THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF SUBURBAN NATURAL GAS COMPANY,

COMPLAINANT,

v.

CASE NO. 17-2168-GA-CSS

COLUMBIA GAS OF OHIO, INC.,

RESPONDENT.

SECOND ENTRY ON REHEARING

Entered in the Journal on October 23, 2019

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Suburban Natural Gas Company.

II. DISCUSSION

A. Procedural Background

{¶ 2} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 3} Columbia Gas of Ohio, Inc. (Columbia) is a natural gas company and public utility as defined in R.C. 4905.03 and R.C. 4905.02, respectively. As such, Columbia is subject to the Commission's jurisdiction.

{¶ 4} On October 20, 2017, Suburban Natural Gas Company (Suburban or Complainant) filed a complaint and request for emergency relief against Columbia.[1] In its complaint, Suburban alleges that Columbia's use of financial incentives to builders and

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1 Suburban, too, is a natural gas company and public utility as defined in R.C. 4905.03 and R.C. 4905.02, respectively.

developers in competitive areas under certain programs violates a stipulated agreement between Suburban and Columbia (the 1995 Stipulation), which was later approved by the Commission. *In re Columbia Gas of Ohio, Inc.*, Case No. 93-1569-GA-SLF, et al. (*1993 Columbia Self-Complaint Case*), Finding and Order (Jan. 18, 1996). Suburban asserts that the 1995 Stipulation was intended to resolve all contested issues between the parties, including Columbia's use of financial incentives to builders and developers in competitive areas under certain programs, and that Suburban released all claims against Columbia arising from the programs with the expectation that Columbia would not later resurrect substantially similar programs in areas served by Suburban. Suburban also asserts that it expressly reserved the right to litigate any such renewed marketing by Columbia and the Commission expressly reserved jurisdiction over the competitive issues raised in those proceedings.

{¶ 5} Suburban submits that Columbia is using its demand-side management (DSM) programs in a manner that violates the 1995 Stipulation and other Commission orders. Suburban states that, most recently, the Commission approved a stipulation and expanded Columbia's DSM program, including an energy efficient new homes program that offers direct cash incentives to home builders meeting certain energy efficiency standards in or within its service territory. *In re Columbia Gas of Ohio, Inc.*, Case No. 16-1309-GA-UNC, et al. (*2016 DSM Case*), Opinion and Order (Dec. 21, 2016). Suburban claims that Columbia is implementing this program in a Delaware County, Ohio subdivision that is not within Columbia's service territory but, instead, is in Suburban's service territory; Suburban suspects that Columbia has recovered or intends to recover the cost of these financial incentives through its DSM Rider for the improper purpose of competing with Suburban. Suburban further claims that Columbia is extending or plans to extend its gas mains to serve the disputed areas in a manner that duplicates Suburban's existing distribution mains. Collectively, Suburban submits that it has been harmed by Columbia's actions, all of which constitute violations of: (1) the 1995 Stipulation, (2) the Commission order approving Columbia's DSM program, (3) Columbia's DSM Rider, (4) Columbia's Main Extension Tariff, and (5) numerous statutory provisions.

{¶ 6} On October 27, 2017, Columbia filed a memorandum contra Suburban's request for emergency relief. Later, on November 13, 2017, Columbia filed its answer to Suburban's complaint. Columbia's answer denies many of the allegations contained in Suburban's complaint and asserts several affirmative defenses.

{¶ 7} A settlement conference was held on November 13, 2017.

{¶ 8} By Entry issued March 1, 2018, the attorney examiner scheduled an evidentiary hearing to commence on April 3, 2018, with testimony to be filed by March 16, 2018. Parties filed direct testimony on March 16, 2018, as directed by the attorney examiner.

{¶ 9} On April 10, 2019, the Commission issued its Opinion and Order (Order), ultimately finding in favor of Columbia.

{¶ 10} Pursuant to R.C. 4903.10, any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the Commission's order is journalized.

{¶ 11} On May 10, 2019, Suburban filed an application for rehearing, asserting 11 distinct assignments of error.

{¶ 12} Columbia filed a memorandum contra on May 20, 2019, urging the Commission to affirm its findings in the Order.

{¶ 13} On June 5, 2019, the Commission issued an Entry on Rehearing granting the application for rehearing to further consider the matters specified in the application for rehearing.

B. Party Arguments and Commission Conclusions

1. SUBURBAN'S ARGUMENT THAT CERTAIN FACTUAL FINDINGS ARE UNSUPPORTED OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND, THEREFORE, CONTRARY TO R.C. 4903.09

{¶ 14} Suburban's first four assignments of error offer varied renditions on the same theme: that the Commission made certain factual findings that are either unsupported by the record or against the manifest weight of the evidence.

{¶ 15} As its first assignment of error, Suburban claims that there are several factual findings in the Commission's Order that are against the manifest weight of the evidence in violation of R.C. 4903.09. Suburban first takes issue with the Commission's determination that "there is some dispute as to whether Mr. Thompson accurately recalled the reason for Pulte Home's (Pulte) choice of Columbia for the Glenross South development." Order at ¶ 60, fn. 14. Suburban claims there was no dispute, as the evidence clearly demonstrated that Columbia emphasized its builder incentive program from the beginning (Suburban Ex. 5 at 22-23, 46-47). According to Pulte land superintendent Jeff Thompson's deposition testimony, Suburban argues that the builder rebates were a deciding factor for Pulte to choose Columbia for this particular development (Suburban Ex. 5 at 46-47).

{¶ 16} In response, Columbia asserts that the Commission never determined why Pulte chose Columbia over Suburban, adding that Suburban's argument that the Commission should have accepted Mr. Thompson's deposition testimony as conclusive for this proposition is flawed, given the record evidence indicating otherwise (Suburban Ex. 5 at 29-30, 67; Tr. Vol. II at 338). As the Commission explicitly "refrain[ed] from making a finding as to this particular issue," Columbia asserts that there is no basis for rehearing. Regardless, Columbia notes that the Commission also indicated that, "even if the record had conclusively shown that the EfficiencyCrafted Homes Program incentives were the factor that led Pulte to choose Columbia over Suburban, the outcome of this proceeding remains the same." Order at ¶ 60.

{¶ 17} The Commission initially notes that we refrained "from making a finding [on the issue of whether] the EfficiencyCrafted Homes Program incentives were the factor that led Pulte to choose Columbia over Suburban." Order at ¶ 60. We also specifically mentioned that one of the reasons the record was unclear on this point was due to the fact that Mr. Thompson was not present at the hearing to provide testimony and the Commission, instead, had to rely on his deposition testimony, which Columbia argued was not completely credible for a variety of reasons. Order at ¶¶ 42, 60. Suburban had an opportunity to subpoena Mr. Thompson as a witness and chose not to do so. Given Mr. Thompson's absence from the hearing, we acknowledged that the record evidence was not sufficient to make such a finding, and Suburban fails to demonstrate why our decision should be amended at this time. Moreover, we also noted that, even if we had made such a finding, the outcome of the proceeding would remain the same. Order at ¶ 60. Accordingly, rehearing as to this assignment of error should be denied.

{¶ 18} As its second assignment of error, Suburban argues that no evidence exists to support Columbia's contention that a cost-benefit study was performed pursuant to its main extension tariff. In support of its argument, Suburban claims that, according to the record evidence, none of Columbia's witnesses have seen the cost-benefit study for the Glenross South development. Instead of relying on this fact to conclude that the cost-benefit study was never conducted, Suburban contends that the Commission, instead, assumed that such a study was conducted. Order at ¶ 62. In fact, Suburban alleges that the Order ignores record evidence disproving the fact that Columbia witnesses Donna Young and Zach McPherson confirmed the results of the analysis (Tr. Vol. II at 313; Tr. Vol. III at 388, 397; Suburban App. for Rehearing at 18-19). Moreover, Suburban notes that, even if the witnesses did testify that Columbia had all of the requisite information to conduct such a study, the evidence falls short of demonstrating that the study was actually conducted for this project. Order at ¶ 62. Suburban also contends that, because Mr. McPherson allegedly had no personal knowledge of whether Columbia's process for conducting a cost-benefit analysis was followed in this case, he should not have been permitted to testify about the

cost-benefit study. For that reason, Suburban notes that its motion to strike his testimony on this point was incorrectly denied (Tr. Vol. III at 386-391). Finally, as to this point, Suburban claims the Commission inappropriately shifted the burden of production of the cost-benefit study onto Suburban when it stated that it was "Suburban's responsibility during the discovery process, to request a print out from the computer model used to conduct the cost-benefit analysis." Order at ¶ 62. Suburban claims that it should not be expected, and cannot, introduce a document that was responsive to its discovery requests but never produced.

{¶ 19} Columbia also asserts that there is no basis for rehearing as to this argument. Columbia notes that its witness, Zach McPherson, testified regarding the process for conducting the required economic analysis used to determine if a main extension requires a deposit from the developer and stated that Columbia determined it could extend its main to Glenross South "given the scope of the development" without a deposit being required (Columbia Ex. 5 at 5-7; Tr. Vol. III at 396-397). Columbia also claims that Ms. Young's testimony, while acknowledging she did not see the study for Glenross South, corroborates that one was done (Tr. Vol. II at 316-318, 342-344). Citing to the Commission's Order, Columbia also notes that the Commission found its witnesses' testimony compelling to conclude that Columbia had the requisite information to conduct the cost-benefit analysis and followed its standard guidelines when performing the analysis. Order at ¶ 62. Finally, Columbia agrees with the Commission's findings regarding Suburban's discovery-related allegations.

{¶ 20} Suburban claims that the Commission merely "assumed" that a cost-benefit analysis for Glenross South was actually conducted. That is simply not the case. The Commission thoroughly evaluated all of the evidence to determine that Columbia "had all of the requisite information to conduct the cost-benefit analysis for Phases 11-15 of the Glenross South development and the project could not have been granted approval internally without the study [citations omitted]." Order at ¶ 62. It appears that Suburban pointed to Mr. McPherson's unadmitted deposition testimony to support its argument that

Mr. McPherson never reviewed the cost-benefit analysis, and, if he did, it occurred well after Suburban filed its complaint with the Commission (Suburban App. for Rehearing at 19). However, as noted by Columbia during the hearing, this statement only indicates that Mr. McPherson was unsure at the time of his deposition if he had seen a cost-benefit study for the Glenross South main extension (Tr. Vol. III at 388). Further, Mr. McPherson's testimony at hearing was more focused on the policy utilized by Columbia to determine whether a contribution in aid of construction will be required, rather than the actual cost-benefit analysis conducted in this proceeding (Columbia Ex. 5 at 6; Tr. Vol. III at 388-390). Given his position with Columbia, Mr. McPherson was more than capable to provide this testimony, and we agree that the attorney examiners were well within their discretion to deny Suburban's motion to strike on this issue (Columbia Ex. 5 at 1-2; Tr. Vol. III at 370, 382).[2] As such, we continue to find the testimony of Ms. Young, Mr. McPherson, and Mr. Codispoti to be compelling on the issue of demonstrating that a cost-benefit study was conducted and determined that no contribution in aid of construction would be required (Columbia Ex. 5 at 6). Further, while we acknowledged in the Order that having a print out copy of the computerized cost-benefit analysis would have resolved much of the speculation as to whether a violation of Columbia's tariff had occurred, we note that Suburban never chose to identify any particular discovery request in which a print out of the cost-benefit analysis would have been responsive or provide evidence of Columbia's failure to adequately respond to that request. Order at ¶ 62, 64. As we will discuss in more general terms later in this Second Entry on Rehearing, we continue to find that these alleged discovery violations should have been raised prior to or, at the very least, at the beginning of the evidentiary hearing. Accordingly, rehearing should be denied as to this assignment of error.

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2 While the attorney examiner denied Suburban's motion to strike portions of Mr. McPherson's testimony, Suburban was not prejudiced by the ruling as the examiner did invite Suburban to "test the weight and credibility of the evidence presented through cross-examination" (Tr. Vol. III at 392).

{¶ 21} In its third assignment of error, Suburban alleges that the Commission's Order ignores evidence that Columbia used builder incentives in an unfair and anticompetitive manner (Suburban App. for Rehearing at 23). While Suburban acknowledges that it is not requesting rehearing on whether Columbia was authorized to offer such incentives to Pulte, Suburban claims that the Commission has yet to determine whether Columbia utilized a lawful program for an unlawful purpose or to achieve an unlawful result, in violation of R.C. 4905.35(A). As Suburban alleges that Columbia merely uses the program as a "competitive response tool" to displace other competitors from desired projects and the program provided a clear competitive advantage over Suburban for the Glenross South development, Suburban argues no other conclusion can be drawn from the evidence. (Suburban Ex. 5; Suburban Ex. 11; Tr. Vol. II at 283.) Suburban goes even farther to claim that it does not offer comparable incentives because the "Commission rejected Suburban's request to offer them" (Suburban App. for Rehearing at 25).

{¶ 22} In response, Columbia first asserts that Suburban did not raise this specific claim in its complaint or discuss this claim in its initial brief, waiting instead to initially raise it briefly in its reply brief. Rather, Columbia notes that the Commission correctly addressed the actual issue raised in Suburban's complaint, which alleged that Columbia's homebuilder incentives violated R.C. 4905.35 because they constitute an "undue or unreasonable preference or advantage" offered "for the purpose of destroying competition" (Complaint at ¶¶ 50, 52). Assuming that Suburban has not waived the opportunity to raise this issue at this point of the proceeding, Columbia asserts the Commission should, nonetheless, reject it as Suburban has failed to demonstrate that any competitive disadvantage it might face from the EfficiencyCrafted Homes Program is "undue or unreasonable," thereby constituting a violation of R.C. 4905.35(A). Specifically, Columbia argues Suburban fails to identify any Commission order in which the Commission has held that an approved energy-efficiency incentive becomes "unreasonable competition" when it is offered to a potential customer that another company would prefer to serve (Suburban App. for Rehearing at 26). Columbia avers that the Commission was clear in its Order that, even if it is assumed that

this program constitutes a competitive advantage, the "advantage should not be stripped away simply because the other competing company does not offer such an incentive." Order at ¶ 60.

{¶ 23} Initially, we note our agreement with Columbia that Suburban attempts to alter its initial grounds for complaint by asserting this new argument at the rehearing stage of the proceeding. For this reason alone, rehearing should be denied. However, even if the Commission were to agree that this is the appropriate question for our consideration, which we do not, we would find that rehearing should be denied. According to Suburban's new argument, a violation of R.C. 4905.35(A) would occur every instance in which Columbia would offer these incentives to Pulte or another developer in order to expand its service territory in an area where another natural gas company wished to serve. This result is nonsensical. Columbia has a lawful program in place and may offer these incentives to encourage developers to choose Columbia over other competitors, given certain developers may value energy efficiency and may prefer to receive service from a company offering energy-efficiency incentives.[3] Order at ¶ 60. As we have indicated before, Ohio promotes full and fair competition in natural gas providers. Order at ¶ 60. There is nothing preventing Suburban from requesting the implementation of a comparable program. In fact, the Commission specifically encouraged Suburban do so, once Suburban remedied the several deficiencies in its last application for such a program. Order at ¶ 59. Suburban is quite correct that, if the Commission were to approve a second application from Suburban, that authority would not make up for its inability to offer such incentives in the past. However, the Commission cannot be held responsible for Suburban's decision to not submit a revised application for such a program since its last attempt was rejected over nine years ago on both procedural and evidentiary grounds. *In re Suburban Natural Gas Co.*, Case No.

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[3] We also note that, according to Ms. Young's testimony, a developer would typically be required to spend more money qualifying a home for the incentive than the amount of the incentive ultimately received. Order at ¶ 42.

11-5846-GA-SLF, Opinion and Order (Aug. 15, 2012) at 6-10. Suburban has to file an application in order for the Commission to act upon it.

{¶ 24} Suburban's fourth assignment of error asserts that there is no question Columbia is substituting service that would otherwise be provided by Suburban, thereby causing "an undue or unreasonable prejudice or disadvantage" to Suburban. According to Suburban, no actual finding of "duplication" is necessary to conclude that Columbia's actions constitute a violation of R.C. 4905.35(A). Suburban also notes that Delaware County's Chief Deputy Engineer, Robert Riley, was merely testifying to the fact that, if duplication occurred, the Commission should address the activity because duplication can cause safety issues for the county. Further, Suburban also states that Columbia has failed to show a legitimate engineering purpose for extending its main into an area where a competitor's main already existed, noting this was Mr. Riley's opinion as the appropriate test to determine whether unnecessary duplication has occurred (Tr. Vol. I at 27).

{¶ 25} Columbia quickly responds to this argument by claiming that the Commission never made a finding of fact that Columbia's main serving Glenross South duplicated Suburban's main and, thus, cannot constitute a valid basis for rehearing. Furthermore, Columbia notes that there is no basis in Ohio law for precluding the duplication of natural gas facilities, which Columbia discusses in response to Suburban's sixth assignment of error.

{¶ 26} We find that rehearing should be denied as to this assignment of error, as well. Suburban's arguments are misplaced. Initially, we note that the only testimony introduced into the record as to the potential duplication of facilities was that of Delaware County's witness Chief Deputy Engineer Robert Riley, who acknowledged that he was not aware of any unnecessary duplication of natural gas facilities in Delaware County, including Columbia's main extension to Glenross South. Order at ¶ 55. Columbia is correct that, based on this limited evidence, we did not make a factual finding as to whether duplication of facilities resulted from Columbia's actions. Further, Suburban does not provide any basis for the Commission to adopt the "legitimate engineering purpose" test for future

proceedings or include any persuasive authority demonstrating that Columbia should be held to that standard now. While these issues may be raised in a subsequent dispute, they cannot genuinely be argued here, especially at this stage of the proceeding.

2. SUBURBAN'S ARGUMENT THAT CERTAIN CONCLUSIONS OF LAW ARE UNSUPPORTED AND CONTRARY TO REVISED CODE TITLE 49

{¶ 27} In its second group of arguments, assignments of error five through eight, Suburban alleges that certain legal conclusions made in the Commission's Order are unsupported and contrary to Revised Code Title 49.

{¶ 28} In its fifth assignment of error, Suburban argues that the Order failed to provide sufficient reasoning for summarily dismissing the statutory violations alleged in Count 5 of its complaint. Order at ¶ 63. Suburban claims that, while findings in its favor for Counts 1, 3, and 4 would result in prima facie evidence of the statutory violations set forth in Count 5, such findings are not necessary for Suburban to prevail in the Count 5 claims. Further, Suburban specifically claims that Columbia engaged in unfair business practices, in violation of R.C. 4905.35, by duplicating Suburban's main and telling Pulte "untrue and disparaging statements about Suburban" in order to serve the Glenross South development (Suburban App. for Rehearing at 28-30).

{¶ 29} Columbia asserts that the Commission properly dismissed Count 5 of Suburban's complaint, specifically noting that even Suburban has acknowledged that the "same proofs that demonstrate the violations alleged in Counts 1-4 also prove these statutory violations" alleged in Count 5 (Suburban Initial Br. at 15). While addressing the duplication arguments later in its memorandum contra, Columbia asserts the new claim regarding the "disparaging statements" should be rejected because it was not included in Suburban's complaint and should, nonetheless, be denied because there is no legal support

to show that two isolated comments could warrant a finding of undue and unreasonable prejudice under R.C. 4905.35(A).[4]

{¶ 30} We initially note that Suburban's argument that the "same proofs" demonstrating the alleged violations in Counts 1-4 would also prove the statutory violations alleged in Count 5 was summarily rejected by the Commission's Order. Order at ¶ 63. Moreover, while Suburban claims that failing to find in its favor on Counts 1, 3, and 4 is not dispositive of the Commission's ultimate determination of Count 5, Suburban fails to point to any additional evidence that would warrant such a finding or attempt to explain what the separate legal theory of relief is. As such, we have no choice but to affirm our earlier decision that these alleged violations cannot stand on their own and deny rehearing as to this assignment of error.

{¶ 31} In its sixth assignment of error, Suburban argues that the Order erroneously concludes that the Commission may neither prevent nor remedy duplication of facilities. Order at ¶ 55. Suburban asserts that the Commission's authority is inherent in its "general regulatory authority under R.C. 4905.04." Further, Suburban claims installing a natural gas main across the street from another natural gas company's main, to serve a new phase of a residential subdivision that the other company would prefer to serve, "inflict[s] 'undue or unreasonable prejudice or disadvantage' on others" in violation of R.C. 4905.35(A).

{¶ 32} Suburban notes that it cited to ample precedent supporting its proposition that regulatory policy disfavors duplication of utility facilities, but claims that the Commission chose not to adhere to that precedent because the cases addressed public utilities other than natural gas companies. Suburban also cites to federal case law that it claims supports its argument that a natural gas company is not permitted "to pick and choose and to serve only those portions of the territory which it finds most profitable." *United Fuel Gas Co. v. Railroad Comm. of Kentucky*, 278 U.S. 300, 309 (1929). Suburban further alleges that R.C. 4905.35(A)

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4 In fact, Columbia asserts that Suburban only mentions these "disparaging statements" in Suburban's post-hearing brief within a footnote (Suburban Initial Br. at 12, fn. 63).

has broad application because the legislature could not have envisioned all of the ways a utility might inflict "undue or unreasonable prejudice or disadvantage" on competing companies. Finally, Suburban states that the Commission should base its decision on the record before it, which Suburban believes clearly shows it would be serving the Glenross South development but for Columbia's anticompetitive actions. Moreover, Suburban notes that the Commission's finding that we cannot prevent or remedy the duplication of service or facilities under any facts is an extreme view.

{¶ 33} Columbia first alleges that the various cases Suburban cites to in support of its claim that the Supreme Court of Ohio "considers the Commission's authority to prohibit duplication of any public utility service unquestioned in law and reason," do not stand for that proposition. In fact, Columbia notes that the telephone case cited by Suburban did not hold that the Commission's authority to regulate public utilities included the inherent authority to determine whether one telephone company should be prohibited from offering duplicative service in another's service area; rather, Columbia states the issue in that case was limited to whether the Commission had the authority to determine if the disputed area was in the service or operating area of a telephone company. *N. Ohio Tel. Co. v. Putnam*, 164 Ohio St. 238, 245-246, 130 N.E.2d 91 (1955). Columbia further asserts that the Commission's authority to prevent the duplication of telephone company facilities, which was not raised in the *Putnam* case, was statutorily provided at the time, and later repealed in 2010. R.C. 4905.24. Similarly, Columbia challenges the same argument in the context of water utilities, noting that Suburban even acknowledged that water utilities effectively do have service territories because they are "required to obtain certificate[s] of public convenience and necessity" under R.C. 4933.25. Suburban Motion for Emergency Relief (Oct. 20, 2017) at 4-5. As part of the Commission rules for applying for such a certificate, applicants are required to include a "statement evidencing that no existing agency * * * would or could economically and efficiently provide facilities and services needed by the public in the area which is the subject of the application." Ohio Adm.Code 4901:1-15-05(D)(19). It is this requirement which Columbia claims is the reason why the Commission considered duplication of

facilities in the case cited by Suburban (Suburban App. for Rehearing at 33, quoting *In re Aqua Ohio, Inc.*, Case No. 06-51-WW-AAC, Opinion and Order (Mar. 28, 2007) at 11).

{¶ 34} Columbia also notes that the cases cited by Suburban involving the natural gas industry similarly fail to demonstrate that the Commission has inherent authority to prevent duplication of facilities or that the duplication of facilities can constitute "an unjust or unreasonable prejudice or disadvantage" in violation of R.C. 4905.35(A). For instance, Columbia argues that Suburban's reliance on *Atwood* is misplaced as that case involved a competitor that was operating as a public utility without first being granted the authority to do so by the Commission. *Atwood Resources, Inc. v. Pub. Util. Comm.*, 43 Ohio St.3d 96, 538 N.E.2d 1049 (1989). The Supreme Court of Ohio's reference to the competitor's sales which "had displaced, or would displace" Columbia's sales was provided in the discussion of whether Columbia had standing to bring its complaint before the Commission. Columbia, instead, asserts that the Commission's reliance on the precedent cited in the Order is more appropriate, while also arguing that Suburban failed to provide the Commission a reason to deviate from those decisions which clearly demonstrate that there are no certified natural gas territories in Ohio. Order at ¶ 55.

{¶ 35} The Commission's Order noted that "Suburban has not cited to any Commission precedent in which we have held, or even suggested, that a natural gas company should be precluded from serving a new customer if such service would result in the duplication of facilities." Order at ¶ 55. We agree with Columbia that the case law cited by Suburban in its application for rehearing does not contradict or question this finding, as many of the cases are factually and legally dissimilar, if not wholly irrelevant to the circumstances before us. We again recognize the longstanding Commission precedent establishing that there are no certified gas service territories in Ohio and any certified natural gas company may serve any customer in any part of the state. Order at ¶ 52, citing *In re Columbia Gas of Ohio, Inc.*, Case No. 87-1528-GA-ATA, Opinion and Order (Dec. 8, 1987). Moreover, Suburban has not provided any justification warranting the Commission's

deviation from this precedent on the basis of avoiding the potential duplication of facilities. Accordingly, rehearing is denied on this issue.

{¶ 36} As its seventh assignment of error, Suburban alleges that the Commission's interpretation of the 1995 Stipulation is unsupportable. Explaining, Suburban notes that its claims do not arise from the fact that Columbia is merely offering builder incentives to a development within the geographic area covered by the 1995 Stipulation; rather, Suburban emphasizes the key fact that it was already serving this development. As such, Suburban believes it has established that Columbia's actions violate the express terms of the 1995 Stipulation.

{¶ 37} In response, Columbia argues that the Commission properly concluded, after thoroughly reviewing the 1995 Stipulation and the Commission order approving it, that the express language of the 1995 Stipulation does not support Suburban's claims. Order at ¶¶ 53-54. Despite Suburban claiming that the Commission failed to apply the terms of the 1995 Stipulation to the "key fact" that Suburban was already serving the Glenross South development, Columbia similarly notes that the language used in the 1995 Stipulation offers no support for Suburban's logic. Finally, while the 1995 Stipulation did aim to avoid another situation that was the subject of the 1986 complaint case between Columbia and Suburban, Columbia avers that the terms of the 1995 Stipulation were satisfied long ago upon the completion of three separate actions: (1) the transfer of certain customers and facilities; (2) the modification of certain provisions in Columbia and Suburban's tariffs; and (3) the exchange of "mutual releases and covenants not to sue." Order at ¶ 17.

{¶ 38} The Commission finds that these arguments were thoroughly considered, and rejected, in the Commission's Order. Order at ¶¶ 53-54. Suburban fails to offer any evidence suggesting that the language of the 1995 Stipulation would be triggered by incorporating the "key fact" that Suburban was already serving this development. We continue to agree with Columbia that nothing in the 1995 Stipulation, the Release, or the Commission order approving the settlement prohibits Columbia from offering the builder incentives through

the EfficiencyCrafted Homes Program. Therefore, the Commission finds rehearing on this assignment of error should, likewise, be denied.

{¶ 39} Suburban also claims, as its eighth assignment of error, that the Order ignores the plain language of the DSM tariff and main extension tariff. Specifically, Suburban contends that the DSM tariff does not permit the payment of incentives or ratepayer funding of the incentives. Further, Suburban notes that the Commission incorrectly identified two mutually exclusive reasons for finding against Suburban on Count 3: the Order suggests both that Suburban forfeited its rights to raise these arguments about the DSM Rider because it failed to intervene in prior DSM proceedings to raise these issues and that the prior DSM cases "thoroughly address a majority of the issues raised by Suburban," which "alleges nothing new or different for the Commission's consideration." Order at ¶ 58. Moreover, Suburban claims that the Order fails to cite to any part of the record from the prior DSM proceedings to support the conclusion that these issues have been addressed and, therefore, fails to provide the required factual support. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89-90, 1999-Ohio-206, 706 N.E.2d 1255. Suburban also raises its earlier arguments that its claims were not addressed by the Commission's Order, first contending that the EfficiencyCrafted Homes program is not authorized under any tariff. Order at ¶ 38; *see In re Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1. Additionally, Suburban alleges that the tariff authorizing Columbia to recover certain DSM program costs does not authorize the recovery of incentive payments as they are not "made available to residential and commercial customers," or those taking natural gas delivery service, as required by Columbia's tariff. Order at ¶ 38. Finally, Suburban submits that Columbia's main extension tariff requires written main extension agreements in all cases, not just those in which a deposit is required. In fact, Suburban argues that it is Columbia's actual practice to obtain a main extension in writing, even if the deposit had been waived. (Suburban Ex. 5 at 40-41.)

{¶ 40} In its memorandum contra, Columbia asserts that the Commission properly concluded that Columbia acted in accordance with its tariffs, again arguing that many of Suburban's arguments were not included in its complaint. Despite their omission from the

complaint, Columbia argues that these arguments should, nonetheless, be rejected now. First, Columbia notes that its DSM Rider does specify that Columbia implements "comprehensive, cost-effective energy efficiency programs [for] residential and commercial customers." P.U.C.O. No. 2, Fifteenth Revised Sheet No. 28. Columbia argues that Suburban has failed to point to any case law or Commission precedent that requires more detail in the tariff sheet, including Suburban's own tariff describing its DSM program. P.U.C.O. No. 3, Section V, Forty-Second Revised Sheet No. 3. Additionally, Columbia maintains that *Ohio Edison* deals with the filed rate doctrine and has no bearing on this case since it was limited to the proposition that the Commission cannot order refunds of collected rider charges absent rider language specifying a refund process. *Ohio Edison* at ¶ 19. In response to questions of whether it is authorized to recover the costs of its homebuilder incentives through the DSM Rider, Columbia states that the Commission has approved the rider, as well as each annual application to adjust the DSM Rider since 2009, and reiterates that a builder is not eligible to receive a DSM incentive for a new home unless the home's owner or resident is a Columbia customer, which is fully consistent with the language of the DSM Rider tariff. Order at ¶ 41. Finally, Columbia notes that Suburban's argument regarding its practice to not require a written line extension agreement when no deposit is required violates the DSM tariff is not only procedurally improper—given that it has not been raised before this point of the proceeding—but should also be rejected due to the Commission's findings that the cost-benefit analysis was performed and established that the main extension was economically justified at Columbia's expense (Columbia Memo. Contra at 21, citing to Suburban App. for Rehearing at 18). Columbia also criticizes Suburban's argument as hypocritical, explaining that both companies' main extension tariffs state that they "may" enter into a line extension agreement and require a deposit when the main extension is not deemed justified at their expense. Order at ¶ 44; Columbia Tariff, P.U.C.O. No. 2, Section III, Part 12, Third Revised Sheet No. 9; Suburban Tariff, P.U.C.O. No. 3, Section III, First Revised Sheet No. 4 and Original Sheet No. 5.

{¶ 41} The actual issue included in Count 3 of the complaint claims that the "cost of programs extended to entities not located in or within Columbia's service territory are not eligible for recovery through the DSM Rider" and that Columbia has, or will attempt, to recover these ineligible costs (Complaint at ¶¶ 40-41). The Commission specifically discredited this argument in our Order by citing to the *2016 DSM Case*, in which the Commission indicated that the "key factor [for a builder to receive an incentive for constructing energy efficient homes for the EfficiencyCrafted Homes Program] is that the home is located within Columbia's service territory and the customer is served by Columbia." Order at ¶ 58, fn. 13, quoting *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶ 115. We agree with Columbia that the builder incentive payments fall squarely within the confines of its tariff.

{¶ 42} Furthermore, despite not being included in the original complaint, the Commission also considered—and ultimately rejected—Suburban's arguments regarding whether the DSM Rider's tariff authorizes Columbia to pay, and subsequently recover, EfficiencyCrafted Homes Program incentives. Order at ¶¶ 38, 54-58. Moreover, in response to Suburban's argument pertaining to the "mutually exclusive reasons for finding against Suburban on Count 3," the Commission was merely indicating that: (1) Suburban failed to intervene in the *2016 DSM Case* or earlier DSM approval cases to raise these concerns; and (2) many of the same concerns voiced by Suburban regarding incentive payments were, nonetheless, raised by other parties or addressed by the Commission itself in over a decade of prior proceedings regarding the review and approval of the DSM Rider. Order at ¶ 56-58.[5] As we noted in the Order:

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[5] Although the Order did not specifically list these cases, they were listed in Columbia's briefs as including: *In re Columbia Gas of Ohio*, Case No. 08-72-GA-AIR, et al., Opinion and Order (Dec. 2, 2008) at 10; *In re Columbia Gas of Ohio, Inc.*, Case No. 08-833-GA-UNC, Finding and Order (July 23, 2008); *In re Columbia Gas of Ohio, Inc.*, Case No. 09-1036-GA-RDR, Opinion and Order (Apr. 28, 2010); *In re Columbia Gas of Ohio, Inc.*, Case No. 10-2480-GA-UNC, Finding and Order (Nov. 22, 2010); *In re Columbia Gas of Ohio, Inc.*, Case No. 11-5028-GA-UNC et al., Finding and Order (Dec. 14, 2011); *In re Columbia Gas of Ohio, Inc.*, Case No. 10-2353-GA-RDR, Opinion and Order (Apr. 27, 2011) at 9; *In re Columbia Gas of Ohio, Inc.*, Case No. 11-5803-GA-RDR, Opinion and Order (Apr. 25, 2012) at 9; *In re Columbia Gas of Ohio, Inc.*, Case No. 12-2923-GA-RDR, Opinion and Order (Apr.24, 2013) at 9; *In re Columbia Gas of Ohio, Inc.*, Case No. 13-2146-GA-RDR,

> [Although] collateral attacks on prior Commission orders are not improper per se, the Commission may, in the interest of judicial economy and efficiency, dismiss the claims against a Commission-approved tariff, where the Commission has recently and thoroughly considered the provisions of the tariff and the complainant alleges nothing new or different for the Commission's consideration. *Board of Education v. The Cleveland Elec. Illum. Co.*, Case No. 91-2308-EL-CSS (July 2, 1992).

Order at ¶ 58. Moreover, we agree with Columbia that *Ohio Edison* is inapplicable to these circumstances. Thus, consistent with the Commission's orders in the prior cases reviewing the DSM Rider and the Order, we find that Columbia is complying with the terms of its tariffs, which are sufficiently detailed for the recovery of the EfficiencyCrafted Homes Program incentive payments.

{¶ 43} We also find Suburban's argument regarding *Tongren* to be baseless. As the Supreme Court of Ohio noted in that case, no hearing was held, no written testimony was filed on behalf of the companies or any other interested party, and Staff did not provide any written comments, testimony, or report regarding the companies' application. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d at 90, 1999-Ohio-206, 706 N.E.2d 1255. This proceeding, on the other hand, involved an evidentiary hearing lasting three days, the filed direct testimony of six separate witnesses (in addition to the deposition testimony of Mr. Thompson), initial and reply briefs following the hearing, and an Order replete with references to the evidence admitted into the record.

{¶ 44} Finally, regarding Suburban's claim that Columbia's main extension tariff requires written main extension agreements in all cases without exception, we note that Columbia's tariff and the record evidence demonstrate that Columbia may enter into a line extension agreement and require a deposit when the main extension is not deemed justified at its expense; however, it is not required (Columbia Tariff, P.U.C.O. No. 2, Section III, Part

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Opinion and Order (Apr. 23, 2014) at 7; *In re Columbia Gas of Ohio, Inc.*, Case No. 14-2078-GA-RDR, Finding and Order (Apr. 22, 2015) at 5; *In re Columbia Gas of Ohio, Inc.*, Case No. 15-1918-GA-RDR, Finding and Order (Apr. 20, 2016) at ¶ 20; *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶¶ 87-88, 115, 119; *In re Columbia Gas of Ohio, Inc.*, Case No. 16-2236-GA-RDR, Finding and Order (Apr. 26, 2017) at ¶ 20; *In re Columbia Gas of Ohio, Inc.*, Case No.17-2374-GA-RDR, Finding and Order (Apr. 25, 2018) at ¶ 39.

12, Third Revised Sheet No. 9; Suburban Ex. 5 at 40-41). Order at ¶ 44. As we found earlier, Columbia complied with its tariff after conducting the required cost-benefit analysis and determining that a deposit was not required, rendering this argument moot.

3. SUBURBAN'S ARGUMENT THAT CERTAIN EVIDENTIARY AND PROCEDURAL RULINGS VIOLATE SUBURBAN'S RIGHT TO DUE PROCESS

{¶ 45} Suburban's final assignments of error allege violations of due process. Suburban claims that it was entitled to present rebuttal testimony as its ninth assignment of error, noting that "[a] party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief" (Suburban App. for Rehearing at 42, quoting *Phung v. Waste Management*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994)). Suburban argues that it not only had a right to present rebuttal testimony, but was wrongfully criticized for "preserving error in the denial of this right." Specifically, while the Commission indicated it has provided clear guidance on the process for proffering disputed evidence, Suburban argues that neither of the cases cited by the Commission involved a proffer of rebuttal testimony and one hearing actually occurred over a year after the hearing in this proceeding.

{¶ 46} Columbia agrees with the Commission's prior holding that Suburban failed to preserve its objections by properly proffering its rebuttal testimony at hearing. Order at ¶ 51.

{¶ 47} While the reference to the hearing in Case No. 16-481-EL-UNC, et al., did occur a year after the hearing in this proceeding, the discussion evidenced in the transcript is consistent with, and representative of, the Commission's process for accepting proffers. The reference to Case No. 14-1297-EL-SSO is also directly on point; there we noted that a proffer is not an additional opportunity to introduce new evidence into the record without providing parties sufficient opportunity to respond to it, i.e., attaching testimony, rebuttal or otherwise, which was excluded from the record to a reply brief. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Fifth Entry on

Rehearing (Oct. 12, 2016) at ¶ 376. However, much like that case, Suburban's interpretation of our rules and process makes no difference as we would first have to conclude that the attorney examiners improperly excluded evidence, which is a conclusion that we cannot make under these circumstances. Accordingly, and consistent with previous findings set forth in the examiner's May 25, 2018 Entry denying certification of Suburban's interlocutory appeal and the Order, we find that rehearing should be denied as to this assignment of error. Order at ¶ 51; Entry (May 25, 2018) at ¶¶ 20-22.

{¶ 48} Suburban also takes issue with the Commission's treatment of Columbia's confidential designations, arguing, as its tenth assignment of error, that the Commission's failure to rule on those designations violates R.C. 4901.12 and 4905.07. While Suburban notes that a protective agreement was utilized to facilitate the exchange of discovery between the parties, it argues that the Commission must still determine whether exhibits and other filings presented to it are entitled to confidential treatment. *See In re Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1.

{¶ 49} Columbia notes that, despite arguing that there were several instances in which Suburban claimed it "made clear that it did not agree with the [confidentiality] designation" at hearing, Suburban only cites to two pages of the hearing transcript that it alleges demonstrate those disagreements and neither page supports its objection (Tr. Vol. II at 233; Tr. Vol. III at 488). In fact, Columbia asserts that one of the references reflects the resolution of a disagreement over a "highly confidential" designation in which the parties agreed to partially redact and re-designate the document for purposes of the hearing (Tr. Vol. III at 488). Given that Suburban has provided no other evidence of an existing confidentiality dispute, Columbia requests that the Commission dismiss Suburban's generalized argument as moot.

{¶ 50} We agree with Columbia that, contrary to the assertions of Suburban, there are no references in either the public or confidential portions of the transcript in which Suburban raises the issue of the subject information's confidentiality. In fact, the only

references to the confidentiality of information we can find support the conclusion that both parties agreed to treat the subject information as confidential during the hearing (e.g., Tr. Vol. I at 218; Tr. Vol. II at 233-234, 245-246, 293-294; Tr. Vol. at 468, 487-489, 502, 506). Suburban never raised the confidentiality of this information as an issue for the attorney examiners to rule on prior to, or during, the hearing. As it does not appear from the hearing transcript that any objections to confidentiality were properly made, we reject this argument.

{¶ 51} As its eleventh and final assignment of error, Suburban argues that the Order's criticism of Suburban's response to alleged discovery violations is unfounded and requests that the Commission remove the criticism from its Order. Suburban claims that, while it could have continued to file motions to compel, it elected a more practical route by subpoenaing documents from Pulte (Suburban App. for Rehearing at 47). Suburban also continues to restate its claims that Columbia withheld vital responsive documents from two Columbia witnesses.

{¶ 52} Similar to its arguments regarding the confidentiality dispute, Columbia agrees with the Commission's ultimate response to Suburban's claims of discovery process abuse by acknowledging the proper avenue for resolving discovery disputes in Commission proceedings. Order at ¶ 64. Columbia notes that Suburban filed one motion to compel, which was later withdrawn, and never attempted to file another motion to compel prior to the hearing (Tr. Vol. I at 9).

{¶ 53} The attorney examiners were correct to reject further arguments regarding alleged discovery abuse and non-responsiveness during the discovery process in their discretion under Ohio Adm.Code 4901-1-27. As noted in the Order, during the five-month interval between the filing of the complaint and the evidentiary hearing, only one motion to compel was filed, and it was later withdrawn. If Suburban believed that Columbia was violating our discovery rules, as allegedly evidenced by the fact that Pulte responded to a subpoena by producing certain documents which were not previously disclosed by

Columbia during discovery, Suburban should have raised and preserved those concerns with the presiding examiners through the discovery process—not for the first time at hearing. Order at ¶ 64. At the very least, Suburban should have raised the issue at the beginning of the hearing in order to ensure that the hearing proceeded in an efficient and expeditious manner. Suburban asserts that it chose "a more practical route" by subpoenaing documents from Pulte and that Columbia would be sanctioned for its "tactics" in any state or federal court. That may be so, but certainly not before a motion to compel was filed, granted, and disobeyed. Civ.R. 37; Fed.R.Civ.P.37. Here, Suburban failed to raise Columbia's alleged non-compliance with our discovery procedures, with supporting documentation (i.e., the discovery requests, Columbia's response, and the information that was withheld), before the attorney examiners prior to hearing. As such, Suburban's "more practical route," to sprinkle unsubstantiated allegations of non-compliance throughout the transcript, appropriately failed. Our rules provide a process to address any discovery disputes prior to the evidentiary hearing, and we encourage all parties to abide by those rules.

{¶ 54} Accordingly, for the foregoing reasons, Suburban's application for rehearing should be denied in its entirety.

III. ORDER

{¶ 55} It is, therefore,

{¶ 56} ORDERED, That Suburban's application for rehearing be denied. It is, further,

{¶ 57} ORDERED, That a copy of this Second Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Sam Randazzo, Chairman
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters

MJA/PAS/mef

Summary: Entry Second Entry on Rehearing that the Commission denies the application for rehearing filed by Suburban Natural Gas Company electronically filed by Docketing Staff on behalf of Docketing