FILE

IN THE SUPREME COURT OF OHIO

Suburban Natural Gas Company, Appellant, v. The Public Utilities Commission of Ohio, Appellee.	) Case No. 19-1765))) Appeal from the Public Utilities Commission) of Ohio)) Public Utilities Commission of Ohio) Case No. 17-2168-GA-CSS))	

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NOTICE OF APPEAL
BY
SUBURBAN NATURAL GAS COMPANY

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NOTICE OF APPEAL OF SUBURBAN NATURAL GAS COMPANY

Appellant, the Suburban Natural Gas Company (Appellant or Suburban), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, hereby gives notice to this Court and the Public Utilities Commission of Ohio (PUCO) of this appeal from the PUCO's decisions in Case No. 17-2168-GA-CSS. The decisions being appealed are the PUCO's Opinion and Order entered in its Journal on April 10, 2019 (Attachment A) and its Second Entry on Rehearing entered in the PUCO's Journal on October 23, 2019 (Attachment B).[1] Under R.C. 4903.20, this appeal should be taken up and disposed by this Court out of order on its docket.

Appellant is the complainant who brought the action before the PUCO in Case No. 17-2168-GA-CSS. On October 20, 2017, Appellant filed a complaint and request for emergency relief against Columbia Gas of Ohio, Inc. (Columbia). In its complaint, Suburban alleged that Columbia's use of financial incentives to builders and developers under certain programs violates PUCO orders, tariffs, statutory provisions, and a stipulated agreement between Suburban and Columbia (the 1995 Stipulation), which was approved by the PUCO.[2] The 1995 Stipulation intended to resolve a 1986 complaint between the parties and end the exact unlawful, unfair, and anticompetitive activities that Columbia is now engaged in.[3]

On April 10, 2019, the PUCO issued its Opinion and Order (Order), incorrectly concluding

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[1] Pursuant to S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

[2] *In re Columbia Gas of Ohio, Inc.*, Case Nos. 93-1569-GA-SLF, et al. (*1993 Columbia Self-Complaint Case*), Finding and Order (January 18, 1996); *In re Columbia Gas of Ohio, Inc.*, Case Nos. 16-1309-GA-UNC, et al. (*2016 DSM Case*), Opinion and Order (December 21, 2016); R.C. 4905.32, R.C. 4905.33, and R.C. 4905.35.

[3] *In the Matter of the Complaint of The Suburban Fuel Gas, Inc.*, 86-1747-GA-CSS, Complaint (August 29, 1986), Opinion and Order (August 4, 1987).

that Suburban had not met its burden of proof to prove the allegations in the complaint. On May 10, 2019, Suburban timely filed an application for rehearing, asserting several assignments of error. On June 5, 2019, the PUCO issued an Entry on Rehearing granting the application for rehearing to further consider the matters specified in the application for rehearing. On October 23, 2019, the PUCO issued its Second Entry on Rehearing.

Appellant files this Notice of Appeal complaining and alleging that the PUCO's Opinion and Order entered in the PUCO's Journal on April 10, 2019 (Attachment A) and its Second Entry on Rehearing entered in the PUCO's Journal on October 23, 2019 (Attachment B) are unlawful and unreasonable, and that the PUCO erred as a matter of law in the following respects, as set forth in Appellant's Application for Rehearing:

A. The PUCO Erred in Failing to Enforce the 1995 Stipulation Entered into Between the Parties and Approved by the PUCO in Violation of Ohio Law. (Suburban's May 10, 2019 Application for Rehearing at 28, 34, Assignments of Error B.1 and B.3).

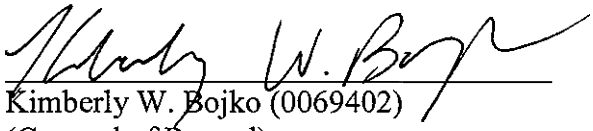
B. The PUCO Erred in Finding that it Lacked Authority to Preclude the Duplication of Utility Facilities in Direct Contradiction to Precedent and the Public Interest. (Suburban's May 10, 2019 Application for Rehearing at 28, 30, Assignments of Error B.1 and B.2).

C. The PUCO Erred in Failing to Find that Columbia Implemented its Builder Incentive Program in an Unfair and Anticompetitive Manner, which is Unjust, Unreasonable, and Contrary to Ohio Law. (Suburban's May 10, 2019 Application for Rehearing at 23, 28, 37, Assignments of Error A.3, B.1, and B.4).

D. The PUCO Erred in Finding that Suburban had Not Met its Burden of Proof to Prove the Allegations of the Complaint. (Suburban's May 10, 2019 Application for Rehearing at 14-42, Assignments of Error A.1, A.2, A.3, A.4, B.1, B.2, B.3, and B.4).

WHEREFORE, Appellant respectfully submits that the PUCO's Opinion and Order entered in the PUCO's Journal on April 10, 2019 and its Second Entry on Rehearing entered in the PUCO's Journal on October 23, 2019 are unreasonable and unlawful in regards to the errors delineated above, and should be reversed or modified with instructions to the PUCO to correct the errors complained of herein.

Respectfully submitted,



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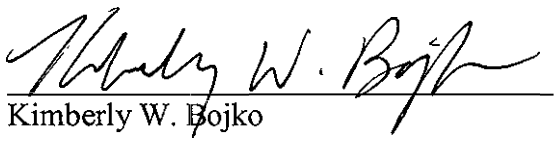
CERTIFICATE OF FILING

I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio as required by S.Ct.Prac.R. 3.11(D)(2), and Ohio Adm. Code 4901-1-02(A) and 4901-1-36, on December 19, 2019.



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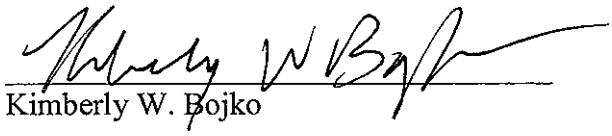
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal by Suburban Natural Gas Company was served in accordance with S.Ct.Prac.R. 3.11(D)(1) and R.C. 4903.13 by leaving a copy at the Office of the Commission in Columbus and upon all parties of record via electronic transmission this December 19, 2019.



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Attachment A

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.

OPINION AND ORDER

Entered in the Journal on April 10, 2019

I. SUMMARY

{¶ 1} The Commission, considering the complaint filed by Suburban Natural Gas Company and the evidence admitted into the record, finds in favor of Columbia Gas of Ohio, Inc.

II. 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

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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

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Case No(s). 17-2168-GA-CSS

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

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.

complaint, Suburban alleges that Columbia's use of financial incentives to builders and developers in competitive areas under certain programs violates a stipulated agreement between Suburban and Columbia (the 1995 Stipulation), which was approved by the Commission on January 18, 1996.[2] 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} Against this backdrop, 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

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2 *In re Columbia Gas of Ohio, Inc.*, Case No. 93-1569-GA-SLF, et al., Finding and Order (Jan. 18, 1996).

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} The attorney examiner granted an untimely motion to intervene filed by the Delaware County Prosecutor's Office on behalf of the Delaware County Board of Commissioners and Delaware County Engineer (collectively, DCP) by Entry issued March 28, 2018. On the same day as the Entry, DCP filed a motion for leave to file the direct testimony of Robert M. Riley out-of-time.

{¶ 10} The evidentiary hearing commenced, as scheduled, on April 3, 2018, and concluded on April 5, 2018. During the hearing, the attorney examiner granted DCP's motion to file testimony out-of-time (Tr. Vol. I at 7). After the hearing concluded, parties filed initial and reply briefs on May 15, 2018, and May 29, 2018, respectively.

{¶ 11} On June 4, 2018, Columbia filed a motion to strike Exhibit A attached to Suburban's reply brief. Suburban filed a memorandum contra the motion to strike on June 19, 2018, to which Columbia filed a reply on June 26, 2018.

III. APPLICABLE LAW

{¶ 12} Several statutory provisions are at issue in this case. R.C. 4905.26 requires that the Commission set for hearing a complaint against a public utility whenever reasonable

grounds appear that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law, or that any practice affecting or relating to any service furnished is unjust or unreasonable.

{¶ 13} R.C. 4905.22 requires, in part, that a public utility furnish necessary and adequate service and facilities, while R.C. 4905.35 prohibits public utilities from making or giving any undue or unreasonable preference or advantage to any person, corporation, or locality, or subjecting the same to any undue or unreasonable prejudice or disadvantage. R.C. Chapter 4905 also imposes certain requirements on public utilities in regard to rates that are to be collected from consumers. Namely, R.C. 4905.30 requires all public utilities to file schedules with the Commission showing all rates and charges for their service, while R.C. 4905.32 bars utilities from collecting rates or charges deviating from those filed with the Commission. Finally, R.C. 4905.33 prohibits utilities from charging or collecting a greater or lesser level of compensation from customers when delivering a similar service under substantially similar conditions.

{¶ 14} In complaint proceedings, the burden of proof is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, it is the responsibility of a complainant, in this instance Suburban, to present evidence in support of the allegations made in its complaint.

IV. DISCUSSION

A. *Summary of Evidence*

{¶ 15} Though this case was initiated as a complaint proceeding on October 20, 2017, this dispute has a vast history spanning over 20 years of competition in the natural gas industry between Columbia and Suburban. We will summarize both the factual evidence presented regarding the circumstances for this specific proceeding, as well as the history leading up to this complaint.

1. 1995 STIPULATION

{¶ 16} Suburban alleges that circumstances giving rise to the 1995 Stipulation occurred in Case No. 86-1747-GA-CSS (*1986 Suburban Complaint Case*). In that case, the Commission found that Suburban had not met its burden of proving its allegations against Columbia in regard to Columbia's offering of general service agency purchase and transportation agreements to Columbia's existing and new customers in order to maintain and to attract load. The Commission found that it was proper for Columbia to offer such agreements to new and to existing customers. However, the Commission also found that Columbia had violated R.C. 4905.32, 4905.33, and 4905.35 by providing free service lines, house piping, and appliances to win competition from Suburban. *1986 Suburban Complaint Case*, Opinion and Order (Aug. 4, 1987).

{¶ 17} In hopes of resolving the existing controversy involving competition between these companies in Ohio and avoiding another situation similar to that in the *1986 Suburban Complaint Case*, the parties negotiated the terms of the 1995 Stipulation in Case No. 93-1569-GA-SLF. The 1995 Stipulation was later approved by the Commission and resulted in the transfer of certain customers and facilities between the two natural gas companies, the modification of certain tariff provisions, and the exchange of "mutual releases and covenants not to sue." *In re Columbia Gas of Ohio, Inc.*, Case No. 93-1569-GA-SLF (*1993 Columbia Self-Complaint Case*), Finding and Order (Jan. 18, 1996) at 2-3.

2. COLUMBIA'S DSM PROGRAM

{¶ 18} Columbia's existing DSM Program includes a portfolio of 12 individual programs, including the EfficiencyCrafted Homes Program which generally incentivizes builders and developers to exceed state energy code minimum levels to conserve natural gas, thus, promoting energy efficiency (Columbia Ex. 6). Columbia introduced the first version of the energy-efficiency builder incentive program, called the Residential New Construction Program, in 2008. *In re Columbia Gas of Ohio, Inc.*, Case No. 08-833-GA-UNC (*2008 DSM Case*), Finding and Order (July 23, 2008). The Commission authorized Columbia

to extend the Residential New Construction Program in 2011 and rename it as the Energy Efficient New Homes program, in which Columbia made certain changes, including various minimum efficiency thresholds, to encourage more energy-efficient building. *In re Columbia Gas of Ohio, Inc.*, Case No. 11-5028-GA-UNC, et al. (*2011 DSM Case*), Finding and Order (Dec. 14, 2011).

{¶ 19} In 2016, Columbia changed the applicable program name to EfficiencyCrafted Homes and received Commission authorization to extend it for an additional six-year term through December 31, 2022. The Commission approved a stipulation filed in the proceeding by a majority of the intervening parties. *2016 DSM Case*, Opinion and Order (Dec. 21, 2016). The Commission recognized Columbia's EfficiencyCrafted Homes Program as an effective method to encourage the construction of energy-efficient homes. *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶ 115.

{¶ 20} Columbia avers that, between 2009 and 2017, it has provided incentives to support the energy-efficient construction of 12,416 homes, further noting that these payments are available to any builders constructing new homes that meet the EfficiencyCrafted Homes Program requirements within the 61 counties in which Columbia serves. Given its high rate of residential development, Columbia witness Thompson testified that Delaware County ranked second only to Franklin County for the number of energy-efficiency incentives paid to builders participating in the program in Ohio. (Columbia Ex. 6 at 5.)

3. SUBURBAN'S REQUEST FOR A DSM PROGRAM AND SIMILAR COMPLAINTS AGAINST COLUMBIA

{¶ 21} On December 11, 2007, Suburban pursued substantially similar claims to those found in the first count of the complaint at hand via a motion to reopen the *1993 Columbia Self-Complaint Case*. In that motion, Suburban alleged that Columbia was in violation of the 1995 Stipulation approved by the Commission and was offering gas service and facilities to residential customers in violation of its tariff. Following requests for a stay, Suburban

moved the Commission to dismiss that motion to reopen, which was granted by the Commission. *1993 Columbia Self-Complaint Case*, Entry (July 16, 2008).

{¶ 22} Shortly after Columbia's Energy Efficient New Homes program was authorized by the Commission in December of 2011, Suburban filed a self-complaint at the Commission requesting to establish a similar DSM program. *In re Suburban Natural Gas Co.*, Case No. 11-5846-GA-SLF (*Suburban Self-Complaint Case*). In support of its request, Suburban noted that it would be unable to compete with other companies that had existing DSM programs, like Columbia. The Commission later denied Suburban's request on both procedural grounds and for lack of evidence. *Suburban Self-Complaint Case*, Opinion and Order (Aug. 15, 2012) at 6-10.

{¶ 23} On May 17, 2013, Suburban filed a new complaint against Columbia once again alleging that Columbia was in violation of the 1995 Stipulation and its tariff. On August 15, 2014, Suburban filed a motion to dismiss its complaint without prejudice. In the Entry considering the motion to dismiss the complaint, the Commission emphasized that, if Suburban opted, in the future, to file a third complaint against Columbia raising the same allegations and/or a motion to reopen the proceedings in the *1993 Columbia Self-Complaint Case*, the Commission intended to move that case to a final conclusion. *In re the Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 13-1216-GA-CSS, Entry (Aug. 27, 2014) at 2.

4. CIRCUMSTANCES LEADING TO PRESENT COMPLAINT

{¶ 24} Suburban alleges this case arose when Pulte Homes (Pulte) selected Columbia over Suburban in October 2017 to provide natural gas distribution service to new phases of a residential subdivision in Delaware County called Glenross[3] (Suburban Ex. 1 at 6). Columbia states that it first became aware of Pulte's plans to develop the south side of Cheshire Road of the Glenross subdivision at one of Pulte's monthly utility meetings in 2016,

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3 The parties used the terms "Glen Ross" and "Glenross" interchangeably throughout this proceeding; therefore, the terms are to be given equal meaning within this Opinion and Order.

to which Ms. Donna Young, one of Columbia's New Business Development Managers, was invited, given her role as Columbia's point of contact with Pulte (Tr. Vol. II at 299-300, 329-330; Tr. Vol. III at 411; Suburban Ex. 25; Suburban Ex. 5 at 22-23; Columbia Ex. 5 at 4).

{¶ 25} In February 2017, Pulte provided Columbia with the civil engineering plans for the development, at which point Columbia began to conduct the cost-benefit analysis for extending the main to serve the development (Suburban Ex. 25; Tr. Vol. II at 300). Mr. Zach McPherson[4] testified that Columbia followed its tariff and standard procedures when it analyzed whether the main extension was economically justified at Columbia's expense, which he added is the model consistently used for all projects across Ohio (Columbia Ex. 5 at 7). Columbia witnesses Donna Young and Zach McPherson both confirmed that the analysis yielded the same result for the Glenross South expansion: the main extension was economically justified at Columbia's expense because the net present value of the project was positive, thereby allowing Columbia, through its tariff, to extend its main to the new area without requiring any contribution from Pulte (Tr. Vol. II at 317-318; Columbia Ex. 5 at 6).

{¶ 26} Ms. Young testified that, due to Pulte's compartmentalized business operations, Pulte's development team—the team responsible for selecting the natural gas distribution company and transforming undeveloped land into subdivision streets and residential lots with utilities—was unaware of Columbia's builder incentive program, the DSM Program. During discussions regarding the reasons why Columbia should be selected to provide natural gas to the new area, Ms. Young stated that she reminded Pulte's development team of the DSM Program. (Tr. Vol. II at 320-321, 327; Suburban Ex. 5 at 29, 60.) Ms. Young testified that, based on discussions with Pulte around September 2017, Columbia was led to believe that the builder incentive program was not a factor in Pulte's decision. Ms. Young did state, however, that she had forwarded some questions from Pulte

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4 Zach McPherson was made Columbia's sales manager for Delaware County in 2016 and was Donna Young's direct supervisor (Tr. Vol. III at 370).

employees to an energy-efficiency consultant to provide Pulte with some recommendations for improving energy efficiency. Ms. Young indicated that the overwhelming majority of her correspondence with Pulte emphasized all of the benefits in totality for choosing Columbia and was not limited to the DSM Program. (Tr. Vol. II at 326-327, 338; Suburban Ex. 27.)

{¶ 27} On or about October 10, 2017, Columbia learned that Pulte had selected Columbia. Pulte advised Columbia that it wanted Columbia to complete its main extension by year end and Columbia met Pulte's request. (Suburban Ex. 28; Columbia Ex. 5 at 6-7.) After learning that Columbia had been selected, Suburban witness Aaron Roll[5] requested an explanation from Pulte's Jeff Thompson,[6] to which Mr. Thompson allegedly responded Columbia's "incentive program" was the reason (Suburban Ex. 1.4). Despite the fact that there is some dispute as to whether Mr. Thompson accurately recalled the reason for Pulte's choice of Columbia for the Glenross South development, Suburban filed the above-captioned complaint case (Suburban Ex. 5 at 26, 29, 59-60, 66; Tr. Vol. II at 266, 338, 343-344). Suburban claims that it had planned to serve this phase of the Glenross project, as well as every other phase, since 2002 (Suburban Ex. 1 at 2-3, 7; Suburban Ex. 1.1). In fact, Suburban witness Mr. Roll engaged Suburban's engineering subcontractor to complete the layout and design of the distribution system for Phase 11, as well as the connection of this system to Suburban's main on Cheshire Road, and incorporated the anticipated new load into Suburban's capacity plan. By mid-summer 2017, Suburban states it was ready to proceed laying pipe as soon as Pulte needed it to. (Suburban Ex. 1 at 5-8.) Further, Suburban argues that Pulte had no reason to believe that Suburban was incapable of serving the additional phases in Glenross, adding that, up to that point, Pulte and Suburban had a very amicable and professional working relationship (Tr. Vol. II at 302-303; Suburban Ex. 26; Suburban Ex. 5 at 16-17).

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5 Aaron Roll is in charge of system operations for Suburban (Suburban Ex. 1 at 1).

6 Jeff Thompson is the Pulte land agent who works with Columbia on new developments (Suburban Ex. 5 at 23).

B. Summary of Parties' Arguments

1. COLUMBIA'S MOTION TO STRIKE EXHIBIT A OF COMPLAINANT'S REPLY BRIEF

{¶ 28} Ohio Adm.Code 4901-1-15(F) provides that any party adversely affected by an oral ruling issued during a hearing and either elects not to take an interlocutory appeal from the ruling or files an interlocutory appeal which is not later certified by the attorney examiner "may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case."

{¶ 29} In Columbia's June 4, 2018 motion to strike Exhibit A of Suburban's reply brief, Columbia asserts Exhibit A of Complainant's reply brief is inconsistent with Ohio Adm.Code 4901-1-15(F) and prejudicial, as it is merely purported rebuttal testimony, the request for which was expressly denied during the hearing and later affirmed in the May 25, 2018 Entry denying the interlocutory appeal. Columbia argues Suburban should have limited itself to a discussion of the need for the rebuttal testimony at issue, consistent with the rule. Finally, Columbia notes that the Commission has clearly indicated that "new information should not be introduced after the closure of the record and parties should not rely upon evidence which has been stricken from the record." *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (*FirstEnergy ESP IV Case*), Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 376. Moreover, in that same decision, the Commission noted that "[t]he appropriate use of a 'proffer' is simply to preserve a party's right to appeal an evidentiary ruling excluding it. It is not, however, an additional opportunity to introduce new evidence into the record without providing parties sufficient opportunity to respond to it." *FirstEnergy ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 376. As Suburban waited nearly two months after the hearing concluded to attempt a proffer, Columbia asserts the attempt is improper.

{¶ 30} In its memorandum contra the motion to strike, Suburban asserts that, under Rule 103(A)(2) of the Ohio Rules of Evidence, an evidentiary ruling excluding evidence cannot constitute reversible error unless "the substance of the evidence was made known to the court by offer or was apparent from the context in which questions were asked." Suburban further notes that, once an offer of proof is made, "the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon" and may "direct the making of an offer in question and answer form." Evid.R. 103(B). Suburban states it is simply preserving the evidentiary rulings for review by means of discussing the matter in an appropriate filing, which is not inconsistent with Ohio Adm.Code 4901-1-15. Furthermore, Suburban notes that R.C. 4901.18 provides that the findings and recommendations of an attorney examiner are "advisory only and do not preclude the commission from taking further evidence." Suburban claims that the Commission is unable to determine whether testimony was properly excluded without knowing what the testimony would have been and can ultimately review the testimony to make such a determination, adding that "the record is not limited to evidence admitted at hearing" and attorney examiners lack the authority to limit the Commission's discretion to take additional evidence, pursuant to R.C. 4901.18.

{¶ 31} In response, Columbia simply argues that the Commission's rules and precedent require the proffering of excluded evidence at hearing and not in post-hearing briefs, consistent with Ohio Adm.Code 4901-1-27(D). Additionally, to Suburban's point, Columbia notes that the attorney examiner did not direct Suburban to proffer Mr. Pemberton's[7] rebuttal testimony in question and answer form; rather, the attorney examiner stated that such rebuttal testimony for the purposes stated during the hearing would not be helpful to the Commission in its decision (Tr. Vol. III at 516). Unless and until the Commission reopens the hearing for the purpose of introducing this testimony into the

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[7] David L. Pemberton Sr. is the current Chairman of the Board, a director, and Chief Executive Officer of Suburban. Before holding these positions, Mr. Pemberton served as the company's President and a director, as well as its General Counsel from February 1989 to December 2000. (Suburban Ex. 4 at 1.)

record, Columbia asserts the Commission should strike the testimony included in Exhibit A. Finally, Columbia states that the Commission has declined invitations to "review * * * proffered * * * rebuttal testimony to determine that the portions identified * * * constitute proper rebuttal testimony improperly excluded by the [a]ttorney [e]xaminer" and argues the Commission should do so again in this case. *In re Ameritech Ohio*, Case No. 96-922-TP-UNC, et al., Opinion and Order (Oct. 4, 2001) at 24.

2. WHETHER COLUMBIA VIOLATED THE 1995 STIPULATION

{¶ 32} Suburban argues that Columbia agreed not to introduce builder incentives or duplicate facilities in areas served by Suburban in the 1995 Stipulation, which is still effective today. Suburban specifically alleges in its complaint that "[t]he 1995 Stipulation was intended to permanently end Columbia's use of builder incentive programs in areas served, or readily-capable of being served, by Suburban. Such areas include the Glen Ross subdivision and adjacent developments." Suburban further alleges that "[t]he Glen Ross subdivision is not within Columbia's service territory, either as of the date of the final order in [the *2016 DSM Case*] or presently." (Suburban Complaint at ¶ 17-18.) While Mr. Pemberton acknowledges that the 1995 Stipulation does not expressly state this intent, he testified that one of the underlying disputes of that case was Columbia's use of builder incentives as an unlawful and anticompetitive discount from tariffed rates. He contends that the 1995 Stipulation's statement that it resolved the parties' competitive disputes meant that Columbia was required to eliminate its builder incentives; he further contends that the 1995 Stipulation allowed Suburban an opportunity to bring claims in the future if the incentives were re-introduced. Additionally, Mr. Pemberton testified that the Release attached to the 1995 Stipulation similarly eliminated the EfficiencyCrafted Homes Program, as it is "substantially similar" to the programs listed in that clause, or, at the very least, is being used in the exact same way earlier incentives were used to pay builders directly for choosing Columbia as their natural gas provider. (Suburban Ex. 4.0 at 13-14; Suburban Complaint, Ex. A, Ex. 7.) While Suburban avers that the 1995 Stipulation does not direct Columbia to cease its competitive efforts, Suburban states that it did establish rules for how

such competition would occur. As the EfficiencyCrafted Homes Program rebates qualify as builder incentives, and no exception was made for incentives tied to energy efficiency, Suburban contends the 1995 Stipulation prohibits Columbia from using such rebates to compete against Suburban. According to Suburban, Columbia's failure to abide by the terms of the 1995 Stipulation amounts to a violation of R.C. 4905.22. If the Commission were to find in favor of Columbia on this issue, Suburban further argues that the parties' efforts toward negotiating, and the Commission's eventual approval of, the 1995 Stipulation were essentially meaningless.

{¶ 33} Both Suburban and DCP also raise concerns regarding the potential duplication of natural gas facilities in the area. Suburban challenges specific construction of the duplicate gas mains along Cheshire Road in Delaware County, and DCP argues a more general opposition to unnecessary duplication (Suburban Ex. 3.0 at 1, 19; Tr. Vol. I at 29). While Suburban acknowledges that any provider may extend its facilities to compete to serve previously unserved areas, it argues that Glenross is not an unserved area and that R.C. 4905.04 provides the Commission with the authority to prohibit any public utility from duplicating the services or facilities of another provider. *See, e.g., N. Ohio Tel. Co. v. Putnam*, 164 Ohio St. 238, 245-246, 130 N.E.2d 91 (1955) (where the Court held that, "[a]lthough there is no statute which specifically gives the Public Utilities Commission authority to determine a boundary between the service areas of adjoining telephone companies, its power to do so would appear unquestioned both in reason and in law"); *Scioto Valley R. & Power Co. v. Pub. Util. Comm.*, 115 Ohio St. 358, 362-363, 154 N.E. 320 (1926). Furthermore, despite not having certified territories, Suburban alleges the Commission has always prohibited duplication of facilities in the water and sewer industry. R.C. 4933.25; Ohio Adm.Code 4901:1-15-05; *In re Aqua Ohio, Inc.*, Case No. 06-51-WW-AAC, Opinion and Order (Mar. 28, 2007) at 1. Given the inherent safety dangers of natural gas, Suburban claims that the policy against duplication of facilities warrants an even stricter application. Finally, Suburban asserts that the Commission is certainly qualified to determine whether the facilities in this case are "unnecessarily duplicative" based on the evidence and circumstances presented, adding

that a complaint case brought under R.C. 4905.26 is the appropriate forum for such a determination. *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 14 Ohio St.3d 49, 50, 471 N.E.2d 475 (1984); *Ideal Transp. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 195, 326 N.E.2d 861 (1975).

{¶ 34} Columbia argues that nothing in the 1995 Stipulation or Commission order from that proceeding prohibited Columbia from offering Commission-approved DSM incentives to builders of energy-efficient homes or from competing for customers in southern Delaware County. Columbia notes that the language referenced by Suburban did not eliminate the builder incentives; rather, it was merely explaining the manner in which the parties resolved a dispute regarding the "provision of marketing incentives to builders and developers of [a Delaware County] subdivision." *1993 Columbia Self-Complaint Case*, Entry (Dec. 6, 1993). Furthermore, Columbia contends that the 1995 Stipulation does not contain any explicit language prohibiting Columbia from offering future builder incentives in Delaware County or otherwise, adding that, even if the Release did have such language, the DSM program incentives at issue in this proceeding are nothing like those at issue in the 1995 Stipulation (Suburban Ex. 4.0 at 14). Finally, Columbia points to Suburban's failure to provide any evidence to show that the tariff modifications resulting from the 1995 Stipulation, which required the companies to "delete the references which restricted them from providing or paying for customer service lines, house piping, and appliances when competing with another regulated natural gas company," are similar in any fashion to the existing EfficiencyCrafted Homes Program (Columbia Ex. 6 at 4). *See also 1993 Columbia Self-Complaint Case*, Finding and Order (Jan. 18, 1996) at 3.

{¶ 35} Of more concern, alleges Columbia, is that Suburban attempts to argue that the 1995 Stipulation prohibits Columbia from offering builder incentives in a particular area of Delaware County identified in the Release, or worse, that it prohibits Columbia from effectively serving customers in that area at all. In fact, Columbia points to Mr. Pemberton's testimony where he describes the area as one in which Columbia agreed not to duplicate pipelines which Suburban had previously constructed (Suburban Ex. 4.0 at 15). Regardless of Suburban's ultimate position, Columbia maintains that the language of the 1995

Stipulation supports neither and the text of that document should speak for itself (Suburban Ex. 3.0 at 1, 19). In addition, while Columbia acknowledges that Glenross South falls within the geographic area described in the Release, Columbia notes that the only significance of the language contained in the Release is that Columbia cannot use it to preclude Suburban from bringing its current claim.

{¶ 36} Finally, in response to concerns raised regarding the duplication of facilities, Columbia initially notes that it finished installing its gas main on Cheshire Road to serve the Glenross South area in December 2017 (Columbia Ex. 5 at 5-7). Further, Columbia adds that Chief Deputy Engineer Robert M. Riley of the Delaware County Engineer's Office explained that he was not currently aware of any unnecessary duplication of natural gas facilities in Delaware County, but acknowledged that some duplication may be necessary or unavoidable (Tr. Vol. I at 20-21, 27). Moreover, Columbia asserts there is no current mechanism to determine what would constitute unnecessarily duplicative natural gas facilities, apart from the General Assembly creating certified territories for natural gas companies in Ohio similar to those of electric suppliers. Columbia further notes that, as a creature of statute, the Commission is limited to the jurisdiction conferred upon it by the General Assembly and, without such direction from the legislature, the Commission cannot instruct the creation of certified natural gas service territories. Finally, Columbia notes that the Commission has already held that "there are no certified gas service territories in Ohio, and any gas company may serve any customer in any part of the state." *In re Columbia Gas of Ohio, Inc.*, Case No. 87-1528-GA-ATA, Opinion and Order (Dec. 8, 1987) at 26. Columbia asserts that Suburban acknowledged Pulte was under no obligation to select Suburban for the Glenross South development, and no contract or other document bound Pulte's predecessors or Pulte to stay with Suburban as their provider for natural gas. Furthermore, Columbia notes that Suburban conceded that Columbia was entitled to construct a main distribution line down Cheshire Road to this development. (Tr. Vol. I at 74, 81, 83-85.)

3. WHETHER COLUMBIA VIOLATED THE COMMISSION ORDERS APPROVING THE DSM PROGRAM OR VIOLATED THE TERMS OF THE DSM RIDER

{¶ 37} Suburban claims that Columbia deployed its DSM Program in an unfair or abusive manner against the Complainant, and beyond the authority granted to it by the Commission, by using the program to competitively expand its service territory rather than enhance energy efficiency for its customers (Suburban Ex. 3.0 at 7). In support of its assertions, Suburban first argues that Columbia has been using the EfficiencyCrafted Homes Program as a competitive response tool by ensuring developers are aware of the program through communications with its sales team. Specifically, Suburban cites to the testimony of Mr. Codispoti, who agreed that the program rebates give Columbia a competitive advantage over Suburban. (Tr. Vol. II at 241-244, 265-266; Tr. Vol. III at 401-403, 405; Suburban Ex. 5 at 23-24, 46-47.) Suburban argues that the Commission Staff testified against Suburban's proposed program in the *Suburban Self-Complaint Case* as being merely a competitive response program, yet Columbia is using its program as such in areas where it currently faces competition, including Glenross and others (Suburban Ex. 2; Suburban Ex. 11; Tr. Vol. II at 231-232). As further evidence of Columbia's anticompetitive activity, Suburban implores the Commission to review the highly confidential data showing where Columbia has paid incentives during the period 2011-2017, broken down by county, the number of homes, and the total dollar amount paid to each builder (Suburban Ex. 42-HC; Suburban Ex. 43-HC; Suburban Ex. 44-HC).[8] Suburban also alleges that Columbia's DSM Program applications established a geographic limitation for the program when Columbia referred to its "service territory," implying that Columbia only sought authority to offer these programs in the area it served at the time of its DSM applications, and not in another utility's service territory (Suburban Ex. 3.0 at 9-10). Further, to the extent that Columbia's DSM Program applications are ambiguous, Suburban argues the applications must be construed against Columbia. *Saalfield Pub. Co. v. Pub. Util. Comm.*, 149 Ohio St. 113, 77

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8 Suburban questions whether historical information regarding the incentives should be deemed highly confidential, as the public record in the *2016 DSM Case* shows the number of incentive rebates received by each builder from 2012 to 2015. *2016 DSM Case*, Hearing Transcript (Sept. 30, 2016) at 323-324, Opinion and Order (Dec. 1, 2016) at ¶ 115.

N.E.2d 914 (1948), paragraph two of the syllabus (*Saalfield Case*). Suburban asserts both parties have used and understand the term "service territory" to mean an area currently being served, or capable of being served, from an existing main (Suburban Ex. 3 at 9). *1986 Suburban Complaint Case*, Hearing Transcript (May 7, 1987) at 173 (where Columbia Vice President described Columbia's service area as "any community or general area that we have historically served").

{¶ 38} Additionally, Suburban notes that the DSM Rider's tariff does not authorize Columbia to pay, let alone recover, EfficiencyCrafted Homes Program rebates, thereby, resulting in a violation of R.C. 4905.30 and 4905.32. According to Suburban, R.C. 4905.30 requires that Columbia's tariffs show "all rates, * * * classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them," and R.C. 4905.32 requires Columbia to file tariffs specifying charges for any service offered or rendered and forbids any direct or indirect refund of these charges. Although main extensions are a service provided by Columbia, the charges for which are properly reflected in a tariff, Suburban asserts that the builder incentive rebates offered through the EfficiencyCrafted Homes Program are not, despite the fact these rebates directly or indirectly reduce charges for main extension service rendered to a customer making the request by reducing the required main extension deposit (Tr. Vol. II at 232). Similarly, 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 (PUCO No. 2, Fourteenth Revised Sheet No. 28; PUCO No. 2, Fifth Revised Sheet No. 15 at ¶ G; PUCO No. 2, Third Revised Sheet No. 9 at ¶ 12). For purposes of this case, Suburban simply requests that the Commission direct Columbia to not seek recovery of incentives paid to Pulte through its DSM Rider.

{¶ 39} Columbia notes that not only did Suburban fail to provide any evidence to support this argument, but Columbia witness Thompson testified that the purpose of the Ohio-wide EfficiencyCrafted Homes Program is to help customers reduce the demand on

Columbia's system by lessening their natural gas usage and, ultimately, lowering the customer's bill through the construction of more energy-efficient homes (Columbia Ex. 6 at 5). As noted above, Columbia continues to argue that its DSM Program is only one feature that Columbia's sales team will typically mention to builders and developers when advocating the benefits of choosing Columbia as a provider of natural gas. In fact, Ms. Thompson testified that Columbia offers the CHOICE program, auction-based commodity service in the form of a standard choice offer, and energy-efficiency programs, as well as the other programs that distinguish Columbia from its competitors and may be considered by a customer when choosing a natural gas provider (Columbia Ex. 6 at 5; Columbia Ex. 5 at 3). Additionally, Ms. Young stated she was simply providing Pulte with the reasons why Columbia would be the best choice to serve the Glenross South area, which included communicating an overview of the DSM program and explaining that the program's purpose was "to encourage reduced gas usage through energy efficiency." (Tr. Vol. II at 327; Columbia Ex. 6 at 2; Suburban Ex. 27).

{¶ 40} Furthermore, in response to Suburban's arguments regarding Columbia's service territory, Columbia notes that Suburban acknowledged that it or any other Ohio natural gas utility does not have a statutory service territory and even testified that Columbia is not "statutorily prohibited from serving any particular geographic area" (Tr. Vol. I at 62-64; Suburban Ex. 3.0 at 9). Moreover, Columbia challenges Suburban's interpretation of its DSM applications and the use of "service territory," noting that Suburban has expanded its service territory to serve new developments beyond its "general boundaries" and has "successfully competed against Columbia" over many years (Tr. Vol. I at 56-58, 63-64; Suburban Ex. 3.0 at 4). Ms. Thompson, as the author of the 2016 DSM application, also contested Suburban's characterization of the application and testified that the phrase "service territory" was simply used to denote that Columbia's DSM Program could be offered to existing and potential customers (Columbia Ex. 6 at 6-7). As such, Columbia argues that the 1987 definition for "service territory" cited by Suburban, which ultimately refers to Columbia's "markets," is not reflective of how Columbia has defined

"service territory" for purposes of its DSM applications or otherwise. Lastly, Columbia contends that Suburban even acknowledged that it must compete against Columbia and other natural gas providers and, by stating that it needed a similar DSM Program in order to compete, effectively conceded to the fact that Columbia's DSM Program could apply in areas Suburban desired to serve. In fact, Columbia adds, if the Commission were to agree with Suburban, it would result in a discriminatory bias against new customers of Columbia that are connected to main line extensions after 2016, when the new energy-efficiency program was approved in the *2016 DSM Case*, as it would prohibit them from taking advantage of several energy-efficient measures (Columbia Ex. 6 at 7-8). Columbia also disagrees with Suburban's mischaracterization of Mr. Codispoti's testimony, noting that he was merely agreeing that, if a builder values energy efficiency and only one of the two competitors for the customer offers incentives, then a competitive advantage will result (Tr. Vol. II at 242, 262-266).

{¶ 41} Columbia responds to Suburban's allegations regarding cost recovery under the DSM Program by suggesting that the Commission review the EfficiencyCrafted Homes Program's Implementation Manual, which states that Columbia will not process incentive payments under the program unless the homes have gas meters and Columbia confirms the home's owner or resident is a Columbia customer (Suburban Ex. 41-HC, Implementation Manual at 20).[9]

{¶ 42} Columbia also stresses that Columbia and Pulte had an established business relationship, which solidified Pulte's choice for Columbia to service the new phases of the Glenross subdivision. As evidence of the already-existing relationship between Columbia and Suburban, Columbia witness McPherson testified that Pulte was already a customer of Columbia's affiliates in other states before extending its business into Ohio. In fact, Mr. McPherson stated that, by the time Pulte selected Columbia to serve the area in question in

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9 Columbia, in its reply brief, waived the highly confidential status for the sentence referenced in its reply brief regarding the Implementation Manual.

this case, Columbia was already working with Pulte on 27 projects across central Ohio. (Columbia Ex. 5 at 4.) Moreover, Columbia asserts Suburban provided no evidence that the DSM Program was a factor in Pulte's decision to select Columbia, adding that Suburban chose not to call as a witness Pulte's representative responsible for the decision but chose instead to rely on Mr. Thompson's questionable deposition testimony (Tr. Vol. II at 325-26, 338; Suburban Ex. 2; Suburban Ex. 5 at 29; Suburban Ex. 26).[10] Additionally, Columbia contends that it would not matter even if Pulte saw value in Columbia's DSM Program and selected Columbia for that reason, since a company cannot be deemed an unfair competitor for offering authorized services and programs that distinguish it from Suburban (Columbia Ex. 5 at 3-4; Columbia Ex 6 at 5). In fact, Ms. Young testified that Pulte spent far more qualifying a home for an incentive than the incentive ultimately received, thereby rebutting Suburban's allegations that Pulte chose Columbia for additional money (Tr. Vol. II at 328-329 (where Ms. Young specifically stated that the average incentive payment was approximately $277, whereas Pulte's extra cost attributed to qualifying each house for the program was approximately $1,500); Suburban Ex. 27). Accordingly, Columbia requests that the Commission deny Suburban's apparent collateral attack of the Commission's order approving the DSM Program.

{¶ 43} In response to Columbia's assertions, Suburban first notes that it is not collaterally attacking any DSM Program order, but even if it were, R.C. 4905.26 specifically permits complaints that represent a collateral attack on a prior decision. *W. Reserve Transit Auth. v. Pub. Util. Comm.*, 39 Ohio St.2d 16, 18, 313 N.E.2d 811 (1974). Furthermore, Suburban states it chose not to intervene in the latest DSM approval case because it was justifiably relying on the terms of the 1995 Stipulation and the DSM application itself. Suburban

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10 In addition to the fact that Mr. Thompson was not present to testify at hearing, Columbia asserts that Mr. Thompson's deposition testimony should not be heavily relied upon for the following reasons: (1) Mr. Thompson was not the ultimate decision-maker as to which company would provide the Glenross South area with natural gas service; (2) Mr. Thompson may have relayed incorrect information to Mr. Roll, Suburban's representative, regarding the decision; (3) Mr. Peck, Mr. Thompson's supervisor, indicated the DSM Program meant nothing to Pulte; and (4) Ms. Young recalled the conversation with Mr. Thompson and states they were speaking about an entirely different subdivision.

further stresses that it is Columbia's actions, and not its intent, on which the Commission must focus to determine whether the testimony and evidence presented in this case are consistent with the DSM Program, emphasizing that Mr. Thompson, the Pulte employee with the most direct contact with Columbia, indicated that the builder incentives were a deciding factor for Pulte in choosing Columbia (Suburban Ex. 5 at 46-47).

4. WHETHER COLUMBIA VIOLATED ITS MAIN EXTENSION TARIFF

{¶ 44} In Count 4 of its complaint, Suburban contends that Columbia not only admitted to requiring no deposit or contribution for the Cheshire Road extension, but has offered no evidence showing that the extension was economically justified. Specifically, Columbia's main extension tariff provides for the following:

> Where a main extension is necessary to provide service availability to plots of lots or real estate subdivisions and such main extension is not deemed justified at the Company's expense, the owners, developers or promoters of such plots of lots or real estate subdivisions may enter into a line extension agreement and deposit with the Company the estimated cost of that portion of the main extension which is not deemed justified at the Company's expense. * * * Where a main extension is deemed economically justified at the Company's expense, based upon a cost-benefit study, no deposit shall be required.

(PUCO No. 2, Third Revised Sheet No. 9, ¶ 12.) Although the tariff explicitly provides that a cost-benefit study be conducted to determine whether the project is economically justified, Suburban points to testimony from Columbia witnesses indicating that no study was conducted in this case and the form typically utilized by Columbia employees to conduct this study was not used (Tr. Vol. II at 216-220, 309-310, 316-317, 334-335; Tr. Vol. III at 386-388, 397, 399-400; Suburban Ex. 5 at 68-69; Suburban Ex. 8). Moreover, Suburban alleges that no one familiar with this case can ascertain how much the Glenross extension was expected to cost; rather, Mr. McPherson can only generally say that the amount was large enough to require his signature, but those levels may have changed since the project was first proposed

(Tr. Vol. III at 415-416, 418-419). Even without the actual cost-benefit study, Suburban notes that Columbia could have offered testimony as to the expected costs and revenues of the main extension, but elected not to do so.

{¶ 45} Furthermore, Suburban asserts that Columbia agreed to not only install the main extension and pipe for Phase 11 for free, but to also pipe and connect the future phases at no cost, phases which had not been designed by Pulte at that point, and adds that none of the governing terms were put into a written line extension agreement (Suburban Ex. 5.8; Tr. Vol. II at 238-239; Suburban Ex. 16; Suburban Ex. 17; Suburban Ex. 5 at 68-69). In fact, Suburban notes Ms. Young's testimony when she described how "[o]ver the last six years I have repeatedly pushed management beyond our guidelines to including future phases to help get rid of deposits on many subdivisions," and claims this is a pattern with Ms. Young that applies to the scenario in this case (Tr. Vol. II at 266, 302, 311-312, 322; Suburban Ex. 26; Suburban Ex. 29). As "public utilities must charge all similarly situated customers the same rates and cannot furnish free service below their actual costs for the purpose of destroying competition," Suburban claims that Columbia's agreement with Pulte to extend its main for Phase 11 and all future phases violates R.C. 4905.33. *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 470, 678 N.E.2d 922 (1997). Given Columbia's failure to produce any evidence that a cost-benefit study was conducted in compliance with its policy, Suburban alleges that it has satisfied its burden of proof as to Count 4 of its complaint and has demonstrated that Columbia violated its main extension tariff.

{¶ 46} Columbia asserts that Suburban has failed to present any evidence that Columbia offered or agreed to waive any tariff-required deposit or other charge for Pulte or others. After noting that the Commission has approved its DSM Program on three separate occasions, Columbia asserts that it continues to comply with its tariff when evaluating service requests from developers, including Pulte, and recovering costs incurred under those programs. In fact, Columbia states that 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 Glenross South, adding that, once the main was extended, there

was no need for an additional main extension to serve future phases (Columbia Ex. 5 at 6-7; Tr. Vol. II at 240, 269, 311-312, 316-318, 334-335). Moreover, according to Mr. McPherson, the main extension could not have received internal approval without such a study (Tr. Vol. III at 396-400, 418-420). Furthermore, Columbia asserts that Suburban never requested a print out of the computer cost-benefit analysis during discovery and, because Suburban has the burden to prove its case, Columbia should not be held responsible for not introducing such a print out during the evidentiary hearing. Columbia also stresses the testimony of Ms. Young on this point, in which she stated that Columbia's Engineering Department knows and was responsible for inputting the construction costs into the model, while Ms. Young and Mr. Codispoti were responsible only for the revenue inputs required by the cost-benefit analysis (Tr. Vol. II at 342-343; Columbia Ex. 5 at 7). Additionally, Columbia points out that its tariff only requires a written line extension agreement when a deposit is required by the cost-benefit analysis, which was not the case here (Columbia Ex. 5 at 8). Finally, Columbia continues to argue that Ms. Young adhered to Columbia's standard guidelines in obtaining and inputting the needed information in the cost-benefit analysis model in every case (Tr. Vol. II at 314-315, 318, 322-323).

5. WHETHER COLUMBIA VIOLATED VARIOUS STATUTES AS ALLEGED IN THE COMPLAINT

{¶ 47} As noted above, Suburban alleges that Columbia violated R.C. 4905.30, 4905.32, 4905.33, and 4929.08(B). Additionally, although these arguments arose at the evidentiary hearing, Suburban contends that Columbia has improperly refused to produce certain discovery and claimed confidentiality for certain portions of discoverable documents, thereby limiting Complainant's opportunity to present its case.

{¶ 48} As Suburban merely restates its allegation that Columbia has committed various statutory violations as Count 5 in its complaint, Columbia asserts that Suburban has failed to demonstrate that these violations occurred, for the various reasons stated above. As to certain issues that arose during the evidentiary hearing, Columbia contends that Suburban never raised the confidentiality of certain information until the evidentiary

hearing and that the information constitutes proprietary information that would be harmful to Columbia if disseminated to the public. Finally, Columbia again asserts that Suburban has failed to present any evidence that Columbia violated any statute, Commission rule or order, or its main line extension tariff, noting that it should not be penalized for offering its customers authorized programs and services that its competitors do not.

{¶ 49} Further, Columbia goes on to allege that Suburban's business conduct contradicts its own arguments for furthering competition and reducing unnecessary duplication of facilities. Specifically, Columbia asserts that Suburban is trying to create an exclusive service territory for itself for the sole purpose of blocking competition from Columbia; as an example, Columbia states that, with no budgetary constraints and no concern for the absence of tariff authority, Suburban is paying customers who reside on large tracts of undeveloped land to sign agreements purporting to grant Suburban the exclusive right to serve all future development of the land in perpetuity, amounting to anticompetitive behavior and potentially illegal activity. (Tr. Vol. I at 88, 97-99, 102-103, 105-106, 108-110; Columbia Ex. 4; Columbia Ex. 6, Attach. H.) *Orwell Natural Gas Co. v. Fredon Corp.*, 2015-Ohio-1212, 30 N.E.3d 977, ¶¶ 71-72 (11th Dist.) (where the court construed R.C. 4929.02(A) as reflecting a public policy to "promote effective competition between willing buyers and sellers" of natural gas and declared unenforceable a deed restriction "which binds all owners and tenants of the property to one natural gas supplier for all time"). Moreover, these agreements, according to Columbia, appear to bind Suburban to pay all costs associated with servicing future developments without first conducting any type of analysis to determine whether the extensions are economically justifiable and, thus, potentially violate Suburban's tariff (Columbia Ex. 4; Columbia Ex. 6, Attach. H; Tr. Vol. I at 101-102).

{¶ 50} Suburban, in responding to Columbia, argues that Suburban has not attempted to establish its own exclusive service territory, asserting instead that it was forced to obtain the easements because that was "the only way that Suburban [was] going to be able to serve any future customers" (Tr. Vol. I at 108). Furthermore, Suburban argues that

Columbia did not cite any examples where Suburban had gone into a development that Columbia already served and duplicated a Columbia main to serve a new phase; rather, the cases cited by Columbia showcase situations where these two companies had to compete to serve a previously unserved area (Tr. Vol. I at 111-113).

V. COMMISSION DECISION

{¶ 51} As an initial matter, the Commission agrees with Columbia's arguments regarding Exhibit A attached to Suburban's reply brief and, accordingly, grants its motion to strike. The Commission and its attorney examiners have provided clear guidance as to how parties should proffer disputed evidence, which is both consistent with our administrative rules and the Ohio Rules of Evidence. *FirstEnergy ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶ 376; *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 16-481-EL-UNC, et al., Hearing Transcript (Feb. 8, 2019) at 176-180; Ohio Adm.Code 4901-1-27(D). We expect all parties to adhere to that guidance. Suburban has acted inconsistently with the procedure followed in Commission proceedings when making a proffer and fails to cite to any case law, let alone a Commission proceeding, where a party has successfully attached unsworn testimony or other evidence to a reply brief as part of a purported proffer. Suburban also fails to persuade us that such testimony should actually be considered by the Commission at this point of the proceeding. Considering such testimony would not only be unduly prejudicial to Columbia, it would completely undermine the Commission's purpose of holding evidentiary hearings in the first place. We will not entertain such disregard for our procedural process or the evidentiary rules by which we abide (and ironically Suburban cites to in its argument for a valid proffer). As such, the Commission, to the extent necessary, affirms the attorney examiner's decision to reject Suburban's request for rebuttal testimony and subsequent request for certification of its interlocutory appeal and grants Columbia's motion to strike, emphasizing that Suburban's rebuttal testimony has not been considered in our determination of this proceeding.

{¶ 52} Moving on to the merits of the complaint before us, the Commission finds in favor of Columbia after determining that Suburban has failed to substantiate the claims alleged in its complaint. Suburban's case, as presented during the hearing, appears to question how competition in the natural gas industry should be conducted and, as described in detail below, we find that Columbia has not competed inappropriately by providing innovative products that help foster energy efficiency for its existing and potential customers. At the foundation of this case is the issue of what constitutes a service territory, and we 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. *In re Columbia Gas of Ohio, Inc.*, Case No. 87-1528-GA-ATA, Opinion and Order (Dec. 8, 1987). In fact, not only does Ohio's statutory framework setting forth the regulation of gas and natural gas companies permit reasonable competition, "the rules of this Commission and those of the Federal Energy Regulatory Commission positively encourage it." *In re Complaint of Suburban Natural Gas Co. v. Kalida Natural Gas Co., Inc.*, Case No. 92-1876-GA-CSS, et al. (*Kalida Case*), Entry (Aug. 26, 1993).[11]

{¶ 53} The Commission finds no merit in Suburban's claim that Columbia's existing homebuilder incentives violate the terms of the 1995 Stipulation. The pertinent stipulation language at issue here provides "[w]hereas, the Commission, through meetings conducted by its Attorney Examiner and Staff, has actively supervised the Parties' resolution of their competitive dispute and rationalization of their distribution systems (in Delaware and Franklin Counties) in the public interest by means of agreement rather than adversary procedure; and Whereas, the Parties are willing to agree, subject to the consent and approval of the Commission * * *, 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

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11 While Suburban references this case in support of its argument that Columbia is engaging in unreasonable competition, we note that the Commission merely denied Kalida Natural Gas Company's motion to dismiss after finding that Suburban had established sufficient grounds for complaint as required by R.C. 4905.26. This case was later dismissed pursuant to the joint motion to dismiss filed by both parties, after an evidentiary hearing had been conducted. Thus, if anything, the *Kalida Case* only serves to show that allowing this case to proceed to a hearing was reasonable and consistent with Commission precedent.

the Parties' tariffs on file with this Commission; and Whereas, said agreement * * * would resolve all contested issues in Case No. 93-1569-GA-SLF and terminate the proceedings in that case." The 1995 Stipulation also provides a "miscellaneous recommendation" that "[t]his Stipulation represents a compromise and settlement of any and all existing disputes between the Parties concerning competition between said Parties." Additionally, the Release indicates that Suburban would "forever refrain from instituting, reinstating, or prosecuting any action or proceeding" against Columbia "constituting, relating to, or based on (1) Columbia's 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 Release , and (2) the direct or indirect payments for customer service lines, house piping, and appliances (collectively, the Settled Claims) forevermore after the date of this Release * * *." (Suburban Complaint at Ex. A, Ex. 7). The Commission agrees with Columbia's position that nothing in the 1995 Stipulation or the Release prohibits Columbia, in perpetuity, from offering any kind of incentives to homebuilders.

{¶ 54} Suburban stresses the importance of honoring the terms of a stipulation; we could not agree more. The Commission further recognizes that we are in the best position to interpret our own orders. Nevertheless, as is the case with a statute which may cause various interpretations, interpreting a document which may contain some ambiguities often requires an examination of contemporaneous documents and statements which may be considered as probative, but not conclusive, evidence of the intent of the document. *See In re Columbus S. Power Co.*, Case No. 91-418-EL-AIR, Opinion and Order (May 12, 1992), Entry on Rehearing (July 2, 1992). When such a dispute arises, the Commission has rendered its interpretation of ambiguous terms contained in the stipulation. However, in this case, no ambiguity exists. We agree with Columbia that neither the 1995 Stipulation nor the subsequent Commission order approving the agreement includes any language prohibiting Columbia from offering Commission-approved DSM incentives to builders of energy-efficient homes or from competing for customers in southern Delaware County. To find

otherwise would ignore the express words chosen and used by the parties in the 1995 Stipulation and, instead, replace them with Suburban's unsubstantiated and speculative arguments.

{¶ 55} Furthermore, as to the concerns raised by Suburban and DCP regarding the unnecessary duplication of facilities, 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. In fact, DCP's witness Chief Deputy Engineer Robert Riley testified that, although Columbia completed installing its gas main on Cheshire Road to serve the Glenross South area in December 2017, he was not currently aware of any unnecessary duplication of natural gas facilities in Delaware County and even acknowledged that some duplication may be necessary or unavoidable. (Tr. Vol. I at 20-21, 27; Columbia Ex. 5 at 5-7.) Furthermore, there is nothing in the record which indicates Pulte was under any obligation to select Suburban for the Glenross South development. Instead, what we have derived from Suburban's witness is that Columbia was entitled to construct a main distribution line down Cheshire Road to this development (Tr. Vol. I at 74, 81, 83-85).

{¶ 56} As to Counts 2 and 3 of the complaint, we find that Suburban has not established that Columbia has violated the Commission orders approving the DSM Program or violated the terms of the DSM Rider. Pursuant to R.C. 4905.70, the Commission is vested with the authority to initiate programs that will promote and encourage energy conservation and reduce the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Further, pursuant to R.C. 4929.02(A)(12), it is the policy of the state to promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation. *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶ 125. We have approved DSM energy-efficiency

and energy-conservation programs for more than 20 years.[12] Specific to this case, Columbia has offered these incentives and recovered costs for implementing the DSM Program for over a decade, including in 2016, when the Commission approved the continuation of Columbia's DSM Program and specifically found that the EfficiencyCrafted Homes Program "is an effective method to encourage the construction of energy-efficient homes in Columbia's service territory." (Columbia Ex. 6 at 3-4). *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶¶ 115, 134. When the Commission approved the EfficiencyCrafted Homes Program, we noted that this is not a traditional DSM program that incentivizes or educates retail customers to conserve natural gas in order reduce their bills; rather, it is a DSM program that "offers incentives to home builders to build homes that exceed state energy code minimum levels," enabling a customer to enjoy the benefits of reduced natural gas consumption for decades, if not longer (Columbia Ex. 6 at Attach. D). The Commission also was quick to remind Columbia, and all other jurisdictional natural gas utilities that offer energy-efficiency programs and recover the associated costs from ratepayers, that each has a duty, as the administrator of such programs, to ensure that its ratepayers incur and pay only reasonable and prudently incurred DSM charges. The Commission also made clear that we would conduct an annual audit of the DSM Program and associated rider, including a requirement that Columbia demonstrate that costs passed through the rider for services received are accurate and no more than appropriate. *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶¶ 115, 119; *see also In re Columbia Gas of Ohio, Inc.*, Case No. 17-2374-GA-RDR, Finding and Order (Apr. 25, 2018) at ¶¶ 35, 36 (where the Commission approved Columbia's DSM Rider tariff language providing that the rider is subject to reconciliation, including upon a finding that certain expenditures are unlawful, unreasonable, or imprudent, and further acknowledged that Columbia's DSM Rider would be subject to

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[12] For example, the Commission has approved DSM Programs for Columbia and other natural gas companies in the following cases: *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Opinion and Order (Sept. 13, 2006), Supplemental Opinion and Order (June 27, 2007); *In re The East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 07-829-GA-AIR, et al., Opinion and Order (Oct. 15, 2008); *In re The Cincinnati Gas and Elec. Co.*, Case No. 95-656-GA-AIR, Opinion and Order (Dec. 12, 1996); *In re Columbia Gas of Ohio, Inc.*, Case No. 08-72-GA-AIR, et al., Opinion and Order (Dec. 3, 2008).

financial audits). As such, and given that Suburban has not provided any evidence for us to conclude otherwise, we continue to recognize that DSM Program designs that are cost-effective, produce demonstrable benefits, and achieve a reasonable balance between reducing total costs and minimizing impacts on non-participants are consistent with Ohio's economic and energy policy objectives. *In re The East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 07-829-GA-AIR, et al., Opinion and Order (Oct. 15, 2008) at 22-23.

{¶ 57} At significant issue with Suburban's allegations is the concept of what constitutes a "service territory," as that phrase is used by Columbia in its DSM Program applications. Of the definitions presented to us, we find Ms. Thompson's explanation of what Columbia means when it refers to its "service territory" – "the general geographic area where Columbia has facilities serving or capable of serving Ohio residents" – to be the most persuasive and workable (Columbia Ex. 6 at 6-7). However, we also recognize the reality that, under this definition, a service territory may be constantly changing due to the fact that natural gas providers are not guaranteed a certified territory, similar to electric utilities, and are continually competing to extend their facilities to reach new areas and customers. We are persuaded by Columbia's position that the purpose of using the term "service territory" in the DSM applications was simply to note that the builder of homes eventually constructed in Glenross South, or any other future development, would be eligible to participate in the DSM Program because Columbia would be providing the natural gas distribution service to those developments. *2016 DSM Case*, Opinion and Order (Dec. 21, 2016). Even if we determined that ambiguity existed in Columbia's DSM Rider tariff, which we do not, Suburban's reliance on the *Saalfield Case* is misplaced, as that case dealt with ambiguity in determining customer eligibility for an alternative rate schedule and is simply irrelevant to the circumstances before us.

{¶ 58} Notably, Suburban failed to intervene or voice its concerns regarding the DSM Program in the *2016 DSM Case* or earlier DSM approval cases (Tr. Vol. III at 502-505). We agree with Suburban that the Commission has found that, under R.C. 4905.26, reasonable grounds may exist to raise issues which might strictly be viewed as a collateral attack on

previous orders. While 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, Entry (July 2, 1992). Additionally, despite Suburban's failure to intervene in the DSM proceedings, the Commission's findings are not consequently rendered inapplicable to Suburban's arguments, as those orders thoroughly address a majority of the issues raised by Suburban regarding the DSM Program, DSM Rider, and the governing tariff language.[13] At the very least, Suburban has been aware of the DSM Program, and of Columbia's offering of such incentives to builders in Delaware County, since December 2011. *Suburban Self-Complaint Case*, Opinion and Order (Aug. 15, 2012) at 1, 4.

{¶ 59} In the *Suburban Self-Complaint Case*, the Commission noted that Suburban's proposed DSM Program was limited to a single residential construction incentive and did not include any of the valuable services in Columbia's DSM Program, including education and training available to any Columbia customer, and was not available to Suburban's current customers. *Suburban Self-Complaint Case*, Opinion and Order (Aug. 15, 2012) at 7. Rather than initiate complaint after complaint against Columbia's authorized use of such a program or engage in the practice of creating exclusive easements for future developments, we find that the more appropriate avenue for Suburban to take would be to amend its earlier application for a similar DSM Program to address the deficiencies cited by the Commission and encourage it to do so.

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13 For instance, the Commission specifically 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." *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶ 115.

{¶ 60} There is no indication that Columbia has deployed its DSM Program in an abusive or anticompetitive manner in order to expand its service territory. Rather, the evidence presented during the hearing demonstrates that the EfficiencyCrafted Homes Program is continuing to effectively incentivize energy-efficient home development in Ohio, consistent with the *2016 DSM Case*, R.C. 4905.70, and 4929.02. Additionally, although we refrain from making a finding as to this particular issue, we further note 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.[14] As Mr. Codispoti agreed to in his testimony, if a builder values energy efficiency and only one of two natural gas providers competing to supply natural gas service offers Commission-approved energy-efficiency incentives, such as those at issue in this case, it is reasonable to assume a competitive advantage will result (Tr. Vol. II at 242, 262-266). But that advantage should not be stripped away simply because the other competing company does not offer such an incentive. We will note, however, that, because the DSM Program and associated rider continue to be subject to an annual audit, including a requirement that Columbia demonstrate that costs passed through the rider for services received are accurate and no more than appropriate, we will continue to ensure Columbia is in compliance with the Commission's applicable rules and orders when administering its DSM Program, including the EfficiencyCrafted Homes Program. *2016 DSM Case*, Opinion and Order (Dec. 21, 2016) at ¶¶ 115, 119.

{¶ 61} Similar to our findings as to Counts 2 and 3 of Suburban's complaint, and based on the evidence introduced during the hearing, we find Columbia has not committed a violation of its main extension tariff by implementing its EfficiencyCrafted Homes Program. Consistent with the tariff language, we agree with Columbia that, when a main extension is determined to be economically justifiable, there is no requirement for a deposit

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14 There remains some dispute as to how much weight Pulte afforded to the incentives when making its decision since Mr. Thompson was not present to testify and, instead, portions of his deposition testimony were admitted into the record (Tr. Vol. III at 360-362).

or written line extension agreement. We note that, while the Columbia DSM incentives and the main extension service are unrelated, any applicable incentives may partially reduce the total amount of a developer's ultimate costs for choosing Columbia to serve a new subdivision (Columbia Ex. 6 at 4; Tr. Vol. II at 232, 269). However, Columbia witness Codispoti explained that these incentive payments were never guaranteed prior to the construction of the energy-efficient homes and the builder or developer would still be required to qualify for the EfficiencyCrafted Homes Program before receiving any such payments, which indicates these incentives could not be used to reduce the main extension deposit required by Columbia's tariff (Tr. Vol. II at 269-270). Moreover, there is no evidence to suggest that estimated builder incentive payments would ever be considered as an input in the cost-benefit study model to ultimately determine whether a deposit was required (see generally Tr. Vol. II at 309-310, 314-315, 342-343, 398-400). Thus, we disagree with Suburban that these incentives constitute violations of Columbia's main extension tariff, R.C. 4905.30, or 4905.32.

{¶ 62} On a similar note, there was much contention over the cost-benefit analysis that was presumably conducted prior to Columbia determining that no deposit or line extension agreement would be required pursuant to its tariff. While we agree that having a print out copy of the computerized cost-benefit analysis would have resolved much of the speculation as to whether a violation occurred, we find the testimony of Mr. McPherson, Ms. Young, and Mr. Codispoti to be compelling in 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 (Columbia Ex. 5 at 6-7; Tr. Vol. II at 240, 269, 311-312, 316-318, 334-335; Tr. Vol. III at 396-400, 418-420). Furthermore, although she was not responsible for conducting the study for the Glenross South development, Ms. Young testified that Columbia adhered to its standard guidelines in obtaining and inputting the needed information in the cost-benefit analysis model in this case, just as it does in every other case where a development requires a main extension (Tr. Vol. II at 314-315, 318, 322-323, 334, 342-343). Finally, as previously

stated in this Opinion and Order, the burden of proof is on the complainant in complaint proceedings before the Commission. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, it is the responsibility of a complainant, in this instance Suburban, to present evidence in support of the allegations made in its complaint. It was, therefore, Suburban's responsibility, during the discovery process, to request a print out from the computer model used to conduct the cost-benefit analysis.

{¶ 63} We agree with Columbia in that the claims set forth in Count 5 of Suburban's complaint, generally alleging various statutory violations, cannot stand on their own in the event that we find Suburban has fallen short of demonstrating the other allegations made in its complaint. Given that we have found Suburban has failed to meet its burden of proof, there is no reason to address the requested relief Suburban seeks in its complaint.

{¶ 64} As a final matter, the Commission reminds Suburban that we expect a certain level of decorum in our evidentiary hearings, as well as the discovery process. We are particularly troubled by Suburban's unfounded allegations regarding the discovery process and its disagreement with certain confidential determinations on responsive discovery documents. The only discovery issue that was ever raised to the attorney examiners prior to the scheduled hearing was a motion to compel that was later resolved between the parties and withdrawn (Tr. Vol. I at 9). No additional motions to compel were ever filed and the attorney examiners were never notified of disputed confidentiality designations in the docket prior to the hearing. The Commission generally views unfavorably allegations that discovery was omitted or information was improperly deemed confidential, which are raised for the first time during the hearing, if that party has not attempted to engage in the Commission's procedures for remedying those discovery disputes. To allow otherwise would result in a highly inefficient means of conducting our hearings. Furthermore, based on the arguments presented at the hearing, the attorney examiner ultimately determined that there was "no indication that either party has violated any sort of discovery rule" (Tr. Vol. II at 281). If Suburban believed that Columbia was violating our discovery rules, as allegedly evidenced by the fact that Pulte was able, in response to a subpoena, to produce

certain documents which were not previously disclosed by Columbia during discovery, or if Suburban contested certain confidential designations on Columbia's discovery responses, Suburban should have raised those concerns with the presiding examiners immediately. We cannot rule on motions or disputes that are not brought before us.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 65} Columbia and Suburban are public utilities and natural gas companies, as defined in R.C. 4905.02 and 4905.03 and, as such, are subject to the jurisdiction of the Commission.

{¶ 66} On October 20, 2017, Suburban filed a complaint against Columbia.

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

{¶ 68} A hearing was held in this matter on April 3, 2018, through April 5, 2018.

{¶ 69} In a complaint case, the burden of proof is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 70} Complainant has presented insufficient evidence for the Commission to conclude that Columbia is prohibited from engaging in its Commission-approved EfficiencyCrafted Homes Program.

{¶ 71} Complainant has not demonstrated that Columbia acted in any manner that was unjust or unreasonable, as required by R.C. 4905.26, or that Columbia otherwise violated any provision of R.C. Title 49, past Commission order, or its tariff.

VII. ORDER

{¶ 72} It is, therefore,

{¶ 73} ORDERED, That the complaint be decided in favor of Columbia and closed of record. It is, further,

{¶ 74} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

M. Beth Trombold, Chair

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

MJA/PAS/mef

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Secretary