

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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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 : Case No. 19-957-GE-COI
Indra Energy's Compliance :
with the Ohio Administrative :
Code and Potential Remedial :
Actions for Non-Compliance. :

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PROCEEDINGS

before Mr. Gregory Price and Ms. Anna Sanyal,
Attorney Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-B,
Columbus, Ohio, called at 2:33 p.m. on Wednesday,
September 11, 2019.

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APPEARANCES:

Whitt Sturtevant, LLP
By Mr. Mark A. Whitt
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On behalf of the Company.

Dave Yost, Ohio Attorney General
John H. Jones, Section Chief
By Ms. Jodi J. Bair
Senior Assistant Attorney General,
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30 East Broad Street, 16th Floor
Columbus, Ohio 43215

On behalf of the Staff of the Public
Utilities Commission of Ohio.

Bruce J. Weston, Consumers' Counsel
Office of the Ohio Consumers' Counsel
By Mr. Terry L. Etter
and Ms. Amy Botschner O'Brien
Assistant Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215

and

Carpenter Lipps & Leland LLP
By Ms. Kimberly W. Bojko
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of Ohio's Residential
Consumers.

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Wednesday Afternoon Session,
September 11, 2019.

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EXAMINER PRICE: Good afternoon. The Commission has set a prehearing conference for Case No. 19-957-GE-COI, being In the Matter of the Commission's Investigation into PALMco Power Ohio, LLC doing business as Indra Energy and PALMco Energy Ohio, LLC d/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Noncompliance.

My name is Gregory Price, with me is Anna Sanyal, and we are the Attorney Examiners assigned to preside over today's prehearing conference.

Let's take appearances, starting with the Company.

MR. WHITT: Thank you, Your Honor. On behalf of the Company, Mark Whitt and Rebekah Glover, from the law firm of Whitt Sturtevant LLP, 88 East Broad Street, Suite 1590, Columbus, Ohio 43215.

EXAMINER PRICE: Thank you.

Ms. Bojko.

MS. BOJKO: Mr. Etter.

EXAMINER PRICE: Mr. Etter, okay.

MS. BOJKO: Your Honor, thank you, good

1 afternoon. On behalf of Ohio's residential
2 consumers, the Office of the Ohio Consumers' Counsel,
3 Bruce Weston, Consumers' Counsel, Terry L. Etter and
4 Amy Botschner O'Brien, Assistant Consumers' Counsel.
5 We are at 65 East State Street, Columbus -- 7th
6 Floor, Columbus, Ohio 43215. Also our Special
7 Counsel, Kimberly Bojko, who is with Carpenter Lipps
8 & Leeland at 280 North High Street, Suite 1300,
9 Columbus, Ohio 43215.

10 EXAMINER PRICE: Thank you.

11 On September 9th, the Office of
12 Consumers' Counsel filed an interlocutory appeal,
13 request for certification to the Commission, and
14 application for review regarding the September 3rd,
15 2019, Attorney Examiner Entry granting in part and
16 denying in part Consumers' Counsel's motion to compel
17 discovery.

18 The Company filed a response on
19 September 10th.

20 We held this prehearing conference -- we
21 scheduled this prehearing conference in order to
22 address the interlocutory appeal.

23 MS. BAIR: Your Honor --

24 EXAMINER PRICE: Consumers' Counsel,
25 would you like to --

1 MS. BAIR: Your Honor, may I make an
2 appearance on behalf of Staff --

3 EXAMINER PRICE: Oh, I'm sorry --

4 MS. BAIR: -- to just note it for the
5 record?

6 EXAMINER PRICE: -- Ms. Bair. I didn't
7 see you back there.

8 MS. BAIR: Thank you.

9 EXAMINER PRICE: It's the awkward room
10 that's causing me the trouble.

11 MS. BAIR: On behalf of the Staff of the
12 Public Utilities Commission of Ohio, Dave Yost,
13 Attorney General, Jodi Bair, Assistant Attorney
14 General, 30 East Broad Street, Columbus, Ohio 43215.
15 Thank you.

16 EXAMINER PRICE: Now, Ms. Bojko or
17 Consumers' Counsel, who's arguing this today?

18 MS. BOJKO: I am.

19 EXAMINER PRICE: You are arguing this,
20 okay. You may proceed.

21 MS. BOJKO: Thank you, Your Honor.

22 Yes, on -- on September 9th, the
23 Consumers' Counsel filed an interlocutory appeal on
24 two grounds. The first ground was under Ohio
25 Administrative Code 4901-1-15(A)(2). And with that

1 citation --

2 EXAMINER PRICE: If I may question before
3 you get rolling here. Your interlocutory appeal,
4 regarding the September 3rd Entry, is solely related
5 to the motion to compel? There were four different
6 rulings in the Entry. There was a motion for
7 continuance that was denied, a motion to intervene
8 that was granted. You don't want to appeal that, do
9 you?

10 MS. BOJKO: No, thank you.

11 EXAMINER PRICE: There was also a
12 certification for interlocutory appeal that was
13 denied. It's my understanding your motion -- the
14 interlocutory appeal we're discussing today is solely
15 related to the motion to compel.

16 MS. BOJKO: Yes, Your Honor, it's related
17 to the denial of requiring depositions to be had or
18 the limiting, in our belief the limiting in scope of
19 the --

20 EXAMINER PRICE: Well, I think you're
21 putting the whole -- I think you're putting the whole
22 ruling into play, both the granting and the denial,
23 so.

24 MS. BOJKO: No, Your Honor. I --

25 EXAMINER PRICE: Yes, Consumers' Counsel,

1 you are putting the entire motion in play.

2 MS. BOJKO: Okay.

3 EXAMINER PRICE: Just to be clear: We
4 may modify the entire motion; we may deny
5 certification. It's hard to say.

6 MS. BOJKO: I understand, Your Honor.

7 So the interlocutory appeal was on the
8 motion to compel, as you pointed out, Your Honor, and
9 it was done on two grounds: One, under
10 4901-1-15(A)(2), with regard to the Entry effectively
11 eliminating or limiting OCC's right to participate in
12 the case and that the appeal should go immediately to
13 the Commission under this Administrative Code
14 section. OCC is authorized to conduct discovery by a
15 variety of methods --

16 EXAMINER PRICE: I have.

17 MS. BOJKO: -- including depositions --

18 EXAMINER PRICE: -- a question about the
19 original motion to compel. Was there a limit to the
20 number of witnesses that you were proposing to
21 depose? Did the motion at all say we'll depose no
22 more than 15 witnesses or 20 or 200?

23 MS. BOJKO: No, Your Honor. The
24 rationale, under Ohio Civil Rule 30(B)(5) and Federal
25 Rule 30(b)(6) is to ask --

1 EXAMINER PRICE: Which are not binding on
2 the Commission.

3 MS. BOJKO: They're instructive to the
4 Commission, Your Honor, that's correct.

5 EXAMINER PRICE: Persuasive authority.

6 MS. BOJKO: Thank you, Your Honor. Under
7 those two -- under the state rule and the federal
8 rule, the common practice in litigated proceedings,
9 when you have not identified a witness or a witness
10 has not filed testimony, such as the case here at the
11 Commission, then it is common practice to ask for a
12 corporate designee. This can be one or multiple --

13 EXAMINER PRICE: I wasn't -- nobody is
14 disputing the asking for the corporate designee. I
15 was asking if there was a limit to the number of
16 witnesses you are proposing to depose.

17 MS. BOJKO: We believe, Your Honor, the
18 way the seven topics were listed in the motion to
19 compel that there was an inherent limit. It could
20 have been one person that's able to talk to all of
21 those subject matters or it could have been two or
22 three. It would most likely be one or two. That is
23 typically how a corporate designee is made.

24 It's also important to have a corporate
25 designee because a lot of times employees are not

1 able to or authorized to speak on behalf of the
2 company. So if they're not authorized to speak on
3 behalf of the company, then their testimony is
4 invalidated.

5 So the tool of a corporate designee is
6 also to allow the company to choose who they believe
7 can best satisfy the discovery request. It's a very
8 common practice and that's what we were seeking.
9 It's not intending to be unlimited and to allow 15
10 corporate designees.

11 We did not have a name of a person. We
12 had no idea who responded to discovery responses.
13 Even though the Administrative Code requires Counsel
14 to list the responsive party for every interrogatory,
15 that was not done.

16 EXAMINER PRICE: And the AE's ruling
17 directed the Company to do that; is that correct?

18 MS. BOJKO: That is correct. Well, I
19 think co-counsel might take issue with that
20 statement, but it is our belief that the ruling
21 requested --

22 EXAMINER PRICE: Can I ask you a
23 question --

24 MS. BOJKO: -- a deponent to be made
25 available based on interrogatories, and Counsel is

1 refusing to do that even after the September 3rd
2 Entry.

3 EXAMINER PRICE: I have a question
4 regarding this notion you've been precluded from --
5 we've terminated your rights to participate in this
6 proceeding which is -- that's a very, I don't know,
7 very broad statement. After the ruling, you still
8 filed testimony for two witnesses to testify at the
9 hearing, right?

10 MS. BOJKO: After?

11 EXAMINER PRICE: The ruling on
12 September 3rd, you still filed two --

13 MS. BOJKO: That's incorrect because
14 there was a directive. There was a directive in the
15 Entry to more narrowly tailor --

16 EXAMINER PRICE: I'm just talking about
17 whether or not you can participate in this hearing.
18 You still filed two witnesses' testimony; is that
19 correct?

20 MS. BOJKO: Your Honor --

21 EXAMINER PRICE: Answer my question.

22 MS. BOJKO: Oh, I'm sorry, two witnesses.
23 I thought you said two deposition notices.

24 EXAMINER PRICE: No. Two witnesses.

25 MS. BOJKO: I apologize.

1 EXAMINER PRICE: Two witnesses. And
2 nothing in the ruling precludes those witnesses from
3 testifying at the hearing; is that right? They'll
4 have an opportunity to testify.

5 MS. BOJKO: I'm sorry?

6 EXAMINER PRICE: They'll have an
7 opportunity to testify, right?

8 MS. BOJKO: Presumably, Your Honor, if
9 you allow it the day of.

10 EXAMINER PRICE: Barring any other
11 protective orders.

12 How many interrogatories, requests for
13 production of documents, requests for admission did
14 you issue after the September 3rd Entry?

15 MS. BOJKO: After the September 3rd
16 Entry, we issued one set of discovery because of the
17 September 3rd ruling that stated that it might be a
18 better way or method to get discovery was by issuing
19 written discovery responses. So we did one written
20 discovery, trying to follow up to answers --

21 EXAMINER PRICE: Which consisted of how
22 many interrogatories?

23 MS. BOJKO: 15, maybe, Your Honor.

24 MR. WHITT: Your Honor, I don't mean to
25 interrupt, but I would just let the record show that

1 I believe I had represented, in our motion yesterday,
2 that OCC had served two sets of written discovery.
3 That was a misstatement on my part.

4 EXAMINER PRICE: Thank you for clarifying
5 the record, Mr. Whitt.

6 MR. WHITT: Thank you.

7 EXAMINER PRICE: Thank you.

8 And how many requests for production of
9 documents was in that set?

10 MS. BOJKO: Oh, I do have that, Your
11 Honor.

12 EXAMINER PRICE: There's going to be a
13 lot of questions along these lines in the course of
14 today.

15 MS. BOJKO: I'm sorry. I didn't know the
16 exact number of interrogatories and requests were
17 going to be relevant. I can find that in a minute,
18 Your Honor.

19 EXAMINER PRICE: Well, I think it's
20 relevant to your argument that you have been
21 terminated from participating in this proceeding.
22 I'm trying to get on the record how much discovery
23 you've done since your rights were allegedly
24 terminated.

25 MS. BOJKO: Your Honor, I think that's a

1 mistaken analogy or train of thought because just
2 because --

3 EXAMINER PRICE: I don't.

4 MS. BOJKO: Just because we issued
5 discovery doesn't mean they've been answered. This
6 whole thing --

7 EXAMINER PRICE: I didn't ask if they --

8 MS. BOJKO: This whole thing started
9 because of a motion to compel --

10 EXAMINER PRICE: First, you can --

11 MS. BOJKO: -- because Counsel hasn't
12 answered --

13 EXAMINER PRICE: -- answer my question
14 and then you can make the argument why you think it's
15 not a good idea.

16 MS. BOJKO: Your Honor, sitting here,
17 right this second, I'm sorry, I do not. It was not a
18 lengthy document. I think it was a handful of
19 discovery requests, maybe seven. It was similar to
20 the notice of deposition, so seven, I think.

21 EXAMINER PRICE: We can wait for an
22 answer. You've got three attorneys here to work on
23 this case. I also need to know how many requests for
24 admission you had on September 3rd.

25 MS. BOJKO: On the September 3rd, we add

1 zero. We had a third set that was requests for
2 admissions that have not been answered either. 13
3 requests for production.

4 EXAMINER PRICE: Thank you.

5 MS. WILLIS: Requests for admissions.

6 MS. BOJKO: 13 requests for admissions in
7 the third set.

8 MR. ETTER: No.

9 MS. BOJKO: That's right.

10 EXAMINER PRICE: Okay. So, one more
11 time. After the September 3rd Entry, you had 15
12 interrogatories, 13 requests for production of
13 documents, and 13 requests for admission?

14 MR. ETTER: No.

15 MS. BOJKO: No, your Honor. The RFAs,
16 the requests for admissions were prior to the ruling.

17 EXAMINER PRICE: Okay.

18 MS. BOJKO: There was only two pieces of
19 discovery that went out after September 3rd. It was
20 one set of discovery, Set 5, and that was based on
21 the Entry itself disallowing depositions and stating
22 that it might be more relevant to get the discovery
23 through written discovery responses. And then there
24 were two notices of deposition that went out. Well,
25 one notice --

1 EXAMINER PRICE: For how many witnesses?

2 MS. BOJKO: One notice of deposition for
3 two witnesses.

4 EXAMINER PRICE: Was that Discovery Set 4
5 or 5?

6 MS. BOJKO: That was Set 5.

7 EXAMINER PRICE: Set 5.

8 EXAMINER SANYAL: And then in Set 5, how
9 many discovery requests did you have?

10 MS. BOJKO: That's what we're trying to
11 find out, Your Honor.

12 EXAMINER SANYAL: Okay.

13 EXAMINER PRICE: I thought we knew that.

14 MS. BOJKO: Just one minute.

15 EXAMINER PRICE: Okay. The first answer
16 you gave me, was that Set 4 or Set 5?

17 MS. BOJKO: We were -- we were
18 speculating, Your Honor. We're trying to get you a
19 definitive answer on Set 5.

20 EXAMINER PRICE: Perfect. Well, we can
21 come back to this.

22 About the arguments of prejudice you make
23 in your memo contra or in your interlocutory appeal,
24 you do claim prejudice to Consumers' Counsel, right,
25 by the ruling?

1 MS. BOJKO: Yes, Your Honor. We do
2 believe that the Civil Rules of Procedure, both at
3 the state and the federal level, allow the tool of a
4 corporate designee in order to provide information
5 that a corporation would otherwise not be allowed or
6 able to provide or would not provide through written
7 discovery; and by disallowing that deposition, then
8 yes, that does prejudice the Consumers' Counsel, the
9 Consumers' Counsel's participation in this case.

10 EXAMINER PRICE: Let's talk about your
11 opportunity to narrow this down before we got to this
12 point.

13 MS. BOJKO: Absolutely, Your Honor.

14 EXAMINER PRICE: How many interrogatories
15 and requests for production of documents did you
16 issue prior to the filing of the stip on July 31st,
17 2019?

18 MS. BOJKO: Your Honor, we issued
19 discovery, prior to the Stipulation being filed, that
20 consisted of 11 interrogatories, 8 requests for
21 production. The majority of which were not responded
22 or provided with regard to the requests for
23 production until last week.

24 EXAMINER PRICE: But you never filed a
25 motion to compel on those.

1 MS. BOJKO: That is correct because we
2 had Counsel's word that they were providing it to us
3 and they did not provide it to us.

4 EXAMINER PRICE: Until last week.

5 MS. BOJKO: That is correct, we did not
6 file --

7 MR. WHITT: Wait. Which discovery are we
8 talking about here? I thought you were asking about
9 the first set.

10 EXAMINER PRICE: I'm asking for anything
11 filed before July 31, 2019, that's what I'm asking.

12 MR. WHITT: Okay.

13 EXAMINER PRICE: And then the RFAs?

14 MS. BOJKO: I'm sorry?

15 EXAMINER PRICE: The requests for
16 admissions? None? Zero?

17 MS. BOJKO: Prior to the Stipulation
18 being filed, Your Honor?

19 EXAMINER PRICE: Yeah.

20 MS. BOJKO: No. We were under the
21 investigation stage and we did not ask for requests
22 for admissions prior to the Stipulation being filed.
23 We were working on settlement with the parties as
24 well.

25 EXAMINER PRICE: I don't think that's

1 relevant for our consideration, so thank you, but it
2 doesn't move the ball any --

3 MS. BOJKO: I think it's very relevant.

4 EXAMINER PRICE: How many -- okay. So
5 from the period between the filing of the stip and
6 the filing of your motion to compel on August 20th,
7 how --

8 MS. BOJKO: I need to say a correction.
9 We also, in the process before filing the
10 Stipulation, were in discussions with Staff and
11 requesting information from Staff.

12 EXAMINER PRICE: I understand that.

13 MS. BOJKO: So that's discovery as well.

14 EXAMINER PRICE: In fact, you made a
15 public records request for some documents, didn't
16 you?

17 MS. BOJKO: We did, but I'm talking
18 before the Stipulation.

19 EXAMINER PRICE: I'm saying you made a
20 public records request. Staff gave you everything
21 that was public record, right?

22 MS. BOJKO: We were working behind the
23 scenes with Staff, as typically is done, in getting
24 workpapers and things associated with the Staff
25 Report.

1 EXAMINER PRICE: Uh-huh, I understand.

2 So in the three weeks between the stip
3 being filed and the motion to compel being filed on
4 August 20th, how many interrogatories and requests
5 for production of documents did you do then?

6 MS. BOJKO: We did . . .

7 I'm sorry, am I including the Fifth Set,
8 too, Your Honor?

9 EXAMINER PRICE: No. We will get to
10 that. We will ask the cumulative number. If you
11 want to give us the cumulative number now, that will
12 be great.

13 MS. BOJKO: I believe, Your Honor,
14 through the Second Set to the Fourth Set, there was
15 55 interrogatories issued and 28 requests for
16 production of documents. This is a quick estimate.
17 I apologize. We were notified of this prehearing
18 conference yesterday and I did not have time to look
19 through all interrogatories and did not know you'd
20 want exact numbers of those.

21 EXAMINER PRICE: It's rough numbers
22 actually. You are claiming undue prejudice and we
23 just, you know, we're not a party to all these
24 discovery actions ahead of time, so the issue in our
25 mind is, is this undue prejudice to you because you

1 didn't diligently pursue this case before the filing
2 of the stip or are you being unduly prejudiced by the
3 motion to compel -- the denial of the motion to
4 compel.

5 MS. BOJKO: Your Honor, for clarity
6 purposes, we're claiming we've been denied due
7 process due to the denial of the deposition. A tool
8 for deposition is completely different than written
9 discovery.

10 I hope that you will also, in turn, ask
11 opposing counsel how many of the 55 interrogatories
12 and 28 requests for production of documents that
13 they've actually answered, and that will help you
14 assess whether a deposition is a better or a more
15 efficient tool for discovery.

16 EXAMINER PRICE: It's not a matter of
17 whether it's better or more efficient. It's a matter
18 of being overly burdensome. Some of these things can
19 be -- corporate designees, that sort of thing, can be
20 obtained through discovery. You know, if he didn't
21 answer, then that's a problem. If he didn't answer
22 and you didn't file a motion to compel, that's
23 another problem.

24 You don't seem to be hesitating to file
25 motions to compel now. We've had two in the last two

1 weeks. Clearly, Consumers' Counsel has a template
2 for doing a motion to compel and you could have done
3 it at any point between the filing of the Staff
4 Report and the first one that you filed.

5 MS. BOJKO: Your Honor, we take very
6 seriously the rules in the Administrative Code that
7 require us to work with co-counsel to try to work out
8 discovery disputes.

9 And I have a timeline here that might
10 help you, with documents attached, that might help
11 you understand the efforts that we did go through,
12 before we actually filed a motion to compel the first
13 time and the second time, and I think you'll get a
14 better understanding.

15 It's not as easy, as I think you think it
16 is, to get responses back from Counsel --

17 EXAMINER PRICE: You don't need to opine
18 as to what I think, Ms. Bojko. I know what I think;
19 is that clear?

20 MS. BOJKO: Yes, Your Honor.

21 It's -- it's not an easy task to try to
22 talk to Counsel and get responses and to work through
23 discovery issues. Every counsel tries to do it in
24 good faith and they try to work through various
25 objections. There are many objections. I think,

1 frankly, sometimes depositions are more efficient
2 because you don't have to go through the written
3 objection process in order --

4 EXAMINER PRICE: I didn't say it was a
5 question of efficiency. I said it was overly
6 burdensome.

7 MS. BOJKO: And not as burdensome as
8 responding to five sets of discovery. Wouldn't you
9 like, Your Honor, at this time, for me to hand you
10 the timeline that I've prepared?

11 EXAMINER PRICE: No. You can read it
12 into the record.

13 MS. BOJKO: Well, I've also produced the
14 documents that go along with the timeline so that you
15 can understand what has been undergone per the rules.

16 EXAMINER PRICE: Has Mr. Whitt seen this
17 before now?

18 MS. BOJKO: They're all things he would
19 have seen, absolutely.

20 MR. WHITT: I have not seen it, Your
21 Honor.

22 MS. BOJKO: Every single document,
23 attached to the timeline, you have seen.

24 MR. WHITT: I haven't seen the timeline.

25 MS. BOJKO: Correct, he has not seen the

1 timeline.

2 May I approach?

3 EXAMINER PRICE: You may.

4 MS. BAIR: Do you have another copy for
5 Staff?

6 MS. BOJKO: Yes, of course.

7 So, as you can see, this whole notice of
8 deposition started on May 20, which was a standard
9 deposition for the OCC to depose any entity, any
10 individual that files testimony.

11 EXAMINER PRICE: And that was limited
12 solely to that topic; is that correct?

13 MS. BOJKO: Absolutely. That's the
14 standard is usually parties file testimony and so we
15 put in a deposition notice before we know who the
16 parties are, before they responded to discovery,
17 before we have any corporate designees highlighted or
18 easily attainable through our discovery means.

19 And secondly, after we had some more
20 information, we decided to file, on August 2nd, an
21 amended notice to take deposition of witnesses and
22 non-witnesses, realizing the Company might not file
23 witness testimony.

24 And in here we believe that we -- and
25 because we had not been made aware of any individual

1 that was involved in this matter, we had no signed
2 interrogatories, we had no requests for admissions
3 signed, no verifications given to us even though
4 they've been promised to us multiple times, we still
5 do not have those and, because of that, we filed the
6 motion to compel.

7 August 2nd, so we're a month, about six
8 weeks out from when that was filed, so these issues
9 have been attempted to try to work through since
10 August 2nd. It isn't an eleventh-hour request.

11 EXAMINER PRICE: But not before August
12 2nd, as your timeline makes clear.

13 MS. BOJKO: No, Your Honor --

14 EXAMINER PRICE: There's only one entry
15 on there before August 2nd; it's May 20th.

16 MS. BOJKO: No, Your Honor, that's not
17 accurate.

18 EXAMINER PRICE: Well, that is what your
19 timeline says. It says 5/20 and then 8/2. There's
20 no other entries before August 2nd.

21 MS. BOJKO: Well, Your Honor, because the
22 requirement to produce this type of document is after
23 a motion to compel is filed. Our motion to compel
24 was filed on August 2nd. You're right, I did not
25 tell you all the times that people talked to Counsel

1 about deposing a witness or other discovery disputes.

2 EXAMINER PRICE: But I'm interested in
3 the pre-August 2nd part, not the post-August 2nd
4 part.

5 MS. BOJKO: Your Honor, what's at issue
6 here today is the motion to compel that was filed on
7 August 2nd.

8 EXAMINER PRICE: No. What's at issue
9 here is your claim to prejudice. And my point about
10 your prejudice is, if you more diligently pursued
11 this case before the stip was filed, because
12 generally we're not going to have a ton of time
13 between the filing of the stip and the actual
14 hearing, you wouldn't be in this spot and papering
15 the daylights out of the Company.

16 MS. BOJKO: Your Honor, I disagree that
17 there was no due diligence or effective
18 representation or anything before August 2nd. There
19 are many --

20 EXAMINER PRICE: I never said effective
21 representation.

22 MS. BOJKO: It's the implication you're
23 making. There was many conversations had, with both
24 Staff and the Company, about the Stipulation, about
25 the problems with proposed provisions, with good

1 things about proposed provisions, information, where
2 it came from, why does it reference X number in the
3 Stipulation. Many of those informal discovery items
4 did, in fact, occur prior to August 2nd.

5 I was merely trying to show you what's
6 happened since August 2nd, which is when the motion
7 to compel was filed, because there's some implication
8 that this is the eleventh hour. And this happened
9 six or seven weeks ago prior to the hearing, so it is
10 not the eleventh hour as claimed and that is what
11 this is responsive to.

12 EXAMINER PRICE: It's certainly 10:30 if
13 it's not the eleventh hour.

14 MS. BOJKO: So, on August 9th, the --

15 EXAMINER PRICE: You would agree that the
16 motion to compel did not include a protective order
17 precluding any discovery?

18 MS. BOJKO: I disagree. I do not believe
19 it did so, Your Honor, but I believe that co-counsel
20 has treated it as such because even with the one
21 deposition, that I think was made clear was allowed
22 in the September 3rd Entry, which was to produce a
23 deponent with regard to those who have signed
24 discovery responses, Counsel for PALMco has stated
25 unequivocally, and that's in your packet, they said

1 they will not voluntarily produce any person for
2 depositions despite the September 3rd Entry's
3 directive and that was on September 10th.

4 EXAMINER PRICE: We'll have time to get
5 to that later.

6 Since you mentioned Mr. Whitt's
7 representations, one of the points Mr. Whitt makes
8 gets to the question whether this is a new or novel
9 point of law which is part of being certified to the
10 Commission.

11 MS. BOJKO: That's our alternative
12 argument, yes, Your Honor.

13 EXAMINER PRICE: And as Mr. Whitt points
14 out, although it's not in the motion to compel rule,
15 the motion for protective order rule specifically
16 provides that discovery may be had only by a method
17 of discovery other than that selected by a party
18 seeking discovery. So that is clearly the Examiners
19 -- wouldn't you agree it's clear the Examiners have
20 the power, under the Administrative Code, to direct
21 that? There's nothing novel about that; is that
22 correct?

23 MS. BOJKO: No, Your Honor, I disagree.
24 I don't think --

25 EXAMINER PRICE: It's in the rules and

1 you -- you disagree it's in the rules or you disagree
2 that something in the rules makes it therefore not
3 novel?

4 MS. BOJKO: I disagree with the
5 interpretation. I do not believe -- I think there
6 are other requirements and parameters around a motion
7 for a protective order. It's not --

8 EXAMINER PRICE: I only asked about the
9 authority. I only asked about whether that
10 particular authority is new or novel, and it's
11 clearly in the rules, is it not?

12 MS. BOJKO: The ability for the Attorney
13 Examiner to tell a party that they need to do written
14 discovery versus deposition is a new or novel concept
15 or policy --

16 EXAMINER PRICE: Why is that --

17 MS. BOJKO: -- that I have not ever seen
18 an Entry do in the 21 years that I've been practicing
19 before this Commission.

20 EXAMINER PRICE: But you haven't read
21 every Entry in the last 21 years.

22 MS. BOJKO: Of course not, Your Honor.

23 EXAMINER PRICE: Of course not. And
24 sometimes rules rarely get applied but there are
25 rules nonetheless, and you would agree that 4901-1-24

1 of the Ohio Administrative Code, (A)(3), says a
 2 protective order may provide that "Discovery may be
 3 had only by a method of discovery other than that
 4 selected by the party seeking discovery." Do you
 5 disagree? That's what the rule says, doesn't it?

6 MS. BOJKO: I can't disagree with what
 7 the rule says. I disagree with your interpretation
 8 and limitation of the rule, Your Honor.

9 EXAMINER PRICE: How is that -- you're
 10 saying "interpretation." What other meaning could it
 11 possibly have?

12 MS. BOJKO: If you read on in the rule,
 13 it talks about unduly burdensome, things that cause
 14 undue harm. I don't believe you can read that one
 15 phrase out of context of the entire --

16 EXAMINER PRICE: Actually, I found your
 17 requests unduly burdensome, exactly, and oppressive,
 18 I believe was the language of the interlocutory
 19 appeal.

20 MS. BOJKO: And we believe two or three
 21 depositions is not oppressive and that is what we're
 22 appealing, Your Honor.

23 EXAMINER PRICE: I guess the other thing,
 24 and Mr. Whitt points this out and I'd like you to
 25 respond to it, you point out in your motion for

1 certification and interlocutory appeal that the
2 discovery rules seek to minimize Attorney Examiner
3 intervention in the discovery process. That's one of
4 the points you make; is that correct?

5 MS. BOJKO: That's the attempt. They try
6 to make you jump through all the hoops. As I point
7 out in the timeline --

8 EXAMINER PRICE: And you sought the
9 Attorney Examiner intervention in this case, not
10 Mr. Whitt; is that correct?

11 MS. BOJKO: We filed a motion to compel
12 because Mr. Whitt was not responding to
13 interrogatories and he was denying our rights to a
14 deposition, absolutely.

15 We jumped through all the hoops that are
16 outlined in my timeline, and after numerous, multiple
17 attempts to schedule a deposition and get responses
18 to discovery, we filed a motion to compel which is
19 what the rules require us to do if we cannot resolve
20 the issue without the intervention of the Attorney
21 Examiners.

22 EXAMINER PRICE: And you also rely upon a
23 CG&E case. It's actually Consumers' Counsel versus
24 Public Utilities Commission, but it's the CG&E RSP
25 case; would you agree? If I say that, we're talking

1 the same case; is that right?

2 MS. BOJKO: Yes.

3 EXAMINER PRICE: Okay. And that case
4 involved denial of discovery into a subject matter or
5 documents, side agreements; is that correct?

6 MS. BOJKO: That is, Your Honor.

7 EXAMINER PRICE: And the topic today
8 involves the method of discovery, not the subject
9 matter. We've not cut you off from any subject
10 matter discovery at this point.

11 MS. BOJKO: Your Honor, I think the Entry
12 can be interpreted that way. I think the Entry said
13 that it wasn't narrowly tailored and that there was
14 an implication that certain items --

15 EXAMINER PRICE: What subject matter did
16 I say, in the Entry, that you could not pursue?

17 MS. BOJKO: You did not directly, Your
18 Honor. As I said, it was an interpretation that --

19 EXAMINER PRICE: So you're interpreting
20 into it something that doesn't exist so that you can
21 have a point to appeal?

22 MS. BOJKO: No, Your Honor. We have to
23 interpret every one of your entries and we do the
24 best that we can and we try to apply it as we deem
25 fit.

Counsel has interpreted your entry to have granted a motion for protection. I don't agree with that interpretation, but we all have to interpret because, as you point out, I cannot be in your mind, I cannot read your mind, and to us it seemed like, when you were selecting the mode of deposition and you stated that our topics were too broad, that you were attempting to limit the scope of those topics. I'm glad to hear that you were not.

EXAMINER PRICE: It doesn't say any subject matter. It just said seven topics were overly broad, overly burdensome for unknown witnesses and an unknown number of witnesses. I never even argued that you couldn't ask for a corporate designee. In fact, I think in the motion you even say asking for a corporate designee is fair.

MS. BOJKO: And so, Your Honor, thank you --

EXAMINER PRICE: So where we are at today. You have noticed the deposition of a witness who signed an interrogatory regarding finances; is that correct?

MS. BOJKO: We have done that previously, Your Honor, so yes.

EXAMINER PRICE: Previously?

1 MS. BOJKO: Well, there wasn't a name
2 attached to it until Counsel --

3 EXAMINER PRICE: But you have a name now.

4 MS. BOJKO: Now we have a name, yes.

5 EXAMINER PRICE: You have a name now.

6 MS. BOJKO: Yes, your Honor.

7 EXAMINER PRICE: And you've provided a
8 notice of deposition for that name.

9 MS. BOJKO: Yes, Your Honor.

10 EXAMINER PRICE: And that name is?

11 MS. BOJKO: Joseph.

12 EXAMINER PRICE: Mr. Joseph. Ms. Joseph?
13 Something Joseph?

14 MS. BOJKO: Miss.

15 MS. GLOVER: Miss.

16 EXAMINER PRICE: Ms. Joseph.

17 MS. BOJKO: The name is not easily
18 ascertainable. We apologize for using the wrong --

19 EXAMINER PRICE: Okay. I think Mr. Whitt
20 has been sitting here patiently. He's alleged to
21 have failed to respond to numerous conversations and
22 requests for discovery, so I think we'll let him
23 respond to your arguments and then we'll go from
24 there.

25 MR. WHITT: Thank you, Your Honor.

1 The issue here isn't about OCC's right to
2 discovery or the interpretation of the Commission's
3 discovery rules. The right to discovery, it has to
4 be exercised timely and in accordance with Commission
5 rules and OCC hasn't done that. And, in fact, I
6 think what OCC has established today is that they
7 have not complied --

8 EXAMINER PRICE: Mr. Etter, you're
9 whispering too loud and I can't hear Mr. Whitt.

10 Sorry, Mr. Whitt.

11 MR. WHITT: OCC has not complied with the
12 representation it made in its motion to intervene
13 that it would not unduly delay these proceedings;
14 yet, that seems to be exactly what they are
15 attempting to do.

16 So, to the extent the entire Order has
17 been reopened due to OCC's motion, the Bench would be
18 well within its authority to revoke intervention by
19 OCC in this case if it were so inclined.

20 EXAMINER PRICE: In all fairness, they
21 only -- they only opened up the motion to compel.
22 The other three rulings were not -- are not
23 necessarily in play.

24 MR. WHITT: Very well.

25 In any event, the timeline OCC has

1 prepared really doesn't help them, and I need to make
2 a couple of corrections.

3 First of all, the motion to compel, that
4 OCC filed, did not seek to compel responses to any
5 interrogatories or any document requests. That
6 motion was limited to the issues in their notice of
7 deposition. So it's not correct to say that they had
8 to -- they had to seek depositions because we weren't
9 providing written discovery responses. We were
10 providing responses.

11 In any event, the motion to compel,
12 obviously what brings us here today is the
13 September 3rd ruling, and it's important to pay
14 attention, I think, to what has happened since
15 September 3rd.

16 Again, the September 3rd Entry, as His
17 Honor pointed out, didn't cut off OCC's right to do
18 anything. It said, look, you can take depositions.
19 It specifically said you can depose, you know, a
20 corporate designee, you can send other more
21 narrowly-tailored notices, you can do all of those
22 things, you just can't -- it basically advised them
23 to use a rifle, not a shotgun, when it comes to
24 depositions.

25 And so, after the September 3rd Entry,

1 you'll see here on September 3rd, OCC asked us for
2 the person responsible for discovery requests. We
3 provided that name the next day. Again, this is
4 OCC's timeline.

5 Testimony is filed on September 4th.

6 September 4th, 5th, and 6th, parties work
7 on dispute of purported confidential information
8 utilized in filed testimony. I can report that's
9 been resolved. The Company has waived any claim of
10 confidentiality, so OCC need not concern itself with
11 any protective order going forward for items that
12 were previously confidential. That's because we're
13 so intransigent in any event.

14 You'll see here on 9/9, a week after the
15 Entry, is the first time OCC asks for the
16 availability of our corporate representative for a
17 deposition. And it is true, I said let me check on
18 that. That was in late morning/early afternoon of
19 9/9. What happened later in the day? Well, at 5:15,
20 we get the filing for an interlocutory appeal, and at
21 5:27, or something like that, we get the notice of
22 two more depositions.

23 I come into the office, the next morning,
24 and I see that the Bench has scheduled a prehearing
25 conference in this case, so that takes the 11th off

1 the table immediately for the deposition. And given
2 the subsequent events that occurred on 9/9, that's
3 why I have said we are not providing anybody
4 voluntarily.

5 The OCC, by the way, has not issued a
6 deposition notice for Ms. Joseph, nor were we going
7 to insist that they do. As of, well, the middle of
8 the day, heck, up until 4:00 on 9/9, I was willing to
9 make the witness available without a notice. She can
10 answer the questions and we'll go about our merry
11 way.

12 But I can't be, you know, ignorant to
13 what happened since then and it is, you know, just
14 this additional, you know, eleventh-hour deposition
15 notices, the interlocutory appeal, and so forth.

16 We're now told, I learned 20 minutes
17 before this hearing, apparently there's some issue
18 now with a third set of discovery answered on
19 September 3rd. We find out today, September 11th,
20 that there's some problem.

21 I haven't even read the motion to compel
22 yet. I can't tell you what it's about, but certainly
23 we'll, I suppose, have to respond to that motion.

24 Again, Your Honor, we're to the point in
25 this case where it really is no longer about what I

1 want to do or what anybody wants to do or should do.

2 We can take depositions, if they're going
3 to be had, basically tomorrow, Friday, or Monday.
4 That's what we're left with. And I have to fly out
5 to New York to do it. There's no reason I should
6 have to do that. There's no reason my client should
7 have to pay for it.

8 Again, going back in the timeline, you
9 can see that the month of August was basically
10 squandered. We filed the Stipulation on July 31st.
11 Radio silence until this last minute flurry of
12 activity, where, again, OCC's failure to plan is now
13 everybody else's emergency: Stop what you're doing;
14 give us what we want; we're going to file papers.
15 It's frankly ridiculous.

16 I will pause.

17 EXAMINER PRICE: Ms. Bojko, care to
18 respond?

19 MS. BOJKO: Your Honor, no questions?

20 The -- the --

21 EXAMINER PRICE: He's not the movant. As
22 opposed to a rate case or some other --

23 MS. BOJKO: Well, I --

24 EXAMINER PRICE: Let me finish.

25 As opposed to a rate case or some other

1 typical PUCO tariff proceeding where the company
2 comes in and makes an application and says we want to
3 raise somebody's rates, we want an increase in a
4 rider; they're not a voluntary participant in this
5 proceeding.

6 This was an enforcement action by the
7 Staff. They were dragged into this. I'm sure, you
8 know, Staff had more than enough supporting testimony
9 for the allegations. There's still allegations
10 today, we haven't had a hearing, but let's not
11 pretend they should be treated the same way as a
12 company that's come in seeking a million-dollar rate
13 increase or a 200,000-dollar rider adjustment.

14 MR. WHITT: If I may, Your Honor, to that
15 point, it raises another issue, which it certainly
16 isn't evident from any discovery that OCC has served
17 or even from their testimony, about what point it is
18 that they're trying to make or what it is they're
19 trying to do.

20 Again, the Company is not asking for
21 anything. Allegations were made. If Staff wanted
22 to, they could have paraded folks in here and gotten
23 out complaint files and we would hear from people.
24 Staff would support the -- or, you know, put on
25 evidence for allegations in the Staff Report, the

1 Company would put on its own evidence, and the
2 Commission would decide whether rules have been
3 violated; if so, how much that ought to cost the
4 Company.

5 Staff and the Company have waived their
6 right to do that. There will be no finding or
7 adjudication of the allegations in the Staff Report.

8 This is a stipulated remedy. Staff
9 doesn't have to prove anything. The Company doesn't
10 have to prove anything. The only thing that needs to
11 be proven is that the Stipulation represents a fair
12 and just result.

13 And OCC hasn't made the slightest effort
14 to produce any evidence that there's any underlying
15 conduct that ought to be remedied. They can't just
16 say "Oh, well, Staff alleged that the Company must
17 have done it; accept that all is true; they should be
18 punished more severely."

19 They have to present some evidence of
20 some rule violation, independent of just allegations
21 in the Staff Report, and there hasn't been any
22 attempt to do that.

23 So I'm not sure what we're doing with
24 this discovery anyway. The testimony filing is over.
25 I will cop to overpromising and under-delivering on

1 the responses to the Fourth Set. Those were served
2 late on Friday afternoon, before the holiday. We did
3 not get them to the client until the next week. The
4 client -- well, I'm responsible. I overpromised,
5 under-delivered, and we still owe some responses to
6 that. We're working on those in addition to
7 responses to the Fifth Set of discovery.

8 But again, Your Honor, it's not just
9 about OCC's discovery rights. We have rights too.
10 The rules are intended to protect us against unfair
11 prejudice, burden, expense, all of those things, and
12 it seems that that's the only objective that this
13 discovery even has.

14 EXAMINER PRICE: Ms. Bojko, any response?

15 MS. BOJKO: I think it's inappropriate to
16 talk about the merits of the case before you today.
17 I don't think we should talk about evidence and --

18 EXAMINER PRICE: He didn't talk about the
19 merits. He just said they don't have the burden of
20 proof.

21 MS. BOJKO: He did. He actually talked
22 about --

23 EXAMINER PRICE: These are allegations
24 until they're proven.

25 MS. BOJKO: He said that OCC has no

1 evidence and that OCC hasn't produced anything. I
2 also disagree with his interpretation of the Staff
3 Report as well as the settlement that was filed that
4 admits wrongdoing.

5 I don't think it's appropriate today to
6 talk about evidence and whether we can prove or not
7 prove the Company has violated the Commission rules
8 that it has already admitted that it's violated per
9 the Stipulation, so I don't think that's appropriate
10 for today.

11 Mr. Whitt made a very incorrect
12 statement, that I think he just corrected, that he
13 got discovery to us on September 3rd. He did not.
14 It was due and we had to ask for it multiple times
15 and it wasn't produced. And then, when it was
16 produced four days late, it has numerous responses
17 that say "TBD." To be determined. There are no
18 objections. There are no responses at all. It just
19 has a big "TBD" in it. So those are deemed
20 incomplete discovery responses and that is one reason
21 for the motion to compel.

22 We just received those. I could not have
23 filed a motion to compel any sooner given that we
24 just received those responses and were continually
25 promised those responses.

1 Three depositions and five sets of
2 discovery, one of which was only served at what we
3 believe was the request in the September 3rd Entry,
4 is not unduly burdensome. It's typical to have one,
5 two, three depositions in a case. It's not unusual
6 and we believe it is fair and reasonable.

7 If the deposition had been had pursuant
8 to the August 2nd notice of deposition, there might
9 have only been one deposition. We don't know because
10 we weren't provided any names of the responsible
11 parties, so we had to do a corporate designee, we had
12 to do a deposition in that fashion. But had
13 Mr. Whitt selected a corporate designee on
14 August 3rd, then we would not have this discussion.

15 And it is a complete misrepresentation to
16 the Bench that there were no discussions or
17 voicemails traded between counsel with regard to
18 deposing those witnesses.

19 MR. WHITT: Your Honor --

20 MS. BOJKO: Those happened before
21 August 9th.

22 MR. WHITT: If you are saying -- are you
23 denying that September 9th --

24 EXAMINER PRICE: You can address
25 arguments to me, not to her.

1 MR. WHITT: Well, my representation to
2 this Bench is that September 9th, 2019 is the first
3 time I was asked about the availability of Ms. Joseph
4 for a deposition. If Counsel is accusing me of
5 misrepresenting that fact, then I want to see
6 evidence produced of that right now.

7 MS. BOJKO: Your Honor, that is not what
8 I stated. I said that since August 2nd, which had in
9 it that we wanted to depose a person that was
10 responsible for answering discovery, I requested and
11 I actually had on my calendar, I suggested
12 September 11th, September 12th. We talked about New
13 York. We talked about doing depositions over the
14 phone. Those discussions did, in fact, occur way
15 before September 9th.

16 Did we know the person's name? No,
17 absolutely not, because we were not given the
18 person's name until September 4th, I believe. So we
19 didn't know the person's name, but we asked for the
20 deposition of the person and we talked about dates
21 and we talked about timeline. So it's very unfair to
22 say we didn't do anything before September 9th
23 because that's just not accurate.

24 We believe this is not unduly burdensome.
25 We believe having a few depositions is better than

1 continually serving discovery particularly at this
2 stage of the hearing. We believe that had a
3 corporate designee been produced on August 2nd, or
4 shortly thereafter, we would not even be here today.

5 It is very --

6 EXAMINER PRICE: So if he agrees to
7 produce Witness Joseph on Monday, we can all go home?

8 MS. BOJKO: Well, Your Honor, I don't
9 believe -- if he's going to commit that Ms. Joseph
10 can respond to the deposition notice in full, but I
11 don't believe that's the case after further discovery
12 we've had and responses we've been getting back and
13 things that have been uncovered in the last month.
14 It's not that we haven't been doing any kind of
15 discovery or due diligence.

16 We believe Mr. Palmese is the entity or
17 the person who is going to be able to speak to the
18 items listed in his notice, and then we believe --

19 EXAMINER PRICE: We'll get to Mr. Palmese
20 in due course.

21 MS. BOJKO: -- Mister -- I'm sorry, I
22 don't know how to pronounce the second gentleman's
23 name. "Bah-hees"? "Bashe"?

24 MR. WHITT: "Bashe."

25 MS. BOJKO: Mr. Bahshe.

1 EXAMINER PRICE: We'll get to them in a
2 moment.

3 MS. BOJKO: That he will be the person
4 that can answer our questions with regard to
5 everything else.

6 So there are individuals responsible for
7 the settlement provisions and the settlement terms
8 and that's what we're trying to understand through
9 deposition, and I think it's a fair discovery tool
10 that's been given to us by the Civil Procedure.

11 EXAMINER PRICE: Let's focus on
12 Ms. Joseph.

13 MS. BOJKO: Sure.

14 EXAMINER PRICE: Let's see if we can take
15 care of one thing at a time here.

16 You provided Ms. Joseph as the name for
17 the financial issues.

18 MR. WHITT: She will verify all of the
19 discovery responses that require a verification. As
20 the rule allows us, the discovery was directed to a
21 corporation and the rules say the corporation shall
22 designate one or more authorized individuals to
23 verify the answers on behalf of the Company and
24 that's what she will do.

25 It hasn't been given yet because my

1 intention was to do one verification that lists all
2 of OCC's discovery responses including the Fifth Set.
3 She'll sign that, we'll give it to them, everything
4 will be verified. OCC can then use the information,
5 to the extent permitted under the rules, at hearing
6 and so forth, so there's no prejudice that they don't
7 have it yet.

8 EXAMINER PRICE: And you will make that
9 witness available for deposition prior to the
10 hearing.

11 MR. WHITT: Well, I have not agreed to
12 that.

13 EXAMINER PRICE: That wasn't a question.
14 That was not a question. You'll make this witness
15 available prior to the hearing. Commit to the Bench
16 you'll take care of this witness.

17 MR. WHITT: Well, that depends on what
18 else you're going to rule.

19 EXAMINER PRICE: Not an unfair response.
20 Okay. I'm just trying to see if we can find some
21 layer of agreement.

22 MR. WHITT: Let me just say I can't, you
23 know, again this is one of the reasons, you know, I
24 have to go prep a witness, do all these things. I
25 can't tell you what she's going to answer. I don't

1 know what they're going to ask.

2 EXAMINER PRICE: As opposed to Ms. Bojko,
3 I accept that it's burdensome to go to New York with
4 an out-of-state witness, I'm not questioning that,
5 but it does seem, based upon the record that we are
6 at at this point, that it's fair, if she's going to
7 be your verifying witness, for her to be deposed
8 prior to the hearing and so --

9 MS. BOJKO: Your Honor, in PUCO
10 proceedings it is not necessarily mandatory that the
11 attorney flies out to New York, so having that as an
12 underlying requirement to make a burdensome ruling
13 is, I think, unfair because that's not the case.
14 We've had many out-of-state witnesses where I'm
15 sitting in my office, objecting to the witness --

16 EXAMINER PRICE: It's not his -- it's not
17 his comfort level.

18 MR. WHITT: My client has skin in the
19 game. Your witnesses are demanding that they pay
20 millions of dollars, be kicked out of the state,
21 tarred and feathered. It's a serious case that needs
22 defending.

23 MS. BOJKO: Your Honor, all of our cases
24 are serious.

25 EXAMINER PRICE: You're winning on this

1 issue, Ms. Bojko. You should stop while you're
2 ahead. I'm trying to get you Witness Joseph. I'm
3 trying to extract a commitment from Mr. Whitt that
4 he'll make Witness Joseph available so that you can
5 depose her one day, two days, three days, as long as
6 your heart's content.

7 MS. BOJKO: Thank you, Your Honor.

8 EXAMINER PRICE: But that does lead into
9 the next issue that I said we would get to and that
10 is the question of Company employees who are not
11 witnesses and who are not going to verify discovery,
12 I guess I'm gathering, and whether you're entitled to
13 depose them. And so, I guess my question is: What
14 elements for these two witnesses, what elements of
15 the three-part test do you think you will reasonably
16 gather admissible information from these two
17 witnesses?

18 MS. BOJKO: Thank you, Your Honor.

19 Obviously not the first test, Your Honor.
20 I wouldn't pretend to argue that counsel here today
21 is not capable of negotiating a settlement agreement;
22 so we're focusing on the second and third test.

23 And if you look at the notice of
24 deposition, we've -- the new revised notice, amended
25 notice of deposition, we've clearly outlined the

1 important provisions for each of the two named
2 witnesses.

3 And Mr. Palmese, we believe, has the
4 knowledge -- and again it's difficult for us to know
5 this because, unlike Mr. Whitt, I don't believe that
6 the verification rule, that's a Civil Procedure rule,
7 Your Honor, that you said is only persuasive in front
8 of you. The rule we're relying on is 4901-1-16 which
9 requires each and every interrogatory to name a
10 responsible person, not to require verification.

11 EXAMINER PRICE: It's my understanding
12 that's what he was going to do.

13 MS. BOJKO: That's not what he's done.
14 We've requested supplementation and that's not my
15 understanding of what he just said he was going to
16 do. That's different than a verification.

17 EXAMINER PRICE: It's the same end
18 result. He's going to designate this witness for
19 every interrogatory. Are you not?

20 MR. WHITT: Yes.

21 EXAMINER PRICE: Whether you do it in a
22 summary fashion or whether she signs each one. If
23 you want her to sign each one, I'll direct him to do
24 that.

25 MS. BOJKO: Your Honor, I don't believe

1 that's what he said. I believe he used the words
2 "where appropriate" or "if appropriate" when he was
3 talking about the verification and listing certain
4 interrogatories that it applied to. That's how I
5 took his statement, sir.

6 MR. WHITT: Requests for production don't
7 need verifying; interrogatories do.

8 EXAMINER PRICE: RFAs do. Requests for
9 Admissions.

10 MR. WHITT: RFAs too.

11 EXAMINER PRICE: That's his distinction.

12 MS. BOJKO: Okay. Thank you. It's not
13 how I understood it, so thank you for the
14 clarification.

15 Your Honor, though, it's our
16 understanding -- I mean, obviously we can have that
17 deposition and then see, but it was our understanding
18 that the person that would be, from our due diligence
19 in our discovery, the person that would be more
20 appropriate to handle Paragraphs 1, 2, 7, and 8 in
21 the settlement were Mr. Palmese, and then the person
22 responsible for handling the Paragraphs 1, 2, 3 would
23 be Mr. Bahshe, and those individuals would be the
24 appropriate people that would be able to talk about
25 the terms of the settlement so that we could

1 ascertain if it meets the second and third prong with
2 regard to public interest and violating any
3 regulatory principle or law. And we list
4 specifically how each subject ties to a paragraph in
5 the Stipulation to narrowly tailor our notice of
6 deposition as you directed on September 3rd.

7 EXAMINER PRICE: One thing you said
8 earlier and it's just surprising because I thought
9 that was not right but I'm fully happy to admit that
10 I'm wrong: Where, in the Stipulation, does PALMco
11 admit to the violations?

12 MS. BOJKO: It's Paragraph 1 and 2, I
13 believe, sir, which is -- let me -- actually, I
14 think it's -- let me find it.

15 It's on page 2. I think I put these,
16 Your Honor, in the motion to compel or in the
17 deposition -- Paragraph 2. It states for potential
18 for future customer harm resulting from the
19 violations, the CRES practices --

20 EXAMINER PRICE: Where are you at?

21 EXAMINER SANYAL: Are you talking about
22 the numbered paragraph?

23 MS. BOJKO: No, I'm sorry. It's page 2.
24 It's not a number.

25 EXAMINER PRICE: First full paragraph?

1 MS. BOJKO: Second full paragraph.

2 EXAMINER PRICE: So you're reading the
3 sentence --

4 MS. BOJKO: It says "The primary
5 objective of this Stipulation is to provide redress
6 for the consumers that were harmed and to avoid, to
7 the extent possible, the potential for future
8 customer harm...." So they're admitting they harmed
9 customers and there could be potential future harm
10 all resulting from the marketing, soliciting, sale,
11 provision or administration of contracts for CRES and
12 CRINGS service. Yes, it is an admission.

13 EXAMINER PRICE: So you read that as a
14 full admission of all the violations?

15 MS. BOJKO: It is an admission, Your
16 Honor. It's redress. The definition of redress for
17 the consumers --

18 EXAMINER PRICE: Ms. Bair --

19 MS. BOJKO: -- that were harmed.

20 EXAMINER PRICE: Ms. Bair --

21 MS. BAIR: Yes.

22 EXAMINER PRICE: -- you're counsel for
23 Staff. Was the Staff's intent that this be an
24 admission of violations occurred as alleged?

25 MS. BAIR: That was not part of the

1 agreement.

2 EXAMINER PRICE: Mr. Whitt, is it your
3 intent to --

4 MR. WHITT: The whole point of the
5 Stipulation is to not litigate the issues.

6 EXAMINER PRICE: So you are not --

7 MR. WHITT: We don't deny Staff alleged
8 these.

9 EXAMINER PRICE: You are not admitting to
10 the violations in that sentence.

11 MR. WHITT: Exactly.

12 EXAMINER PRICE: Well, I believe your
13 interpretation is not consistent with the views of
14 the counsel that drafted this document.

15 MS. BOJKO: Your Honor, the four corners
16 of the document can speak for itself. I think it's a
17 complete admission.

18 The Company is not going to agree to
19 remove itself from the market for multiple years as
20 well as pay hundreds of thousands of dollars in
21 restitution for customers that were only allegedly
22 harmed. They have high rates that they paid and then
23 there are redress for those customers to fully
24 compensate them --

25 EXAMINER PRICE: People in litigation

1 reach settlements without admitting to liability or
2 admitting to a crime every day in this country.

3 MR. WHITT: And if I may add, Your Honor,
4 this is exactly why the evidence rules specifically
5 prohibit the use of settlement agreements as evidence
6 of guilt.

7 There's no doubt the Stipulation is
8 coming into the record. That's clear. But you can't
9 use the Stipulation to argue that it creates -- that
10 it's evidence or inference of culpability. It can't
11 be used for that. It can be used for many other
12 things but not for what they want to use it for.

13 EXAMINER PRICE: Interesting. I guess
14 we'll deal with that at hearing.

15 MS. BOJKO: Yes. I fully -- I disagree.
16 Settlement discussions cannot be used as admission of
17 guilt, but the document itself --

18 EXAMINER PRICE: Subsequent remedial
19 measures are not admissible as evidence of guilt.

20 MS. BOJKO: The words in the Stipulation,
21 that I think speak for themselves, is an admission.
22 I was frankly shocked that it was in there, Your
23 Honor. So --

24 EXAMINER PRICE: I'm frankly shocked
25 that's your interpretation because that's not the way

1 I interpret it whatsoever. The five Commissioners
2 will decide.

3 Okay. So you're not intending to ask
4 these two witnesses what happened in the settlement
5 agreement, right? What happened in the settlement
6 negotiations in deposition. You're solely intending
7 to ask them why they settled?

8 MS. BOJKO: No, Your Honor.

9 EXAMINER PRICE: You're asking --

10 MS. BOJKO: I don't think those are
11 appropriate for the -- I don't think Counsel would
12 let his witness respond to those questions.

13 EXAMINER PRICE: Well, you object to a
14 lot of things he's objecting to, so I wouldn't hold
15 you to that.

16 I'm still not clear what the purpose --
17 these witnesses -- these Company employees are not
18 witnesses, as I understand it, in this case. They're
19 not testifying on behalf of the three-part test. I'm
20 not clear why you need their deposition in order
21 to -- or is it the case that perhaps, after you
22 depose Ms. Joseph, you wouldn't need the depositions
23 whatsoever?

24 MS. BOJKO: That could be very well
25 possible, Your Honor, but, as we said, I don't

1 believe she's the responsible person. But I don't
2 know that, you're right. I don't know that and I
3 won't know that until she is deposed.

4 But we believe that -- when it talks
5 about the customers affected and the number of
6 customers and the amount they were affected by, we
7 would like to explore how that was determined, how
8 the numbers were arrived at, how that was set. So
9 it's the terms of the settlement --

10 EXAMINER PRICE: How is that
11 not settlement -- isn't that privileged settlement
12 negotiations?

13 MS. BOJKO: No.

14 MR. WHITT: They were at most of the
15 settlement meetings anyway. I really don't know what
16 it is they think they want to know but don't know.

17 My question is let's say we have all
18 three of these depositions. Then what? None of
19 these witnesses have been subpoenaed to appear at
20 hearing, and I would say don't get any ideas because
21 I would object to any subpoenas at this point. The
22 filing of testimony is over. So what do we do with
23 the transcripts? Throw them at the Commission and
24 say "Figure it out. We took this. Read it for
25 something"?

1 EXAMINER PRICE: Well, in all fairness,
2 the requirements to file the subpoena is a rule --
3 filed ahead of time, is a rule which can be overcome
4 for good cause shown.

5 MS. BOJKO: The date hasn't expired for
6 the time to submit subpoenas, Your Honor. We get
7 five days before the hearing. It's not five days
8 before the hearing yet.

9 EXAMINER PRICE: There you go too.

10 MR. WHITT: I don't know what rule that
11 is, but ordinarily you have to serve a subpoena in
12 sufficient time for parties that may have an
13 objection.

14 EXAMINER PRICE: The rule is whatever the
15 rule is.

16 MS. BOJKO: The rule is five days and
17 that does not expire until --

18 EXAMINER PRICE: There you go.

19 MR. WHITT: Well, the testimony deadline
20 was September 4th.

21 EXAMINER PRICE: I think your witnesses
22 are still fair game to be subpoenaed as long as it's
23 within the five days.

24 MS. BOJKO: But you're right, Your Honor,
25 you have overcome the five-day rule before. 2009,

1 for Ohio American, in fact, is one off the top of my
2 head.

3 EXAMINER PRICE: It's good cause shown.

4 MS. BOJKO: Your Honor, so to get back to
5 your question. There's requirements in here for
6 contingencies with regard that whether --

7 EXAMINER PRICE: You just don't know.
8 You're speculating that one witness can answer and
9 one witness cannot.

10 MS. BOJKO: That's true, Your Honor. We
11 tried to do our due diligence and --

12 EXAMINER PRICE: You don't know at this
13 point.

14 MS. BOJKO: -- narrow the depositions as
15 you requested.

16 EXAMINER PRICE: Right.

17 Closing arguments.

18 Ms. Bojko, briefly. I've read your
19 motion. I've read the memo contra.

20 MS. BOJKO: Your Honor, in closing, the
21 Consumers' Counsel filed an interlocutory appeal on
22 two grounds, 4901-1-15(A)(2), appealing the
23 September 3rd Entry which we believe effectively
24 eliminated or limits OCC's rights to participate in
25 this case by denying --

1 EXAMINER PRICE: Does the rule say
2 "effectively" or does it say it terminates your
3 participation? Are you reading "effectively" in
4 there or am I going to read the rule and am I going
5 to see "effectively" in the rule?

6 MS. BOJKO: Your Honor, you are correct,
7 as you know, that "effectively" is not in the rule,
8 but we're explaining --

9 EXAMINER PRICE: I'm just asking.

10 MS. BOJKO: -- to you why our rights are
11 affected by the ruling and, because our rights are
12 affected by the ruling, it can immediately go to the
13 Commission instead of asking the Attorney Examiners
14 to certify it.

15 We believe that OCC's authorized to
16 conduct discovery by a variety of methods, including
17 depositions, and that the rules allow for depositions
18 explicitly and that we can do that, so we can do
19 written discovery and conduct discovery.

20 EXAMINER PRICE: Do you cite to any case
21 where the Commission has held that rights were
22 effectively terminated?

23 MS. BOJKO: No, Your Honor. I know that
24 the issue has been raised in front of this Commission
25 before and the Commission has decided whether they

1 believe that an entity's rights have been affected
2 negatively rising to the level of meeting the
3 standard of 4901-1-15.

4 I will tell you, I have a lot of case law
5 about the appropriateness of asking for a corporate
6 designee, which is what we did in that notice of
7 deposition.

8 EXAMINER PRICE: That's a dead issue,
9 Ms. Bojko. I really -- you keep asking for that and
10 I -- maybe I'm wrong but I thought, in granting the
11 motion to compel, we said that was a proper -- it was
12 a proper discovery request and I thought we directed
13 them to comply with it.

14 MS. BOJKO: You directed them to comply
15 with telling us a representative that responded to
16 discovery. I think the corporate designee goes
17 beyond that, Your Honor, and they can talk about
18 other portions of the Stipulation, the settlement,
19 the case, the violations, things of that nature.

20 EXAMINER PRICE: But they get to
21 designate who --

22 MS. BOJKO: Right. Absolutely.

23 EXAMINER PRICE: -- that person is.

24 MS. BOJKO: Absolutely. But I think --

25 EXAMINER PRICE: Not you.

1 MS. BOJKO: That's correct.

2 And I think the concern with the ruling,
3 Your Honor, was that it was stating that only one
4 would be allowed for interrogatory designation or
5 verifications as opposed to a general corporate
6 designee which is commonly used from the Civil Rules
7 of Procedure. That was the distinction I was trying
8 to make.

9 Your Honor, alternatively, given the
10 hurdle that you have acknowledged that we have to go
11 directly to the Commission, OCC raised an alternative
12 argument in its interlocutory appeal which should be
13 certified to the Commission because the 9/3 entry
14 presents a new or novel question and is a departure
15 from past precedent, we believe, because robust
16 discovery is allowed and encouraged by multiple
17 methods and the 9/3 entry selected a preferred method
18 of discovery which is a new or novel question under
19 4901-1-15(B).

20 And that is why we were asking, in the
21 alternative, that the Attorney Examiner certify this
22 to the full Commission to ensure that our discovery
23 rights are protected and that there is no selection,
24 among the Bench, of which discovery rights might be
25 appropriate at any given time since the statute

1 4903.082 directs the Commission to ensure the parties
2 are allowed full and reasonable discovery.

3 Discovery may be attained through a
4 variety of means, including depositions, and we
5 believe that any limitation of those, --

6 EXAMINER PRICE: Any limitation?

7 MS. BOJKO: -- that don't arise to unduly
8 burdensome or oppressive, is something that goes
9 against the discovery rights allowed to a party, so
10 we believe that we should have been allowed more
11 complete and thorough depositions and we request that
12 you direct those depositions to be had. Thank you.

13 EXAMINER PRICE: Final words, Mr. Whitt.

14 MR. WHITT: Your Honor, I'm just having
15 difficulty wrapping my head around the notion that
16 the September 3rd Entry simultaneously cuts off the
17 right to take depositions, yet compels the Company to
18 produce witnesses for depositions. I don't know how
19 I can do both of those things.

20 What I know is this: The
21 September 3rd Entry told OCC you're allowed to depose
22 their corporate designee.

23 On September 6th, I think it was,
24 whatever the timeline says, we were asked who is the
25 person verifying your interrogatory responses. We

1 said Ms. Keenia Joseph.

2 It's not until September 9th, two days
3 ago, that we are requested, per the September 3rd
4 Entry, to give dates for her deposition, which we
5 initially agreed and then backed down when we
6 received two additional deposition notices as well as
7 the interrogatory appeal.

8 The issue is not whether OCC is allowed
9 to discovery. The issue is whether they've exercised
10 their discovery rights timely and in accordance with
11 Commission rules.

12 The one thing I will agree with them
13 about their interlocutory appeal is where they say
14 the parties ought to have the ability to put together
15 their own cases or something to that effect. I agree
16 with that.

17 The parties are also responsible for the
18 consequence of their choices, and when you sleep on
19 your rights until the eleventh hour, you can't be
20 heard to complain that other parties are objecting to
21 what you want to do because of undue burden and
22 expense. Thank you.

23 EXAMINER PRICE: Okay. At this time, we
24 will go off the record for a few minutes while my
25 colleague and I take this under advisement. Thank

1 you all for your thoughtful arguments. We'll be back
2 probably no later than 4:00. We're off the record.

3 (Recess taken.)

4 EXAMINER PRICE: Let's go back on the
5 record.

6 At this time, the Attorney Examiner finds
7 that the interlocutory appeal does not terminate
8 OCC's participation in this case. OCC can and has
9 participated in discovery since the ruling. OCC had
10 the opportunity to submit testimony and has done so.
11 OCC has been granted intervention and can appeal the
12 decision of the Commission. OCC can cross-examine
13 witnesses at the hearing. Therefore, it's clear
14 their rights to terminate in this proceeding -- to
15 participate in this proceeding have not been
16 terminated. This can only be -- the interlocutory
17 appeal, therefore, must be certified to the
18 Commission. It will not be certified. There is no
19 undue prejudice to OCC.

20 OCC had ample opportunity to engage in
21 discovery prior to the Stipulation filing and did
22 engage in discovery. The Attorney Examiner notes
23 there was over 19 weeks of opportunity for discovery
24 prior to the hearing. OCC has had six weeks to
25 prepare for the hearing. There's no prejudice to OCC

1 with only six weeks to prepare for the hearing given
2 the narrow scope of issues in this case.

3 This is not a new or novel ruling. It
4 does not depart from the law. As Mr. Whitt has
5 pointed out, the Attorney Examiners have the power to
6 restrict discovery under the Ohio Administrative Code
7 4901-1-24, including the method by which discovery
8 may be had.

9 Just for clarity at this time, the
10 Attorney Examiner will grant a protective order of
11 the same scope as the denial of the motion to compel
12 to make it clear that we're operating under both the
13 motion to compel rule and the protective order rule.

14 Questions regarding the ruling?

15 Ms. Bojko.

16 MS. BOJKO: I guess I just don't
17 understand your granting of the protective order. Of
18 all deponents or --

19 EXAMINER PRICE: It's the exact same
20 scope as the motion to compel. I just wanted to make
21 it clear that we're operating under the authority
22 granted us under the protective order rule, which
23 allows us to restrict the method of discovery which
24 you object to, but that's the sole scope.

25 The -- basically the amended notice of

1 deposition, which we previously ruled -- we denied
2 the motion to compel discovery, we denied the motion
3 to compel, we'll also grant a protective order as to
4 the amended notice of deposition. Nothing beyond
5 that. Nothing beyond that. That's the sole scope of
6 the protective order.

7 MS. BOJKO: So, Your Honor, you're ruling
8 in the September 3rd Entry that a deposition can be
9 had of Ms. Joseph regarding the --

10 EXAMINER PRICE: We will get to that. We
11 will get to Ms. Joseph.

12 MS. BOJKO: I'm sorry. Thank you.

13 EXAMINER PRICE: With respect to the
14 second motion to compel, we are going to defer ruling
15 on all aspects of that motion to compel in order to
16 allow Mr. Whitt the opportunity to respond, with the
17 exception of Witness Joseph. We will grant the
18 motion to compel discovery and Mr. Whitt will make
19 Ms. Joseph available for deposition prior to the
20 hearing.

21 And while we're on the topic of the
22 hearing, the Examiner has a family medical emergency
23 and will not be able to be here at the hearing on the
24 19th. We're rescheduling the hearing to -- on the
25 18th. We're rescheduling the hearing to Thursday

1 September 19th at 10:00, and we will have the hearing
2 room reserved for two days just in case.

3 Mr. Whitt, that gives you an extra day to
4 make your witness available.

5 If, after deposing Ms. Joseph, Consumers'
6 Counsel wants to renew its request to depose the
7 other two witnesses, they may do so at that time.

8 EXAMINER PRICE: Further questions?

9 MR. WHITT: I'm sorry, Your Honor.
10 Having not had the opportunity to review the motion
11 to compel, I'm not sure what issues are left
12 outstanding, but with respect to --

13 EXAMINER PRICE: They've asked to compel
14 two of your witnesses.

15 Ms. Bojko, the names escape me.

16 MS. BOJKO: Palmese and Bahshe.

17 EXAMINER PRICE: They are highly critical
18 of your responses to requests for admission and ask
19 for a motion to compel on those and I believe some
20 other written discovery.

21 MS. BOJKO: The Fourth Set, the "to be
22 determined" requests were objected to and the lack of
23 a signatory supplement was objected to for both the
24 RFAs and all the sets.

25 EXAMINER PRICE: Although it's my

1 understanding that Mr. Whitt has represented that
2 that will be addressed without the Bench's
3 intervention.

4 MR. WHITT: And I will renew that
5 representation.

6 EXAMINER PRICE: Thank you.

7 MS. BOJKO: Your Honor, we have an
8 out-of-state witness that changed her flight schedule
9 already for the 18th, so we're just hoping that
10 either the 19th or 20th would work. Did you say we
11 have flexibility of the 20th if possible?

12 EXAMINER PRICE: If she can make the
13 20th, we will have the hearing room. I apologize,
14 but --

15 MR. WHITT: I may not have cross for the
16 out-of-state witness and, if I don't, I will let
17 Counsel know so she doesn't make a trip
18 unnecessarily. Obviously, if the Bench has
19 questions, then she will need to be here.

20 EXAMINER PRICE: I am willing to swallow
21 my questions for that witness if you don't have
22 questions. Or, frankly, if you want to do a
23 deposition and stip in the deposition of the
24 witness's testimony, we don't necessarily need to
25 bring her in if the parties can agree to that.

1 MR. WHITT: We'll think about that.

2 MS. BOJKO: Just because it's a change in
3 flight, which increases on a daily basis, would you
4 please let us know as soon as possible?

5 EXAMINER PRICE: You should have been
6 nicer to him about flying to New York if that's your
7 request, Ms. Bojko.

8 MS. BOJKO: Well, she already did it once
9 because of us, Your Honor.

10 EXAMINER PRICE: Any other questions?
11 Clarifications? Hearing none, at this time, we'll go
12 off the record. The hearing in this case, just to
13 make sure it's clear on the record, will be September
14 19th at 10:00, Hearing Room 11-A. But always check
15 the hearing room; things do change.

16 Thank you, all. We are adjourned. We
17 are off the record.

18 (Thereupon, the proceedings concluded at
19 4:09 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, September 11, 2019, and carefully compared with my original stenographic notes.

Carolyn M. Burke
Carolyn M. Burke, Registered
Professional Reporter, and
Notary Public in and for the
State of Ohio.

My commission expires July 17, 2023.

- - -



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

Summary: Transcript In the Matter of the Commission's Investigation into PALMco Power OH, LLC d/b/a Indra Energy and PALMco Energy OH, LLC s/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance, hearing held on September 11, 2019. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Burke, Carolyn