

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY BRIEF OF PALMCO ENERGY**

The Commission should adopt Staff's recommendation and approve the Stipulation.<sup>1</sup>

All of OCC's objections can be summarized into two basic claims: first, that the Stipulation does not compensate enough consumers; and second, the Stipulation does not sufficiently punish PALMco. The first claim is objectively false, and the second is merely an opinion. OCC has not shown that the Stipulation is unreasonable.

The settlement compensates *more* consumers than Staff recommended, *regardless* of whether PALMco sells its business. Refunds to an even larger pool of consumers are contingent on PALMco selling its business. OCC objects to this contingency; it wants the expanded refunds automatically. But Staff did not recommend these expanded refunds in the first place. To suggest that the Stipulation sells *any* group of consumers short is false.

The forfeiture is lower than recommended, but that is the nature of settlement. The fact that a compromise was reached does not render the compromise "unreasonable," especially when this compromise allowed Staff to secure additional benefits for consumers. Whether PALMco pays a forfeiture, or how much it pays, does not impact *consumers* in any event.

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<sup>1</sup> PALMco is aware of the letter docketed by Staff on December 16, 2019 requesting a new investigation based on matters that allegedly occurred in and after August 2019. PALMco will respond to these new allegations in due course. Staff's *request* for a new investigation does not obligate the Commission to open one, but even if it does, the new allegations must obviously be resolved on their own record.

OCC also objects to procedural rulings that prevented it from hauling in out-of-state witnesses, but it has not explained how those rulings were prejudicial. The rulings couldn't have been prejudicial because OCC secured the deposition testimony of two of the three witnesses it wanted to put on the stand. For all the hoopla over these witnesses, OCC's brief does not rely on their sworn testimony to establish a single material fact. OCC was not entitled to put witnesses on the stand for the sake of spectacle.

### **ARGUMENT**

PALMco's initial brief explains why the Stipulation meets the traditional three-part test. Staff's brief does the same. There is no need to re-plow that field. This reply will first address OCC's complaint about certain procedural rulings, and then address its objections to the Stipulation.

#### **A. The procedural rulings were correct. Even if they were not, OCC has not shown prejudice.**

OCC dropped the ball on timely or properly securing the attendance of witnesses at hearing. OCC has decided to add these rulings to its list of things to argue about. OCC was wrong then and it is wrong now.

OCC complains, "[t]here is nothing unreasonable or oppressive about requiring PALMco to produce a single witness for a single day at a public hearing before the PUCO to answer for the allegations made in the Staff Report."<sup>2</sup> No one said there is. But securing the appearance of out-of-state witnesses required OCC to follow certain procedures, and OCC failed to do so.

OCC created problems for itself in at least two ways: first, by refusing to acknowledge the distinction between PALMco and its employees; and second, by self-detonating its attempted

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<sup>2</sup> OCC Initial Brief (OCC Br.) at 34-35.

trial-by-ambush through the issuance of subpoenas at the last minute. The Attorney Examiner properly quashed these subpoenas, but permitted OCC to take the deposition of Mr. Palmese. The record was held open for OCC to submit the transcript. What revelation does his testimony reveal? Basically nothing. His testimony is footnoted for a handful of uncontested and immaterial issues.<sup>3</sup>

Before even issuing the hearing subpoenas, OCC had already deposed Ms. Joseph. The transcript of her testimony was submitted at hearing. The relevance of this testimony? Who knows. OCC has not cited it *at all*.

In reviewing the final order, the Court “will not reverse an order of the commission as unreasonable or unlawful because of action of the commission, if such action did not prejudice the party seeking such reversal.” *City of Cincinnati v. Public Util. Comm’n*, 151 Ohio St. 353, 365, 86 N.E.2d 10, 18 (1949). OCC should consider itself lucky that it was able to secure the testimony of *any* out-of-state witnesses by *any* means. OCC cannot demonstrate prejudice by rulings that enable it to secure the testimony of two of the three witnesses it improperly subpoenaed.

Never satisfied unless it gets the last word, OCC argues that “the PUCO should interpret R.C. 4928.09 and R.C. 4929.21 to mean that marketers like PALMco have consented to providing out-of-state witnesses to appear at a hearing before the PUCO.”<sup>4</sup> The Commission cannot “interpret” these statutes to mean anything other than what they say. The statutes require the *entity* to consent to the jurisdiction of Ohio courts and the Commission. The entity (PALMco) is distinct from its employees (the individuals OCC tried to subpoena). As stated in the very case cited by OCC, OCC “cites no authority in support of [its] position that the statute

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<sup>3</sup> See OCC Br. at fn. 21, 31, 32, 55, 56.

<sup>4</sup> OCC Br. at 39.

requiring an out-of-state corporation to waive service if it desires to conduct business in Ohio [gives a party the ability to call individual employees of the out-of-state corporation into the state for depositions or testimony at trial.” *Burgess v. Prudential Ins. Co. of Am.*, No. C-870225, 1988 WL 68686, at \*5 (1<sup>st</sup> Dist. Ct. App. June 29, 1988). See also OCC Br. at 38 (citing *Burgess*).

PALMco has never contested the Commission’s jurisdiction. PALMco has never argued it is immune from a subpoena. OCC could have issued a subpoena to PALMco directing it to produce witnesses to testify about specific topics on behalf of the entity. *PALMco* would then have to designate witnesses to testify on its behalf. That is not what OCC did. OCC attempted to subpoena individual employees through PALMco’s registered agent. As PALMco explained in its motion to quash, “service upon the corporations’ statutory agents did not effectuate service upon individual employees.” *A.O. Smith Corp. v. Perfection Corp.*, 2004-Ohio-4041, ¶ 16 (10th dist.) 2004 WL 1728615.

There is a process in place for securing the attendance of out-of-state witnesses and OCC did not follow it. That is OCC’s fault, not the Attorney Examiner’s or the Commission’s.

**B. OCC cannot refute that the Stipulation provides consumer benefits that exceed Staff’s recommendations.**

A good three-quarters of OCC’s brief does nothing more than quote the Staff Report or OCC witness commentary about the Staff Report. Buried within this discussion is a key admission: “[T]he recommendations contained the Staff Report on pages 17-20 represent a reasonable resolution [.]”<sup>5</sup> OCC claims, the settlement “falls well short of the recommendations in the Staff Report,” but that is simply not true.<sup>6</sup>

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<sup>5</sup> OCC Br. at 19.

<sup>6</sup> *Id.* at 20.

OCC complains that the Stipulation does not call for “immediate suspension or rescission of PALMcos certificates”<sup>7</sup> Staff asked the Commission to “Suspend, conditionally rescind, or rescind PALMco's certification.”<sup>8</sup> PALMco ceased marketing during the pendency of this case and will exit Ohio completely in the first quarter of 2020. The effect of the Stipulation is to both suspend *and* rescind PALMco’s certification. OCC complains that the certain principles are not “permanently barred” from reapplying for certification, but Staff never made such a recommendation.<sup>9</sup>

OCC then complains that under the Stipulation, “certain customers” receive refunds “but others inexplicably do not.”<sup>10</sup> OCC seems to be suggesting that Staff recommended refunds to any customer who ever enrolled with PALMco since the company began operating in 2010. That is simply not so. Staff recommended re-rating of customers “enrolled during the above noted timeframes.”<sup>11</sup> That timeframe is very clearly identified as December 1, 2018 through April 15, 2018.<sup>12</sup> PALMco has already re-rated every customer who enrolled during this timeframe, whether they complained to the Commission or not. PALMco has also paid an additional \$85,000 to customers outside the timeframe identified by Staff.

OCC then complains the settlement “does not provide refunds for all other variable rate customers who enrolled with PALMco *outside the periods* identified in the Settlement and have *not complained* to the PUCO.”<sup>13</sup> Again, the Staff Report makes no such recommendation. It is

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.* at 20.

<sup>10</sup> *Id.* at 21.

<sup>11</sup> *Id.* at 17.

<sup>12</sup> See Staff Report at 3 (identifying number of customer contacts received “From December 1, 2018 to April 15, 2019”).

<sup>13</sup> OCC Br. at 24 (emphasis added).

ridiculous to suggest that the settlement is unreasonable because it does not compensate people neither Staff nor PALMco know about.

Staff also recommended the Commission “[p]rohibit PALMco from transferring any customer contracts to another entity.”<sup>14</sup> It is abundantly clear from the context that Staff was not recommending a blanket prohibition on selling or assigning contracts *ever*, under *any* circumstances. To read the recommendation this way would prohibit customers from choosing another supplier, or defaulting to the utility when PALMco’s certificates expire. Staff wanted to make sure PALMco did not transfer or assign customers without prior approval, and the Stipulation accomplishes this objective.

OCC has not rebutted the point made in PALMco’s initial brief: that the Stipulation gives consumers *more* than Staff initially recommended.

**C. OCC has not shown that the concessions made to achieve the benefits offered by the Stipulation are unreasonable.**

The Stipulation adopts three of four recommendations. The only recommendation not adopted is the payment of a \$1,400,000.00 forfeiture. The voluntary commitment to issue automatic refunds to customers who enrolled in October and November 2018 was not recommended by Staff, either. Nor was the five-year stay-out provision. Nor was the provision that has enabled customers to receive \$85,000 in refunds regardless of the enrollment period. “Whether a settlement is fair, reasonable and adequate must be evaluated by examining the settlement in its entirety and not as isolated components.” *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 245–46 (S.D. Ohio 1991) (finding class action settlement fair, reasonable, and adequate).

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<sup>14</sup> Staff Report at 17.

The unstated premise of OCC’s entire case is that Staff “found violations” and these “findings” alleviate the Commission from rendering any findings of its own. Staff alleged it, so it must be so. Staff recommended forfeitures of a certain amount, so no other amount will do. But the mere issuance of the Staff Report did not entitle consumers to *anything*. PALMco did not have to stop marketing or enrolling new customers. PALMco did not have to issue refunds. PALMco did not have to initiate or entertain settlement talks. PALMco would have been well within its rights to keep doing what it was doing until a hearing was held and the Commission issued a final order. R.C. 4928.08(D); R.C. 4929.20(C)(1) (authorizing various sanctions “*after* reasonable notice and opportunity for hearing.”).

It is not realistic to expect PALMco to give up the right to defend itself without getting something in return. The Company’s voluntary efforts to make things right—before the Stipulation is even approved—should also count for something. What *possible* reason would PALMco have for agreeing to the settlement provisions OCC is demanding? Because OCC demanded them? The absence of OCC’s signature on the Stipulation is not a sign the Stipulation is unreasonable. It is a sign of the utter lack of productivity in OCC’s take-it-or-leave it approach to “settlement.”

The Commission’s rules expressly grant Staff the right to compromise and settle enforcement actions. O.A.C. 4901:1-34-05. Even when Staff does not settle, its recommendations are only that—recommendations. The Commission must ultimately determine whether violations occurred and the appropriate remedies. The Stipulation allows the parties who actually have a dog in the fight to conserve resources and, by implication, the Commission’s resources as well. “[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.” *Does 1-2 v. Deja Vu Servs., Inc.*,

925 F.3d 886, 895–96 (6th Cir. 2019), *quoting Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

OCC complains that “there seems to have been little, if any, reason for providing refunds to some customers and the forfeiture to the state contingent upon the sale of PALMco’s customer contracts.”<sup>15</sup> Perhaps the disconnect here is that OCC does not understand the economics of the private sector. PALMco is not a rate-regulated utility with a guaranteed revenue stream. It is not a public office funded by taxpayers. PALMco makes money by selling gas and electricity to retail consumers. The company agreed to stop enrolling new consumers. That put a cap on its revenue stream. The investigation increased the likelihood of consumers leaving PALMco for another supplier or utility default service, greatly jeopardizing those revenues. Of revenues previously received, PALMco returned over a half million dollars. And, its legal bills have not been cheap. It does not make sense to insist on payment of a forfeiture when the party against whom the forfeiture is levied does not have the ability to pay. A piece of paper saying the State of Ohio is entitled to \$1.4 million is not the same thing as \$1.4 million sitting in the state treasury.

PALMco and Staff had to deal with the reality of finite resources. The Staff Report recommends a forfeiture that exceeds refunds to consumers by a wide margin. Good for the State of Ohio; not so good for consumers. The Stipulation reallocates money from the State of Ohio to consumers. The contingency feature ensures that the proceeds of a sale are devoted first to consumers, and only after \$800,000 is paid to consumers, a forfeiture of up to \$750,000 paid to the state. Maybe there were other ways to structure the settlement, but that is not the issue. The

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<sup>15</sup> OCC Br. at 21.



issue is whether the chosen structure is reasonable, and a reasonable settlement need not be to OCC's liking.

## CONCLUSION

As suggested in PALMco's initial brief, the Commission should consider the reasonableness of the Stipulation the way courts consider class action settlements. Here, as in a civil class action, "the Settlement serves the public interest. It will avoid a time-consuming and expensive trial. In addition, it will eliminate the possibility of any time-consuming and expensive appeals. The Settlement results in a final and complete resolution of all of the issues raised by the Class Members in the litigation." *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 248 (S.D. Ohio 1991).

The Commission should reject OCC's objections and approve the Stipulation.

Dated: December 17, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by electronic mail this 17th day  
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