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.	)	

COLUMBIA GAS OF OHIO, INC.'S INITIAL POST-HEARING BRIEF

Table of Contents

1. Introduction

On January 5, 2018, Columbia moved to dismiss all counts of Suburban's complaint. Suburban responded in part by urging the Commission to defer ruling until Suburban received the benefits of discovery and an evidentiary hearing.[1] Suburban now has served multiple sets of written discovery, deposed Columbia's two designated hearing witnesses, and deposed two other Columbia employees whom Suburban called to testify in its case-in-chief. The Commission has conducted a three-day hearing. Yet, Suburban has failed to introduce any evidence to support its complaint or its opposition to Columbia's motion to dismiss. For the reasons set forth below, Columbia respectfully asks the Commission to dismiss or otherwise grant judgment to Columbia on Suburban's complaint and make clear in its Order that Columbia is free to compete, free to extend facilities to serve new customers, and free to offer DSM incentives within areas where Suburban also operates.

2. Statement of Facts

2.1. Columbia's relationship and dealings with Pulte Homes

2.1.1. Columbia has had an established working relationship with Pulte Homes for years.

This case was triggered by Pulte Homes' selection of Columbia over Suburban in October 2017 to provide natural gas distribution service to new phases of a residential subdivision in Delaware County called Glenross.[2] Columbia was well known to Pulte Homes before Pulte selected Columbia to serve the Glenross south development on the south side of Cheshire Road. Pulte Homes moved into Ohio after acquiring Dominion Homes in August 2014[3] and was already an excellent customer of Columbia's affiliates in other states before coming to Ohio.[4] By the time Pulte considered Columbia's proposal to serve Glenross south, Columbia was already working with Pulte on 27 projects across central Ohio.[5]

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[1] Suburban's Memorandum Contra Columbia's Motion to Dismiss at pp. 12-13, 15.

[2] *See, e.g.*, Suburban Ex. 1.0, Roll, p. 6: 19-24.

[3] Suburban Ex. 5, J. Thompson Deposition Tr. 7: 11-24; Vol. I Tr. 80 (Roll).

[4] Columbia Ex. 5, McPherson, p. 4: 15-17.

[5] *Id*. at p. 4: 20-23.

Given the number of projects Columbia had with Pulte, Pulte invited Columbia's New Business Development Manager, Donna Young, to attend Pulte's monthly utility meetings. Ms. Young served as Columbia's point of contact with Pulte Homes, both for the residential subdivision projects she personally oversaw in her company-assigned geographic sales territory and those projects in the sales territories overseen by other Columbia new business development managers, such as Joseph Codispoti.[6]

2.1.2. After learning about the Glenross south project in 2016, Columbia made a proposal to serve it.

At one of Pulte's monthly utility meetings in 2016, Pulte shared with Ms. Young its plan to develop the south side of Cheshire Road. Ms. Young asked if Pulte would consider a proposal from Columbia to serve the new development and Pulte said it would. Ms. Young alerted her direct supervisor, Zach McPherson, of the opportunity and involved Mr. Codispoti because the development was within his geographic area of responsibility. Ms. Young remained involved because she was Pulte's principal point of contact with Columbia on all of its projects.[7]

In February of 2017, Pulte provided Columbia with the civil engineering plans for the development.[8] Columbia then had all the information it required to run its cost-benefit analysis for extending a main to serve the development. Columbia complied with its tariff[9] and its standard operating procedure in analyzing whether the main extension was economically justified at Columbia's expense.[10] As Mr. McPherson testified:

> For subdivisions, the process involves several key steps. First, we collect the details regarding the property from the builder or developer. The plans are then reviewed by our engineering department, which determines what facilities would be required to serve the new homes. The engineers also put together a full estimate of the investment required of Columbia to construct the facilities. From that point, the sales team uses a proprietary model that

[6] Vol. II Tr. 329: 14-25, 330: 1-15 (Young); Columbia Ex. 5, McPherson Direct, p. 4: 25-27.

[7] Vol. II Tr. 329: 14-24 (Young); Columbia Ex. 5, McPherson Direct, p. 4: 29-35.

[8] Suburban Ex. 25; Vol. II Tr. 300: 7-17.

[9] See Columbia Tariff, P.U.C.O. No. 2, Section III, Part 12, Third Revised Sheet No. 9 (referencing "Plots of lots or real estate subdivisions."

[10] Columbia Ex. 5, McPherson Direct, p. 6: 20-24.

> compares the cost—the engineer's estimated construction costs—with the benefit—the revenues expected to be generated by the additional customers. This is how we conduct the cost-benefit analysis required by the tariff. Our accounting department is responsible for this model to ensure the analysis is consistent and appropriate. The only variables inputted by the engineering and sales departments are the revenues and the costs.[11]

Mr. McPherson testified that Columbia relies upon this model to evaluate all projects across Ohio.[12] Ms. Young made clear that Columbia applied this model approach to Pulte's Glenross south development the same way it applies it to all other residential subdivision developments requiring main extensions.[13] Both witnesses also confirmed the result of the analysis for Glenross south: the main extension was economically justified at Columbia's expense, because the net present value of the project was positive. Consequently, as authorized by its tariff, Columbia was able to extend its main to Glenross south without requiring a contribution in aid of construction from Pulte.[14]

2.1.3. Columbia reminded Pulte of its EfficiencyCrafted℠ Homes Program.

Columbia's new business development managers routinely inform builders and developers of all of the reasons why Columbia is their best choice. Those reasons include Columbia's safety record, competitive rates, the CHOICE program, customer focus, builder support personnel, and prompt service line installations, as well as the award-winning DSM program. In regards to the DSM program, Columbia informs customers that the program is very well-administered and helps builders build a higher quality, more energy-efficient product.[15]

Pulte Homes was familiar with Columbia's DSM programs before Glenross south. Pulte began receiving builder incentive payments in 2015 for qualify-

[11] Columbia Ex. 5, McPherson Direct, p. 7: 16-27.

[12] *Id*. at p. 7: 29-34.

[13] Vol. II Tr. 316: 25, 317: 1-2, 318: 1-5, 342: 22-25, 343: 1-13 (Young).

[14] Vol. II Tr. 317: 23-25, 318: 1-5 (Young); Columbia Ex. 5, McPherson Direct, p. 6: 16, 24-27.

[15] Columbia Ex. 5, McPherson Direct, p. 3: 16-25; Columbia Ex. 6, M. Thompson Direct, p. 10: 33-40, p. 11: 1-13.

ing homes in Delaware, Fairfield, Franklin, and Union Counties.[16] However, this information was not well known to the development side of Pulte Homes.

Pulte is a compartmentalized operation.[17] The development side of Pulte transforms undeveloped land into subdivision streets and residential lots with utilities. It is responsible for selecting the natural gas distribution company, but is not involved with Columbia's builder incentive program.[18] Pulte's production side is responsible for the construction and marketing of homes and decides when to participate in Columbia's builder incentive program.[19] Ms. Young simply reminded Pulte's development side of the builder incentive program when communicating all of the other reasons to select Columbia.[20]

By September 2017, Pulte had yet to confirm that Columbia would serve Glenross south. On September 5, 2017, Ms. Young wrote to Pulte Homes' Joel West to inquire whether Steve Peck and Matt Callahan had advised Mr. West of their decision.[21] Mr. West replied that "they" told him they would give their final answer at the next utility meeting.[22] In his email response, Mr. West also questioned whether Pulte's homes would qualify for the energy credits.[23] Appreciating that Mr. West was relatively new to Pulte Homes and that Pulte's development side was not familiar with the details of the energy-efficiency program, Ms. Young responded that homes constructed by Pulte in the past had qualified to participate in the program.[24]

In a meeting later in September 2017 with Mr. West and Mr. Peck to discuss all the benefits of choosing Columbia to serve Glenross south, Ms. Young learned that Pulte did not view Columbia's EfficiencyCrafted℠ Homes Program as a reason to select Columbia. Mr. Peck cited Pulte's $1,500-per-unit cost to build a qualifying home.[25] At the time, Pulte had been participating just slightly

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[16] Columbia Ex. 5, McPherson Direct, at p. 5: 1-7.

[17] Vol. II Tr. 321: 8-13, 327: 22-25 (Young).

[18] Suburban Ex. 5, J. Thompson Deposition Tr. 29: 11-21; Vol. II Tr. 320: 10-17, 321: 8-13 (Young).

[19] Suburban Ex. 5, J. Thompson Deposition Tr. 60: 6-18.

[20] Vol. II Tr. 327: 22-25 (Young).

[21] Suburban Ex. 26.

[22] *Id*.

[23] *Id*.

[24] Vol. II Tr. 320: 3-17 (Young); Suburban Ex. 26.

[25] Vol. II Tr. 325: 9-13 (Young).

above the program's entry-level threshold, with incentives averaging only $277 per qualifying home.[26] Based on comments from Pulte Homes' Steve Peck to Ms. Young about the EfficiencyCrafted℠ Homes program shortly before Pulte announced its selection of Columbia, Columbia was led to believe that the builder incentive program was not a factor in Pulte's decision.[27] After the meeting, Ms. Young shared Mr. Peck's comments with an energy-efficiency consultant for the EfficiencyCrafted℠ Homes Program.[28] In an email dated September 21, 2017, Ms. Young forwarded to Mr. Peck the consultant's comments and recommendations for improving energy efficiency. She closed her September 21 email as she had opened her September 5 email: by summarizing all the reasons unrelated to the energy efficiency program that made Columbia the best choice for Glenross south.[29]

2.1.4. Pulte selected Columbia to serve Glenross south.

On or about October 10, 2017, Columbia learned that Pulte had selected Columbia.[30] Pulte advised Columbia that it wanted Columbia to complete its main extension by year end.[31] Columbia met Pulte's request.[32]

Suburban accepts that Pulte was under no obligation to select Suburban for the Glenross south development.[33] No contract or other document bound Pulte's predecessors – much less Pulte, their successor – to stay with Suburban.[34] Suburban also concedes that Columbia was entitled to construct a main distribution line down Cheshire Road to this development.[35]

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[26] Suburban Ex. 27.

[27] Vol. II Tr. 338: 13-16 (Young).

[28] *Id*. at 326: 4-25, 327: 1-11.

[29] Suburban Ex. 27.

[30] Suburban Ex. 28.

[31] *Id*.

[32] Columbia Ex. 5, McPherson Direct, pp. 6-7.

[33] Vol. I Tr. 81: 19-23, 83: 22-25, 84: 1(Roll).

[34] *Id*. at 74: 1-12, 81:7-23.

[35] *Id*. at 85: 2-8.

2.1.5. Suburban filed its Complaint after hearing that Pulte selected Columbia because of its builder incentive program.

Suburban filed its complaint in reaction to hearing that Columbia's EfficiencyCrafted[SM] Homes Program was the deciding factor in Pulte's choice of Columbia. After Mr. Roll learned that Pulte had selected Columbia to serve Glenross south, he asked Pulte's Jeff Thompson for an explanation. Mr. Thompson told Mr. Roll that Columbia's "incentive program" was the reason.[36]

However, Mr. Thompson admittedly was not the decision-maker in selecting Columbia.[37] Mr. Thompson relied upon his supervisor, Steve Peck, to approve the selection of Columbia over Suburban.[38] Mr. Thompson did not attend the meeting a couple of weeks earlier, in which Mr. Peck told Ms. Young that Columbia's builder incentive program not a factor to them.[39] Mr. Thompson also admittedly knows little about the EfficiencyCrafted[SM] Homes Program.[40] He indicated that someone else at Pulte makes the decision as to whether Columbia's builder incentive program makes a difference in how Pulte designs its homes.[41] Ms. Young was the only Columbia representative who mentioned the program to Pulte in connection with Glenross and she never spoke to Mr. Thompson about it.[42] When asked about Mr. Thompson's different recollection during deposition, Ms. Young surmised he had mistakenly recalled a different meeting with her involving a different subdivision development.[43] In any event, soon after Mr. Roll reported to his superiors what Mr. Thompson had told him, Suburban filed this complaint case.

2.2. Columbia's DSM Programs in Delaware County and Across Ohio

Suburban has been keenly aware of Columbia's DSM builder incentive programs for many years. Although Suburban views the programs as a competitive threat, because Suburban does not have its own similar programs, Columbia

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[36] Ex. 1.4 to Suburban Ex. 2.0 Roll Direct.

[37] Suburban Ex. 5, J. Thompson Deposition Tr. 26: 10-11, 29: 11-21.

[38] *Id*. at 29:11-21.

[39] Vol. II Tr. 338: 13-16 (Young).

[40] Suburban Ex. 5, J. Thompson Deposition Tr. 59:1-20, 60: 1-19, 66: 17-21.

[41] *Id*. at 67: 6-10.

[42] Vol. II Tr. 266: 4-12 (Codispoti); 343: 14-25, 344: 1-14 (Young).

[43] Vol. II Tr. at 343: 14-25, 344: 1-14 (Young).

never designed any of its programs as a means to compete for new customers. Columbia has used, and continues to use, these programs to help its customers curb the demand on Columbia's system by lessening their natural gas usage and, ultimately, lower the customer's bill.[44]

Columbia introduced the first version of its energy-efficiency builder incentive program, called the Residential New Construction Program, in 2008 in Case No. 08-833-GA-UNC.[45] The Commission authorized Columbia to extend the Residential New Construction Program in 2011 in Case Nos. 11-5028-GA-UNC, *et al*., and to rename it the Energy Efficient New Homes program. Columbia changed the objective to encourage builders to build housing that was ENERGY STAR® compliant, that had a Home Energy Rating Score ("HERS") of 80 or less, or that provided energy savings over code minimum levels based on other accepted energy modeling approaches. Columbia also replaced the fixed, $1,000-per-qualified-home incentive that was established in 2008 with a tiered system, to incentivize more energy-efficient building.[46]

Also in December 2011, Suburban filed a self-complaint at the Commission asking to establish a DSM program like Columbia's. Suburban acknowledged that Suburban and Columbia "must compete for load" and asserted that Suburban needed "to have a DSM in its tariff" to "effectively compete with Columbia" for "customers looking to locate in an area in which Suburban and Columbia compete * * *."[47] The Commission denied Suburban's self-complaint, both on procedural grounds and for lack of evidence.[48]

In 2016, in Case Nos. 16-1309-GA-UNC, *et al.*, Columbia changed its DSM program name from Energy Efficient New Homes to EfficiencyCrafted℠ Homes and received Commission authorization to extend it for an additional six-year

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[44] Columbia Ex. 6, M. Thompson Direct, at p. 5: 1-9.

[45] The Application from Case No. 08-833-GA-UNC is attached to Columbia Ex. 6 as M. Thompson Attachment A.

[46] *In re Application of Columbia Gas of Ohio, Inc., for Approval of Demand-Side Management Programs for its Residential and Commercial Customers*, Case No. 11-5028-GA-UNC, *et seq*., Finding and Order (Dec. 14, 2011). The Application and Stipulation from Case Nos. 11-5028-GA-UNC, et al., are attached to Columbia Ex. 6 as Thompson Attachments B and C.

[47] *In the Matter of the Self-Complaint of Suburban Natural Gas Co. Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF ("*2011 Suburban Self-Complaint Case*"), Opinion and Order, at 8 (Aug. 15, 2012) (noting Suburban witness David Pemberton Jr.'s assertions that "Suburban would be unable to compete with other companies that had DSM programs[,]" including Columbia).

[48] *2011 Suburban Self-Complaint Case*, Opinion and Order (Aug. 15, 2012).

term through December 31, 2022. Most of the parties to the case, including Commission Staff, Ohio Partners for Affordable Energy, and Columbia, filed a Stipulation on August 12, 2016,[49] and the Commission approved the Stipulation by Order dated December 21, 2016.[50]

Columbia's DSM builder incentive program began receiving accolades in 2012, when the U. S. Environmental Protection Agency recognized Columbia as the EPA ENERGY STAR® Partner of the Year. Columbia received this recognition again in 2013. From 2014 through 2017, U.S. EPA further recognized the program with its EPA ENERGY STAR® Partner of the Year – Sustained Excellence in Energy Efficiency Program Delivery award. In addition to these accolades, the program was awarded the 2012 and 2013 Leadership in Housing Award (now known as the ENERGY STAR® Certified Homes Market Leader Award), and in 2014 through 2017 the ENERGY STAR® Certified Homes Market Leader Award.[51] The Commission has recognized Columbia's EfficiencyCrafted℠ Homes Program as an effective method to encourage the construction of energy-efficient homes.[52]

Between 2009 through 2017, Columbia has provided incentives to support the energy efficient construction of 12,416 homes. These payments are available to any new homes that meet the EfficiencyCrafted℠ Homes Program's requirements within the 61 counties in which Columbia serves; however, Columbia naturally has provided more incentives in counties where more homes are built. For example, in 2016, the number of qualifying homes in Franklin County was more than three times that of any other county and more than double any other county in 2017.[53] Delaware County also has experienced a high rate of residential development, which places it second among Ohio counties for the number of energy efficiency incentives paid to builders participating in the program.[54]

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[49] The Application and Stipulation from Case Nos. 16-1309-GA-UNC, *et al.*, are attached to Columbia Ex. 6 as Thompson Attachments D and E, respectively.

[50] *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.*, ("*2016 Columbia DSM Case*"), Opinion and Order ("DSM Order") (Dec. 21, 2016).

[51] Columbia Ex. 6-M. Thompson Direct, p. 6: 1-11.

[52] *2016 Columbia DSM Case*, DSM Order at ¶ 115.

[53] Columbia Ex. 6, M. Thompson Direct, p. 5: 32-40.

[54] Suburban Exs. 42-44 (highly confidential).

3. Law and Argument

3.1. Suburban has not met its burden of proof with regard to its claims regarding the 1995 Stipulation.

Count 1 of Suburban's Complaint asserts that Columbia is acting "directly contrary to the 1995 Stipulation and the Finding and Order approving same" by "extending its mains and proposed distribution lines into Suburban's operating area and offering financial incentives to builders * * * ."[55] Put differently, Suburban alleges "Columbia is violating the [1995] Stipulation by[: 1] resuming incentive programs that the Stipulation does not authorize, and [2] duplicating Suburban's facilities to serve the recipients of these incentives."[56] Suburban has not presented evidence or law to support either of these claims. Nothing in the plain text of the 1995 Stipulation and Order prohibited Columbia from offering Commission-approved DSM incentives to builders of energy-efficient homes or from competing for customers in southern Delaware County.

3.1.1. The 1995 Stipulation does not prohibit Columbia from offering energy efficiency incentives in Delaware County.

Suburban insists that the 1995 Stipulation required Columbia to stop offering any kind of incentives to homebuilders, indefinitely, in any areas Suburban wants to serve.[57] Suburban's C.E.O., Mr. Pemberton, admits the 1995 Stipulation does not actually say that.[58] But, he argues the prohibition on builder incentives can be extrapolated from two clauses in the 1995 Stipulation and its attachments. The first clause is a "Whereas" clause that notes "the Commission, through meetings conducted by its Attorney Examiner and Staff, has actively supervised the Parties' resolution of their competitive dispute and rationalization of their distribution systems * * * ."[59] Mr. Pemberton asserts that "[o]ne of Suburban's underlying claims in the case was that Columbia's builder incentives were an unlawful and anticompetitive discount from tariffed rates."[60] The implication appears to be that, if the 1995 Stipulation resolved the parties' dispute, and that dispute includ-

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[55] Complaint ¶ 29.

[56] Suburban's Memo Contra Columbia's Motion to Dismiss at 9,

[57] *See* Suburban Ex. 4.0, Pemberton Direct, pp. 13: 18 – 14: 9.

[58] *See* Suburban Ex. 4.0, Pemberton Direct, p. 13: 18-21.

[59] Verified Complaint Ex. A, 1995 Stipulation, at 2 (cited in Suburban Ex. 4.0, Pemberton Direct, at p. 14: 1-2).

[60] Suburban Ex. 4.0, Pemberton Direct, p. 14: 2-4.

ed "Columbia's builder incentives," the Stipulation must have required Columbia to eliminate all builder incentives. The second clause is in a Release attached to the 1995 Stipulation. The Release states that Suburban "releases and forever discharges Columbia * * * from any and all claims" relating to certain specified programs, namely:

> 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 * * * .[61]

Suburban's implication here appears to be that Columbia's EfficiencyCrafted[SM] Homes Program is "substantially similar" to these programs, and that Suburban's release of claims against Columbia implies a Columbia agreement to stop all such programs.

Suburban relies entirely on unfounded implications it self-servingly posits. Its position is legally and factually unsupportable, for five reasons. First, the Stipulation explained the manner in which the parties resolved their dispute, and it was not by eliminating Columbia's builder incentive programs. Instead, the Stipulation said the parties "agree[d] * * * to (1) the transfer of certain customer and facilities * * * and (2) the modification of certain * * * provisions * * * in the Parties' tariffs" and that "said agreement, if approved * * *, would resolve all contested issues * * * ."[62] Second, "whereas" clauses "cannot alone create contractual obligations."[63] Even if the 1995 Stipulation had not explained the nature of the parties' agreement, the "whereas" clause's broad statement that the 1995 Stipulation resolved the parties' claims would not bind Columbia to any particular resolution. Third, a stipulation must be interpreted according to what it says,[64] not what it doesn't say. Suburban admits the 1995 Stipulation does not include "specific language" prohibiting Columbia from offering builder incentives.[65] Fourth, the DSM incentives at issue in this proceeding are nothing like the "builder incentives" at issue in the 1995 Stipulation. Suburban has introduced no evidence

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

[62] *Id.* at 2.

[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, 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").

[65] Suburban Ex. 4.0, Pemberton Direct, p. 14: 21.

describing the builder programs listed above (such as "the Buckeye Builder program"), and thus cannot demonstrate that the EfficiencyCrafted℠ Homes Program is substantially similar to those programs. But the remaining incentives at issue in the 1995 Stipulation were "pay[ments] for customer service lines, house piping, and appliances[,]"[66] which Suburban alleged "were an unlawful and anti-competitive discount from tariffed rates."[67] The builder payments here, in contrast, are payments "to incentivize more energy efficient building" and have been repeatedly approved by the Commission.[68] And fifth, the 1995 Stipulation *did not actually eliminate* Columbia's payment of builder incentives. To the contrary – it modified Columbia's and Suburban's tariffs to "delete the references which restricted them from providing or paying for customer service lines, house piping, and appliances when competing with another regulated natural gas company."[69] Thus, Suburban's release of claims most likely reflected the parties' understanding that Columbia's builder incentives were *no longer prohibited* by its tariff.

Either way, Suburban has not supported its assertion that the 1995 Stipulation *forever* prohibited Columbia from offering any kind of incentives to builders. Suburban has not introduced any evidence to support its theory that the EfficiencyCrafted℠ Homes Program is substantially similar to the programs listed in the release attached to the 1995 Stipulation. And the 1995 Stipulation (and release) do not actually prohibit Columbia from continuing such programs.

3.1.2. The 1995 Stipulation and Order do not limit the areas where Columbia can acquire new customers or prohibit Columbia from constructing facilities to serve them.

Count 1 of Suburban's Complaint further asserts that Columbia is violating the 1995 Stipulation by "extending its mains and proposed distribution lines into Suburban's operating area * * * ."[70] Suburban's position on this point has changed repeatedly and is ultimately self-contradictory.

Mr. Pemberton initially testified that the following language, in the release attached to the 1995 Stipulation, described an area "within which Suburban re-

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[66] *See In re 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).

[67] Suburban Ex. 4.0, Pemberton Direct, p. 14: 3-4.

[68] Columbia Ex. 6, M. Thompson Direct, p. 4: 7-30.

[69] *1993 Self-Complaint Case*, Entry, Finding and Order, at 3 (Jan. 18, 1996).

[70] Complaint ¶ 29.

served the right to sue should Columbia reintroduce builders' incentive programs":[71]

> This Release and Covenant Not to Sue shall not be asserted as a defense to or bar against any claim, cause of action, or suit by Releasor against Releasee involving activities after the date of this Release and Covenant Not to Sue and within the area of Delaware County bounded by U.S. Route 23 on the west, Lazelle Road on the south, Alum Creek Reservoir and Interstate 71 on the east, and U.S. Route 36 and State Route 37 on the north.[72]

But, Mr. Pemberton then went on to describe this area as one in which Columbia agreed not to "duplicate pipelines which Suburban had [previously] constructed."[73] Moreover, he specifically asserted that Columbia's pipeline on Cheshire Road is a "violation[ ] of the 1995 Stipulation" because it is a "duplication of a Suburban pipeline"[74] in "*the area reserved to Suburban*" by the Second Amended Stipulation.[75]

Suburban is, at base, offering three contradictory arguments: (1) that the 1995 Stipulation prohibits Columbia from offering builder incentives in general (discussed in the prior section); (2) that the 1995 Stipulation prohibits Columbia from offering builder incentives in a particular, delineated portion of southern Delaware County; and (3) that the 1995 Stipulation effectively prohibits Columbia from serving customers in that portion of southern Delaware County *at all*. These arguments are irreconcilable. If the 1995 Stipulation prohibits Columbia's use of builder incentives in general (argument (1)), then Suburban's reservation of a right to sue if Columbia offers builder incentives in Delaware County (argument (2)) would be redundant. If the 1995 Stipulation prohibits Columbia from competing for customers in most of southern Delaware County (argument (3)), then the specific alleged prohibition on using builder incentives to compete in that county (argument (2)) would be unnecessary.

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[71] Suburban Ex. 4.0, Pemberton Direct, p. 14: 10 – 15: 1.

[72] Complaint, Exhibit A (1995 Stipulation), Exhibit 7 (Suburban Release) at 2-3.

[73] Suburban Ex. 4.0, Pemberton Direct, p. 15: 11-15.

[74] Suburban Ex. 4.0, Pemberton Direct, p. 17: 1-6 (describing an alleged violation of the 1995 Stipulation shown on Suburban Ex. 4.5).

[75] Suburban Ex. 4.0, Pemberton Direct, pp. 15: 1-3 (emphasis added) (explaining the area depicted by Suburban Ex. 4.5). *See also id.* at 16: 2-3 (referring again to "the area reserved to Suburban by the Second Amended Stipulation").

No matter what position Suburban ultimately chooses to argue, though, its positions are unsupported by the text of the 1995 Stipulation and contradicted by Suburban's own past statements. A stipulation speaks for itself.[76] The 1995 Stipulation does not state that Columbia agrees to eliminate duplication of facilities or forgo lawful competition for customers in southern Delaware County. Indeed, in its 2013 complaint case against Columbia, Suburban conceded that "the Stipulation creates no * * * exclusive territories and Suburban has not argued, and is not arguing, that it does. * * * Columbia may install mains, service lines, and any other infrastructure necessary to compete with Suburban in southern Delaware and northern Franklin Counties."[77] In the Glenross subdivision in Delaware County that is the subject of the current dispute, lawful competition has led Pulte to choose service from Columbia. The Commission should reject Suburban's attempt to block Pulte's choice of Columbia as its natural gas company, predicated solely on Suburban's self-contradictory efforts to reinterpret a 23-year-old stipulation, and grant judgment to Columbia on Count I of Suburban's Complaint.

3.1.3. Ohio law allows duplication of natural gas facilities—any natural gas company may serve any customer in any part of the state.

Suburban and Intervenors Delaware County Board of Commissioners and Delaware County Engineer seek disparate relief with regard to Columbia's alleged duplication of natural gas facilities. According to Andrew Sonderman, Suburban's President and Chief Operating Officer, Suburban seeks only an order "direct[ing] Columbia to stop further construction" of its "duplicate gas mains along Cheshire Road in Delaware County," to the extent those mains have not already been completed, and "to cease and desist from initiating any additional extension or expansion" of that pipeline.[78] Delaware County, on the other hand, offer no opinion about Columbia's gas main on Cheshire Road or the merits of Suburban's claims more broadly.[79] Instead, Delaware County is "concerned

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[76] *See In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR *et al*., Fifth Entry on Rehearing, ¶ 90 (Apr. 5, 2017) (holding, "the intentions of any particular signatory party do not change the settlement agreement set forth * * * in the stipulation, which speaks for itself"); *see also In re Dayton Power & Light Co.*, Case No. 02-2779-EL-ATA *et al*., Opinion and Order, at 12 (Sept. 2, 2003).

[77] *Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 13-1216-GA-CSS ("*2013 Suburban Complaint Case*"), Suburban's Memo Contra Columbia Motion to Dismiss, at pp. 4-5 (June 25, 2013).

[78] Suburban Ex. 3.0, Sonderman Direct, pp. 1: 21-24 and 19: 1-4.

[79] *See* Vol. I. Tr. 29: 16-24 (Riley).

about the unnecessary duplication of natural gas facilities"[80] by either Columbia *or* Suburban.[81]

At this point, there is little factual basis to act on Suburban's or Delaware County's requests for relief. Columbia finished installing its gas main on Cheshire Road to serve Glenross south in December 2017.[82] And Robert M. Riley, Chief Deputy Engineer of the Delaware County Engineer's Office, explained that he was not currently aware of any unnecessary duplication of natural gas facilities in Delaware County.[83] For that reason, there have been no instances where unnecessary duplication of natural gas facilities caused increased costs, project delays, or confusion in emergency situations "on public roads maintained by Delaware County."[84]

More importantly, there are numerous policy reasons not to restrict the construction of "unnecessarily duplicative" facilities in Delaware County. First and foremost, there is no agreed-upon definition of "unnecessarily duplicative." Suburban may claim to "know it when [it] sees it," as Justice Potter Stewart once commented (in a case relating to Ohio's obscenity laws).[85] But, as Mr. Riley acknowledged at hearing, there may be instances in which some duplication of natural gas facilities is necessary.[86] He elaborated that "that there may be some duplication that's inherent in the simple design of gas lines where they may cross and then some of that may be unavoidable just due to engineering issues."[87] He further acknowledged that there may be instances in which different natural gas companies' pipelines either cross or run alongside each other, such that an area could be served by either pipeline.[88] Neither Suburban nor Delaware County has explained how the Commission might determine whether a natural gas facility is "duplicative" and whether that duplication is "unnecessary." Second, there is no clear mechanism for prohibiting "unnecessarily duplicative" natural gas facilities, short of the General Assembly creating certified territories for natural gas

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[80] Delaware Ex. 1, Riley Direct, p. 2: 19-20.

[81] Vol. I. Tr. 18: 23 – 19: 7 (Roll).

[82] *See* Columbia Ex. 5, McPherson Direct, pp. 5: 13-24, 6: 34-39, and 7: 1-3.

[83] Vol. I. Tr. 20: 18-21 (Roll).

[84] *Id*. at 20: 22 – 21: 3.

[85] *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676 (1964) (Stewart, J., concurring).

[86] Vol. I. Tr. 27: 1-4 (Roll).

[87] *Id*. at 20: 14-17.

[88] *Id*. at 27: 5-10.

companies. And third, any prohibition on duplicating natural gas facilities in Delaware County will be unavoidably discriminatory. Suburban has aggressively opposed any expansion of Columbia's mains into its claimed "general boundaries," but sees no problem extending its mains significant distances to serve new developments where Columbia currently operates.[89] A prohibition on extending Columbia's lines on Cheshire Road alone would leave Suburban free to continue extending its lines into areas Columbia currently serves. And a broader prohibition against unnecessary duplication of natural gas facilities in Delaware County could not apply to natural gas distribution *cooperatives*, which are outside the Commission's jurisdiction.[90] Thus, any ruling granting Delaware County's requested relief would leave cooperatives (like The Energy Cooperative, which filed correspondence supporting Suburban's position) free to extend duplicative facilities into areas Suburban and Columbia currently serve, while prohibiting the reverse.

However, the primary reason to decline Suburban's and Delaware County's invitation to restrict unnecessary duplication of natural gas distribution facilities is legal. The Commission is a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly.[91] It cannot "act beyond its statutory powers."[92] And while the legislature directed the Commission to fix "certified territories" for each electric supplier in Ohio[93] within which "each electric supplier shall have the exclusive right to furnish electric service[,]"[94] it did not do the same for natural gas companies. As the Commission held in a 1987 proceeding involving Columbia, "there are no certified gas service territories in Ohio, and any gas company may serve any customer in any part of the state."[95]

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[89] *See* Section 3.5.3, *infra*.

[90] *See* R.C. 4905.04 (vesting the Commission with "power and jurisdiction to supervise and regulate public utilities") and R.C. 4905.02(A)(2) (excluding cooperatives from the definition of "public utility").

[91] *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 537 (1993); *Tongren v. Pub. Util. Comm.*, 85 Ohio St. 3d 87, 88 (1999).

[92] *Discount Cellular v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 372, 2007-Ohio-53, ¶ 51.

[93] *See* R.C. 4933.82

[94] R.C. 4933.83(A).

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

Indeed, Suburban previously admitted that natural gas companies "do not have exclusive service areas and often compete for new load."[96]

In short, Ohio law "positively encourage[s]" free competition in the field of natural gas distribution.[97] Because the General Assembly has not given the Commission authority to restrict the areas in which natural gas companies may compete for customers, the Commission should decline any request from Suburban or Delaware County to do so.

3.2. Columbia's DSM Applications and the DSM Orders approving them do not prohibit Columbia from making DSM incentives available to homebuilders in areas Suburban (or any other company) wants to serve.

In support of Counts 2 and 3 of its Complaint, Suburban accuses Columbia of "abusing" its EfficiencyCrafted[SM] Homes Program as a "competitive tool" in two ways: 1) by unfairly "using its EfficiencyCrafted[SM] Homes Program as cover to invade Suburban's service area" and 2) by ignoring the implied agreement in its DSM applications to limit the program's application to the "established boundaries" of Columbia's "service territory" (as they existed before Columbia extended its main down Cheshire Road to Glenross south.)[98] Suburban fails to support either of these accusations.

3.2.1. There is no evidence that Columbia deployed its DSM program in an unfair or abusive manner against Suburban.

Suburban testified that Columbia is using its EfficiencyCrafted[SM] Homes Program to "expand its service territory rather than enhance energy efficiency * * * ."[99] Suburban failed to present any evidence to support its speculation and Columbia directly refuted it.

Ms. Thompson, Columbia's witness responsible for Columbia's energy efficiency team and 2016 DSM application, testified that:

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[96] *2011 Suburban Self-Complaint Case*, Self-Complaint ¶ 6 (Dec. 1, 2011).

[97] *In re Complaint of Suburban Natural Gas Company v. Kalida Natural Gas Company, Inc.*, Case Nos. 92-1876-GA-CSS and 93-279-GA-ABN, 1993 Ohio PUC LEXIS 736, Entry, at *12 (Aug. 26, 1993). *See also* R.C. 4929.02.

[98] Suburban Ex. 3.0, Sonderman Direct, pp. 5: 1-6,9: 1-9

[99] Suburban Ex. 3.0, Sonderman Direct, p. 7: 5-7.

> Columbia did not propose any energy efficiency program, including the EfficiencyCrafted[SM] Homes Program, as a way to extend its facilities and serve new customers. Columbia has used, and continues to use, these programs to help its customers curb the demand on Columbia's system by lessening their natural gas usage and, ultimately, lowering the customer's bill through the construction of more energy efficient new homes. * * *
>
> Columbia offers its EfficiencyCrafted[SM] Homes Program in all 61 counties in which it operates, not just in counties where other natural gas companies are located, such as Delaware County. The EfficiencyCrafted[SM] Homes Program is intended to promote energy efficiency.[100]

That Columbia's sales team members typically mention Columbia's DSM program to builders and developers when listing all of the other features and benefits of choosing Columbia's service is hardly an abuse of the program. This program would be far less effective if Columbia's employees were prohibited from even mentioning it to potentially interested builders and developers. Once a member of Columbia's sales team accurately communicates all Columbia has to offer, it is up to the builder or developer to decide what is important when selecting between competitive natural gas utilities. As Columbia's Ms. Thompson explained:

> In terms of competition, customers, builders, and developers have the right to choose a natural gas company, and may weigh services and programs offered by competing natural gas companies when making that choice. Columbia offers the CHOICE program, SCO auction-based commodity service, energy efficiency programs and other programs or services that distinguish Columbia from its competitors. Columbia's new business team informs prospective customers of all Columbia has to offer. This includes the DSM program of interest to builders and developers. There are many factors other than DSM that a builder, developer or customer may consider when choosing a natural gas provider.[101]

Ms. Young was the only Columbia representative to discuss the EfficiencyCrafted[SM] Homes Program with Pulte Homes in connection with Glenross south. As any good sales professional would do, she communicated the reasons why Columbia was Pulte Homes' best choice for Glenross south.[102] As for the

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[100] Columbia Ex. 6, M. Thompson Direct, p. 5: 1-17.

[101] Id. at p. 5: 19-28; see also Columbia Ex. 5, McPherson Direct, p. 3: 16-25.

[102] Vol. II Tr. 327: 3-11 (Young).

DSM program, she simply forwarded information about the program that she was provided by an energy-efficiency consultant to answer Pulte's questions. She accurately communicated that the purpose of the program was "to encourage reduced gas usage through energy efficiency."[103]

Ironically, Suburban failed to prove that the incentive program was even a factor in Pulte's decision to select Columbia. Suburban chose not to call Pulte's decision-maker to testify. But, based on what Pulte's representatives conveyed to Ms. Young in September 2017, which she documented in her emails shortly before Pulte announced its selection of Columbia, it is reasonable to conclude that Pulte's decision was *not* influenced by the possibility of its production side receiving future DSM incentives. It appears far more likely that Pulte's development side was swayed by Columbia's (and Ms. Young's) track record of performance in the 27 other Pulte projects Columbia was serving.[104]

Suburban relies on what Pulte's Mr. Thompson relayed to Mr. Roll as evidence that the builder incentive program provided Columbia an unfair competitive advantage to win the Glenross south project.[105] But, Mr. Thompson was not the decision-maker.[106] He also did not attend the September 2017 meeting at which Mr. Thompson's superior, Mr. Peck, informed Ms. Young that the DSM program "meant nothing to them."[107] Mr. Thompson also mistakenly recalled speaking with Ms. Young about the DSM program's benefits in connection with Glenross south when the meeting actually involved a different subdivision.[108] Suburban elected not to call Mr. Thompson at hearing to clarify or correct his deposition testimony.

The best evidence is that Pulte did not see the DSM program as a reason to select Columbia over Suburban. But, even assuming that Pulte did and does value the opportunity to qualify for financial incentives to offset some of the cost to construct more energy-efficient homes, then Columbia's program is working as designed—to encourage more energy-efficient home construction to reduce gas

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[103] Suburban Ex. 27. See also Columbia Ex. 6, M. Thompson Direct, p. 2:4-5.

[104] *See* § 2.1.4, *supra*.

[105] Suburban Ex. 2.0, Ex. 1.4 thereto.

[106] Suburban Ex. 5, J. Thompson Deposition Tr. 29: 11-21; Suburban Ex. 26.

[107] Vol. II Tr. 325: 24-25, 326: 1-3, 338: 13-16 (Young).

[108] *Id*. at 343: 14-25, 344: 1-14 (Young).

usage. Columbia should not be labeled an "unfair" competitor simply because it offers services and programs that distinguish it from Suburban.[109]

3.2.2. Suburban misinterprets Columbia's reference to "service territory" in its DSM Applications.

When responding to Columbia's motion to dismiss, Suburban conceded that "the 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]. [110] Suburban instead points to Columbia's DSM applications as "establishing a self-imposed geographic limitation * * *" through use of the phrase "service territory."[111] Suburban reads Columbia's DSM applications as "imply[ing] a distinction between its 'service territory' and the service territory of other providers [which] put the Commission and public on notice that the DSM programs would be offered only 'in' Columbia's service territory."[112] Suburban further suggests that "service territory" must be interpreted to refer to the area Columbia served at the time it filed its DSM applications.[113] Suburban faults Columbia for offering builder incentives outside Columbia's "own established boundaries."[114]

Suburban's self-serving interpretations of Columbia's DSM applications presuppose Columbia and other natural gas providers have defined "service territories" with "established boundaries." Yet, Suburban acknowledges that Ohio natural gas utilities do not have statutory service territories[115] and testified that Columbia is not "statutorily prohibited from serving any particular geographic area."[116] In fact, during hearing Suburban admitted that it does not have fixed or

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[109] Columbia Ex. 6, M. Thompson Direct, p. 5: 19-28. Suburban witness Andrew Sonderman also cites Columbia's Joseph Codispoti's mention of the DSM program to the developer of Berlin Manor as "an attempt to win business." Ex. 3.0, p. 6: 1-6. Mr. Codispoti testified that he simply shared with this developer all the benefits of choosing Columbia, with the DSM program being one. Vol. II Tr. 261: 15-25, 262: 1-25, 263: 1-2. In any event, there is no evidence that this "attempt" was determinative because the developer of Berlin Manor has yet to make a selection of natural gas distributors. Vol. I Tr. 77: 24-25, 78: 1-2 (Roll).

[110] Suburban's Memorandum Contra Columbia's Motion to Dismiss at 11 (emphasis in original).

[111] *Id*.

[112] Suburban Ex. 3.0, Sonderman Direct, p. 10: 6-8.

[113] *Id.* at p. 9: 20 – 10: 4.

[114] Id. at p. 9: 3-4.

[115] *See* Suburban's Memorandum Contra to Columbia's Motion to Dismiss at 11.

[116] Suburban Ex. 3.0, Sonderman Direct, p. 9: 1-2.

"established" boundaries defining its service territory.[117] In citing what it calls the "general boundaries" of its service territory, it admits to having extended its mains and expanded its service territory to serve new developments beyond its "general boundaries" to the north, east, and west.[118] As a result, Suburban's service area overlaps Columbia's in many locations after having "successfully competed against Columbia for many years."[119] Like Suburban, Columbia also "continually extends its mains to serve new areas and reach new potential customers, thereby changing its service area on a regular basis."[120]

Suburban's self-serving interpretation of what Columbia meant when using the phrase "service territory" in its 2016 DSM application was refuted by the application's lead author, Ms. Thompson:

> With such language, Columbia was not limiting its ability to serve customers outside the geographic boundaries of Columbia's mains, service lines, and meters as of June 10, 2016 or December 21, 2016 when the Commission ultimately approved Columbia's energy efficiency program. Instead, this phrase was simply intended to mean that Columbia's energy efficiency programs, including the EfficiencyCrafted[SM] Homes Program, may be offered to Columbia's customers and potential customers. Columbia cannot provide these programs to premises or properties when they're served by other natural gas service providers, such as The East Ohio Gas Company d/b/a Dominion Energy, Vectren Energy Delivery of Ohio or any other LDC – including Suburban. However, if a property switches in northeast Ohio from Dominion Energy to Columbia, for example, then Columbia is able to offer these energy efficiency programs to that customer.[121]

Suburban's interpretation of "service territory" in Columbia's DSM applications is further contradicted by Suburban's representations to the Commission in its December 2011 self-complaint case. Suburban acknowledged that Suburban and Columbia "must compete for load" and asserted that Suburban needed "to have a DSM in its tariff" to "effectively compete with Columbia" for "customers

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[117] Vol. I Tr. 62: 16-17, 64: 3-6, 21-22. (Roll).

[118] *Id*. at 56: 14-18, 57: 1-14, 24-25, 58: 1-25. Suburban also concedes that a significant area of land west of I-71 within its so-called "general boundaries" is not actually part of Suburban's current service territory because it has not extended its mains there or committed to make service available for anyone there. *Id*. at 63: 3-25, 64: 1-6.

[119] Suburban Ex. 3.0, Sonderman Direct, p. 4: 21.

[120] Columbia Ex. 6, M. Thompson Direct, p. 6: 31-33.

[121] Columbia Ex. 6, M. Thompson Direct, p. 6: 13-21, p. 7: 18-32.

looking to locate in an area in which Suburban and Columbia compete * * *."[122] Suburban obviously would not have filed that case and made those representations had it believed that Columbia's DSM program did not apply in areas Suburban desired to serve.

Even today Suburban concedes that "the very nature of a builder incentive program entails service to previously unserved locations."[123] If the application of Columbia's DSM programs is restricted to the boundaries of Columbia's operating area in 2016:

> the Commission would be depriving new customers of the ability to participate in Columbia's energy efficiency programs until January 1, 2023. In Case No. 16-1309-GA-UNC, et al., Columbia requested and received approval for a six-year term of its energy efficiency program through December 31, 2022. Under Suburban's theory, new customers of Columbia that are connected to main line extensions after June 10, 2016 or December 21, 2016, would not be eligible for a smart thermostat, an in-home energy audit, an energy efficient appliance rebate, an online home audit, a home energy usage report, income-eligible home weatherization, or a new home incentive. Such a restriction on the availability of the programs was never intended by Columbia, nor would the Commission have approved such a blatant discrimination against customers.[124]

Suburban attempts to lessen the consequence of its interpretation of Columbia's DSM applications by suggesting that Columbia also meant the term "service territory" to include "areas where Columbia was the only provider capable of extending an existing main to a new development."[125] With this testimony, Suburban concedes that Columbia's DSM program is not strictly confined to Columbia's 2016 operating area. But, Suburban's effort to anticipate counterpoints by inferring such a specific, two-component definition of a phrase Columbia saw no reason to define in its applications only further exposes the absurdity of Suburban's self-serving interpretation of Columbia's meaning.

Suburban has opted to present a tortured interpretation of what Columbia "must have meant" in its 2016 application rather than admit what it really is do-

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[122] *2011 Suburban Self-Complaint Case*, Post-Hearing Brief at 3 (July 9, 2012).

[123] Suburban's Motion for Emergency Interim Relief at 5.

[124] Columbia Ex. 6, M. Thompson Direct, p. 7: 34-40, 8: 1-17.

[125] Suburban Ex. 3.0, Sonderman Direct, p. 9: 14-17.

ing—collaterally attacking the Commission's DSM Order. The Commission should reject Suburban's collateral attack. If the Commission's intervention rules are to mean anything, the Commission should not allow a public utility to ignore a Commission proceeding that may "adversely affect[ ]" it[126] (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."[127] 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. Suffice it to say that no 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. Columbia certainly never intended or envisioned such a restriction and there is no basis for reading such a limitation into the DSM Order.

3.3. Suburban presented no evidence that Columbia violated its main line extension tariff.

In Count 4 of its Complaint, 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.[128] Suburban failed to present any evidence that Columbia offered or agreed to waive any tariff-required deposit or other charge for Pulte Homes or others. As set forth in the Statement of Facts, *supra,* Columbia complied with its tariff when evaluating service requests from developers, including Pulte Homes.

3.4. Suburban presented no evidence that Columbia violated any statute.

Count 5 of Suburban's Complaint "incorporates the allegations" in Counts 1 through 4 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 Suburban has been "damaged by Columbia's statutory violations."[129] Co-

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

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

[128] *Id.* at ¶ 45.

[129] *Id*. at ¶¶ 47-53.

lumbia, 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.

When responding to Columbia's motion to dismiss, Suburban's argued that "the statutory violations alleged in Count 5 survive independently."[130] Suburban's argument cannot be squared with the language in Suburban's Complaint. Suburban's statutory violation allegations are based on its allegations 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 same violations alleged in Counts 1 through 4.[131] 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, Suburban's failure to present supporting evidence at hearing still mandates dismissal of Count 5.

3.5. Suburban's own business conduct contradicts its claims and policy arguments in this case.

Finally, Suburban has not demonstrated that the relief it has requested – a termination of the EfficiencyCrafted[SM] Homes Program in Delaware County and a prohibition on further extensions of Columbia's pipeline on Cheshire Road[132] – would be fair and equitable. The evidence presented at hearing suggests that Suburban may have been engaging in the very wrongdoing of which it has accused Columbia: unfair competition, waiving required mainline extension fees, and unnecessary duplication of distribution facilities.

3.5.1. Suburban is creating an exclusive service territory for itself.

During direct testimony, Suburban insisted that it is not seeking an exclusive service territory and that Columbia is free to compete in every geographic

[130] Suburban Memo Contra at 15.

[131] Complaint ¶ 52.

[132] Suburban Ex. 3.0, Sonderman Direct, pp. 18: 14 – 19: 4.

area.[133] Yet, cross-examination revealed that Suburban is actively trying to create an exclusive service territory for itself, on a parcel-by-parcel basis, for the *sole* purpose of blocking competition from Columbia.[134] With no budgetary constraints[135] and no concern for the absence of tariff authority,[136] Suburban is paying customers who reside on large tracts of undeveloped land to sign form agreements purporting to grant Suburban the exclusive right to serve *all* future development of the land *in perpetuity*.[137] These agreements, which Suburban has been acquiring for the past twenty-five years,[138] also purport to prevent the landowner from granting easements or other rights to any other natural gas distributor to construct facilities on the property needed to reach other destinations.[139] Developers who ultimately acquire lands subject to these recorded agreements are faced with the Hobson's Choice of accepting Suburban's service offering or hiring a lawyer and expending the time and money to litigate for the right to choose a competitive natural gas distribution company. As one example, Columbia had lines available to serve the new Mount Carmel Lewis Center Medical Center and was already serving much of the surrounding area.[140] However, because the land was earlier covered by one of Suburban's exclusive service agreements, the customer chose to be served by Suburban. Suburban had to extend its main nearly a mile to reach the customer.[141] Consequently, these agreements pose a significant barrier to competition and customer choice, even putting aside their questionable legality.[142]

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[133] Suburban Ex. 3.0, Sonderman Direct, pp. 5: 2-3, 8: 29-30, 9: 1-2.

[134] Vol. I Tr. 102: 5-10, 103: 3-15, 105: 1-16, 108: 3-22 (Roll).

[135] *Id.* at 103: 21-24.

[136] *Id*. at 106: 20-24 (Roll). *See also* Columbia Ex. 6, M. Thompson Direct, p. 12: 30-33.

[137] *Id*. at 97-99, 102-103, 106; Columbia Ex. 4 at ¶¶ 1, 4, and 5; Attachments H and I to Columbia Ex. 6, M. Thompson Direct.

[138] *See, e.g.* Columbia Ex. 6, M. Thompson Direct, Attachment H, Exclusive Natural Gas Service Agreement dated March 23, 1993, pp. 1-23.

[139] Columbia Ex. 4 at ¶ 1. See similar provision in agreements in Attachments H and I to Columbia Ex. 6, M. Thompson Direct.

[140] Columbia Ex. 5, McPherson Direct, p. 9: 25-31.

[141] Vol. I Tr. p. 88: 21-25, 109-110 (Roll).

[142] *See, e.g.*, R.C. §4905.35 (A) (undue preference) and *Orwell Natural Gas Co. v. Fredon Corp*., Lake App. No. 2014-L-026, 2015-Ohio-1212, at ¶¶71-72 (court construed R.C. §4929.02(A) as reflecting a public policy to "promote effective competition between willing buyers and sellers" of natural gas and declared unenforceable a deed restriction "which binds all owners and tenants of the property to one natural gas supplier for all time * * *."). *See also* Commission Mission Statement ("Our mission is to assure all residential and business consumers access to adequate,

3.5.2. Suburban may be prematurely waiving deposits in violation of its tariff.

In Count 4 of its Complaint, Suburban accuses Columbia of violating its tariff by not requiring a deposit from "builders or others" in aid of constructing main extensions. Assuming this allegation refers to Pulte Homes' Glenross south subdivision, Columbia determined that the cost of construction was economically justified at Columbia's expense based on the number of homes to be served and Pulte's build-out schedule, as authorized by Columbia's tariff.[143]

Suburban's tariff likewise requires Suburban to determine whether a main extension is justified at its expense.[144] Yet, the record reveals that Suburban, in its standard "exclusive" rights agreement form, contracts to pay all costs associated with servicing future developments[145] *without knowing anything at all* about the future development that may or may not justify the cost of extending mains at Suburban's expense.[146] If either party is violating its Commission-approved mainline extension tariff, that party appears to be Suburban.

3.5.3. Suburban is unconcerned about duplicating Columbia's facilities when extending its mains to serve new developments that Columbia could serve without a main extension.

Suburban claimed, in direct testimony, that "duplicating utility distribution facilities is inefficient and wasteful" whenever "the service need driving the investment can be met with existing facilities."[147] In this case, Suburban is unhappy that Columbia extended a main down Cheshire Road to serve Glenross south when Suburban could have served it without a significant main extension. However, Glenross south is just one example of competition between these utili-

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safe and reliable utility services at fair prices, *while facilitating an environment that provides competitive choices*" by, among other things, "establishing and enforcing a fair competitive framework for all utilities.") (available at https://www.puco.ohio.gov/puco/index.cfm/how-the-puco-works-for-you/mission-and-commitments) (emphasis added).

[143] Vol. II Tr. 310: 10-15, 323: 1-20 (Young), Columbia Ex. 5, McPherson Direct, p. 6: 8-10.

[144] Suburban Tariff, P.U.C.O. No. 3, Section III, Part 33., First Revised Sheet No. 4 and Original Sheet No. 5.

[145] *See e.g.*, Columbia Ex. 4, ¶ 1. *See* similar provision in Attachments H and I to Columbia Ex. 6, M. Thompson Direct.

[146] Vol. I Tr. 101: 6-9, 102: 2-10 (Roll).

[147] Suburban Ex. 3.0, Sonderman Direct, p. 12: 5-8.

ties. Cross-examination revealed three recent examples where Suburban elected to extend its mains significant distances to serve new developments, despite knowing that Columbia already had facilities at or very near the entrances of the developments.[148] Suburban plans to cross over Columbia's closer existing main to reach the Clear Creek subdivision development.[149] Suburban extended its main 1,800 feet along Columbia's existing main on the same side of the road to reach Olentangy Crossings even though Columbia's main already ran all the way to the entrance of the development.[150] And, Suburban extended its main nearly a mile to reach the Mount Carmel Medical Center, which Columbia already was in position to serve with existing lines to the property.[151] Suburban's actual knowledge of the presence of Columbia's mains at these locations was no factor at all in Suburban's decision to duplicate Columbia's facilities.[152]

Columbia accepts that competition creates the possibility of facilities overlap.[153] Suburban, however, evidently only accepts that overlap when the customer chooses Suburban over Columbia.

Suburban says that it filed this complaint case to stop "unfair and unlawful competition."[154] It insists it "is prepared to continue to compete with Columbia on a level playing field."[155] But what it is asking the Commission to do here is to tilt the field in Suburban's favor. Moreover, Suburban's unfounded complaint in this and past proceedings, its decision to drag Columbia's important customer Pulte Homes into deposition to explain why it chose Columbia for distribution service,[156] and its letter inviting the Delaware County Commissioners and Engineer to intervene in this proceeding and take up Suburban's cause under false pretenses[157] provide further reasons why the Commission should be wary of Suburban's perspectives on the meaning of "fair competition." Suburban's hy-

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[148] Vol. I Tr. 67: 12-17, 70: 22-25, 71: 1-23, 72: 12-17, 85: 9-25, 86: 11-25, 87: 1-5, 88: 21-25, 89: 7-16, 109-110 (Roll).

[149] *Id.* at 71: 11-20, 72: 12-17, 85: 9-18.

[150] *Id.* at 85: 20-24, 86: 15-24.

[151] *Id. at* 88: 21-25, 89: 7-16; Columbia Ex. 5, McPherson Direct, p. 9: 25-31.

[152] Vol. I Tr. 61: 8-12, 71: 24-25, 72: 1-4 (Roll).

[153] Columbia Ex. 5, McPherson Direct, p. 9: 29-31.

[154] Suburban Ex. 3.0, Sonderman Direct, p. 20: 10-11.

[155] *Id.* at 20: 13.

[156] Vol. II Tr. 234: 19-21; Suburban Ex. 5, J. Thompson Deposition Tr. 39: 19-21.

[157] Vol. I Tr. 13: 22-25, 14: 1-5 (Riley); Columbia Ex. 3.

pocrisy regarding the companies' competition for customers in Delaware County weighs against awarding Suburban the relief it seeks.

4. Conclusion

For the third time in ten years, Suburban Natural Gas Company has attempted to hijack the Commission's complaint process as a means to restrain competition for customers in Delaware County. Competition between Columbia and Suburban is in the best interest of both public utilities' customers. Building energy-efficient homes, too, is in the best interest of consumers. Nonetheless, Suburban asks the Commission to ignore customer interests and imply a "service territory" limitation in the 1995 Stipulation and Order, as well as in the 2016 DSM Opinion and Order, though no such competitive restrictions exist and none would be lawful regardless.

Suburban's citations to the 1995 Stipulation and the DSM Order are fanciful; its factual arguments are self-contradictory and unsupported by the hearing record; and its legal assertions find no support in Ohio law. Therefore, Counts 1, 2, and 3 all must be dismissed. Count 4, too, must be dismissed for lack of evidence. Suburban failed to prove that Columbia violated its tariff in any manner. The hearing record establishes that Columbia complied with its tariff and offered no special treatment to Pulte Homes (or any other builder) when determining that no deposit is required for a main extension. And Count 5 must be dismissed for the same reasons as Counts 1-4, particularly for lack of evidence.

For all of these reasons, Columbia respectfully requests that the Commission dismiss Suburban's Complaint and make clear that Columbia is free to compete, free to extend facilities to serve new customers, and free to offer DSM incentives throughout Ohio, including within areas Suburban also operates.

Respectfully submitted,

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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 15th day of May, 2018, upon the parties listed below:

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Summary: Brief /Initial Post-hearing Brief electronically filed by Cheryl A MacDonald on behalf of Columbia Gas of Ohio, Inc.