FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO



In the Matter of the Complaint of:

The Suburban Fuel Gas, Inc.,

Complainant

vs.

Case No. 86-1747-GA-CSS

Columbia Gas of Ohio, Inc.,

Respondent

# COMPLAINANT'S BRIEF IN REPLY TO THE RESPONDENT'S POST-HEARING BRIEF

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By: David L. Pemberton

ATTORNEYS FOR COMPLAINANT
THE SUBURBAN FUEL GAS, INC.

Dated: July 17, 1987

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COMES NOW the complainant, by its attorneys, and respectfully submits its brief in reply to the respondent's post-hearing brief filed July 7, 1987 in the above-docketed proceeding.

### PRELIMINARY STATEMENT

A wily law professor once said, "If you've got bad facts, argue the law; and if you've got bad law, argue the facts. If you've got both bad facts and bad law, just argue." That's what the respondent does--it just argues.

At the outset of its brief, the respondent states "the facts in this case are essentially undisputed" (Respondent's Post-Hearing Brief, Page 5). Yet, the respondent's Answer in this case denied every material allegation of the Amended Complaint. Moreover, the respondent failed to even suggest, let alone offer, a single stipulation of fact, either prior to, at, or subsequent

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to the hearing herein. Apparently, what the respondent means by the foregoing statement is that the evidence so overwhelmingly supports the complainant's allegations of fact in this case that it would be futile for the respondent to continue to dispute them. Nevertheless, the foregoing admission does not prevent the respondent from either totally disregarding or distorting material facts in this case in presenting its arguments to the Attorney Examiner in its post-hearing brief.

Having early-on conceded the facts in its post-hearing brief, the respondent attempts to construct a legal defense for its actions by citing cases with which hardly anyone would disagree. These cases deal, in the main, with the antidiscrimination provisions of state and federal statutes and hold that not <u>all</u> discrimination is unlawful, including price differentials designed to meet competition. The problem with the respondent's defense is that it is not directed to any position taken by complainant in this case but is directed, instead, to "straw men" positions hypothecated by the respondent. The complainant's concerns in this case relate to unjust and unreasonable discrimination and to the respondent's abuse of those flexible rate programs which have been approved by this Commission and, in particular, the respondent's CTAPA program. Instead of addressing these very real issues, the respondent postulates legal arguments it apparently feels it can win in the hope of avoiding those which the evidence in this case clearly shows it cannot win.

The balance of the respondent's legal defense consists of denials of accepted law which border on the ridiculous, such as its contention that the provision of customer service lines and similar facilities does not constitute a "utility" service includable in the respondent's tariff and subject to the anti-discrimination statutes of this state and its contention that these same statutes can be avoided by the simple expedient of serving selected customers under special contracts while ignoring the identical needs of others similarly situated or serving them under different rates and terms and conditions for service under the respondent's published tariff. Both of these contentions are refuted by the express provisions of the involved statutes and established law, particularly when the unlawful discrimination involved is coupled with an unlawful purpose or motive, as in the instant case.

Mostly, however, the respondent is content merely to repeat the positions advanced in its prepared testimony in this case and to conveniently ignore those facts which do not support that testimony. Accordingly, without rearguing its initial post-hearing brief, complainant will attempt to place the respondent's blanket denials in the more specific context of this case.

## ARGUMENT

At Pages 5 through 9 of its post-hearing brief, the respondent attempts to justify or excuse its behavior in this case by referring to the "new" competitive environment in the natural



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gas industry created by developments at the federal regulatory level, particularly the issuance of FERC Order No. 436 and this Commission's response thereto. At Page 6, the respondent states:

> "As a result, local gas distribution companies, which were once considered natural monopolies, now face intense competition from alternate fuels, such as electricity and fuel oil; from unregulated gas producers; and, as the record in this case shows, from other natural gas distribution companies."

Complainant submits that the respondent's attempted justification is misplaced.

In the first place, long before the issuance of FERC Order No. 436 or any other federal regulatory decision, Ohio local distribution companies faced competition from alternate fuels, unregulated gas producers, and other natural gas distribution companies. As the record shows, the respondent and the complainant have been competitors since 1958, while FERC Order No. 436 was not issued until 1985. Moreover, FERC Order No. 436 had nothing whatsoever to do with competition from alternate fuels. The issuance of FERC Order No. 436, therefore, in and of itself, had nothing whatsoever to do with creating a competitive climate in Ohio.

Secondly, this Commission's recognition in PUCO Case No. 85-800-GA-COI and the other cases cited at Pages 7 and 8 of the respondent's brief that some flexibility might be required to enable Ohio natural gas distribution companies to meet any increased competition which might be experienced as a result of FERC Order No. 436 provides absolutely no basis or justification for the actions

of the respondent complained of in this case. None of those decisions authorized or permitted the rates, practices, or policies implemented by the respondent herein to meet the competition posed by the complainant; and none of them, in particular, authorized the selective offering and/or withholding of those rates, practices, and policies to and/or from customers similarly situated.

Respondent cannot, therefore, excuse or justify its actions in this case based on any action taken by either the FERC or by this Commission.

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At Pages 9 through 12 of its post-hearing brief, the respondent essentially summarizes the prepared testimony of Mr. Devers regarding the respondent's "marketing philosophy." Noticeably missing from this summary is any reference to Mr. Devers' testimony on cross-examination. For a complete summary of Mr. Devers' testimony in this regard, complainant would refer the Attorney Examiner to Pages 16 through 27 of the complainant's initial post-hearing brief. In addition, complainant offers the following observations.

At Page 10 of the respondent's post-hearing brief, the respondent asserts that "there is nothing in the record of this case" that indicates that the respondent has attempted to take the complainant's existing customers. In fact, the record shows that Bowling Green Church of God had agreed to take service from the complainant, who had taken substantial steps, including the provision of facilities, in reliance on that agreement,



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until this customer was unlawfully given a free regulator by the respondent to induce it to take service from the respondent instead; and the respondent, itself, concedes at Page 14 of its post-hearing brief that both C & C Fabrications and Dayspring Assembly of God Church "would have taken service from Suburban" if the respondent had not entered into CTAPA agreements with them. The respondent's characterization of the record, therefore, is inaccurate, to say the least.

On the other hand, at Pages 10 through 12, the respondent accuses the complainant of raiding the respondent's "markets" and duplicating the respondent's facilities by providing service to Equity Meats and D. S. Brown. As shown by the record, however, that portion of the Equity Meats plant served by the complainant was burning and had been burning propane for years and D. S. Brown was burning fuel oil. Moreover, the North Baltimore ordinance was required by law to serve D. S. Brown whose plant is located within the Village of North Baltimore. Again, the respondent's characterization of the record in this regard leaves much to be desired. More importantly, however, respondent conveniently disregards the fact that while the respondent acted in blatant disregard of the law in soliciting and obtaining customers who had also been solicited by the complainant, the complainant did not; and it is the respondent's unlawful behavior--not the complainant's alleged "market raiding"--that is at issue in this case!

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At Pages 12 through 37 of its post-hearing brief, the respondent attempts to respond to the complainant's allegations regarding the respondent's abuse of the CTAPA program and related issues. At Page 13, the respondent repeats Mr. Devers' prepared testimony to the effect that that program has no adverse impact on any customer "because the gas supplies for CTAPA customers are taken from incremental purchases not needed for system supply." Obviously, this statement ignores the fact that sales below the maximum CTAPA rate will ultimately require some subsidy from non-CTAPA general service customers; that the lower-cost incremental gas supplies purchased for CTAPA customers are not made available to general service customers, generally; and, most importantly, that the CTAPA contract, itself, has not been and will not be made available to all customers or prospective customers, even those similarly situated, subject to competition. Under such circumstances, Mr. Devers' statement is myopic, at best, and, at worst, untrue.

At the same page, the respondent also repeats Mr. Devers' prepared testimony to the effect that the CTAPA program was neither designed for nor utilized to raid existing markets of competitors. Yet, on the very next page of its post-hearing brief (Page 14), the respondent states that C & C Fabrications and Dayspring Assembly of God Church would both have taken service from the complainant if they had not been offered a CTAPA agreement. For a complete discussion of the respondent's abuses of this program, complainant would refer the Attorney



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Examiner to Pages 41 through 47 of the complainant's initial post-hearing brief.

Again, the respondent's reliance on Mr. Devers' prepared testimony in isolation from the rest of the record in this case produces obvious distortions of the evidence in its post-hearing brief.

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At Pages 15 through 18 of the respondent's post-hearing brief, the respondent attempts to minimize and avoid its unlawful behavior in establishing and charging the CTAPA rates. Initially, the respondent attempts to disprove the complainant's assertions concerning the intended scope and purpose of the CTAPA program by citing the Attorney Examiner to some unrelated GCR proceeding wherein reference to that program is made rather than to the CTAPA "blanket approval" order or case file itself. Rather than burden th Attorney Examiner with further argument on this issue, complainant suggests that adequate resources are available within the Commission whereby the Attorney Examiner can determine the Commission's intent regarding the intended scope and purpose of the respondent's CTAPA program.

The respondent then attempts to avoid the evidence that it unlawfully charged CTAPA rates by mischaracterizing the complainant's position herein. At Page 16 of its post-hearing brief, the respondent asserts that the complainant's concern regarding its offering of the CTAPA rate is that it is a contract rate offered to small-volume general service customers rather than



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a tariff rate. That is not the complainant's concern. Complainant's concern is that, even as a contract rate, the CTAPA rate must be made available to all customers similarly situated--not merely to selected general service customers as has been done and will be done by the respondent. While the respondent has argued that the antidiscrimination provisions of Chapter 4905 of the Revised Code do not apply to such contracts, the Supreme Court of Ohio long ago decided that they do (see Cleveland & Eastern Traction Co. v. Pub. Util. Comm. (1922), 106 Ohio St. 210); and the respondent's contention in this regard is without merit.

Complainant is also concerned that, in addition, the respondent has charged the CTAPA rate before the contract was even filed with, let alone approved by, the Commission in violation not only of R.C. 4905.30 and R.C. 4905.32, but, despite the respondent's denial, in violation of the express language of R.C. 4905.31, itself. At Page 17 of its post-hearing brief, the respondent states: "There is nothing in R.C. §4905.31 that prohibits a ility from temporarily offering service under a special arr nt, pending Commission approval." In fact, R.C. 4905.31 ssly provides: "No such arrangement, sliding scale, minimum charge, classification, variable rate, or device is lawful unless it is filed with and approved by the public utilities commission" (Emphasis added). Obviously, therefore, charging and collecting a contract rate before it is filed with and approved by the Commission, even "temporarily," is unlawful.

Finally, the respondent attempts to minimize its manifestly unlawful conduct by arguing that the statutes should not apply in competitive situations (a position which the Commission could not lawfully embrace if it wanted to); that based upon subsequent Commission approvals of the contracts, the issue as to its transgressions is moot; and that the only penalty imposed for failing to file such contracts with the Commission is that the contracts shall not be lawful, citing Cookson Pottery Co. v. Pub. Util. Comm. (1954), 161 Ohio St. 498, and Lake Erie Power & Light Co. v. Telling-Belle Vernon Co. (1937), 57 Ohio App. 457. Complainant submits that both the Cookson and the Lake Erie cases are clearly distinguishable from and inapplicable to the facts presented in this case and, while complainant has not prayed for such relief, would call the Attorney Examiner's attention to the substantial fines, penalties, damages, and forfeitures set forth in Chapter 4905 of the Ohio Revised Code for violations by a public utility or its agents or officers of any statute, rule, regulation, or order of this Commission, including R.C. 4905.31. Again, the respondent's view of the issues and consequences of this case is severely myopic.

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At Pages 19 through 29 of its post-hearing brief, the respondent continues its argument regarding unlawful discrimination, again, citing Cookson, supra. Again, complainant submits, the Cookson case does not apply. In fact, the portion of that case quoted by the respondent in its post-hearing brief actually negates

the respondent's position since the respondent generally would serve the "special contract" customers here involved under its general service tariff; and, in fact, the "special" CTAPA contracts involved in this case actually incorporate by reference the respondent's general service tariff. Respondent is not, therefore, as was the utility in Cookson, supra, involved exclusively in service to contract customers.

Moreover, in Associated Gas Distributors v. Federal Energy Regulatory Commission, No. 85-1811 (D.C. Cir., June 23, 1987), a case heavily relied upon by the respondent to sustain its position that selective rate discounting is lawful under federal law, the D.C. Circuit Court of Appeals expressly confirmed that Sections 4 and 5 of the Natural Gas Act (the antidiscrimination provisions of the federal statute) still apply.[1] (See Pages 50 and 52-53 of Court's opinion, excerpts of which are attached to the respondent's post-hearing brief.) In fact, in the regulations promulgated by the FERC in implementing Order No. 436, a pipeline

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[1] Section 4(b) of the Natural Gas Act provides:

> "No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service."

Section 5(a) of the Natural Gas Act provides for discrimination complaints and hearings.



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discounting any service from the maximum rate must, within 15 days of the close of the billing period, report the maximum rate for the transaction, the rate actually charged, the shipper's identity, and any corporate affiliation between the pipeline and shipper [18 C.F.R. §284.7(d)(5)(iv)] to enable the FERC to monitor behavior and to act promptly when it or another party detects behavior arguably falling under the bans of Sections 4 and 5 of the NGA. (See Pages 47 and 50 of Court's opinion, excerpts of which are attached to the respondent's post-hearing brief.)

Finally, at Pages 27 through 29, the respondent addresses several of the specific instances of unjust or unreasonable discrimination extant on this record. With regard to its failure to offer the Bowling Green Church of God a CTAPA contract, the respondent alleges that the program was not available at the time. Assuming that this were true, why hasn't the respondent offered this customer a CTAPA contract now that that program is available?

As to why Dayspring Assembly of God Church remains the only church in the Findlay Division to enjoy a CTAPA contract, the respondent cites and relies on Mr. Law's testimony that if there were other churches in the area who would otherwise take service from a competitor, they would be offered a CTAPA agreement. Unfortunately, Mr. Law recanted this testimony on recross-examination when he admitted that it was inaccurate and misleading.

Finally, as to why Equity Meats was given a CTAPA contract whose rates could be decreased but not increased, while C & C Fabrications and Dayspring Assembly of God Church were not, the respondent says merely "Fquity Meats declined to sign the contract without the indicated change" (Page 28). Moreover, while allegedly failing to grasp the significance to a business customer like Equity Meats of having a "cap" on its energy costs while its competitor does not, the respondent says if this is deemed to be significant, the difference "would be fully justified by the fact that Fquity Meats was an existing customer which Columbia was trying to retain...whereas C & C Fabrication and Dayspring Assembly of God were new customers, which had not previously been served by a gas utility...and which made no such demand" (Page 28). After careful deliberation, complainant simply does not grasp the significance of this distinction.

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At Pages 29-32 of its post-hearing brief, the respondent addresses complainant's contention that the respondent has violated R.C. 4905.33 by furnishing free service or service for less than cost for the purpose of destroying competition. Actually, the respondent addresses only the complainant's contention that the CTAPA program, itself, violates this statute; and, accordingly, the respondent apparently concedes that the furnishing of free customer service lines, regulators, line extensions, and similar incentives for the purpose of beating the competition posed by the complainant violates this statute. In any event, the



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respondent's post-hearing brief contains no defense against those accusations, as established by the evidence in this case.

With respect to its misuse of the CTAPA program, itself, the respondent contends that Mr. Devers' statement that this program does not involve the provision of service at less than actual cost is unrefuted on the record (Page 29). This is simply not true. The CTAPA contracts submitted in this case, themselves, permit the provision of service thereunder at less than the respondent's actual cost and their sole purpose is to meet and beat competition. Contrary to Mr. Devers' testimony, the CTAPA contracts do not contain a "floor rate." Consequently, they could be flexed downward even to the point that the respondent would receive no contribution whatsoever to its fixed costs.

Similarly, the respondent persists in its contention that the exclusion of some 22.5¢ per Mcf from the CTAPA "base rate" is justified since the respondent has no excise tax liability for gas purchased under the CTAPA program, despite the obvious problems with that position. Moreover, the respondent advances the additional argument in its post-hearing brief that even if it is wrong and is subsequently assessed the tax, it is covered by the CTAPA contracts which specifically require the customer to reimburse it for any such tax liability. Complainant wonders if CTAPA customers have been advised of this position, would agree with the respondent's interpretation of their contract, and have knowingly and willingly accepted this additional risk. Complainant also wonders how, in executing the CTAPA gas purchases,

the respondent could possibly have been acting as an "agent" when CTAPA customers were, as yet, unknown at the time of those purchases.

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At Pages 32 through 37 of its post-hearing brief, the respondent addresses the complainant's arguments urging the Commission to review and reconsider special marketing programs like the respondent's CTAPA program. In reply, complainant would merely recall the Attorney Examiner to the arguments set forth at Pages 47 through 49 of the complainant's initial post-hearing brief. In addition, complainant specifically disputes the respondent's assertions that captive customers will ultimately benefit from such programs (Page 35) and that there has been "no showing that CTAPA will destroy competition" (Page 36).

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At Pages 37 through 44 of its post-hearing brief, the respondent attempts to explain and justify its line extension policies. Complainant submits that the fact that the respondent devoted six pages of its post-hearing brief to this issue suggests that, at best, some clarification of its tariff is required. Basically, however, the language of the tariff is simple and direct. "Where a main extension is requested for commercial or industrial purposes and such main extension is determined by the Company to be economically feasible, the applicant or applicants may enter into a line extension agreement and shall deposit with the Company the estimated cost of such extension" (Emphasis added).



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While the respondent expends a great deal of time and effort explaining what goes into its determination of whether a main extension would be "economically feasible," that is merely a corollary issue since it is clear, complainant submits, that once that determination is made, a deposit is required. The fact that the respondent uses both the permissive "may" and the mandatory "shall" in setting forth its line extension policy clearly indicates the mandatory nature of this requirement. However, if that is not the respondent's intention, then the tariff should be amended prospectively. In addition, the tariff should be amended to include the factors testified to by Mr. Devers which the respondent considers in arriving at its initial determination that the main extension is justified in the first instance, including the formula used to determine the "maximum allowable investment" for a requested extension. Otherwise, a prospective customer cannot independently determine whether he or she is being accorded the same consideration or treatment accorded prospective customers similarly situated. As presently written, respondent's tariff attempts to reserve to the respondent the complete discretion to determine whether a main extension is "economically feasible" at all.

The respondent concludes this portion of its post-hearing brief by alluding to what the complainant's own line extension tariff provisions might or might not provide and alleges that complainant is seeking to have it both ways, i.e., have the Commission impose a strict interpretation of the respondent's

tariff on the respondent while remaining free to pursue the more liberal interpretation argued for by the respondent in this case. Complainant submits, however, that while its tariff and its actions under that tariff are not at issue in this case, it is prepared to follow the same interpretation applied by the Commission to the respondent's line extension tariff provisions in this case. Complainant is not seeking an unfair advantage. What complainant is seeking is the assurance that the respondent will be required to do what its tariff says so that the complainant will not lose a customer like C & C Fabrications, Inc. to the respondent because the respondent extended its main at no cost to the customer while the complainart requested a deposit as required by the identical provisions of its own tariff. In fact, complainant submits, that is one of the principal goals of this case--to require the respondent to observe the laws and statutes of Ohio and the express provisions of its published tariff in order that not only complainant but customers and prospective customers can independently determine what the respondent's rules, regulations, rates, practices, and policies are and insist on their fair and equal application.

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At Pages 44 through 50 of its post-hearing brief, the respondent attempts to defend its so-called "marketing program" by arguing (a) its "marketing incentives" are offered only in situations where needed to beat competition; (b) these incentives benefit all of the respondent's customers by producing increased

contributions to fixed costs; and (c) the costs thereof are fully absorbed by the respondent's shareholders and are not passed on to the respondent's customers (Pages 44-45). Moreover, as the respondent previously unsuccessfully argued with respect to the provision of free customer service lines, the respondent argues that the provision of such "incentives" does not involve the provision of utility service and, therefore, R.C. 4905.30, R.C. 4905.32, R.C. 4905.33, and R.C. 4905.35 do not apply.

Respondent's legal position with regard to its so-called "marketing program" is ridiculous. Obviously, the provision and installation of customer service lines, regulators, line extensions, meters, and the like is governed by R.C. 4905.30 and R.C. 4905.32, which expressly and broadly cover the provision of services, privileges, and facilities of every kind furnished by a public utility; and the fact that the respondent specifically deals with these matters in its published tariff constitutes an admission which belies its position in this case. It is equally obvious that the respondent has extended these services, privileges, and facilities to customers and prospective customers in a manner and for a purpose which clearly violate R.C. 4905.30, R.C. 4905.32, R.C. 4905.33, and R.C. 4905.35. By the respondent's own admissions, these services, privileges, and facilities were and are provided only where necessary to beat competition, particularly from the complainant, and were and are offered free to the customer. Under such circumstances, it is incredible that the respondent would even contend that its marketing program

complies with the Ohio law and should be permitted to continue. Finally, the record is clear that these services, privileges, and facilities were not and will not be offered to all customers similarly situated as required by R.C. 4905.32, R.C. 4905.33, and R.C. 4905.35; and no amount of argument or unsupported denials by the respondent can change these record facts.

As a concluding thought regarding the respondent's so-called "marketing program," complainant would point out that the respondent's contention that the offering of these "incentives" produces increased contributions to fixed costs through the attraction of new customers to the benefit of its existing customers must be carefully examined in the context of this case. Was the provision of a free $5,000 line extension to C & C Fabrications and a free $2,000 customer service line to the Wood County Children's Resource Center, given the relatively modest gas usage of these customers, done to benefit the respondent's existing customers through the contribution these customers would make to the respondent's "fixed costs" or did the respondent act out of a desire to destroy the competition posed by the complainant? Complainant submits that the record unequivocally shows that the respondent acted solely out of the latter motive, since it would not, according to its own testimony, have offered any of the so-called "marketing incentives" involved in this case but for the competition posed by the complainant.

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At Page 50 of its post-hearing brief, the respondent attempts again to raise the standing issue previously considered and properly disposed of by the Attorney Examiner and the Commission herein. Complainant submits that it is inappropriate to reargue that issue. However, complainant would note that the respondent apparently failed to read the Commission's entry denying the respondent's motions to dismiss and directing the respondent to file its answer to the complaint. By that entry, the Commission expressed the view that "(i)t is to the extent that Suburban's allegations against Columbia could affect service to the public that the complaint touches the function of this Commission" (January 6, 1987 Entry, Paragraph 9). Otherwise, the respondent would not have raised objection to the complainant's concern for the impact of the respondent's unlawful behavior on so-called "third parties."

## CONCLUSION

While it is understandable that the respondent would attempt to present the evidence in the best possible light and to defend certain of its practices in its brief, complainant finds it incomprehensible that, despite the clear and convincing evidence of illegal conduct presented by the record herein, the respondent persists in not disclaiming a single action or policy placed before the Attorney Examiner and the Commission in this case. In fact, to the very last paragraph of its brief, the respondent, despite the gravity of this case and the compelling nature of

the evidence of its misconduct, almost blithely justifies that misconduct. In concluding its post-hearing brief, the respondent says: "In any competitive situation, there will be successes and failures, winners and losers. Whatever its merits, Suburban's complaint in this case was undoubtedly prompted by Columbia's success in the marketplace. Columbia should not be penalized for that success" (Page 52) (Emphasis added). Obviously, complainant submits, the respondent has missed the whole point of this complaint.

It is not the respondent's "success in the marketplace" that bothers the complainant or should bother the Attorney Examiner and the Commission but the respondent's abject failure to observe and follow the law. It is not the respondent's "success in the marketplace" that bothers the complainant or should bother the Attorney Examiner and the Commission but the nature and kind of marketplace the respondent would have us compete in. According to the respondent, that marketplace would permit, in fact, require, unreasonably discriminatory rate practices, unpublished rates, unauthorized practices, and kickbacks, rebates, drawbacks, and devices--all designed not only to meet but to destroy competition. That is not the marketplace, complainant submits, envisioned by the Ohio General Assembly when it enacted Title 49 of the Revised Code.

Finally, it is not the respondent's "success in the marketplace" that bothers the complainant or should bother the Attorney Examiner and the Commission but the role in that marketplace that the

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respondent would reserve to this Commission. According to the respondent, it can discriminate as much as it wants among customers similarly situated, offer special rates, offer rebates or special privileges, and do about anything it wants so long as it does so pursuant to special contracts filed under R.C. 4905.31. Moreover, it can charge these special rates and offer special privileges and facilities without even waiting for the Commission's approval under that statute. In fact, according to the respondent, it can do so before it even files contracts for approval thereunder. , addition, if the respondent chooses to offer special services, privileges, or facilities under a tariff, instead, it can do so, despite R.C. 4905.30 and R.C. 4905.32, by simply expressly excluding them from its tariff and claiming that they are thereby no longer utility services, privileges, or facilities subject to the jurisdiction of this Commission. In such a "marketplace," complainant submits, it is hard to conceive of what role at all would be reserved to the Commission.

If the foregoing, at first glance, appears to overstate the respondent's position in this case, complainant submits that large portions of the respondent's post-hearing brief are deserving of a "second look."

**WHEREFORE**, complainant respectfully urges the Attorney Examiner and the Commission to disregard the arguments contained in the respondent's post-hearing brief and grant the relief requested in the complaint.

Respectfully submitted,

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**ATTORNEYS FOR COMPLAINANT**
**THE SUBURBAN FUEL GAS, INC.**



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the foregoing reply brief to Kenneth W. Christman, Esquire, Columbia Gas of Ohio, Inc., P. O. Box 117, Columbus, OH 43216, and Evelyn R. Robinson, Esquire, Office of the Consumers' Counsel, 137 East State Street, Columbus, OH 43215, by first class mail, postage prepaid, this 17th day of July, 1987.

David L. Pemberton
David L. Pemberton

Summary: Brief Complainant's Brief in Reply to the Respondent's post-hearing brief filed by D. Pemberton. electronically filed by Docketing  Staff on behalf of Docketing