

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION OF PALMCO ENERGY OH, LLC TO STRIKE TESTIMONY FILED ON
BEHALF OF OFFICE OF OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel (OCC) has filed two pieces of testimony. Both witnesses oppose the July 31, 2019 Stipulation—not because there is something inherently wrong with it, but because the Stipulation resolves this case on terms less punitive than recommended in the Staff Report. Any settlement that does not give Staff everything it asked for is an unreasonable settlement, as far as OCC is concerned.

OCC's entire case, including both pieces of testimony, relies solely on the Staff Report. Its witnesses do not claim to have independent knowledge of any alleged violations of statutes or Commission rules. All they know is what they read in the Staff Report. But there is a big difference between *Staff allegations* of violations and a *Commission finding* of violations. As a consequence of the settlement, Staff will not be presenting evidence to prove anything alleged or recommended in the Staff Report. And while the Staff Report may be admissible at hearing for some purposes, it is not admissible to prove the truth of the matters asserted. OCC cannot simply ride Staff's coattails as a substitute for competent, credible, and admissible evidence that PALMco committed *any* violations, let alone violations that would justify the sanctions recommended in the Staff Report or by OCC.

Thus, there is no foundation for the testimony of Kerry Adkins or Barbara Alexander. Both witnesses simply assume that everything alleged in the Staff Report has been proven, and that the Stipulation itself is evidence of guilt. But the Staff Report does not prove itself. Its contents are not a substitute for admissible evidence. Testimony about its contents is not admissible either, at least for the purpose offered; *i.e.*, to attempt to prove the truth of the matters asserted. Nor is the Stipulation admissible to prove that PALMco has “admitted” to any violations.

Merely striking the portions of the testimony that rely on the Staff Report would leave nothing else relevant to consider. Both pieces of testimony should be stricken in their entirety, in accordance with Rule 4901-1-27(B).

I. BACKGROUND

This is an enforcement action against PALMco¹, a retail natural gas and electric supplier. The May 10, 2019 Staff Report alleges PALMco violated Commission rules governing marketing and sales practices. PALMco and Staff have settled per the terms of the Stipulation. The settlement requires PALMco to pay restitution to customers and a forfeiture of up to \$750,000. OCC was included in the settlement discussions but declined to sign the Stipulation.

The Staff Report *alleges* violations. It does not represent a Commission *finding* of violations. If this case were litigated, Staff would have to do more than mark the Staff Report as an exhibit, have someone authenticate it, and declare: “We rest our case.” Each example of an alleged violation described in the Staff Report would have to be supported with admissible evidence. In the first example summarized on page 6, for example, testimony from both the “sales representative” and “consumer” would be necessary to substantiate the conversation

¹ “PALMco” refers collectively to PALMco Energy OH, LLC and PALMco Power OH, LLC.

partially summarized in the Staff Report. The consumer's bills would have to be produced and authenticated. The "natural gas utility's default service price" for the relevant time period would have to be substantiated. Enrollment documents and call recordings would also have to be offered and admitted into evidence. A *lot* of witnesses and documents would had to have been produced to justify a forfeiture of \$1.4 million.

PALMco also had a story to tell. But telling that story would not have come cheap, and litigation is highly disruptive to business. PALMco elected to resolve Staff's concerns the way companies often resolve investigations, lawsuits, and claims: by negotiation instead of litigation.

The net result of the Stipulation is that the allegations in the Staff Report will not be adjudicated. Staff will not be presenting evidence to support any allegations in the Staff Report. PALMco will not be subpoenaing Staff witnesses or consumers. The Commission does not have to calculate a forfeiture, which would require evidence of a specific number of violations multiplied by a dollar amount. The Stipulation provides an agreed remedy without putting Staff or PALMco to their respective burden of proof. Both parties get something; neither party gets everything. That, by definition, is a good settlement.

OCC filed testimony on September 4, 2019. Its witnesses ask the Commission to reject the settlement. Barbara Alexander "recommend[s] that the PUCO find that PALMco violated various PUCO rules and Ohio law by engaging in a pattern of unfair, misleading, deceptive and unconscionable activities against Ohio Consumers."² Her conclusions are based solely on the Staff Report. Kerry Adkins's testimony and recommendations are also based entirely on "Staff's findings."³ Neither witness offers any independent evidence of any violation of Ohio law or Commission rules.

² Direct Testimony of Barbara R. Alexander, at 2-3.

³ See, e.g., Direct Testimony of Kerry J. Adkins, at 4.

II. ARGUMENT

The Staff Report contains multiple levels of hearsay. It is not admissible for the truth of its contents under any hearsay exception. The Stipulation is not admissible for the purpose of creating an unfair inference that the decision to settle reflects PALMco's culpability. Laundering inadmissible evidence through witnesses does not make the evidence admissible. The testimony is fatally tainted and must be stricken.

A. The Staff Report is inadmissible for the purpose sought by OCC.

The Ohio Rules of Evidence forbid OCC from relying on the Staff Report as a substitute for competent, credible evidence that PALMco did *anything* sanctionable, let alone something to deserve the sanctions its witnesses recommend.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(c). "Unless an exception applies under Evid.R. 803 or Evid.R. 804, hearsay statements are not admissible pursuant to Evid.R. 802 [.]” *Pool v. Wade*, 115 Ohio App.3d 449, 452, 685 N.E.2d 791 (6th Dist. 1996). The Staff Report is plainly hearsay when offered by *OCC's witnesses* to prove the truth of assertions and conclusions made by *Staff*.

Evid.R. 803(8) provides a hearsay exception for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . unless the sources of information or other circumstances indicate lack of trustworthiness." The Staff Report does not qualify for either exception.

Rule 803(8)(a) encompasses the internal functions or activities of an agency. "Where the focus of the particular record is more *external* to the functioning of the agency, in that it largely

concerns the activities and conduct of certain citizens, or events or transactions outside the operation of the agency or office, it should not be admitted under subsection (a).” *Pool v. Wade*, 115 Ohio App. 3d at 452, *quoting Weissenberger’s Ohio Evidence*, Section 803.105, 409-10 (1996). Subsection (b) covers “events, transactions and conditions of almost any sort,” but “does not include records, or portions of records, that may be characterized as ‘evaluations’ or ‘interpretations’ of such events or transactions.” *Id.* at 453, *quoting Weissenberger’s*, Section 803.106, at 411.

Rule 803(8) of the Federal Rules of Evidence mirrors the Ohio rule, but adds a subdivision (c) for “investigative reports of governmental administrative agencies.” *Pool v. Wade*, 115 Ohio App. 3d at 453. Courts have found that the absence of a comparable provision in the Ohio rule was intentional. *Id.* *See also State v. Humphries*, 79 Ohio App.3d 589, 597, 607 N.E.2d 921, 926–927 (12th Dist. 1992), *Cincinnati Ins. Co. v. Volkswagen of Am., Inc.*, 41 Ohio App.3d 239, 535 N.E.2d 702 (10th Dist. 1987). “[U]nlike the Federal Rules of Evidence, the public records exception under the Ohio rules does not encompass evaluative or investigative reports.” *Humphries*, 79 Ohio App.3d at 597.

The Staff Report falls squarely into the realm of an investigative or evaluative report. The focus of the report is on the activities of PALMco, not Staff. The report does not merely document events or transactions; it evaluates and interprets the significance of these transactions in the context of Commission rules. A third party such as OCC cannot rely on the Staff Report as proof of any assertion made or conclusion stated.

The Commission gave considerable thought to the proper use of investigative reports in cases against the FirstEnergy utilities arising from the August 2003 blackout. *See, e.g., S.G. Foods et al v. FirstEnergy Corp., et al.*, Case No. 04-28-EL-CSS, Entry (March 7, 2006).

Following that event, an international team assembled from various private and governmental agencies conducted an investigation and wrote a report highly critical of the utilities. The Commission found that “such investigative reports are generally held not to be admissible in Ohio courts.” *Id.* at ¶ 60 (citing cases). The Commission deemed the report inadmissible. *Id.* at ¶ 71 (“[T]he Commission will not allow admission of the task force report as a hearsay exception.”).

The Staff Report does not deserve special treatment simply because it was prepared by the Commission’s Staff and this is a Commission case. Due process still applies in Commission cases, and the exclusion of investigative reports is grounded in due process concerns. Just as the Ohio Department of Liquor Control cannot sanction a licensee based solely on the written report of one of its agents, the Commission cannot sanction parties based solely on its own Staff’s written reports. *See B&N Enterprises, Inc. v. Liquor Control Comm’n*, 131 Ohio App.3d 394, 398, 772 N.E.2d 599 (10th Dist. 1999) (“[T]he commission simply accepted the unsworn report of the agent without considering any other evidence. We, therefore, conclude that the commission’s decision suspending appellant’s liquor permit was not supported by reliable, substantial, and probative evidence.”). If Staff cannot rely on notice of alleged violations as proof of the violations, neither can OCC.

OCC claims the settlement is not punitive enough. It therefore has the burden of showing that PALMco did something to deserve harsher sanctions than those to which it has already agreed. OCC cannot rest on the Staff Report—just as Staff could not have relied solely on the Staff Report had Staff decided to litigate. When OCC decided it was going to oppose the Stipulation, it assumed the burden of presenting competent, admissible evidence to support its assertions that (a) PALMco committed violations and (b) the agreed remedy is inadequate to the

point of being unlawful. The fact that the Stipulation does not incorporate Staff's recommendations in their entirety does not make the stipulation unlawful, or inconsistent with the three-part test in any way.

OCC has no case. Its witnesses present no evidence that would allow the Commission to find that anything alleged in the Staff Report (of any probative value) has been proven. The testimony proposing various remedies *as if* the allegations were proven is improper and should be excluded.

B. The Stipulation is not admissible to prove culpability.

The hearing will focus on the reasonableness of the Stipulation. This will obviously require admission of the Stipulation into evidence. But the admission of evidence for one purpose does not mean the evidence may be used for any and all purposes. OCC is not permitted to point to the Stipulation as evidence that PALMco committed violations, as alleged in the Staff Report or otherwise. Yet this is exactly how OCC's witnesses characterize the Stipulation. Their testimony must be stricken for this reason as well.

Like most settlements, the Stipulation contains no admission of liability or violations. At the September 11 prehearing conference, OCC suggested that PALMco would not have signed the Stipulation if it wasn't culpable. The evidence rules recognize the tendency to draw this sort of inference from settlement agreements. That is why settlement agreements are not admissible for this purpose. Evidence Rule 408 forbids the use of settlement agreements "to prove liability for or invalidity of the claim or its amount." If settlement agreements *were* admissible for this purpose, there would be less incentive to resolve disputes by agreement. Why settle if the settlement will be considered an admission of guilt?

Commission enforcement actions are more often than not resolved through settlement. These actions are usually brought to address a pattern of activity. Summarizing these activities in a Staff Report is one thing. Litigating these activities is another, for all of the reasons previously mentioned: consumer witnesses must be located and subpoenaed, records identified and produced, and preparations made for “mini trials” of each alleged violation. Given unlimited time and resources, Staff could choose to pursue a zero-sum approach to enforcement: give us what we want or we will litigate. Staff’s resources are not unlimited. For reasons not necessarily having anything to do with the merits, violations that are easy to allege are not always easy to prove. Staff can never be assured that its recommended outcome will be the litigated outcome. The probability of obtaining half a loaf now versus a full loaf later must be considered and weighed. There are many legitimate reasons for Staff to decide to settle cases.

The same can be said of Staff’s counterparties. Companies settle all sorts of disputes all the time for reasons having nothing to do with the merits.

The Stipulation required PALMco to give up the right to defend itself in exchange for Staff giving up the obligation to prove anything alleged in the Staff Report. The expectation of certainty, though, has now been turned on its head. OCC is attempting to use the Staff Report as evidence that PALMco committed violations and the Stipulation as evidence that PALMco has admitted to the violations. PALMco is arguably in a *worse* position than it would be if it had chosen to litigate. OCC is attempting to litigate allegations that Staff has settled. To effectively counter these allegations, PALMco would have to go after the party who originally made them—Staff. But PALMco can’t do that because it settled with Staff. Forcing PALMco to counter allegations that it admitted to violations by signing the Stipulation would put the company in an

impossible position. If OCC is permitted to stymie settlements this way, the Commission should not expect to see settlements in future enforcement actions.

III. CONCLUSION

Opinions about the reasonableness of the Stipulation or compliance with the three-part test must be based on admissible evidence. OCC's testimony is not based on admissible evidence. The testimony merely assumes the existence of facts that OCC has not proven or even attempted to prove. The testimony must be excluded from evidence.

Date: September 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail, to the following on this 18th day of September, 2019:

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Summary: Motion to Strike OCC Testimony electronically filed by Shelli T Clark on behalf of Palmco Energy OH, LLC dba Indra Energy and Palmco Power OH, LLC dba Indra Energy