IN RE COMPLAINT OF SUBURBAN NATURAL GAS COMPANY, APPELLANT, *v.* COLUMBIA GAS OF OHIO, INC., INTERVENING APPELLEE; PUBLIC UTILITIES COMMISSION, APPELLEE.

[Cite as *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221.]

Public utilities—Natural-gas distribution service—Demand-side-management program—Allegation that natural-gas provider improperly used incentive program to pay financial incentives to home builder to unlawfully gain advantage over competitor that already served home builder's area—R.C. 4903.09—Public Utilities Commission adequately explained reasons for its decision, including why it did not follow the precedent relied on by complaining company—Orders affirmed.

(No. 2019-1765—Submitted August 18, 2020—Decided November 12, 2020.)

APPEAL from the Public Utilities Commission, No. 17-2168-GA-CSS.

DONNELLY, J.

{¶ 1} Appellant, Suburban Natural Gas Company ("Suburban"), and intervening appellee, Columbia Gas Company of Ohio, Inc. ("Columbia"), each provide natural-gas distribution service to customers in southern Delaware County. Suburban filed a complaint with the Public Utilities Commission alleging that Columbia had improperly used one of its demand-side management ("DSM") programs[1] to unlawfully gain an anticompetitive advantage over Suburban. Under

1. According to the Energy Information Administration, an agency of the United States Federal Statistical System, DSM programs "consist of the planning, implementing, and monitoring activities" of utilities "designed to encourage consumers to modify their level and pattern" of usage. https://www.eia.gov/electricity/data/eia861/dsm/ (accessed Oct. 21, 2020) [https://perma.cc/NW5H-9VN4].

the DSM program in question—the "EfficiencyCrafted Homes Program"—Columbia is authorized to offer cash incentives directly to residential builders to construct homes that exceed certain energy-efficiency standards. According to Suburban, Columbia used this program to pay financial incentives to a home builder to displace Suburban as the natural-gas provider of a planned residential subdivision. The commission decided in favor of Columbia, finding that Suburban failed to prove the allegations in the complaint.

{¶ 2} Suburban appeals, arguing that the commission's decision is unlawful and unreasonable. Because Suburban has failed to demonstrate reversible error, we affirm the commission's decision.

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 3} In October 2017, Suburban filed a complaint under R.C. 4905.26 against Columbia and a request for emergency relief. The complaint alleged that Columbia had improperly paid financial incentives to a home builder, Pulte Homes, to gain an unfair competitive advantage in areas of Delaware County that Suburban already served or was readily capable of serving.

{¶ 4} The complaint was filed shortly after Pulte selected Columbia over Suburban to provide natural-gas distribution service to new phases of a residential subdivision in southern Delaware County called Glenross. According to the complaint, Suburban currently distributes natural gas to over 550 customers in Glenross, and Suburban had managed and planned its system to accommodate the next phase of the development, approximately 490 homes to be built by Pulte and referred to as Glenross South, located on the south side of Cheshire Road. Suburban claimed that under the EfficiencyCrafted Homes Program, Columbia was authorized to pay incentives only for homes built within Columbia's service territory. Suburban alleged that despite Glenross being located outside Columbia's service territory, Columbia offered cash incentives to Pulte in an attempt to displace Suburban as the natural-gas provider for all future phases of Glenross South.

{¶ 5} Suburban claimed that it was harmed because, but for the builder incentives, Pulte would have chosen Suburban to serve Glenross South instead of Columbia. Suburban's complaint also sought emergency relief from the commission to stop Columbia from extending its gas-distribution main to serve Glenross South in a manner duplicating Suburban's existing distribution main that served the area. About two months after the complaint was filed, however, Columbia completed the installation of its gas main on Cheshire Road to serve Glenross South.

{¶ 6} Against this backdrop, Suburban alleged that Columbia's use of financial incentives to Pulte violated (1) a 1995 stipulated agreement ("the 1995 stipulation") between the parties that had been approved by the commission, (2) the commission's order approving Columbia's DSM program (which included the EfficiencyCrafted Homes Program), (3) Columbia's DSM rider, (4) Columbia's gas-main tariff, and (5) numerous statutory provisions. Suburban asserted that the 1995 stipulation was intended to resolve future issues regarding Columbia's use of financial incentives to builders and developers in competitive areas and to end the unlawful, unfair, and anticompetitive activities that Columbia is now engaged in.

{¶ 7} The commission held an evidentiary hearing in April 2018. The commission issued an opinion and order finding that Suburban had failed to prove the allegations in the complaint. The commission denied Suburban's application for rehearing.

{¶ 8} Suburban filed this appeal, raising four propositions of law. The commission filed a brief opposing reversal. Columbia intervened to support the commission's orders and filed a brief.

II. STANDARD OF REVIEW

{¶ 9} "R.C. 4903.13 provides that a [commission] order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy,*

Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50, *modified on other grounds, Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 87. We will not reverse or modify a commission decision as to questions of fact when the record contains sufficient probative evidence to show that the decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. The "appellant bears the burden of demonstrating that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record." *Id*.

III. ANALYSIS

{¶ 10} Suburban challenges the commission's decision on four grounds: the commission erred in (1) failing to enforce the 1995 stipulation, (2) finding that it lacked authority to preclude duplication of utility facilities, (3) failing to find that Columbia implemented its builder program in an unfair and anticompetitive manner, and (4) finding that Suburban did not meet its burden of proof. Because none of Suburban's arguments justifies reversal, we affirm the commission's orders.

A. Proposition of law No. I: Whether the commission erred in failing to enforce the 1995 stipulation

{¶ 11} Suburban argues that the commission erred in failing to enforce the 1995 stipulation. According to Suburban, the 1995 stipulation settled claims arising from the same type of conduct that Columbia engaged in at Glenross and was intended to forever prohibit Columbia from (1) using builder incentives to compete against Suburban in an area already served by Suburban and (2) duplicating Suburban's facilities.

{¶ 12} The 1995 stipulation arose out of a self-complaint filed with the commission by Columbia seeking to confirm that Columbia's tariffs allowed it to offer incentives when it successfully competed to serve a residential subdivision called Oak Creek in Delaware County. *In re Self-Complaint of Columbia Gas of Ohio, Inc., Concerning Certain of Its Existing Tariff Provisions*, Pub. Util. Comm. No. 93-1569-GA-SLF, ¶ 1 (Jan. 18, 1996). Suburban questioned Columbia's authority to offer the incentives and intervened in that case. Columbia and Suburban ultimately resolved the case through the 1995 stipulation, in which they agreed to (1) exchange certain facilities and customers, (2) delete tariff language that restricted them from providing or paying for customer-service lines, house piping, and appliances when competing with another regulated natural-gas company, and (3) execute the releases and covenants not to sue attached to the stipulation.

{¶ 13} In this case, the commission found "no merit in Suburban's claim that Columbia's existing homebuilder incentives violate the terms of the 1995 Stipulation." Pub. Util. Comm. No. 17-2168-GA-CSS, ¶ 53 (Apr. 10, 2019). The commission held that the 1995 stipulation and the commission's order approving it contained no "language prohibiting Columbia from offering Commission-approved DSM incentives to builders of energy-efficient homes or from competing for customers in southern Delaware County." *Id.* at ¶ 54.

{¶ 14} Suburban's first proposition of law raises three separate challenges to the commission's determination. None has merit.

1. Whether the commission failed to apply the express terms of the 1995 stipulation

{¶ 15} Suburban argues that the commission failed to "apply the express language of the 1995 Stipulation and Releases and Covenant Not to Sue." Suburban specifically alleges that the commission ignored Columbia's release and covenant not to sue, which Suburban claims, quoting that document, "prohibits

Columbia from instituting or reinstating certain builder programs 'or any program substantially similar to such programs' " in areas already served by Suburban.[2] According to Suburban, the implementation of the builder program at Glenross South violates the 1995 stipulation. We lack jurisdiction over this argument because Suburban failed to raise it on rehearing before the commission as required by R.C. 4903.10.

{¶ 16} The commission's order quoted language from *Suburban's* release and covenant not to sue—not from Columbia's—in finding that "nothing in the 1995 Stipulation or the Release prohibits Columbia, in perpetuity, from offering any kind of incentives to homebuilders." Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 53 (Apr. 10, 2019). Yet Suburban did not argue on rehearing that the commission should have applied the language of Columbia's release instead of Suburban's. Rather, Suburban alleged that the commission erred when it applied the language of Suburban's release "to claims that Suburban did not make." To be clear, Suburban—referring to its own release—conceded that the commission's "Order cite[d] the controlling language of the 1995 Stipulation." That is, instead of alleging error in the commission's failure to apply Columbia's release, Suburban argued on rehearing that "[t]he Order misrepresent[ed] Suburban's claim" by "fail[ing] to apply the express terms of the Stipulation [i.e., Suburban's release] to the relevant facts."

{¶ 17} Suburban did not raise the same argument on rehearing that it raises on appeal. The failure to preserve this specific claim in an application for rehearing deprives us of jurisdiction to review it. *In re Complaint of Cameron Creek Apts. v.*

2. Suburban in its reply brief also claims that the commission ignored a particular clause in the 1995 stipulation that prevents Columbia from duplicating Suburban's facilities, except in certain circumstances. We do not consider this argument because Suburban is barred from raising new arguments for the first time in its reply brief. *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 54.

Columbia Gas of Ohio, 136 Ohio St.3d 333, 2013-Ohio-3705, 995 N.E.2d 1160, ¶ 23-24.

2. Whether the commission failed to explain its order

{¶ 18} Suburban next alleges that the commission violated R.C. 4903.09 because its order fails to cite evidence and sufficiently detail its reasons for refusing to enforce the 1995 stipulation. Suburban maintains that, unlike Columbia, it offered credible evidence to support its interpretation that the 1995 stipulation prohibited Columbia from offering builder incentives and duplicating Suburban's facilities. Suburban further maintains that the commission simply agreed with Columbia and summarily rejected Suburban's claims without record support or explanation.

{¶ 19} Under R.C. 4903.09, the commission's opinions must set forth "the reasons prompting" its decisions, based upon its findings of fact. The commission " 'abuses its discretion if it renders an opinion on an issue without record support' " and a supporting rationale. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 90, 706 N.E.2d 1255 (1999), quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166, 666 N.E.2d 1372 (1996). Although strict compliance with the terms of R.C. 4903.09 is not required, a commission order must contain sufficient detail for this court to determine the factual basis and reasoning relied on by the commission. *Id.* at 89; *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 32. After review, we conclude that the order here complies with R.C. 4903.09.

{¶ 20} The commission first reviewed the pertinent language of the 1995 stipulation and Suburban's accompanying release. The commission concluded that it was not necessary to examine "contemporaneous documents or statements which may be considered as probative * * * evidence of intent of the document" because "no ambiguity exists" in the terms of the 1995 stipulation. Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 54 (Apr. 10, 2019).

{¶ 21} Suburban repeatedly faults the commission for not citing evidence that refutes Suburban's interpretation of the stipulation. As Suburban sees it, "[w]ithout record evidence to the contrary, Suburban's interpretation of the 1995 Stipulation by the drafters of the language is neither 'speculative' nor 'unsubstantiated,' and it should be adopted." Extrinsic evidence, however, may not be considered when the outcome turns solely on the plain language of an agreement. *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 47.

{¶ 22} The commission found that the 1995 stipulation is unambiguous. Suburban does not argue on appeal that the 1995 stipulation is ambiguous. In fact, by arguing that the commission failed to apply the "express" terms of the 1995 stipulation, Suburban essentially concedes that the stipulation is unambiguous. We reject Suburban's argument that the commission violated R.C. 4903.09.

3. Whether Columbia's tariff authorizes builder incentives

{¶ 23} Suburban's third argument under its first proposition of law is that Columbia has no tariff on file with the commission that authorizes the company to offer builder incentives. Suburban asserts that the absence of such tariff language violates the express terms of the 1995 stipulation and also violates R.C. 4905.30(A) (requiring public utilities to print and file schedules showing all rates, classifications, and charges for services furnished) and 4905.32 (prohibiting charges and rates different from the charges and rates specified in the schedule filed with the commission and forbidding any direct or indirect refunds except as specified in the schedule).

{¶ 24} The commission rejected this argument. Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 53-54, 61 (Apr. 10, 2019). In its second rehearing entry, it found that Columbia's tariff schedules are "sufficiently detailed" to authorize the payment of incentives to builders and the recovery of incentive payments from ratepayers under the EfficiencyCrafted Homes Program. Pub. Util. Comm. No. 17-2168-GA-

CSS, ¶ 42 (Oct. 23, 2019). Suburban does not even cite the applicable tariff, let alone point to any language—or lack thereof—in the tariff that would support its claim. Suburban has failed to carry its burden of demonstrating error on appeal. *See In re Application of Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶ 17-18.

{¶ 25} For the foregoing reasons, we reject Suburban's first proposition of law.

B. Proposition of law No. II: Whether the commission erred in finding that it lacked authority to preclude duplication of facilities

{¶ 26} At the commission, Suburban challenged Columbia's extension of its gas-distribution main along the south side of Cheshire Road, parallel to Suburban's main on the north side of Cheshire. Suburban conceded that Columbia could extend its main to distribute natural gas to areas that do not have service, but it argued that Glenross was not an unserved area because Suburban had served Glenross since 2004. The commission faulted Suburban for failing to cite any precedent precluding a natural-gas company from serving a new customer if that service would result in a duplication of facilities. The commission also found that the record did not support Suburban's claim that Columbia's pipeline extension resulted in duplicate facilities on Cheshire Road.

1. The commission did not hold that it lacked authority to preclude the duplication of utility facilities

{¶ 27} Suburban argues on appeal that the commission erroneously concluded that it lacked authority under R.C. Title 49 to prevent or remedy the duplication of utility facilities. Suburban avers that the commission ignored numerous cases cited by Suburban that have held that duplicate utility facilities are against the public interest. The commission, however, did *not* hold that it lacked authority to prohibit or remedy the duplication of natural-gas facilities. It found that Suburban had cited no precedent for the proposition that the commission must

preclude a natural-gas company from serving new customers if that service would "result in the duplication of facilities." Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 55 (Apr. 10, 2019). The commission merely held that Suburban failed to cite caselaw applicable to the facts of its case and thereby did not carry its burden as the complainant under R.C. 4905.26.

2. The commission adequately explained why it did not follow the "precedent" relied on by Suburban

{¶ 28} Suburban counters that the commission departed from precedent without adequate explanation. Suburban maintains that the cases it cited "are directly on point" because the commission has regulatory authority over all public utilities under R.C. 4905.04, regardless of type.

{¶ 29} We have instructed the commission to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975), *superseded on other grounds by statute as recognized in Babbit v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979). If the commission departs from precedent, it must explain why, though the explanatory hurdle is not particularly high. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52.

{¶ 30} The commission explained that the cases cited by Suburban were inapplicable because they did not involve "a natural gas company [being] precluded from serving a new customer if such service would result in the duplication of facilities." Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 55 (Apr. 10, 2019). The commission also cited longstanding precedent establishing that natural-gas companies are not bound by certified service territories and may serve any customer in any part of the state. The commission reiterated in its second rehearing entry that "the case law cited by Suburban * * * does not contradict or question" the

commission's conclusion that Suburban's cited cases are inapplicable, "as many of the cases are factually and legally dissimilar, if not wholly irrelevant to the circumstances before us." Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 35 (Oct. 23, 2019). We conclude that the commission adequately explained why it was not compelled to follow Suburban's alleged precedents by stating that the cases cited by Suburban did not involve natural-gas companies and did not adjudicate the same issue. *See Columbus S. Power Co.* at ¶ 52-54.

3. The record supports the commission's order

{¶ 31} Third, Suburban maintains that it submitted sufficient evidence to support its duplicate-facilities claim. The commission concluded that Suburban had presented no evidence of any unnecessary duplication of natural-gas facilities on Cheshire Road. The commission's order cited testimony from Delaware County Chief Deputy Engineer Robert Riley, who testified that he knew of no unnecessary duplication of natural-gas facilities in Delaware County, even with the recent extension of Columbia's distribution main on Cheshire Road. Riley also testified that some duplication of facilities may be inherent in the design of gas lines and even unavoidable due to engineering issues.

{¶ 32} To be sure, Riley testified on redirect that he did not specifically consider whether Columbia's distribution main on Cheshire Road duplicated Suburban's main because he "was not familiar with what other gas lines exist in that same area." Even so, this testimony does not help Suburban. As the complainant before the commission, Suburban bore the burden of proving the allegations in the complaint. *Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 513-514, 684 N.E.2d 43 (1997). Riley's testimony on redirect does not constitute affirmative evidence that Columbia duplicated Suburban's facilities on Cheshire Road.

{¶ 33} Other testimony in the record, from Suburban's own witness, undermined Suburban's case on this point. Aaron Roll, Suburban's vice president

of system development, admitted on cross-examination that Pulte was under no legal obligation to select Suburban to serve the Glenross South development. Moreover, Roll conceded that Columbia was entitled to construct a distribution main down Cheshire Road to this development.

4. Suburban has not carried its burden of demonstrating error

{¶ 34} As shown above, the record supports the commission's determination. Suburban points to other evidence that it asserts the commission ignored, but we conclude that Suburban's evidence is either irrelevant or does not justify reversal.

{¶ 35} For example, Suburban, citing testimony in the record, claims that it established that "a duplication of utility facilities already located in the area would be a waste of resources and would prove to be uneconomical, inefficient, and contrary to good public policy." But as already noted, other testimony established that some duplication of facilities may be inherent and even necessary.

{¶ 36} Suburban also repeatedly states that it was already serving the Glenross subdivision when Columbia extended its gas main to serve Glenross South. But although Suburban provides distribution service to the Glenross subdivision north of Cheshire Road, evidence showed that the Glenross South subdivision was still under development and that no gas company was providing distribution service to that subdivision when Columbia extended its gas main along the south side of Cheshire Road.

{¶ 37} Given its existing distribution main on Cheshire Road, Suburban asserts that the commission failed to take into account that it was obligated to serve the new phases of Glenross upon request. This argument ignores that the developer of Glenross South never requested that Suburban provide distribution service to the new phases.

{¶ 38} Suburban additionally maintains that the commission was guilty of "minimizing and twisting the concerns expressed by" Delaware County witness

Riley. According to Suburban, Riley testified that he was concerned by the allegations of Suburban's complaint, "including increased costs to customers, subsidizing the incentive program, and the unnecessary duplication of natural gas facilities in the County." It is clear, however, that Riley was testifying only generally about the concept of unnecessary duplicate facilities and was not weighing in on the merits of Suburban's complaint.

{¶ 39} Finally, Suburban notes that Riley defined an "unnecessary duplication of gas facilities" as a situation in which "there's not a legitimate engineering purpose for having that duplication." According to Suburban, "Columbia has not and cannot offer a legitimate engineering purpose for extending gas facilities into an area where Suburban's gas facilities already existed." Yet Suburban cites no authority that required the commission to adopt Riley's definition as the standard to be applied in this case.

{¶ 40} In the end, Suburban asks this court to reweigh the evidence. But that is not our function on appeal. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 39. We accordingly reject Suburban's second proposition of law.

C. Proposition of law No. III: Whether the commission erred in failing to find that Columbia implemented its builder program in an unfair and anticompetitive manner

{¶ 41} Suburban argues that the commission erred in failing to find that Columbia implemented its builder-incentive program in an unfair and anticompetitive manner in order to expand its service territory into an area already served by Suburban. Suburban maintains that when the commission approved Columbia's 2016 DSM-program application, it placed certain limitations and restrictions on Columbia's authority to offer builder incentives. Suburban claims that Columbia exceeded the scope of its authority under the builder program when

it offered incentives for homes built in Glenross South. We reject proposition of law No. III for the following reasons.

1. Whether Columbia offered builder incentives outside its "service territory"

{¶ 42} Suburban contends that based on Columbia's 2016 DSM application, the commission authorized Columbia to pay incentives under the builder program only for homes built within Columbia's service territory and for customers served by Columbia. Suburban maintains that despite the commission's DSM order, Columbia offered incentives to Pulte for homes built outside Columbia's service territory and for home buyers who are not current Columbia customers. According to Suburban, this practice violates the state policy, set forth in R.C. 4929.02(A)(12), to promote an alignment of natural-gas-company and consumer interests in energy efficiency and conservation.

{¶ 43} Suburban has forfeited this argument. The commission rejected Suburban's service-territory allegation, finding that the Glenross South development was in the "service territory" of both Columbia and Suburban, as that term was used in Columbia's DSM-program application. Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 57 (Apr. 10, 2019). Suburban did not seek rehearing of the commission's determination that Glenross South was within Columbia's service territory. Suburban also did not argue on rehearing that Columbia's builder incentives were limited to customers already served by Columbia. Moreover, Suburban's rehearing application did not even mention R.C. 4929.02(A)(12), let alone argue that Columbia's builder program is contrary to the state policy set forth in that provision.

{¶ 44} Because Suburban did not raise any of these arguments on rehearing before the commission, we lack jurisdiction to address them on appeal. R.C. 4903.10; *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, ¶ 15.

2. Whether Columbia used its builder-incentive program as a competitive-response tool

{¶ 45} Suburban contends that the commission erred in not finding that Columbia deployed its builder program in an abusive or anticompetitive manner. Suburban maintains that Columbia was authorized to encourage the construction of energy-efficient homes, not to use builder incentives to compete against Suburban for new customers.

a. Whether the commission ignored evidence that Columbia used builder incentives as a competitive-response tool

{¶ 46} The commission found that there was no evidence that Columbia deployed its builder incentives in an abusive or anticompetitive manner in order to expand into Glenross South. Specifically, the commission found that the record did not establish that the builder incentives were the deciding factor that led Pulte to choose Columbia over Suburban. But even if the incentives were the deciding factor, the commission concluded that the outcome would have been the same. The commission acknowledged that if a builder values energy efficiency, Columbia's incentives will result in a competitive advantage over Suburban when competing to distribute natural-gas service. The commission found that this advantage should not be "stripped away" from Columbia simply because Suburban chose not to offer similar incentives. Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 60 (Apr. 10, 2019).

{¶ 47} On appeal, Suburban argues that the commission ignored undisputed evidence that Columbia used builder incentives to respond to competition by Suburban in an area where Suburban was already providing service. Suburban points to testimony from Zach McPherson, Columbia's new-business manager, that Columbia told the developer of Glenross about the builder-incentive program. Suburban also cites testimony from Joseph Codispoti, Columbia's lead-development manager, who conceded that the builder program gives Columbia a

competitive advantage over Suburban. The commission did not ignore this testimony.

{¶ 48} The commission found that Columbia was authorized to offer incentives under this program to encourage developers to choose Columbia over competitors, given that some developers may value energy efficiency and may prefer to receive service from a company offering energy-efficiency initiatives. In addition, the commission acknowledged that Columbia had a competitive advantage over Suburban as a result of its energy-efficiency incentives. But the commission rejected the argument that this advantage violated R.C. 4905.35(A) (which forbids a public utility from subjecting a corporation to "undue or unreasonable prejudice or disadvantage"), noting in its second rehearing entry that Suburban could eliminate any competitive advantage by requesting its own energy-efficiency program. Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 23 (Oct. 23, 2019).

{¶ 49} The commission considered Suburban's evidence, but it did not assign the testimony the same significance as Suburban. That weighing decision, in addition to being highly discretionary, is beyond the scope of Suburban's argument.

b. Whether the commission departed from precedent when it found that Columbia did not use builder incentives as a competitive-response tool

{¶ 50} Suburban also contends that the commission departed from precedent when it found that Columbia did not use builder incentives as a competitive-response tool at Glenross South. In 2011, the commission rejected Suburban's application to offer builder incentives, in part on the ground that Suburban's proposed builder program was merely "a competitive response program and only intended to help Suburban compete with other natural gas companies for new load." *In re Self-Complaint of Suburban Natural Gas Co. Concerning Its Existing Tariff Provisions*, Pub. Util. Comm. No. 11-5846-GA-SLF, 10 (Aug. 15,

2012) ("*Suburban Self-Complaint* case"). According to Suburban, the commission in this case failed to explain its departure from this precedent as required by *Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 52, and R.C. 4903.09.

{¶ 51} Suburban, however, did not argue on rehearing that the commission failed to explain its departure from the *Suburban Self-Complaint* case. Although Suburban cited R.C. 4903.09 five times in its rehearing application, it never argued that the commission violated this statute when it refused to follow the *Suburban Self-Complaint* case. Suburban's failure to raise these specific arguments through an application for rehearing deprived the commission of a chance to consider the arguments below and jurisdictionally bars this court from reviewing them now. *See* R.C. 4903.10; *Ohio Partners for Affordable Energy*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, at ¶ 15.

3. Whether the commission erred regarding Suburban's failure to intervene in Columbia's 2016 DSM case

{¶ 52} Suburban asserts that the commission erred when it determined that Suburban should have intervened in the 2016 DSM case to raise concerns about Columbia's unfair and anticompetitive use of its builder-incentive program. Suburban maintains that it had no reason to intervene in the 2016 DSM case to challenge the builder program because it had no expectation that Columbia would implement the program in an unfair and anticompetitive manner.

{¶ 53} Suburban has not established reversible error. Although the commission did note that "Suburban failed to intervene or voice its concerns regarding the DSM Program in the *2016 DSM Case* or earlier DSM approval cases," Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 58 (Apr. 10, 2019), the commission did not find that Suburban had forfeited any arguments. As previously discussed, the commission's order addressed and found no merit to Suburban's claims "that Columbia has deployed its DSM Program in an abusive or

anticompetitive manner in order to expand its service territory," *id.* at ¶ 60, as well as Suburban's other claims regarding Columbia's implementation of its builder program.

4. Whether the commission erred in finding that Suburban's anticompetitive-conduct claim was raised for the first time on rehearing

{¶ 54} Suburban challenges the commission's determination that Suburban's unfair-and-anticompetitive-conduct claim was a new issue raised for the first time on rehearing. The commission found in its second rehearing entry that Suburban had altered one of the grounds in its complaint by asserting a new argument at the rehearing stage. According to the commission, Suburban's complaint alleged that Columbia violated R.C. 4905.35 because its builder incentives constituted an " 'undue or unreasonable preference or advantage' offered 'for the purpose of destroying competition.' " Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 22 (Oct. 23, 2019), quoting the complaint. The commission found that this allegation differed from Suburban's rehearing argument that Columbia used builder incentives in an unfair and anticompetitive manner. *Id.* at ¶ 23.

{¶ 55} After the commission made this finding in its second rehearing entry, Suburban never filed a subsequent application for rehearing and thus never alleged error in the commission's finding that Suburban had raised a new argument at the rehearing stage. Accordingly, we lack jurisdiction to consider the argument on appeal. *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶ 56.

D. Proposition of law No. IV: Whether the commission erred in finding that Suburban failed to meet its burden of proving the allegations in the complaint

{¶ 56} Suburban argues that the commission erred in finding that Suburban did not carry its burden of proving the allegations in Count Five of the complaint. Suburban contends that it demonstrated that Columbia violated numerous statutory

provisions in implementing its builder-incentive program but that the commission summarily dismissed these allegations, in violation of R.C. 4903.09.

{¶ 57} The commission found that the statutory violations alleged in Count Five of the complaint hinged on Suburban proving the other allegations in the complaint. The commission summarily rejected the claims in Count Five after finding that Suburban had failed to carry its burden of proof on those other allegations.

{¶ 58} On rehearing, Suburban argued that the statutory violations alleged in Count Five were independent of the claims asserted under the other counts. The commission rejected this argument in its second rehearing entry, noting that Suburban had argued to the commission in its posthearing brief that the " 'same proofs' " that demonstrated the alleged violations in the other counts would also prove the statutory violations in Count Five. Pub. Util. Comm. No. 17-2168-GA-CSS at ¶ 30 (Oct. 23, 2019), quoting the posthearing brief. The commission denied rehearing after finding that Suburban had failed to offer additional evidence or a separate legal theory as to how the allegations in Count Five stood on their own.

{¶ 59} Suburban has failed to demonstrate error in the commission's summary dismissal of these statutory violations alleged in Count Five of Suburban's complaint. As set forth above, the commission's order and rehearing entry explained the reasoning for rejecting Suburban's claims, as required by R.C. 4903.09. Even so, Suburban argues on appeal that, contrary to the commission's summary conclusion, "the statutory violations can and do stand on their own." But Suburban inexplicably attempts to prove that Columbia violated the various statutes based solely on arguments raised in its first three propositions of law. Suburban's failure to identify an independent legal theory or any evidence undermines its claim that these alleged statutory violations stand on their own. Therefore, we reject Suburban's fourth proposition of law. *See Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 39.

IV. CONCLUSION

{¶ 60} For the foregoing reasons, Suburban has not demonstrated that the commission erred in deciding the complaint in Columbia's favor. Therefore, we affirm the commission's orders.

Orders affirmed.

O'CONNOR, C.J., and FRENCH, FISCHER, DEWINE, and STEWART, JJ., concur.

KENNEDY, J., concurs in judgment only.

Carpenter, Lipps & Leland, L.L.P., Kimberly W. Bojko, and Michael H. Carpenter, for appellant.

Dave Yost, Attorney General, and Thomas G. Lindgren, John H. Jones, and Robert A. Eubanks, Assistant Attorneys General, for appellee.

Porter, Wright, Morris & Arthur, L.L.P., Mark S. Stemm, Eric B. Gallon, and Devan K. Flahive; and Joseph Clark, for intervening appellee.
