

**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 and PALMco)	
Energy OH, LLC d/b/a Indra Energy's)	Case No. 19-0957-GE-COI
Compliance with the Ohio Administrative)	
Code and Potential Remedial Actions for)	
Non-Compliance.)	

**MEMORANDUM CONTRA OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
MOTION TO CERTIFY INTERLOCUTORY APPEAL
AND
MOTION OF PALMCO ENERGY OH, LLC FOR A PROTECTIVE ORDER**

The only thing “new” or “novel” about this interlocutory appeal is the lengths to which OCC will go to beat a dead horse—even when it *wins* a discovery motion. The September 3 Entry says that OCC may depose: (i) anyone who verified discovery responses, (ii) anyone who files testimony, and (iii) anyone else served with a “narrowly tailored notice of deposition.” (Sept. 3, 2019 Entry ¶¶ 28-30.) To twist this around and claim the Entry requires OCC to “use approaches other than oral depositions for developing certain issues” is enough to make any right-thinking person’s head explode. (*See* OCC Mot. at 3.)

Even if an appeal of a routine discovery order were certifiable (it is not), it is hard to imagine what point would be served by granting OCC’s request. Indeed, within minutes of serving a motion claiming that its right to take depositions was wrongfully cut-off, OCC served a deposition notice. So somehow the September 3 Entry simultaneously allows and prohibits depositions. OCC needs to make up its mind.

If all of this were not enough, the deposition notice issued on September 9 is directed to two individuals whose role at PALMco has been known to OCC since the earliest days of this case. The delay in issuing these notices is inexcusable. The Attorney Examiner should issue a

protective order to spare not only PALMco but Staff the undue burden and expense associated with these eleventh-hour depositions.

I. ARGUMENT

Rule 4901-1-15(A) authorizes interlocutory appeals in four limited circumstances, two of which do not apply here. The September 3 Entry does not fit within the other two circumstances, either. The issue raised is not even certifiable.

The rules also allow the issuance of protective orders to protect parties from “annoyance, embarrassment, oppression, or under burden or expense.” O.A.C. 4901-1-24(A). A protective order is warranted here to prevent the depositions noticed on September 9 from proceeding. While motions for a protective order should ordinarily include an affidavit describing efforts made to resolve a dispute, the discussion that follows makes clear that this dispute is not going to be resolved. Counsel signature on this pleading and presence at the prehearing conference tomorrow also diminish the need for an affidavit. In any event, a waiver of Rule 4901-1-24(B)(3) is hereby requested under Rule 4901-1-38(B).

A. There are no grounds to certify an interlocutory appeal.

Rule 4901-1-15 (A)(1) allows interlocutory appeal of a ruling that “[g]rants a motion to compel discovery or denies a motion for protective order.” It is true the September 3 Entry partially granted a motion to compel, *but it was OCC’s motion*. While it would otherwise go without saying, the rules are not set up for parties to file interlocutory appeals to complain about getting what they asked for.

The grounds relied on by OCC, “terminate a party’s right to participate in a proceeding,” do not apply either. *See* O.A.C. 4901-1-15(A)(2). The September 3 Entry merely ruled on a discovery motion. OCC’s right to “participate” in the proceeding was not terminated. In fact,

OCC filed direct testimony the day after the September 3 Entry, and served written discovery two days later. While PALMco would certainly have no objection to terminating OCC's right to participate in this proceeding, that simply has not happened.

The September 3 Entry did not impose a sweeping ban on depositions. The Attorney Examiner found that the “*information and documents sought in the Amended Notice* could be, and should have been, obtained through less burdensome means of discovery [.]” (Entry ¶ 30 (emphasis added).) The Commission's rules expressly authorize an Attorney Examiner to order that “discovery may be had only by a method of discovery other than that selected by the party seeking discovery” and that “[c]ertain matters not be inquired into.” O.A.C. 4901-1-24(A)(3-4). There is nothing “new or novel” about the exercise of that authority here. Nor can OCC be heard to complain about the exercise of authority *it asked the Attorney Examiner to exercise*. No one has jumped out of the woodwork to “interfer[e] with how parties should prepare their respective case.” (OCC at 4.)

Not only does the Entry *not* say OCC cannot take depositions; the Entry specifically recognized that OCC *can* take depositions:

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. (Entry ¶ 28)

The Entry did not limit depositions to only hearing witnesses:

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. (*Id.* ¶ 29)

And the Entry also recognized OCC's ability to issue *proper* deposition notices:

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.* (*Id.* ¶ 30)

Since the September 3 Entry was issued, OCC has served two additional sets of written discovery (for a total now of five). On Monday, September 9, it served a deposition notice for two specific PALMco employees, Robert Palmese and Adam Bashe. Per the notice at issue in the September 3 Entry, OCC has also requested the deposition of Keenia Joseph, the individual who will verify PALMco's discovery responses. OCC's "right to meaningfully participate in the proceeding" has not been "terminate[d]." (OCC at 5)

The September 3 Entry tells OCC what to do if it wants to take depositions. OCC then issued deposition notices. There is no relief to be had from certifying an interlocutory appeal of the September 3 Entry.

B. The eleventh-hour deposition notices should be quashed and a protective order issued.

OCC finally issued deposition notices to specific individuals yesterday, September 9. Those notices should be quashed. OCC waited too long to issue them, and to allow the depositions to proceed now would be unduly burdensome and prejudicial.

The identities of Mr. Palmese and Mr. Bashe have been known (or at least knowable) for months. If there is a good reason for waiting until a week before the hearing to issue deposition notices for these individuals, we would be interested in hearing it.

The September 3 Entry told OCC it could depose any individual who verified discovery responses. OCC did not ask about the availability of this witness until September 9. The request to accommodate this individual for a deposition on September 11 cannot be honored due to the prehearing conference. OCC waited too long for this deposition as well.

It is no answer for OCC to say, “the rules allow depositions” or “there is no discovery deadline in this case.” Pounding the table and proclaiming “Discovery is our right!” does not work either. Other parties in this proceeding have rights, too. “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.” O.A.C. 4901-1-16(A) (emphasis added). The right to seek discovery must be balanced against other parties’ right to be protected from “annoyance, embarrassment, oppression, or undue burden or expense.” O.A.C. 4901-1-24(A). The Attorney Examiner may remedy discovery overreach in numerous ways. Orders may issue that “[d]iscovery not be had,” that “[d]iscovery may be had only on specified terms and conditions,” that “[c]ertain matters not be inquired into,” and that the scope of discovery “be limited to certain matters.” O.A.C. 4901-1-24(A)(1-5).

The relevant circumstances do not favor OCC. On the one hand we have OCC’s unexplained failure to wait until the week before hearing (and nearly a week *after* direct testimony was filed) to issue deposition notices. On the day OCC served the notice, PALMco was finishing the responses to OCC’s fourth set of written discovery and starting its responses to OCC’s fifth set. Also that same day, OCC filed the interlocutory appeal that brings us here today.

The impracticality of producing witnesses on September 10 in response to a notice issued the day before is obvious (especially since the notice requests the production of numerous documents “at least one day prior” to the deposition). September 10 is being spent writing this memo in preparation for the prehearing conference on September 11. That leaves September 12, 13, and 16 as the only days where depositions are even possible. Other work needs to be done the day before hearing on September 17.

Assume for arguments' sake that PALMco and Staff have no other work to do.

PALMco's counsel would need to fly to Brooklyn, NY, to prepare the witnesses and attend the depositions. A transcript of the depositions may or may not be available before the hearing starts. (New York court reporters do not prepare expedited transcripts on the cheap.) Even if depositions were held this Thursday and the transcripts were available Friday, that still would not leave time for the transcripts to be filed three days before hearing, as required under O.A.C. 4901-1-21(N).

But suppose everyone can pull this off and depositions begin on Thursday or Friday. The parties are being asked to move mountains at the eleventh hour to cover these topics:

- “[R]elevant topics within the scope of this proceeding,”
- “[T]he deponent’s knowledge and expertise with regard to Paragraphs 1, 2, and 7 of the Stipulation [.]”
- “PALMco’s current financial condition,”
- “[T]he availability of funds that could be used by PALMco to provide restitution to PALMco’s customers and forfeitures to the State of Ohio,”
- “[T]he 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.”
- “PALMco’s managerial capabilities discussed in Paragraph 8 of the Stipulation,”
- “[C]omplaints and enforcement actions taken against PALMco in all states in which PALMco does business as raised in the Staff Report resolved by the Stipulation [.]”

Could all of these topics have been covered earlier? Yes. Are the depositions being requested because OCC suddenly uncovered some smoking gun? No. Was the identity of the deponents hidden? No. OCC's failure to plan should not be everyone else's emergency.

CONCLUSION

The Attorney Examiner should deny the request to certify an interlocutory appeal and grant a protective order to stop the recently-noticed depositions. Any prejudice claimed by issuing these rulings is entirely of OCC's own making.

Date: September 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail, to the following on this 10th day of September, 2019:

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Summary: Memorandum Contra Office of the Ohio Consumers' Counsel's Motion to Certify Interlocutory Appeal and Motion for Protective Order electronically filed by Ms. Rebekah J. Glover on behalf of PALMco Energy OH, LLC d/b/a Indra Energy and PALMco Power OH, LLC d/b/a Indra Energy