OCC EXHIBIT NO._____

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

PUBLIC VERSION

DIRECT TESTIMONY
OF
KERRY J. ADKINS
IN OPPOSITION TO THE SETTLEMENT

On Behalf of
The Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215

September 4, 2019

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. PURPOSE/BACKGROUND.....3

III. ANALYSIS AND RECOMMENDATIONS 10

IV. SUMMARY AND CONCLUSION 31

ATTACHMENTS:

Attachment KJA-1
Attachment KJA-2
Attachment KJA-3

I. INTRODUCTION

Q1. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND POSITION.

A1. My name is Kerry J. Adkins. My business address is 65 East State Street, 7th Floor, Columbus, Ohio 43215. I am employed by the Office of the Ohio Consumers' Counsel ("OCC") as a Senior Regulatory Analyst.

Q2. PLEASE SUMMARIZE YOUR EDUCATION AND PROFESSIONAL EXPERIENCE.

A2. I earned a Bachelor of Arts degree in History with a pre-law option from Ohio Northern University in 1983. In 1988, I earned a Master of Public Administration degree with specializations in Regulatory Policy and Fiscal Administration from The Ohio State University. In addition, I have attended various utility regulatory seminars and training programs sponsored by the Public Utilities Commission of Ohio ("PUCO") and OCC.

My professional experience in the utility regulation field began when I was hired by the PUCO in August 1989 as a Researcher II in the Nuclear Division of what was then the Consumer Services Department. In that capacity, I monitored the financial and operating performance of utility-owned and operated nuclear power plants and made policy and recommendations regarding nuclear power issues in rate proceedings. In addition, I served as staff to the Utility Radiological Safety

Board of Ohio ("URSB") and liaison to the URSB's Citizens Advisory Council. Around 1995, my career transitioned towards deregulation and the development of competitive options for formerly utility-supplied services. I was a PUCO Staff representative to various committees and working groups that oversaw the development of customer choice ("Choice") pilot programs, and I analyzed and made recommendations concerning the pilot programs as they progressed. Later, as the pilot programs matured into legislatively-sponsored restructuring programs, I worked with the General Assembly's Legislative Service Commission on draft bill language concerning the consumer protection provisions in Substitute Senate Bill 3 (122nd General Assembly) that restructured the electric industry in Ohio and Substitute House Bill 9 (124th General Assembly), which restructured the natural gas industry. After the restructuring laws were enacted, I managed PUCO Staff teams that were responsible for drafting and enforcing the PUCO's rules governing certification of competitive energy suppliers and the competitive suppliers' interactions with Ohio consumers. In 2008, I transferred to what was then the PUCO's Utilities Department (now the Rates and Analysis Department) where I supervised Staff teams responsible for analyzing and making recommendations regarding utility rate filings, primarily related to the natural gas industry. I retired from the PUCO in September 2018. I began my current employment at OCC in November 2018. At OCC, I review and analyze utility filings at the PUCO and other regulatory agencies and make recommendations to protect the interests of residential utility consumers.

Q3. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY OR TESTIFIED BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO?

A3. Yes. The cases in which I have submitted testimony or have testified before the PUCO can be found in Attachment KJA-1.

II. PURPOSE/BACKGROUND

Q4. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A4. The purpose of my testimony is to recommend, for consumer protection, that the PUCO reject the settlement agreement between PALMco (an energy marketer) and the PUCO Staff that was filed in this case on July 31, 2019 ("Settlement").

The Settlement does not provide adequate protection for residential consumers from PALMco's misleading and deceptive marketing practices. In addition, the Settlement could allow PALMco to profit from its unlawful actions, which would be inappropriate. The Settlement is unjust and unreasonable to consumers. And the Settlement is inconsistent with the PUCO's standard for approving settlements. The PUCO should reject or modify the Settlement and adopt OCC's recommendations.

Q5. CAN YOU PROVIDE A BRIEF DESCRIPTION OF THE ISSUES IN THIS CASE THAT LED TO THE SETTLEMENT?

A5. Yes. In a letter dated April 16, 2019 (attached as Exhibit KJA-2), the PUCO Staff requested that the PUCO Commissioners initiate an investigation into PALMco's electric and natural gas marketing practices. The Staff based its recommendation for an investigation on the significant volume of consumer calls (numbering 486) to the PUCO's call center involving issues with PALMco. Those calls included 373 calls to the PUCO's call center involving customer complaints alleging inordinately high electric and/or gas bills and misleading and deceptive marketing practices by PALMco. On page one of the PUCO Staff's letter, the Staff stated that it "discovered PALMco's unfair, misleading, deceptive and unconscionable marketing, solicitation, and sales acts and practices when PALMco committed to provide customers with 'competitive' and 'the best' rates, when in reality, PALMco charged customers quadruple the price to compare." In the letter, the PUCO Staff recommended, due to "the egregious nature of PALMco's acts and practices," that the PUCO should consider suspending or rescinding PALMco's certificates.

In light of the Staff's findings, on April 17, 2019, the PUCO issued an Entry that, among other things, directed PALMco to "show cause why its certification as an electric Marketer and its certification as a natural gas Marketer should not be

suspended, rescinded, or conditionally rescinded."[1] On May 10, 2019, the PUCO Staff filed a formal report (attached as Exhibit KJA-3) detailing the results of its investigation of the customer complaints noted in its April 16, 2019 letter. On April 24, 2019, OCC filed a motion to suspend PALMco's certificate.

The PUCO Staff reported an alarming 486 customer contacts to its call center involving PALMco during a six-month period (December 1, 2018 and April 15, 2019).[2] Staff noted that 373 of these contacts (77%) involved allegations of inordinately high rates, misleading and deceptive practices, enrollment disputes, and contract inquiries. Staff concluded that PALMco engaged in a pattern of probable non-compliance with Ohio Adm. Code 4901:1-21 and Ohio Adm. Code 4901:1-29,[3] provisions in the PUCO's rules that set forth the minimum requirements for electricity and natural gas marketing to Ohio consumers.

The PUCO Staff found that the most common misleading and deceptive tactic perpetrated by PALMco was enrolling electric and natural gas customers by offering customers an introductory ("teaser") rate lower than the local utility's rate for a short period of time with the promise of "low," "competitive," or "best possible" rates in future months. Staff reported that the actual rates that PALMco

[1] PUCO Entry (April 17, 2019) at 4.

[2] Staff Report at 3.

[3] *Id.*

charged customers after the teaser period ended were as much as four to six times higher than the rates charged by the customers' incumbent electric and natural gas utilities.[4] PALMco's outrageously high rates were inconsistent with any commonly understood definition of the words it used for selling to customers: "low," "competitive," or "best possible" rates. The PUCO Staff also stated that, at the time PALMco enrolled customers into a teaser price, it knew the high variable rate it would eventually charge, but did not disclose that rate to the customers during marketing or enrollment.[5]

The Staff also noted other rules violations by PALMco, including failure to respond to PUCO record requests and failure to provide proper documentation to customers upon enrollment.[6]

Based on its findings, the PUCO Staff recommended that the PUCO: (1) suspend, rescind, or conditionally rescind PALMco's electric and natural gas Marketer certifications; (2) order PALMco to pay a forfeiture of $1.4 million to the state; (3) order PALMco to make restitution to customers harmed during the period of December 1, 2018 to April 15, 2019, equal to the difference between the customers' applicable local utility rates and the rates PALMco actually charged to

[4] See Staff Letter at 1.

[5] Staff Report at 9.

[6] *See Id*. at 9-12.

customers; and (4) prohibit PALMco from transferring customer contracts to another entity.[7] In addition, the PUCO Staff reasonably concluded that the number and egregious nature of the violations demonstrate that PALMco is unable to maintain the required management oversight that is necessary for marketer certification.[8]

On July 31, 2019, the PUCO Staff and PALMco filed a Settlement, purportedly to "resolve all issues identified by the Staff in its Staff Report of Investigation filed in this proceeding on May 10, 2019."[9]

Q6. CAN YOU PROVIDE AN OVERVIEW OF THE MORE NOTABLE PROVISIONS INCLUDED IN THE SETTLEMENT?

A6. Yes. The Settlement provides that PALMco and the PUCO Staff agree that PALMco has made restitution to all customers who enrolled between December 1, 2018 and April 15, 2019 that were charged a variable rate and all customers who made informal complaints to the PUCO Staff through July 26, 2019. It also provides that PALMco will cease enrolling new residential or small commercial customers for the remaining terms of its electric and natural gas marketing certificates and that PALMco will not seek to renew its electric and natural gas

[7] *Id.* at 17.

[8] *Id.* at 18-20.

[9] Settlement at 1-2.

1 marketing certificates. The Settlement provides that PALMco will endeavor in
2 good faith to sell its customer contracts to another certified marketer and use the
3 proceeds from the sale to make restitution to customers enrolled between October
4 1, 2018 and November 30, 2018 who have not already been compensated up to an
5 estimated $800,000. Any proceeds above the initial $800,000 will be split fifty-
6 fifty between PALMco and payment of a civil forfeiture up to $750,000. If
7 PALMco is unable to sell its customer contracts prior to the end of its marketing
8 certificates, then its customers will default to their incumbent utility for electric or
9 natural gas service. Finally, the Settlement provides that PALMco will not sell or
10 transfer any customer contracts to any of its current owners, officers, or partners.
11 And PALMco agrees that its current owners, officers, or partners will not operate
12 as an owner, officer, director, or partner for another competitive electric or natural
13 gas marketer in Ohio for at least five years.
14
15 ***Q7. ARE YOU FAMILIAR WITH THE COMPETITIVE ELECTRIC AND***
16 ***NATURAL GAS CONSUMER PROTECTION RULES THAT PALMCO***
17 ***VIOLATED AND THE PUCO'S RULES THAT GOVERN CERTIFCATION***
18 ***OF COMPETITIVE ELECTRIC AND NATURAL GAS MARKETERS SUCH***
19 ***AS PALMCO?***
20 ***A7.*** Yes. When I was a PUCO employee, I was the team-lead or co-lead of the PUCO
21 Staff teams that drafted the initial electric and natural gas marketer rules that
22 govern interactions between competitive electric and natural gas suppliers and

customers and the competitive electric and natural gas supplier certification rules. These rules were mandated by Substitute Senate Bill 3 (122nd General Assembly) and Substitute House Bill 9 (124th General Assembly) and are currently embodied in Ohio Adm. Code 4901:1-21 (electric), 4901: 1-29 (natural gas), 4901:1-24 (electric marketer certification), and 4901:1-27 (natural gas marketer certification). In addition, I was the PUCO Staff manager directly responsible for enforcing these rules from their adoption dates in 2000 for electric and 2002 for natural gas through 2007.

Q8. ARE YOU FAMILIAR WITH THE PUCO'S SETTLEMENT PROCESS AND STANDARDS FOR APPROVING SETTLEMENT AGREEMENTS?

A8. Yes. While working at the PUCO I represented the PUCO Staff in numerous cases that involved settlement discussions and that ultimately led to stipulated agreements that were approved by the PUCO. Additionally, although I am not an attorney and my opinions expressed herein are not represented as legal opinions, I have a considerable amount of experience developing testimony and testifying about stipulated agreements regarding the PUCO's settlement standards.

Q9. WHAT IS THE PUCO'S STANDARD FOR EVALUATING AND APPROVING SETTLEMENT AGREEMENTS?

A9. Generally, the PUCO will evaluate and adopt a stipulation only if it meets all the following criteria:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?[10]
2. Does the settlement, as a package, benefit customers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?[11]

III. ANALYSIS AND RECOMMENDATIONS

Q10. IN YOUR OPINION, DOES THE SETTLEMENT IN THIS CASE MEET THE PUCO'S STANDARD FOR EVAULATING AND APPROVING STIPULATED AGREEMENTS?

A10. No. The settlement fails all three prongs of the PUCO's standard.

[10] The PUCO takes into account the "diversity of interests" as part of the first part of the stipulation assessment. See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer, Case No. 10-388-EL-SSO*, Opinion and Order at 48 (August 25, 2010).

[11] *Consumers' Counsel v. Pub. Util. Comm'n.* (1992), 64 Ohio St.3d 123, 126.

Q11. PLEASE EXPLAIN HOW THE SETTLEMENT DOES NOT MEET THE FIRST PRONG OF THE PUCO'S SETTLEMENT STANDARD – THAT THE SETTLEMENT IS A PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES.

A 11. The only parties that signed the Settlement are PALMco and the PUCO Staff (the "Signatory Parties"). Neither of these parties directly nor wholly represents the interests of PALMco's residential consumers, the people who were directly harmed by PALMco's actions.

Moreover, the Settlement states that the "Signatory Parties engaged in lengthy, serious, and arm's length bargaining in an effort to reach a mutually acceptable resolution that would address the concerns raised in the Staff Report."[12] Noticeably absent from this statement, however, is that OCC (the agency that does fully represent the interests of PALMco's residential customers) was excluded from at least some of these negotiations. And OCC was only provided settlement terms after several exclusive meetings between PUCO Staff and PALMco, where the bulk of the settlement terms were hammered out and agreed to.

[12] Settlement at 2.

1 As a result, the Settlement is not a product of serious bargaining because the
2 bargaining at times excluded an entire class of customers –residential customers,
3 who were in the fact the customers harmed by PALMco's misleading and
4 deceptive marketing practices. The PUCO Staff's role in the process is important,
5 of course, but the Staff's role is not a substitute for the role of an advocate for
6 consumers. The settlement does not pass the first prong of the PUCO's settlement
7 standard.
8
9 ***Q12. PLEASE EXPLAIN HOW THE SETTLEMENT DOES NOT MEET THE***
10 ***SECOND PRONG OF THE PUCO'S SETTLEMENT STANDARD – THAT***
11 ***THE SETTLEMENT AS A PACKAGE BENEFITS CUSTOMERS AND THE***
12 ***PUBLIC INTEREST.***
13 ***A12.*** The Settlement provides that that its primary objective is "…to provide redress for
14 the consumers that were harmed and to avoid, to the extent possible, the potential
15 for future harm…."[13] That is generally a good objective, though it is not a good fit
16 in the objective to say that "to the extent possible" the "potential for future harm"
17 should be avoided (because such harm from PALMco can be avoided with
18 certainty through a better settlement outcome than what occurred). The
19 Settlement's provisions leave open the very real possibility that thousands of
20 customers harmed by PALMco's actions will not be made whole. In addition,

[13] Settlement at 2.

1 PALMco could escape paying full or even any punitive measures for harming
2 Ohio consumers and violating the PUCO's rules. And PALMco may even profit
3 from its unlawful actions. Therefore, the Settlement is unjust, unreasonable, not
4 in the public interest, and does not benefit customers. Accordingly, the
5 Settlement should be rejected.
6
7 ***Q13. PLEASE EXPLAIN HOW THE SETTLEMENT DOES NOT MEET THE***
8 ***THIRD PRONG OF THE PUCO'S SETTLEMENT STANDARD – THAT***
9 ***THE SETTLEMENT DOES NOT VIOLATE ANY IMPORTANT***
10 ***REGULATORY PRINCIPLE OR PRACTICE.***
11 ***A13***. First, under the Settlement, PALMco can avoid making full restitution to
12 consumers harmed by its deceptive practices. Second, it could escape paying full
13 or even any punitive measures at all for harming Ohio consumers and violating
14 the PUCO's rules. Lastly, under the Settlement PALMco may even profit from
15 its unlawful actions. Therefore, the Settlement violates several important
16 regulatory principles and should be rejected.

Q14. CAN YOU ELABORATE FURTHER ON HOW THE SETTLEMENT LEAVES OPEN THE POSSIBILITY THAT THOUSANDS OF CUSTOMERS HARMED BY PALMCO'S MISLEADING AND DECEPTIVE MARKETING WILL NOT BE MADE WHOLE?

A14. Yes. There are two ways that the Settlement leaves open the possibility that some customers harmed by PALMco's actions will not receive restitution for the harm caused. First, restitution for many customers will be contingent on the sale of PALMco's customer contracts. This involves customers who enrolled with PALMco between October 1, 2018 and November 30, 2018 who have not already received restitution. Under the terms of the Settlement if PALMco does not sell its customer contracts or does not receive at least $800,000 for the sale of its customer contracts, then some number of customers will not receive full restitution. For example, if PALMco decides that it is easier and less costly to cut its losses in Ohio and simply conduct a "fire sale" and sell its customer contracts for a nominal amount or if it is unable to obtain at least $800,000 from the sale, then customers could be left with only partial restitution or no restitution at all.

And, at this point, it is important to recognize that there is a very real possibility that PALMco could receive less than $800,000 for sale of its customer contracts. The majority of its contracts are [redacted].[14] These

[14] Per PALMco's confidential responses to OCC interrogatories INT-012(a) and OCC INT-012(b), PALMco had [redacted] gas accounts and [redacted] electric accounts as of August 12, 2019 for a total customer count of [redacted] Per PALMco's confidential responses to OCC interrogatories INT-012(d) and OCC INT-

1 contracts likely will not have substantial value to other marketers because the
2 purchasing marketer will have no assurance of retaining the customers long
3 enough to recoup its costs of acquiring them. Another issue that could diminish
4 the value of a sale of PALMco's business is that some substantial portion of
5 customers may either return to their local utility's standard service offer ("SSO")
6 or choose another competitive electric and/or natural gas marketer for their
7 service after being informed that PALMco is exiting the Ohio market.[15]
8 Competitive electric and natural gas marketers interested in purchasing
9 PALMco's customer contracts will no doubt factor this potentially large customer
10 exodus into the purchase price they will offer to PALMco.
11
12 There is nothing in the Settlement or anywhere else in the record in this case that
13 discusses the likelihood that PALMco will receive at least $800,000 for the sale of
14 its customer contracts. Moreover, and more importantly, there is nothing in the
15 Settlement, or anywhere else in the record in this case, that provides for full
16 restitution to all of the customers harmed by PALMco's actions if PALMco is
17 unable to sell the customer contracts or if the sale price is less than the estimated

012(e), PALMco had [redacted] gas accounts and [redacted] electric accounts as of August 12, 2019 for a total of [redacted] accounts. [redacted] total customers – [redacted] accounts = [redacted] accounts. [redacted] contracts from PALMco responses to OCC interrogatories RPD-1-006, OCC RPD-1-007, and OCC RPD-1-008.

[15] Settlement Paragraph 6, at 5.

1 $800,000. Paragraph III.8 of the Settlement recognizes the possibility that
2 PALMco might not be able to sell its customer contracts.
3
4 Indeed, the PUCO Staff's original position stated in the Staff Report,[16] that
5 PALMco should not be allowed to transfer its customers to another marketer,
6 provides consumer protection that is missing from the Settlement that allows such
7 a transfer. After suffering the bad acts of PALMco, consumers should not be
8 subject to PALMco's discretion to sell consumers' contracts to another marketer
9 of PALMco's choosing. In addition to this unfairness to consumers, there is the
10 bad result that PALMco could profit from the sale of its business despite what the
11 PUCO Staff found to be PALMco's building of that business on deception of
12 Ohio consumers. Consumers should be switched to their utility's standard offer.
13
14 The second indication that some customers may not receive full restitution for the
15 harm caused by PALMco is that the Settlement does not address restitution for all
16 customers. The Settlement represents that PALMco made restitution to all
17 customers enrolled to a variable rate contract between December 1, 2018 and
18 April 15, 2019 and all customers who made informal complaints to the PUCO
19 Staff that were referred to PALMco regardless of when the customer enrolled. It
20 also represents that PALMco will make restitution to customers who enrolled

[16] Staff Report at 17.

with PALMco between October 1, 2018 and November 30, 2018 who have not already received restitution if PALMco sells its customer contracts for at least $800,000.

However, the Settlement is completely silent about all other variable rate customers who enrolled with PALMco outside of the periods identified in the Settlement and have not complained to the PUCO. And there are more of these customers than there are customers who have received or may receive restitution in the future . According to PALMco's responses to OCC discovery, PALMco has made or intends to make restitution (contingent on the sale of its customer contracts) to approximately [redacted] customers.[17] But it currently has approximately [redacted] lectric and natural gas customers being served under variable rate contracts.[18] This means that more than half of PALMco's variable rate customers [redacted] will not receive restitution for overcharges unless they complain to the PUCO before this case is resolved. That is an unreasonable result that harms customers, and is not in the public interest. Further, the Settlement does not explain how restitution was made to customers to date. At this point, there should be no trust extended by the PUCO to PALMco for any matter, and especially not for the matter of restitution to consumers for PALMco's harm to them.

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[17] [redacted].

[18] [redacted]

Q15. IS IT IN THE PUBLIC INTEREST TO MAKE PALMCO'S RESTITUTION TO CUSTOMERS CONTINGENT ON THE SALE OF ITS CONTRACTS AND TO LEAVE CUSTOMERS AT RISK FOR NOT GETTING RESTITUTION FOR THE HARM THAT PALMCO CAUSED?

A15. Clearly it is not. As noted above, under the Settlement's provisions, PALMco may decide that it is less costly to simply cut its losses in Ohio and sell its customer contracts for the first offer that comes along for a nominal amount. If that happens, or if PALMco receives less than $800,000 for the customer contracts for any reason, then all customers will not get full restitution. Similarly, the Settlement provides for restitution for variable rate customers who enrolled with PALMco outside of the time periods specified in the Settlement only if they complain to the PUCO prior to the resolution of this case. Given the known violations of Ohio law and the PUCO's rules, customers should not have to complain to the PUCO in order to receive restitution for overcharges by PALMco. Many customers may not even be aware that they were overcharged. Because they were misled into believing that they were offered a competitive variable rate, some customers may not know what competing rates are or that they can complain to the PUCO. Many customers may have simply switched to their incumbent utility's SSO or to another marketer after a month or two on PALMco's service at rates that were well above the prevailing SSO rates. Regardless if customers are still being served by PALMco or if customers switched after being overcharged, if they were charged the same exorbitant rates

as the customers covered under the Settlement were charged, then these customers were harmed by PALMco's actions. And it is in the public interest that they should also be recompensed. The public interest is served when all customers who experienced harm are made whole.

Q16. DOES IT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLES TO MAKE PALMCO'S RESTITUTION TO CUSTOMERS CONTINGENT ON THE SALE OF PALMCO'S CONTRACTS AND LEAVE CUSTOMERS AT RISK FOR NOT GETTING RESTITUTION FOR THE HARM THAT PALMCO CAUSED?

A16. Yes. Restitution for harm done to consumers is fundamental to enforcement of consumer protection rules. And R.C. 4928.16 (electric) and 4929.24 (gas) expressly provide the PUCO the authority to order competitive electric and natural gas marketers found to have violated the competitive electric or natural gas rules to make restitution to customers harmed by the violations.[19] The PUCO's authority should not be limited by the Settlement's provision that restitution due to customers harmed by PALMco's actions is contingent on the sale of PALMco's customer contracts.

[19] R.C. 4928.16(B)(1) and R.C. 492.24(B)(1).

Q17. WHAT DO YOU RECOMMEND REGARDING RESTITUTION TO CUSTOMERS HARMED BY PALMCO'S ACTIONS?

A17. First, the PUCO should order PALMco to immediately transfer all customers to their local utility's standard offer in accordance with each utility's tariffs. Next, the PUCO should order PALMco to immediately make restitution to all customers harmed by its unlawful actions without any contingency provision related to the sale of its customer contracts. And, this order should apply for all customers harmed, not just those groups identified in the Settlement or those customers who have complained to the PUCO. PALMco should be required to identify all customers it overcharged and make the appropriate monetary restitution.

The PUCO should not be swayed by any claims that PALMco lacks the resources necessary to make full restitution to aggrieved customers. There is no evidence in the record of this case that PALMco lacks sufficient resources to fully recompense all customers harmed by its unlawful actions. The PUCO should order full restitution to customers even if PALMco must liquidate its assets in order to do so.

If the PUCO decides to adopt the Settlement, then it should modify it to impose a minimum "exit fee" that would apply to PALMco to cover any shortfall between the amount it receives from sale of its customer contracts and the amount necessary to make full restitution to customers. There should be no instance

where customers receive less than full restitution for the harm that PALMco caused them.

Q18. CAN YOU ELABORATE FURTHER ON HOW THE SETTLEMENT LEAVES OPEN THE POSSIBILITY THAT PALMCO COULD PAY ONLY PARTIAL CIVIL FORFEITURES OR ESCAPE ANY PUNITIVE MEASURES FOR HARMING CUSTOMERS?

A18. Yes. Because the Settlement makes PALMco's payment of forfeitures for violating the PUCO's rules contingent on the sale of its customer contacts and completing customer restitution for certain customers, PALMco must be able to sell its customer contracts for more than $800,000 before it pays any amount of civil forfeiture. The first $800,000 is reserved for customer restitution. After that amount is met, all additional proceeds are split evenly between payment of a civil forfeiture up to $750,000 and PALMco. PALMco gets to keep all proceeds from the sale of the customer contracts above $2.2 million ($800,000 restitution + $750,000 forfeiture + $750,000 retained by PALMco). Therefore, if PALMco sells its customer contracts for $800,000 or less, it will pay nothing towards a civil forfeiture. And it will pay less than the full $750,000 civil forfeiture provided in the Settlement if it sells the customer contracts for less than $2.2 million.

Q19. IS IT IN THE PUBLIC INTEREST TO POTENTIALLY ALLOW PALMCO TO PAY ONLY PARTIAL FORFEITURES OR ESCAPE ANY PUNITIVE MEASURES FOR HARMING CUSTOMERS?

A19. No. The public interest is served by requiring marketers to comply with the PUCO's competitive electric and natural gas rules and by imposing punitive measures for violation of the rules. It is not in the public interest to simply let PALMco walk away without paying any form of penalty or allowing it to pay only a partial forfeiture if it sells its customer contracts for $800,000 or less or for less than $2.2 million.

Q20. DOES IT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLES TO POTENTIALLY ALLOW PALMCO TO ESCAPE ANY PUNITIVE MEASURES OR PAY ONLY PARTIAL FORFEITURES FOR HARMING CUSTOMERS?

A20. Yes. Punitive measures in the form of civil forfeitures or some other form of monetary penalty (e.g. treble damages) are fundamental principles for enforcing consumer protection rules. Such measures serve to punish bad actors for violating the rules and bringing harm to consumers. The measures also demonstrate that rule breaking will not be tolerated. And they serve as a deterrent to other potential bad actors. Ohio law envisions that bad actors will be penalized for bad acts by expressly giving the PUCO authority to assess forfeitures for violating the

1 PUCO's rules.[20] The Settlement provision making payment of any forfeiture
2 contingent on the sale of PALMco's customer contracts leaves open the
3 possibility that PALMco will pay only a partial forfeiture or may not pay any
4 forfeiture at all. Worse yet, the fact that PALMco may keep a portion of the sale
5 proceeds from the sale of its book of business means that there is distinct
6 possibility that PALMco may profit from its bad acts. Thus, it violates the
7 important regulatory principle that punitive measures should be imposed for rule
8 violations and future deterrence.
9
10 ***Q21. WHAT DO YOU RECOMMEND REGARDING PUNITIVE MEASURES AS***
11 ***A RESULT OF THE HARM THAT PALMCO CAUSED CUSTOMERS?***
12 ***A21.*** The PUCO should not make payment of any forfeiture contingent on the sale of
13 PALMco's customer contracts. Instead it should directly impose the original $1.4
14 million civil forfeiture that Staff recommended in the Staff Report. And it should
15 order PALMco to pay the full amount immediately. However, if the PUCO
16 adopts the Settlement, it should modify the Settlement to set a minimum exit fee
17 that would, first, cover all restitution owed to customers and then at least some
18 amount of guaranteed civil forfeiture. PALMco should be subject to paying this
19 fee regardless of any proceeds from the sale of its customer contracts.
20

[20] R.C. 4928.16 (electric) and R.C. 4929.24 (natural gas).

1 ***Q22. CAN YOU ELABORATE FURTHER ON HOW THE SETTLEMENT***
2 ***LEAVES OPEN THE POSSIBILITY THAT PALMCO COULD PROFIT***
3 ***FROM ITS UNLAWFUL ACTIONS?***
4 ***A22.*** Yes. There are two ways under the Settlement that PALMco can profit from its
5 unlawful actions. First, PALMco gets to keep one-half of the proceeds from the
6 sale of its customer contracts that exceed the initial $800,000 reserved for
7 restitution to customers enrolled between October 1, 2018 and November 30,
8 2018 who have not yet received restitution. As discussed above, in order to pay
9 full restitution to customers and the full forfeiture provided in the Settlement
10 PALMco would have to sell the customer contracts for $2.2 million. At the $2.2
11 million mark, PALMco will have fully met the Settlement's proposed $750,000
12 forfeiture and it will have retained $750,000 for itself. PALMco will keep 100%
13 of all proceeds above $2.2 million. This means, so long as PALMco sells its
14 customer contracts for more than $800,000, it will gain proceeds from the sale
15 and potentially profit from deceptively acquiring customers.
16
17 Second, the Settlement provides that PALMco will continue serving its existing
18 customers and accept customer contract renewals until it completes the sale of the
19 customer contracts or the expiration dates of its current PUCO certifications.[21] As
20 a result, PALMco will continue to receive the profit margin that is built into the

[21] Settlement at 4-6.

1 rates that it is currently charging customers until the date that sale of its contracts
2 is completed or its certification expire.
3
4 ***Q23. IS IT IN THE PUBLIC INTEREST TO ALLOW PALMCO TO POTENTAILY***
5 ***PROFIT FROM ITS UNLAWFUL ACTIONS?***
6 ***A23.*** No. The public interest would best be served if customers are transferred to their
7 incumbent utility's SSO as soon as the transfer can be completed pursuant to each
8 utility's tariffs. Customers would be protected from any ongoing harm by
9 PALMco and not be subject to transfer and to the risks of and potential harm from
10 being served by another marketer at unknown variable rates. Additionally,
11 PALMco will not continue to profit from its unlawful actions.
12
13 ***Q24. DOES IT VIOLATE ANY IMPORTANT REGULATORY PRINCIPLES TO***
14 ***ALLOW PALMCO TO POTENTIALLY PROFIT FROM ITS UNLAWFUL***
15 ***ACTIONS?***
16 ***A24.*** Yes. The Staff Report makes it clear that PALMco acquired at least some, and
17 potentially all, of its customer base through deceptive means. It should not be
18 permitted to sell its book of customers and then use the proceeds to pay some
19 forfeitures and then pocket the rest. PALMco should not be permitted to profit
20 from its unlawful actions. Allowing it to do so clearly violates a fundamental
21 tenet of rule enforcement. Therefore, to protect consumers the PUCO should find

that the Settlement is unjust, unreasonable, and not in the public interest and reject it.

Q25. WHAT DO YOU RECOMMEND REGARDING POTENTIALLY ENABLING PALMCO TO PROFIT FROM ITS UNLAWFUL ACTIONS?

A25. The PUCO should order that all PALMco customers be transferred to their incumbent utility's SSO as soon as the transfer can be completed in accordance with each utility's tariffs. The PUCO should recognize that some or even all of PALMco's customers enrolled with PALMco after being deceived about the rates they would pay. Neither PALMco nor a marketer that purchases PALMco's customer contracts should profit from PALMco's deception. The PUCO should also order PALMco to make full restitution to all customers harmed by its actions and immediately pay the $1.4 million forfeiture originally recommended in the Staff Report. And payment of the customer restitution and forfeitures should not be contingent on the sale of PALMco's customer contracts. These measures would serve to make it less likely that PALMco gains any profit from its deceptive practices.

If, however, the PUCO decides to accept the Settlement, it should at the very least modify it to include a minimum exit fee that PALMco would pay regardless of the proceeds it realizes from the sale of its customer contracts to cover restitution to customers and some level of civil forfeiture.

1 ***Q26. ARE THERE ANY OTHER DEFICIENCIES IN THE SETTLEMENT THAT***
2 ***CAUSE IT NOT TO BE IN THE PUBLIC INTEREST AND/OR TO VIOLATE***
3 ***IMPORTANT REGULATORY PRINCIPLES?***
4 ***A26.*** Yes, there are several. First the Settlement's first two recommendation
5 paragraphs state that PALMco and PUCO Staff agree that PALMco has
6 voluntarily "re-rated"[22] all customers enrolled between December 1, 2018 and
7 April 15, 2019 and all customers who brought informal complaints to the PUCO
8 through July 26, 2019.[23] A significant omission, however, is that the Settlement
9 is completely silent on how the re-rating was or will be verified. It does not
10 include an attachment, incorporate by reference, or point to any process that
11 describes how Staff or an independent third-party has or will verify that the
12 customers referred to in the Settlement have indeed received the full restitution
13 due them. Similarly, the Settlement provides no consequences if PALMco has
14 not fully provided refunds to customers. It is not in the public interest and it
15 violates basic principles of rules enforcement to simply accept the word of a
16 company that, in effect, has admitted to deceiving customers.[24]
17

[22] At Footnote 2 on page 4, the Settlement defines the terms "re-rate" or "re-rated" to mean the difference between the rate PALMco charged a customer and the rate the customer would have paid to the applicable utility under the utility's SSO or default rate that was refunded or credited to the customer.

[23] Settlement at 4.

[24] On page 2 of the Settlement, PALMco, as a Signatory Party, admits that the purpose of the Settlement is "to provide redress for the consumers that were harmed." This consumer harm primarily took the form of PALMco enrolling customers by deceptively offering customers lower rates when in fact it charged rates 4 to 6 times higher than applicable utility SSO rates.

A second deficiency is that the Settlement calls for PALMco's existing customer contracts to be sold to another marketer at some unknown rate. Although the Settlement doesn't say so explicitly, transfer of the customer contracts will presumably comply with the PUCO's contract assignment rules.[25] Accordingly, PALMco customers currently being served under fixed-rate contracts will continue with the new marketer under the same fixed rate. But most of PALMco's customers have variable rate contracts and it is unknown what variable rate the new marketer might charge. Variable rate customers could end up paying more than they are currently paying PALMco. It is not in the public interest for customers that may have been deceptively enticed to enroll with one marketer to potentially end up paying even more to another marketer. It is safer and more in the public interest to simply transfer PALMco's customers back to their incumbent utility's SSO and let them choose another marketer on their own, if they prefer to do so.

Third, the Settlement provides that customers will be notified of the contract assignment to the marketer that purchases PALMco's contracts. And it provides that the notice will comport with the PUCO's disclosure requirements for such notices, notify customers that PALMco is exiting the Ohio markets, and inform customers of their rights to continue service with the new marketer or return to

[25] Ohio Adm. Code 4901:1-21-11(D) (electric) and Ohio Adm. Code 4901:1-29-10(D) (natural gas).

1 their utility's SSO service. The Settlement does not, however, provide that
2 customers will be told why PALMco is exiting the Ohio markets. Customers
3 should be informed why and the circumstances surrounding PALMco's exit from
4 Ohio as they are considering their options to stay with the new marketer that
5 PALMco has chosen or return to their utility's SSO service. Moreover, customers
6 still served by PALMco who were unaware that they may have been overcharged
7 can go back over their billing statements to determine if they overpaid. If so, they
8 can still complain to the PUCO and receive restitution per the terms of the
9 Settlement. Ensuring that PALMco's customers have the maximum amount of
10 unbiased information as they consider their options is surely in the public interest.
11 Conversely, leaving vital information out of customer notices is contrary to the
12 public interest.
13
14 A fourth deficiency is that Recommendation Paragraph 9 in the Settlement
15 provides that PALMco agrees it will not transfer or sell any customer contracts to
16 any of its current owners, officers, or partners.[26] However, this limitation does
17 not apply to PALMco's past owners, officers, or partners, especially any who
18 were affiliated with PALMco during the time periods encompassed by the Staff
19 Report's documented violations. It is clearly in the public interest that any owner,
20 officer, or partner who was involved with PALMco at the height of the deceptive

[26] Settlement at 7.

practices described in the Staff Report should not be eligible to be involved in any way with the purchase or ongoing service of PALMco's customer accounts. Yet, the Settlement fails to offer this basic customer protection.

Q27. WHAT DO YOU RECOMMEND REGARDING THE ADDITIONAL DEFICIENCIES IN THE SETTLEMENT THAT CAUSE IT TO BE NOT IN THE PUBLIC INTEREST AND/OR TO VIOLATE IMPORTANT REGULATORY PRINCIPLES?

A27. First, I would recommend that the PUCO reject the Settlement altogether in favor of a simple and direct order to PALMco to immediately return all customers to their incumbent utility's SSO (in accordance with each applicable utility's tariffs), make full restitution to customers for the harm it has caused that is not conditioned on the sale of PALMco's contracts, and require the utility to pay a $1.4 million civil forfeiture that is not conditioned on the sale of PALMco's contracts.

Second, if the PUCO decides to accept the Settlement, then at a minimum it should modify it (in addition to all other modifications discussed in my testimony) to: (1) include a comprehensive independent verification process to ensure that all restitution represented as completed in the Settlement has indeed been made; (2) provide for consequences to PALMco if the verification process reveals that PALMco has not made the proper customer restitution represented in the

1 Settlement, including a directive to complete such restitution and additional
2 monetary penalties; (3) require that the notice to customers informing them that
3 PALMco is exiting the Ohio markets also inform them of the reasons why
4 PALMco is leaving and advise them to consult the PUCO's Apples-to-Apples
5 chart as they consider whether to continue service with the new marketer or return
6 to their utility's SSO; and (4) prohibit the sale of customer contracts to any entity
7 that has any association with past PALMco owners, officers, or partners that were
8 associated with PALMco during the time periods covered by the PUCO Staff's
9 investigation as reported in the Staff Report.
10
11 **IV. SUMMARY AND CONCLUSION**
12
13 ***Q28. CAN YOU SUMMARIZE YOUR RECOMMENDATIONS?***
14 ***A28.*** Yes. In summary fashion, I recommend that the PUCO do all of the following:
15
16 1. Reject the Settlement because the negotiation process was flawed, the
17 settlement is unjust and unreasonable, is not in the public interest, and
18 violates important regulatory principles.
19 A. Order PALMco to immediately return all customers to their
20 incumbent utility's standard offer in accordance with each
21 applicable utility's tariffs.

1 B. Order PALMco to identify all customers who were overcharged
2 (including those who were charged four- to six-times higher rates
3 than the utilities' standard offer) as described in the Staff Report,
4 not just the customers who enrolled during the time periods
5 specified in the Staff Report or who have complained to the
6 PUCO.
7 C. Order PALMco to make full restitution to all customers who were
8 overcharged, not just the customers who enrolled during the time
9 periods specified in the Staff Report or who have complained to
10 the PUCO.
11 D. Order PALMco to immediately pay a $1.4 million civil forfeiture
12 (the amount recommended in the Staff Report) without any
13 contingencies regarding sale of PALMco's customer contracts or
14 customer restitution.
15 2. If the PUCO adopts the Settlement, (and it should not) first modify the
16 Settlement to:
17 A. Include an exit fee that would set a minimum payment payable by
18 PALMco regardless of the amount of proceeds realized from the
19 sale of its customer contracts that would cover any shortfalls
20 between the amount needed for full restitution to customers plus
21 some level of civil forfeiture and the proceeds for the sale of the
22 customer contracts.

B. Include a comprehensive and independent verification process to ensure that all restitution represented as completed in the Settlement has indeed been completed.

C. Include a provision for consequences to PALMco if the verification process reveals that PALMco has not made all the customer restitutions represented in the Settlement, a requirement for PALMco to make restitution to any customers missed, and provision for additional monetary penalties.

D. Include a requirement that the notice to customers informing them that PALMco is exiting the Ohio markets also inform them of the reasons why PALMco is leaving and advise them to consult the PUCO's Apples-to-Apples chart as they consider whether to continue service with the new marketer or return to their utility's SSO.

E. And, include a provision prohibiting PALMco from selling its customer contracts to any entity that has any association with past PALMco owners, officers, or partners that were associated with PALMco during the time periods covered by the PUCO Staff's investigation as reported in the Staff Report.

Q29. DOES THIS CONCLUDE YOUR TESTIMONY?

A29. Yes. However, I reserve the right to incorporate new information that may subsequently become available through outstanding discovery or otherwise, or to supplement my testimony if any provisions of the Settlement are modified.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Direct Testimony of Kerry J. Adkins on Behalf of the Office of the Ohio Consumers' Counsel, PUBLIC VERSION* was served via electronic transmission to the persons listed below on this 4th day of September 2019.

/s/ Terry Etter
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