

**BEFORE  
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	)	Case No. 19-957-GE-COI
Compliance with the Ohio	)	
Administrative Code and Potential	)	
Remedial Actions for Non-Compliance.	)	

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

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On September 3, 2019, the PUCO (through its hearing officer, Mr. Price) denied an Ohio Consumers' Counsel motion to compel pre-hearing discovery. OCC sought to orally question (depone under oath) personnel at PALMco Energy, the marketer that obtained from the PUCO a certificate to sell energy to Ohioans and that the PUCO Staff now describes as orchestrating "a marketing program reliant upon misleading and deceiving customers." In the absence of these OCC efforts, it appears that PALMco is on a course to avoid any questioning under oath at the PUCO about mistreatment of Ohio consumers.

In denying certain topics for OCC's intended oral depositions of PALMco, hearing officer Price generally ruled in favor of PALMco's objections to OCC's requests, concluding that OCC's requests are "overly broad, oppressive, and unduly burdensome"

and that OCC “seeks to burden PALMCo” and should obtain the information and documents through other means.<sup>1</sup>

But, according to the PUCO’s own Staff, *oppression* and *burden* have been imposed through the outrageously deceptive business practices by PALMCo, upon the Ohioans that OCC represents (not vice versa). The PUCO should welcome that a state agency (OCC) wants to orally question PALMCo, under oath, in the PUCO’s regulatory process and then present a consumer protection case to the Commissioners for their consideration in the public interest of Ohio consumers. Indeed, the “other means” of discovery that the hearing officer recommends to OCC (instead of depositions under oath) have already been pursued by OCC with unsatisfactory results due to PALMCo’s objections, incomplete responses, and avoidance of answers.

Ohio law and rule support overturning the hearing officer’s limitation on OCC’s use of oral depositions. The PUCO’s discovery rules are to be liberally construed.<sup>2</sup> Ohio law provides “all parties and intervenors shall be granted ample rights of discovery.”<sup>3</sup> Furthermore, the PUCO’s rules state “the purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.”<sup>4</sup> Despite the fact that the PUCO’s discovery rules are intended

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<sup>1</sup>Entry, ¶30.

<sup>2</sup> See Civ.R. 26(B)(1), which is similar to Ohio Adm. Code 4901-1-16(B), which has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt.Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661.

<sup>3</sup> R.C. 4903.082.

<sup>4</sup> Ohio Adm. Code 4901-1-16(A).

to minimize the Commission intervention in the discovery process,<sup>5</sup> the hearing officer in this case has intervened to determine that at this time OCC should use approaches other than oral depositions for developing certain issues involving consumer protection.

This PUCO control of OCC's case development and participation should be reversed by the full Commission. Accordingly, the PUCO Commissioners should overrule the hearing officer's ruling. The Commissioners should allow the Ohio Consumers' Counsel to proceed with the case preparation (including depositions) and case presentation that it intends, consistent with Ohio Administrative Code rules 4901-1-16 et seq. and R.C. 403.082. And the Commissioners should require PALMco to make available the deponents that OCC seeks to question, including deponents on PALMco's finances and deponents on the Settlement that PALMco negotiated and signed.

OCC is adversely affected by the September 3 Entry and an immediate appeal to the PUCO is justified under Ohio Adm. Code 4901-115(A)(2) and also (B). The rulings contained in the September 3 Entry effectively terminate OCC's rights to participate in the proceeding under Ohio Adm. Code 4901-1-15(A)(2). And the ruling presents new or novel questions of law and depart from past precedent and policy under which the PUCO can decide that certain discovery methods (depositions) are out of bounds for use by a party to the PUCO proceeding. The PUCO should modify the Entry to afford OCC the right to depose an individual of PALMco's choosing who has knowledge of the PALMco settlement filed in this proceeding, including but not limited to PALMco's current financial condition, the availability of funds that could be used by PALMco to provide restitution to PALMco's customers and forfeitures to the State of Ohio as set forth in the

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<sup>5</sup> *Id.*

settlement, the use of PALMco's corporate property and/or funds, and/or the manner in which funds are kept, the transfer of funds, goods, and/or services between PALMco and its parent and subsidiary companies, and complaints and enforcement actions taken against PALMco in all states in which PALMco does business.

As allowed by Ohio Adm. Code 4901-1-15(B), the Legal Director (Ms. Hawkins) and others have the authority to certify this appeal to the Commissioners. The Commissioners will be denied the opportunity to hear this appeal unless it is certified to them. The rulings contained in the September 3 Entry present new or novel questions of law and depart from past precedent. This appeal should be certified to the full Commission under Ohio Adm. Code 4901-1-15(B).

In a 2003 case involving the Cincinnati Gas and Electric Company and others, the PUCO denied an OCC motion to compel discovery regarding an outrageous scheme of secret deals.<sup>6</sup> Upon OCC's appeal, the Ohio Supreme Court overturned the PUCO's denial of OCC's discovery, ruling that "Accordingly, we hold that the commission abused its discretion in barring discovery of side agreements in this matter based on a federal settlement privilege. We remand this matter to the commission and order that it compel disclosure of the requested information."<sup>7</sup> That ruling should be applied here to allow OCC to proceed with its discovery (including discovery of the settlement agreement) under the PUCO's rules.

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

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<sup>6</sup> *In re Cincinnati Gas and Electric Company Application for Provision of Market Based Standard Service Offer*, 03-93-EL-ATA, Entry at (May 13, 12004).

<sup>7</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND**

At the request of the PUCO Staff, in April 2019 the PUCO opened this investigation into PALMco's marketing practices. The PUCO Staff's request was based on over 300 customer complaints regarding PALMco's marketing practices in less than a year. The Staff found "a pattern of unfair, misleading, deceptive, and unconscionable activities" with issues that "appear to be systemic and demonstrate that the company's management decisions inappropriately orchestrate a marketing program reliant upon misleading and deceiving customers, rather than in a manner that is fair, honest, and in compliance with Ohio laws and rules."<sup>8</sup>

On July 31, 2019, the PUCO Staff and PALMco filed a Stipulation and Recommendation for settlement of this case. Among other things, the settlement provides that restitution for some customers and the payment of a forfeiture would be contingent on PALMco selling its Ohio business. OCC did not sign the settlement. One reason OCC opposes the settlement is because it makes restitution for some customers who were

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<sup>8</sup> PUCO Staff Report at 2 (May 10, 2019).

harm by PALMco's marketing practices contingent on the sale of PALMco's Ohio business. (And there are numerous other settlement provisions that OCC objects to, including allowing PALMco to profit from its misleading and unlawful marketing to Ohio customers, as well as the failure to return PALMco customers to the utilities' standard offer.)

In the course of conducting discovery in this proceeding, in addition to written discovery, on August 2, 2019, OCC filed an Amended Notice of Deposition in this case. Among the persons OCC sought to depose were:

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.<sup>9</sup>

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<sup>9</sup> Amended Notice of Depositions (August 2, 2019) at 2.

PALMco refused to designate a person(s) with knowledge and expertise on these subjects and make them available for deposition, as requested by OCC. After several attempts to resolve this discovery dispute with PALMco, OCC filed a Motion to Compel on August 20, 2019.

In the September 3 Entry, the Attorney Examiner determined that “the Amended Notice properly seeks individuals to be designated by PALMco pursuant to Ohio Adm. Code 4901-1-21.”<sup>10</sup> The Attorney Examiner also recognized that the “information and documents sought through the Amended Notice are reasonably calculated to lead to the discovery of admissible evidence.”<sup>11</sup> Nevertheless, the Attorney Examiner denied OCC’s Motion as it pertains to the deposition request discussed above.<sup>12</sup> The basis for the denial is that the request is “overly broad, oppressive, and unduly burdensome” and that OCC should obtain the information and documents through other means.<sup>13</sup>

The September 3 Entry presents a new or novel interpretation of PUCO rules and policy, under which the PUCO can decide that certain discovery methods (depositions) are out of bounds for use by a party to the PUCO proceeding, and can effectively eliminate a party’s ability to choose its own witnesses to testify in a PUCO proceeding. Especially in a case with a Settlement, this ruling is contrary to the Ohio Supreme Court ruling that the PUCO abuses its discretion when it precludes OCC discovery of key issues

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<sup>10</sup> September 3 Entry, ¶30.

<sup>11</sup> *Id.*

<sup>12</sup> The Entry granted OCC’s Motion as it pertains to any witnesses for PALMco in this case and any persons who signed a response to an interrogatory or was responsible for PALMco’s responses to requests for production of documents or requests for admissions. *Id.*, ¶¶28-29. It should be noted that PALMco did not file any witness testimony in this proceeding on September 4, 2019. Testimony was filed by OCC and the PUCO Staff.

<sup>13</sup> *Id.*, ¶30.



related to the Settlement. *Ohio Consumers' Counsel v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶ 77-94 (discovery of side agreements related to a Settlement between the utility and others).

An immediate determination is needed to avoid undue prejudice to OCC. If there is no quick ruling, OCC will be forced to prepare its case under the stringent standards the Attorney Examiner set, which include foregoing depositions in lieu of written discovery.

The PUCO should immediately modify the Entry, and affirm the liberal discovery standards, found in Ohio law and PUCO rules, that allow parties to choose among the various discovery tools what best serves their trial preparation needs. The PUCO should affirm that parties are free to present their case, using any one of a number of discovery tools set forth in the PUCO rules, without the PUCO otherwise interfering with how parties should prepare their respective case.

## **II. STANDARD OF REVIEW**

Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling that “terminates a party’s right to participate in a proceeding ...”

Alternatively, the PUCO will review an Attorney Examiner’s ruling if the Attorney Examiner (or other authorized PUCO personnel) certifies the appeal.<sup>14</sup> The standard applicable to certifying an appeal is that “the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from

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<sup>14</sup> Ohio Adm. Code 4901-1-15(B).

past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question.”<sup>15</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>16</sup> Under this standard, OCC’s Appeal should be certified and the August 14 Entry should be modified as discussed herein.

**III. AN IMMEDIATE APPEAL CAN BE TAKEN TO THE FULL COMMISSION BECAUSE THE RULING TERMINATES OCC’S RIGHT TO PARTICIPATE.**

The September 9, 2019 Entry denying OCC a method of discovery when other forms of discovery have been insufficient to obtain appropriate and/or necessary answers to discovery or that require a more in depth review that can only be completed by oral examination effectively terminates OCC’s right to meaningfully participate in the proceeding. Under Ohio Adm. Code 4901-1-15(A)(2), a ruling that prevents a party from meaningful participation in a proceeding may be appealed to the full PUCO.

The Entry stated that instead of depositions, OCC should attempt to obtain the information through other discovery means, such as interrogatories and requests for admission.<sup>17</sup> Eliminating or limiting a method of discovery (e.g., depositions) in favor of another type of discovery (e.g., written discovery) prevents a party from full participation in a case wherein the rules and Ohio law (as well as the courts) require ample rights of discovery. See R.C. 4903.082. The PUCO should affirm that parties are free to present

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<sup>15</sup> *Id.*

<sup>16</sup> Ohio Adm. Code 4901-1-15(E).

<sup>17</sup> Entry, ¶30.

their case, using any one of a number of discovery tools set forth in the PUCO rules (or multiple tools) without the attorney examiners deciding how and by which method parties prepare their respective cases.

**IV. ALTERNATIVELY, THE INTERLOCUTORY APPEAL SHOULD BE CERTIFIED FOR THE COMMISSION TO CONSIDER ALLOWING OCC TO DEPOSE A PERSON WHO IS FAMILIAR WITH PALMCO'S FINANCES AND A PERSON FAMILIAR WITH THE TERMS OF THE SETTLEMENT AGREEMENT**

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

If the PUCO determines that this Appeal cannot be immediately taken to the Commission under Ohio Adm. Code 4901-1-15(A)(2), this Appeal should be certified to the PUCO pursuant to Ohio Adm. Code 4901-15(B). An “immediate determination” by the PUCO is needed to prevent undue prejudice<sup>18</sup> to OCC and residential customers. The undue prejudice will result from OCC not having access to information that is crucial to presenting the case on behalf of consumers injured by PALMco’s misleading and deceptive marketing practices. That information includes information on PALMco’s finances and information on the terms of the Settlement agreement between PALMco and the PUCO Staff.

In support of the need for an immediate determination, it should be recognized that Ohio law and rule provide for parties to have adequate discovery in advance of opportunities to advocate to the PUCO. R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules.<sup>19</sup> The taking of

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<sup>18</sup> Ohio Adm. Code 4901-1-15(B).

<sup>19</sup> See Ohio Adm. Code 4901-1-16 et seq.

depositions is a fundamental part of discovery. That fundamental right would be directly impeded if OCC cannot depose a PALMco representatives who has knowledge of PALMco's financial situation and knowledge of the terms of the Settlement agreement.

As explained previously, the Entry stated that instead of depositions, OCC should attempt to obtain the information through other discovery means, such as interrogatories and requests for admission.<sup>20</sup> In fact, OCC has used written interrogatories, requests for production, and requests for admission to discover relevant information that PALMco has. Those methods of discovery have not been particularly helpful here.

At this point in the proceeding, with the evidentiary hearing looming, OCC sought to take depositions of PALMco personnel. Depositions are an important tool for trial. Depositions are permitted under the PUCO rules, specifically 4901:1-21. Depositions are far more efficient in obtaining the complete story for a number of reasons. Depositions allow counsel to develop a strategy for the remainder of the case. Depositions also enable attorneys to evaluate the witness for purposes that can include subpoenaing the witness to appear at the evidentiary hearing, which is permissible under PUCO rule 4901:1-25. Depositions afford counsel the immediate opportunity to ask further questions of the witness rather than waiting for the response time allowed under PUCO rules or entries (in this instance, seven days). And depositions generally lead to a greater exposition of the truth. OCC chose to pursue the depositions to obtain needed discovery, in addition to its efforts to obtain written discovery through interrogatories, requests for production, and requests for admission, all of which OCC has used to obtain relevant information on PALMco's misleading and deceptive marketing to customers.

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<sup>20</sup> Entry, ¶30.

Absent a deposition regarding PALMco's financial situation, OCC will be unduly prejudiced. This Appeal should be certified to the PUCO.

**B. The ruling represents a new or novel question of law and policy.**

The PUCO allows discovery of any information that appears reasonably calculated to lead to the discovery of admissible evidence.<sup>21</sup> Discovery may be obtained through a variety of means, including depositions.<sup>22</sup> “Any party to a pending commission proceeding may take the testimony of any other party or person, other than a member of the commission staff, by deposition upon oral examination with respect to any matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code.”<sup>23</sup> The frequency of discovery methods is not limited unless the PUCO orders otherwise in response to a motion for protective order.<sup>24</sup>

In this case the Attorney Examiner determined that OCC properly seeks individuals to be designated by PALMco pursuant to Ohio Adm. Code 4901-1-21 and that the information sought by OCC is reasonably calculated to lead to discovery of admissible evidence.<sup>25</sup> Nevertheless, the Attorney Examiner denied OCC's motion to compel depositions because there are presumably other means to obtain the information. This determination is contrary to the Attorney Examiner's findings that OCC's deposition notice is proper and is reasonably calculated to discover admissible evidence. And the Attorney Examiner's ruling is contrary to the discovery rules of practice which are intended to minimize the PUCO's intervention in the discovery process. See Ohio Adm. Code 4901-1-16(A). A discovery method that is

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<sup>21</sup> Ohio Adm. Code 4901-1-16(B).

<sup>22</sup> *Id.*

<sup>23</sup> Ohio Adm. Code 4901-1-21(A).

<sup>24</sup> Ohio Adm. Code 4901-1-16(B).

proper and seeks information that is reasonably calculated to lead to the discovery of admissible evidence should not be set aside simply because the Attorney Examiner believes other means of obtaining the information are more appropriate or should be undertaken only after other forms of discovery has occurred. The PUCO's discovery rules do not work in this way.

Further, given that the hearing in this case is only a week or so away, a deposition is the least burdensome and most expeditious means to obtain the information OCC seeks. Rather than having to prepare responses to interrogatories on a subject as well as responses to follow-up interrogatories, PALMco's designated deponent could be asked – and respond to – follow-up questions during the deposition. In this regard, depositions are more efficient and less burdensome than interrogatories.

The Entry represents a new or novel approach to law and policy, and undermines the great latitude given to parties (under the law and the PUCO rules) on discovery as tool to facilitate thorough and adequate preparation for hearing. This Appeal should be certified to the PUCO.

## **V. THE COMMISSION SHOULD MODIFY THE ENTRY AND ALLOW DEPOSITIONS REGARDING PALMCO'S FINANCES AND THE SETTLEMENT AGREEMENT**

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.<sup>26</sup> 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

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<sup>25</sup> Entry, ¶30.

<sup>26</sup> See Staff Report (May 10, 2019) at 3.

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. A key provision of the settlement makes restitution for some customers and the payment of a forfeiture contingent upon the sale of PALMco's Ohio business. The PUCO should know whether PALMco can make full restitution to customers and pay the maximum forfeiture under the settlement without selling its Ohio customer contracts to another company. Deposing a PALMco employee with knowledge of its financial situation is the most efficient and least burdensome way of getting the relevant information. The PUCO should allow OCC to depose a PALMco employee who can provide reliable information regarding PALMco's financial situation.

There are also other terms of the Settlement which OCC opposes that require further exposition. Deposing a witness from PALMco on the settlement will assist OCC in further understanding the terms of the Settlement and in determining whether the settlement meets the PUCO's three prong settlement standard.

## **VI. CONCLUSION**

OCC's interlocutory appeal of the September 3 Entry meets the standard for granting interlocutory appeals. Under Ohio Adm. Code 4901-1-15(A)(2), a ruling that prevents a party from meaningful participation in a proceeding may be appealed to the full PUCO. Alternatively, OCC's appeal should be certified to the PUCO and the PUCO should allow OCC to depose a PALMco employee who has knowledge of PALMco's financial situation.

Respectfully submitted,

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/s/ Terry L. Etter

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the Commission, and Application for Review by the Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 9<sup>th</sup> day of September 2019.

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

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

CASE No. 19-957-GE-COI

ENTRY

Entered in the Journal on 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**

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**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

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

**Commission of Ohio Docketing Information System on**

**9/9/2019 5:24:28 PM**

**in**

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

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