

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

**STAFF'S MOTION TO QUASH THE SUBPOENAS FILED BY OHIO
CONSUMERS COUNSEL AND MEMORANDUM IN SUPPORT**

The Staff of the Public Utilities Commission of Ohio (Staff), pursuant to Ohio Adm.Code 4901-1-25(C), and Ohio Adm.Code 4901-1-12, asks the Public Utilities Commission of Ohio (PUCO or Commission) for an order quashing the Office of the Ohio Consumers' Counsel's (OCC) subpoenas, filed on September 13, 2019, compelling Commission Staff members Robert Fadley and Barbara Bossart to testify in the evidentiary hearing in this case. The basis for this Motion to Quash is set forth in the attached memorandum, which is incorporated by reference.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John H. Jones
Section Chief

/s/ Jodi J. Bair

Jodi J. Bair
Assistant Attorney General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3414
614.644.8599 (telephone)

866.431.4694 (facsimile)
jodi.bair@ohioattorneygeneral.gov

**On Behalf of the Staff of
The Public Utilities Commission of
Ohio**

MEMORANDUM

Staff moves the Commission pursuant to Ohio Adm.Code 4901-1-25(C) and Ohio Adm.Code 4901-1-12 for an order quashing the OCC's subpoenas compelling Staff members Robert Fadley and Barbara Bossart to testify in the evidentiary hearing in this case. Staff respectfully moves to quash the subpoenas because they are unreasonable and oppressive as they seek information that is duplicative, unreasonable, oppressive, and reasonably anticipated to concern confidential settlement negotiations.

INTRODUCTION

On April 16, 2019, the Commission opened this case to investigate alleged unfair, deceptive, or unconscionable acts in Ohio by PALMco Power OH, LLC, d/b/a Indra Energy and PALMco Energy OH, LLC d/b/a Indra Energy (collectively, PALMco). PALMco is a certified competitive retail natural gas and electric service provider. Staff of the Commission Service Monitoring and Enforcement Department reviewed customer contacts from December 1, 2018 to April 15, 2019 and believed that PALMco engaged in misleading deceptive practices to market and enroll customers as well as violated several requirements of Ohio Adm.Code 4901:1-21 and 4901:1-29. Staff stated that it had received 486 customer contacts and most of these contacts related to complaints of high billing, misleading practices, enrollment disputes, and contract inquiries.

Staff filed a report on May 10, 2018 indicating that there was an increase in PALMco customer contacts due to, among other things, PALMco's high variable rates.

Staff also identified a pattern of unfair, misleading, deceptive and unconscionable activities.

Subsequently, OCC filed the testimony of Kerry Adkins and Barbara Alexander and the Staff filed the testimony of Melissa Scarberry. OCC then filed many subpoenas compelling witnesses to testify at the hearing; however, the subject of this Motion and Memorandum to Quash are in reference to the subpoenas seeking to require Robert Fadley and Barbara Bossart to testify. Staff respectfully moves the Commission to quash these subpoenas because they are unreasonable and oppressive in that they seek confidential settlement negotiation information and information that is duplicative, since Staff witness Scarberry is testifying on behalf of Staff.

ARGUMENT

While Ohio Adm.Code 4901-1-28 permits a party to issue a subpoena to a Staff member that contributed to a Staff Report, under Ohio Adm.Code 4901-1-25(C), an attorney examiner may quash a subpoena if it is unreasonable or oppressive. OCC's subpoenas to Staff members Barbara Bossart and Robert Fadley are unreasonable or oppressive, and therefore should be quashed, for multiple reasons.

First, as recently held by this Commission, "[i]t would be unreasonable to establish a precedent, in cases involving a contested stipulation, under which a non-signatory party could compel the testimony of a signatory party witness, or a signatory party could compel the testimony of a non-signatory party witness, seeking to determine the basis for a party's decision to either join or not join the stipulation. We find that such a precedent would have a chilling effect on settlement negotiations in Commission

proceedings.”¹ While OCC’s true motivations for issuing the subpoenas are unknown, the only logical conclusion is that OCC seeks to determine the basis, justification, or underlying support for Staff’s decision to enter into the stipulation by questioning Staff on the witness stand about the propriety of its investigation. Any other line of questioning would be irrelevant in relation to the stipulation.

However, to examine the stipulation in the manner anticipated by the OCC is to start down a path that the settlement is designed to avoid. By issuing last minute subpoenas to two Staff members, three company employees, and former PALMco customers, OCC now seems to want to go back in time and do its own investigation into PALMco. OCC has had five months since this proceeding began and four months since the Staff Report was filed to acquire relevant information through pre-hearing discovery and/or public records requests. The fact-finding phase of the proceeding has concluded. Yet OCC now, on an expedited basis, seeks to conduct its discovery and review of the matter.² Staff should not be made to endure a quasi-deposition when the Commission’s rules provide that a member of Staff cannot be required to attend and give testimony at a deposition.³ Furthermore, Staff should not be made to endure this quasi-deposition at this stage of the proceeding in an attempt to determine the support, or lack thereof as OCC would have it, for Staff’s decision to enter into the stipulation.

¹ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 16 – 18 (March 31, 2016).

² Ohio Adm.Code 4901-1-25(E) requires all motions for subpoenas requiring the attendance of witnesses at a hearing to be filed with the Commission no later than ten days prior to the commencement of the hearing, unless ordered for good cause shown when expedited treatment is requested.

³ Ohio Adm.Code 4901-1-25(D) and 4901-1-16(I).

Second, “with respect to testimony in support of a stipulation, Ohio Adm.Code 4901-1-30(D) requires only that at least one signatory party file or provide supporting testimony. OCC[], in effect, seek[s] to amend the rule. As it stands now, the rule appropriately requires the signatory parties, consistent with their evidentiary burden to support the stipulation, to determine whether testimony from multiple witnesses is necessary or whether the testimony of one witness is sufficient to demonstrate that the stipulation is reasonable and satisfies the Commission’s three-part test.”⁴ That is exactly the situation in this case – OCC seeks to compel more Staff witnesses to testify, when the Ohio Administrative Code only requires one witness. The Commission’s rules require no additional testimony, and to force Staff to testify so that OCC can discover why Staff management authorized settlement on these terms would have a chilling effect on settlement negotiations in Commission proceedings.

Third, the subpoenaed Staff witnesses can offer little evidence of probative value that Staff witness Scarberry cannot already offer. Ms. Scarberry has been an integral part of this entire proceeding as she was part of Staff’s investigation into the company, helped draft the Staff Report, helped negotiate the settlement, and has now offered testimony in support of the settlement. There are few, if any, relevant areas of inquiry that Ms. Scarberry could not testify to. Issuing subpoenas for additional witnesses to testify to the same topics is unreasonable.

⁴ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR Opinion and Order at 18 (March 31, 2016).

Fourth, the subpoenas are unreasonable because the September 19, 2019 evidentiary hearing is to determine whether the stipulation, not the Staff Report, is just and reasonable. The Attorney Examiner's August 14, 2019 Entry in this case directed parties to "file testimony in support or in opposition of the stipulation"—not testimony in support or in opposition of the Staff Report.⁵ Thus, OCC's subpoenas to question Staff about the Staff Report are improper.

Finally, the subpoenas should be quashed because they would allow OCC to decide which Staff member(s) should testify, effectively robbing Staff of the ability to exercise independent legal strategy in demonstrating its case to the Commission. OCC intervened in this proceeding five months ago, has received five different sets of discovery responses, participated in many settlement discussions, and should be fully capable of presenting its own case. To allow OCC to dictate which Staff witnesses are to testify would be clearly unreasonable and oppressive for Staff.

CONCLUSION

OCC's subpoenas are unreasonable and oppressive because they seek information that is duplicative and seek confidential settlement negotiations that are protected under Ohio law. Staff witness Melissa Scarberry filed testimony in support of the Joint Stipulation and will be subject to cross-examination by OCC regarding the Joint Stipulation. It is unreasonable and oppressive to force more Staff members to take the stand when it would elicit entirely redundant information. Furthermore, OCC's subpoenas of two management Staff members, who supervised Staff's involvement in the

⁵ Entry at 3 (August 14, 2019).

settlement process and who authorized Staff to sign as a signatory party, should be quashed for seeking discovery of Staff's settlement positions. A non-signatory party forcing this testimony could establish a dangerous precedent, creating a rule that any amount of witnesses on behalf of a signatory party could be compelled to participate in more litigation. This will likely create a chilling effect on parties and hamper their willingness to compromise their litigation positions in settlements. OCC's subpoenas in this vein will upset the benefit of settlements by causing more litigation expense and labor. Staff respectfully requests that the Commission quash OCC's subpoenas for Robert Fadley and Barbara Bossart.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John H. Jones
Section Chief

/s/ Jodi J. Bair

Jodi J. Bair
Assistant Attorney General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3414
614.644.8599 (telephone)
866.431.4694 (facsimile)
jodi.bair@ohioattorneygeneral.gov

**On Behalf of the Staff of
The Public Utilities Commission of
Ohio**

PROOF OF SERVICE

I hereby certify that a true copy of the Foregoing **Staff's Motion to Quash the Subpoenas Filed by Ohio Consumers' Counsel and Memorandum in Support**, submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via United States mail or electronic mail, upon the following Parties of Record, this 18th day of September 2019.

/s/ Jodi J. Bair

Jodi J. Bair

Assistant Attorney General

Parties of Record:

Jennifer Coleman

PALMco Energy OH, LLC, dba Indra
Energy
8751 18th Avenue
Brooklyn, New York 11214
regulatory@indraenergy.com

Terry L. Etter

Amy Botschner O'Brien

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4203
terry.etter@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov

Mark Whitt

Rebekah Glover

Whitt Sturtevant
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
glover@whitt-sturtevant.com

Kimberly W. Bojko

Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
bojko@carpenterlipps.com

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Summary: Motion to Quash the Subpoenas filed by Ohio Consumers Counsel and
Memorandum in Support electronically filed by Mrs. Tonneta Y Scott on behalf of PUCO