

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into PALMco Power)	Case No. 19-957-GE-COI
OH, LLC dba Indra Energy and)	
PALMco Energy OH, LLC dba Indra)	
Energy's Compliance with the Ohio)	
Administrative Code and Potential)	
Remedial Actions for Non-)	
Compliance.)	

**INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO THE COMMISSION,
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential consumers, respectfully seeks modification of the Attorney Examiner's August 14, 2019 Entry in this proceeding. PALMco Power OH, LLC ("PALMco") and the PUCO Staff (and any supporters) should go forward first with the filing of their testimony in support of their settlement. But instead the Entry requires parties opposing the settlement to file testimony on the same day (September 4, 2020) as the stipulators. A fair process is to allow OCC the opportunity to review the stipulators' agreement in advance of preparing and filing testimony for consumers, which should be no sooner than the weeks after two stipulators file. OCC's Appeal of the August 14 Entry should be certified to the Public Utilities Commission of Ohio ("PUCO") for review.

The rulings contained in the PUCO's August 14 Entry present new or novel questions of law and departs from past precedent. This appeal should be certified to the

full Commission under Ohio Adm. Code 4901-1-15(B). The PUCO should modify the Entry to provide that opponents of the settlement may file testimony after stipulators (and any supporters) file.

The reasons for these arguments are more fully stated in the following memorandum in support.

Respectfully submitted,

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/s/ Terry L. Etter

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MEMORANDUM IN SUPPORT

I. BACKGROUND

The PUCO Staff, acting on over 300 customer complaints in less than a year, has investigated the marketing practices of PALMco. The Staff found “a pattern of unfair, misleading, deceptive, and unconscionable activities” with issues that “appear to be systemic and demonstrate that the company’s management decisions inappropriately orchestrate a marketing program reliant upon misleading and deceiving customers, rather than in an manner that is fair, honest, and in compliance with Ohio laws and rules.”¹ PALMco’s reported misconduct against Ohioans shocks the conscience.

On July 31, 2019, the PUCO Staff and PALMco filed a Stipulation and Recommendation for settlement of this case. OCC did not sign the settlement.

On August 14, 2019, the Attorney Examiner in this case issued an Entry setting the procedural schedule. The Entry directed all parties to file testimony, whether

¹ PUCO Staff Report at 2 (May 10, 2019).

supporting or opposing the settlement, on September 4, 2019.² The Entry set the hearing for this case on September 18, 2019.³ (Attachment 1).

By requiring testimony opposing the settlement to be filed the same day as testimony supporting the settlement, the Entry presents new or novel questions of law and departs from precedent. The PUCO's rules (Ohio Adm. Code 4901-1-30(D)) provide that parties that file a settlement must file or provide the testimony of at least one signatory party in support of a settlement. This rule recognizes that settlements inherently need explanation outside the four corners of the settlement document. The PUCO rules also permit parties that do not join the settlement to offer evidence and/or argument in opposition to the settlement.⁴ The Parties supporting the settlement have the burden of proof.

Parties opposing the settlement should be entitled to file testimony in response to the proponents' testimony that explains and supports the settlement. That can only be accomplished if opponent testimony is filed after the proponent's testimony. Here, the PUCO's process interferes with parties' ability to effectively challenge the settlement because it requires the simultaneous filing of testimony by both proponents and opponents without the opportunity for discovery, including depositions, on the filed testimony.

The PUCO should modify the Entry so that testimony opposing the settlement is filed no sooner than two weeks after testimony supporting the settlement. To be

² Entry, ¶10.

³ *Id.*

⁴ Ohio Adm. Code 4901-1-30(D).

consistent with precedent, the PUCO should provide that opponents of the settlement file testimony after supporters' testimony is filed.

II. STANDARD OF REVIEW

The PUCO will review an Attorney Examiner's ruling if the Attorney Examiner (or other authorized PUCO personnel) certifies the appeal.⁵ The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question."⁶ Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.⁷ Under this standard, OCC's Appeal should be certified and the August 14 Entry should be modified as discussed herein.

III. THE INTERLOCUTORY APPEAL SHOULD BE CERTIFIED FOR THE COMMISSION TO CONSIDER MODIFYING THE PROCEDURAL SCHEDULE TO ENSURE A FAIR PROCESS.

A. An immediate determination is needed to prevent undue prejudice.

This Appeal should be certified to the PUCO. An "immediate determination" by the PUCO is needed to prevent undue prejudice⁸ to OCC and residential customers. The undue prejudice will result from the schedule requiring OCC to file testimony opposing the settlement on the same day as testimony supporting the settlement, preventing

⁵ Ohio Adm. Code 4901-1-15(B).

⁶ *Id.*

⁷ Ohio Adm. Code 4901-1-15(E).

⁸ Ohio Adm. Code 4901-1-15(B).

opposing parties from conducting discovery on the testimony prior to filing their own testimony. The filing date of OCC's testimony should be after the signatory parties file their testimony to allow OCC time to conduct discovery and prepare expert testimony in light of the testimony supporting the settlement.

In advance of filing testimony, OCC should have time to conduct depositions on an unknown number of signatory parties' witnesses and to produce testimony that is responsive to claims made by them. The signatory parties, who have the burden of proof, did not file testimony with the settlement (but could have filed then). OCC filed an amended notice of depositions on August 2, 2019, two days after the settlement was filed. Thus far, PALMco has refused to provide witnesses to be deposed. Nevertheless, OCC is working with PALMco to resolve the dispute. Thus, there has not yet been an opportunity to depose signatory parties' witnesses at all. If OCC must file testimony on the same day as the signatory parties without an opportunity for depositions on testimony explaining and supporting the settlement, it would be denied essential discovery rights. Given these circumstances, OCC should be afforded at least two weeks (and may need more) for filing testimony after the stipulators file.

In support of the need for an immediate determination, it should be recognized that Ohio law and rule provide for parties to have adequate discovery in advance of opportunities to advocate to the PUCO. R.C. 4903.082 states that "[a]ll parties and intervenors shall be granted ample rights of discovery." Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed "full and reasonable discovery" under its rules.⁹ The taking of depositions is a fundamental part of the right of discovery. That

⁹ See Ohio Adm. Code 4901-1-16 et seq.

fundamental right would be directly impeded if OCC must file its own testimony at the very time that proponents will be filing their testimony.

B. The ruling represents a new or novel question of law or policy and a departure from PUCO precedent.

Traditionally, parties opposing a settlement are given more time to prepare testimony than parties supporting a settlement. This is in recognition of the need for parties opposing the settlement to conduct written discovery and/or by deposing witnesses. For example, in the recent AEP DIR case the settlement was filed on July 2, 2019 and testimony supporting the settlement was filed on July 15, 2019.¹⁰ Parties opposing the settlement were given until August 20, 2019 to file testimony.¹¹

The Entry departs from PUCO precedent by requiring OCC to file testimony opposing the settlement on the same day testimony supporting the settlement is filed. The PUCO should follow its precedent and allow OCC to file testimony at least two weeks after testimony supporting the settlement is filed. Doing so is fair, reasonable, and in keeping with the notion that the burden of proof lies with the parties offering the settlement. Opponents would then be given a full opportunity to address the settlement and the supporting testimony that comes with it.

¹⁰ Case Nos. 17-38-EL-RDR, et al., Entry (July 16, 2019), ¶13.

¹¹ *Id.*, ¶14. *See also* Case No. 18-1205-GA-AIR, Tr. at 4-5 (May 20, 2019); Case No. 16-481-EL-UNC et al., Entry (November 15, 2018), ¶11; Case No. 18-857-EL-UNC, Entry (October 31, 2018), ¶11; Case No. 17-2202-GA-ALT, Entry (October 30, 2018), ¶21; Case No. 16-2422-GA-ALT, Entry (September 17, 2017), ¶10; Case No. 13-1939-EL-RDR, Entry (June 20, 2016), ¶3; Case No. 14-1297, Entry (December 9, 2015), ¶12; *id.*, Entry (July 2, 2015), ¶11.

IV. THE COMMISSION SHOULD MODIFY THE PROCEDURAL SCHEDULE TO ALLOW FOR ADEQUATE PREPARATION IN THIS SIGNIFICANT CASE AFFECTING THE PUBLIC.

This case involves a competitive supplier that is alleged to have committed hundreds of violations of PUCO rules prohibiting unfair and misleading marketing practices that deceive consumers.¹² The importance of this case is not only in compensating consumers who were harmed by PALMco's practices, but also in helping to prevent future harm by others who may be willing to conduct the same practices. That should be part of the PUCO's determination as to whether the settlement is reasonable and in the public interest.

As part of its scrutiny of the settlement in this case, the PUCO should have as much information as possible regarding the settlement. OCC expects to provide the PUCO with a different perspective of the settlement than the signatory parties may provide. In order to do that, OCC's testimony should be responsive to arguments made by the signatory parties when presenting the settlement. OCC cannot do that if it is forced to file its testimony on the same day as testimony supporting the settlement. Further, OCC should be afforded due process by allowing discovery to be conducted on the filed testimony prior to filing its own testimony. Accordingly, testimony opposing the settlement should be filed after the signatory parties' testimony is filed.

¹² See Staff Report (May 10, 2019) at 3.

V. CONCLUSION

OCC's interlocutory appeal of the August 14 Entry meets the standard for granting interlocutory appeals. OCC's appeal should be certified to the PUCO and the PUCO should modify the procedural schedule as OCC recommends.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Terry L. Etter

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the Commission, and Application for Review by the Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 19th day of August 2019.

/s/ Terry L. Etter
Terry L. Etter
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THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMMISSION'S
INVESTIGATION INTO PALMCO POWER
OH, LLC DBA INDRA ENERGY AND
PALMCO ENERGY OH, LLC DBA INDRA
ENERGY'S COMPLIANCE WITH THE OHIO
ADMINISTRATIVE CODE AND POTENTIAL
REMEDIAL ACTIONS FOR NON-
COMPLIANCE.**

CASE NO. 19-957-GE-COI

ENTRY

Entered in the Journal on August 14, 2019

{¶ 1} PALMco Energy OH, LLC d/b/a Indra Energy (PALMco Energy) is a retail natural gas supplier as defined in R.C. 4929.01; is certified to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and is subject to the jurisdiction of this Commission pursuant to R.C. 4929.24. Accordingly, PALMco Energy is required to comply with the Commission's minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.

{¶ 2} PALMco Power OH, LLC d/b/a Indra Energy (PALMco Power) is also an electric services company as defined in R.C. 4928.01; is certified to provide competitive retail electric service (CRES) under R.C. 4928.08; and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16. Accordingly, PALMco Power is required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21.

{¶ 3} R.C. 4928.08 and 4929.20 allow the Commission to suspend, rescind, or conditionally rescind the certification of any electric services company or retail natural gas supplier issued under these sections if the Commission determines, after reasonable notice and opportunity for hearing, that the electric services company or retail natural gas supplier has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state. Additionally, R.C. 4928.16 and 4929.24 grant the Commission the authority to order any

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remedy or forfeiture provided under R.C. 4905.54 to 4905.60 and 4905.64, and to order restitution to customers and rescission of customer contracts.

{¶ 4} On April 17, 2019, the Commission issued an Entry in this matter. In the Entry, the Commission stated that Staff of the Commission's Service Monitoring and Enforcement Department had reviewed customer contacts involving PALMco Energy and PALMco Power (collectively, PALMco) from December 1, 2018, to April 15, 2019, as well as PALMco's responses, and believed that PALMco engaged in misleading and deceptive practices to market and enroll customers, as well as violating several requirements of Ohio Adm.Code Chapters 4901:1-21 and 4901:1-29. Based on Staff's findings, the Commission scheduled a hearing in this matter for PALMco to show cause why it's certification as a CRES provider and its certification as a CRNGS supplier should not be suspended, rescinded, or conditionally rescinded. The Commission also set a procedural schedule for this matter.

{¶ 5} On May 3, 2019, the attorney examiner granted, in part, PALMco's motion to modify the procedural schedule. The attorney examiner extended the testimony filing deadline from May 17, 2019, to May 29, 2019, and rescheduled the hearing from May 24, 2019, to June 4, 2019.

{¶ 6} Subsequently, on May 29, 2019, the attorney examiner granted an unopposed motion by Staff to extend the date of the hearing to July 8, 2019, and to extend the deadline for filing testimony to July 1, 2019.

{¶ 7} On June 28, 2019, Staff and PALMco filed a joint motion for extension of the procedural schedule and request for expedited treatment. On the same day, the attorney examiner granted the motion and extended the testimony filing deadline to July 30, 2019, and rescheduled the hearing to August 8, 2019.

{¶ 8} On July 30, 2019, Staff, PALMco, and the Office of the Ohio Consumers' Counsel filed a joint motion for extension of the procedural schedule and request for

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expedited treatment. On the same day, the attorney examiner granted the parties' joint motion and suspended the procedural schedule.

{¶ 9} On August 2, 2019, PALMco and Staff jointly filed a stipulation and recommendation (Stipulation). PALMco and Staff indicate that the Stipulation is intended to resolve all outstanding issues in this matter.

{¶ 10} Upon review, the attorney examiner finds that a new procedural schedule should be issued in this matter. A hearing is scheduled for September 18, 2019, at 10:00 a.m., at the Commission offices, 11th Floor, Hearing Room 11-D, 180 East Broad Street, Columbus, Ohio 43215. Parties should file testimony in support or in opposition of the Stipulation filed by PALMco and Staff on or before September 4, 2019.

{¶ 11} It is, therefore,

{¶ 12} ORDERED, That a hearing be scheduled in accordance to Paragraph 10. It is, further,

{¶ 13} ORDERED, That the parties file testimony in accordance to Paragraph 10. It is further,

{¶ 14} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Anna Sanyal

By: Anna Sanyal
Attorney Examiner

JRJ/hac

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Case No(s). 19-0957-GE-COI

Summary: Attorney Examiner Entry issuing new procedural schedule to set hearing and deadline to file testimony electronically filed by Heather A Chilcote on behalf of Anna Sanyal, Attorney Examiner, Public Utilities Commission

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Case No(s). 19-0957-GE-COI

Summary: Request Interlocutory Appeal, Request for Certification to the Commission, and Application for Review by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.