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 POST-HEARING REPLY BRIEF

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1. Introduction

Suburban Natural Gas Company's initial brief is rife with record distortions, red herrings, unsupported factual allegations and innuendos, and flawed legal arguments – and that's just the Introduction.

Suburban begins its Brief by accusing Columbia of various sorts of perfidy in its efforts to compete with Suburban for Pulte Homes' business. But none of those allegations is supported by the record. Columbia "question[ed] Suburban's service record" and "falsely claim[ed] that Suburban was about to raise rates?"[1] Suburban cites no evidence establishing that any of the factual information Ms. Young conveyed to Pulte about Suburban's higher rates and lack of service was in error.[2] Columbia "characterize[ed] Suburban as a rag-tag assemblage of country bumpkins"?[3] Pulte's witness testified that Columbia did not "badmouth[ ]" Suburban.[4] Columbia's offer of EfficiencyCrafted℠ Homes incentives helped "seal the deal" with Pulte?[5] Pulte's decision-maker on the development side, Steve Peck, indicated that the potential for builder incentives meant nothing to their decision.[6] Columbia finally "sealed the deal" by agreeing to provide Pulte Homes a free main extension to get Pulte's business at Glenross South?[7] Pulte's only witness testified that he had no idea if Columbia's determination not to require a deposit was a factor in Pulte's decision.[8] Suburban has not supported any of its accusations about Columbia's efforts to win Pulte's business for Glenross South.

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[1] Suburban Initial Br. at 2.

[2] *See* Suburban Ex. 26 (email dated September 5, 2017 at 2:15:10 PM); Vol. II Tr. 302: 23-25, 303: 1-18 (Young). *See also* Columbia Ex. 6, M. Thompson Direct, p. 11: 9-13 (on Suburban's higher rates.)

[3] Suburban Initial Br. at 2.

[4] Suburban Ex. 5, J. Thompson Deposition Tr. 58: 3-6.

[5] Suburban Initial Br. at 2.

[6] Vol. II Tr. 338; 13-16 (Young). Ms. Young also testified that she never talked to Mr. Thompson about DSM builder incentives relative to Glenross South, much less about any six figure "payoff" as Suburban describes it. *Id.* at 343:14-25, 344: 1-14. Mr. Thompson admitted that he did not understand if, when, or how Pulte could or would ultimately qualify for builder incentives. Suburban Ex. 5 Tr. 59:1-20, 60: 1-19, 66: 17-21.

[7] Suburban Initial Br. at 2.

[8] Suburban Ex. 5, J. Thompson Deposition Tr., p. 47: 4-6. *See also id*. at 36: 5-23; 40: 6-14, 23-24; 41: 1-6.

Suburban mischaracterizes unnamed witness testimony as "admissions," without record citation.[9] No Columbia witness admitted to routinely using builder incentives to compete with Suburban. Mr. Codispoti's "routine" when speaking with builder/developers is to list *all* of the services and programs Columbia offers.[10] And, no Columbia witness "admitted to a habit of discounting main extension deposits for favored builders."[11] Suburban is shamelessly mischaracterizing Ms. Young's testimony and implying wrongdoing where none exists.[12]

Suburban goes on to imply that Columbia must have conducted its cost/benefit study for Glenross South improperly, or not at all, because "no one at Columbia seems to know" how much it cost to extend its main down Cheshire Road.[13] Columbia's witnesses confirmed that the study was completed for Glenross South, and that the study showed no deposit was required of Pulte.[14] Ms. Young testified that Columbia's Engineering Department determined and knows the construction costs inputted into the model.[15] Ms. Young's department was responsible only for the revenue inputs required by the cost/benefit analysis.[16]

Suburban also infers that Columbia provided Pulte Homes special treatment by not requiring a "writing" from Pulte to memorialize the main extension.[17] But Columbia *only* requires a written line extension agreement when a deposit is required by the cost/benefit model.[18]

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[9] Suburban Initial Br. at 3.

[10] Vol. II Tr. 261: 15-25, 262: 1-25, 263: 1-5.

[11] Suburban Initial Br. at 3.

[12] *See infra* p. 29.

[13] Suburban Initial Br. at 2.

[14] Vol. II Tr. 334: 16-23 (Young); Columbia Ex. 5, McPherson Direct, pp. 6: 18-27, 7: 13-30; Vol. III Tr. 396: 16-18, 397: 4-25, 398: 1-23.

[15] Vol. II Tr. 342: 12-25, 343: 1-8 (Young)

[16] *Id*; see also Columbia Ex. 5, McPherson Direct, p. 7: 13-27.

[17] Suburban Initial Br. at 2.

[18] Columbia Ex. 5, McPherson Direct, p. 8: 1-4.

While Suburban takes great liberties in trying to manufacture support for its claims, it cannot escape the realities that have plagued its complaint case from the beginning:

- The 1995 Stipulation does not support Suburban's attempt to limit competition from Columbia in perpetuity. It *nowhere* reflects an agreement by Columbia to ever or forever refrain from: 1) extending its mains to serve new developments in areas where Suburban operates; or 2) sponsoring Commission-approved DSM programs to encourage energy efficiency and reduced natural gas usage.

- The term "service territory" in the DSM Orders and Columbia's DSM applications does mean *something*, just not the meaning Suburban invents. Columbia's DSM incentives are, in fact, available only for homes served by Columbia, *i.e.*, those in *Columbia's service territory*. To date, no homes have been built in Glenross South,[19] and the homes constructed there may or may not ultimately qualify for a DSM incentive, but *all* of them will be in Columbia's service territory because they will be served by Columbia.

- Suburban never had a good faith basis to accuse Columbia of violating its Main Extension Tariff. Suburban failed to refute Columbia's testimony that it relied on the output from Columbia's standardized, computer-based cost/benefit economic model to determine that the main extension to Glenross South was economically justified at Columbia's expense.

And Suburban appears to argue that, if the Commission ultimately finds Suburban failed to meet its burden of proof on any issue, the fault lies with Columbia.[20] But Suburban "has the burden of proving the allegations of the complaint."[21] If Suburban believed that Columbia had improperly "refus[ed] to produce discovery[,]" as it now asserts,[22] it could have pursued its motion to compel. Instead, Suburban withdrew that motion, and the Bench ruled at hearing that "there's no indication that either party has violated any sort of discovery

[19] Suburban Ex. 5, J. Thompson Deposition Tr., p. 58: 21-24.

[20] *See* Suburban Initial Br. at 3-4.

[21] Entry ¶ 10 (Nov. 20, 2017).

[22] Suburban Initial Br. at 3.

rule from the Commission."[23] And if Suburban believed Columbia had improperly asserted confidentiality for the information it did produce, as Suburban now complains,[24] it could have challenged those confidentiality designations pursuant to the parties' Confidentiality Agreement. Again, it did not. The fault for Suburban's failure to meet its burden of proof lies solely with Suburban, and the unsupported and legally unsupportable claims it chose to bring in this proceeding.

For the reasons provided below, and in Columbia's Initial Brief, Columbia respectfully asks the Commission to dismiss 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. Columbia's Reply to Suburban's Statement of Facts

Much of what Suburban includes in its recitation of facts is irrelevant to the legal issues. But, because Suburban tends to distort the record, Columbia will reply to each of Suburban's fact subsections with corrections and comments to clarify the record without regard to relevance.

2.1. Suburban's Operations.

Suburban reminds the Commission that it did not begin service in central Ohio until 1989.[25] Delaware County has been in the center of Columbia's service area far longer. When Suburban decided to move into the area, it should have anticipated competition.

Suburban's characterization and fixation on the Oak Creek, Alum Creek, and Bowling Green "incidents" in the late 1980s and early 1990s[26] offer nothing to support Suburban's allegations in the current complaint case. As a preliminary matter, the allegation that Columbia offered incentives to the developer of Alum Creek in the early 1990s[27] was struck from Mr. Pemberton's testimony,[28] and is

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[23] Vol. II Tr. 281: 6-8.

[24] *See* Suburban Initial Br. at 3.

[25] *Id*. at 5.

[26] Suburban Initial Br. at 5-7.

[27] *See* Suburban Initial Br. at 5, citing Suburban Ex. 4.0, Pemberton Testimony, at 11.

thus entirely unsupported (and entirely inappropriate to raise in Suburban's post-hearing briefs). And the other two incidents occurred 25 to 30 years ago and involved incentives entirely unlike the Commission-approved DSM incentives at issue here. The Bowling Green matter involved "free main and service line extensions, appliance rebates, [and] unapproved special contract rates" to customers.[29] And the Oak Creek matter, if the attachment to Suburban witness Mr. Pemberton's testimony is to be believed, involved a threat by Columbia to pull out of a cooperative advertising agreement with a developer unless the developer chose Columbia to serve its latest development.[30] Here, again, Suburban is relying on portions of Mr. Pemberton's testimony that were struck and are not properly before the Commission.[31] And the remaining support for this last allegation[32] – a 25-year-old memorandum written *to* Mr. Pemberton by his son, recounting a conversation the son had with the developer's representative about a different conversation the developer's *Director of Marketing* had purportedly had with a Columbia representative *"six to eight weeks" prior*[33] – is lacking any indicia of reliability. But even on its face, these allegations are completely irrelevant to the allegations in this complaint case.

2.2. The 1995 Stipulation

Suburban's selective and partial quotations of language from the 1995 Stipulation fail to support Suburban's conclusion that the Stipulation imposed "commitments prohibiting [Columbia] from reintroducing incentives in competition with Suburban or duplicating Suburban's facilities."[34] The Stipulation did not impose any continuing commitments regarding builder incentive programs or future pipeline construction, in perpetuity or otherwise. It narrowly resolved "any and all *existing* disputes between the parties concerning competition"[35] through "(1) the transfer of certain customers and facilities * * *[,]

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[28] *See* Tr. Vol. I at 179: 20 – 180: 16 (granting Columbia's motion to strike Suburban Ex. 4.0, Pemberton Testimony, at 11, lines 9 (starting with "The developer") -17).

[29] Suburban Initial Br. at 6.

[30] *See* Suburban Initial Br. at 5 (citing, *inter alia*, Suburban Ex. 4.0, Pemberton Testimony, at 10).

[31] *See* Tr. Vol. I at 169: 5 – 171: 6 (striking Pemberton Testimony, at 10, lines 3-9).

[32] *See* Suburban Initial Br. at 5.

[33] *See* Suburban Ex. 4.1 at 2, cited in Suburban Ex. 4.0, Pemberton Testimony, at 10.

[34] Suburban Initial Br. at 8.

[35] Complaint, Exhibit A (1995 Stipulation), at p. 9, ¶C.1. (emphasis added).

(2) the modification of certain * * * provisions * * * in the Parties' [then-filed] tariffs," [36] and (3) the exchange of "mutual releases and covenants not to sue * * *."[37] Upon the parties' completion of these three actions, compliance was achieved and the 1995 Stipulation resolved all contested issues and terminated proceedings in Columbia's self-complaint case.[38]

Columbia agrees with Suburban on one factual point: that the Commission "retain[ed] jurisdiction * * * to supervise and assure the Parties' compliance with [the 1995 Stipulation]."[39] Yet, Suburban erroneously conflates this jurisdictional reservation with an affirmative covenant by Columbia not to engage in future activities that could be subject to review.[40] Nothing in the Stipulation's provision addressing the Commission's jurisdiction prohibited Columbia from "reintroducing incentives in competition with Suburban or duplicating Suburban's facilities."[41]

Suburban also misplaces reliance on the significance of the "bounded" geographic area set forth in its Release and Covenant Not To Sue.[42] Suburban's Release begins by releasing Columbia from claims:

> from the beginning of the world to the execution date of this Release constituting, relating to, or based on (1) 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 Releasee* * *.[43]

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[36] *Id*. at p. 2.

[37] *Id*. at p. 9 ¶C.1.

[38] *Id*. at p. 2.

[39] *Id*. at p. 9 ¶C.5.

[40] Suburban Initial Br. at 8.

[41] *Id*.

[42] Complaint, Exhibit A (1995 Stipulation), Exhibit 7 (Suburban's Release and Covenant Not to Sue), at 1-2

[43] *Id*. at 1-2.

Suburban "further covenants and agrees that it will forever refrain" from bringing claims "for any damages, loss, or injury" against Columbia, again:

> based on (1) 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 Releasee * * *.[44]

However, Suburban carved out an exception. The Release states that it:

> 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.[45]

Suburban's reservation of right to challenge Columbia's activities in the defined bounded area after the date of the release cannot rationally be read to commit Columbia to do or refrain from doing anything. Nowhere does the 1995 Stipulation prohibit Columbia from offering builder incentives in the bounded area described in the Release. The record contains no evidence to suggest that the EfficiencyCrafted℠ Homes Program is "substantially similar" to any of the earlier pre-1995 programs. But it does not matter. The Commission need not decide whether the EfficiencyCrafted℠ Homes Program is "substantially similar" because, either way, Suburban's Release does not bar claims arising in the bounded area after the date it was executed.

Suburban concludes this section by crediting Columbia for "honor[ing]" its "commitments" in the 1995 Stipulation for two decades[46] (up to 2007)[47], and then inexplicably fast forwards a decade to assert that "[t]hings changed" when Columbia's sales manager for Delaware County (Myra Miller) retired in 2016.[48]

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[44] *Id*. at 2.

[45] *Id*. at pp. 2-3 of Suburban's Release and Covenant Not To Sue (emphasis added.)

[46] Suburban Initial Br. at 8.

[47] Suburban Ex. 4.0, Pemberton Direct, p. 15: 4-15.

[48] Suburban Initial Br. at 8. To the contrary regarding Ms. Miller's retirement and the nature of the alleged "change," *see* Vol. II Tr. 333: 18-25, 334: 1-9.

During the recent decade overlooked by Suburban, Columbia had been providing EfficiencyCrafted[SM] Homes builder incentives in Delaware County.[49] What changed in the intervening decade is that, before this complaint case, Suburban accepted that Columbia's offering of DSM incentives to homebuilders in Delaware County was lawful and that "Suburban must compete with Columbia in this environment * * *."[50]

2.3. Columbia's sales organization.

Suburban portrays Columbia witness Mr. McPherson as a new manager unfamiliar with Ohio who needed to research locations for growth opportunities and was drawn to southern Delaware County where Suburban operates.[51] In fact, Mr. McPherson grew up in Ohio and did not feel any need to research where his department should focus efforts.[52] He also explained that Columbia's desire for growth is "not based in locations."[53] Mr. McPherson had no knowledge of Glenross or that Ms. Young was even going to talk to Pulte Homes about Glenross South until Ms. Young came back from one of Pulte's monthly utility meetings in late 2016 and informed him of the opportunity.[54]

Suburban also mistakenly states that Ms. Young hosts monthly meetings with Pulte. Actually, Pulte's Jeff Thompson hosts Pulte's monthly meetings with all of the large utilities.[55] Pulte reviews all of its developments with utility representatives at these meetings including upcoming projects.[56] It was during one of these meetings that Ms. Young heard about the development plan for Glenross South and asked Pulte for an opportunity to submit a proposal.[57] Suburban then imagines that Ms. Young continued the discussion of Glenross

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

[50] *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).

[51] Suburban Initial Br. at 9.

[52] Vol. III Tr. 408: 17-25 (McPherson).

[53] Vol. III Tr. 408: 25, 409: 1 (McPherson).

[54] Vol. III Tr. 410: 23-25, 411: 1-10 (McPherson).

[55] Suburban Ex. 5, J. Thompson deposition Tr. 22: 11-17; Vol. II Tr. 329: 15-18 (Young); Vol. III Tr. 411: 1-10 (McPherson).

[56] *Id*. and Vol. II Tr. 329: 14-18 (Young).

[57] Vol. II Tr. 299: 11-25, 300: 18-24 (Young).

South with Pulte's Mr. Thompson at a Blue Jackets game, even though Ms. Young did not attend the game[58] and there is no evidence Ms. Young had even learned of the Glenross South opportunity by the date she gifted the tickets.

2.4. Suburban's plans to serve Glenross South.

While Suburban may have planned to handle the new load from Glenross South,[59] Suburban understood that Pulte had no obligation to choose Suburban.[60] Pulte's predecessor, Dominion Homes, relied on Suburban on the north side of Cheshire Road, but did not commit itself or its successors to stay with Suburban in the future. Pulte had every right to consider Columbia for its new development on the south side of Cheshire Road.[61]

2.5. Columbia's Glenross South pitch.

Suburban assumes Mr. Thompson was correct in communicating that builder incentives were the reason Pulte selected Columbia over Suburban.[62] But, as Columbia set forth in its initial brief, Mr. Thompson was not the decision maker, and his boss Mr. Peck told Ms. Young that the builder incentive program was not a factor.[63] But, this evidentiary conflict is not material. 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 usage. It does not matter if Pulte saw value in Columbia's EfficiencyCrafted[SM] Homes Program and selected Columbia knowing only Columbia provided that value. Columbia cannot be labeled an unfair competitor simply because it offers services and programs that distinguish

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[58] *See* Suburban Exs. 23-24.

[59] Suburban Initial Br. at 10.

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

[61] Suburban states that it already serves over 300 homes on the south side of Cheshire Road. Suburban Initial Br. at 11. In fact, Suburban's witness testified that Suburban's main "supplies gas to approximately 324 customers *on both the north and* south side of Cheshire Road." Suburban Ex. 1.0, Roll Direct, p. 7: 8-10 (emphasis added).

[62] Suburban Initial Br. at 12.

[63] Vol. II Tr. 338: 13-16.

it from Suburban. Columbia offers a variety of programs and services that distinguish it from its competitors.[64]

Suburban next exaggerates Glenross South as a "major coup for Columbia."[65] There is no dispute that it represents a big project. But Suburban's record citations do not support its exaggeration that the project was featured in a quarterly presentation[66] or that Ms. Young received a job promotion because of Glenross South.[67] The record does not indicate where Glenross South ranks in terms of importance to Columbia among the other 27 projects Columbia was already handling for Pulte Homes.

Suburban concludes its statement of "facts" by presuming that Pulte's decision to select Columbia "came down to one factor and one factor only: money."[68] As previously explained, the record is not clear as to what influenced Pulte to select Columbia. The record reflects a conflict between what Mr. Thompson told Mr. Roll and what Mr. Thompson's boss and decision-maker, Mr. Peck, told Ms. Young. Suburban ignores Ms. Young's testimony concerning her meeting with Pulte's Mr. Peck and lack of meeting with Mr. Thompson about the program.[69] No one from Columbia promised Pulte that its later constructed homes would definitely qualify for energy efficiency incentives. No money changed hands. In fact, Ms. Young testified that Pulte spent far more qualifying a home for an incentive than the incentive ultimately received.[70]

Suburban also misrepresents the record by implying that Columbia deviated from its economic model to grant Pulte a free main extension. Mr. McPherson, Ms. Young, and Mr. Codispoti all testified that Columbia had all the information needed to conduct the cost/benefit analysis for phases 11-15 of

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[64] *See* Columbia Ex. 6, M. Thompson Direct, p. 5: 19-28; Columbia Ex. 5, McPherson Direct, p. 3; 1-39, 4: 1-5.

[65] Suburban Initial Br. at 12.

[66] For a recounting of these irrelevant facts, *see* Vol. III Tr. 411: 11-25, 412: 1-25 (McPherson.)

[67] Vol. II Tr. 295:2-13.

[68] Suburban Initial Br. at 13.

[69] Vol. II Tr. 338: 13-16, 343; 21-25, 344: 1-14 (Young).

[70] Vol. II Tr. 328: 25, 329: 1-7 (Young) ($1500 vs. average incentive payment of $277); Suburban Ex. 27.

Glenross South.[71] Once the main was extended to Glenross South, there obviously would be no need for an additional main extension (or any associated cost) to serve future phases. There is no evidence to support Suburban's inference that this fact "caught Pulte by surprise."[72] Pulte merely sought email confirmation. And, there is no evidence to view Columbia's ability to meet its customer's year-end deadline as anything other than excellent service.

3. Argument

3.1. Suburban fails to prove that "Columbia violated the 1995 Stipulation."

Suburban argues again, as it has in the past, that the 1995 Stipulation must be interpreted to forever bar Columbia from "duplicating Suburban's facilities" or offering "builder incentives" of any kind, including DSM incentives, because otherwise "the Commission's approval of the stipulation was meaningless."[73] Columbia responded to these arguments in its initial brief (*see* § 3.1), and will attempt to limit the repetition of those points here.

The 1995 Stipulation resolved all contested issues in Columbia's 1993 Self-Complaint,[74] which the Commission narrowly framed as "the interpretation and application of Columbia's tariff as related to the provision of marketing incentives to builders and developers of the Oak Creek subdivision."[75] In the 1995 Stipulation, Columbia and Suburban agreed only "to (1) the transfer of certain customers and facilities between the Parties and (2) the modification of certain tariff provisions which are currently contained in the Parties' tariffs on file with the Commission."[76] This narrow agreement did not govern what either party could or could not do in the future. If—as Suburban asserts—the 1995 Stipulation established "rules for how such competition [between Suburban and

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[71] Columbia Ex. 5, McPherson Direct, p. 6: 18-27; Vol. II Tr. 311: 24-25, 312: 1 (Young); Vol. II Tr. 240: 1-4, 269: 5-13 (Codispoti)

[72] Suburban Initial Br. at 13.

[73] Suburban Initial Br. at 15.

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

[75] *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, 1993 Ohio PUC LEXIS 1097, at ¶ 8 (Dec. 6, 1993).

[76] Complaint, Exhibit A (1995 Stipulation), at 8.

Columbia] would occur,"[77] such rules would pertain to compliance with those expressly agreed-upon terms.

Instead, Suburban cites language from its "Release and Covenant Not to Sue" as lone support for its argument that Columbia violated the 1995 Stipulation by offering EfficiencyCrafted[SM] Homes builder incentives.[78] This Release, however, did not prohibit Columbia from offering future builder incentive programs. Suburban merely limited the scope of its release of claims by reserving the right to challenge Columbia's "activities" after the date of the Release "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."[79] Columbia acknowledges that Suburban's current claim about Glenross South arises "within the geographic area where Suburban reserved the right to complain."[80] Consequently, the only significance of the release language is that Columbia cannot use it to preclude Suburban from bringing its current claim. Suburban, based on this Release, erroneously conflates its right to bring a claim with a right to a favorable disposition on the merits of its claim.[81]

At bottom, the 1995 Stipulation is irrelevant because its terms do not apply to Suburban's claims in this case. Columbia satisfied all terms of the Stipulation long ago. Suburban's assertion that Columbia is prohibited from duplicating pipeline facilities is not supported by the 1995 Stipulation or existing law, ignores Suburban's own duplication of Columbia's facilities[82], and would require legislation if "duplication" of natural gas facilities were to be regulated. And Suburban's assertion that the 1995 Stipulation prohibits all payments to home builders – even those "tied to energy efficiency"[83] – is similarly unsupported by the Stipulation's text. Although Suburban claims that the 1995 Stipulation set forth clear restrictions on competition – "no incentives [to

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[77] Suburban Initial Br. at 17.

[78] *Id.* at 18.

[79] *Id*. at pp. 2-3 of Suburban's Release and Covenant Not To Sue.

[80] Suburban Initial Br. at 15-16.

[81] *See id*. at 18 ("Whatever right Columbia generally has to offer DSM programs is expressly limited by the stipulation.")

[82] Columbia Initial Br. § 3.5.3.

[83] *Id.* at 16.

builders] and no duplication of facilities within a limited, defined area"[84] – those restrictions are nowhere to be found in the 1995 Stipulation. Columbia cannot violate requirements that only Suburban can see.

3.2. Suburban fails to prove that "Columbia violated the Orders approving its DSM program."

Suburban claims that Columbia "exceeded the scope of its authority" under the EfficiencyCrafted[SM] Homes Program in two respects: 1) by offering builder incentives outside its "service territory;" and 2) by using the program as a "competitive tool."[85] Columbia refuted this argument in its Initial Brief.[86] At the risk of repetition, Columbia again briefly addresses each element of Suburban's argument below.

3.2.1. Homes constructed in Glenross South will receive natural gas distribution service from Columbia and, therefore, will be eligible to participate in Columbia's Efficiency-Crafted[SM] Homes Program.

Suburban opens its argument by claiming that "Columbia's DSM applications repeatedly emphasized that builder incentives would be offered 'in' or 'within' Columbia's 'service territory."[87] (In truth, Suburban cites one use of the term in each of Columbia's 2008 and 2011 DSM applications.[88]) Although Suburban concedes that natural gas companies do *not* have certified service territories, Suburban insists that "Columbia must have intended to convey *something*" by the phrase, and hazards a guess that Columbia intended to limit the application of its EfficiencyCrafted[SM] Homes Program from 2017-2022 to the unstated, undisclosed boundaries of its service territory in 2016.[89] Indeed,

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[84] *Id.* at 17.

[85] Suburban Initial Br. at 19.

[86] Columbia Initial Br. § 3.2.

[87] Suburban Initial Br. at 19.

[88] *Id*. at 19, footnote 85. To be precise, Columbia described the "target market" of its 2008 "Residential New Construction Program" as "Builders of new, gas heated single family homes built in the COLUMBIA service territory" and the "program description" of the 2011 "Energy Efficient New Homes program" states the program "will provide incentives to home builders within Columbia Gas of Ohio's service territory to build homes that exceed state energy code minimum levels."

[89] Suburban Initial Br. at 20.

Suburban insists that this is how "both parties have used and understand the term 'service territory[,]'" citing to testimony from a Columbia Vice President in a 1987 Commission hearing.[90]

This is not, in fact, how both parties have used the term "service territory." Suburban misquotes the 1987 transcript – Columbia's Vice President was asked to describe what he considered Columbia's "markets," not to define Columbia's "service territory"[91] – and Suburban fails to explain why a 31-year-old comment in an unrelated proceeding would control the interpretation of Columbia's DSM applications.

Nor is Suburban's proffered definition of "service territory" for Columbia's DSM applications consistent with how either party uses the term currently. Suburban witness Aaron Roll offered a most expansive definition of Suburban's "service territory" as any area where Suburban commits to serve before its mains are extended and without regard to the location of a competitor's nearest facilities.[92] Suburban's Andrew Sonderman proposed a more restrictive definition of the term to apply to Columbia: "areas where [a natural gas company] already has gas mains, or areas where [it is] the only provider capable of extending an existing main to a new development."[93] For its part:

> Columbia considers its service territory or service area to be, at any time, the general geographic area where Columbia has facilities serving or capable of serving Ohio residents. But this geographic area is not fixed. Columbia continually extends its mains to serve new areas and reach new potential customers, thereby changing its service area on a regular basis.[94]

Columbia certainly hopes to extend the benefits of energy savings to new potential customers with its DSM program through 2022 and this necessarily

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[90] *Id.* at 20 and n.88.

[91] *See In re Complaint of Suburban Fuel Gas, Inc. v. Columbia Gas of Ohio, Inc.*, Case No. 86-01747-GA-CSS, May 7, 1987 Hearing Tr. at 173 (cited in Suburban Initial Br. at 20 n. 88).

[92] Vol. I Tr. 59: 3-18, 61: 2-12.

[93] Suburban Ex. 3.0, Sonderman Direct, p. 9: 14-17. Suburban claims to be capable of reaching every unserved corner of its "generally bounded," self-proclaimed service area. Vol. I Tr. 62: 19-25, 63: 1-12, 90:3-17 (Roll).

[94] Columbia Ex. 6, M. Thompson Direct, p. 6: 27-33.

means its service area will change on a regular basis. And, nothing prohibits Columbia from competing to serve new areas that its competitors are also capable of reaching. Customers served by Columbia obviously are within Columbia's service territory and are eligible to participate in the DSM program. The term "service territory" in its DSM applications:

> 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.[95]

The builder of homes eventually constructed in Glenross South will be eligible to participate in the EfficiencyCrafted[SM] Homes Program because Columbia will, in fact, be providing the natural gas distribution service to the development. This is *all* that Columbia intended to convey to the public, builders, and the Commission when using the term "service territory" in its 2008 and 2011 DSM applications. It appears the Commission understood this intent when it held that Columbia's EfficiencyCrafted[SM] Homes program "is an effective method to encourage the construction of energy efficient homes in Columbia's service territory" and that "[t]he key factor is that the home is located within Columbia's service territory and the customer is served by Columbia."[96]

Suburban also overlooks the unintended consequences of its tortured interpretation of "service territory." Suburban insists it seeks only to challenge Columbia's use of the EfficiencyCrafted[SM] Homes program, one of twelve programs in Columbia's DSM portfolio.[97] Yet Columbia used the term "service territory" in its 2016 DSM application when identifying a "key purpose" of *all* the programs in the DSM portfolio: to "provide cost-effective, customer-oriented

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[95] Columbia Ex. 6, M. Thompson Direct, pp. 6: 13-21 and 7: 18-32.

[96] *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs for its Residential and Commercial Customers*, Case No. 16-1309-GA-UNC, Opinion and Order ("*2016 DSM Order*"), at 85 (Dec. 21, 2016).

[97] Suburban Initial Br. at pp. 1 and 17. *See* list of DSM programs in Columbia's DSM portfolio at Columbia Ex. 6, M. Thompson Direct, Attachment D, p. 10 of 33.

energy efficiency services for residential and commercial customers *throughout Columbia's entire service territory*."[98] Columbia's target area for its DSM program is all 61 counties in which it operates.[99] And Columbia further explained that its WarmChoice® program "focuses on health and safety to help ensure that low-income residents *within Columbia's service territory* are insulated from the dangers of antiquated, unsafe heating equipment despite income limitations."[100] Unless Suburban would suggest that Columbia intended to "imply" different meanings for this common term depending on where the term was used in the DSM applications, even though not a single word anywhere in those applications indicates such an inexplicable intent, Suburban's position here would restrict Columbia's ability to offer all of its DSM programs, not just EfficiencyCrafted℠ Homes.

As its final desperate argument, Suburban insists the Commission must interpret "any ambiguity" in the 2008 and 2011 DSM applications regarding the term "service territory" in Suburban's favor.[101] Yet the case Suburban cites for this proposition, *Saalfield Pub. Co. v. Public Utilities Com.*, 149 Ohio St. 113, paragraph 2 of the syllabus (1948),[102] says nothing of the sort. In *Saalfield*, the Supreme Court of Ohio held that ambiguous "provisions in a *rate schedule*" must be "construed favorably to the *shipper*" – not that ambiguous words in a rider *application* must be construed favorably to the applicant's *competitors*. Columbia's testimony about the meaning of the "service territory" in its DSM applications is clear and unambiguous. As the drafter of its applications,[103] Columbia's statement of intent should control over Suburban's implausible and self-serving inferences.

3.2.2. The fact that developers and homebuilders may value the EfficiencyCrafted℠ Homes Program does not make it unfair or unlawful.

In December 2016, the Commission authorized Columbia to continue offering its EfficiencyCrafted℠ Homes Program, finding that the program "is an

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[98] Columbia Ex. 6, M. Thompson Direct, Attachment D, p. 2 of 33 (emphasis added).

[99] Columbia Ex. 6, M. Thompson Direct, p. 5: 14-17, 35-37.

[100] Columbia Ex. 6, M. Thompson Direct, Attachment D, p. 27 of 33 (emphasis added).

[101] Suburban Initial Br. at 20.

[102] *See id.*

[103] *See* Columbia Ex. 6, M. Thompson Direct, p. 6: 13-18.

effective method to encourage the construction of energy efficient homes" and that "installing energy efficient and conservation measures during construction can provide long-term savings for the resident."[104] Suburban does not care. "[R]egardless of how much gas has been saved, or how much has been spent to achieve these savings," Suburban says, "the program is *also* being used to muscle Suburban out of its own service territory."[105]

As a collateral attack, Suburban challenges Columbia's EfficiencyCrafted[SM] Homes Program as "crony capitalism and corporate free ridership."[106] Suburban recites data from Columbia's 2016 DSM case to complain that too few builders from 2012-2015 received too many of the total incentives.[107] Suburban at hearing cited Internet sources of data to argue that builders will build in southern Delaware County without incentives to increase energy efficiency.[108] Suburban complains of the competitive advantage the program provides Columbia. Notably, Suburban did not intervene and voice any of these opinions in the 2016 DSM proceeding or in either of the earlier DSM cases.[109] Columbia has been providing builder incentives in Delaware County since at least 2011.[110] The Commission should not allow a public utility to ignore a Commission proceeding it feels may "adversely affect[ ]" it[111] 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."[112] The Commission should reject Suburban's attempt to duplicate Columbia's 2016 DSM case by collaterally attacking the program's purpose and value here.

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[104] *2016 DSM Order*, ¶ 115.

[105] Suburban Initial Br. at 27.

[106] *Id.* at 26.

[107] *Id.*

[108] *See* Suburban Ex. 3.0, Sonderman Direct, pp. 14: 12 – 15: 12.

[109] *See* Tr. Vol. III at 502-505 (Suburban admitting, under questioning from the Bench, that it did not intervene in Columbia's DSM proceeding, and Columbia arguing that Suburban's "collateral attack on the DSM order" should be disallowed).

[110] *See* Suburban Ex. 42 (highly confidential).

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

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

Regardless, the main premise underlying Suburban's argument – that Delaware County is Suburban's "service territory" and Suburban is entitled to all new customers in that area – is contrary to Ohio law. As Suburban has conceded, "the very nature of a builder incentive program entails service to previously unserved locations."[113] And Suburban has further conceded that "natural gas companies do not have service 'territories' in the same sense as electric or water utilities * * * ."[114] Indeed, in the same 1987 transcript that Suburban has attempted to rely on in this case, Suburban's current Chairman and CEO (and then attorney) David L. Pemberton, Sr., asked *Columbia* to agree that "any gas company in the State of Ohio can serve any customer in the State of Ohio * * * under the law[,]" and "there isn't any defined market [area]" for natural gas companies.[115] Thus, Columbia isn't "muscl[ing] Suburban out of its own service territory"; it is competing with Suburban for new customers in previously unserved areas, just as Ohio law allows.

The second premise underlying Suburban's argument – that the EfficiencyCrafted[SM] Homes Program is "unlawful" if it gives Columbia a competitive advantage over Suburban[116] – is equally lacking. There is no Ohio statute, Commission rule, or precedent that prevents natural gas companies from advertising the factors that differentiate them from their competitors. Once a member of Columbia's sales team like Mr. Codispoti 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

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[113] Suburban's Motion for Emergency Interim Relief at 4.

[114] *Id*.

[115] *In re Complaint of Suburban Fuel Gas, Inc. v. Columbia Gas of Ohio, Inc.*, Case No. 86-01747-GA-CSS, May 7, 1987 Hearing Tr. at 175-176.

[116] Suburban Initial Br. at 1.

> builder, developer or customer may consider when choosing a natural gas provider.[117]

The Commission recognized this when it denied Suburban's 2011 self-complaint, finding that there were a number of factors that differentiate Suburban and Columbia, including "differences in the companies' rates, rate structures, size, or even whether it had a Choice program * * * ."[118] Mr. Codispoti also described other programs and services Columbia offers that Suburban does not offer that may lead builders to select Columbia over Suburban.[119] For example, unlike Suburban, which requires builders or homeowners to install service lines at their cost,[120] Columbia handles the installation of service lines to every home in the new subdivision for the builder pursuant to its tariff.[121] And Suburban offers no basis for distinguishing Columbia's DSM programs from any of these other factors. If it were improper for Columbia to describe the potential benefits of its EfficiencyCrafted[SM] Homes Program to builders who have other options for natural gas distribution service, then it would be improper for Columbia to mention *any* of the reasons why Columbia believes it is a better choice than Suburban.

Lastly, Suburban's attempt to infer a "competitive response benefit" in Columbia's EfficiencyCrafted[SM] Homes Program from Columbia's "confidential" and "highly confidential" document designations wrongly presumes that Columbia wants to "prevent the public from seeing what it is paying for * * * ."[122] Columbia wishes to avoid giving away valuable data and proprietary information, funded by Columbia's customers for the benefit of Columbia's

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[117] Columbia Ex. 6, M. Thompson Direct, at p. 5: 19-28; *see also* Columbia Ex. 5, McPherson Direct, p. 3: 16-25.

[118] *2011 Suburban Self-Complaint Case*, Opinion and Order at 8 (Aug. 15, 2012).

[119] Vol. II Tr. 261: 15-25, 262: 1-25, 263: 1-16. Suburban also misquotes Mr. Codispoti's testimony about the potential "competitive advantage" the builder incentive program can incidentally provide. Initial Br. at 1, 22. Mr. Codispoti actually stated the obvious: *if* a builder values energy efficiency and only one of two competitors for the customer offers incentives, then a competitive advantage will result. Vol. Tr. II 242: 1-6, 265: 3-25, 266: 1-2.

[120] Suburban Tariff, P.U.C.O. 3, Section III, Part 23(b), Third Revised Sheet No. 1 ("the customer shall be responsible for the original installation of the service line").

[121] Vol. II Tr. 262: 10-25, 263: 1-5; *see also* Columbia Tariff, P.U.C.O. No. 2, Section III, Part 1, First Revised Sheet No. 6a ("The Service Line Connection * * * shall be made by the Company, or its representative, without cost to the customer * * *.").

[122] *Id*. at 26.

customers, that Suburban and other competitors could use to copy Columbia's DSM program without just compensation. Columbia encourages its competitors to create their own energy efficiency incentive programs to help their customers manage energy consumption.

3.3. Suburban fails to prove that "Columbia violated its DSM Rider."

Columbia has been offering incentives under its EfficiencyCrafted[SM] Homes Program, and recovering its costs to implement that program, for almost a decade. Suburban now argues that Columbia has been violating the law all along. First, Suburban appears to argue that EfficiencyCrafted[SM] Homes incentives are a "rate" or "charge" for "service" that should have been included in a published tariff under R.C. 4905.30.[123] Second, it argues the incentives are a "refund" prohibited by R.C. 4905.32.[124] And third, it argues that Columbia's tariff authorizes the recovery of only *some* of its DSM program costs, and not those associated with the EfficiencyCrafted[SM] Homes Program.[125] Although the Commission could simply remedy each of these purported problems by modifying Columbia's tariff, no such modifications are necessary. Suburban has misinterpreted the relevant statutes and tariff provisions.

3.3.1. Columbia's payments to homebuilders are lawful DSM incentives, not unlawful rebates.

Columbia introduced its EfficiencyCrafted[SM] Homes Program in 2008.[126] Since then, the Commission has approved the program three times.[127] In 2008, the Commission found Columbia's request for approval of specific listed DSM programs, including Columbia's New Homes Program, to be "reasonable and in the public interest" and "authorized [Columbia] to implement those programs * * * ."[128] In 2011, it approved and adopted a stipulation that recommended the

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[123] Suburban Initial Brief at 28.

[124] *Id.* at 28-29.

[125] *See id.* at 29-30.

[126] Columbia Ex. 6, M. Thompson Direct, p. 2: 9.

[127] *See id.* at pp. 3:1 – 4:40 (citing Columbia's applications and/or Commission orders in Case Nos. 08-833-GA-UNC, 11-5028-GA-UNC *et al.*, and 16-1309-GA-UNC *et al.* approving Columbia's DSM programs).

[128] *In re Application of Columbia Gas of Ohio, Inc., for Approval of a Demand Side Management Program for Residential and Commercial Customers*, Case No. 08-833-GA-UNC, Finding and Order, ¶ 6 (July 23, 2008).

continuation of Columbia's DSM programs, including what was then called the Energy Efficient New Homes program.[129] And in 2016, it again approved the continuation of Columbia's DSM programs, specifically finding that the EfficiencyCrafted℠ Homes Program "is an effective method to encourage the construction of energy efficient homes in Columbia's service territory."[130]

The Commission-approved EfficiencyCrafted℠ Homes Program is not a "service" for which Columbia's customers pay a "rate" or "charge." It is a DSM program that "offers incentives to home builders to build homes that exceed state energy code minimum levels."[131] Consequently, R.C. 4905.30 is irrelevant to the EfficiencyCrafted℠ Homes Program. And R.C. 4905.32 is equally irrelevant. Suburban argues that EfficiencyCrafted℠ Homes incentives are an unlawful "rebate" that "reduces 'charges' for main extension 'service' * * *."[132] But Columbia's DSM incentives and main extension charges are unrelated. A homebuilder can receive a DSM incentive even if it has not paid a main extension charge.[133] It need only "build housing that [is] ENERGY STAR® compliant, that ha[s] a Home Energy Rating Score ('HERS') of 80 or less, or that provide[s] energy savings over code minimum levels based on other accepted energy modeling approaches."[134] And although Mr. Codispoti testified that EfficiencyCrafted℠ Homes incentives may "partially offset" a main extension deposit,[135] that does not mean the incentives are tied to, or partially refund, the main extension deposit. It simply acknowledges that a developer's ultimate costs for choosing Columbia to serve a new subdivision will be less if the developer also owns the homes in the subdivision and those homes qualify for EfficiencyCrafted℠ Homes incentives.

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[129] *In re Application of Columbia Gas of Ohio, Inc., for Approval of Demand-Side Management Programs for its Residential and Commercial Customers*, Case Nos. 11-5028-GA-UNC et al., Finding and Order, ¶¶ 14-15 (Dec. 14, 2011).

[130] *2016 DSM Order*, ¶¶ 115, 134.

[131] Columbia Ex. 6, M. Thompson Direct, Attachment D (2016 DSM Application), p. 11.

[132] Suburban Brief at 28.

[133] *See* Columbia Tariff, P.U.C.O. No. 2, Third Revised Sheet No. 9, § 3.12 (explaining that Columbia does not require a deposit for main extensions of 100 feet or less or those "deemed justified at the Company's expense").

[134] Columbia Ex. 6, M. Thompson Direct, p. 4:7-13 and 4:34-40.

[135] Vol. II Tr. 232:2-20.

For both of these reasons, Columbia's offering of DSM incentives to new homebuilders does not violate R.C. 4905.30 or R.C. 4905.32.

3.3.2. Columbia is authorized to recover its program costs through Rider DSM.

The Commission has also approved Columbia's recovery of its costs for implementing the EfficiencyCrafted℠ Homes Program. In 2008, the Commission authorized Columbia "to establish a Demand Side Management Rider ('Rider DSM')" to "provide for the recovery of costs incurred in the implementation of DSM programs" approved by the Commission.[136] Between 2009 and 2017, "Columbia * * * provided incentives to support the energy efficient construction of 12,416 homes."[137] And the Commission has approved Columbia's annual applications to adjust Rider DSM every year since 2009.[138]

Suburban, however, asserts that Columbia may not actually recover those costs through Rider DSM, because the relevant tariff states that Rider DSM recovers "costs associated with the implementation of * * * energy efficiency programs *made available to residential and commercial customers*."[139] In particular,

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[136] *In re Application of Columbia Gas of Ohio, Inc., for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case Nos. 08-72-GA-AIR et al., Opinion and Order, pp. 6, 10, 26 (Dec. 3, 2008).

[137] *Id.* at p. 5:34-35.

[138] *See In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 09-1036-GA-RDR, Opinion and Order, at 10 (Apr. 28, 2010); *In re Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates to Recover Costs Incurred in 2010*, Case No. 10-2353-GA-RDR, Opinion and Order, at 9 (Apr. 27, 2011); *In re Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates to Recover Costs Incurred in 2011*, Case No. 11-5803-GA-RDR, Opinion and Order, at 9 (Apr. 25, 2012); *In re Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 12-2923-GA-RDR, Opinion and Order, at 9 (Apr. 24, 2013); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 13-2146-GA-RDR, Opinion and Order, at 7 (Apr. 23, 2014); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 14-2078-GA-RDR, Finding and Order, at 5 (Apr. 22, 2015); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 15-1918-GA-RDR, Finding and Order, ¶ 20 (Apr. 20, 2016); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 16-2236-GA-RDR, Finding and Order, ¶ 20 (Apr. 26, 2017); *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 17-2374-GA-RDR, Finding and Order, ¶ 39 (Apr. 25, 2018).

[139] Suburban Brief at 30 (emphasis in original).

Suburban asserts that a company is not a "customer" unless it is receiving "sales service" from Columbia, and that "[s]ervices rendered to builders and developers for main extensions are not 'sales service.'"[140] But, as explained in the EfficiencyCrafted℠ Homes Program's Implementation Manual, Columbia will not process incentive payments under that program unless the homes have gas meters and Columbia "confirm[s] the meter numbers are in the Columbia Gas system."[141] In other words, a builder cannot receive a DSM incentive for a new home unless the home's owner or resident is a Columbia customer.

If the Commission believes Columbia's Rider DSM tariff is ambiguous, and that a tariff amendment would be warranted to clarify that Columbia may recover its costs for the EfficiencyCrafted℠ Homes Program, Columbia would not oppose such an amendment. However, Columbia does not believe such an amendment is necessary. And given the Commission's repeated approval of both the EfficiencyCrafted℠ Homes Program and Columbia's recovery of Program-related costs through Rider DSM, Suburban's arguments provide no justification for denying recovery of any DSM incentive payments to Pulte Homes in future proceedings.

3.4. Suburban fails to prove that "Columbia violated its main extension tariff."

Suburban has the burden of proof, but criticizes Columbia for not doing enough to prove that it conducted the cost-benefit analysis required by its tariff before determining that the main extension to Glenross South was economically justified at Columbia's expense.

Suburban never requested a print-out of the computer cost-benefit analysis during discovery. Suburban's claims that Columbia failed to present the Glenross South cost-benefit analysis does not mean a study was not performed. Instead, the evidence presented at hearing proves otherwise. Columbia witnesses testified under oath that the cost-benefit analysis *was* conducted in the same manner it is for *every* main extension.[142] They explained how it was done and

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[140] *Id.*

[141] Suburban Ex. 41-HC, EfficiencyCrafted Implementation Manual (9/25/2017 update), at 20. Columbia waives its "Highly Confidential" assertion for the sentence of the Implementation Manual quoted above.

[142] *See* Columbia Ex. 5, McPherson Direct, p. 7: 13-38; Vol. II Tr. 316: 25 – 318: 5, 334: 10 – 335: 11 (Young).

how it worked. Mr. McPherson made clear that the main extension could not have received internal approval without the study.[143]

Suburban makes much of the fact that none of Columbia's witnesses knew the cost of the main extension to Glenross South. In explaining how Columbia conducts its cost/benefit analysis, Ms. Young testified that Columbia's Engineering Department knows and was responsible for inputting the construction costs into the model.[144] Ms. Young and Mr. Codispoti were responsible only for the revenue inputs required by the cost/benefit analysis.[145]

Suburban next attempts to cast doubt by chastising Columbia's witnesses for not recalling whether anyone completed the "form" providing "the number and type of homes to be built * * * and similar details."[146] Again, Suburban is trying to make something out of nothing. Mr. Codispoti testified that this information is ordinarily obtained from the developer without use of the form,[147] and that use of the form is left to personal preference.[148] The record shows that Columbia received all the information it required from Pulte to conduct the cost-benefit analysis.

Suburban also suggests that Columbia provided Pulte Homes special treatment by not requiring Pulte to execute a main extension agreement.[149] Suburban ignores that Columbia only ever requires a written line extension agreement when a deposit *is* required by the cost/benefit model.[150] Suburban's questioning of Columbia's business practice in this regard is legally irrelevant and stands in curious contrast to the evidence that Suburban *never* requires a written line extension agreement.[151]

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[143] Vol. III Tr. 396: 16-18, 397: 1-14, 398: 14-16, 399: 13-25, 400: 1-20, 417: 22-25, 418: 1-18, 419: 14-25, 420: 1-18 (McPherson.)

[144] Vol. II Tr. 342: 12-25, 343: 1-8 (Young)

[145] *Id*.; Columbia Ex. 5, McPherson Direct, p. 7: 13-27.

[146] Suburban Initial Br. at 33.

[147] Vol. II Tr. 272: 14-25, 273: 1-8 (Codispoti).

[148] Vol. II Tr. 271: 21-25, 272: 1-25, 273: 1-25 (Codispoti).

[149] Suburban Initial Br. at 33.

[150] Columbia Ex. 5, McPherson Direct, p. 8: 1-4.

[151] Vol. I Tr. 59: 3-18, 66: 24-25, 67: 1-14, 74: 9-12 (Roll).

Finally, Ms. Young did *not* "confess to fudging cost benefit studies in the past in order to placate favored developers."[152] Ms. Young adhered to Columbia's standard guidelines in obtaining and inputting the needed information in the economic model in every case.[153]

In sum, 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 without conducting its cost-benefit analysis.[154]

3.5. Suburban fails to prove that "Columbia has violated Revised Code Title 49."

Finally, Suburban asserts that it has "met its burden of proof for Count 5" of its Complaint because it demonstrated that Columbia violated various statutes in Revised Code Chapter 4905, including R.C. 4905.22, 4905.26, 4905.30, 4905.32, 4905.33, 4905.35, and 4905.56.[155]

Suburban previously denied that Count 5 was "based on the same allegations as Counts 1 through 4" and would fail if Counts 1 through 4 were dismissed.[156] "[T]he statutory violations alleged in Count 5 survive independently[,]" Suburban asserted, even if Suburban did not "prove that Columbia violated the 1995 Stipulation, DSM Orders, or its Main Extension Tariff * * * ."[157] Now, Suburban admits that Count 5 is tied to Counts 1 through 4. Suburban confirms that the basis for its allegations in Count 5 are its allegations that Columbia "disregarded the 1995 Stipulation, acted beyond any authority granted by the DSM program approval orders, * * * violated its main extension tariff[,]" and will seek "to recover the cost of the incentives paid to Pulte from its DSM rider * * *."[158]

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[152] Suburban Initial Br. at 33-34.

[153] Vol. II Tr. 314: 12-25, 315: 1-22, 318: 1-5, 322: 14-25, 323: 1-21 (Young).

[154] *See also* Columbia's Initial Br. at pp. 2-3.

[155] Suburban Brief, pp. 35-36.

[156] Suburban's Memorandum Contra Motion to Dismiss, p. 15.

[157] *Id.*

[158] Suburban Brief, p. 35.

As demonstrated above, Suburban has not met its burden of proof for Counts 1 through 4 of its Complaint. Suburban has not demonstrated that Columbia violated the 1995 Stipulation or the Commission's numerous orders approving Columbia's DSM program. Suburban has not demonstrated that Columbia violated its Main Extension Tariff. And Suburban has not demonstrated that Columbia's Rider DSM tariff prohibits the recovery of costs related to the EfficiencyCrafted℠ Homes Program. Consequently, Suburban has not met its burden of proof for Count 5 of its Complaint either.

4. Conclusion

This is a simple case, though Suburban has attempted to complicate it. Columbia's EfficiencyCrafted℠ Homes Program offers financial incentives to homebuilders that encourage the construction of more energy-efficient homes.[159] Columbia has offered those incentives, and recovered its costs for implementing that Program, for almost a decade, with full Commission approval.[160] Suburban has been aware of this Program, and of Columbia's offering of such incentives to builders in Delaware County, since at least December 2011.[161]

Before this proceeding, Suburban accepted that Columbia's offering of EfficiencyCrafted℠ Homes incentives in Delaware County was lawful. Indeed, Suburban sought to create a program to match Columbia's incentive payments.[162] In this case, however, Suburban has taken the opposite position, arguing that the incentives (and Columbia's "duplication" of Suburban's facilities in Delaware County) actually violate a 22-year-old stipulation between the parties (Complaint, Count 1) and the Commission's opinions approving the Program (Counts 2 and 3). Suburban has also argued that Columbia violated its Main Extension Tariff when it failed to require a deposit to extend its main to serve Glenross South (Count 4) without any evidence to support this baseless allegation.

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[159] *2016 DSM Order*, at 85 (Dec. 21, 2016).

[160] *See* Columbia Ex. 6, M. Thompson Direct, at pp. 3:1 – 4:40 (citing Columbia's applications and/or Commission orders in Case Nos. 08-833-GA-UNC, 11-5028-GA-UNC *et al.*, and 16-1309-GA-UNC *et al.* approving Columbia's DSM programs).

[161] *2011 Suburban Self-Complaint Case*, Opinion and Order at 1, 4 (Aug. 15, 2012).

[162] *See generally id.*

Suburban's past statements disprove its claims here. Suburban has conceded that the 1995 Stipulation contains no explicit prohibition on offering DSM incentives to homebuilders;[163] that the 1995 Stipulation permits Columbia to "install mains * * * and any other infrastructure necessary to compete with Suburban" in Delaware County;[164] and that the Commission's DSM orders say nothing about Columbia's ability to offer DSM incentives in areas where it competes with other natural gas companies.[165]

Suburban has attempted to side-step those concessions, but its latest arguments on these points are so implausible that merely describing them refutes them. Suburban is asking this Commission to conclude: (1) that the parties' 1995 Stipulation should not be interpreted to mean what it *says*, but instead to align with Suburban's post hoc interpretation of the language in an unsigned release form attached to the Stipulation; (2) that the Commission's orders approving Columbia's EfficiencyCrafted[SM] Homes should not be interpreted to mean what they *said*, but instead to align with Suburban's interpretation of a Columbia Vice President's testimony on an unrelated topic in an unrelated hearing 31 years ago; and (3) that it is unfair competition for Columbia to discuss the EfficiencyCrafted[SM] Homes Program with developers in Delaware County, but *fair* competition for Suburban to unlawfully buy up exclusive rights to serve future developments on large tracts of undeveloped land in the same areas.[166] These positions have no support in Ohio law or Commission precedent, and the Commission should reject them.

For all of these reasons, and the reasons stated in Columbia's Initial Brief, 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.

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[163] *See* Suburban's Memorandum Contra Columbia's Motion to Dismiss at 8 ("Granted, the 1995 Stipulation does not state, 'Thou shalt not offer builder incentives.'").

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

[165] *See* Suburban's Memorandum Contra Columbia's Motion to Dismiss at 11 ("the Commission has *not* addressed whether [DSM] incentives may be properly used to compete against gas utilities").

[166] *See* Columbia Initial Br. at 24.

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 29th day of May, 2018, upon the parties listed below:

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