BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

MOTION FOR INTERIM EMERGENCY RELIEF
(EXPEDITED RULING REQUESTED)

In accordance with R.C. 4905.04, 4905.06 and 4909.16, and as set forth in Count 6 of the related Verified Complaint, Suburban Natural Gas Company (Suburban) respectfully requests that the Commission issue an order for emergency relief directing Columbia Gas of Ohio, Inc. (Columbia) to do all of the following:

1. Immediately cease and desist from extending its duplicative distribution main east from Braumiller Road along Cheshire Road in Delaware County, Ohio;

2. Immediately cease and desist from offering financial incentives to developers and builders in Suburban's operating area;

3. Account for and suspend payment of any such financial incentives already offered or accepted; and

4. Separately account for all construction costs incurred in extending distribution mains and facilities into Suburban's operating area, with such costs being subject to ratemaking disallowance pending the outcome of this proceeding.

As explained in the supporting memorandum, Suburban will suffer immediate and irreparable injury if the requested emergency relief to preserve the status quo is not granted. Because time is of the essence, Suburban requests an expedited ruling on this motion, in accordance with Rule 4901-1-12 (C).

MEMORANDUM IN SUPPORT

This motion is being filed concurrently with a Verified Complaint. The Complaint details how Columbia is using its builder incentive program, not to promote energy conservation or demand-side management, but to build duplicative gas facilities and lure customers away from Suburban's system and onto Columbia's. This is not speculation. Columbia's contractors are currently on site and ready to break ground on a main extension project *on the opposite side of the same street where Suburban has had mains in place for years.*

Columbia is violating both the letter and spirit of a 1995 Stipulation that was supposed to *permanently* end the promotion of financial incentives in areas served, or readily-capable of being served, by Suburban. The Commission understood the serious harm that these practices had caused to Suburban. That is why it retained jurisdiction "to continue to review the companies' practices in this area. Nothing in our acceptance of this stipulation should be interpreted as precluding the Commission's ability to review and limit the practices or take other remedial actions when the activities described in the tariff are undertaken in a manner which violates Section 4905.33, Revised, Code, or other pertinent sections of the Revised Code." Case No. 93-1569-GA-SLF et al., Finding and Order (Jan. 18, 1996) ¶ 10.

The authority to issue an order carries with it the authority to enforce an order, and the Commission's enforcement authority includes the power to grant interim emergency relief. The circumstances here not only justify interim emergency relief; they require it. Not one more improper incentive payment should be offered or made. Not one foot of unnecessary pipe should

be laid. The Commission should preserve the status quo by entering an order requiring Columbia to immediately cease the illegal and improper conduct alleged in the Complaint.

ARGUMENT

The Commission has broad supervisory authority to regulate public utilities. R.C. 4905.04, 4905.06. This authority includes the power to investigate and determine the "regulations, practices, and service to be installed, observed, used, and rendered," and the exercise of this authority requires the public utility to "obey such order and do everything necessary or proper to carry it into effect." R.C. 4905.37.

The Commission may act without notice or a hearing "to prevent injury to the business or interests of the public utility or of any public utility." R.C. 4909.16. "[I]n the case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility." *Id*. Such an order "shall take effect at such time and remain in force for such length of time as the commission prescribes." *Id*.

The Commission has historically considered requests for emergency relief by considering the same factors courts apply in deciding whether to grant injunctive relief. *See AT&T Ohio v. Dayton Power & Light Co*., Case No. 06-1509-EL-CSS, Entry (March 28, 2007) ¶¶ 7-8, 13. These factors are: (i) the likelihood of success on the merits; (ii) whether irreparable harm will occur if emergency relief is not granted; (iii) whether third parties will be unjustifiably harmed if emergency relief is not granted; and (iv) whether granting emergency relief is in the public interest. *See id*. at 9 ¶ 7, *citing Proctor & Gamble Co. v. Stoneham*, 747 N.E.2d 268, 273 (Ohio App. 2000). No one factor is dispositive; rather, the four factors must be balanced. *City of Cleveland v. Cleveland Elec. Illum. Co.*, 684 N.E.2d 343, 350 (Ohio App. 1996). As shown below, each of these factors weigh decidedly in favor of granting emergency relief.

A. Suburban will likely succeed on the merits.

Suburban must show that there is "a substantial likelihood" that it will prevail on the merits of the underlying claim. *Proctor & Gamble*, 747 N.E.2d at 273. The allegations in the Verified Complaint establish a strong showing of the likelihood of success.

As detailed in the Complaint, Columbia is improperly leveraging its existing builder incentive programs to gain a cost advantage over Suburban—a ploy not permitted by the Commission's prior orders or Columbia's tariffs. If Columbia offers a builder several hundred (or even thousands) of dollars in rebates and incentives, but Suburban does not (and it does not), there is an obvious incentive for the builder to choose Columbia as the natural gas provider. Columbia has no skin in the game with the incentives it offers; whatever discount it extends to the builder is recovered through Columbia's DSM Rider. Suburban does not have such a rider, so any attempt to match Columbia's incentives would be financially ruinous to both the company and its ratepayers.

The Complaint details how Columbia's activities are unreasonable and unlawful in several different respects. As alleged in Count 1, Columbia's EnergyCrafted Homes program is "substantially similar to" the programs Columbia agreed not to offer in areas served or capable of being served by Suburban. (Verified Compl. ¶ 27.) Columbia is therefore violating the 1995 Stipulation and subsequent order entered in Case No. 93-1569-GA-SLF.

Count 2 demonstrates Columbia's violation of the December 21, 2016 Opinion and Order approving its DSM Program. In a series of orders dating back to 2008, Columbia represented its builder incentive program as an offering available "in" or "within" Columbia's service territory. (Verified Compl. ¶¶12-14.) Granted, natural gas companies do not have service "territories" in the same sense as electric or water utilities (*See* R.C. 4933.25 (water and sewer utilities required

to obtain certificate of public convenience and necessity); R.C. 4933.83(A) (establishing exclusive service territories to electric suppliers)), and the very nature of a builder incentive program entails service to previously unserved locations. But in offering incentives to builders in areas already served by Suburban, and extending distribution mains that duplicate Suburban's existing mains in order to serve those builders, Columbia is operating well outside its "service territory" under any reasonable definition.

Counts 3 and 4 establish Columbia's violation of both its DSM Rider and Main Extension Tariff, both of which are being used by Columbia to underwrite its wrongful conduct. And in Count 5, Suburban ties Columbia's violations of Commission orders and its tariff to statutory provisions that prohibit Columbia's predatory, unlawful behavior.

The obligations in the 1995 Stipulation, the findings in the Commission's prior orders, the conditions in Columbia's DSM Rider and Main Extension Tariff, the requirements of the Ohio Revised Code—all of these prohibit incentives and discounts in areas where Suburban also serves customers. It is not even a close question. Columbia's anticipated defense—that the Commission has approved Columbia's DSM program—is itself a violation. The incentive program Columbia is operating to compete against Suburban is not the program it advertised or that the Commission approved.

A showing of success on the merits on just one count in the Complaint would support the request for emergency relief. Here there is a substantial likelihood that Suburban will prevail on the merits on *all* counts.

B. Suburban will continue suffering irreparable harm if emergency relief is not granted.

Columbia's unlawful actions do not just foretell future harm; Suburban is currently being harmed, and irreparably so.

Columbia's last attempt to put Suburban out of business by aggressively promoting financial incentives was addressed in Case No. 93-569-GA-SLF et al. (Verified Compl. ¶7.) The parties agreed to a comprehensive stipulation to settle competitive issues in overlapping service areas. (*Id*. ¶¶ 6-10.) Suburban released Columbia from all claims arising under its builder incentive program, with the expectation that Columbia would not later resurrecnt "any program substantially similar to such programs" in areas served or readily capable of being served by Suburban. (*Id*. ¶ 9.) Suburban reasonably relied on this commitment. The Commission retained jurisdiction to enforce this commitment if necessary. (*Id*. ¶ 10.) Suburban planned its system accordingly to meet the needs of both present and future customers.

Suburban's investment in the Glen Ross subdivision and adjacent areas over the past three decades is now in jeopardy. Suburban currently serves over 550 customers in Glen Ross, and had expected over time to serve nearly 500 more. (*Id*. ¶ 16.) Columbia is now in the process of duplicating Suburban's facilities by laying mains on the other side of Cheshire Road; a precursor to cherry-picking new construction. (*Id*. ¶¶ 19-23.) At least one builder has agreed to take service from Columbia—not because the builder intends to build homes to a greater energy-efficiency standard, but to get the free money Columbia is offering. (*Id*. ¶¶ 19, 21.) It is only a matter of time before other builders follow suit.

With each illegal payment offered or made, with each permit granted, with each foot of main placed in the ground, Columbia further encroaches upon Suburban's territory and takes away new business, leaving Suburban with no alternative but to seek legal resource and remedies to protect its rights. The Commission should not wait until resolution of this dispute to restrain and reverse patently impermissible activities. By then, it will be too late to unscramble the egg. Suburban's right to take discovery, present its case at hearing, and enforce a final order will not

provide complete or necessary relief in a timely manner; only through the emergency relief will Suburban be spared further immediate and irreparable harm.

C. No third parties will be unjustifiably harmed if emergency relief is not granted.

The third factor requires consideration of whether "the potential injury that may be suffered by [the defendant] will not outweigh the potential injury suffered by [the plaintiff] if the injunction is not granted." *City of Cleveland*, 684 N.E.2d at 350. Columbia will suffer no injury, if emergency relief is granted.

Suburban seeks only to preserve the status quo—that the parties continue to operate under the terms of the 1995 Stipulation and that Columbia limit the utilization of available financial incentives to builders and developers in areas that it currently serves. If Columbia ultimately prevails on the merits, it can proceed with the main extensions. If the injunction is not granted however, and Suburban prevails on the merits, more illegal financial incentives will be offered, more permits will be granted, more pipes will be laid, more harm will occur to Suburban's business relationships and reputation—potential injuries, the extent of which, Suburban cannot be made whole simply by an award of money damages.

D. Granting injunctive relief is in the public interest.

The interest of the public weighs strongly in favor of granting emergency relief. In the absence of emergency relief, illegal financial incentives will be offered, unnecessary permits will be applied for, and duplicative, redundant gas facilities will be installed. Columbia must incur costs to conduct these impermissible activities—costs that, absent Commission action, would be borne by Columbia's ratepayers. The design of efficient gas facilities, the deterrence of uncompetitive behavior, and the avoidance of imprudent and unreasonable costs are all in the public interest.

E. Expedited treatment of this request for emergency relief is warranted.

Pursuant to OAC 4901-1-12, any motion may include a specific request for an expedited ruling. The grounds for the expedited ruling are the same as the grounds for the emergency relief: Suburban will suffer immediate and irreparable harm, if Columbia continues to utilize improper incentives to obtain new business in areas that Suburban serves. The Commission should act to restrain the illicit activities as quickly as possible before those activities cause further harm to Suburban's business relationships and reputation. The expedited ruling for emergency relief, once granted, will preserve the status quo in Suburban's service territory, while the administrative process runs its course and resolution of this dispute can be achieved.

CONCLUSION

If ever a case justified emergency relief, it is this one. Suburban cannot stress enough how important it is that the Commission take immediate action. Columbia will undoubtably deny and defend the allegations against it, as is its right. But the ultimate merits of Suburban's claims are not the issue. The issue is whether Suburban has presented credible allegations that Columbia is engaging in improper or unlawful conduct that threatens immediate harm. The Verified Complaint establishes this in spades. Granting emergency relief will harm no one. Denying it could be ruinous for Suburban.

Date: October 20, 2017

Respectfully Submitted,

/s/ *Mark A. Whitt*

Mark A. Whitt
Christopher T. Kennedy
Rebekah Glover
WHITT STURTEVANT LLP
88 E. Broad St., Suite 1590
Columbus, Ohio 43215
614.224.3911
whitt@whitt-sturtevant.com
kennedy@whitt-sturtevant.com
glover@whitt-sturtevant.com

Stephen D. Martin
MANOS, MARTIN & PERGRAM CO, LPA
50 North Sandusky Street
Delaware, Ohio 43015
740.362.1313
740.362.3288 (fax)
smartin@mmpdlaw.com

Attorneys for Complainant

(All counsel consent to service by e-mail)

CERTIFICATE OF SERVICE

This document was filed via the Commission's e-filing system on October 20, 2017. Parties who have subscribed to electronic service will receive notice of this filing from the Commission. Service is also being made this day to the following persons by email:

Stephen B. Seiple sseiple@niscource.com

s/ Mark A. Whitt

Summary: Motion for Interim Emergency Relief and Request for Expedited Treatment electronically filed by Ms. Rebekah J. Glover on behalf of Suburban Natural Gas Company