

## 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 September 3, 2019

{¶ 1} In this Entry, the attorney examiner finds that: the motion to intervene filed by Ohio Consumers' Counsel should be granted; the interlocutory appeal filed by Ohio Consumers' Counsel should not be certified to the Commission; the motion to compel discovery filed by Ohio Consumers' Counsel should be granted, in part, and denied, in part; and the motion for a continuance should be denied.

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} 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 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.

{¶ 5} 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 its 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, setting the matter for hearing on May 24, 2019.

{¶ 6} On April 24, 2019, the Ohio Consumers' Counsel (OCC) filed a motion to intervene in this case.

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

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

{¶ 9} On June 28, 2019, the attorney examiner granted a joint motion filed by Staff and PALMco and extended the testimony filing deadline to July 30, 2019, and rescheduled the hearing to August 8, 2019.

{¶ 10} On July 30, 2019, the attorney examiner granted a joint motion filed by Staff, PALMco, and OCC and suspended the procedural schedule.

{¶ 11} 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. Accordingly, on August 14, 2019, the attorney examiner rescheduled the hearing for September 18, 2019, and directed the parties to file testimony in support or in opposition of the Stipulation filed by PALMco and Staff on or before September 4, 2019.

{¶ 12} On August 19, 2019, OCC filed an interlocutory appeal, request for certification and application for review of the August 14, 2019 Entry.

*1. Intervention should be granted.*

{¶ 13} OCC filed a timely motion to intervene in this case on April 24, 2019. No party filed a memorandum contra the motion to intervene.

{¶ 14} The attorney examiner finds that the unopposed motion to intervene is reasonable and should be granted, as OCC has satisfied the Commission's criteria for intervention, pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11.

***2. The interlocutory appeal should not be certified to the Commission.***

{¶ 15} In its interlocutory appeal, OCC seeks the Commission to overturn the August 14, 2019 Entry to the extent that it requires all parties to file testimony in support or in opposition to the Stipulation on the same day. OCC contends that testimony in opposition to the Stipulation should be filed two weeks after testimony in support of the Stipulation. No memorandum contra the interlocutory appeal was filed by any party.

{¶ 16} In support of its interlocutory appeal, OCC claims that parties opposing the settlement are entitled to file testimony in response to the proponents' testimony that explains and supports the settlement. OCC argues that an immediate determination is necessary to prevent undue prejudice to OCC. OCC alleges, without support, that the signatory parties bear the burden of proof in this proceeding. Thus, OCC claims the filing date of its testimony should be after the signatory parties file their testimony in order to allow OCC time to conduct discovery and prepare expert testimony in light of the testimony supporting the settlement.

{¶ 17} OCC also contends that the ruling represents a new or novel question of law or policy and a departure from Commission precedent. OCC contends that, traditionally, parties opposing a settlement are given more time to prepare testimony than parties supporting a settlement, in recognition of the need for parties opposing a settlement to conduct written discovery and depose witnesses. As an example, OCC points to a recent case involving Ohio Power's distribution investment rider where the deadline for filing testimony for parties opposing the settlement was given more than a month to file testimony after the parties in support of the settlement. *In re Ohio Power Co.*, Case Nos. 17-38-EL-RDR, et al., Entry (Jul. 16, 2019) (*Ohio Power DIR Case*) at ¶13. Thus, OCC contends that the Commission should modify the procedural schedule in this proceeding to allow for adequate preparation in this significant case. OCC expects to provide the Commission with a different perspective of the settlement than the signatory parties but, in order to do that,

OCC testimony should be responsive to the arguments made by the parties supporting the settlement.

{¶ 18} Ohio Adm. Code 4901-1-15, sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. OCC does not allege that the ruling which is the subject of the interlocutory appeal is one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeal should only be certified to the Commission if it meets the requirements of Ohio Adm.Code 4901-1-15(B), which specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements need to be met. In this case, the attorney examiner finds that neither provision was satisfied.

{¶ 19} With respect to the first provision, whether the interlocutory appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent, the attorney examiner finds that the interlocutory appeal does not present a new or novel question of law or policy. The Commission and its attorney examiners have had years of experience managing dockets and establishing procedural schedules. Therefore, the appeal does not present a new or novel question of law or policy. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO Entry (Sept. 30, 2008) at 3; *In re Columbus S. Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2.

{¶ 20} Moreover, the attorney examiner notes that this proceeding was initiated by the Commission, under R.C. 4928.16 and R.C. 4929.24. These two statutes establish the Commission's jurisdiction under R.C. 4905.26 over CRES and CRNGS providers, respectively, for any service subject to certification by the Commission. Accordingly, the Commission should follow precedent under 4905.26 for the purposes of this proceeding. In complaint cases brought under R.C. 4905.26, simultaneous filing of pre-filed testimony is the norm, not the exception. *Republic Steel v. Ohio Power Co.*, Case No. 17-2115-EL-CSS, Entry (Apr. 30, 2018) at ¶¶6, 10; *Schumann v. The Cleveland Elec. Illum. Co.*, Case No. 17-473-EL-CSS, Entry, (Apr. 25, 2017) at ¶¶6, 9, Entry (Jun. 15, 2017) at ¶¶8, 10; *PCC Airfoils v. The Cleveland Elec. Illum. Co.*, Case No. 16-2213-EL-CSS, Entry (Mar. 3, 2017) at ¶¶6, 10.

{¶ 21} The attorney examiner notes that this case is different from a rate case or any other tariff proceeding, where the utility files an application for an increase in rates or an application to amend its tariffs or adjust a rider, and the utility bears the burden of proof in the proceeding. In those cases, it is appropriate, in most circumstances, to require the utility, who filed an application to initiate the proceeding and bears the burden of proof, to submit testimony in support of a stipulation before the filing of testimony in opposition to the stipulation. Thus, OCC's reliance upon the *Ohio Power DIR Case* is misplaced. AEP Ohio may not have filed an application for the annual review of its distribution investment recovery rider (Rider DIR) in that case, but AEP Ohio sought approval for its Rider DIR, which included provisions for the annual review of the rider. *Ohio Power DIR Case*, Entry (Jul. 16, 2019) at ¶3. However, PALMco did not file an application to initiate this proceeding; PALMco is not the complaining party in this case. The fact that the hearing will address the Stipulation rather than the allegations in the Staff Report is of little weight; it is still a stipulation filed in a case brought under R.C. 4905.26, and, as noted above, there is ample precedent for the simultaneous filing of testimony in cases brought under R.C. 4905.26. If OCC seeks to respond to the testimony offered in support of the Stipulation, it may request to file rebuttal testimony. Therefore, because the August 14, 2019 Entry requiring simultaneous filing of testimony regarding the Stipulation is consistent with Commission

precedent, the attorney examiner finds that the interlocutory appeal is not taken from a ruling which represents a departure from past precedent.

{¶ 22} The attorney examiner also finds that an immediate determination by the Commission is not needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling. Furthermore, OCC has demonstrated no undue prejudice resulting from the August 14, 2019 Entry.

{¶ 23} OCC claims that it is unduly prejudiced by the August 14, 2019 Entry because it lacks sufficient time to perform discovery in this proceeding. However, the record demonstrates that OCC has had ample opportunity to seek discovery from PALMco in this proceeding. The Commission initiated this proceeding on April 17, 2019, and set this matter for hearing on an expedited basis. OCC moved to intervene on April 24, 2019. On May 3, 2019, the attorney examiner extended the procedural schedule, and, due to the expedited nature of the hearing, shortened the response time for discovery to seven calendar days. The Staff Report was filed on May 10, 2019. The hearing was then rescheduled three additional times, ultimately to September 18, 2019. Therefore, by the time the hearing commences on September 18, 2019, OCC will have had over 21 weeks to conduct discovery with a seven-day response time required for over 19 weeks of that period. The attorney examiner finds that this period represents an ample opportunity for discovery regarding Staff allegations against PALMco.

{¶ 24} OCC has also had an ample opportunity for discovery regarding the Stipulation. The Stipulation was filed on July 31, 2019. OCC will have had six weeks to conduct discovery before the hearing commences on September 18, 2019. The seven-day discovery response time has been, and will continue to be, in effect for this six-week period. Moreover, OCC will have two full weeks between the filing of testimony supporting the Stipulation and the hearing to depose witnesses from PALMco who file testimony in support of the Stipulation.

{¶ 25} Further, the attorney examiner finds that there has been more than sufficient time to prepare for hearing in this matter. As stated above, the Commission initiated this proceeding on April 17, 2019, setting the matter for hearing on May 24, 2019. Staff filed a letter in the docket on April 17, 2019, outlining the allegations against PALMco. On May 10, 2019, Staff filed its Staff Report in this proceeding, further detailing the results of its investigation. Four extensions of the hearing date have been granted. Since there has been an ample opportunity for discovery and to prepare for the hearing, the attorney examiner finds that OCC has not demonstrated any prejudice resulting from the August 14, 2019 Entry.

*3. The motion to compel discovery should be granted, in part, and denied, in part.*

{¶ 26} On August 2, 2019, OCC filed an amended notice to take depositions and requests for production of documents (Amended Notice), seeking depositions of an unknown number of individuals, to be designated by PALMco. OCC subsequently filed a motion to compel discovery on August 20, 2019. In support of its motion, OCC claims that it seeks information and documents regarding PALMco's financial position which is relevant and reasonably calculated to lead to the discovery of admissible evidence. OCC also claims that PALMco's objections are without merit. OCC notes that it seeks deposition to be designated by PALMco as permitted under Ohio Adm.Code 4901-1-21(F). OCC disputes PALMco's characterization of the Amended Notice as a "fishing expedition," claiming that discovery is to be liberally construed.

{¶ 27} In its memorandum contra, PALMco contends that OCC has had time to prepare and serve discovery since the beginning of the proceeding. PALMco argues that it has been clear since the proceeding was opened that the Commission intended for a swift resolution to the case. PALMco notes that the parties have spent significant time and effort towards reaching a settlement and argues that OCC cannot now seek to delay the proceeding by pursuant "retributive discovery" not relevant to the Stipulation.



{¶ 28} The attorney examiner finds that the motion to compel discovery should be granted, in part, and denied, in part. In its Amended Notice, OCC seeks to depose all witnesses to be called by PALMco to present testimony in this proceeding. It is not unusual for parties in Commission proceedings to seek to depose the witnesses of an opposing party who will present testimony at the hearing. OCC's motion to compel for these witnesses is reasonable and should be granted.

{¶ 29} Likewise, OCC seeks to depose all person(s) responsible for answering OCC's written discovery served upon PALMco in this proceeding. OCC appears to qualify this request by limiting the request to discovery "*regarding disconnection*" (Motion to Compel, Ex. 2 at 2). This qualification is confusing as disconnection does not appear to be a relevant issue in this proceeding and should be ignored. The attorney examiner finds that OCC's request to depose all person(s) responsible for answering OCC's written discovery served upon PALMco is reasonable and should be granted. PALMco will make available for deposition, prior to the hearing, any person who has signed an answer to an interrogatory under Ohio Adm.Code 4901-1-19(A), any person who was responsible for responding to a request for production of documents under Ohio Adm.Code 4901-1-18, and any person or was responsible for responding to a request for admission under Ohio Adm.Code 4901-1-22.

{¶ 30} The attorney examiner finds that the motion to compel should be denied for the remaining individuals identified by OCC in its Amended Notice. The attorney examiner notes that the Amended Notice properly seeks individuals to be designated by PALMco pursuant to Ohio Adm.Code 4901-1-21. The attorney examiner also notes that the information and documents sought through the Amended Notice are reasonably calculated to lead to the discovery of admissible evidence. However, the attorney examiner finds that the request for depositions for these individuals is overly broad, oppressive and unduly burdensome. Much of the information and documents sought in the Amended Notice could be, and should have been, obtained through less burdensome means of discovery, such as

interrogatories, requests for production of documents, and requests for admission. As noted above, OCC has had the opportunity to seek discovery in this proceeding since April 24, 2019. Instead, OCC seeks to burden PALMco with numerous depositions on a broad array of topics in the limited time remaining before the hearing, with the potential for additional burdensome and oppressive discovery requests if the motion to compel is granted. The attorney examiner notes that, notwithstanding this ruling, OCC still has an opportunity to seek additional written discovery prior to the hearing as the seven-day discovery response time for written discovery remains in effect, and after obtaining relevant information and documents, OCC may file a more narrowly-tailored notice of deposition prior to the hearing.

*4. The motion for a continuance should be denied.*

{¶ 31} OCC included a motion for a continuance with its motion to compel on August 20, 2019. In the motion for a continuance, OCC proposes a new procedural schedule consistent with its interlocutory appeal, seeking an additional five weeks of time, from the ruling on the motion to compel, to prepare for the hearing. OCC generally repeats the arguments made in support of its interlocutory appeal, claiming that a continuance will not prejudice any other the party, that OCC's testimony opposing the Stipulation should be responsive to the testimony in support of the Stipulation, and that OCC should be granted more time to conduct discovery prior to filing its testimony.

{¶ 32} The attorney examiner finds that OCC's motion for a continuance seeks to unduly delay this proceeding and should be denied. The Commission intended the hearing in this case to take place on an expedited basis, and the hearing has already been rescheduled four times. OCC has had more than sufficient time to seek discovery and prepare for the hearing. As noted above, by the time the hearing commences on September 18, 2019, OCC will have had over 21 weeks to conduct discovery, including a shortened, seven-day discovery response period for over 19 weeks of that period. OCC has been in possession of the Staff Report, which outlines Staff's case against PALMco, since May 10, 2019, over four months before the scheduled hearing. With respect to the Stipulation, OCC

will have had six weeks to prepare for the hearing after the filing of the Stipulation, including two weeks to depose any PALMco witnesses testifying in support of the Stipulation. Further delays in the hearing will simply delay a resolution to this case and delay any potential restitution to customers. The hearing will proceed as scheduled.

{¶ 33} It is, therefore,

{¶ 34} ORDERED, That OCC's motion to intervene be granted. It is, further,

{¶ 35} ORDERED, That OCC's request for certification of its interlocutory appeal be denied. It is, further,

{¶ 36} ORDERED, That OCC's motion to compel be granted, in part and denied, in part. It is, further,

{¶ 37} ORDERED, That OCC's motion for a continuance be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Gregory A. Price

By: Gregory A. Price  
Attorney Examiner

MJA/hac

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**9/3/2019 2:22:12 PM**

**in**

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

Summary: Attorney Examiner Entry granting motion to intervene, denying request for certification of interlocutory appeal, granting in part and denying in part motion to compel, and denying motion for continuance electronically filed by Heather A Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio