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.	)	

COMPLAINANT'S MEMORANDUM CONTRA MOTION TO DISMISS

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I. INTRODUCTION

If a credible argument could be made that Suburban has not alleged reasonable grounds for complaint, Columbia would have filed a motion to dismiss at the earliest opportunity. It did not. Columbia's first filing in this case was a memorandum contra Suburban's motion for emergency relief. Columbia's lead argument was that a hearing had to be held before the Commission could act on the motion or Complaint.[1] Columbia got what it asked for. Not only is this case set for hearing, *Columbia agreed to the procedural schedule and hearing date*. Having made its bed, Columbia must now lie in it.

The attorney examiner has already acknowledged that there are reasonable grounds for complaint. "Upon review of the pleadings," the attorney examiner decided an evidentiary hearing is necessary.[2] The pleadings reviewed included Columbia's response to Suburban's motion for emergency relief. Columbia's motion to dismiss raises the very same arguments. Both filings wrongly assert that Suburban's allegations are a subterfuge for gaining an "exclusive service territory."[3] Both filings claim that the 1995 Stipulation does not restrict Columbia's predatory business practices in any way.[4] Both filings imply that the Commission has blessed Columbia's practices by approving its demand-side management (DSM) program.[5] In short, Columbia's motion to dismiss offers nothing new. The attorney examiner considered these arguments but determined that a hearing is necessary. Now that the hearing is scheduled, it would be reversible error to dismiss this case for failure to state reasonable grounds for complaint. *Allnet Comm.*

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[1] Memorandum Contra Motion for Emergency Relief at 4-5 (Oct. 27, 2017) (Mem. Contra Emerg. Motion).
[2] Entry ¶ 9 (Nov. 20, 2017).
[3] Mem. Contra Emerg. Motion at 3; Memorandum in Support of Motion to Dismiss at 1 (Jan. 5, 2018) (Mem. Supp.).
[4] Mem. Contra Emerg. Motion at 6-7; Mem. Supp. at 10.
[5] Mem. Contra Emerg. Motion at 8-9; Mem. Supp. at 11-13.

Servs. v. Public Util. Comm., 32 Ohio St.3d 115, 118 (1987) (reversing and remanding order dismissing complaint, where complaint had been scheduled for hearing before the motion to dismiss was filed).

Each count of the Complaint alleges facts that, if true, support a finding that Columbia has violated Ohio law. Therefore, reasonable grounds for complaint have been stated. Columbia's motion to dismiss represents both a belated and improper collateral attack of the Entry setting this case for hearing, as well as an improper request to prematurely resolve disputed issues of law and fact. Columbia's motion must be denied.

II. FACTS

Much could be said about Columbia's "background" narrative but need not be said here. The issue is whether Suburban has properly and adequately alleged reasonable grounds for complaint *in this case*. The Complaint revolves around Columbia's use of builder incentives in a manner that violates the 1995 Stipulation, the Commission's DSM Orders, and several Ohio statutes. Suburban will limit its discussion accordingly.

A. Columbia's builder incentives.

Columbia spends tens of millions annually on DSM programs, and earns a return "of" and "on" these expenditures. A large portion of DSM spending consists of cash payments to developers and builders. Columbia doled out over $11 million to the 70 home builders who received incentives between 2012 and 2015; an average of $157,000 per builder.[6] Columbia

[6] Mem. Supp. at 7; *Annual Application for Adjustment to Rider IRP and Rider DSM Rates*, Case No. 17-2374-GA-RDR, Notice of Intent, PFN Exhibit 7D, Schedule DSM-2 (Nov. 28, 2017) (2017 DSM update).

recently sought to expand the program by offering even more incentives to more builders, but its request was denied.[7]

Columbia's current builder incentive program is called "EfficiencyCrafted Homes." The gist of the program involves a cash payment to homebuilders who build to a certain level of energy efficiency, as measured by a HERS score (Home Energy Rating System). Columbia originally required homes to exceed a HERS benchmark by 50% to become eligible for incentive payments, but has since lowered the threshold to 30%.[8] Columbia's application in its 2016 DSM proceeding does not disclose whether builders who meet this standard are entitled to incentive payments, or whether Columbia is free to grant or withhold incentives at its discretion.

As the required efficiency gain has decreased from 50% to 30%, incentive program expenditures have markedly increased. Columbia spent just over $400,000 on builder incentives in 2010.[9] By 2013, that figure jumped to nearly $3.5 million, and has since hovered between $2.5 to $3 million annually.[10] Nearly $20 million is budgeted for the 2017-22 program period.[11] Program funds go directly to the builder, not the customer, and Columbia neither requires nor monitors whether the builder passes along the payment to the home purchaser.[12]

Apart from high-level figures of overall program expenditures, little else is known about Columbia's implementation and administration of the EfficiencyCrafted Homes program. There

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[7] *Application for Approval of Demand Side Management Programs*, Case No. 16-1309-GA-UNC, Transcript of Hearing at 361-62 (Sept. 30, 2016) (2016 DSM Hearing); Opinion and Order ¶ 115 (Dec. 21, 2016) (2016 DSM Order).
[8] Mem. Supp. at 5, 7.
[9] 2017 DSM Update, PFN Exhibit 7D, Schedule DSM-2.
[10] *Id*.
[11] Case No. 16-1309-GA-UNC, Application, Appendix B, Table 3 (June 10, 2016) (2016 DSM Application).
[12] 2016 DSM Hearing at 317-18.

is no public information about how much Columbia has paid to each participating builder, either in total or per home. Columbia considers this information confidential.[13] All that is known publicly is that payment levels differ depending on the new home HERS score: "The more efficient the home, the higher the rebate."[14] Oddly enough, however, Columbia has never verified whether the builders receiving incentives are actually building homes that are more efficient than those of builders who do not receive incentives.[15]

Regardless of whether the EfficiencyCrafted homes program offers the DSM benefits advertised, Columbia *also* views the program as a means to establish and preserve an advantage over competitors. In its most recent DSM proceeding, Columbia asked for, and received, confidential treatment of information about participation rates and specific incentive payment amounts, out of concern that competitors might "copy Columbia's Program for their own economic benefit" or "use this information to benchmark their own programs that may directly compete with Columbia."[16] If Columbia's objective were merely to promote construction of energy efficiency homes, it would not go out of its way to keep its incentive payments secret.

Columbia's ratepayer-funded incentives give it a competitive advantage over Suburban. Consider the following example: A proposed 100-home development sits on land reachable by both Columbia and Suburban. Columbia offers to pay the builder $1000 per new home built. The Commission rejected Suburban's proposal to offer the very same incentive, so Suburban cannot match the offer.[17] All other things being equal, the builder's choice is to go with Columbia and

[13] *Id*. at 318-20; *see also* Case No. 16-1309-GA-UNC, Columbia Motion for Protective Order (Sept. 9, 2016).
[14] 2016 DSM Hearing at 315.
[15] *Id*. at 371-72.
[16] Case No. 16-1309-GA-UNC, Motion for Protective Order at 7-8.
[17] *Self-Complaint of Suburban Natural Gas Co.*, Case No. 11-5846-GA-SLF, Opinion and Order (Aug. 15, 2012).

receive $100,000, or go with Suburban and receive $0. For any builder focused on its bottom line (which is to say, most builders) the choice is obvious.

Builders do not build homes out of a sense of social consciousness. They build homes to make money. The difference between what it costs to build a home and what the home sells for represents the builder's profit. Whatever societal or economic benefits are achieved by energy efficiency are of no consequence to a builder's bottom line; a builder doesn't pay the gas bills after the home is sold. Plainly and simply, Columbia's EfficiencyCrafted Homes program lowers builders' costs and increases their profit—at absolutely no cost to the builders receiving incentive payments.[18] In an environment where Columbia can offer these incentives but Suburban cannot, the economic advantage is clear. That is why the 1995 Stipulation bars these incentives in areas where Columbia competes with Suburban.

B. The 1995 Stipulation.

The EfficiencyCrafted Homes program is essentially the same program Columbia had in place in the late 1980s and early 1990s. The only material difference is that instead of Columbia's shareholders bearing the cost of these incentives, the costs have since been shifted to ratepayers.

Enough has already been said about the 1995 Stipulation and surrounding circumstances that a detailed narrative is unnecessary. As alleged in the Complaint (and confirmed in the documents cited therein), the Stipulation was to "resolve all contested issues" in a series of complaint cases over Columbia's use of incentives to compete with Suburban.[19] These contested issues included Columbia's use of builder incentives.[20] Columbia is simply mistaken to argue

[18] 2016 DSM Hearing at 363.
[19] Complaint ¶ 9; 1995 Stipulation at 2.
[20] Complaint ¶ 9.

that the Stipulation "says nothing about eliminating duplication of facilities or preventing lawful competition."[21] As discussed later, the Stipulation addresses these issues directly.[22]

In approving the Stipulation, the Commission made clear that it would enforce continuing compliance. "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."[23]

If Columbia offered builder incentives outside of the area involved after execution of the 1995 Stipulation, Suburban is not aware of it. It appears that Columbia "officially" resurrected its incentive programs in 2010.[24] Suburban had no knowledge of incentives being offered in the areas of Delaware County it serves until 2017, more than 22 years after execution of the Stipulation.[25]

III. ARGUMENT

The Commission must afford an evidentiary hearing "if it appears that reasonable grounds for complaint are stated[.]" R.C. 4905.26. In conducting the hearing, "the parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." R.C. 4905.26. The statute prohibits the summary disposition of cases. "A hearing is required where it appears that reasonable grounds for complaint are stated." *First Toledo Corp. v. Toledo Edison Co*., 02-2665-EL-CSS, Entry ¶ 9 (June 11, 2003). *See also Dennewitz v. Dominion East Ohio*, 07-517-GA-CSS, Entry ¶ 5 (Oct. 24, 2007) ("There is no

[21] Mem. Supp. at 11.
[22] *See also* Complaint ¶¶ 9, 27.
[23] *Self-Complaint of Columbia Gas of Ohio, Inc.*, Case No. 93-1569-GA-SLF *et al*., Finding and Order ¶ 10 (Jan. 18, 1996).
[24] 2017 DSM Update, PFN Exhibit 7D, Schedule DSM-2.
[25] Complaint ¶ 19.

summary judgment provision in the Commission's [Rules of Practice]."); *Miller v. Baltimore & Ohio R.R.*, Case No. 80-1109-RR-CSS, Entry ¶14 (Apr. 15, 1983) ("[S]ince a public hearing is necessary for the resolution of this matter, the motion for summary judgment is denied.").

To meet the "reasonable grounds" standard, a complaint "must contain allegations which, if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful." *Ohio Consumers' Counsel v. Dayton Power & Light Co.*, Case No. 88-1085-EL-CSS, Entry (Sept. 27, 1988). In applying the standard, "all material allegations of the complaint must be accepted as true and construed in favor of the complaining party." *Ohio Consumers' Counsel v. Dominion Retail Inc.,* Case No. 09-257-GA-CSS, Entry ¶ 7 (July 1, 2009). *See also* Lucas Cty. Comm'rs v. Pub. Util. Comm'n, 80 Ohio St. 3d 344, 347 (1997) ("[I]n reviewing commission dismissals for failure to state a claim, we also assume the allegations of the complaint to be true."). Under the Commission's rules, factual claims do not need to be stated with particularity unless discrimination is alleged. O.A.C. 4901-9-01(B).

Scheduling a hearing presupposes that reasonable grounds for complaint have been stated, regardless of whether the scheduling order says so expressly. *Western Reserve Transit Auth. v. Public Util. Comm'n*, 39 Ohio St. 2d 16, 18 (1974). The Commission cannot find that reasonable grounds for complaint have been stated, set the case for hearing, but subsequently dismiss the complaint for failure to state reasonable grounds. *Id*.

Each count of Suburban's complaint alleges facts that, if true, support a finding that Columbia has violated Ohio Revised Code Title 49. Therefore, reasonable grounds for complaint have been properly stated under R.C. 4905.26.

A. Count 1 alleges reasonable grounds for violation of the 1995 Stipulation.

Count 1 alleges that Columbia is violating the 1995 Stipulation. If the Complaint alleges facts to support a finding that Columbia has done something the Stipulation does not allow, or

not done something the Stipulation requires, then reasonable grounds for complaint have been stated for Count 1.

Columbia argues that the 1995 Stipulation "says nothing about eliminating duplication of facilities or preventing lawful competition."[26] Columbia either hasn't read the Stipulation, or its mischaracterization is deliberate. The Stipulation memorializes "the Parties' resolution of their competitive dispute and rationalization of their distribution systems."[27] Section A describes "the transfer of certain customers and facilities" necessary to "rationalize" and separate a tangled web of distribution lines.[28] Section B describes "the modification of certain tariff provisions" to eliminate language about discounting house lines and services lines when competing against each other.[29] The "Settled Claims" defined in the Stipulation expressly include claims about Columbia's then-existing builder incentive programs and "any program substantially similar to such programs."[30] Thus, issues concerning "duplication of facilities" and "competition" not only *do* appear in the text of the Stipulation, but are the very issues giving rise to it.

Granted, the 1995 Stipulation does not state, "Thou shalt not offer builder incentives." Nor did it need to. One of Suburban's underlying claims in the cases settled by the Stipulation was that Columbia's builder incentives represented an unlawful and anticompetitive discount from tariffed rates. In releasing this claim, Suburban did not agree that Columbia could resume builder incentives. If it had, the Stipulation would have said so, and Columbia's revised tariff would have authorized the incentives. The Stipulation says nothing of the sort, nor did the revised tariff authorize incentive programs in any way.

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[26] Mem. Supp. at 11.
[27] 1995 Stipulation, 2d Whereas clause.
[28] *Id*., 5th and 6th Whereas Clause and pp. 3-7.
[29] *Id*., 6th Whereas Clause and p. 8.
[30] *Id*., Exhibit 7 at 2; *see also* Complaint ¶¶ 9, 27.

Likewise, the Stipulation does not state, "Thou shalt have no duplication of facilities." Again, such language was unnecessary. The Stipulation describes the asset and customer transfers necessary to segregate the parties' respective systems. The performance of these settlement obligations eliminated the duplication of facilities.

As alleged in the Complaint, Columbia is violating the Stipulation by resuming incentive programs that the Stipulation does not authorize, and duplicating Suburban's facilities to serve the recipients of these incentives.[31] The Stipulation required Columbia not only to stop offering incentives, but to *stay stopped*. The parties agreed not just to separate their systems, but to *stay separated.* To suggest the Stipulation allows Columbia to turn around and offer the *same* incentives and *again* duplicate Suburban's facilities would render the Stipulation meaningless. Indeed, if the purpose of the 1995 Stipulation was *not* to prevent a reoccurrence of the activities that led to the Stipulation in the first place, then what was it? Columbia has no answer. To say the Stipulation "speaks for itself" merely begs the question, and the failed attempt to distinguish the "text" of the Stipulation from its "purpose and intent" a distraction.[32]

Columbia tries to sidestep the allegations in Count 1 by inventing a straw man. It argues that the Stipulation does not establish "general service territory restrictions."[33] Suburban has not alleged that it did. Columbia's repeated assertions that Suburban is jockeying for an "exclusive service territory" are completely fabricated, and Columbia's entire discussion of state and federal antitrust laws completely misses the mark.[34] The Complaint does not allege that *any* geographic area is off-limits to Columbia. The gist of the Complaint is that Columbia cannot use incentive

[31] Complaint ¶¶ 27-29.
[32] Mem. Supp. at 10-11.
[33] *Id*. at 10.
[34] *See id*. at 13-15.

programs to gain a foothold in areas where Suburban is currently serving or readily capable of serving. Suburban is happy to compete with Columbia on a level playing field, as it has for several decades.

The 1995 Stipulation does not permit Columbia to offer incentives in areas where it competes with Suburban. Period. Shrugging off the express terms of the Stipulation as Suburban's "unilateral view" and "not supported by the text" does not change the words in this document.[35] Reasonable grounds for complaint are stated in Count 1.

B. Counts 2 and 3 allege reasonable grounds for violating the DSM Orders.

Counts 2 and 3 allege that Columbia is violating the DSM Orders by offering incentives in areas that are not "in" or "within" its "service territory."[36] Suburban did not invent the quoted term; they are terms Columbia used in its 2008 and 2011 DSM applications, and ratified in its 2016 application.[37] The Order in Columbia's 2016 DSM proceeding specifically references the EfficiencyCrafted Homes program "in Columbia's service territory," and rejected Columbia's request to expand the program to more builders.[38] If the DSM Orders are logically read as imposing or recognizing a geographic limitation on the offering of builder incentives, then Columbia is in violation of law by exceeding this limitation. Reasonable grounds for complaint are stated for Counts 2 and 3.

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[35] *Id*. at 10.
[36] Complaint ¶¶ 32-37.
[37] Case No. 08-833-GA-UNC, Application at 25 (July 1, 2008) (referencing builder incentives "in Columbia's territory"); Case No. 11-5028-GA-UNC, Application at 26-28 (Sept. 9, 2011) (builder incentives "in" and "within" Columbia's "service territory"); Case No. 16-1309-GA-UNC, Columbia Initial Comments at 2 (Aug. 15, 2016) (DSM Program will provide benefits "throughout Columbia's territory.").
[38] 2016 DSM Order ¶ 16.

Columbia first argues that gas utilities do not have a statutory "service territory," so there is no way Suburban can state reasonable grounds for complaint that Columbia has violated a "service territory" restriction.[39] Columbia misses the point. The Complaint does not allege that Columbia is violating a *statutory* service area restriction. Counts 2 and 3 are based on Columbia's representation in its DSM applications that it would offer programs "in" or "within" Columbia's "service territory."[40] The stipulation in the 2016 DSM proceeding adopted the application "without modification," and the Commission, in turn, approved the stipulation. If the *application* is logically read as establishing a self-imposed geographic limitation that Columbia has not honored, then Columbia is in violation of the DSM stipulation and approval order.

Columbia then argues, "[n]o party in the 2016 Columbia DSM case argued that Columbia should be prohibited from offering energy efficiency incentives to home builders in areas capable of being served by other natural gas companies."[41] This only shows that the Commission has *not* addressed whether incentives may be properly used to compete against gas utilities. Even if it had, such a prior ruling would *not* bar Suburban's Complaint. R.C. 4905.26 "is extremely broad, and would permit what might be strictly viewed as a 'collateral attack' in many instances." "*Western Reserve Transit Auth. v. Public Util. Comm'n*, 39 Ohio St. 2d 16, 18 (1974). In any event, Suburban is challenging Columbia's use of incentives now, and the issue is whether reasonable grounds for complaint have been stated. What other parties argued or did not argue in the 2016 DSM proceeding is irrelevant.

[39] Mem. Supp. at 12.
[40] Complaint ¶¶ 32-36.
[41] Mem. Supp. at 12.

Columbia's third and final argument is that the claims are "[in]consistent with Suburban's own past interpretation of the Commission's DSM Orders."[42] Columbia refers to Suburban's 2011 DSM self-complaint, where Suburban acknowledged that it competes with Columbia in certain areas in Delaware County. It is not at all clear how this acknowledgment is inconsistent with allegations that Columbia has violated the DSM Orders. Suburban has not alleged in this case, and did not allege in the 2011 proceeding, that Columbia may not compete with Suburban. Again, Columbia grossly mischaracterizes the Complaint.

Although it does not say so directly, Columbia seems to suggest that the Commission's DSM orders give it a free pass to extend incentives wherever and however it wishes, in any amount it wishes, or for any purpose it wishes. To read the DSM Orders that broadly would mean Columbia is exempt from statutory provisions prohibiting unfair and predatory practices—a conclusion that is both untenable and unlawful. *See Columbus S. Power Co. v. Pub. Util. Comm'n.*, 67 Ohio St. 3d 535, 535 (1993) ("It is axiomatic that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly."); *Lucas County Comm'rs v. Public Util. Comm'n*, 80 Ohio St.3d 344, 347 ("The Commission may exercise only that jurisdiction conferred by statute."). An otherwise lawful DSM program may be used to accomplish an unlawful end, and what is just and reasonable in some circumstances may not be just and reasonable in others. If the evidence shows that Columbia is extending incentives in areas where it is not authorized to extend them, or is extending incentives in authorized areas for the purpose of destroying competition, the DSM orders provide no defense.

Columbia had to have meant *something* when it represented to the Commission that it would offer incentive programs "in" or "within" its "service territory." This issue can only be

[42] *Id*.

resolved after discovery and an evidentiary hearing. Reasonable grounds for complaint under Counts 2 and 3 have been stated.

C. Count 4 states reasonable grounds for a violation of Columbia's Main Extension Tariff.

Columbia argues that Count 4 should be dismissed because it "asserts no facts."[43] Yes, it does. Suburban alleges, "Columbia is offering to, or has, agreed with builders or others to waive deposits or other charges required under the Main Extension Tariff."[44] That the allegation is based "[o]n information and belief" is immaterial. Commission complaints need not be pled with particularity. O.A.C. 4901-9-01(B). Nor does a complainant need to attach documentary evidence to "support" each allegation in a complaint, as Columbia wrongly suggests.[45] Suburban's duty at the pleading stage is to properly *allege* a violation, and it has done so by identifying the tariff requirements and how they have been violated.

The claim that Suburban "could not support the claim in Count 4 when it filed its Complaint and cannot do so now" is simply false, and the "admission" Columbia refers to is a gross mischaracterization of both Columbia's discovery request and Suburban's response.[46] The specific question to Suburban was: "Please describe in detail *any and all* actions taken by Columbia that Suburban alleges violated Columbia's Main Extension Tariff and the specific tariff provisions implicated by each action." (Emphasis added.)[47] This interrogatory specifically asks for a comprehensive, all-inclusive list of "any and all" actions that violated the tariff. Knowledge of *some* action is not knowledge of "any and all" actions—Suburban doesn't know

[43] Mem. Supp. at 15.
[44] Complaint ¶ 45.
[45] *See* Mem. Supp. at 16.
[46] *Id*.
[47] The discovery request and response are included as Exhibit 1 to Columbia's motion.

what it doesn't know. Because Columbia's discovery request essentially asked Suburban to provide information known and knowable only by Columbia, Suburban responded:

> As alleged in Paragraphs 44 and 45, the tariff language in Columbia's Extension of Distribution Mains provision requires "deposits" for main extensions in certain circumstances. Suburban believes that Columbia has offered or agreed to waive or reduce these deposits, in addition to or in lieu of other builder incentives. Suburban cannot "describe in detail [any] and all actions taken by Columbia" until the conclusion of discovery.

It is absurd to claim that reasonable grounds for complaint cannot be stated for Count 4 because Suburban has not identified "any and all" ways in which Columbia has violated its tariff. Suburban has alleged violations, and this is sufficient to state reasonable grounds for complaint—regardless of whether discovery ultimately reveals 1 violation or 100.

Columbia's discovery responses bear mentioning here, because they support Suburban's allegations. Columbia produced several "Residential Performance Commitment" agreements obligating the company to "construct, install and or improve certain facilities," under terms and conditions deemed "competitively sensitive, proprietary in nature and confidential."[48] The "deposit required" by the applicant under these agreements is "$0.00." If the economics of these agreements are such that a deposit *should* have been collected, then this evidence would be sufficient to establish a tariff violation.

Columbia also produced agreements titled "Line Extension Agreement Residential Conversion," which show that a deposit *was* required. If the deposit amount was less than it should have been, then this, too, would support a finding that Columbia violated its tariff.

[48] Suburban is happy to furnish these documents on request. They are not attached here because the documents may raise confidentially issues that the parties have not yet addressed.

Columbia admits that it has discretion in calculating the amount of deposits "depending on the circumstances."[49] The tariff requirement to collect deposits for expenditures not "justified" cannot be read as giving Columbia absolute, unfettered discretion to determine whether to charge a deposit or how much to collect. Where discretion is granted, it must be exercised reasonably. *See, e.g., Application of Ormet Primary Aluminum Corp*., 129 Ohio St. 3d 9, 16 (2011) (Commission may approve "reasonable arrangement" under R.C. 4905.31 over objection of electric utility). Whether Columbia has exercised its discretion reasonably is a mixed question of law and fact that can only be resolved through discovery and a hearing.

Like all the other counts in the Complaint, whether Suburban ultimately *proves* the allegations in Count 4 is beside the point. Suburban has pled that Columbia is discounting or waiving deposits, in violation of its tariff. This allegation states reasonable grounds for complaint. And while under no obligation to cite evidence supporting this claim, Suburban has done so.

D. Count 5 states reasonable grounds for statutory violations.

Columbia does not have much to say about Count 5. It simply states that this count is based on the same allegations as Counts 1 through 4, and since those counts should be dismissed, this one should be, too.[50] Columbia fails to account for the fact that *even if* reasonable grounds for complaint had not been stated for Counts 1 through 4, the statutory violations alleged in Count 5 survive independently.

Suburban does not need to prove that Columbia violated the 1995 Stipulation, DSM Orders, or its Main Extension Tariff for the Commission to find that Columbia nonetheless failed to charge its tariff rates, in violation of R.C. 4905.32; that Columbia extended free or reduced

[49] Mem. Supp. at 15.
[50] *Id*. at 8.

service for the purpose of destroying competition, in violation of R.C. 4905.33; that Columbia has extended undue preferences and advantages, in violation of R.C. 4905.35; or that Columbia has *implemented* an otherwise lawful DSM program in violation of state policy and R.C. 4929.08. Suburban has properly *alleged* violations of these statutes, and resolving these claims is inherently fact-intensive. *See City of Canton v. Pub. Util. Comm.,* 63 Ohio St. 2d 76, 82 (1980); *In re East Ohio Gas Co.*, 144 Ohio St.3d 265, 2015-Ohio-3627, ¶ 28. Reasonable grounds for complaint are stated for Count 5.

IV. CONCLUSION

Suburban has satisfied the standard under R.C. 4905.26. If it had not, the attorney examiner would not have scheduled this case for hearing. And since a hearing has been scheduled, the Commission cannot now dismiss the Complaint for failure to state reasonable grounds. Columbia's motion to dismiss must be denied.

Date: January 22, 2018

Respectfully submitted,

/s/ *Mark A. Whitt*

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CERTIFICATE OF SERVICE

This document was filed via the Commission's e-filing system on January 22, 2018. 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:

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s/ Mark A. Whitt

Summary: Memorandum Contra Motion to Dismiss electronically filed by Ms. Rebekah J. Glover on behalf of Suburban Natural Gas Company