

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA PALMCO ENERGY OH, LLC'S MOTION TO STRIKE
TESTIMONY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

By the Public Utilities Commission of Ohio ("PUCO") Staff's own findings and determinations contained in the Staff Report of Investigation ("Staff Report") filed in this case, PALMco¹ engaged in unfair, misleading, deceptive, and unconscionable acts and practices in its marketing of electric and natural gas to Ohioans.² Despite this, the PUCO Staff and PALMco entered into a settlement that leaves consumers without an adequate remedy and unprotected from additional harm. To protect consumers from the insufficient and inadequate remedies contained in the settlement, the Office of the Ohio Consumers' Counsel ("OCC") decided not to sign the settlement and is opposing it at hearing.

¹ "PALMco" refers to PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy.

² Staff Report of Investigation (May 10, 2019) at 18 (Note: all Staff Report page citations refer to those used in the Staff Report, not by .pdf document).

On September 4, 2019, OCC filed the Direct Testimony of Kerry Adkins and Barbara Alexander with the PUCO as instructed to do so by the PUCO. Now, on the eve of the hearing, PALMco comes before the regulator and wants the PUCO to deem its own Staff's work hearsay, and therefore, meaningless and inadmissible to prove the truth of the matters asserted therein. This is the exact role of the Staff of the PUCO. PALMco's outlandish motion would set horrible precedent, rendering all of the investigations, audits, and reviews conducted by PUCO Staff that result in a Staff Report absolutely futile as the Staff Reports could not be used as evidence in any type of proceeding or for the truth of the matters asserted therein. Not only is such a request inconsistent with the PUCO's rules, including Ohio Adm. Code 4901-1-28(E), the request would cripple the PUCO Staff and the agency. Such a suggestion would be highly inefficient and is simply absurd.

More specifically, PALMco filed a Motion to Strike all of the testimony filed by OCC, arguing that OCC's testimony relies exclusively upon hearsay. But PALMco provides little legal authority in support of its Motion, and a review of the existing legal authority demonstrates that the Staff Report is simply not hearsay. Under Article VIII of the Ohio Rules of Evidence, PALMco's Motion lacks merit and should be denied for the following reasons:

- 1) The Staff Report is not hearsay.
- 2) Even if the Staff Report is hearsay (which it is not), it falls under the public records exception and the regularly conducted activity exception.
- 3) Nothing prohibits expert witnesses from relying upon hearsay to form an expert opinion.

- 4) No party is prejudiced by admission of the Staff Report or OCC testimony, even for the truth of the matters asserted, because both Staff and OCC are subject to cross-examination and/or rebuttal.

Hearsay, as generally defined, 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.³ Black's Law Dictionary defines *hearsay rule* as "[t]he rule that no assertion offered as testimony can be received unless it is or has been open to test by cross-examination or an opportunity for cross-examination, except as provided otherwise by the rules of evidence, by court rules, or by statute." The primary purpose of the hearsay rule is that out-of-court statements amounting to hearsay are not made under oath and are not subject to cross-examination. That is simply not the case here. The PUCO Staff is a party to this case and subject to cross-examination.

PALMco's Motion to Strike is very light on legal authority. But a review of the relevant legal authority, specifically the Ohio rules of evidence, demonstrate that the Staff Report is not hearsay and OCC's witnesses may rely upon it, even for the truth of the matters asserted therein. Accordingly, the PUCO should deny PALMco's Motion to Strike.

II. ARGUMENT

A. The Staff Report is not hearsay.

The Staff Report is not hearsay. Federal Rule of Evidence Rule 801(d)(2) makes clear that an opposing party's statement made in its individual or representative capacity, in which the party manifested that it believed the statement to be true, and made by an employee within the

³ See Fed. R. Evid. 801(c); Ohio R. Evid. 801.

scope of that employee's responsibility is not hearsay. Likewise, Ohio R. Evid. 801(D)(2) provides that a statement is not hearsay if:

The statement is offered against a party and is

- (a) the party's own statement, in either an individual or a representative capacity, or
- (b) a statement of which the party has manifested an adoption or belief in its truth, or
- (c) a statement by a person authorized by the party to make a statement concerning the subject, or
- (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
- (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

The Staff Report clearly satisfies parts (a) and (d) of Ohio R. Evid. 801(D)(2) as admissions by a party-opponent. The PUCO Staff was acting in a representative capacity at the direction of the PUCO, pursuant to Entry issued on April 17, 2019. Further, Mr. Robert Fadley, as Director of the PUCO's Service Monitoring and Enforcement Department, and other Staff members were authorized to make the statements and file the Staff Report. And it is fair to assume that Mr. Fadley, having signed the document, was speaking truthfully regarding the PUCO Staff's findings and determinations. The Staff Report satisfies parts (a) and (d) of Ohio R. Evid. 801(D)(2) as admissions by a party-opponent.

The Staff Report also satisfies part (b) of Ohio R. Evid. 801(D)(2) and is not hearsay. In numerous places, the PUCO Staff states that it "determined" that PALMco had violated the PUCO's rules, "finds" PALMco managerially unfit to provide competitive services in Ohio, and

“believes” that the evidence shows that PALMco is in violation of PUCO rules.⁴ It is hard to imagine a stronger statement manifesting a belief in the truth of the Staff Report than the PUCO Staff outright saying it believes the evidence shows PALMco is in violation of PUCO rules. These determinations, findings, and beliefs manifest Staff’s belief in the truth of the Staff Report.

And regarding parts (c) and (d) of Ohio R. Evid. 801(D)(2), Mr. Fadley and the Staff who contributed to the Staff Report were authorized to make such statements concerning the subject and were servants concerning a matter within the scope of their employment. Specifically, Mr. Fadley was acting as a representative and agent for the PUCO Staff, in the course of his employment as Director of the PUCO’s Service Monitoring and Enforcement Department, when he signed the Staff Report. Mr. Fadley was authorized to sign and file the Staff Report on behalf of the PUCO Staff.

Further, it should be noted that Ohio R. Evid. 801(D)(2) says *or*, not *and*, so the rule contains four reasons why this is not hearsay. Satisfying even one of these criteria would demonstrate that the Staff Report is not hearsay. The Staff Report is not hearsay. Accordingly, OCC’s witnesses may rely upon the Staff Report, even to assert the truth of the matters asserted therein.

⁴ Staff Report at 3, 18, 19, 20 (Note: Page numbers refer to Staff Report, not the pages of the .pdf document).

B. Even if the Staff Report is considered hearsay (which it is not), it falls under the public records exception and the record of regularly conducted activity exception.

The Ohio Rules of Evidence prohibit the admission of evidence that is hearsay, unless the evidence is otherwise admissible.⁵⁶ Here, the Public Records exception in Ohio R. Evid. 803(8) is on point:

Records, 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, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the source of information or other circumstances indicate lack of trustworthiness.⁷

Contrary to PALMco's claims,⁸ the Staff Report is a report of a public agency, setting forth the activities of the agency. It is not merely a report by a task force and it is certainly not a notice of alleged violations.⁹ The PUCO Staff had a duty to file the Staff Report because the PUCO ordered it. By Entry issued on April 17, 2019, the PUCO found that "[t]he Staff Report shall be due by May 10, 2019."¹⁰ Therefore, the Staff Report falls under the Public Records exception to the hearsay rule and may be admitted into evidence, even for the truth of the matters asserted within the Staff Report and by OCC's witnesses.

⁵ Hearsay is otherwise admissible by Constitution of the United States, by the Constitution of the State of Ohio, by statutes enacted by the General Assembly, by the rules of evidence, or by other rules prescribed by the Supreme Court of Ohio.

⁶ Ohio R. Evid. 802.

⁷ Ohio R. Evid. 803(8).

⁸ Motion to Strike (September 18, 2019) at 4.

⁹ *Id.* at 6.

¹⁰ Entry (April 17, 2019) at ¶ 10.

Additionally, the record of regularly conducted activity exception in Ohio R. Evid.

803(6) states:

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(1), unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Staff Report is a report, made after a thorough investigation, docketed by the PUCO Staff in the PUCO’s docketing system. It is regular practice for the PUCO Staff to file Staff Reports – numerous rules in the Ohio Administrative Code demonstrate as much. Further, not only is it regular practice for the PUCO Staff to file a Staff Report, but in some instances the Staff Report is automatically “deemed to be admitted into evidence as of the time it is filed with the commission.”¹¹ That rule further provides that the unavailability of any person contributing to the Staff Report shall not affect the admissibility of the Staff Report.¹² Therefore, even if the Staff Report is considered hearsay, it falls under the exceptions to the hearsay rule and may be relied upon, even for the truth of the matters asserted therein. The PUCO should deny PALMco’s Motion to Strike.

¹¹ Ohio Adm. Code 4901-1-28(E).

¹² *Id.*

C. Nothing prohibits expert witnesses from relying upon hearsay to form an expert opinion.

Quite simply, expert witnesses regularly rely upon the work of others to form their opinions. Here, Ohio R. Evid. 703 is persuasive:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.

In this case, OCC's witnesses have provided expert testimony with opinions and inferences perceived by them based upon the Staff Report. That Staff Report has been filed in the docket and should be automatically admitted into evidence at hearing under Ohio Adm. Code 4901-1-28(E). Moreover, contrary to PALMco's assumptions, OCC witnesses have reviewed customer complaints and have and can come to their own conclusions as regulatory experts as to whether PALMco's acts violate PUCO rules.

Further, not only can OCC's witnesses testify about their opinions and perceptions of the Staff Report, they can testify to *an* ultimate issue in this case – whether PALMco engaged in unfair, misleading, deceptive, and unconscionable acts and practices in its marketing of electric and natural gas to Ohioans. This is made clear by Ohio R. Evid. 704, which states:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

OCC's expert witness testimony is not based upon hearsay, but even if it were, it is still admissible. OCC's expert witnesses are qualified experts with significant experience in PUCO matters. They will provide reliable and valuable expert testimony to the PUCO. And there is nothing prohibiting them from relying on the Staff Report or providing opinions on an ultimate issue in this case. Accordingly, the PUCO should deny PALMco's Motion to Strike.

D. No party will be prejudiced by the admission of OCC's testimony.

The purpose of the hearsay rule is to prevent the admission of unreliable evidence. Generally, hearsay is prohibited from admission into evidence because the out-of-court declarant is not open to cross-examination. But that is not the case here – parties have an opportunity to cross-examine the PUCO Staff. Admission of the Staff Report, even for the truth of the matters asserted within, are subject to cross-examination. If PALMco believes the Staff Report is unreliable, then it can cross-examine the PUCO Staff (the declarant). And therein lies the likely reason for PALMco's objection to admission of the Staff Report – PALMco has a settlement with the PUCO Staff, but to demonstrate the reasonableness of the settlement, PALMco needs to cross-examine the PUCO Staff to demonstrate that Staff's own report is unreliable. But if PALMco can succeed in striking OCC's testimony, or shift the burden of proof to OCC, then PALMco can avoid cross-examining the very party with which it has a settlement. The PUCO should deny PALMco's Motion.

III. CONCLUSION

The PUCO must determine if the Settlement does what it purports to do -- "resolve all of the issues identified by the Staff in its Staff Report of Investigation filed in this proceeding on May 10, 2019 * * *."¹³ To that end, it is imperative that the PUCO receive a full and accurate record in this proceeding in order to determine whether the Settlement is reasonable and a product of serious bargaining among capable, knowledgeable parties. Striking OCC's testimony and excluding it from the record would be unfair, unjust, and prejudicial to OCC and consumers.

¹³ Settlement at 1-2.

Accordingly, OCC respectfully requests that the PUCO deny PALMco's Motion to Strike OCC's testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra by the Office of the Ohio Consumers' Counsel was provided to the persons listed below electronically this 19th day of September 2019.

/s/ Terry L. Etter
Terry L. Etter
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Summary: Memorandum Memorandum Contra PALMco Energy OH LLC's Motion to Strike
Testimony by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J.
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