

**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)	
Compliance with the Ohio)	Case No. 19-0957-GE-COI
Administrative Code and Potential)	
remedial Actions for Non-Compliance)	
)	

**INITIAL POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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INTRODUCTION

The Stipulation presented in this case addresses the concerns raised by the Staff of the Public Utilities Commission of Ohio (Staff) in the Staff's investigation into customer complaints alleging PALMco Power OH, LLC d/b/a Indra Energy (PALMco Power), PALMco Energy OH, LLC d/b/a Indra Energy's (PALMco Energy)(collectively, PALMco or Company) of non-compliance with multiple provisions of the Ohio Revised Code (R.C.), the Ohio Administrative Code (Ohio Adm.Code), and insufficient management capacity to serve as a certified retail electricity service (CRES) or competitive retail natural gas service (CRNGS) provider in Ohio. The Stipulation in this case addresses the issues discovered during Staff's investigation into hundreds of consumer complaints leveled against the Company and resolves the underlying issues. The Stipulation acknowledges that PALMco will continue to rerate its customers.

PALMco's customers will be transferred in good faith to unaffiliated third-party suppliers and be notified of their opportunity to switch suppliers with no early termination fee. PALMco will provide the state of Ohio with up to a \$750,000 forfeiture. Finally, the Stipulation also bars PALMco and its executives from operating as a CRES or CRNGS in Ohio.

The Stipulation between PALMco and the Staff provides a reasonable outcome for PALMco's customers. The Ohio Consumers' Counsel's (OCC) arguments that the Stipulation is not in the public interest and does violate important regulatory principles and practices are misguided. The Stipulation is reasonable and meets the Commission's three-part test for approval of stipulations. It should be adopted by this Commission.

DISCUSSION

I. The Stipulation meets the Three-Part Test for reasonableness.

Rule 4901-1-30, Ohio Adm.Code, authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such agreements are to be accorded substantial weight.¹ The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. The standard of review for considering the reasonableness of a stipulation has been discussed

¹ *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St, 3d 123, at 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St, 2d 155.

in a number of prior Commission proceedings.² In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve cases.³ When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support remains operative. While the Commission "may place substantial weight on the terms of a stipulation," it "must determine, from the evidence, what is just and reasonable."⁴ The agreement of some parties is no substitute for the procedural protections reinforced by the evidentiary support requirement.⁵

PALMco and Staff respectfully submit that the stipulation here satisfies the reasonableness criteria, and that the evidence of record supports and justifies a finding that its terms are just and reasonable.

² See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.*, Case No. 92-1463-GA-AIR, et al. (August 26, 1993); *Ohio Edison Co.*, Case No. 89-1001-EL-AIR (August 19, 1993); *The Cleveland Electric Illumination Co.*, Case No. 88-170-EL-AIR (January 31, 1989); and *Restatement of Accounts and Records* (Zimmer Plant); Case No. 84-1187-EL-UNC (November 26, 1985).

³ *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St. 3d 559, citing, *Consumers' Counsel*, *supra*, at 126.

⁴ *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 592 N.E.2d 1370.

⁵ *In re Application of Columbus S. Power Co.* (2011), 129 Ohio St.3d 46.

A. The Stipulation is a product of serious bargaining among capable, knowledgeable parties.

This Stipulation and Recommendation is the product of an open process in which all parties were represented by able counsel and technical experts experienced in regulatory matters before the Commission, and the decisions made were based upon thorough analysis of complex issues.⁶ The Stipulation represents a comprehensive compromise of issues raised by parties with diverse interests.⁷ Overall, the Stipulation presents a fair and reasonable result.⁸ All of the parties to this proceeding were present at or informed of negotiations that resulted in the Stipulation.⁹ Evidence in the hearing demonstrates that OCC was noticed and participated in many settlement emails, discussions, and meetings.¹⁰

In sum, the Stipulation represents a comprehensive, reasonable resolution of the issues in this case by informed parties with diverse interests.

B. The Stipulation, as a package, benefits ratepayers and the public interest.

The Stipulation, as a package, benefits customers and the public interest and represents a just and reasonable resolution of all issues in this proceeding. The Stipulation stops PALMco from functioning as a CRES or CRNGS entity in the state, removing the

⁶ Staff Ex. 1 (Scarberry Direct) at 3-4.

⁷ Staff Ex. 1 at 3.

⁸ Staff Ex. 1 at 4.

⁹ Staff Ex. 1 at 3.

¹⁰ See Tr. II. at 300 – 310.

potential for future customer harm.¹¹ The Stipulation requires PALMco to provide the proceeds from any assignment of its remaining customer contracts to adjust and refund all customers who were enrolled between October 1, 2018 and November 30, 2018 and have not received a refund previously, amounting to approximately \$800,000.¹² The Stipulation also prohibits PALMco from enrolling any new residential or small commercial customer for the remainder of its CRES and CRNGS certificates' terms, ensuring no new customers can be harmed.¹³ The Stipulation requires PALMco to reassign its current customers before it exits the market and notify them of the exit.¹⁴ In addition, the notice to customers shall inform them that they may switch gas or electric providers with no fee. PALMco's notification must inform the customers of their rights to find a new supplier free of penalties, providing them with additional information so they may make an informed choice regarding their utilities suppliers.¹⁵ The Stipulation prohibits current owners of PALMco from serving as officers, owners, or partners in any other CRES or CRNGS provider in Ohio for at least five years, to ensure Ohioans are not harmed in the future by PALMco and as a deterrent to other providers. Finally, the Stipulation forces PALMco to pay a forfeiture of up to \$750,000.¹⁶ PALMco has already rerated and refunded customers it had overcharged from December 1, 2018 to April 15,

¹¹ Staff Ex. 1 at 4.

¹² Staff Ex. 1 at 5.

¹³ Staff Ex. 1 at 5-6.

¹⁴ Staff Ex. 1 at 6.

¹⁵ Staff Ex. 1 at 6.

¹⁶ Staff Ex. 1 at 6.

2019, amounting to \$385,000 in refunds.¹⁷ PALMco voluntarily rerated these customers because there has been no order issued from the Commission ordering such a refund. The Company has also provided refunds to consumers who filed informal complaints before the Commission, amounting to \$55,000.¹⁸ Again, the Company voluntarily provided these refunds before the issuance of any Commission Entry ordering such refunds.

The fact that customers have already received refund in the hundreds of thousands of dollars is clearly a public benefit. Customers have been and continue to be rerated at the default rate of the appropriate distribution gas or electric company at the time of the overcharge by PALMco. These customers may likely receive a better rate than they may have selected at that time and a better rate than many other utility customers were paying at that time. This rerate is unequivocally a public benefit.

In addition to the rerate provisions of the Stipulation, PALMco owners will not provide gas or electric to customers in the state of Ohio for five years. In other words, the owners of PALMco will not operate as an officer, owner, or partner for another CRES or CRNGS provider in Ohio for at least five years and may not acquire any PALMco customer contracts.¹⁹ Finally, PALMco will not renew its Ohio certifications to provide CRES or CRNGS and Staff will evaluate managerial capabilities of an applicant and may share its recommendation with the Commission through a filing in the docket if any of the current officers, partners and/owners apply for future certification. This public benefit

¹⁷ Staff Ex. 1 at 4-5.

¹⁸ Staff Ex. 1 at 5.

¹⁹ Staff. Ex. 1 at 6.

will ensure that Ohio consumers are not harmed in the future by the Company and deters future action if PALMco returns to Ohio.

Another public benefit provided by the Stipulation is that PALMco is not now (voluntarily) enrolling new customers nor will the Company enroll any new residential or small commercial customers for the remaining term of its existing CRES or CRNGS certificates.²⁰ This provision removes the possibility of Ohioans entering into misleading variable rate contracts that may be harmful; thereby providing a benefit to Ohio's utility customers.

Overall, as a package, the Stipulation benefits customers and is in the public interest.

C. The Stipulation does not violate any important regulatory principle or practice.

The final prong of the Commission's three-part test is passed, as the Stipulation does not violate any important regulatory principle or practice. The Stipulation complies with all relevant and important regulatory principles and practices.²¹ The terms of the Stipulation represent a compromise of the Signatory Parties.²² The individual provisions of the Stipulation are consistent with or do not violate any important Commission principle or practice.²³

²⁰ Staff Ex. 1 at 5.

²¹ Staff Ex. 1 at 7.

²² Staff Ex. 1 at 7.

²³ Staff Ex. 1 at 7.

D. OCC Arguments

1. Signatory Parties

OCC argues that the Settlement was not the product of serious, arm's length bargaining as OCC was not involved in the entirety of the negotiations.²⁴ OCC witness Kerry J. Adkins claims that OCC was "excluded from at least some of [the] negotiations," and decries how OCC was provided settlement terms after exclusive meetings between PUCO Staff and PALMco."²⁵

However, during the hearing, evidence demonstrated that quite the opposite was true. On cross examination, OCC's Mr. Adkins was handed a collection of documents where OCC was included in many emails discussing settlement.²⁶ Even though Mr. Adkins may not have been copied on every single email between the parties, it is clear that Terry Etter and Amy Botschner O'Brien, both OCC attorneys, were copied and actually provided input to many settlement documents.²⁷ To the contrary, there is no evidence in the record demonstrating that OCC was excluded from the negotiation meetings. Thus, OCC's argument should be rejected.

2. Benefit to Customers and the Public Interest

OCC argues that the Settlement does not benefit customers and the public interest.²⁸ Witness Adkins insists that the settlement would leave PALMco's customers

²⁴ OCC Ex. 2 (Adkins Direct) at 11.

²⁵ OCC Ex. 2 at 11.

²⁶ Tr. II at 300.

²⁷ Tr. II. at 302.

²⁸ OCC Ex. 2 at 12.

without reparations.²⁹ He further claims that PALMco could avoid any enforcement whatsoever and profit from its actions,³⁰ as the Stipulation is “contingent on the sale of PALMco’s customer contracts.”³¹ The sale, Witness Adkins attests, incentivizes PALMco to dump its clients on the market for less than their contracts are worth so PALMco can exit the market quickly and make as much money as possible.³² In fact, the sale does quite the opposite of what OCC suggests. Because the company can keep 50% of the sale, after the rerates are paid, there is quite an incentive to get top dollar for the customer contracts.

Robert Palmese, President and CEO of PALMco, testified that he plans to sell the Ohio business.³³ It is also in PALMco’s best interest to move their customers to other suppliers, as PALMco can receive fifty percent of any proceeds from those sales once they have provided the \$800,000 re rated.³⁴ Such a condition encourages PALMco to work vigorously to sell its customer supply contracts, which will ensure the consumers are made whole and provided with a quality utility supply under the Commission’s rules and regulations.

Again, as argued above, the Stipulation benefits the public by providing the rerating to customer, the company not renewing its CRES or CRNGs certificates, not enrolling new customers, PALMco will not renew its certifications, its owners are leaving

²⁹ OCC Ex. 2 at 12

³⁰ OCC Ex. 2 at 13.

³¹ OCC Ex. 2 at 14.

³² See OCC Ex. 2 at 14.

³³ Palmese Deposition (October 10, 2019) at 42.

³⁴ Tr. I at 128-29.

the state of Ohio for five years, and providing for a penalty that my amount to \$750,00. Therefore, OCC's argument should be rejected.

3. Promoting Important Regulatory Principles and Practices

OCC argues the Stipulation violates three regulatory principles which are grounds for denying it: PALMco can avoid paying full restitution; PALMco can escape punitive measures despite their harm to Ohio consumers; and PALMco could profit from the Stipulation.³⁵ OCC previously mentioned these issues in their objection to the second prong of the Commission's test.³⁶

As described above, the Stipulation changes PALMco's policy with respect to its treatment of current customers, will continue to provide them with restitution, and removes the Company from the Ohio utility marketplace. PALMco has already taken steps to ensure that its consumers are made whole by refunding approximately \$385,000 to customers enrolled from December 1, 2019 to April 15, 2019 and refunds for those customers who had filed complaints with the Commission amounting to approximately \$55,000.³⁷ By selling the customer contracts, PALMco can exit Ohio utilities marketplace quicker than if it were forced to retain the customers indefinitely, ensuring the Company can no longer operate in Ohio or harm Ohioans.³⁸ PALMco is also forbidden to increase its customer base any further, preventing any new individuals being

³⁵ OCC Ex. 2 at 13.

³⁶ *Compare* OCC Ex. 2 at 12-13 *with* OCC Ex. 2 at 13.

³⁷ Staff Ex. 1 at 5.

³⁸ *See* Staff Ex. 1 at 4-6.

harmful by the Company's practices.³⁹ Further, OCC ignores that PALMco's owners are barred from working in Ohio for at least five years from the adoption of the settlement and it will renew its current certifications. This is an appropriate result for settlement of this case and to ensure the future of PALMco's customers. OCC's arguments should be rejected.

CONCLUSION

The Stipulation meets all prongs of the three-part test. OCC's arguments to the contrary should be rejected. The Commission should adopt the Stipulation as its order in this case.

³⁹ Staff Ex. 1 at 5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Initial Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio has been served upon the below-named counsel via electronic mail, this 2nd day of December, 2019.

/s/ Jodi J. Bair

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