

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MEMORANDUM CONTRA PALMCO'S MOTION TO QUASH SUBPOENAS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

Due to PALMco's<sup>1</sup> unfair, misleading, deceptive, and unconscionable acts and practices in its marketing of electric and natural gas to Ohioans, the Office of the Ohio Consumers' Counsel ("OCC") seeks to protect consumers. On September 13, 2019, OCC filed motions asking the Public Utilities Commission of Ohio ("PUCO") to issue subpoenas for several witnesses to testify at the upcoming hearing in this case. Among the subpoenas OCC sought were subpoenas for the following three PALMco employees:

1. Ms. Keenia Joseph, PALMco's VP for Regulatory and Compliance, who has been identified as the person responsible for answering OCC discovery requests;
2. Mr. Robert Palmese, PALMco's President/Managing Member; and

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<sup>1</sup> "PALMco" refers to PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy.

3. Mr. Adam Bashe, PALMco's Vice President of Business Development and Chief Sales Officer.

The PUCO granted OCC's motions and issued the subpoenas on September 13, 2019. PALMco filed a motion to quash the subpoenas on September 16, 2019. Pursuant to the Attorney Examiner's directive via email on September 17, 2019, OCC hereby files this Memorandum Contra PALMco's motion to quash. PALMco has not shown good cause for quashing the subpoenas and thus PALMco's motion should be denied.

## II. ARGUMENTS

### A. **The PUCO should deny PALMco's motion because OCC has in fact provided personal service to the three PALMco employees.**

PALMco main argument for quashing the subpoenas is that OCC's service of the subpoenas for PALMco's officers was improper because OCC served the subpoenas on PALMco's statutory agent in Ohio rather than on the individual witnesses.<sup>2</sup> PALMco claims that its registered agent is not the agent of any of the individuals who OCC seeks to compel to testify.<sup>3</sup> PALMco's argument is incorrect.

Ohio law requires electric and natural gas marketers to designate an agent authorized to receive service of process in this state.<sup>4</sup> The law also provides that no electric or natural gas marketer may continue to operate in Ohio unless it continues to consent to PUCO jurisdiction and service of process in this state.<sup>5</sup> OCC served the subpoenas on PALMco's statutory agent in Ohio.

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<sup>2</sup> PALMco Motion at 3.

<sup>3</sup> *Id.*

<sup>4</sup> R.C. 4928.09(A)(1)(b); R.C. 4929.21(A)(1)(b).

<sup>5</sup> R.C. 4928.09(A)(2); 4929.21(A)(2).

In an email on September 17, 2019, the Attorney Examiner directed PALMco to make Ms. Joseph available to testify at the hearing in this case. This action moots PALMco's arguments regarding Ms. Joseph.

As for Mr. Palmese, he *is* PALMco. He is the president and managing member of the company. From the deposition of Ms. Joseph, OCC learned that Mr. Palmese is intricately involved in the day-to-day operations of the company. Most importantly, he sets the rates that PALMco charges its customers. He is more than just an employee. He is an owner who has hands-on involvement in PALMco's operations. Serving the corporate agent should amount to personal service that satisfies the PUCO's rules.

Additionally, Ohio Adm. Code 4901-1-25(B) provides that a subpoena may be served on a witness by leaving it at the witness's business address if the witness is a party or employee of a party to the case. The rule requires that service must be made by someone who is at least 18 years old and is not a party to the proceeding. Further, Ohio Civ. R. 4.3(A) provides that service of process may be made outside Ohio "in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state." Under the rule, "person" includes "an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's: (1) Transacting any business in this state...."

Prior to the filing of PALMco's motion to quash, OCC had made arrangements to have the subpoenas served on the witnesses at their place of business. OCC did serve the subpoenas at PALMco's Brooklyn, New York headquarters at the time of Ms. Joseph's deposition on September 17, 2019. Service was made by a New York service processor.

Thus, contrary to PALMco's assertion, the subpoenas have been properly served to the three PALMco employees who OCC seeks to have testify at the hearing.

**B. PALMco's motion should be denied because OCC is not required to ask PALMco to voluntarily produce witnesses to testify at the hearing or express an intention to subpoena witnesses. Nevertheless, PALMco's unwillingness to provide witnesses for depositions makes it obvious that it would not provide witnesses for the hearing.**

In its motion, PALMco complained that OCC did not ask PALMco's counsel to voluntarily produce the witnesses or OCC did not previously indicate any intention to subpoena witnesses.<sup>6</sup> But these are not requirements to subpoena witnesses. Nothing in the PUCO's rules mandate that, before seeking a subpoena, a litigant must first attempt to ask a witness, through counsel or otherwise, to appear voluntarily at a PUCO hearing. There is also no requirement that a litigant provide notice of the intention to subpoena witnesses.

Further, based on previous discussions with PALMco's counsel at the prehearing conference and otherwise, it was quite evident that PALMco would resist having the three witnesses voluntarily appear at the hearing. OCC has tried to depose all three witnesses.<sup>7</sup> PALMco refused to make the witnesses available for deposition, so OCC filed a motion to compel the depositions on September 11, 2019.<sup>8</sup> At the prehearing conference held later that day, the Attorney Examiners required PALMco to make Ms. Joseph available for a deposition and deferred ruling on Mr. Palmese and Mr. Bashe until after the deposition of Ms. Joseph.<sup>9</sup>

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<sup>6</sup> PALMco Motion at 2.

<sup>7</sup> See Notice to Take Depositions (September 9, 2019).

<sup>8</sup> See OCC Motion to Compel (September 11, 2019) at 3.

<sup>9</sup> Tr. (September 11, 2019) at 68.

Obviously, because PALMco was unwilling to produce witnesses for depositions, it would be highly likely that PALMco would also be unwilling to produce witnesses for the hearing. Making a request as suggested by PALMco would be futile. Regardless, OCC followed the PUCO's rules and properly obtained the subpoenas.

**C. PALMco's motion should be denied because complying with the subpoenas is not unreasonable and oppressive as PALMco contends.**

If any party's actions have been unreasonable or oppressive in this case, it is PALMco's misleading actions toward its customers and the harm that was inflicted on those customers who fell for PALMco's marketing deceptions. Under Ohio Adm. Code 4901-1-25, motions for subpoenas should be filed at least ten days before a hearing but may be filed as soon as five days before the hearing where the party seeks expedited treatment. Because OCC sought the subpoenas five days before the hearing, OCC sought expedited treatment.

PALMco contends that complying with the subpoenas is unreasonable and oppressive. PALMco raises two arguments in this regard. First, PALMco claims that OCC has not shown why expedited treatment of the motion for subpoenas is necessary.<sup>10</sup> PALMco asserts that the witnesses' names were known well in advance, and thus OCC should have prepared motions for subpoenas well in advance of the deadlines provided in the PUCO's rules.<sup>11</sup> But, as PALMco knows, its on-going refusal to answer some discovery responses, its failure to follow the PUCO discovery rules and sign the

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<sup>10</sup> PALMco Motion at 6.

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

interrogatory answers by the person making them,<sup>12</sup> and to provide witnesses for depositions have impaired the discovery process for this case and caused the delay of which PALMco now complains.

OCC served its fourth set of discovery on PALMco on August 30, 2019. Under the procedural schedule in this case, responses were due on September 6, 2019. But PALMco did not provide complete responses to that set of discovery until September 12, 2019. Additionally, OCC asked that a corporate designee be designated on August 2, 2019 when it filed an Amended Notice of Deposition. Not only did PALMco refuse to designate an employee(s) to be available for deposition(s), PALMco refused to provide any names of any employees that could respond to the questions posed by OCC. Thus, the witnesses' names were not known.

Further, it was not until the September 11<sup>th</sup> prehearing conference that a ruling on an OCC motion to compel required PALMco to specifically make Ms. Joseph available to be deposed. OCC sought the subpoenas two days later. PALMco's stonewalling concerning discovery responses created much delay in the discovery process and created a need for expedited treatment of the motions for subpoenas.

Second, PALMco asserts that because the witnesses are from out of state, OCC should have begun arranging for appearances well in advance.<sup>13</sup> PALMco claims that

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<sup>12</sup> Ohio Adm. Code 4901-1-19(A) ("Any party may serve upon any other party written interrogatories, to be answered by the party served. If the party served is a corporation, partnership, association, government agency, or municipal corporation, it shall designate one or more of its officers, agents, or employees to answer the interrogatories, who shall furnish such information as is available to the party. Each interrogatory shall be answered separately and fully, in writing and under oath, unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer. **The answers shall be signed by the person making them**, and the objections shall be signed by the attorney or other person making them." (emphasis added).

<sup>13</sup> *Id.*

this would be necessary to better accommodate the witnesses' work schedules and reduce costs.<sup>14</sup> But to support this contention, PALMco complains about the expense involved in the "last-minute fire drill to schedule Ms. Joseph's deposition...."<sup>15</sup> This has nothing to do with scheduling witnesses for the hearing.

PALMco ignores the fact that Ms. Joseph's deposition was ordered by the PUCO the first time on September 3, 2019. And the "last-minute fire drill" was necessitated by PALMco's refusal to make available for deposition the person responsible for responding to discovery, as the PUCO required on September 3, 2019.<sup>16</sup> PALMco has also refused to voluntarily make other witnesses available for the hearing. PALMco's affirmative decision on this issue was not fully articulated until the prehearing conference last week. PALMco's arguments against complying with the subpoenas are flawed. The PUCO should deny PALMco's motion and enforce the subpoenas issued.

### **III. CONCLUSION**

OCC's subpoenas for Ms. Joseph, Mr. Palmese, and Mr. Bashe were properly sought, properly signed, and properly served. PALMco has not shown good cause to quash the subpoenas. The PUCO should deny PALMco's motion and require the witnesses to appear at the evidentiary hearing and be cross-examined regarding the consumer issues in this case.

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<sup>14</sup> *Id.*

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

<sup>16</sup> Entry (September 3, 2019), ¶29.

Respectfully submitted,

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Consumers' Counsel

/s/ Terry L. Etter

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Memorandum Contra was provided to the persons listed below electronically this 18<sup>th</sup> day of September 2019.

/s/ Terry L. Etter  
Terry L. Etter  
Assistant Consumers' Counsel

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