

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

**PALMCO ENERGY OH, LLC'S MEMORANDUM CONTRA
MOTION TO COMPEL DISCOVERY**

Ohio Consumers' Counsel's latest discovery motion raises four issues. The only issue of any practical significance is whether OCC's September 9, 2019 notice of deposition should be enforced. PALMco will first explain why it should not, and then address the remaining issues.

ARGUMENT

A. The September 9 Deposition Notice is Defective and Untimely.

PALMco did what parties are supposed to do when objecting to a deposition notice: it sought a protective order. It is not clear what OCC hopes to accomplish by moving to compel PALMco to do something that PALMco previously explained it should not have to do.

The Attorney Examiner has already ruled that PALMco must produce Keenia Joseph under the August 2, 2019 deposition notice. The deposition is scheduled for Tuesday, September 17. (Whitt Aff. ¶ 12.)¹

OCC served another deposition notice at 5:17 p.m. on September 9. (*Id.* at ¶ 8.) PALMco's motion for protective order explains why producing witnesses at this late stage would

¹ Counsel's notaries are not in the office this afternoon. Counsel will bring a notarized version of the affidavit to the hearing next week. The notarized version can be produced earlier if the Attorney Examiner believes this is necessary.

be unduly burdensome. There is another reason to prohibit these depositions: the September 9 notice is fatally defective.

The Commission's rules authorize two types of depositions, each of which serve different purposes and require different notice. A party desiring to take the deposition of a "person" must include "the time and place for taking the deposition" and "the name and address of each person to be examined." O.A.C. 4901-1-21(B). If testimony is sought on behalf of an organization, the notice must "designate with reasonable particularity the matters on which examination is requested." O.A.C. 4901-1-21(F). The organization must then designate someone (or more than one person if necessary) "duly authorized to testify on its behalf." *Id.* The persons designated must "testify as to matters known or reasonably available to the organization." *Id.*

The deposition notice requirements under the Commission's rules are substantially similar to Rule 30 of the Ohio Rules of Civil Procedure. Section (F) is virtually identical to both Rule 30(B)(5) of the Ohio rules and Rule 30(B)(6) of the federal rules.

The September 9 notice does not state whether it is issued under Rule 4901-1-21(B) or (F). Nor is it obvious whether OCC seeks to depose persons or an organization. The named deponents are Robert Palmese and Adam Bashe, "or someone designated by PALMco." The deponent is directed to testify about "relevant topics within the scope of this proceeding, including but not limited to" the same laundry list of topics the September 3 Entry deemed overbroad. The notice bounces back and forth between "Mr. Palmese" and "the deponent," without ever explaining whether OCC is seeking the testimony of *Mr. Palmese* (section (B)) or the testimony of *PALMco* (section (F)).

Whether OCC is demanding the production of witnesses under Section (B) or (F) is not a trivial distinction. If OCC is seeking the testimony of Mr. Palmese and Mr. Bashe (Section B),

the witnesses would only be responsible for testifying to matters within their personal knowledge. But if the testimony of PALMco is being sought (Section F), the organization's designated representative(s) do not need personal knowledge. *See PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir. 2004) (Rule 30(b)(6) designee “was free to testify to matters outside his personal knowledge as long as they were within the corporate rubric.”). PALMco's designee would have an affirmative obligation to study for and be prepared to answer questions on the topics noticed. “If the designated deponent cannot answer those questions, then the corporation has failed to comply with its Rule 30(b)(6) obligations and may be subject to sanctions, etc.” *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995), *aff'd sub nom. King v. Pratt & Whitney*, 213 F.3d 646 (11th Cir. 2000), and *aff'd sub nom. King v. Pratt & Whitney*, 213 F.3d 647 (11th Cir. 2000).

Testifying as a corporate representative is serious business—for both sides. “[A]n entity producing a witness for a Rule 30(b)(6) deposition must ensure that he or she has been educated on what the entity, as a corporate personage, ‘knows’ or could reasonably find out. But there is one important limitation on this obligation: it extends only so far as the party issuing the deposition notice has honored its own obligation to ‘describe with reasonable particularity the matters for examination.’ Fed.R.Civ.P. 30(b)(6).” *Philbrick v. eNom, Inc.*, 593 F.Supp.2d 352, 363 (D.N.H. 2009) (internal citations omitted).

The September 9 document does not fulfill the basic purpose of a notice of deposition—under Sections (B) (or F). It mashes together aspects of both sections without specifying the actual deponents. If the deponents are supposed to be the individuals listed, these individuals are only required to testify to matters within their personal knowledge. They are not required to educate themselves about any topic listed in the notice. If PALMco is the intended deponent,

OCC has no right to dictate whom the organization designates as its representative(s). *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469–70, 692 N.E.2d 198 (1998) (affirming trial and appellate court finding that ambiguous deposition notice did not give issuing party the right to designate witness). Moreover, a Section (F) notice that lists topics “including, but not limited to” topics specifically enumerated is fatally defective. “Where, as here, the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.” *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (“Plaintiff broadens the scope of the designated topics by indicating that the areas of inquiry will ‘includ[e], but not [be] limited to’ the areas specifically enumerated. An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task.”).

The September 3 Entry put OCC on notice that if it wanted to take depositions, it had to issue proper notices. The September 9 notice is not “more narrowly tailored” than the previous notice. (*See* OCC at 3.) The August 2 notice at least specified it was being issued under Section (B). The September 9 notice forces PALMco to guess at whether witnesses need to be prepared to testify about matters within their personal knowledge or whether they should prepare to testify on behalf of the organization. Rather than put down its shotgun and pick up a rifle, OCC hauled out a blunderbuss. OCC is not entitled to depositions that have not been properly noticed.

B. OCC’s third set of discovery (requests for admission)

OCC does not (and cannot) claim that PALMco failed to timely serve responses and objections to OCC’s request for admissions. There is no basis to compel the production of answers and objections already served.

According to OCC, “PALMco should be ordered to provide clear answers, separate from objections, and should be required to comply with the PUCO rules that require a party or its

attorney to sign both the objections and the answers.” (OCC at 10.) Given that the rules *require* PALMco to state and support any objections, it is difficult to understand what OCC is complaining about.

Each of OCC’s when-did-you-stop-beating-your-wife-style requests for admission is prefaced with the following statement:

Please admit or deny the following statement. If the response is anything but an unqualified admission, please explain in detail. (*See* OCC at Exhibit 3.)

Two of the thirteen requests were denied. (*Id.*, RFA 3-009, 3-013.) The remainder were denied subject to an objection. PALMco did not “mix[] the objection and the answer in such a way as to undermine the usefulness of this discovery tool”—whatever that is supposed to mean. (OCC at 10.) The responses begin with an unequivocal statement: “Objection.” The sentences that follow explain the basis for the objection—as required under Rule 4901-1-22(B) (“If an objection is made, the reasons therefor shall be stated”) and as requested by OCC (“If the response is anything but an unqualified admission, please explain in detail.”). The responses concluded, “Subject to this objection, PALMco denies this request for admission.”

PALMco’s objections and responses are “mixed” only in the sense that both an objection and answer are necessary for a complete response under Rule 4901-1-22. If complying with the Commission’s rules is “manipulative and deceptive,” there is really nothing else PALMco can say. (*See* OCC at 10.)

C. Supplementation of responses.

The introduction section of OCC’s motion complains of PALMco’s alleged failure to supplement discovery responses, but OCC never develops this argument. The argument is waived.

The argument is also baseless. To say PALMco has “disregarded” a request to supplement discovery implies that PALMco ignored the request, which is simply not true. OCC asked for updated discovery responses on the afternoon of September 3:

Hi, Mark. Please update PALMco’s discovery responses per the PUCO’s rules. Particularly, the responses provided by PALMco do not identify who was responsible for each response. A list of each person and the responses the person is responsible for would suffice. Also, in RPD 2-010 we had asked for PALMco’s most recent audited financial statement but PALMco provided the 2015 and 2016 statements that were filed with its 2018 application in its response to RPDs 2-012 and 2-013. Please provide any and all more recent statements. Thanks. (Whitt Aff. ¶ 4.)

PALMco responded the next morning:

Terry –

Keenia Joseph (VP, Regulatory and Compliance) will verify the discovery responses. I will send you a signed verification.

As for more recent audited financial statements, the company objected to RPD 2-010 based on relevance. We have not changed our position since serving the discovery responses on August 9. OCC’s August 20 motion to compel did not address this RPD (or any other). The right to move to compel any further response has been waived.

Let us know if you have any questions. (Whitt Aff. ¶ 5.)

OCC asked PALMco to supplement certain responses and PALMco declined to do so, telling OCC why. PALMco has done everything the rules require. There is no requirement for parties to engage in a make-work exercise of preparing a document labeled “Supplemental Responses” that supplements no responses.

D. Responses to fourth set of discovery.

PALMco has provide responses and objections to the fourth set of discovery. PALMco will accept its share of the blame for the responses being late. But OCC bears some responsibility for the delay as well.

OCC's narrative leaves out important parts of the story. OCC served this discovery at 4:31 p.m. on Friday August 30, just before the Labor Day weekend. (Whitt Aff. ¶ 2.) The day after the holiday weekend (September 3) was spent finalizing responses to OCC's third set of discovery and also determining whether responses to the first and second set of discovery should be updated, as also requested by OCC on September 3. (Whitt Aff. ¶¶ 3-5.) September 4 (the direct testimony filing deadline) and the following few days were spent reviewing direct OCC's testimony. Counsel dropped the ball by not making sure responses to the fourth set of discovery were finalized and served on the September 6 due date.

On September 9, OCC counsel sent a reminder email about the fourth set of discovery. (Whitt Aff. ¶ 6.) An hour and a half later, PALMCo's counsel responded:

Terry – we are still working on the responses. I should have given you a heads up on Friday. We hope to complete these today. If we can't, we will at least provide what we have and give you an ETA for the remainder.
(Whitt Aff. ¶ 7.)

Progress was being made on completing the responses. Then, at 5:17 p.m., OCC served the deposition notice addressed above. (Whitt Aff. ¶ 8.) Less than 10 minutes later, OCC also served its interlocutory appeal of the September 3 Entry. (*Id.* ¶ 9.) Responses to the fourth set of discovery did not get served.

The next morning (September 10) the Attorney Examiner announced a prehearing conference for September 11. PALMco completed and served most of the responses to the fourth set at 12:53 p.m. on September 10. (Whitt Aff. ¶ 10.) The timing of OCC's deposition notices also required PALMco to prepare and file a motion for protective order on September 10. Much of September 11 was spent preparing for and attending the prehearing conference. PALMco served the remaining responses to the fourth set on September 12. (*Id.* ¶ 11.)

OCC will no doubt find fault in the responses to the fourth set of discovery. But the responses have now been served, so the issue of whether responses must be compelled is moot.

CONCLUSION

No one disagrees that all parties in Commission proceedings are entitled to discovery. That does not mean every party gets to make its own discovery rules. The Commission makes the rules. Parties who refuse to follow them do so at their peril. Parties who *do* follow them should not be slandered as “manipulative and deceptive.” (OCC motion at 10.)

OCC has not followed the rules. It has churned out discovery and motions and interlocutory appeals with no endgame in mind, other than to harass and annoy. A civil court would undoubtably slap OCC with sanctions for its latest missive. PALMco would be content with an order denying the motion to compel and granting its requested protective order.

Dated: September 13, 2019

Respectfully submitted,

/s/ Mark A. Whitt

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AFFIDAVIT OF MARK A. WHITT

STATE OF OHIO)	
)	SS:
COUNTY OF FRANKLIN)	

Mark A. Whitt, being first duly sworn, states:

1. I am counsel of record in this proceeding for PALMco. I have personal knowledge of the matters set forth in this Affidavit.
2. My email inbox shows that OCC served its fourth set of discovery at 4:31 p.m. on Friday, August 30, 2019. I was not in the office at the time.
3. On September 3, 2019, my office served PALMco's responses to OCC's third set of discovery. The responses are attached as Exhibit 3 to OCC's motion to compel.
4. At 3:25 p.m. on September 3, 2019, I received an email from Terry Etter stating:

Hi, Mark. Please update PALMco's discovery responses per the PUCO's rules. Particularly, the responses provided by PALMco do not identify who was responsible for each response. A list of each person and the responses the person is responsible for would suffice. Also, in RPD 2-010 we had asked for PALMco's most recent audited financial statement but PALMco provided the 2015 and 2016 statements that were filed with its 2018 application in its response to RPDs 2-012 and 2-013. Please provide any and all more recent statements. Thanks.

5. I responded to this email on September 4 at 12:39 p.m. stating:

Terry –

Keenia Joseph (VP, Regulatory and Compliance) will verify the discovery responses. I will send you a signed verification.

As for more recent audited financial statements, the company objected to RPD 2-010 based on relevance. We have not changed our position since serving the discovery responses on August 9. OCC's August 20 motion to compel did not address this RPD (or any other). The right to move to compel any further response has been waived.

Let us know if you have any questions.

6. On September 9, 2019, OCC counsel Terry Etter sent me a reminder email about responses to OCC's fourth set of discovery, which were due on Friday, September 6.

7. I replied to Mr. Etter's email approximately an hour and a half later:

Terry – we are still working on the responses. I should have given you a heads up on Friday. We hope to complete these today. If we can't, we will at least provide what we have and give you an ETA for the remainder.

8. At 5:17 p.m. on September 9, 2019, I received an email from OCC serving the notice of deposition at issue in OCC's motion to compel.

9. At 5:26 p.m. on September 9, 2019, I received email service of OCC's motion to certify interlocutory appeal of the September 3 Entry.

10. PALMco served partial responses to OCC's fourth set of discovery at 12:53 p.m. on September 10, 2019. These are attached to OCC's motion to compel as Exhibit 2.

11. PALMco served the remaining responses to OCC's fourth set of discovery at 11:06 a.m. on September 12, 2019.

12. By agreement of counsel, the deposition of Keenia Joseph has been scheduled for Tuesday, September 17, beginning at 1:00 p.m.

Mark A. Whitt

Sworn and subscribed before me in my presence this ____ day of September, 2019.

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served by electronic mail this 13th day of September, 2019, to the following:

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/s/ Mark A. Whitt

One of the Attorneys for PALMco Energy
OH, LLC d/b/a Indra Energy and PALMco
Power OH, LLC d/b/a Indra Energy

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

Summary: Memorandum Contra OCC Motion to Compel Discovery 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