notwithstanding the Menards situation discussed above or that Suburban, in seeking a DSM, initially filed an application not for an increase in rates, met with Staff and Legal to discuss its efforts, then filed a self-complaint, appeared at the evidentiary hearing, Pemberton testified about Suburban's need for a DSM, and Staff conceded that Pemberton knows Suburban's business and its needs better than Staff. Tr. 73:23-74:2.

number of customers could participate in Suburban's proposed program, Staff conceded that they do not know how many customers could participate. *See id.* at 46:15-23.⁴

In opposing Suburban's proposal, Staff applied a standard unsupported by law and arbitrary, unreasonable tests. Were the Commission to adopt Staff's position, the inevitable result will be an unlawful, unreasonable order contrary to O.R.C. § 4903.13.

All Suburban Customers Will Benefit From Suburban's Proposed DSM

Pemberton testified during the evidentiary hearing succinctly to the benefits that all customers will reap were Suburban to have a DSM. *See, e.g.,* Pemberton Testimony, Tr. at 31:3-8 (not having DSM deterrent to investment and increasing load); *id.* at 31:12-18 (existing customers' relative capacity charges increase where Suburban unable to increase load); *id.* at 31:19-25 (existing customers' relative rates increase if customers lost or unable to serve new customers); *id.* at 16:6-8 (existing customers benefit through lower rates when more customers added); *id.* at 16:18-23 (rate case not a condition precedent to existing customers benefiting from additional load).

In their prepared testimony, Staff conceded that nonparticipating customers will benefit from lower rates due to increased throughput upon a subsequent rate case. Prepared Testimony of Stephen E. Puican, Staff Exhibit 1, at 5:16-18. During the evidentiary hearing, Staff confirmed that nonparticipating customers would benefit from lower rates due to increased load. Puican Testimony, Tr. 52:19-53:6. No doubt, according to Staff, that an increase in throughput results in decreased rates for everyone, all else equal. *See id.* at 52:10-13. Further, Staff agrees with Pemberton that increased throughput results in lower fixed costs, which will result in lower rates upon a subsequent rate case. *See*

⁴ Once again, the arbitrary, unreasonable nature of Staff's view is underscored by assertions that Suburban's shareholders could fund a DSM program. Tr. 43:22-44:1. Staff acknowledged that they were not saying that such a result is fair, just that Suburban is not prohibited from providing DSM programs because Suburban shareholders could pay for them. *See id.* at 83:9-18. In short, Staff's position is that Columbia – with over a million customers in sixty-one of Ohio's eighty-eight counties – gets to have a ratepayer funded DSM program but Suburban does not. *See id.* at 44:2-5. Staff agreed that if the Commission were to adopt their position, customers would be deprived of a ratepayer funded DSM option. *See id.* at 43:8-12. Notwithstanding the notion of a shareholder-funded program, by any reasonable measure, adopting Staff's position would deprive customers of any DSM option.

id. at 53:13-21. And the new residences built with the benefit of Suburban's proposed DSM will have energy efficient measures in them, thus encouraging energy efficiency. *See id.* at 89:2-5. Staff acknowledged that Columbia's two primary justifications for its DSM – a DSM reviewed and approved by the Commission – were energy conservation and lower bills. *See id.* at 47:13-17; 52:3-5. Accordingly, Suburban's proposed DSM will result in the very same benefits as those asserted by Columbia and used as justification for its DSM program.⁵ Importantly, Staff concedes that DSM programs have additional benefits above and beyond energy conservation and lower bills. *See id.* at 92:2-12.

Staff's Position Is Antithetical To Ohio's Stated Policy As To Natural Gas Service

In addition to Staff and Pemberton's thoughts on the benefits of Suburban's proposed DSM program, it is important to recognize that the people of the State of Ohio, through their elected representatives, have already identified policies that benefit consumers and listed them in O.R.C. § 4929.02. Staff's recommendation must be measured against O.R.C. § 4929.02.

One such policy is recognizing the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment. O.R.C. § 4929.02(6). Staff's recommendation here does not foster flexible regulatory treatment. *See* Puican Testimony, Tr. 58:2-20.⁶ Another such policy is promoting an alignment of natural gas company interest with

⁵ Any distinction between Staff's view and Pemberton's view is a distinction without a meaningful difference. The distinction involves when the benefits to nonparticipating customers will accrue. Staff asserts only upon a subsequent rate case. Pemberton testified that the benefits will accrue immediately. In either case, there can be no doubt but that nonparticipating customers will benefit and it makes no sense to prohibit Suburban from laying the foundation now. As Staff agreed, if the Commission approves Suburban's proposal, Staff would be able to evaluate the cost/benefit of the program as the method for recovering the costs for the program – a rider – is structured similarly to Suburban's current IRP rider. Tr. at 53:23-54:5; 88:6-9. And if Staff determines that the program is unmerited, it can be terminated upon a customer complaint or *sua sponte* by the Commission. *Id.* at 99:4-14.

⁶ Staff repeatedly asserted that Suburban is not really proposing a DSM since its proposal is not the same as Columbia's in that it does not involve a stakeholder group or a portfolio approach. *See* Tr. at 78:4-6; 82:22-25; 88:6-9. Thus according to Staff, there is one way and one way only to do a DSM program – have a stakeholder group and a portfolio approach. Not the stuff of flexible regulatory treatment. Superfluous, too. The customers and groups making up Columbia's stakeholder group did not intervene here notwithstanding that they had an opportunity to and knew of Suburban's proposed DSM program. *See id.* at 44:5-45:2; 45:4-24. Or, as Pemberton explained, there is no reason to replicate Columbia's stakeholder group since "the time and effort has already been looked into as to the feasibility and correctness of the demand-side management rider . .

consumer interest in energy efficiency and conservation. O.R.C. § 4929.02(12). Although Suburban is seeking to offer the same DSM services as Columbia for new home construction and such services promote energy efficiency and conservation, Staff nonetheless thinks their opposition is consistent with O.R.C. § 4929.02(12). Puican Testimony, Tr. 59:8-23; 89:2-5. Regarding facilitating additional choices for supply of natural gas for residential consumers, *see* O.R.C. § 4929.02(3) and (11), Staff acknowledged Pemberton's testimony that not having a DSM is a deterrent to achieving this objective, but could not say if Staff's position furthers this objective or not. *See* Puican Testimony, Tr. 63:17-23. But Staff later acknowledged that if the Commission adopts Staff's position, residential consumers will be deprived of a choice for a natural gas provider. *See id.* at 65:4-66:4. As Staff's position relates to promoting effective competition, *see* O.R.C. § 4929.02(7), Staff acknowledged that Columbia's investment and participation in its DSM program has increased and that it has paid over \$8.8 million in rebates to residential customers, but stuck by their assertion that opposing Suburban's DSM does not thwart effective competition. Puican Testimony, Tr. 66:5-25. Perhaps conceding the inherent awkwardness in taking that position, Staff asserted that its opposition is based on a "wider view," so effective competition is a "secondary consideration to the larger consideration of do we really want to have the Commission open up a whole new category of competitive response situations" *Id.* at 67:18-68:1. Staff did not deny that its opposition was antithetical to encouraging market access for DSM services, *see* O.R.C. § 4929.02(4), instead saying that Staff "cannot look at this in just a very

. [meeting with stakeholders would be] duplicative and not a cost that [Suburban] would want to pass on to our customers, since it's already been decided what's fair and not fair" Pemberton Testimony, Tr. 15:12-16:2. To the degree that "stakeholder" input is important to Staff, Suburban reiterated, and Staff agreed, that Suburban sought authority from the Commission in its self-complaint to provide notice to its customers of the proposed DSM program, solicit customer comments for Staff's consideration, and alert customers to the option of actually intervening in this case. *See* Puican Testimony, Tr. 74:6-24; 76:23-77:3-19; *see also id.* at 80:15-23 (O.R.C. § 4905.26 requires, under the circumstances here, notice and solicitation of customer input). Since such notice would be sent to Suburban's *actual* customers, rather than a purportedly representative "stakeholder" group, as in Columbia's case, Suburban's proposal is superior. Staff, however, was not sure if customers' input would be "meaningful," and said that the Commission does not base its decisions on customer comments. *See id.* at 77:4; 77:11-19. In fact, Staff sees no particular value to giving notice and soliciting input. *See id.* at 81:12-16. So on the one hand, Staff is critical of Suburban's DSM proposal for its lack of a stakeholder group, but on the other hand, when faced with Suburban's superior method of obtaining input from stakeholders – its actual customers – Staff says "no."

narrow little construct within that language in the statute. [Staff has] to look at the big picture” Puican Testimony, Tr. 68:16-23. Staff explained how their opposition stacks up with promoting comparable natural gas services to retail consumers to give them options, *see* O.R.C. § 4929.02(2), by noting that that provision was “probably the biggest one that opened up our markets to choice” – but they are nonetheless unwilling to extend the same principle to Suburban’s proposed DSM plan to give retail consumers choice. *See* Puican Testimony, Tr. 69:3-11.

When measured by Ohio’s stated policy as to natural gas service, Suburban’s proposal meets all of the relevant elements of that policy, and Staff’s position fails them. Considered that way, there can be no doubt that Suburban has met its burden as stated by the Commission and Staff’s opposition is meritless.

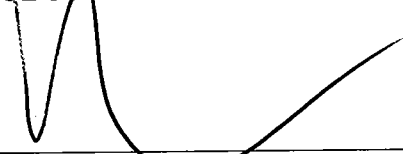
Conclusion

As stated by the Commission, the issue in this case is whether Suburban’s “current rates, charges, and tariff are unjust, unreasonable, insufficient, or inadequate and that not having a DSM rider in its tariff is inequitable and unjust to Suburban and all of its customers.” Entry, ¶ 4. Staff’s recommendation is not based on this standard, and its recommendation is therefore inapposite. Thus, were the Commission to adopt Staff’s position, the inevitable result is an unlawful and unreasonable order. Further, Pemberton’s testimony based on twenty-one years of competing with Columbia is that Suburban’s current rates, charges, and tariff are unjust, unreasonable, insufficient, and inadequate and that not having a DSM rider in its tariff is inequitable and unjust to Suburban and all of its customers. Pemberton explained succinctly that Suburban and all of its customers will benefit from its proposed DSM. And when measured by Ohio’s stated policy as to natural gas service, Suburban’s proposal meets all of the relevant elements of that policy, and Staff’s position fails them – Suburban has met its burden.

The Commission should find that Suburban’s current tariff is unjust and unreasonable as it does not contain a DSM and approve Suburban’s proposed modification to its tariff.

Respectfully submitted,

SUBURBAN NATURAL GAS COMPANY

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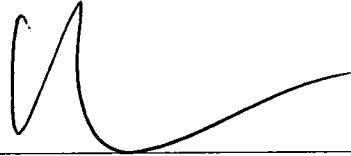
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief was served upon the following as a courtesy, via U.S. Mail, postage prepaid, on this 9 day of July 2012.

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William J. Michael

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Summary: Brief Suburban Natural Gas Company's Post-Hearing Brief electronically filed by William J. Michael on behalf of Suburban Natural Gas Company