

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into PALMco Power,)	
OH, LLC dba Indra Energy and)	
PALMco Energy OH, LLC dba Indra)	Case No. 19-2153-GE-COI
Energy's Compliance with the Ohio)	
Administrative Code and Potential)	
Remedial Actions for Non-Compliance.)	

**MOTION FOR SANCTIONS AND FORFEITURES
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

PALMco¹ was ordered to respond to discovery issued by the Office of the Ohio Consumers' Counsel ("OCC"), but it still refuses to do so. PALMco should be sanctioned for defying a direct order by the Public Utilities Commission of Ohio ("PUCO") to respond to OCC's discovery.

PALMco's defiance of the PUCO's April 6 Entry requiring a response to OCC's discovery should be surprising. But there is little surprise anymore with PALMco given its history of obstructionist tactics with OCC and rip-offs of Ohio consumers in violation of various laws and rules. That said, OCC has a case to prepare for consumer protection, which is OCC's right under law and rule.

OCC therefore moves, under Ohio Adm. Code 4901-1-23(F),² for the PUCO to take all necessary actions to enforce its April 6 Entry and to assess sanctions and

¹ "PALMco" refers to PALMco Energy OH, LLC and PALMco Power OH, LLC d/b/a Indra Energy (collectively, PALMco).

² See also Ohio Adm. Code 4901:1-10-30.

forfeitures against PALMco in the amount of \$10,000 per day for its refusal to respond to OCC's discovery.³

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ Angela D. O'Brien
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*Special Counsel for the
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³ R.C. 4905.54.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case involves the PUCO's *second* investigation into "the egregious nature of PALMco's actions" and PALMco's "continuing to charge consumers unconscionable rates" while it was already under investigation for the same conduct.⁴ That, unfortunately, is PALMco being PALMco. As a result of PALMco's "egregious" and "unconscionable" conduct, the PUCO Staff recommended among other things that PALMco re-rate customers that were charged variable rates and pay a forfeiture of up to \$10,222,000.

As the state voice of consumers, OCC filed a motion to intervene in this proceeding on December 27, 2019. PALMco opposed OCC's intervention, which is consistent with PALMco's contempt for consumers. PALMco also challenged OCC's right to discovery, despite discovery being expressly permitted under Ohio law, the PUCO's rules, and PUCO precedent.⁵ PALMco then lost in a ruling. The PUCO rejected

⁴ Case No. 19-2153-GE-COI, PUCO Staff Letter (Dec. 16, 2019).

⁵ OCC has fully explained its legal positions regarding discovery in this case in its previous Motions to Compel, and incorporates those arguments by reference here.

PALMco's meritless arguments and granted OCC's motion to intervene and motions to compel discovery in the April 6 Entry. With respect to OCC's discovery requests, the PUCO concluded:

Consequently, OCC's motions to compel discovery dated February 14, 2020 and March 17, 2020 should also be granted and PALMco should collaborate with OCC to exchange discovery pursuant to Ohio Adm. Code 4901-1-16.⁶

PALMco did not file an interlocutory appeal of the PUCO's April 6 Entry, so the ruling stands. Under Ohio Adm. Code 4901-1-23(E), "If no application for review is filed within the time limit set forth in that rule, the order of the legal director, the deputy legal director, or the attorney examiner becomes the order of the commission."

But PALMco has refused to comply with the PUCO's directive in the April 6 Entry.

On April 8, 2020, OCC contacted PALMco's counsel to inquire when PALMco would produce discovery in accordance with the order.⁷ PALMco's counsel did not respond to OCC's April 8th communication. On April 14, 2020, OCC again contacted PALMco's counsel regarding the discovery responses. On April 15, 2020, PALMco's counsel finally responded to OCC stating simply that: "PALMco will not be responding to the first or second set of discovery."⁸ When OCC asked why PALMco would not respond to OCC's discovery (in violation of the April 6 Entry), PALMco's counsel stated that "I'm not at liberty to discuss at this time."⁹ Since then, PALMco has not

⁶ April 6 Entry, at ¶19.

⁷ Exhibit A (April 8, 2020 10:05 AM e-mail from OCC counsel Angela O'Brien to PALMco counsel Mark Whitt and Lucas Fykes).

⁸ *Id.* (April 15, 2020 1:05 PM e-mail from PALMco counsel Mark Whitt to OCC counsel Angela O'Brien).

⁹ *Id.* (April 15, 2020 1:12 PM e-mail from PALMco counsel Mark Whitt to OCC counsel Angela O'Brien).

communicated or collaborated with OCC, nor has it provided any responses (neither objections nor substantive responses) to any of OCC's discovery requests. Instead, PALMco filed a Complaint in Prohibition with the Supreme Court of Ohio on April 28, 2020, challenging the PUCO's jurisdiction over PALMco in this case.

II. ARGUMENT

Attorney Examiners are authorized to compel the production of books, accounts, papers, records, and documents, and issue other orders on behalf of the PUCO.¹⁰ The PUCO's rules provide that any party that disagrees with a decision by an Attorney Examiner may file an interlocutory appeal of that decision.¹¹ Otherwise, orders are effective immediately when entered into the PUCO's Journal.¹²

The PUCO is further authorized to impose strict sanctions on entities who fail to comply with its orders. R.C. 4905.54 provides that PALMco is subject to forfeitures for failure to comply with an order of the PUCO made under Chapters 4901, 4903, 4907, and 4909 of the Ohio Revised Code. PALMco was ordered to produce discovery under Ohio Adm. Code 4901-1-23. This rule amplifies R.C. 4903.082, which provides that all parties before the PUCO have ample rights to discovery. Thus, the PUCO has authority to issue forfeitures under R.C. 4905.54.¹³ R.C. 4905.54 provides:

Every public utility or railroad and every officer of a public utility or railroad shall comply with every order, direction, and requirement of the public utilities commission made under

¹⁰ R.C. 4901.18.

¹¹ See Ohio Adm. Code 4901-1-15; Ohio Adm. Code 4901-1-23(E).

¹² R.C. 4903.15.

¹³ See e.g. *In the Matter of Filing of Annual Reports for Calendar Year 2013 by all Regulated Entities*, Case No. 14-01-AU-RPT, Finding and Order (Jan. 22, 2014), at ¶¶2-6 (PUCO authorized to impose civil forfeitures under R.C. 4905.54 on competitive retail electric and natural gas supplier who fail to file annual reports as required by the PUCO).

authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force. Except as otherwise specifically provided in section 4905.95 of the Revised Code, ***the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility or railroad that violates a provision of those chapters or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated. Each day's continuance of the violation or failure is a separate offense.*** All forfeitures collected under this section shall be credited to the general revenue fund. (emphasis added).

Additionally, Ohio Adm. Code 4901:1-10-30 authorizes the PUCO to assess to competitive retail electric suppliers (like PALMco):

any and all remedies available under the law, including but not limited to the following:

- (1) Forfeiture to the state of not more than ten thousand dollars for each such failure, with each day's continuance of the violation being a separate offense.
- (2) Corrective action to effectuate compliance.
- (3) Restitution or damages to the customer/consumer.

The April 6 Entry found that PALMco is an “electric services company” under R.C. 4928.01 and a “retail natural gas supplier” under R.C. 4929.01 subject to the PUCO’s jurisdiction.¹⁴ Under R.C. 4928.01(A)(9) an electric services company “means an electric light company.” An “electric light company” is defined under R.C.

¹⁴ April 6 Entry, at ¶1 (PALMco Power “is an electric services company as defined in R.C. 4928.01; is certified to provide competitive retail electric service (CRES) under R.C. 4928.08; and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16. Accordingly, PALMco Power is required to comply with the Commission’s minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21.”); April 6 Entry, at ¶2 (PALMco Energy “is a retail natural gas supplier as defined in R.C. 4929.01; is certified to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and is subject to the jurisdiction of this Commission pursuant to R.C. 4929.24. Accordingly, PALMco Energy is required to comply with the Commission’s minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.”)

4928.01(A)(7) and “has the same meaning as in section 4905.03 of the Revised Code.”

Under 4905.03 of the Code, an electric light company is defined and under R.C. 4905.02 a “public utility” includes those entities defined under R.C. 4905.03.

PALMco, as a supplier of natural gas service to Ohio consumers, is also a “natural gas company” as defined in R.C. 4905.03(E) and thus, qualifies as a “public utility” under R.C. 4905.02. So PALMco is a public utility for purposes of R.C. 4905.54, meaning that it must comply with every order, direction, and requirement of the public utilities commission.¹⁵ Under that statute the PUCO may assess a forfeiture for non-compliance.

In addition, the PUCO has jurisdiction (in complaint proceedings) over any person who has violated or failed to comply with any provisions regarding competitive retail natural gas or electric service for which it is subject to certification or any rule or order adopted or issued by the commission for purposes of those sections.¹⁶ The complaint process is a PUCO “proceeding,” which under Ohio laws¹⁷ and rules¹⁸ allows for intervention and discovery. The PUCO, in furtherance of OCC’s discovery rights, granted OCC’s motion to compel. PALMco violated the PUCO’s ruling, and continues to violate it. Therefore, the PUCO is authorized to impose sanctions of up to \$10,000 per day for each day that PALMco fails to comply with a PUCO order.

PALMco’s willful disregard for the PUCO’s discovery rulings has caused OCC (and the PUCO) to unnecessarily expend state time and resources. PALMco’s imposition

¹⁵ See R.C. 4905.02(A).

¹⁶ See R.C. 4928.16(2), R.C. 4929.24(A)(2).

¹⁷ See R.C. 4903.221; 4905.26; 4903.082.

¹⁸ See Ohio Admin. Code 4901-1-16.

on government and consumers, and disregard for the rule of law, should not be tolerated. Under the PUCO's order, PALMco is required to produce discovery responses regardless as to whether or not it agrees with the ruling.

The General Assembly armed the PUCO with the power to impose substantial forfeitures of up to \$10,000 a day. The maximum forfeiture is warranted in this case. OCC respectfully requests that the PUCO take action under R.C. 4905.54 to enforce the April 6 Entry, and impose sanctions on PALMco in the amount of \$10,000 per day for each day it refuses to respond to OCC's discovery in this case.

In sum, PALMco's refusal to comply with the April 6 Entry warrants severe consequences. The PUCO should impose sanctions and forfeitures on PALMco for each day that it refuses to comply with the order to produce discovery to OCC. The PUCO should also take any other necessary action to enforce the April 6 Entry. For reasons which at this moment must be all too obvious, it is not clear what works for conforming PALMco's conduct to law and rule, but a light touch clearly does not work for consumer protection. Enforcement of the order with sanctions is necessary.

III. CONCLUSION

PALMco has been ordered by the PUCO to provide discovery responses to OCC. PALMco, unsurprisingly, disagrees with that order. And PALMco has now opted for noncompliance with the PUCO's order. In other words, PALMco is being PALMco.

For the the reasons explained above, the PUCO should take any and all necessary actions to enforce the April 6 Entry in this case by ordering PALMco to take immediate steps to produce responses to OCC's discovery. In addition, the PUCO should impose a forfeiture on PALMco in the amount of \$10,000 per day, as allowed by law, for each day

after April 6, 2020 that it has refused to comply with the order to produce discovery to OCC. The PUCO should elevate consumer protection over PALMco's bad behavior. And the PUCO should now sanction PALMco for violating a PUCO order to provide the state consumer advocate with information about impositions against Ohio consumers.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien

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Assistant Consumers' Counsel

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Sanctions and Forfeitures by the Office of the Ohio Consumers' Counsel was served via electronic transmission upon the parties this 7th day of May 2020.

/s/ Angela D. O'Brien
Angela D. O'Brien
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

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Bingham, Debra

From: O'Brien, Angela
Sent: Wednesday, April 15, 2020 1:18 PM
To: Mark Whitt; Lucas Fykes
Cc: bojko@carpenterlipps.com; Healey, Christopher
Subject: RE: New filing for case: 19-2153-GE-COI

Mark-

PALMco is deliberately violating the PUCO's order by refusing to respond to OCC's discovery. If we cannot come to some reasonable resolution we will further pursue the matter.

Angela

Angela O'Brien
Assistant Consumers' Counsel

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-----Original Message-----

From: Mark Whitt <whitt@whitt-sturtevant.com>
Sent: Wednesday, April 15, 2020 1:12 PM
To: O'Brien, Angela <Angela.O'Brien@occ.ohio.gov>; Lucas Fykes <fykes@whitt-sturtevant.com>
Cc: bojko@carpenterlipps.com; Healey, Christopher <Christopher.Healey@occ.ohio.gov>
Subject: Re: New filing for case: 19-2153-GE-COI

I'm not at liberty to discuss at this time.

Mark A. Whitt
whittsturtevant LLP
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whitt@whitt-sturtevant.com <applewebdata://3D255D59-7EB4-4DA6-AAB8-A919BF98B48E/https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.whitt-sturtevant.com%2F&data=02%7C01%7CAngela.O'Brien%40occ.ohio.gov%7Ca5c3cb5e7ea041b1240708d7e16017db

%7C50f8fcc494d84f0784eb36ed57c7c8a2%7C0%7C0%7C637225675146094636&data=P8US3x7bvVXyFgs74QVs0ZEN93wwwR2Ku9EJAK3UJU%3D&reserved=0>

On 4/15/20, 1:09 PM, "Angela.O'Brien@occ.ohio.gov" <Angela.O'Brien@occ.ohio.gov> wrote:

Why?

Best regards,

Angela

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-----Original Message-----

From: Mark Whitt <whitt@whitt-sturtevant.com>

Sent: Wednesday, April 15, 2020 1:02 PM

To: O'Brien, Angela <Angela.O'Brien@occ.ohio.gov>; Lucas Fykes <fykes@whitt-sturtevant.com>

Cc: bojko@carpenterlipps.com; Healey, Christopher <Christopher.Healey@occ.ohio.gov>

Subject: Re: New filing for case: 19-2153-GE-COI

Angela -

Sorry for the delay in getting back to you. Palmco will not be responding to the first or second set of discovery.

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%7C50f8fcc494d84f0784eb36ed57c7c8a2%7C0%7C0%7C637225675146094636&data=P8US3x7bvVXyFgs74QVs0ZEN93wwwR2Ku9EJAK3UJU%3D&reserved=0>

On 4/14/20, 9:47 AM, "Angela.O'Brien@occ.ohio.gov" <Angela.O'Brien@occ.ohio.gov> wrote:

Mark-

Could you please advise whether PALMco will be responding to OCC's discovery in the above-referenced proceeding?

Thank you.

Angela O'Brien

Angela O'Brien
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-----Original Message-----

From: O'Brien, Angela
Sent: Wednesday, April 8, 2020 10:05 AM
To: Mark Whitt <whitt@whitt-sturtevant.com>; Lucas Fykes <fykes@whitt-sturtevant.com>
Cc: bojko@carpenterlipps.com; Healey, Christopher <Christopher.Healey@occ.ohio.gov>
Subject: FW: New filing for case: 19-2153-GE-COI

Good morning, Mark.

The PUCO's April 6 Entry in this case granted OCC's intervention and directs PALMco to respond to OCC's discovery.

Please let us know when we can expect PALMco's discovery production.

Best regards,

Angela

Angela O'Brien
Assistant Consumers' Counsel

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-----Original Message-----

From: DISSUBSCRIPTION@puc.state.oh.us <DISSUBSCRIPTION@puc.state.oh.us>
Sent: Monday, April 6, 2020 4:00 PM
To: O'Brien, Angela <Angela.O'Brien@occ.ohio.gov>
Subject: New filing for case: 19-2153-GE-COI

A new document has been added to case(s): 19-2153-GE-COI

Link to document:

<https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fdis.puc.state.oh.us%2FDocumentRecord.aspx%3FDocID%3D1d9f70f1-98ae-4ae2-99ff-c7f88fe566ed&data=02%7C01%7CAngela.O'Brien%40occ.ohio.gov%7Ca5c3cb5e7ea041b1240708d7e16017db%7C50f8fcc494d84f0784eb36ed57c7c8a2%7C0%7C0%7C637225675146094636&sdata=swkLTo3RIko7AWiiGhtn7SvpO3yIXn9H2WCtqk3KJ3M%3D&reserved=0>

Summary: Attorney Examiner Entry ordering that OCC's motion to intervene and compel be granted and PALMCO should collaborate with OCC to exchange discovery pursuant to Ohio Admin. Code 4901-1-1-16; a new procedural schedule shall be set: motions to intervene due 07/06/20; all discovery requests, excluding deposition notices, served by 08/03/20; Staff report due by 08/10/20; testimony due by 08/17/20 and a hearing scheduled for 08/24/20 at 10:00 a.m. electronically filed by Mrs. Kelli C. King on behalf of Anna Sanyal, Attorney Examiner, Public Utilities Commission of Ohio.

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in

Case No(s). 19-2153-GE-COI

Summary: Motion Motion for Sanctions and Forfeitures by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of O'Brien, Angela D