

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into PALMco Power)	Case No. 19-0957-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.)	

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

I. INTRODUCTION

Due to PALMco's¹ 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. Under Ohio Adm. Code 4901-1-28(E), OCC properly filed motions on September 13, 2019, asking the Public Utilities Commission of Ohio ("PUCO") to issue subpoenas for two PUCO employees to testify at the upcoming hearing in this case. OCC sought subpoenas for Barbara Bossart, Chief, Reliability and Service Analysis Division, Service Monitoring and Enforcement Department; and Robert Fadley, Director, Service Monitoring and Enforcement Department. Based on information and belief, these two PUCO employees made or

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

contributed to the Staff Report of Investigation (“Staff Report”) filed in this case and may be subpoenaed to testify at the hearing, as permitted by Ohio Adm. Code 4901-1-28(E).

The PUCO granted OCC’s motions and issued the subpoenas on September 13, 2019. OCC served the subpoenas on these PUCO employees, and filed return of service forms with the PUCO, consistent with Ohio Adm. Code 4901-1-25(B). The PUCO Staff, through its counsel, filed a motion to quash the subpoenas on September 17, 2019, at approximately 3:00 p.m. the day before the PUCO hearing is scheduled to commence. The PUCO Staff has not shown good cause for quashing the subpoenas. The PUCO’s motion should be denied.

II. ARGUMENTS

A. The PUCO Staff’s motion is based on the false assumption that OCC is attempting to determine the basis, justification, or underlying support for signing the settlement.

The PUCO Staff’s arguments against the subpoenas are based on mere conjecture. Staff claims that it does not know “OCC’s true motivations” for issuing the subpoenas.² Staff then assumes that “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.” This leads into Staff’s second and fifth arguments that (1) OCC is attempting to have more witnesses testify in support of the settlement than required under the PUCO’s rules³ and (2) the subpoenas rob the Staff of its ability to exercise independent legal strategy

² Staff’s Motion at 3.

³ *Id.* at 4.

regarding this case.⁴ The PUCO Staff's arguments are based on the false assumption that OCC has subpoenaed the Staff witnesses to testify regarding the settlement.

As OCC noted in its motion for the subpoenas of Mr. Fadley and Ms. Bossart, OCC requested that they be called as witnesses because of their knowledge of the underlying commission-ordered investigation and Staff Report filed in this case.⁵ OCC explained that under Ohio Adm. Code 4901-1-28(E), in cases where the PUCO orders an investigation to be performed by the Staff, the Staff Report shall be deemed admitted into evidence at the time of its filing at the PUCO. Further under this rule, if a hearing is scheduled in the case in which the Staff Report is filed, *any person making or contributing* to the Staff Report may be subpoenaed to testify at the hearing in accordance with Ohio Adm. Code 4901-1-25(A). OCC's motion for the subpoenas was based on OCC's information and belief that Mr. Fadley and Ms. Bossart made or contributed to the Staff Report. Given that this is the only limitation set forth in Ohio Adm. Code 4901-1-28(E), Mr. Fadley and Ms. Bossart are persons who may be properly subpoenaed under Ohio Adm. Code 4901-1-28(E).

One of the key issues for the PUCO to decide is whether the settlement is just and reasonable and meets the PUCO's three-prong settlement standard. The Settlement states that "[the Settlement] is intended to resolve all the issues identified by the Staff in its Staff report of Investigation filed in this proceeding on May 10, 2019."⁶ In this regard, the PUCO must determine, among other things, that the settlement package benefits customers, is in the public interest, and does not violate important policies and principles.

⁴ *Id.* at 5.

⁵ OCC's Motion for Subpoenas at 1-2.

⁶ Stipulation and Recommendation at 2 (May 10, 2019).

OCC contends that, based on the investigation that occurred and the findings incorporated in the Staff Report, the settlement does not meet these standards.

In order to determine whether the settlement meets these standards, the record developed should include the Staff's investigation and findings related to PALMco's abusive marketing of services to Ohioans. Persons contributing to the Staff Report are crucial witnesses that can answer questions parties have on the Staff's investigation of PALMco. The settlement itself refers to its primary objective as providing "redress for the consumers that were harmed" by the marketing efforts of PALMco.⁷ But the settlement provides for, among other things, only limited refunds to select customers for overcharges. And some of the customer refunds and a proposed forfeiture that PALMco would pay to the state of Ohio were made contingent on PALMco selling its customer contracts to another marketer.⁸ The testimony adduced from these Staff witnesses will be focused on the investigation, Staff findings, and strong Staff recommendations set forth in the Staff Report.

B. The PUCO Staff's arguments regarding the reasonableness of OCC's subpoenas are without merit.

The PUCO Staff also claims that the subpoenas for Mr. Fadley and Ms. Bossart are unreasonable. The Staff asserts that they can offer little evidence of probative value that Staff's sole witness in support of the settlement, Melissa Scarberry, cannot already offer.⁹ The PUCO Staff claims that 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

⁷ Stipulation at 2.

⁸ Stipulation at 5-6.

⁹ Staff's Motion at 4.

Staff Report, helped negotiate the settlement, and has now offered testimony in support of the settlement.”¹⁰ The Staff claims that “there are few, if any, relevant areas of inquiry that Ms. Scarberry could not testify to.”¹¹ But this information is not conveyed in Ms. Scarberry’s testimony and is not apparent from the documents produced by Staff on September 18, 2019 under a public record’s request. And because Staff is generally immune from discovery, there was no way of knowing this information, even based on the testimony that was filed.

The Staff Report is not mentioned once in Ms. Scarberry’s testimony. She also does not explain her involvement in the investigation that led to the Staff Report or her involvement in the drafting of the Staff Report. In fact, her testimony does not even mention that there was an investigation prior to the settlement. Her testimony also fails to mention that the Settlement is intended to resolve all the issues identified by the Staff in its Staff report of Investigation, or how the Settlement accomplishes that for the protection of customers harmed by PALMco’s bad acts. Her testimony does not lead to the conclusion that she was “an integral part” of this entire proceeding.

Under the PUCO’s rules, Staff members cannot be deposed in PUCO proceedings.¹² But any Staff member can be subpoenaed to testify regarding a Staff Report in cases where the PUCO orders an investigation to be performed by the Staff. And the PUCO rules do not require OCC to accept a witness chosen by the PUCO attorneys for purposes of cross examination. The rule is wide open, allowing OCC to subpoena any person making or contributing to the Staff Report. Staff’s attempt to

¹⁰ *Id.*

¹¹ *Id.*

¹² Ohio Adm. Code 4901-1-21(A).

restrict OCC to a witness of its own choosing is plainly inconsistent with the rules. OCC is following the PUCO rules and has reasonably limited its request for the appearance of two Staff members that made or contributed to the Staff Report. (The rules allow OCC to subpoena “any” person making or contributing to the Staff Report).

OCC subpoenaed Mr. Fadley because he signed both the letter filed on April 16, 2019 asking that this proceeding be initiated and he signed the Staff Report as the Director of the Service Monitoring and Enforcement Department. Ms. Bossart was subpoenaed because her name was included in several footnotes in the Staff Report regarding correspondence with PALMco with respect to violations of Ohio law and rules for the marketing of electric and gas service in Ohio. Additionally, Ms. Bossart holds a position of Chief, Reliability and Service Analysis Division, Service Monitoring and Enforcement Department, which would appear to be a key position in terms of investigating customer complaints with regard to competitive services. Ms. Scarberry, Utility Specialist 2 in the Reliability and Service Analysis Division of the Service Monitoring and Enforcement Department, on the other hand, is not mentioned in the Staff Report.

The PUCO Staff also argues that the subpoenas are unreasonable because the hearing is to determine whether the settlement, not the Staff Report, is just and reasonable. But as discussed above, the PUCO should not make that determination without allowing the development of a full and complete record that includes details of the investigation into the wide-spread and continuing violations of Ohio law and rules regarding unfair, misleading, deceptive and unconscionable activities engaged in by PALMco. According to the Staff Report PALMco orchestrated “a marketing program

reliant upon misleading and deceiving customers” which “caused extreme harm to consumers in Ohio.” The Staff Report also concluded that PALMco is “managerially unfit to provide competitive services in Ohio.”¹³ The Staff Report contains the investigation, results from the investigation, and reasonable recommendations as to how the violations should be addressed. Surely OCC is entitled to explore the findings of the Staff Report and put on a case to show that “the redress for consumers that were harmed” by PALMco’s actions is insufficient, given the multitude of customer complaints, and the continuous violations, all detailed in the Staff Report.

The PUCO should not gauge the settlement in a vacuum, as the Staff suggests. Especially since the Settlement is intended to resolve all the issues identified by the Staff in its Staff report of Investigation. The PUCO needs to hear testimony regarding customer complaints, the investigation into those complaints and PALMco’s practices, and violations of Ohio law and rules. Otherwise, the record will reflect the resolution of those issues in the Staff Report that PALMco and the Staff agreed to resolve, but not necessarily all the issues that were identified by the Staff. OCC’s request to subpoena two witnesses out of the many PUCO Staff members that likely contributed to the Staff Report is reasonable and permissible under Ohio Adm. Code 4901-1-28(E).

Accordingly, the PUCO should deny the Staff’s motion.

III. CONCLUSION

OCC’s subpoenas for Mr. Fadley and Ms. Bossart were properly sought, properly signed, and properly served. The PUCO Staff has not shown good cause to quash the

¹³ Staff Report at 3, 17, and 19

subpoenas. The PUCO should deny the Staff's motion to quash. Instead the PUCO should require the two PUCO Staff employees, who made or contributed to the Staff Report, to appear at the evidentiary hearing and be cross-examined regarding the investigation ordered by the Commission and the filing of its Staff Report, documenting the investigation and findings.

Respectfully submitted,

Bruce Weston (0016973)
Consumers' Counsel

/s/ Terry L. Etter

Terry L. Etter (0067445), Counsel of Record
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964 (Etter direct)
Telephone [Botschner O'Brien]: (614) 466-9575
Terry.etter@occ.ohio.gov
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)

*Special Counsel for the
Office of the Ohio Consumers' Counsel*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum Contra was provided to the persons listed below electronically this 19th day of September 2019.

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

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

Jodi.bair@ohioattorneygeneral.gov
whitt@whitt-sturtevant.com
Glover@whitt-sturtevant.com

Keenia Joseph
PALMco Energy OH, LLC,
dba Indra Energy
8751 18th Avenue
Brooklyn, NY 11214
regulatory@indraenergy.com

Attorney Examiners:

Gregory.price@puco.ohio.gov
Stacie.Cathcart@puco.ohio.gov
Anna.Sanyal@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/19/2019 11:42:17 AM

in

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

Summary: Memorandum Memorandum Contra the PUCO Staff's Motion to Quash Subpoenas by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.