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.	)	

REPLY IN SUPPORT OF COLUMBIA GAS OF OHIO, INC.'S MOTION TO DISMISS

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1. Introduction

The Commission and Columbia Gas of Ohio, Inc. ("Columbia") have been here before. Every few years for the last decade, Suburban Natural Gas Company ("Suburban") has come to the Commission complaining that Columbia is competing unfairly.[1] In its 2007 and 2013 complaints, Suburban alleged Columbia was violating a 1995 Stipulation[2] by serving customers in Delaware County that Suburban wanted to serve. And in a 2011 self-complaint, Suburban alleged that the Commission needed to let it offer Demand-Side Management ("DSM") incentives to new homebuilders in Delaware County to compete with Columbia. But Suburban never received the relief it sought. In the 2007 and 2013 proceedings, Suburban ultimately withdrew its complaints before hearing. And in the 2011 proceeding, the Commission dismissed Suburban's complaint because Suburban had not shown that any alleged inequity between Columbia and Suburban was related to Suburban's lack of a DSM program.

Now, like clockwork, Suburban is back with another complaint case against Columbia. And, like before, Suburban is arguing that Columbia is: (1) unlawfully serving customers Suburban wants to serve; and (2) unfairly offering those customers DSM incentives Suburban cannot match. In its Complaint, Suburban alleged that Columbia's offering of DSM incentives to homebuilders in Delaware County violates the 1995 Stipulation and the Opinion and Order in Columbia's 2016 DSM proceeding. It further alleged that Columbia's extension of mains to subdivisions Suburban wants to serve violates the 1995 Stipulation.

Yet, in response to Columbia's Motion to Dismiss, Suburban now admits that neither the 1995 Stipulation nor the 2016 DSM Opinion and Order contain the prohibitions Suburban said they contained. Instead, Suburban is reduced to arguing that the 1995 Stipulation *must* bar Columbia from duplicating its facilities and offering DSM incentives in Delaware County, or else Suburban would not have signed it. And Suburban now admits it is *asking* the Commission to restrict Columbia's ability to offer DSM incentives in areas Suburban would like to serve, rather than attempting to enforce an existing restriction. Suburban insists that the Commission must allow it to collaterally attack the 2016 DSM order pending on rehearing and add new restrictions to the order.

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[1] *See generally* Columbia Motion to Dismiss at 4-7.

[2] *See* Complaint, Exhibit A (1995 Stipulation).

For the reasons stated in Columbia's Motion to Dismiss and below, Counts 1 through 3 of Suburban's Complaint fail to state reasonable grounds for complaint and should be dismissed without hearing. Suburban should not proceed to hearing on an argument that a document attached to its Complaint (the 1995 Stipulation) contains language it clearly does not contain. And Suburban should not be permitted to collaterally attack the 2016 DSM Opinion and Order in this complaint case, simply to raise fact and policy arguments that were already considered and addressed in the 2016 DSM proceeding and Suburban's 2011 self-complaint case.

Suburban's Complaint also asserts several broad and general categories of wrongdoing. Count 4 alleges that Columbia is either waiving or offering to waive, for "builders or others," some kind of charge required by Columbia's Main Extension Tariff. And whereas Count 5 appears to assert that the allegations in Counts 1 through 4 violate various Ohio statutes (R.C. §§ 4905.32, 4905.33, 4905.35, and 4929.08(B)), Suburban now insists those allegations are free-standing accusations that rise or fall on their own merits. Suburban asserts that broad accusations that Columbia is failing to charge unidentified tariff rates, giving unidentified customers unspecified "free or reduced service[s] for the purpose of destroying competition," extending unspecified "undue preferences and advantages," and otherwise implementing its DSM program "in violation of state policy"[3] are all proper and sufficient allegations for a complaint and entitled to full discovery and hearing. Commission precedent says otherwise. Counts 4 and 5 of Suburban's Complaint do not state reasonable grounds for complaint and should also be dismissed without hearing.

Suburban attempts to avoid any reckoning over the insufficiency of its claims by asserting that Columbia requested a hearing on the Complaint. It then tells the Commission that it has no choice but to permit the Complaint to proceed to hearing since a hearing date has been set. Neither is true.[4] Suburban's attempt to convince the Commission to ignore Columbia's motion is not surprising given that Suburban's inconsistent and legally untenable positions cannot survive even a modicum of legal scrutiny or any standard of "reasonableness." For the reasons set forth in Columbia's motion to dismiss and below, Columbia urges the Commission to follow through on its stated intention in Case No. 13-1216-GA-CSS to "expeditiously move [this third Suburban complaint] to a final conclusion" and dismiss it without hearing.

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[3] Suburban Memo Contra Motion to Dismiss ("Suburban Memo Contra") at 15-16.

[4] See *infra*, section 2.4 at 16-17.

2. Law and Argument

The Commission has warned complainants against minimizing the "reasonable grounds" requirement in R.C. § 4905.26. The Commission has held that, "if [a] complaint is to meet the 'reasonable grounds' test, it must contain allegations, which, if true, would support the finding that the * * * practices * * * complained of are unreasonable or unlawful. To permit a complaint to proceed to hearing when a complainant has failed to allege one or more elements necessary to a finding of unreasonableness or unlawfulness would improperly alter both the scope and burden of proof. Thus, in considering the sufficiency of [a] complaint, one must bear in mind that there is more involved here than just a legal nicety."[5] The Commission has further warned that, "in deciding whether reasonable grounds have been stated which would warrant the setting of a hearing, the Commission relies upon the coherence of the complaint and argument in its support."[6] And, the Commission need not accept a complainant's legal conclusions as true,[7] or accept its descriptions of documents attached to the pleadings; the Commission may review those attachments when weighing a motion to dismiss.[8]

Here, even a quick review of the 1995 Stipulation attached to Suburban's Complaint disproves the allegations in Count 1 of the Complaint. Another quick review of the Commission's 2016 DSM Opinion and Order disproves Counts 2 and 3, as Suburban now concedes. And Counts 4 and 5 contain nothing but broad allegations and legal conclusions, neither of which is sufficient to proceed to hearing. Suburban attempts to camouflage these failings behind a web of contradictory comments and procedural arguments, as shown below. But the Commission should see through the façade Suburban has constructed. Suburban fails to state reasonable grounds and its Complaint should be dismissed.

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[5] *In re Consumers' Counsel v. West Ohio Gas Co.*, Case No. 88-1743-GA-CSS, Entry, 1989 Ohio PUC LEXIS 104, *16 (Jan. 31, 1989).

[6] *In re Consumers' Counsel v. The Dayton Power & Light Co.*, Case No. 88-1085-EL-CSS, Entry, 1988 Ohio PUC LEXIS 893, at *10 (Sep. 27, 1988).

[7] *See, e.g., Ettayem v. Land of Ararat Invest. Group, Inc.*, 10th Dist. Franklin No. 17AP-93, 2017-Ohio-8835, at ¶ 20 ("The court need not, however, accept as true any unsupported and conclusory legal propositions advanced in the complaint.").

[8] *See In re Complaint of The Cincinnati Gas & Electric Company v. Licking Rural Electrification Inc.*, Case No. 01-17-GA-CSS, Entry, at ¶ 6 (Jan. 10, 2002).

2.1. Counts 1-3 of Suburban's Complaint do not state reasonable grounds for complaint regarding Columbia's DSM incentives.

> ***Suburban's Self-Contradictions: Then v. Now***
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> **Suburban (2012):**
>
> [Columbia] has a DSM program in its tariff. * * * Suburban must compete with Columbia in this environment, as local distribution companies * * * must compete for load. * * * 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. * * * Suburban is seeking to offer the same DSM services as Columbia for new home construction * * *.[9]
>
> **Suburban (2018):**
>
> Suburban had no knowledge of incentives being offered in the areas of Delaware County it serves until 2017 * * *. * * * Columbia is violating the DSM orders by offering incentives in areas that are not 'in' or 'within' its 'service territory.'"[10]

As referenced above and in the Motion to Dismiss, this complaint case is Suburban's second attempt to eliminate the competitive advantage it believes the EfficiencyCrafted® Homes program provides Columbia. In its 2011 self-complaint case, Suburban told the Commission it needed to be able to match Columbia's DSM offerings for new home construction in order to compete with Columbia for load (*see supra*). The Commission held Suburban had failed to "demonstrate any economic disadvantage by not having a DSM tariff" and denied Suburban's self-complaint.[11] Suburban is now back, arguing again that "Columbia's [DSM] incentives give it a competitive advantage over Suburban."[12] But this time, Suburban asserts Columbia is legally *prohibited* from offering those DSM incentives in areas where Suburban competes.[13]

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[9] *In re Self-Complaint of Suburban Natural Gas Co.*, Case No. 11-5846-GA-SLF ("*2011 Suburban Self-Complaint Case*"), Post-Hearing Brief at 2-3, 9 (July 9, 2012).

[10] Suburban Memo Contra at 6, 10.

[11] *2011 Suburban Self-Complaint Case*, Opinion and Order, at 7 (Aug. 15, 2012).

[12] Suburban Memo Contra at 4.

[13] *See* Complaint ¶¶ 32-33, 36.

Suburban confesses it has no substantive support for its position. It acknowledges "the very nature of a builder incentive program entails service to previously unserved locations."[14] It recognizes that Ohio natural gas utilities do not have statutory service territories.[15] It concedes the 1995 Stipulation does not explicitly prohibit Columbia from offering DSM incentives.[16] And it agrees "the Commission has *not* addressed whether [DSM] incentives may be properly used to compete against gas utilities."[17] Yet Suburban still argues that the Commission must allow it to take its challenges to Columbia's DSM incentives to hearing. As discussed below, none of Suburban's arguments against Columbia's EfficiencyCrafted® Homes program states reasonable grounds for complaint.

2.1.1. The 1995 Stipulation does not prohibit Columbia from offering DSM incentives to homebuilders in areas Suburban wants to serve.

Suburban's Self-Contradictions: Then v. Now

Suburban (2017):

[U]sing the [Efficiency]Crafted Homes program * * * in areas currently served by Suburban * * * [is] directly contrary to the 1995 Stipulation and the Finding and Order approving same.[18]

Suburban (2018):

Granted, the 1995 Stipulation does not state, "Thou shalt not offer builder incentives."[19]

Suburban first insists that the 1995 Stipulation required Columbia to stop offering any kind of incentives to new homebuilders, indefinitely, in areas that Suburban wants to serve.[20] But Suburban admits the Stipulation does not actually

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[14] Suburban Motion for Emergency Interim Relief at 5.

[15] *See* Suburban Memo Contra at 11.

[16] *See id.* at 8 ("Granted, the 1995 Stipulation does not state, 'Thou shalt not offer builder incentives.'").

[17] *Id.* at 11.

[18] Complaint ¶¶ 28-29.

[19] Suburban Memo Contra at 8.

[20] *See id.* at 8-9.

say that (*see supra*). The closest Suburban comes to identifying Stipulation language that supports its argument is a clause in an unsigned Release attached to the 1995 Stipulation,[21] in which Suburban said it:

> releases and forever discharges Columbia * * * from any and all claims * * * which the Releasor ever had or now has * * * relating to, or based on[,] the Buckeye Builder program, the Scarlet Builder program, the Gray Builder program, the High Volume Single Family Builder program, the Mark of Efficiency program, or any program substantially similar to such programs offered by [Columbia] * * * .[22]

Obviously, this is a release of existing claims, not a prohibition on any future conduct. But Suburban's argument rests not on the language *in* the Release, but the language that is *not* in the Release. Suburban argues that Columbia is barred from offering builder incentives because 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."[23] Ultimately, Suburban invites the Commission to *imagine* that the 1995 Stipulation contains a prohibition on new builder incentives because, according to Suburban, a Stipulation without such language would have served no purpose.[24]

Suburban's arguments fail for three reasons. First, Suburban's approach to stipulation interpretation is contrary to law and logic. A Stipulation must be interpreted according to what it says,[25] not what it doesn't say, and Suburban admits the 1995 Stipulation does not actually prohibit Columbia from offering builder incentives in areas Suburban would prefer to serve (*see supra*). To the contrary – the Stipulation actually modified Columbia's and Suburban's tariffs to allow those companies to provide or pay for customers' service lines, house pip-

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[21] *See id.* at 8 n.30.

[22] Complaint, Exhibit A (1995 Stipulation), Exhibit 7, Suburban Release at 1-2.

[23] Suburban Memo Contra at 8 (emphasis added).

[24] *See id.* at 9 (arguing, "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?").

[25] *See, e.g., In re Dayton Power & Light Co.*, Case No. 02-2779-EL-ATA *et al.*, Opinion and Order, at 12 (Sept. 2, 2003) (holding that "[t]he Commission will evaluate the terms of the stipulation as they appear on its face").

ing, and appliances.[26] Second, EfficiencyCrafted® Homes is not a "builder incentive" program like the ones listed in the Release. According to Suburban, those "builder incentives" offered "unlawful and anticompetitive discount[s] from tariffed rates."[27] The Commission-approved EfficiencyCrafted® Homes program provides rebates to builders of new homes, and is unrelated to any tariffed rates. And third, the Stipulation had a purpose, which it stated clearly: to "resolve all contested issues in Case No. 93-1569-GA-SLF and terminate the proceedings in that case."[28] Those contested issues did not involve DSM. As the Commission explained at the time, Columbia's self-complaint "only request[ed] an interpretation of a tariff provision and a determination of whether Columbia recently complied with the tariff provision."[29]

Thus, Count 1 of Suburban's Complaint does not state reasonable grounds for complaint. The prohibition on post-1995 DSM incentives that Suburban purports to rely on exists only in its imagination, and unavoidably contradicts the arguments Suburban made to this Commission in its 2011 self-complaint case. Columbia respectfully submits that Count 1 should be dismissed.

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[26] *See* Complaint, Exhibit A (1995 Stipulation) at 8; *In the Matter of the Self-Complaint of Columbia Gas of Ohio Concerning its Existing Tariff Provisions*, Case No. 93-1569-GA-SLF ("*1993 Self-Complaint Case*"), Entry, Finding and Order, at 3 (Jan. 18, 1996).

[27] Suburban Memo Contra at 8.

[28] Complaint, Exhibit A (1995 Stipulation), at 2.

[29] *See 1993 Self-Complaint Case*, Entry, 1993 Ohio PUC LEXIS 1097, at ¶ 8 (Dec. 6, 1993).

2.1.2. The 2016 DSM Opinion and Order does not prohibit Columbia from offering DSM incentives to homebuilders in areas Suburban wants to serve.

Suburban's Self-Contradictions: Then v. Now

Suburban (2017):

By offering and extending DSM programs and incentives to entities located outside its service territory, Columbia is in violation of the Commission's December 21, 2016 Opinion and Order in Case No. 16-1309-GA-UNC.[30]

Suburban (2018):

[T]he Commission has *not* addressed whether [DSM] incentives may be properly used to compete against gas utilities [in areas capable of being served by other natural gas companies].[31]

Like Count 1, Counts 2 and 3 of Suburban's Complaint rely on an unsupported legal fiction: that the Commission's 2016 Opinion and Order approving the continuation of Columbia's DSM program imposed a "geographic limitation on [Columbia's] offering of builder incentives" that cannot actually be found in the Commission's order or Columbia's DSM filings.

Suburban argues that the Commission's 2016 DSM Opinion and Order *can* be "read as imposing or recognizing a geographic limitation on the offering of builder incentives" because the Order "specifically reference[d] the EfficiencyCrafted® Homes program 'in Columbia's service territory,' and rejected Columbia's request to expand the program to more builders."[32] But, as Columbia previously explained, the references to "Columbia's service territory" were a response to an argument from the Office of the Ohio Consumers' Counsel ("OCC") that Columbia should not be permitted to provide DSM incentives to builders whose headquarters are outside the areas Columbia serves.[33] The Commission

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[30] Complaint ¶ 36.

[31] Suburban Memo Contra at 11 (emphasis in original).

[32] *Id.* at 10, citing *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs for its Residential and Commercial customers*, Case Nos. 16-1309-GA-UNC *et al.*, Opinion and Order ("*2016 DSM Opinion and Order*"), at ¶ 16 (Dec. 21, 2016). Columbia believes Suburban meant to cite ¶ 115 of the Order.

[33] *See* Columbia Motion to Dismiss at 12.

held that OCC's concerns were irrelevant, and that "[t]he key factor is that the *home* is located within Columbia's service territory and the *customer* is served by Columbia."[34] And the Commission did not bar Columbia from expanding the program to more builders, as Suburban mistakenly asserts. It simply held Columbia had failed to show that an "additional [proposed] incentive is needed to induce new home builders to participate * * *."[35] In other words, the Commission found the program already offered sufficient incentives to attract new home builders which, as Suburban concedes, are located "in previously unserved locations."[36]

Suburban ignores the context and plain meaning of the Commission's holding and, instead, proposes an alternative theory based on speculation and conjecture. First, Suburban assumes the Commission's order used the phrase "Columbia's service territory" because Columbia's DSM Application used that phrase.[37] Next, Suburban assumes Columbia used that phrase because Columbia was "establishing a self-imposed geographic limitation * * *."[38] Suburban does not explain what that "geographic limitation" is or point to any language in Columbia's Application that might shed light on the issue. Instead, Suburban insists the phrase "had to have meant *something*" and argues that its meaning "can only be resolved after discovery and an evidentiary hearing."[39]

Suburban cites no precedent for the proposition that the true meaning of a Commission opinion may be determined through "discovery and an evidentiary hearing" regarding the Application it approved. And for good reason; the Commission "speaks through its orders,"[40] and Suburban has acknowledged the Commission's 2016 DSM Opinion and Order says nothing on this topic (*see su-*

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[34] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand Side Management Program for its Residential and Commercial Customers*, Case Nos. 16-1309-GA-UNC *et al*, Opinion and Order ("*2016 DSM Opinion and Order*"), at ¶ 115 (Dec. 21, 2016).

[35] *Id.*

[36] Suburban Motion for Emergency Interim Relief at 5. Notably, Suburban never confronts the factual logic gap in its "service territory" argument—home builders in these unserved locations are "within" Columbia's service area by the time they construct homes that, only upon completion, may qualify for EfficiencyCrafted® Homes rebates if shown to meet energy efficiency standards.

[37] *See* Complaint ¶¶ 32-33; Suburban Memo Contra at 11.

[38] Suburban Memo Contra at 11.

[39] *Id.* at 12-13 (emphasis original).

[40] *2016 DSM Opinion and Order* at ¶ 107.

pra). Consequently, Suburban has no legal basis to argue that Columbia violated the order by offering new home DSM incentives in areas Suburban would prefer to serve. Suburban simply theorizes that the phrase "Columbia's service territory" must mean something other than "the areas where Columbia's customers are located" and then insists that it's entitled to explore this new theory through a complaint case. Counts 2 and 3 of the Complaint should be dismissed.

2.1.3. Suburban cannot use this complaint case to collaterally attack the orders in Suburban's 2011 self-complaint case and Columbia's 2016 DSM case.

Suburban's remaining arguments under Counts 2 and 3 effectively ask the Commission to reopen and reconsider Suburban's 2011 self-complaint and Columbia's 2016 DSM case. After acknowledging that the Commission's 2016 DSM Opinion and Order did not address whether Columbia may offer DSM incentives to home builders in areas capable of being served by other natural gas companies, Suburban states, for the first time, that it is "challenging Columbia's use of [such] incentives now * * *."[41] Suburban newly asserts that the Commission's 2016 DSM Opinion and Order is *ultra vires*, because "extending [DSM] incentives in authorized areas for the purpose of destroying competition" is contrary to unidentified "statutory provisions prohibiting unfair and predatory practices" and, thus, beyond the Commission's authority to allow.[42] Finally, it suggests (under Count 5) that offering DSM incentives in areas where Columbia competes with Suburban for load violates the state policy in R.C. § 4929.02, in contravention of R.C. § 4929.08.[43] In other words, Suburban seeks to argue that the 2016 DSM Opinion and Order is unfair, is contrary to the public interest, and violates important regulatory principles – the same assertions the Commission rejected when it denied Suburban's self-complaint and approved (with modifications)the stipulation in Columbia's 2016 DSM proceeding.

Suburban argues that all of this is permissible because complainants are allowed to "collaterally attack" prior rulings.[44] Although "R.C. 4905.26 *can* be used as a means of collateral attack on a *prior* commission proceeding[,]"[45] Sub-

[41] Suburban Memo Contra at 11.

[42] *Id.* at 12.

[43] *Id.* at 16.

[44] *See id.* at 11.

[45] *Complaint of City of Reynoldsburg v. Columbus S. Power Co.*, 134 Ohio St. 3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, at ¶ 65 (emphasis added).

urban is attacking a *pending* Commission proceeding on rehearing. If the Commission's intervention rules are to mean anything, the Commission cannot allow a public utility to ignore a Commission proceeding that may "adversely affect[ ]" it[46] (like the 2016 DSM proceeding) and, instead, file a parallel complaint case to raise its concerns. R.C. § 4901.13 gives the Commission "the discretion to decide how * * * it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort."[47] The Commission should not allow Suburban to duplicate Columbia's 2016 DSM case by attacking its results here, especially while the case is pending on rehearing.

Moreover, although "collateral attacks on prior Commission orders are not improper per se, * * * the Commission may, in the interest of judicial economy and efficiency, dismiss a complaint where the Commission has recently and thoroughly considered the subject matter of the complaint and the complainant alleges nothing new or different for the Commission's consideration."[48] The Commission has recently and thoroughly considered both Columbia's EfficiencyCrafted® Homes program *and* Suburban's argument that the program puts it at an unfair disadvantage. The Commission's 2016 DSM order found that EfficiencyCrafted® Homes "is an effective method to encourage the construction of energy efficient homes[,]" which "can provide long-term savings for the resident[s]."[49] It found that "limiting the number of incentives [under the program]" could cause "builders to forgo installing energy efficiency and conservation measures * * *."[50] And, more broadly, it found that "DSM programs that are cost-effective, have demonstrable benefits, and have a reasonable balance between reducing total costs and minimizing impacts to non-participant customers are beneficial to Ohio's * * * energy policy objectives."[51] Earlier, in Suburban's 2011 self-complaint case, the Commission considered and rejected Suburban's claims that it was "unfair[ ]" for Columbia to have a DSM program and Suburban not to

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[46] R.C. § 4903.221 (describing the statutory requirements for intervention in a Commission proceeding).

[47] *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982).

[48] *In re Complaint of Honecker v. Columbia Gas of Ohio, Inc. and American Elec. Power Co.*, Case No. 00-544-GE-CSS, Entry, ¶ 5 (Feb. 8, 2001).

[49] *2016 DSM Opinion and Order* at ¶ 115.

[50] *Id.*

[51] *Id.* at ¶ 127.

have one.[52] The Commission found Suburban had not demonstrated that it had lost "a single customer" to other natural gas companies that "offer[ed] DSM programs to residential builders; that "Columbia was economically advantaged" by its residential construction DSM incentive; or that "any alleged inequity between Columbia and Suburban was solely related to Suburban's lack of a DSM program, and not differences in the companies' rates, rate structures, size, * * * or a whole host of differences between Columbia and Suburban."[53] The Commission should not allow Suburban to relitigate these same points again in this complaint case.

As Columbia previously noted, Ohio "positively encourage[s]" competition among natural gas companies.[54] Suburban insists it is "happy to compete with Columbia" so long as it has "a level playing field."[55] But the Commission has already held that the field *is* level; DSM does not give Columbia an unfair advantage. The Commission should leave Columbia and Suburban to continue competing for customers in Delaware County, and reject Suburban's latest request to change the rules of the game.

[52] *2011 Suburban Self-Complaint Case*, Opinion and Order, at 7 (Aug. 15, 2012).

[53] *Id.* at 7-8.

[54] *In re Complaint of Suburban Natural Gas Co. v. Kalida Natural Gas Co., Inc.*, Case Nos. 92-1876-GA-CSS and 93-279-GA-ABN, 1993 Ohio PUC LEXIS 736, Entry, at *12 (Aug. 26, 1993).

[55] Suburban Memo Contra at 10.

2.2. Suburban has not stated reasonable grounds for complaint regarding Columbia's alleged "duplication" of Suburban's facilities.

Suburban's Self-Contradictions: Then v. Now

Suburban (2013):

[T]he [1995] Stipulation creates no * * * exclusive territories * * *. * * * Columbia may install mains, service lines, and any other infrastructure necessary to compete with Suburban in southern Delaware and northern Franklin Counties.[56]

Suburban (2017):

By extending its mains and proposed distribution lines into Suburban's operating area * * *, Columbia is violating the purpose and intent of the 1995 Stipulation * * *.[57]

Suburban (2018):

[T]he Stipulation does not state, "Thou shalt have no duplication of facilities."[58]

Suburban (2018):

Columbia is violating the Stipulation by * * * duplicating Suburban's facilities to serve the recipients of [its DSM] incentives.[59]

Suburban (2018):

Columbia's repeated assertions that Suburban is jockeying for an "exclusive service territory" are completely fabricated * * *.[60]

Columbia also moves to dismiss the portion of Count 1 alleging that Columbia is violating the 1995 Stipulation by duplicating Suburban's facilities – unless Suburban has already withdrawn the claim itself. As shown above, Subur-

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[56] *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 13-1216-GA-UNC ("*2013 Suburban Complaint Case")*, Memo Contra Columbia Motion to Dismiss, at 4-5 (June 25, 2013).

[57] Complaint ¶ 29.

[58] Suburban Memo Contra at 9.

[59] *Id.*

[60] *Id*.

ban has talked out of both sides of its mouth on this issue. In its 2013 complaint case against Columbia, Suburban swore the 1995 Stipulation leaves Columbia free to extend its facilities and compete with Suburban anywhere in Delaware County (*see supra*). In its initial pleadings in this case, however, Suburban asserted that the 1995 Stipulation bars Columbia from running mains parallel to Suburban's mains (*see supra*). And now, Suburban is back to a variation on its original position, insisting that it "is happy to compete with Columbia" in "areas where Suburban is currently serving or readily capable of serving" – just so long as Columbia does not offer DSM incentives in such areas.[61] It is unclear exactly what Suburban's position is, except that it believes it should be permitted to push this case through discovery and hearing.

The position in Suburban's *Complaint*, at least, is unsupported. Suburban cites: (1) a "Whereas" clause in the Stipulation that asserts the Commission "actively supervised the Parties' * * * rationalization of their distribution systems (in Delaware and Franklin Counties)" and (2) Stipulation clauses in which Columbia and Suburban agreed to "transfer * * * certain customers and facilities between the Parties * * *."[62] But "whereas" clauses "cannot alone create contractual obligations."[63] And the other clauses resolve only a specific dispute over specific facilities and customers in Delaware County. Suburban's assertion that the 1995 Stipulation also prohibits Columbia from ever duplicating *other* Suburban facilities is wishful thinking. Suburban admits there is no language in the 1995 Stipulation that explicitly states the prohibition it is asking the Commission to adopt.[64]

Suburban's 2013 admissions on this issue (*see supra*) were correct: there is nothing in the 1995 Stipulation that prohibits Columbia from running distribution facilities that parallel or "duplicate" Suburban's facilities. Under Ohio law, "any gas company may serve any customer in any part of the state."[65] If Suburban *is* still asking this Commission to hold that the 1995 Stipulation prohibits Co-

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[61] *Id*.

[62] Complaint, Exhibit A (1995 Stipulation), at 2. *See also* Suburban Memo Contra at 8, nn. 27-28 (citing 1995 Stipulation, 2nd, 5th, and 6th Whereas Clauses and Stipulation pp. 3-7 (the agreement to transfer customers and facilities)).

[63] *St. James Therapy Ctr., Ltd. v. Gomez Enters.,* Lucas C.P. No. CI 2012-1288, 2012 Ohio Misc. LEXIS 18139, at *21 (Aug. 23, 2012).

[64] *See* Suburban Memo Contra at 9 ("the Stipulation does not state, 'Thou shalt have no duplication of facilities.'").

[65] *In re Application of Columbia Gas of Ohio, Inc. to Amend its Rules and Regulations*, Case No. 87-1528-GA-ATA, 1987 Ohio PUC LEXIS 184, at *26 (Dec. 8, 1987).

lumbia from extending its mains and distribution lines into areas Suburban would like to serve, the Commission should dismiss that claim.

2.3. Suburban has not stated reasonable grounds for complaint under Count 4 (regarding Columbia's Main Extension Tariff) or Count 5 (regarding Columbia's alleged statutory violations).

Lastly, Columbia moves to dismiss Counts 4 and 5, on the grounds that those Counts offer nothing but broad allegations and legal conclusions.

In Count 4, Suburban speculates that Columbia has *either:* (1) "offer[ed] * * *or* * * * agreed to waive" (2) "deposits *or* other [required] charges" for (3) "builders *or* others," at some time and in some place.[66] This is not the "clear [explanation] of the facts which constitute the basis of the complaint" that the Commission's rules require;[67] it's a "choose your own adventure" story. Suburban admits that "Columbia * * * has discretion in calculating the amount of deposits" required under the Main Extension Tariff,[68] and Suburban does not identify any customers for which Columbia has exercised that discretion *un*reasonably. It simply asserts that such instances *may* have occurred. Suburban's suspicion that Columbia may have violated its Main Extension Tariff somehow, somewhere, with someone, is not sufficient to proceed to discovery and hearing.

Count 5 offers even less in the way of material allegations than Count 4. Count 5 "incorporates the allegations" in Counts 1 through 5 of the Complaint, summarizes four statutes (R.C. §§ 4905.32, 4905.33, 4905.35, and 4929.08(B)), summarizes the allegations in the prior counts, and then asserts it has been "damaged by Columbia's statutory violations."[69] Columbia, in its Motion to Dismiss, noted that Count 5 was tied to Counts 1 through 4 and, thus, should be dismissed for the same reasons as those prior counts. Suburban's new response is that "the statutory violations alleged in Count 5 survive independently."[70]

Suburban's new argument cannot be squared with the language in Suburban's Complaint. Suburban's statutory violation allegations are based on its alle-

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[66] Complaint ¶ 45.

[67] Ohio Admin. Code 4901-9-01(B).

[68] Suburban Memo Contra at 15.

[69] *See* Complaint ¶¶ 47-53.

[70] Suburban Memo Contra at 15.

gations that Columbia "extend[ed] DSM programs to ineligible entities, [sought] cost recovery of ineligible costs through Rider DSM, waiv[ed] deposits and fees under its Main Extension Tariff, duplicat[ed] the existing gas distribution facilities of Suburban, and otherwise extend[ed] preferences and advantages for the purpose of destroying competition" – in other words, the exact same violations alleged in Counts 1 through 4.[71] Nonetheless, if Suburban now wants the Commission to treat those allegations as freestanding allegations of wrongdoing, independent from and unrelated to the remaining allegations in Suburban's Complaint, then the Commission should still dismiss Count 5. As stated in Columbia's Motion to Dismiss, "[b]road, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony."[72] Count 5 should be dismissed.

2.4. Columbia did not waive its right to seek dismissal of Suburban's Complaint.

As explained above, Suburban's Complaint is based on a foundation of unsupported legal arguments and broad, self-contradictory factual assertions that crumble upon scrutiny. Yet Suburban hopes the Commission won't give its Complaint that scrutiny before ruling on its motion to compel. Suburban argues that Columbia requested a hearing in this case and cannot back out of it. Suburban then argues that Columbia waited too long to file its motion and that the Commission, having set this case for hearing, cannot reconsider its prior entry and dismiss this action. None of these arguments is supported by fact or law.

Suburban first argues that Columbia requested, and therefore, implicitly conceded the propriety of, a hearing on Suburban's Complaint when it opposed Suburban's motion for emergency relief.[73] Columbia did nothing of the sort. Columbia pointed out that the Commission is not authorized to grant preliminary injunctive relief in a complaint case. It can only grant injunctive relief *after* a hearing.[74] But Columbia did not request a hearing; it asked the Commission to deny Suburban's motion for emergency relief,[75] which the Commission has effectively

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[71] Complaint ¶ 52.

[72] *In re Complaint of Wingo v. Nationwide Energy Partners, LLC*, Case No. 16-2401-EL-CSS, Finding and Order, ¶ 23 (Nov. 21, 2017), quoting *In re Consumers' Counsel v. The Dayton Power & Light Co.*, Case No. 88-1085-EL-CSS, Entry (Sep. 27, 1988).

[73] *See* Suburban Memo Contra at 1, citing Columbia Memo Contra Motion for Interim Emergency Relief at 4-5.

[74] *See* Columbia Memo Contra Motion for Interim Emergency Relief at 4-5.

[75] *See id.* at 5, 11-13.

done. As with its arguments on Counts 1 through 3, Suburban is asking the Commission to read language into a document that isn't there.

Suburban next faults Columbia for not filing its motion to dismiss "at the earliest opportunity."[76] Yet, the Commission's rules do not establish a filing deadline. Columbia deferred filing its motion solely to provide Suburban a "benefit-of-the-doubt" opportunity to add substance to its bare allegations in responding to the written discovery requests Columbia promptly served. Soon after Suburban responded with objections and nothing to support its allegations,[77] Columbia moved to dismiss.

Finally, Suburban argues that the Commission cannot grant a motion to dismiss after setting a complaint for hearing. But, in setting a complaint case for hearing, the Commission does not forfeit its ability to grant a motion to dismiss the matter pursuant to R.C. § 4905.26. Suburban's assertion that the Commission's hearing entry irreversibly presupposes reasonable grounds for the complaint turns on a misreading of *Western Reserve Transit Authority v. Public Utilities Commission* (1974). In that case, the Supreme Court of Ohio reversed the Commission's dismissal of a complaint when the Commission, by journal entry after receiving the complaint, stated "there *may be* reasonable grounds for the complaint."[78] The Supreme Court concluded that R.C. § 4905.26 did not permit the Commission to make such a tentative finding.[79] As the Supreme Court later clarified, *Western Reserve Transit* stands for the proposition that the Commission may revisit its *own* orders (though not the orders of a court).[80] And, indeed, the Commission has considered motions to reconsider findings that a complainant has set forth reasonable grounds for complaint.[81] For ample reason, Columbia's Motion to Dismiss asks the Commission to do exactly that.

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[76] *Id.*

[77] Suburban attempts to justify those objections in its Memo Contra, arguing that an interrogatory requesting "any and all" information on a particular topic requires omniscience to answer. *See* Suburban Memo Contra. at 13. Although Columbia believes Suburban's interpretation of its interrogatory is disingenuous and dilatory, Columbia will address those arguments in a separate filing.

[78] *W. Res. Transit Auth. v. Pub. Util. Comm'n*, 39 Ohio St. 2d 16, 19 (1974).

[79] *Id.*

[80] *Wilkes v. Ohio Edison Co.*, 131 Ohio St.3d 252 (2012).

[81] *See In re Complaint of Greg Hart Communs., Inc. v. The Ohio Bell Telephone Co.*, Case No. 92-1953-TP-CSS, Entry, 1993 Ohio PUC LEXIS 1051, at ¶¶ 1-3 (Dec. 1, 1993) (referencing the respond-

3. Conclusion

For the third time in ten years, Suburban Natural Gas Company is asking the Commission to let it hijack the Commission's complaint process – including the complainant's "ample rights of discovery"[82] – as a means to restrain competition for customers in Delaware County. But R.C. § 4905.26 requires a complainant to state "reasonable grounds for complaint" before proceeding to discovery and hearing, and Suburban has failed to meet that standard. Suburban's citations to the 1995 Stipulation and the 2016 DSM Opinion and Order are fanciful; its factual arguments are self-contradictory; and its legal assertions find no support in Ohio law.

For the reasons provided above and in Columbia's Motion to Dismiss, Columbia respectfully asks the Commission to dismiss Suburban's baseless claims, shield Columbia from the unnecessary burden and expense of proceeding to discovery and hearing, and make clear to Suburban that natural gas companies in Ohio, including Columbia, are permitted to compete with one another.

Respectfully submitted,

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ent's motion for reconsideration of the Attorney Examiner's finding of reasonable grounds for complaint and reaffirming the Commission's prior determination).

[82] Suburban Motion to Compel at 2, quoting R.C. § 4903.082.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document is being served via electronic mail on the 29th day of January, 2018, upon the parties listed below:

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Summary: Reply in Support of Motion to Dismiss electronically filed by Cheryl A MacDonald on behalf of Columbia Gas of Ohio, Inc.