

**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.)	

**MOTION TO COMPEL DEPOSITIONS,
MOTION FOR CONTINUANCE,
AND
REQUEST FOR EXPEDITED RULING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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In this case involving PALMco's¹ unfair, misleading, deceptive, and unconscionable acts and practices in its marketing of electric and natural gas to Ohioans, the Office of the Ohio Consumers' Counsel ("OCC") seeks to protect consumers by enforcement of the discovery rules and Ohio law to obtain information relevant to this case. OCC, on behalf of residential utility consumers, moves the Public Utilities Commission of Ohio ("PUCO"), the legal director, the deputy legal director, or an attorney examiner for an Order compelling PALMco to provide corporate representatives in response to OCC's Amended Notice to Take Depositions and Request for Production of Documents ("Amended Notice"), attached as Exhibit 2, and to compel the production of documents identified in OCC's Amended Notice.

¹ "PALMco" refers to PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy.

To be clear, OCC seeks to depose a corporate designee(s) with knowledge of PALMco's finances and financial documents that have been filed with the PUCO (OCC Deposition Notice, paragraph 1, subparts (a) through (f), paragraph 4, paragraph 5), a corporate designee(s) with knowledge of the Stipulation² and its terms (OCC Deposition Notice, paragraph 1(g)), and persons responsible for answering OCC's written discovery (paragraph 3). OCC's Amended Notice also sought the production of documents. This Motion to Compel is made with respect to the entire Amended Notice (including the documents asked to be produced), except for deponents identified in paragraph 2, which counsel for PALMco has agreed to provide.

A key issue for consumers in this case is whether the settlement provision that requires refunds to some customers and the amount of the forfeiture that PALMco pays to be contingent upon the sale of PALMco's business is reasonable and benefits the public and the public interest.³ Thus, an examination of PALMco's financial position and financial documents is necessary to protect consumers in this case. An examination of the other settlement terms is also necessary to understand whether the settlement is just and reasonable for consumers under the PUCO's three-prong test.

To date, however, PALMco has refused to allow depositions to be conducted of its corporate representatives regarding PALMco's financial position, financial documents, and other terms of the Stipulation. PALMco's refusal to allow OCC to conduct discovery, via depositions, is the subject of OCC's Motion to Compel.

For the reasons set forth in the Memorandum in Support, OCC's Motion to Compel should be granted. In addition, OCC seeks a continuance of the deadline for OCC to file

² Stipulation and Recommendation (July 31, 2019).

³ Stipulation at 5-6.

testimony opposing the Stipulation. In an interlocutory appeal of the Entry establishing the procedural schedule in this case (filed yesterday), OCC explained that testimony opposing the Stipulation should be filed after testimony supporting the Stipulation.⁴ To allow time for deposing witnesses supporting the Stipulation (and allowing time for the PUCO to rule on the Motion to Compel), OCC asks that the deadline for filing testimony opposing the Stipulation be no sooner than three weeks after the PUCO issues a ruling on OCC's Motion to Compel, with an evidentiary hearing to follow two weeks later. This continuance will serve the public interest by providing the PUCO an adequate record on which to base its decision. The continuance will not unduly delay the proceeding or prejudice any party.

Given the impending testimony due date and evidentiary hearing, OCC hereby requests that the PUCO issue an expedited ruling on these motions under Ohio Adm. Code 4901-1-12(C). However, OCC cannot certify that no party objects to the issuance of an expedited ruling. A timely ruling on the Motion to Compel would allow OCC to go forward with depositions, and adequately prepare for litigation of these important consumer issues.

Respectfully submitted,

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⁴ Interlocutory Appeal (August 19, 2019).

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This investigation involves PALMco's practices in marketing electric and natural gas services to Ohioans. The PUCO Staff investigation was initiated after receiving a high number of customer complaints (373 instances) about PALMco.⁵

After investigating the complaints, the Staff identified a pattern of unfair, misleading, deceptive and unconscionable activities being undertaken by PALMco that violated several PUCO rules.⁶ The Staff further concluded that these issues with PALMco "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 a manner that is fair, honest, and in compliance with Ohio laws and rules."⁷ The PUCO Staff also found that PALMco violated PUCO rules; failed to demonstrate its fitness or capability to provide service, engaged in anti-competitive acts by misleading customers into switching away from another marketer;

⁵ See PUCO Staff Report (May 10, 2019) at 3.

⁶ *Id.*

⁷ *Id.*

failed to comply with state laws or rules designed to protect consumers in this state; and/or has otherwise engaged in fraudulent, misleading, deceptive, unconscionable or unfair acts or practices.⁸ Based on the results of its investigation, the PUCO Staff recommended action against PALMco that included suspending or rescinding PALMco's certification, refunds to customers, and the payment of forfeitures.

On July 31, 2019, the PUCO Staff and PALMco filed the Stipulation for settlement of this case. The settlement provided for, among other things, refunds to customers. However, some of the customer refunds and a proposed forfeiture that PALMco would pay were made contingent on PALMco selling its customer contracts to another marketer.⁹

On May 20, 2019, OCC served a Notice to Take Depositions and Request for Production of Documents on PALMco, as OCC is permitted to do by R.C. 4903.082 and Ohio Adm. Code 4901-1-16, et al.¹⁰ After the settlement was filed, on August 2, 2019 OCC served an Amended Notice to Take Depositions on PALMco.

In the Amended Notice, OCC sought to depose corporate designee(s) who are familiar with PALMco's finances, corporate documents regarding PALMco's financial statements and arrangements, and PALMco's transactions among its affiliates.¹¹ In addition, OCC sought to depose any individuals who will be testifying in these proceedings on behalf of PALMco, any individuals with knowledge of the Stipulation that was filed, the individuals who were responsible for answering and responding to

⁸ *Id.* at 20.

⁹ Stipulation at 5-6.

¹⁰ See Exhibit 1 (Deposition Notice).

¹¹ Exhibit 2 at 2 (Amended Notice).

discovery on behalf of PALMco in these proceedings, and the individuals responsible for preparation of two exhibits filed that were filed under seal with PALMco's most recent competitive retail electric and natural gas service certificate applications.¹²

On August 9, 2019, counsel for PALMco sent OCC a letter objecting to the Amended Notice.¹³ PALMco claimed that the Amended Notice does not sufficiently describe the individuals who OCC wishes to depose. PALMco asserted that the Amended Notice does not include the name of specific individuals to be deposed or a general description sufficient for identification of specific individuals whose names are not known. PALMco also asserted that the Amended Notice "directs PALMco to identify and produce every individual who knows anything about any of the five topics (and seven sub-topics) listed in the Notice." PALMco characterized the Amended Notice as a "fishing expedition" that is not allowed by the PUCO's rules.

PALMco also contended that both the timing and content of the Amended Notice suggest that OCC's primary motive behind the depositions "is not to seek relevant or admissible evidence, but to harass and annoy in the hope of gaining settlement leverage." To support this contention, PALMco pointed to two phrases, consisting of six words, that appear in the last sentence of the Amended Notice's first paragraph. PALMco claimed that the "scattershot description of the people OCC wishes to depose is apparently intended to cast as wide a net as possible, without regard to whether any individuals falling under any of these descriptions have relevant knowledge about material, disputed

¹² *Id.* at 2-3.

¹³ See Exhibit 3 (Whitt Letter).

issues.” PALMco concluded the letter by saying, “In short, PALMco does not intend to comply with the August 2, 2019 Notice.”

After receiving the letter, OCC attempted to resolve this dispute with PALMco. On August 9, 12, and 15, 2019, counsel for OCC and PALMco’s counsel corresponded regarding the Amended Notice and pending dispute. In addition, on August 14, 2019, OCC sent PALMco’s counsel a letter explaining how PALMco’s assertions regarding the Amended Notice are wrong and how the Amended Notice complies with the PUCO’s rules.¹⁴ Because the PUCO has since adopted a procedural schedule that requires testimony to be filed in less than three weeks, OCC asked that PALMco make the deponents available for depositions by August 20, 2019.

On August 16 and 19, 2019, counsel for OCC had further communications with PALMco’s counsel. OCC’s counsel explained that the depositions were necessary in order to gather additional information regarding the terms and operation of the Stipulation, including the financial issues embedded in the Stipulation that affect consumers. Counsel for OCC also explained that the financial issues go to the heart of whether the settlement is just and reasonable and in the public interest under the PUCO’s three-part test.

Counsel for OCC further explained that time is of the essence in scheduling the noticed depositions as the PUCO has set a date for filed testimony opposing (or supporting) the settlement, which is September 4, 2019, less than three weeks away. While PALMco indicated that it will provide deponents regarding witnesses who will file testimony, PALMco would not commit, at this time, to provide deponents with

¹⁴ Exhibit 4 (OCC Letter).

knowledge of its financial position and financial documents, a deponent(s) with knowledge of the specific settlement terms, or persons responsible for answering OCC's written discovery.

Given that PALMco is not currently refusing to provide individuals who will be filing testimony on its behalf (if any), OCC is not seeking a Motion to Compel regarding such witness(es) who will ultimately file testimony. OCC is, however, asking the PUCO at this time to compel all other aspects of OCC's Amended Notice, including the request to produce documents. OCC's Motion to Compel seeks that PALMco designate a corporate representative(s) with knowledge of the matters specified with reasonable particularity in paragraph 1, subparts (a) through (f), and paragraph 4, and paragraph 5 of the Amended Notice (including regarding PALMco's finances and financial documents), a corporate representative with knowledge of the terms of the Stipulation (paragraph 1(g)), and an individual(s) responsible for answering OCC's written discovery (paragraph 3). Once these individuals have been identified, OCC asks that the PUCO order PALMco to make those individuals available for depositions by OCC as soon as practicable.

OCC has a right to depose corporate designees under the ample discovery rights granted parties in R.C. 4905.082 and Ohio Adm. Code 4901-1-21, as well as Ohio Civil Rule 30(B)(5). The depositions OCC seeks in the Amended Notice are necessary for OCC to fulfill its statutory duty to represent consumers.¹⁵

¹⁵ R.C. Chapter 4911.

II. STANDARD OF REVIEW

The PUCO has held that “the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side’s industry or efforts.”¹⁶ The PUCO’s discovery rules “do not create an additional field of combat to delay trials or to appropriate the Commission’s time and resources; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”¹⁷ The rules are also intended “to minimize commission intervention in the discovery process.”¹⁸ The rules help to assure full and reasonable discovery, consistent with the statutory discovery rights of parties under R.C. 4903.082.

Specifically, R.C. 4903.082 states that OCC and “[a]ll parties and intervenors shall be granted ample rights of discovery.” Therefore OCC, a party in this case, is entitled to depose persons (other than PUCO Staff) under Ohio Adm. Code 4901-1-21(A). Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules.

Accordingly, the PUCO has adopted Ohio Adm. Code 4901-1-21(F) that provides:

A party may in the notice and in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, and shall set forth, for each person designated, the matters on which he or she

¹⁶ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry (March 17, 1987) at 23.

¹⁷ *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76.

¹⁸ Ohio Adm. Code 4901-1-16(A).

will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

The PUCO's discovery rule is similar to Ohio Civil Rule 30(B)(5), which governs the scope of depositions in civil cases. Discovery rights have been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.¹⁹

In Ohio Adm. Code 4901-1-23, the PUCO provided the procedure for parties to obtain the enforcement of these discovery rights, guaranteed by law and rule. Ohio Adm. Code 4901-1-23(A)(3) provides a means for the PUCO to compel a party to appear or answer a question propounded under Ohio Adm. Code 4901-1-21 when the party has failed to do so. Ohio Adm. Code 4901-1-23(C) details the technical requirements for a motion to compel, all of which are met by OCC in this pleading.

A motion to compel is to be accompanied by a memorandum in support setting forth the basis of the motion and authorities relied upon, a brief explanation of how the information sought is relevant, and responses to objections raised by the party from whom the discovery is sought.²⁰ Copies of the discovery requests and the responses are to be attached.²¹ Finally, Ohio Adm. Code 4901-1-23(C) also requires the party seeking discovery to file an affidavit explaining how it has exhausted all other reasonable means of resolving the differences with the party from whom the discovery is sought.

¹⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, ¶83, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661; *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St. 3d 1479.

²⁰ See Ohio Adm. Code 4901-1-23(C)(1).

²¹ Ohio Adm. Code 4901-1-23(C)(2).

OCC has detailed in the attached affidavit, consistent with Ohio Adm. Code 4901-1-23(C)(3), the efforts which it undertook to resolve differences between it and PALMco.²² At this point it is clear that there is no resolution regarding corporate representatives with knowledge of PALMco's financial position and the financial documents, with knowledge of the terms of the Stipulation that was filed, or who were responsible for answering and responding to discovery on behalf of PALMco in these proceedings. OCC seeks to depose individuals with knowledge that is relevant to OCC's case in this proceeding and is unable to obtain the depositions without the PUCO compelling such a result.

III. MOTION TO COMPEL

A. The information OCC seeks is relevant and reasonably calculated to lead to the discovery of admissible evidence.

In this case, one of the key issues is that the settlement provides for refunds to some customers, but has made refunds to some other customers contingent on proceeds it receives from the sale of customer contracts.²³ The Stipulation also makes the payment of forfeitures contingent on the proceeds it receives from the sale of customer contracts.

In addition to the justness and reasonableness of the overall settlement package, OCC questions the justness and reasonableness of requiring customer refunds and the forfeiture mentioned in the settlement to be contingent on the sale of the customer contracts. OCC also questions whether such contingency is necessary and in the public interest in light of the findings and recommendations contained in the Staff Report.

²² See Exhibit 5 (affidavit).

²³ Stipulation at 5-6.

OCC's Amended Notice seeks to depose individuals who have knowledge of PALMco's financial position and financial documents and individuals with knowledge of the specific settlement terms included in the Stipulation. OCC's Amended Notice also pertains to persons who were responsible for answering OCC's written discovery, which included some of the aforementioned financial documents. And the Amended Notice seeks the production of documents. The Amended Notice relates directly to issues in this case.

B. PALMco's objections to the Amended Notice are without basis.

1. PALMco's objection that the Amended Notice does not follow the PUCO's rules is wrong.

PALMco claimed that the Amended Notice does not sufficiently describe the individuals who OCC wishes to depose. PALMco asserted that the Amended Notice does not include the name of specific individuals to be deposed or a general description sufficient for identification of specific individuals whose names are not known. PALMco asserted that the Amended Notice "directs PALMco to identify and produce every individual who knows anything about any of the five topics (and seven sub-topics) listed in the Notice." PALMco is incorrect.

With respect to deponents identified in paragraph 1 of the Amended Notice (including subparts (a) through (g)), the Amended Notice is compliant with Ohio Adm. Code 4901-1-21(F) for deposing a corporate designee(s) of PALMco. The matters to be covered in the deposition are narrowly tailored and specified with reasonable particularity. In fact, there are only seven topics identified. Ohio Adm. Code 4901-1-21(F) is akin to Ohio Civil Rule 30(B)(5) and is precisely the procedure OCC followed.

The burden now shifts to PALMco to designate the appropriate representative(s) to testify to those matters.

With respect to deponents identified in paragraph 4, and paragraph 5 of the Amended Notice, under Ohio Adm. Code 4901-1-21(B), OCC provided “a general description sufficient for identification.” This is because OCC does not know the names and addresses of each individual referenced. OCC has no further obligation in the Amended Notice beyond that required by the rule.

Finally, with respect to the individuals responsible for answering discovery (paragraph 3) and preparing Exhibits C-3 and C-5 filed with PALMco’s competitive retail electric and natural gas service certificate applications (paragraph 4 and paragraph 5), OCC has no way of knowing the responsible individuals. Thus, OCC complied with the PUCO’s discovery rules by providing “a general description sufficient for identification.”

Contrary to PALMco’s assertions, OCC’s amended deposition notice complies with the requirements of Ohio Adm. Code 4901-1-21(B) and (F). The PUCO should compel PALMco to comply with the Amended Notice and provide individuals to be deposed regarding the terms of the settlement, PALMco’s financial position and financial documents, and written discovery requests, as well as provide the documents requested.

2. PALMco’s objection that the Amended Notice does not seek to depose individuals with relevant knowledge of material, disputed issues is without merit.

PALMco claimed that the “scattershot description of the people OCC wishes to depose is apparently intended to cast as wide a net as possible, without regard to whether any individuals falling under any of these descriptions have relevant knowledge about material, disputed issues.” Once again, PALMco is incorrect.

As discussed above, OCC is questioning the justness and reasonableness of various terms of the Stipulation, including the provision requiring some of the customer refunds and the forfeiture to be contingent on the sale of PALMco's customer contracts. OCC is also questioning whether such contingency is necessary and in the public interest in light of PALMco's reported conduct and recommendations set forth in the Staff Report. OCC also has questions regarding the terms of the settlement, which go to its reasonableness or lack thereof. Thus, the deposition notice is directly relevant to the proceeding and, specifically, to the three-part test in determining whether the settlement should be adopted.

Discovery is to be liberally construed.²⁴ PALMco's objections are unfounded and appear intended to obfuscate and block OCC from conducting discovery relevant to the issues in these proceedings to impede a complete record from being developed. The PUCO should overrule PALMco's objection and compel PALMco to provide individuals who have the knowledge sought in the Amended Notice to be deposed.²⁵

²⁴ See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 83 (2006) ("The text of Ohio Adm. Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.") (citations omitted); *In Re Ohio Edison Co.*, Case No. 03-2144-EL-ATA, Entry (Jan. 7, 2004), 2004 WL 1801323, *2 ("Rule 4901-1-16, O.A.C., states that the purpose of the discovery rules is to facilitate thorough and adequate preparation in Commission proceedings. The rule clearly expresses that a party may seek discovery of any matter relevant to the subject matter of the proceeding. The information need not be admissible to be discoverable, as long as the information appears reasonably calculated to lead to the discovery of admissible information."); *In the Matter of the Complaint of Toledo Premium Yogurt, Inc., DBA Freshens Yogurt, Complainant*, Case No. 91-1528-EL-CSS, Entry (Nov. 19, 1993), 1993 WL 13744539, *1 ("[T]he Commission has traditionally applied liberal discovery and evidentiary standards in the governance of its proceedings.").

²⁵ PALMco also contended that both the timing and content of the Amended Notice suggest that OCC's primary motive behind the depositions "is not to seek relevant or admissible evidence, but to harass and annoy in the hope of gaining settlement leverage." To support this contention, PALMco pointed to two phrases, consisting of six words, that appear in the last sentence of the Amended Notice's first paragraph. Given the relevance of the Amended Notice, as shown in this Motion to Compel, PALMco's argument is baseless.

C. OCC undertook reasonable efforts to resolve the discovery dispute.

As detailed in the attached affidavit, OCC made reasonable efforts to resolve this discovery dispute.²⁶ Once OCC received the letter expressing PALMco's objections, OCC communicated to PALMco's counsel its concerns. OCC offered legal authority to support its view of PALMco's responsibilities under the discovery rules. OCC discussed the issues with PALMco's counsel on multiple occasions. Given the procedural schedule in this case, and that PALMco is not cooperating with OCC to make deponents available, the Motion to Compel is necessary to resolve this discovery dispute.

Reasonable efforts to resolve this discovery dispute were undertaken. Those efforts failed, necessitating this Motion to Compel PALMco to provide deponents with knowledge of its financial position and financial documents, documents produced through discovery, and with knowledge of the terms of the Stipulation. The PUCO should not delay in resolving this dispute.

IV. MOTION FOR CONTINUANCE

OCC does not seek a continuance of the deadline for testimony supporting the Stipulation (September 4, 2019). Instead, OCC seeks a continuance of the deadline for filing testimony opposing the settlement and of the hearing in this case. OCC requests that the PUCO continue the filing of opposing testimony to no sooner than three weeks after the PUCO issues a ruling on OCC's Motion to Compel, with an evidentiary hearing to follow two weeks later. The procedural schedule requested by OCC is consistent with

²⁶ See Exhibit 5 (affidavit).

PUCO practice, will not unduly delay the proceeding, will not prejudice any party, and will further the public interest.

A. The procedural schedule proposed by OCC is consistent with PUCO practice.

It is the PUCO's practice to schedule filing deadlines for testimony opposing settlements to occur after filing deadlines for testimony supporting settlements. This is in recognition of the need for parties opposing the settlement to conduct written discovery and/or depose 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, 2019.²⁷ Parties opposing the settlement were given until August 20, 2019 to file testimony.²⁸ This type of procedural is the norm for cases involving settlements.²⁹

The proposed schedule furthers the PUCO's rules regarding stipulations. 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 signatory parties have the burden of proof regarding the PUCO's three-prong test and that settlements inherently need explanation outside the four corners of the settlement document. In this regard, the signatory parties could have filed testimony with the settlement but did not.

²⁷ Case Nos. 17-38-EL-RDR, et al., Entry (July 16, 2019), ¶13.

²⁸ *Id.*, ¶14.

²⁹ See, e.g., 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.

The PUCO rules also permit parties that do not join the settlement to offer evidence and/or argument in opposition to the settlement.³⁰ 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 requirement that all testimony be filed on the same day interferes with OCC's ability to effectively challenge the settlement. Under the current procedural schedule OCC must file its testimony opposing the settlement without the opportunity for discovery, including depositions, on the proponents' filed testimony. This is not fair or reasonable and would be inconsistent with PUCO practice.

B. The procedural schedule OCC proposes would not prejudice any party.

OCC's proposed procedural schedule would not unduly delay the proceeding or prejudice any party. In fact, OCC will be prejudiced if a continuance of testimony opposing the settlement is not granted. The prejudice will result from the schedule requiring OCC to file testimony opposing the settlement on the same day as testimony supporting the settlement, preventing OCC from conducting discovery on the testimony prior to filing its 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. The PUCO should grant OCC's motion.

³⁰ Ohio Adm. Code 4901-1-30(D).

C. The public interest will be furthered by granting OCC's motion for continuance.

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.³¹ 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. In advance of filing testimony, OCC should have time to conduct depositions on an unknown number of signatory parties' representatives and to produce testimony that is responsive to claims made by them. But as discussed in the Motion to Compel, there has not yet been an opportunity to depose signatory parties' representatives at all. If OCC must file testimony on the same day as the signatory parties without an opportunity for depositions

³¹ See Staff Report (May 10, 2019) at 3.

on testimony explaining and supporting the settlement, it would be denied essential discovery rights.

Given these circumstances, OCC should be afforded time, after the ruling on its Motion to Compel, to conduct discovery, draft testimony, and prepare for hearing. Accordingly, OCC proposes a continuance tied to three weeks after the PUCO issues a ruling on OCC's Motion to Compel, with an evidentiary hearing to follow two weeks later. The procedural schedule requested by OCC is consistent with PUCO practice, will not prejudice any party, and will further the public interest.

V. CONCLUSION

R.C. 4903.082 guarantees that parties have ample discovery rights in PUCO cases. These discovery rights are to be liberally construed. In this case, OCC's Amended Notice seeks to depose individuals, to be chosen by PALMco, who have knowledge regarding its financial position, financial documents, the settlement, and written discovery, which are relevant to OCC's case for consumers. PALMco's arguments against the Amended Notice are without merit.

Granting OCC's Motion to Compel will further the interests of consumers by requiring PALMco to produce information relevant to this case. It is appropriate and fitting that the PUCO, consistent with its rules and the statutes discussed herein, grant OCC's Motion to Compel on an expedited basis and require PALMco to provide corporate representatives to be deposed regarding the terms of the Stipulation, including its financial position and financial documents, and written discovery in a timely manner. Correspondingly, the PUCO should also grant OCC's Motion for a Continuance to afford OCC a brief period to conduct the depositions and file testimony in response.

Respectfully submitted,

Bruce J. Weston (0016973)
Consumers' Counsel

/s/ Terry L. Etter

Terry L. Etter (0067445), Counsel of Record
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964 (Etter direct)
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Terry.etter@occ.ohio.gov
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(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)

*Outside Counsel for the
Office of the Ohio Consumers' Counsel*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion to Compel Depositions, Motion for Continuance, and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel was provided to the persons listed below electronically this 20th day of August 2019.

/s/ Kimberly W. Bojko

Kimberly W. Bojko

*Outside Counsel for the
Office of the Ohio Consumers' Counsel*

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Jennifer Coleman
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Brooklyn, NY 11214
regulatory@indraenergy.com

Attorney Examiners:

Stacie.Cathcart@puco.ohio.gov
Anna.Sanyal@puco.ohio.gov

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into PALMco Power)	Case No. 19-0957-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.)	

**NOTICE TO TAKE DEPOSITIONS
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In accordance with Ohio Adm. Code Section 4901-1-21(B), please take notice that the Office of the Ohio Consumers' Counsel ("OCC") will take the deposition upon oral examination of any and all witnesses of PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy ("PALMco") in this case.

The deposition will be conducted at OCC's offices, 65 East State Street, 7th Floor, Columbus, Ohio, 43215, beginning at 10:00 a.m. on May 30, 2019, or at another time and date agreed upon by OCC and PALMco, and will continue from day to day, except for holidays and weekends, until completed. The deponent(s) will appear at the designated time and date with all requested documents (identified below) and will remain present until deposed.

The deposition will be taken of the aforementioned deponent(s) on relevant topics within the scope of this proceeding, including but not limited to, each deponent's knowledge and expertise with the subject matter of these proceedings. The deposition

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice to Take Deposition and Requests for Production of Documents was served on the persons stated below via electronic transmission this 20th day of May 2019.

/s/ Terry L. Etter
Terry L. Etter
Assistant Consumers' Counsel

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5/20/2019 4:46:20 PM

in

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

Summary: Notice of Deposition Notice to Take Depositions and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into PALMco Power)	Case No. 19-0957-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.)	

**AMENDED NOTICE TO TAKE DEPOSITIONS
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Public Utilities Commission of Ohio ("PUCO"), acting on over 300 customer complaints in less than a year, has investigated the marketing practices of PALMco Power OH, LLC ("PALMco") and 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 a manner that is fair, honest, and in compliance with Ohio laws and rules." ¹ PALMco's reported misconduct against Ohioans shocks the conscience.

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

To protect customers, in accordance with Ohio Adm. Code Section 4901-1-21(B), please take notice that the Office of the Ohio Consumers' Counsel ("OCC") will take the deposition upon oral examination of the following individuals:

1. Person(s) employed by PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy ("PALMco") with knowledge and expertise regarding:
 - a. PALMco's current financial condition.
 - b. The availability of funds to PALMco that could be used by PALMco to provide restitution to PALMco customers.
 - c. The availability of funds to PALMco that could be used by PALMco to pay forfeitures to the State of Ohio.
 - d. PALMco's keeping of corporate records, the manner in which PALMco's funds are kept, and/or the use of PALMco's corporate property.
 - e. Service contracts, agreements, work orders, and/or other documents governing the transfer of funds, goods, and/or services between PALMco and its parent and subsidiary companies.
 - f. Collateral obligations and/or agreements PALMco has with respect to each Ohio gas and electric distribution utility pertaining to PALMco's supply of electric and gas competitive retail services in Ohio.
 - g. The Joint Stipulation and Recommendation filed at the PUCO on July 31, 2019 and the negotiations leading up to the Joint Stipulation and Recommendation.
2. All person(s) who will be called by PALMco to present testimony, including direct, rebuttal, surrebuttal, and any other form of testimony filed, or to be filed, in these proceedings.
3. All person(s) responsible for answering OCC's interrogatories, responding to requests for production of documents (including responses that state that no documents are responsive to a request to produce), and/or responding to requests for admissions regarding disconnection served in these proceedings upon PALMco.

4. All person(s) responsible for preparing Exhibits C-3 and C-5 to PALMco's Electric Renewal Certificate Application, filed before the Public Utilities Commission of Ohio in Case No. 10-139-EL-CRS on January 18, 2018.
5. All person(s) responsible for preparing Exhibits C-3 and C-5 to PALMco's Natural Gas Renewal Certificate Application, filed before the Public Utilities Commission of Ohio in Case No. 10-138-GA-CRS on January 16, 2018.

The deposition will be conducted at OCC's offices, 65 East State Street, 7th Floor, Columbus, Ohio, 43215, starting on August 13, 2019 at 10:00 a.m., or at another time and date agreed upon by OCC and PALMco, and will continue from day to day, except for holidays and weekends, until completed. The deponent(s) will appear at the designated time and date with all requested documents (identified below) and will remain present until deposed. Deponents will be deposed one after another.

The deposition will be taken of the aforementioned deponent(s) on relevant topics within the scope of this proceeding, including but not limited to, each deponent's knowledge and expertise with the subject matter of these proceedings. The deposition will be taken upon oral examination (as upon cross-examination) before an officer authorized by law to take depositions.

Pursuant to Ohio Adm. Code Rules 4901-1-21(E) and 4901-1-20, OCC requests that each deponent produce, at least one day prior to the taking of his/her deposition, the following documents:

1. A copy of each deponent's testimony filed in this case;
2. A copy of all workpapers each deponent used in developing his/her testimony;
3. A copy of all documents each deponent used in answering OCC discovery and/or PUCO Staff data requests;

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice to Take Deposition and Requests for Production of Documents was served on the persons stated below via electronic transmission this 2nd day of August 2019.

/s/ Terry L. Etter
Terry L. Etter
Assistant Consumers' Counsel

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Jennifer Coleman
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in

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

Summary: Notice of Deposition Amended Notice to Take Depositions and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.



MARK A. WHITT
Direct: 614.224.3911
whitt@whitt-sturtevant.com

VIA E-MAIL

August 9, 2019

Terry L. Etter, Esq.
Assistant Consumers' Counsel
Office of Ohio Consumers' Counsel
65 East State St., 7th Floor
Columbus, OH 43215

Re: *In Re: Palmco Power Ohio, LLC*, PUCO Case No. 19-957-GE-COI

Dear Terry:

I write in response to OCC's Amended Notice to Take Depositions served on the afternoon of Friday, August 2, 2019. PALMco objects to the Notice, for two reasons.

First, the Notice does not sufficiently describe the individuals OCC wishes to depose. Under Rule 4901-1-21(B), a deposition notice "shall state ... the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient for identification." The Notice does not include the "name" of specific individuals nor "a general description sufficient for identification of" specific individuals. Instead, the Notice directs PALMco to identify and produce every individual who knows anything about any of the five topics (and seven sub-topics) listed in the Notice. The rules do not permit this sort of fishing expedition. To the extent OCC wishes to depose witnesses about specific topics, OCC must serve a proper notice under Rule 4901-1-21(F). It is then up to PALMco to "choose one or more of" its officers or employees to testify on the company's behalf. The Notice does not satisfy the requirements of Rule 4901-21(B) *or* (F).

Second, both the timing and content of the Notice suggest that OCC's primary motive is not to seek relevant or admissible evidence, but to harass and annoy in the hope of gaining settlement leverage. This much is clear from the first page of the Notice, which gratuitously charges PALMco with "misconduct against Ohioans" that "shocks the conscience." The scattershot description of the people OCC wishes to depose is apparently intended to cast as wide a net as possible, without regard to whether any individuals falling under any of these descriptions have relevant knowledge about material, disputed issues. The rules prohibit discovery served for the purpose of "annoyance, embarrassment, oppression, or undue burden or expense." O.A.C. 4901-1-24(A). The August 2 Notice serves these purposes and no other.

In short, PALMco does not intend to comply with the August 2, 2019 Notice. Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Whitt". The signature is written in a cursive, flowing style.

Mark A. Whitt

cc: Counsel of Record



Office of the Ohio Consumers' Counsel

August 14, 2019

VIA ELECTRONIC MAIL

Mark A. Whitt, Esq.
Whitt Sturtevant LLP
The KeyBank Building
88 East Broad Street, Ste. 1590
Columbus, Ohio 43215

Re: In re *PALMco Power Ohio, LLC*, PUCO Case No. 19-957-GE-COI

Dear Mr. Whitt:

Thank you for your letter of August 9, 2019. There, PALMco Power Ohio ("PALMco") objected to the Ohio Consumers' Counsel's (OCC) Amended Notice to Take Depositions, filed on August 2, 2019. OCC's deposition is to question PALMco personnel about, among other things, PALMco's abuses of Ohioans in its marketing of energy services as documented by the PUCO Staff.

Respectfully, PALMco's objections to OCC's depositions lack merit and deviate from the Ohio authority under statute and rules that govern depositions in PUCO proceedings. PALMco's objections appear intended to block OCC from conducting discovery relevant to the serious consumer issues in this proceeding, and to impede the development of a complete record for the PUCO to issue its judgment.

The PUCO has today issued a procedural entry setting deadlines for testimony and the evidentiary hearing, so the timeliness of the depositions takes on added importance for the consumers that OCC seeks to protect. We ask that PALMco withdraw its objections. We seek to begin taking depositions no later than August 20, 2019, in an order that should begin with the subjects of PALMco's financial resources to pay refunds and forfeitures.

Contrary to PALMco's assertions, OCC's deposition notice complies with the requirements of Ohio Adm. Code 4901-1-21(B) and (F). With respect to deponents identified in paragraph I of the deposition notice (including subparts (a) through (g)), this is compliant with Ohio Adm. Code 4901-1-21(F) for deposing a corporate designee(s) of PALMco. The matters to be covered in the deposition are narrowly tailored and specified with reasonable particularity. In fact, there are only seven topics identified. Ohio Adm. Code 4901-1-21(F) is akin to Ohio Civil Rule 30(B)(5) and is precisely the procedure OCC followed. The burden now shifts to PALMco to designate the appropriate representative(s) to testify to those matters. If you have questions or need clarification regarding certain topics, we are willing to discuss clarifications with you. But we will not forego deposing the corporate designee(s).

Mark A. Whitt, Esq.
August 14, 2019
Page 2 of 2

With respect to deponents identified in paragraphs 2, 3, 4, and 5, under Ohio Adm. Code 4901-1-21(B), OCC provided "a general description sufficient for identification." This is because OCC does not know the names and addresses of each individual referenced. OCC has no further obligation in the notice beyond that required by the rule.

Finally, with respect to the individuals responsible for preparing Exhibits C-3 and C-5 filed with PALMco's competitive retail electric and natural gas service certificate applications, OCC has no way of knowing the individuals responsible for preparing those Exhibits. Thus, OCC complied with the PUCO's discovery rules by providing "a general description sufficient for identification."

We expect that there may be some overlap in the above categories (i.e., your testifying witnesses may also have been involved in answering discovery responses). It is not our intention to now depose the same individual multiple times (unless needed later in compliance with rules).

The deposition notice is directly relevant to the proceeding and to the consumer protection from PALMco that the proceeding is about. And, specifically, the notice is relevant to the three-part test in determining whether the Stipulation in this proceeding should be adopted. And, as you are well aware, discovery in this proceeding, like under the Ohio Civil Rules, is to be liberally construed.

For consumer protection and given that time is of the essence for consumers and that PALMco is interposing delay for our consumer protection, we will be filing a motion to compel as soon as possible. This letter and our other interactions with PALMco are part of our effort to resolve the matter between the parties. We look forward to hearing from you and anticipate the rescheduling of the properly noticed depositions so that we may perform our consumer protection services for Ohioans.

Sincerely,

Terry L. Etter

Terry L. Etter

cc: Kimberly W. Bojko, Esq.
Amy Botschner O'Brien, Esq.
Rebekah J. Glover, Esq.

**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.)	

AFFIDAVIT OF KIMBERLY W. BOJKO

I, Kimberly W. Bojko, outside counsel for the Office of the Ohio Consumers' Counsel ("OCC") in the above-captioned case, being first duly sworn, depose and state that, based on knowledge and information, the following efforts have been made to resolve the differences with PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy ("PALMco") as to the Amended Notice to Take Depositions and Request for Production of Documents ("Amended Notice") served by OCC on August 2, 2019:

1. On May 20, 2019, OCC served a Notice to Take Depositions and Request for Production of Documents on PALMco, as OCC is permitted to do by R.C. 4903.082 and Ohio Adm. Code 4901-1-16, et al.
2. OCC served the Amended Notice on August 2, 2019.
3. On August 9, 2019, OCC received a letter, by electronic mail, from PALMco's counsel, Mark Whitt. Mr. Whitt raised objections to the Amended Notice and stated that PALMco would not comply with the Amended Notice.

4. On August 9, 12, and 15, 2019, I corresponded with PALMco's counsel regarding the Amended Notice and pending dispute. Through those correspondences, PALMco's counsel stated his intent to refuse to comply with the Amended Notice.

5. On August 14, 2019, OCC sent a letter to Mr. Whitt responding to the objections raised in his August 9, 2019 letter and requesting that PALMco comply with the Amended Notice.

6. On August 16 and 19, 2019, I again discussed PALMco's response to the Amended Notice with Mr. Whitt. I explained to PALMco's counsel that the deposition was necessary in order to gather additional information regarding the terms and operation of the Stipulation. I also explained that these issues go to the heart of whether the settlement is just and reasonable and in the public interest under the PUCO's three-part test. I further explained that time is of the essence in scheduling the noticed depositions as the PUCO issued a procedural schedule wherein testimony is due in less than three weeks.

7. While PALMco indicated that it will provide deponents regarding witness testimony that is filed, PALMco would not commit to provide deponents who have knowledge of its financial position and financial documents, a deponent(s) with knowledge of the specific settlement terms, or persons responsible for answering OCC's written discovery at this time, and certainly could not by the noticed August 20, 2019 date. Given PALMco's willingness to provide individuals who file witness testimony for depositions in the future, OCC is not moving to compel that portion of its Amended Notice. OCC does, however, move to compel the depositions of corporate designee(s) who have knowledge of the matters specified with reasonable particularity in paragraph

1, subparts (a) through (f), paragraph 4, and paragraph 5 of the Amended Notice, including PALMco's finances and financial documents, corporate designee(s) who have knowledge of the Stipulation and its terms (paragraph 1(g)), and persons responsible for answering OCC's written discovery (paragraph 3). OCC also moves to compel the production of documents identified in the Amended Notice. To be clear, the Motion to Compel is made with respect to the entire Amended Notice (including the documents asked to be produced), except for deponents identified in paragraph 2, which counsel for PALMco has agreed to provide.

8. Reasonable resolution of this discovery dispute may not be achieved without the PUCO's intervention. OCC therefore files the Motion to Compel.

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

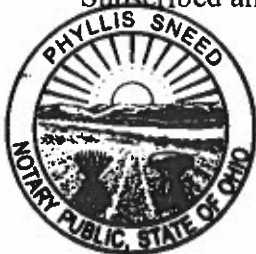
The undersigned, being of lawful age and duly sworn on oath, hereby certifies, deposes and state the following:

I have caused to be prepared the attached written affidavit for OCC in the above referenced docket. This affidavit is true and correct to the best of my knowledge, information and belief.

Further affiant sayeth naught.


Kimberly W. Bojko, Affiant

Subscribed and sworn to before me this 20th day of August 2019.



PHYLLIS SNEED
NOTARY PUBLIC
STATE OF OHIO
My Commission Expires
August 23, 2023


Notary Public

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in

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

Summary: Motion To Compel Depositions, Motion for Continuance, and Request for Expedited Ruling by The Office of the Ohio Consumers' Counsel electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Consumers' Counsel