**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Commission’s Investigation into PALMco Power OH, LLC d/b/a Indra Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance. | )))))) | Case No. 19-957-GE-COI |

**INITIAL BRIEF FOR THE PROTECTION OF CONSUMERS FROM PALMCO’S FALSE, MISLEADING, DECEPTIVE, AND UNCONSCIONABLE PRACTICES**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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# **I. INTRODUCTION**

This case is about an energy marketer that has been ripping off Ohioans and that the PUCO Staff found to be “managerially unfit to provide competitive services in Ohio.”[[1]](#footnote-2) The “unfit” marketer, PALMco,[[2]](#footnote-3) charged some consumers five to six times more than the rates charged by the customers’ incumbent electric and natural gas utilities, which the Staff found to be “an unconscionable sales practice.”[[3]](#footnote-4) And PALMco engaged in hundreds of unfair, misleading, deceptive, and unconscionable acts and practices in its marketing and supplying of electricity and natural gas to Ohioans during late 2018 and early 2019.[[4]](#footnote-5) These unlawful practices were documented in 373 consumer complaints and contacts concerning PALMco to the Public Utilities Commission of Ohio (“PUCO”).[[5]](#footnote-6) Consumers mostly complained about the excessively high rates PALMco charged after initially providing electric and/or natural gas service at rates that were below the local utility’s default rate listed on the customer’s bill.[[6]](#footnote-7)

PALMco customers also contacted the PUCO regarding billing inquiries, misleading and deceptive marketing practices, enrollment disputes, and contract inquiries.[[7]](#footnote-8) A consumer witness at the hearing testified to PALMco’s misleading and deceptive marketing and enrollment practices: PALMco “talk[ed] a good game over the phone. When they contacted me, they were telling me about what a good rate they could give me, better than what AEP was doing.”[[8]](#footnote-9) The witness testified that he told the marketer that he “needed in writing exactly what I was agreeing to” but his “bills started going up and up and up.”[[9]](#footnote-10) The consumer witness further testified that he never received any refunds back from PALMco.[[10]](#footnote-11)

Another consumer witness testified that a door-to-door salesperson from PALMco called on her at her residence and “it sounded really good” but that the offer came to feel “almost like a bait-and-switch.”[[11]](#footnote-12) She explained “all of a sudden, the rate jumped.” During the “first part of 2019, latter part of 2018, the rate quadrupled and my bill went up a hundred dollars.”[[12]](#footnote-13) “[A]s far as the gas rates were concerned…it wasn’t what I expected at all when I signed up.”[[13]](#footnote-14)

Ohio law protects consumers against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of retail electric service and in the administration of any contract for service.[[14]](#footnote-15) The PUCO has rules that provide similar protections for natural gas service consumers.[[15]](#footnote-16)

The PUCO Staff investigated PALMco’s marketing practices in Ohio and found that PALMco had violated several rules that protect consumers from marketers’ misleading and deceptive practices. Based upon its findings, the PUCO Staff asked the PUCO Commissioners to open an inquiry into PALMco’s marketing practices.[[16]](#footnote-17) After a full investigation of the complaints and customer contacts, the PUCO Staff recommended that the PUCO suspend or rescind PALMco’s certificates to provide utility service to consumers.[[17]](#footnote-18) The PUCO Staff also asked the PUCO to order PALMco to refund overcharges to consumers and pay a $1.4 million forfeiture.[[18]](#footnote-19) The PUCO Staff further recommended that the PUCO prohibit PALMco from transferring any customer contracts until all affected customers have been notified and recompensed for PALMco’s unlawful actions.[[19]](#footnote-20)

But, on July 31, 2019, the PUCO Staff filed a Settlement with PALMco that falls well short of the recommendations in the Staff Report for consumer protection.[[20]](#footnote-21) For example, the Settlement does not recommend immediate suspension or rescission of PALMco’s certificates to provide utility service in Ohio. Instead, the Settlement allows PALMco to continue its business until its certificates expire early next year.[[21]](#footnote-22) PALMco’s principals are barred from seeking new operating certificates for the next five years,[[22]](#footnote-23) but not permanently barred. PALMco is not required to provide credits or refunds to all affected customers. Some refunds are contingent upon the sale of customer contracts to another marketer.[[23]](#footnote-24) The potential forfeiture was decreased by nearly half (to $750,000), and even then it is contingent upon the sale of PALMco’s customer contracts to another marketer.[[24]](#footnote-25) And PALMco may get to keep some proceeds from the sale of customer contracts.[[25]](#footnote-26)

To protect consumers, the Office of the Ohio Consumers’ Counsel (“OCC”) opposes the Settlement. The Settlement does not adequately protect residential consumers from PALMco’s misleading and deceptive marketing practices. The Settlement does not provide restitution to all customers who were harmed by PALMco’s unlawful actions. And it could allow PALMco to profit from its deceptive and unconscionable marketing practices. That would be inappropriate. The Settlement is unjust and unreasonable to consumers and is inconsistent with the PUCO’s standard for approving settlements.

The Settlement is not binding on the PUCO. The PUCO may reject the Settlement or modify it. In this Brief, OCC demonstrates that the Settlement does not meet the PUCO’s criteria for approving stipulations. Because this Settlement does not provide restitution for some consumers who were harmed by PALMco’s unlawful actions, there is doubt about the seriousness of the negotiations. Further, making some restitution and the forfeiture contingent on the sale of PALMco’s Ohio business is not in the public interest, does not benefit consumers, and violates important regulatory principles. Out of fundamental fairness to consumers, the PUCO should reject or modify the Settlement, as OCC recommends herein.

# II. STANDARD FOR REVIEW

Generally, the PUCO will evaluate and adopt a stipulation only if it meets all the following criteria:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?[[26]](#footnote-27)

2. Does the settlement, as a package, benefit customers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?[[27]](#footnote-28)

The Settlement does not meet the PUCO’s standard for approving stipulations. The PUCO should reject the Settlement or modify it as OCC recommends.

# III. BACKGROUND

This case began because of hundreds of consumer complaints regarding PALMco’s marketing, billing, and enrollment practices over a six-month period. The PUCO Staff reported an alarming 486 customer contacts to its call center involving PALMco during the period December 1, 2018 through April 15, 2019.[[28]](#footnote-29) The PUCO Staff noted that 373 of these contacts (77%) concerned inordinately high rates, misleading and deceptive practices, enrollment disputes, and contract inquiries.[[29]](#footnote-30) Upon review of the 486 customer contacts, the PUCO Staff specifically found that PALMco engaged in a pattern of probable non-compliance with the Ohio Administrative Code’s minimum requirements for marketing electricity and natural gas to Ohio consumers and asked the Commission to find that violations of the Ohio Administrative Code did in fact occur.[[30]](#footnote-31)

According to the PUCO Staff, PALMco’s rates were *not* “low,” “competitive,” or the “best possible” rates that were promised to consumers. Instead, after a short introductory period where PALMco offered very low “teaser” rates, the actual rates that PALMco charged customers were as much as four to six times higher than the rates charged by the customers’ incumbent electric and natural gas utilities.[[31]](#footnote-32) PALMco’s outrageously high rates were inconsistent with any commonly understood definition of the words it used for selling to customers: “low,” “competitive,” or “best possible” rates.[[32]](#footnote-33) Further, the PUCO Staff found that when PALMco enrolled customers it knew the high variable rate it would eventually charge them but did not disclose that rate to the customers during marketing or enrollment.[[33]](#footnote-34)

Based on the customer contacts, its investigation, and its findings, the PUCO Staff originally recommended that the PUCO: (1) suspend, rescind, or conditionally rescind PALMco’s electric and natural gas marketer certifications; (2) order PALMco to pay a forfeiture of $1.4 million to the state; (3) order PALMco to make restitution to customers harmed during the period of December 1, 2018 to April 15, 2019, equal to the difference between the customers’ applicable local utility rates and the rates PALMco actually charged to customers; and (4) prohibit PALMco from transferring customer contracts to another entity.[[34]](#footnote-35) In addition, the PUCO Staff reasonably concluded that the number and egregious nature of the violations demonstrate that PALMco is unable to maintain the required management oversight that is necessary for marketer certification.[[35]](#footnote-36)

On July 31, 2019, the PUCO Staff and PALMco filed a Settlement, purportedly to “resolve all issues identified by the Staff in its Staff Report of Investigation filed in this proceeding on May 10, 2019.”[[36]](#footnote-37) Under the Settlement, PALMco and the PUCO Staff agree that PALMco has made restitution to all customers who enrolled between December 1, 2018 and April 15, 2019 and were charged a variable rate.[[37]](#footnote-38) The Settlement also alleges that PALMco has made restitution to all customers who made informal complaints to the PUCO Staff through July 26, 2019.[[38]](#footnote-39)

But restitution for customers who enrolled between October 1, 2018 and November 30, 2018 and have not already been compensated (estimated to be $800,000) would be contingent upon PALMco selling its customer contracts to another marketer.[[39]](#footnote-40) If PALMco is able to sell its customer contracts, after the initial $800,000 from the sale of the customer contracts is used for customer restitution, PALMco would get to keep half of the remaining proceeds from the sale of customer contracts.[[40]](#footnote-41) The other half would go toward the payment of a civil forfeiture that is limited or capped at $750,000.[[41]](#footnote-42) If PALMco is unable to sell its customer contracts before its marketing certificates expire, then its customers will default to their incumbent utility for electric or natural gas service.[[42]](#footnote-43)

The Settlement also provides that PALMco will stop enrolling new residential or small commercial customers for the remaining terms of its electric and natural gas marketing certificates.[[43]](#footnote-44) Nevertheless, PALMco would continue to provide utility service to Ohioans who were still under contract for service from PALMco. PALMco will not seek to renew its electric and natural gas marketing certificates.[[44]](#footnote-45) Finally, the Settlement provides that PALMco will not sell or transfer any customer contracts to any of its current owners, officers, or partners.[[45]](#footnote-46) And PALMco agrees that its current owners, officers, or partners will not operate as an owner, officer, director, or partner for another competitive electric or natural gas marketer in Ohio for at least five years.[[46]](#footnote-47)

OCC did not sign the Settlement as the agreement is unjust and unreasonable and it discriminates against some customers who were harmed by PALMco’s unlawful actions in violation of Ohio law, because it does not provide refunds for the overcharges and/or deceptive and misleading marketing, sales, and enrollment practices for all customers. Unlike restitution for customers who enrolled between December 1, 2018 and April 15, 2019, restitution for PALMco customers who enrolled between October 1, 2018 and November 30, 2018 is contingent on the sale of PALMco’s Ohio business,[[47]](#footnote-48) even though those customers were harmed just as much as customers who enrolled between December 1, 2018 and April 15, 2019. Thus, some customers who were deceived by PALMco’s marketing tactics might not be protected under this Settlement even though other customers similarly harmed would receive refunds. In addition, the Settlement is unjust and unreasonable because PALMco may profit from its unlawful activities if the proceeds from the sale of its Ohio business exceeds $800,000. And the maximum $750,000 forfeiture (which could be much less) is unjust and unreasonable as it is an insufficient penalty for PALMco’s disregard for the consumer protection provisions of the PUCO’s rules.

The Settlement does not meet the PUCO’s criteria for approving stipulations. The PUCO should reject the Settlement or modify it as OCC recommends through its testimony and recommendations contained herein.

# IV. ARGUMENT AND RECOMMENDATIONS

## A. The Staff Report and other evidence of PALMco’s consumer abuse and violations of Ohio Law creates irreconcilable differences between Staff recommendations in the Staff Report and the Settlement.

### 1. The Staff Report provides ample evidence of PALMco’s numerous and continuous violations of Ohio laws and rules that protect customers from false and misleading marketing and sales practices.

An alarming 486 customer contacts to the PUCO’s call center involving PALMco during a six-month period (December 1, 2018 and April 15, 2019) has been documented.[[48]](#footnote-49) The PUCO Staff noted that 373 of these contacts (77%) concerned inordinately high rates, misleading and deceptive practices, enrollment disputes, and contract inquiries.[[49]](#footnote-50) Upon review of the 373 customer contacts,[[50]](#footnote-51) the PUCO Staff specifically found that PALMco engaged in a pattern of probable non-compliance with the Ohio Administrative Code’s minimum requirements for marketing electricity and natural gas to Ohio consumers and asked the PUCO to find that violations of the Ohio Administrative Code did in fact occur.[[51]](#footnote-52)

More specifically, after reviewing the 373 customer contacts,[[52]](#footnote-53) Staff identified the following violations of the Ohio Administrative Code by PALMco: Ohio Adm. Code 4901:1-21-03(A), 4901:1-21-05(A) and (C), 4901:1-21-11(A), 4901:1-29-03(A), and 4901:1-29-05(A) and (D).[[53]](#footnote-54) Staff provided specific examples of PALMco’s violations of these rules.[[54]](#footnote-55) According to the PUCO Staff, PALMco’s rates were not “low,” “competitive,” or the “best possible” rates that were promised to consumers. Instead, after a short introductory period where PALMco offered very low “teaser” rates, the actual rates that PALMco charged customers were as much as four to six times the rates charged by the customers’ incumbent electric and natural gas utilities.[[55]](#footnote-56) PALMco’s outrageously high rates were inconsistent with any commonly understood definition of the words it used for selling to customers: “low,” “competitive,” or “best possible” rates.[[56]](#footnote-57) Further, the PUCO Staff found that when PALMco enrolled customers it knew the high variable rate it would eventually charge them but did not disclose that rate to the customers during marketing or enrollment.[[57]](#footnote-58) After reviewing the customer contacts, Staff stated: “Staff believes that these practices demonstrate unfair, misleading, deceptive, or unconscionable tactics in relation to the marketing, solicitation, sale of, administration of, contracts for, or provision of CRES or CRNGS in violation of the Ohio Administrative Code.”[[58]](#footnote-59)

Additionally, during its investigation of the customer contacts,[[59]](#footnote-60) Staff identified the following violations of the Ohio Administrative Code by PALMco: Ohio Adm. Code 4901:1-21-04, 4901:1-21-06(D)(2)(b), 4901:1-21-08(B), 4901:1-29-04, 4901:1-29-06(E), and 4901:1-29-08(B).[[60]](#footnote-61) According to the PUCO Staff, during Staff’s investigation, PALMco failed to respond to Staff’s record requests, causing Staff to send multiple requests and to contact PALMco’s regulatory contact directly. After its investigation, Staff stated: “As Staff’s investigation showed, PALMco failed to respond to Staff requests for information in violation of the Ohio Administrative Code.”[[61]](#footnote-62)

During its investigation of the customer contacts,[[62]](#footnote-63) Staff further identified the following violations of the Ohio Administrative Code by PALMco: Ohio Adm. Code 4901:1-21-05(A), 4901:1-21-06(D), 4901:1-29-05(A), and 4901:1-29-06(D).[[63]](#footnote-64) Staff provided specific examples of PALMco’s violations of these rules.[[64]](#footnote-65) According to the PUCO Staff, (1) PALMco’s contracts for door-to-door enrollments did not contain clear and understandable pricing, terms, and conditions of service, (2) PALMco provided unfair, misleading, and deceptive statements and/or insufficient information in its marketing and enrollment materials, and (3) PALMco knowingly charged customers rates that were up to six times the introductory rate or default rate for natural gas service and up to five times the introductory rate or default rate for electric service. After its investigation, Staff stated: “Staff reviewed many complaints that show that PALMco was engaging in unfair, misleading or deceptive acts/or practices by providing unfair, misleading, and deceptive statements and/or insufficient information in its marketing and enrollment materials for customers to make intelligent cost comparisons. In addition, Staff believes that knowingly charging customers rates that were up to six times the introductory rate and/or natural gas default rate and up to five times the introductory rate and/or the electric utility default rate is an unconscionable sales practice.”[[65]](#footnote-66)

Moreover, during its investigation of the customer contacts,[[66]](#footnote-67) Staff identified the following violations of the Ohio Administrative Code by PALMco: Ohio Adm. Code 4901:1-24-13(E) and 4901:1-27-13(E).[[67]](#footnote-68) Staff provided specific examples of PALMco’s violations of these rules.[[68]](#footnote-69) According to the PUCO Staff, PALMco had demonstrated an inability to comply with the Commission rules and manage a competitive retail utility service. Staff also explained that PALMco and/or its affiliates have experienced compliance issues in other states.[[69]](#footnote-70) After its investigation, Staff stated: “Despite PALMco’s claims, Staff continues to identify instances of PALMco’s unfair, misleading, deceptive or unconscionable acts and practices in Ohio.”[[70]](#footnote-71) And continued: “Based on these facts, Staff believes that PALMco has not demonstrated that its managerial capabilities are sufficient to ensure it can provide CRES and CRNGS in compliance with the Ohio Administrative Code. In addition, Staff believes that PALMco’s management decisions and marketing behavior have caused extreme harm to consumers in Ohio.” [[71]](#footnote-72) “Therefore, Staff finds PALMco managerially unfit to provide competitive services in Ohio.”[[72]](#footnote-73) Staff further concluded:

Based on Staff’s investigation and findings, Staff believes that the evidence shows that PALMco is in violation of each of the above cited provisions of Ohio Adm. Code 4901:1-24-13(E) and 4901:1-27-13(E). Staff believes that, since its last certification renewal, PALMco has: failed to demonstrate the fitness or capability to provide any competitive service covered by its certification(s); violated applicable Commission rules adopted pursuant to Chapter 4928 and/or 4929 of the Ohio Revised Code; engaged in anticompetitive acts by misleading customers into switching away from another CRES/CRNGS provider; failed to comply with state laws or rules designed to protect consumers in this state; and/or has otherwise engaged in fraudulent, misleading, deceptive, unconscionable or unfair acts or practices.[[73]](#footnote-74)

In an attempt to address the rule violations and harm actually caused to PALMco’s customers and other consumers that were set forth in the Staff Report and to prevent potential future harm, a Settlement was entered into that stated:

The primary objective of this [Settlement] is to provide redress for the consumers *that were harmed* *and to avoid, to the extent possible, the potential for future customer harm* *resulting from* the marketing, solicitation, sale, provision or administration of contracts for competitive retail electric serve (CRES) and/or competitive retail natural gas service (CRNGS) *by PALMco* to customers.[[74]](#footnote-75)

OCC witness Adkins testified that he and OCC staff reviewed a substantial number of the 373 customer contacts reported to the PUCO and independently identified numerous rule violations by PALMco consistent with those identified in the Staff Report.[[75]](#footnote-76) Specifically, Mr. Adkins stated: “In response to OCC interrogatories, PALMco provided all of the customer complaints that were provided to the PUCO Staff. We reviewed -- I personally reviewed somewhere more than 60, other OCC Staff reviewed an additional 20-plus, to total more than 80, and we found, again, the same pattern of abuse.”[[76]](#footnote-77)

Mr. Adkins further testified that the harm described in the Staff Report extends well beyond those customers who enrolled between December 1, 2018 and April 15, 2019.[[77]](#footnote-78) In referencing the harm caused to consumers who enrolled with PALMco outside the period defined in the Staff Report, OCC witness Adkins explained that “there’s ample record in this case to show that anybody who was charged that variable rate experienced harm.”[[78]](#footnote-79) Mr. Adkins further explained:

Q. And could you explain why you came to the conclusion that more customers were harmed than what's provided for in the settlement?

A. Yes. Customers -- just by reviewing the customer contacts, the complaints that were provided to us, again we saw the same pattern that was described in the Staff Report. It also -- that pattern -- we're also aware that, based on everything PALMco provided us, that there's one variable rate that customers were charged. All customers were charged the variable rate. Regardless of whether they're in the period, outside the period, they were charged the same variable rate. That rate was 4 to 6 times higher. We independently confirmed those rates were indeed 4 to 6 times higher. Customers don't willingly or knowingly pay 4 to 6 times higher. So the deception that happened during the period, it's pretty safe to assume it also happened outside the period. Customers, in this type of industry, they shop based on price. They don't know -- an electron is an electron, a molecule of gas is a molecule of gas. There's no product differentiation. So customers outside the period are the same as customers inside the period. If they were charged the variable rate that was 4 to 6 times higher, it's pretty safe to assume they were deceived. Also just based on that same pattern and practice that, you know, Ms. Alexander described in other states that Staff described in the Staff Report, customers in the period, there's no real difference between customers inside the period and customers outside the period. Customers shouldn't have to complain in order to get restitution for the harm that was caused. The Stipulation itself describes that customers were harmed. That's the purpose of the Stipulation was to redress the harm.[[79]](#footnote-80)

He also testified:

 Q. Can you give me the name of one customer who allegedly sustained harmed and who is not listed on the spreadsheets, that the Company has provided to Staff, listing customers who have received restitution?

 A. I believe I -- in my direct testimony I identified there were 6,400-some customers –

 Q. Can you name one of them?

 A. I believe, in my testimony, I identified 6,400-plus.

 Q. But you can't tell me who anybody is?

 A. I guess to repeat my answer, I believe there was 6,400-some customers who are outside the period who did not -- will not receive restitution unless they complain to the PUCO.[[80]](#footnote-81)

The Settlement confirms OCC’s claims that the harm was more pervasive than originally contemplated in the Staff Report in as much as the Settlement provides the possibility of re-rating some customers who enrolled between October 1, 2018 and November 30, 2018 in the magnitude of $800,000 (contingent upon the sale of the customer contracts) and to some customers who complain regardless of when enrollment occurred.[[81]](#footnote-82) The Settlement itself explains that it was intended to provide redress for the consumers that were harmed,[[82]](#footnote-83) including the customers who enrolled between October 1, 2018 and November 30, 2018 and/or who complain as those customers are specifically addressed in the Settlement.[[83]](#footnote-84)

Additionally, consumers testified at the hearing on how consumers had been harmed by PALMco, explaining of PALMco’s misleading and deceptive marketing, sales, and enrollment practices. One consumer witness testified to PALMco’s misleading and deceptive enrollment practices from his own personal experience: PALMco “talk[ed] a good game over the phone. When they contacted me, they were telling me about what a good rate they could give me, better than what AEP was doing.”[[84]](#footnote-85) The witness testified that he told the marketer that he “needed in writing exactly what I was agreeing to” but his “bills started going up and up and up.”[[85]](#footnote-86) But, despite the harm endured by the consumer, the consumer witness testified that he never received any refunds back from PALMco.[[86]](#footnote-87)

Another consumer witness testified of the harm caused to her by PALMco. She explained that a door-to-door salesperson from PALMco called on her at her residence and “it sounded really good” but that the offer came to feel “almost like a bait-and-switch.”[[87]](#footnote-88) She explained “all of a sudden, the rate jumped.” During the “first part of 2019, latter part of 2018, the rate quadrupled and my bill went up a hundred dollars.”[[88]](#footnote-89) “[A]s far as the gas rates were concerned…it wasn’t what I expected at all when I signed up.”[[89]](#footnote-90)

Based upon the 373 customer contacts themselves[[90]](#footnote-91) and Staff’s investigation and review of those contacts,[[91]](#footnote-92) as well as OCC’s independent review of a substantial number of the same customer contacts, and the consumers who were harmed who appeared and testified at the hearing, and the Settlement language itself, the evidence in the record is clear. The evidence plainly demonstrates that PALMco continuously and consistently violated numerous Ohio Administrative Code rules and harmed consumers. Therefore, the PUCO should find that PALMco violated the Ohio Administrative Code sections delineated above and that its marketing and enrollment practices are unjust and unreasonable in violation of Ohio law.

### 2. Inexplicably, despite the Staff Report findings of PALMco’s bad acts that harmed customers, the Settlement does not adequately protect PALMco’s customers and other consumers.

 The Staff Report contains 20 pages of single-spaced text detailing the PUCO Staff’s investigation of PALMco and describing how PALMco violated Ohio law and the PUCO’s rules for protecting consumers. There is no doubt that the PUCO Staff conducted a thorough investigation into PALMco’s failure to comply with Ohio law as the PUCO directed in its April 17, 2019 Entry. While OCC believes the evidence in this case supports a PUCO finding that PALMco should have its certificates of authority to provide retail electric and natural gas service to Ohio customers immediately and permanently rescinded, the recommendations contained in the Staff Report on pages 17-20 represent a reasonable resolution to the harm that PALMco has caused Ohio customers. For example, the PUCO Staff recommended that the PUCO suspend or rescind PALMco’s certificates to provide utility service to consumers.[[92]](#footnote-93) The PUCO Staff also asked the PUCO to order PALMco to refund overcharges to consumers and pay a $1.4 million forfeiture.[[93]](#footnote-94) The PUCO Staff further recommended that the PUCO prohibit PALMco from transferring any customer contracts until all affected customers have been notified and recompensed for PALMco’s unlawful actions.[[94]](#footnote-95)

By contrast, the Settlement between PALMco and PUCO Staff cannot be reconciled with the Staff Report as it falls well short of the recommendations in the Staff Report for consumer protection.[[95]](#footnote-96) For example, the Settlement does not recommend immediate suspension or rescission of PALMco’s certificates to provide utility service in Ohio. Instead, the Settlement allows PALMco to continue its business until its certificates expire early next year.[[96]](#footnote-97) PALMco’s principals are barred from seeking new operating certificates for the next five years,[[97]](#footnote-98) but not permanently barred. PALMco is not required to provide credits or refunds to all affected or harmed customers. Some refunds to some harmed customers are contingent upon the sale of customer contracts to another marketer.[[98]](#footnote-99) The potential forfeiture was decreased by nearly half (to $750,000), and even then it is contingent upon the sale of PALMco’s customer contracts to another marketer.[[99]](#footnote-100) And PALMco may profit off its bad acts as it may be able to keep some proceeds from the sale of customer contracts.[[100]](#footnote-101)

The Settlement is an unjust and unreasonable resolution of the issues, does not sufficiently compensate those who were harmed, and does not assess the proper penalties for a bad actor that is “unfit to provide competitive services in Ohio.”[[101]](#footnote-102) Therefore, the Settlement does not benefit customers or the public interest, violates regulatory principles, and cannot be reconciled with the Staff Report. Accordingly, the PUCO should reject it in its entirety.

## B. Because the Settlement does not guarantee refunds for all consumers who were harmed by PALMco’s deceptive marketing practices, the PUCO should find that the Settlement does not meet the first criterion the PUCO uses when considering settlements.

The PUCO’s first criterion for considering settlements is whether the settlement is a product of serious bargaining among capable, knowledgeable parties. But the Settlement filed in this case falls short of protecting all consumers harmed by PALMco. Certain customers who were harmed by PALMco’s deceptive marketing practices receive refunds, but others inexplicably do not. Neither the Settlement nor the witnesses supporting it have an explanation as to why certain customers harmed by PALMco are being protected and others are not. In this regard, the fact that OCC – the statutory advocate for all residential customers – did not sign the Settlement that unfairly discriminates against some customers calls into question the seriousness of the bargaining that produced the Settlement.

Further, 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. The record contains no information regarding PALMco’s financial situation and the PUCO Staff apparently made no independent evaluation of PALMco’s finances. The testimony supporting the Settlement does not show that PALMco is unable to pay all refunds or all of the forfeiture. Yet PALMco’s payment of refunds for some consumers and the forfeiture, which helps protect consumers, is notably absent from the Settlement.

The record also provides no basis to make refunds for some customers and the forfeiture contingent upon the sale of PALMco’s Ohio business. The only testimony supporting the Settlement merely parrots the terms of the agreement, without adding any details as to why payment of some refunds and the forfeiture must wait for the sale of PALMco’s Ohio business. When some consumers are deprived of refunds that should rightfully be theirs, that should be explained in the Settlement and supported by evidence, but it is not. It seems that protecting *all* consumers who were harmed by PALMco was not a priority of either party signing the Settlement.

The lack of consumer protections in the Settlement casts doubt on the seriousness of the bargaining that led to the Settlement. The Settlement was not the product of serious bargaining. The Settlement does not pass the first prong of the PUCO’s settlement standard.

## C. The PUCO should find that the Settlement is not in the public interest and does not benefit consumers.

### 1. The Settlement is not in the public interest and does not benefit consumers because it makes refunds for some consumers who were harmed by PALMco contingent on the sale of its Ohio business.

The PUCO’s second criterion for considering settlements is whether the settlement, as a package, benefits customers and the public interest. The Settlement filed in this case fails to meet this criterion.

Refunds for harm caused to consumers is fundamental to enforcement of consumer protection rules. R.C. 4928.16 (electric) and R.C. 4929.24 (gas) expressly provide the PUCO the authority to order competitive electric and natural gas marketers found to have violated the competitive electric or natural gas rules to make restitution to customers harmed by the violations.[[102]](#footnote-103) As explained previously, the Settlement indicates that that its primary objective is “to provide redress for the consumers that were harmed and to avoid, to the extent possible, the potential for future harm….”[[103]](#footnote-104) But the Settlement falls short of this objective because it does not provide that all consumers harmed by PALMco will actually receive the refunds they deserve.

As OCC witness Adkins pointed out, the Settlement leaves open the very real possibility that thousands of customers harmed by PALMco’s actions will not be made whole.[[104]](#footnote-105) As explained above, refunds for customers who enrolled with PALMco between October 1, 2018 and November 30, 2018, and who have not already received a refund, would be contingent on the sale of PALMco’s customer contracts. Refunds for such customers is estimated to be $800,000. Thus, if PALMco does not sell its customer contracts or does not receive at least $800,000 for the sale of its customer contracts, then possibly thousands of customers will not receive full refunds that they deserve for being ripped off by this Marketer.

As OCC witness Adkins noted, PALMco could likely receive less than $800,000 for the sale of its Ohio business.[[105]](#footnote-106) In his deposition, Mr. Palmese confirmed Mr. Adkins’s observation.[[106]](#footnote-107) Mr. Adkins noted that most of PALMco’s contracts are month-to-month variable rate contracts.[[107]](#footnote-108) These contracts likely will not have substantial value to other marketers because marketers will have no assurance of retaining the customers long enough to recoup its costs of acquiring them. In addition, some substantial portion of customers may either return to their local utility’s standard service offer (“SSO”) or choose another competitive electric and/or natural gas marketer for their service after being informed that PALMco is exiting the Ohio market.[[108]](#footnote-109) Mr. Adkins observed that competitive electric and natural gas marketers interested in purchasing PALMco’s customer contracts “will no doubt factor this potentially large customer exodus into the purchase price they will offer to PALMco.”[[109]](#footnote-110)

Mr. Adkins also testified that PALMco may decide that it is less costly to simply cut its losses in Ohio and sell its customer contracts for the first offer that comes along for a nominal amount.[[110]](#footnote-111) If that happens, then not all customers will get full or any refunds under this Settlement.

The Settlement also does not provide refunds for all other variable rate customers who enrolled with PALMco outside of the periods identified in the Settlement and have not complained to the PUCO. OCC witness Adkins testified that there are more of these customers than there are customers who have received or may receive refunds in the future through the Settlement.[[111]](#footnote-112) He pointed out that PALMco’s responses to OCC discovery showed that PALMco has made or intends to make refunds (contingent on the sale of its customer contracts) to approximately 6,143 customers.[[112]](#footnote-113) But as of August 12, 2019, PALMco had approximately 12,625 electric and natural gas customers being served under variable rate contracts.[[113]](#footnote-114) This means that more than half of PALMco’s variable rate customers (6,482) will not receive refunds for significant overcharges unless they complain to the PUCO before this case is resolved.

Mr. Adkins observed that this is an unreasonable result that harms consumers and is not in the public interest.[[114]](#footnote-115) Given the known violations of Ohio law and the PUCO’s rules by PALMco, customers ripped off by this Marketer should not have to complain to the PUCO in order to receive a refund for being overcharged by PALMco. Mr. Adkins noted that many consumers may not even be aware that they were overcharged.[[115]](#footnote-116) Because they were misled into believing that they were offered a competitive variable rate, some customers may not know what competing rates are or that they can complain to the PUCO. He stated that many customers may have simply switched to their incumbent utility’s SSO or to another marketer after a month or two on PALMco’s service at rates that were well above the prevailing SSO rates.[[116]](#footnote-117)

Whether consumers are still being served by PALMco or switched after being overcharged, if they were charged the same exorbitant rates as the consumers covered under the Settlement were charged, then these consumers were harmed by PALMco’s actions and they should also receive refunds to remedy the harm. It is in the public interest to compensate all consumers who were harmed by PALMco’s unlawful acts, and the public interest can only be served if and when all customers who experienced harm are made whole. The PUCO should order PALMco to make refunds or credits to all of its customers or former customers who were charged the exorbitant rates under the same parameters as the customers covered under the Settlement. Only then can the Settlement truly and fully “provide redress for the consumers that were harmed” by PALMco.[[117]](#footnote-118) As such, the Settlement is unjust and unreasonable and insufficient to address the harm caused.

The record does not show that PALMco lacks the resources necessary to make full restitution to the consumers who were harmed by PALMco’s unlawful actions. There is no evidence in the record of this case that PALMco lacks sufficient resources to fully recompense all consumers harmed by its unlawful actions. The PUCO should order full refunds to consumers even if PALMco must liquidate its assets in order to do so.

On the other hand, nothing in the Settlement or anywhere else in the record in this case discusses the likelihood that PALMco will receive at least $800,000 for the sale of its customer contracts (an amount that certain refunds to consumers harmed by PALMco is unreasonably contingent upon). In fact, the Settlement recognizes the possibility that PALMco might not be able to sell its customer contracts.[[118]](#footnote-119) Nevertheless, neither the Settlement nor the testimony supporting it requires PALMco to make full refunds to all the consumers harmed by PALMco’s actions if PALMco is unable to sell the customer contracts for at least $800,000. This is an unreasonable outcome that harms consumers and is not in the public interest.

All consumers who were victims of PALMco’s bad acts should receive full refunds to compensate them for the harm caused by PALMco’s deceptive and misleading marketing acts and practices. It does not benefit consumers if PALMco avoids paying full refunds to some consumers based on the amount it receives from the sale of its Ohio business. It is also not in the public interest. The PUCO should reject the Settlement.

If, however, the PUCO decides to adopt the Settlement, it should modify the Settlement to impose a minimum “exit fee” that would apply to PALMco to cover any shortfall between the amount it receives from the sale of its customer contracts and the amount necessary to make full refunds to Ohioans PALMco harmed. There should be no instance where consumers who PALMco harmed receive less than full refunds for that harm that PALMco deliberately caused them.

### 2. The Settlement is not in the public interest and does not benefit consumers because PALMco might avoid paying a forfeiture for its unlawful actions.

Punitive measures in the form of civil forfeitures or some other form of monetary penalty (e.g., treble damages) are fundamental principles for enforcing consumer protection rules. Such measures serve to punish bad actors for violating the rules and bringing harm to consumers. The measures also serve as a deterrent to other potential bad actors by showing that rule breaking will not be tolerated. Ohio law expressly gives the PUCO authority to assess forfeitures on bad actors for violating the PUCO’s rules.[[119]](#footnote-120)

In this case, the payment of a forfeiture is part of the Settlement’s redress for the harm PALMco caused to consumers. But the Settlement weakens its own forfeiture provision by making PALMco’s payment of forfeitures contingent on the sale of its customer contacts and completing restitution for some, but not all, consumers harmed by PALMco. The customer refunds are estimated to be $800,000 so PALMco would have to sell its Ohio business for at least that amount before it pays any forfeiture. Even if the sale of customer contracts exceeds $800,000, only half of the additional proceeds would go toward payment of a forfeiture. PALMco would keep the rest.

Thus, depending on the selling price of PALMco’s Ohio business, PALMco could pay little or no forfeiture for harming consumers for disregarding the PUCO’s consumer protection rules. As Mr. Adkins observed, if PALMco sells its customer contracts for $800,000 or less, it will pay no forfeiture.[[120]](#footnote-121) And it will pay less than the full $750,000 civil forfeiture provided in the Settlement if it sells the customer contracts for less than $2.2 million ($800,000 restitution + $750,000 forfeiture + $750,000 retained by PALMco).[[121]](#footnote-122)

A required forfeiture is necessary in this case because of PALMco’s pattern of similar deceptive actions against consumers in other states. As OCC witness Alexander described in her testimony, the proceedings from other states identified in the Staff Report describe and document a similar pattern of inappropriate conduct that was found to be unreasonable and in violation of various state laws and regulatory rules.[[122]](#footnote-123) She testified that in each proceeding, the attorney general or the state utility commission had received large numbers of customer complaints that described promises of lower prices, “competitive prices,” “savings,” and a high level of customer service by sales agents of each of the PALMco group of companies.[[123]](#footnote-124) She observed that in most of those proceedings, the consumers alleged instances of misrepresentation of the identity of the PALMco sales agent at the door or over the phone, as well as a pattern of exorbitant prices charged under the variable rate contracts that conflict with representations of PALMco’s sales agents.[[124]](#footnote-125) And as she detailed in her testimony, in each of the proceedings the fact pattern of the customer complaints is similar to those identified in the Staff Report.[[125]](#footnote-126)

But unlike the Settlement in Ohio, the settlements and orders in the other states do not make customer restitution and/or the payment of forfeitures by PALMco contingent upon the sale of PALMco’s customers to another marketer.[[126]](#footnote-127) Thus, in the other states that have ordered refunds, all consumers who PALMco harmed will receive full restitution of the amount PALMco overcharged them. That is not the case with the Ohio settlement. And in those states where PALMco was ordered to pay a forfeiture, the full forfeiture will be paid. The Settlement in this case does not require PALMco to pay the full forfeiture. This does not serve to deter other marketers from misleading or deceiving Ohioans.

The outcomes in other states identified by Ms. Alexander shows that the Settlement in this case is seriously deficient to protect consumers. The Settlement here amounts to nothing more than a cost of doing business for PALMco.

The public interest is served by requiring marketers to comply with the PUCO’s competitive electric and natural gas rules and by imposing punitive measures for violation of those rules. It is not in the public interest to simply let PALMco walk away without paying any form of penalty if it sells its customer contracts for $800,000 or less, or a reduced penalty if the sale price is for less than $2.2 million.

Making PALMco’s forfeiture contingent upon the sale of its Ohio business is not in the public interest. It also does not benefit consumers who were harmed by PALMco. The PUCO should reject the Settlement. Instead, it should directly impose the original $1.4 million civil forfeiture that the PUCO Staff recommended in the Staff Report. And it should order PALMco to pay the full amount immediately.

### 3. The Settlement is not in the public interest and does not benefit consumers because PALMco might even profit from its unlawful actions.

OCC witness Adkins observed that the Settlement may allow PALMco to profit from its unlawful actions. If the sale amount of its customer contracts exceeds the initial $800,000 reserved for restitution to customers enrolled between October 1, 2018 and November 30, 2018 who have not yet received refunds, PALMco would keep one-half of the remaining proceeds.[[127]](#footnote-128) Thus, PALMco could gain proceeds from the sale and potentially profit from deceptively acquiring customers.

In addition, Mr. Adkins noted that the Settlement allows PALMco to continue serving its existing customers and accepting customer contract renewals until it completes the sale of the customer contracts or until its current PUCO certifications expire.[[128]](#footnote-129) Thus, PALMco will continue to receive the profit margin that is built into the rates that it is currently charging customers until the date that sale of its contracts is completed or its certifications expire (which could include some of the exorbitant rates that led to the investigation in the first place). Further, the Settlement does not prevent PALMco from renewing its contracts (and further ripping off customers) at a higher rate than customers were charged under their previous contract.[[129]](#footnote-130) There are no price protections put in place through the Settlement to prevent PALMco from charging excessive rates and doing exactly what led to the Commission Ordered Investigation in the first place.

## D. The PUCO should find that the Settlement violates several important regulatory principles that protect consumers.

As explained throughout this brief, the Settlement violates several important regulatory principles. For one, it allows PALMco to profit from its unlawful actions by continuing to serve customers that were acquired through deceptive means. PALMco might also profit from the sale of customer contracts. As Mr. Adkins testified, this clearly violates a fundamental tenet of rule enforcement.[[130]](#footnote-131)

In addition, the Settlement provision making payment of any forfeiture contingent on the sale of PALMco’s customer contracts leaves open the possibility that PALMco will pay only a partial forfeiture or may not pay any forfeiture at all. Thus, it violates the important regulatory principle that punitive measures should be imposed for rule violations and to deter others from violating the rules.

The Settlement thus fails the PUCO’s third criterion for considering settlements. The PUCO should reject the Settlement.

## E. The PUCO should reject the Settlement, but if it does not, it should modify it in ways that protect consumers and further the public interest.

As discussed above, the Settlement does not meet the PUCO’s criteria for approving settlements. The PUCO should reject it. If the PUCO does not reject the Settlement (which it should reject), the PUCO should not approve the Settlement without first modifying it to protect consumers and further the public interest. In that regard, OCC has several recommendations.

First, the PUCO should require that all consumers that were harmed by PALMco are fully compensated for the difference between what they paid PALMco and what they would have paid under the utility’s default rate by refunding to each consumer that difference in full.

Second, the PUCO should include an exit fee that would set a minimum payment payable by PALMco regardless of the amount of proceeds realized from the sale of its customer contracts. This exit fee would cover any shortfalls between the amount needed for full refund to customers plus some level of civil forfeiture and the proceeds for the sale of the customer contracts.

Third, the PUCO should include a comprehensive and independent verification process to ensure that all refunds represented as completed in the Settlement have indeed been completed. This would include a provision for consequences to PALMco if the verification process reveals that PALMco has not made all of the consumer refunds represented in the Settlement, a requirement for PALMco to make restitution to any consumers missed or not covered by the Settlement, and a provision for additional monetary penalties. Although the Settlement addresses the “re-rating” (refund) of customers who were overcharged, it does not address how the refunds was or will be verified. It does not include any process that describes how the PUCO Staff or an independent third-party has or will verify that the customers referred to in the Settlement have indeed received the full refunds due them. The Settlement also does not address consequences if PALMco fails to properly re-rate customers. The PUCO should rectify these shortcomings in the Settlement.

Fourth, the PUCO should include a requirement that the notice to customers that PALMco is exiting the Ohio markets also inform them of the reasons why PALMco is leaving. Customers should be informed why and the circumstances surrounding PALMco’s exit from Ohio as they weigh their options to stay with the new marketer that PALMco has chosen or return to their utility’s SSO service.

This will allow customers still served by PALMco who were unaware that they may have been overcharged to go back over their billing statements to determine if they overpaid. If so, they can still complain to the PUCO and receive restitution per the terms of the Settlement. Ensuring that PALMco’s customers have the maximum amount of unbiased information as they consider their options is surely in the public interest. Conversely, leaving vital information out of customer notices is contrary to the public interest. This notice should also advise customers to consult the PUCO’s Apples-to-Apples comparison chart as they consider whether to continue service with the new marketer or return to their utility’s SSO.

Fifth, the PUCO should provide price protection to those consumers currently served by PALMco. The PUCO should protect PALMco’s customers by not allowing PALMco to charge a rate higher than the utility’s default rate for natural gas and electric service (i.e., the standard choice offer rate or the standard service offer rate).

Sixth, the PUCO should prohibit PALMco from selling its customer contracts to any entity that has any association with past PALMco owners, officers, or partners that were associated with PALMco during the time periods covered by the PUCO Staff’s investigation mentioned in the Staff Report. It is clearly in the public interest that any owner, officer, or partner who was involved with PALMco at the height of the deceptive practices described in the Staff Report should not be eligible to be involved in any way with the purchase or ongoing service of PALMco’s customer accounts. Yet, the Settlement fails to offer this basic customer protection.

If the PUCO does not reject the Settlement in its entirety, the PUCO should modify the Settlement as proposed herein to protect consumers and further the public interest.

## F. It is neither unreasonable nor oppressive for PALMco to be required to produce a single witness subject to a valid subpoena to answer for the allegations of unfair, misleading, deceptive, unconscionable, and unlawful acts against Ohio consumers.

The standard for quashing a subpoena is that the subpoena is “unreasonable or oppressive.”[[131]](#footnote-132) The Staff Report identifies extensive allegations of unfair, misleading, deceptive, unconscionable, and unlawful acts and practices in PALMco’s marketing of electricity and natural gas to Ohio consumers. There 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.

Accordingly, OCC filed a motion under Ohio Adm. Code 4901-1-25 asking the PUCO to issue subpoenas for PALMco president and chief executive officer Robert Palmese and PALMco employees Keenia Joseph and Alan Bashe.[[132]](#footnote-133) The PUCO Attorney Examiner signed the subpoenas. OCC properly served the subpoenas and filed return of service forms with the PUCO, consistent with Ohio Adm. Code 4901-1-25(B).

But at the hearing, the Attorney Examiner quashed OCC’s subpoenas.[[133]](#footnote-134) Specifically, the Attorney Examiner quashed OCC’s corporate subpoena, ruling that “[t]his is not a typical Commission practice case where the company comes in with an application and it’s an in-state utility and the company is seeking some sort of relief, whether it's a rate increase or a tariff change, from the Commission.”[[134]](#footnote-135) The Attorney Examiner added that PALMco did not initiate this case and thus “we do agree that the subpoenas are unable to bring in an out-of-state witness to testify against as well.”[[135]](#footnote-136) The Attorney Examiner quashed OCC’s subpoena of the PALMco employees. Instead, the Examiner chose a “safe path” that allows for depositions of Mr. Palmese and Ms. Joseph to be admitted into the record.[[136]](#footnote-137) The deposition transcripts may be cited on brief and PALMco may move to strike the use of the deposition transcripts based only on objections raised to the cited portion of the transcript.[[137]](#footnote-138)

 The PUCO should overturn these rulings. The Ohio Revised Code and Administrative Code allow for subpoenas of corporate designees, and they allow for subpoenas of out-of-state witnesses, especially of those entities that are regulated by the PUCO and have subjected themselves to the jurisdiction of the PUCO.

### 1. The plain language of Ohio Adm. Code 4901-1-25 allows parties to subpoena a corporation like PALMco.

Under the PUCO’s rules, “person” is defined as “a person, firm, *corporation*, unincorporated association, government agency, the United States, the state of Ohio or one of its political subdivisions, or any other legally cognizable entity including any entity defined as a ‘person’ in division (A) of section 4906.01 of the Revised Code.”[[138]](#footnote-139)

Ohio Adm. Code 4901-1-25 states that the “commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas.” Further, “[a] subpoena shall command the *person* to whom it is directed to attend and give testimony at the time and place specified therein.”[[139]](#footnote-140)

PALMco is a corporation. A corporation is a person. A person can be subpoenaed. Therefore, PALMco can be subpoenaed.

Thus, there is no basis for the Attorney Examiner’s conclusion that the PUCO’s rules do not allow a corporation to be subpoenaed.[[140]](#footnote-141)

### 2. By doing business as a marketer in the State of Ohio, PALMco consented to jurisdiction under R.C. 4928.09 and 4929.21, which includes consent to subpoenas.

PALMco voluntarily chose to do business in the State of Ohio. Under both R.C. 4928.09(a)(1)(a) (which applies to electricity marketers) and 4929.21(A)(1)(a) (which applies to natural gas marketers), prior to doing business in the State of Ohio, a marketer like PALMco must “[c]onsent[] irrevocably to the jurisdiction of the courts of *this state* and service of process in this state, including, without limitation, service of summonses and subpoenas....”[[141]](#footnote-142) This language necessarily is directed to out-of-state corporations like PALMco because in-state marketers would already be subject to Ohio jurisdiction simply by virtue of being located in Ohio.[[142]](#footnote-143)

Additionally, per Ohio Adm. Code 4901:1-29-03, PALMco is required to maintain an employee and an office open for business in the State of Ohio. With this office, PALMco is also subject to the jurisdiction of the State of Ohio. By entering the competitive energy market in Ohio, becoming certified by the PUCO, and maintaining an office in the State of Ohio, PALMco has availed itself of the benefits of Ohio and has consented to the jurisdiction of Ohio. Thus, PALMco consented to being subpoenaed by the PUCO, and OCC’s subpoenas for Mr. Palmese and Ms. Joseph should not have been quashed.

### 3. R.C. 4928.09(B) and 4929.21(B) explicitly contemplate an out-of-state witness appearing in Ohio pursuant to a subpoena.

Under R.C. 4928.09(B) and 4929.21(B), which apply to PALMco, “[a] person who enters this state pursuant to a ... subpoena ... authorized by this section is not subject to arrest or service of process, whether civil or criminal, in connection with other matters that arose before the person’s entrance into this state pursuant to such ... subpoena.” These statutes only make sense if the person subject to the subpoena is from out of state.

The statutes refer to a person who *enters* the State of Ohio. An individual who is already in the state of Ohio cannot enter the state of Ohio. Thus, the only way to give these sections of the Revised Code meaning is to interpret them to mean that the PUCO can subpoena a marketer’s out-of-state witness. If the PUCO could only subpoena in-state witnesses, then there would be no need for a statute that addresses individuals *entering* the state of Ohio pursuant to a subpoena. The PUCO may not interpret a statute in a way that renders it meaningless.[[143]](#footnote-144)

### 4. Courts interpreting similar “consent to jurisdiction” statutes have found that such consent to jurisdiction includes being compelled to provide out-of-state witnesses for trial.

In *Burgess v. Prudential Insurance Co. of America,*[[144]](#footnote-145) the insurance company in question was subject to R.C. 3909.05. Under that law, an out-of-state insurance company is required to maintain a statutory agent in Ohio to receive service of process.[[145]](#footnote-146) The *Burgess* court found that R.C. 3909.05 “gives a party the ability to call individual employees of the out-of-state corporation into the state for depositions *or testimony at trial*” as long as the individual is personally served with the subpoena.[[146]](#footnote-147)

The statutory language for electric and natural gas marketers in R.C. 4928.09 and R.C. 4929.21 is similar to the language found in R.C. 3909.05, as it requires a marketer to designate a statutory agent to receive service of process in Ohio.[[147]](#footnote-148) Thus, under *Burgess*, 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. Indeed, the statutory language that applies to PALMco is even stronger than that found in the insurance statutes at issue in *Burgess*. The marketer statutes explicitly provide that marketers consent to being subpoenaed. There is no similar language in the insurance statute, R.C. 3909.05. If the *Burgess* court interpreted R.C. 3909.05 to require a company to produce an out-of-state witness for trial, then certainly the more explicit language found in R.C. 4928.09 and 4929.21 should do the same.

The Attorney Examiner’s ruling that out-of-state witnesses cannot be subpoenaed to appear before the PUCO is not supported by law.

# V. SUMMARY AND CONCLUSION

The PUCO should find that PALMco has unreasonably and unjustly violated numerous provisions of Ohio law and certain consumer protection provisions of the Ohio Administrative Code and acted in a manner that was unjust, unreasonable and unlawful. The PUCO should also find that the Settlement is unjust, unreasonable, harms consumers, is contrary to the public interest, and violates important regulatory principles and policies, and does not protect all Ohioans who have been harmed by the deceptive and “unfit” marketer. The Settlement should protect consumers. It does not. Therefore, the PUCO should reject the Settlement or approve it only with the modifications recommended by OCC.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Initial Brief was served via electronic transmission to the persons listed below on this 2nd day of December 2019.

*/s/ Terry Etter*

 Terry Etter

 Assistant Consumers’ Counsel

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1. OCC. Ex. 6 (PUCO Staff Report (May 10, 2019)) at 19 (“Staff Report”). [↑](#footnote-ref-2)
2. “PALMco” refers to PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy. [↑](#footnote-ref-3)
3. Staff Report at 14. [↑](#footnote-ref-4)
4. *See* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-5)
5. *Id*.; *see also* Staff Report at 3. [↑](#footnote-ref-6)
6. *See* Staff Report at 3. [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. *See* Tr. Vol. II at 256-257 (Testimony of Robert W. Steele). [↑](#footnote-ref-9)
9. *Id*. at 257. [↑](#footnote-ref-10)
10. *Id*. [↑](#footnote-ref-11)
11. *See* Tr. Vol. I at 11, 16 (Testimony of Miranda Warner). [↑](#footnote-ref-12)
12. *Id*. at 11. [↑](#footnote-ref-13)
13. *Id*. at 15. [↑](#footnote-ref-14)
14. R.C. 4928.10. *See also* Ohio Adm. Code 4901:1-21-02(A)(2)(c); Ohio Adm. Code 4901:1-21-03(A); Ohio Adm. Code 4901:1-21-05(C); Ohio Adm. Code 4901:1-29-11(A). [↑](#footnote-ref-15)
15. Ohio Adm. Code 4901:1-29-02(A)(3)(c); Ohio Adm. Code 4901:1-29-03(A); Ohio Adm. Code 4901:1-29-05(D); Ohio Adm. Code 4901:1-29-10(A). [↑](#footnote-ref-16)
16. OCC Ex. 5 (Staff Letter (April 16, 2019)) (“Staff Letter”). [↑](#footnote-ref-17)
17. *See* Staff Report at 17-20. [↑](#footnote-ref-18)
18. *See* id. at 17. [↑](#footnote-ref-19)
19. *See* id. at 18. [↑](#footnote-ref-20)
20. Jt. Ex. 1 (Stipulation and Recommendation (July 31, 2019)) (“Settlement”). [↑](#footnote-ref-21)
21. PALMco still has about 11,000 customers in Ohio. *See* Deposition Transcript of Robert Palmese (October 10, 2019) (“Palmese Deposition Transcript”) at 43, lines 11-13. [↑](#footnote-ref-22)
22. Settlement at 7. [↑](#footnote-ref-23)
23. *Id.* at 5-6. [↑](#footnote-ref-24)
24. *Id.* at 6. [↑](#footnote-ref-25)
25. *Id.* [↑](#footnote-ref-26)
26. The PUCO takes into account the “diversity of interests” as part of the first part of the stipulation assessment. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer, Case No. 10-388-EL-SSO*, Opinion and Order at 48 (August 25, 2010). [↑](#footnote-ref-27)
27. *Consumers’ Counsel v. Pub. Util. Comm’n*. (1992), 64 Ohio St.3d 123, 126. [↑](#footnote-ref-28)
28. Staff Report at 3; *see also* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-29)
29. *Id.* [↑](#footnote-ref-30)
30. Staff Report at 3. [↑](#footnote-ref-31)
31. *See* Staff Letter at 1. *See also* Palmese Deposition Transcript at 51, line 22 through 52, line 20. [↑](#footnote-ref-32)
32. In fact, PALMco’s president and chief executive officer stated that PALMco’s objective is to get the best possible rate for PALMco, not consumers. *See* Palmese Deposition Transcript at 51, lines 6-21. [↑](#footnote-ref-33)
33. Staff Report at 9. [↑](#footnote-ref-34)
34. Staff Report at 17. [↑](#footnote-ref-35)
35. *Id*. at 18-20. [↑](#footnote-ref-36)
36. Stipulation at 1-2. [↑](#footnote-ref-37)
37. *Id.* at 4. [↑](#footnote-ref-38)
38. *Id.* [↑](#footnote-ref-39)
39. *Id.* at 5. [↑](#footnote-ref-40)
40. *Id.* at 6. [↑](#footnote-ref-41)
41. *Id.* [↑](#footnote-ref-42)
42. *Id.* [↑](#footnote-ref-43)
43. *Id.* at 4. (It is important to note that PALMco’s natural gas marketer certificate expires on February 20, 2020 and its electric marketer certificate expires on March 8, 2020). [↑](#footnote-ref-44)
44. *Id.* [↑](#footnote-ref-45)
45. *Id.* at 7. [↑](#footnote-ref-46)
46. *Id.* [↑](#footnote-ref-47)
47. *Id*. at 5. [↑](#footnote-ref-48)
48. Staff Report at 3; *see also* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-49)
49. *Id.* [↑](#footnote-ref-50)
50. *See* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-51)
51. Staff Report at 3. [↑](#footnote-ref-52)
52. *See* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-53)
53. Staff Reportat 3. [↑](#footnote-ref-54)
54. *Id*. at 6-8. [↑](#footnote-ref-55)
55. *See* Staff Letter at 1. *See also* Palmese Deposition Transcript at 51, line 22 through 52, line 20. [↑](#footnote-ref-56)
56. In fact, PALMco’s president and chief executive officer stated that PALMco’s objective is to get the best possible rate for PALMco, not consumers. *See* Palmese Deposition Transcript at 51, lines 6-21. [↑](#footnote-ref-57)
57. Staff Report at 9. [↑](#footnote-ref-58)
58. *Id.*  [↑](#footnote-ref-59)
59. *See* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-60)
60. Staff Report at 9*.*  [↑](#footnote-ref-61)
61. *Id.* at 12. [↑](#footnote-ref-62)
62. *See* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-63)
63. Staff Report at 12. [↑](#footnote-ref-64)
64. *Id.* at 13-14. [↑](#footnote-ref-65)
65. *Id.* at 14. [↑](#footnote-ref-66)
66. *See* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-67)
67. Staff Report at 15, 19-20. [↑](#footnote-ref-68)
68. *Id.* at 15-17. [↑](#footnote-ref-69)
69. *Id*. at 15-16. [↑](#footnote-ref-70)
70. *Id.* at 16. [↑](#footnote-ref-71)
71. *Id.* at 17. [↑](#footnote-ref-72)
72. *Id.* at 19. [↑](#footnote-ref-73)
73. *Id.* at 20. [↑](#footnote-ref-74)
74. Settlement at 2 (emphasis added). [↑](#footnote-ref-75)
75. *See* Tr. Vol. II at 348 (Testimony of OCC witness Adkins). [↑](#footnote-ref-76)
76. *Id.* [↑](#footnote-ref-77)
77. *See* Tr. Vol. II at 322 (Testimony of OCC witness Adkins). [↑](#footnote-ref-78)
78. *Id.* [↑](#footnote-ref-79)
79. *Id*. at 351-52. [↑](#footnote-ref-80)
80. *Id*. at 356-57 (objections and rulings omitted). [↑](#footnote-ref-81)
81. Settlement at 4-5. [↑](#footnote-ref-82)
82. *Id.* at 2. [↑](#footnote-ref-83)
83. *Id.* at 4-5. [↑](#footnote-ref-84)
84. *See* Tr. Vol. II at 256-257 (Testimony of Robert W. Steele). [↑](#footnote-ref-85)
85. *Id*. at 257. [↑](#footnote-ref-86)
86. *Id*. [↑](#footnote-ref-87)
87. *See* Tr. Vol. I at 11, 16 (Testimony of Miranda Warner). [↑](#footnote-ref-88)
88. *Id*. at 11. [↑](#footnote-ref-89)
89. *Id*. at 15. [↑](#footnote-ref-90)
90. *See* OCC Ex. 7 (Customer Contacts regarding PALMco). [↑](#footnote-ref-91)
91. *See* Staff Report. [↑](#footnote-ref-92)
92. *See* Staff Report at 17-20. [↑](#footnote-ref-93)
93. *See* id. at 17. [↑](#footnote-ref-94)
94. *See* id. at 18. [↑](#footnote-ref-95)
95. Jt. Ex. 1 (Stipulation and Recommendation (July 31, 2019)) (“Settlement”). [↑](#footnote-ref-96)
96. PALMco still has about 11,000 customers in Ohio. *See* Deposition Transcript of Robert Palmese (October 10, 2019) (“Palmese Deposition Transcript”) at 43, lines 11-13. [↑](#footnote-ref-97)
97. Settlement at 7. [↑](#footnote-ref-98)
98. *Id.* at 5-6. [↑](#footnote-ref-99)
99. *Id.* at 6. [↑](#footnote-ref-100)
100. *Id.* [↑](#footnote-ref-101)
101. Staff Report at 19. [↑](#footnote-ref-102)
102. R.C. 4928.16(B)(1) and R.C. 492.24(B)(1). [↑](#footnote-ref-103)
103. Settlement at 2. [↑](#footnote-ref-104)
104. Adkins Testimony at 13-17. [↑](#footnote-ref-105)
105. *Id.* at 14-15. [↑](#footnote-ref-106)
106. Palmese Deposition Transcript at 36, line 9. [↑](#footnote-ref-107)
107. Adkins Testimony at 14. [↑](#footnote-ref-108)
108. *Id.* at 15. [↑](#footnote-ref-109)
109. *Id.* [↑](#footnote-ref-110)
110. *Id.* at 18. [↑](#footnote-ref-111)
111. *Id.* at 17. [↑](#footnote-ref-112)
112. *Id*. [↑](#footnote-ref-113)
113. *See* *id.* at 15. [↑](#footnote-ref-114)
114. *Id.* at 17. [↑](#footnote-ref-115)
115. *Id.* at 18. [↑](#footnote-ref-116)
116. *Id.* [↑](#footnote-ref-117)
117. Settlement at 2. [↑](#footnote-ref-118)
118. *Id.* at 6 (¶III.8). [↑](#footnote-ref-119)
119. R.C. 4928.16 (electric) and R.C. 4929.24 (natural gas). [↑](#footnote-ref-120)
120. Adkins Testimony at 21. [↑](#footnote-ref-121)
121. *Id.* *See also* Palmese Deposition Transcript at 36, line 9. [↑](#footnote-ref-122)
122. Alexander Testimony at 2. [↑](#footnote-ref-123)
123. *Id.* [↑](#footnote-ref-124)
124. *Id.* at 2-3. [↑](#footnote-ref-125)
125. *Id.* at 3-9. [↑](#footnote-ref-126)
126. *See* Palmese Deposition Transcript at 53, line 15 through 55, line 12. [↑](#footnote-ref-127)
127. Adkins Testimony at 24. [↑](#footnote-ref-128)
128. *Id.* at 24-25. *See also* Palmese Deposition Transcript at 43, lines 7-10. [↑](#footnote-ref-129)
129. Palmese Deposition Transcript at 45, lines 5-8. [↑](#footnote-ref-130)
130. *Id.* at 25. [↑](#footnote-ref-131)
131. Ohio Adm. Code 4901-1-25(C). [↑](#footnote-ref-132)
132. Motion for Subpoena Duces Tecum by the Office of the Ohio Consumers’ Counsel (September 13, 2019). [↑](#footnote-ref-133)
133. Tr. Vol. I at 99-101. [↑](#footnote-ref-134)
134. *Id.* at 99. [↑](#footnote-ref-135)
135. *Id.* at 100. [↑](#footnote-ref-136)
136. *Id.* 99-100. [↑](#footnote-ref-137)
137. *See* Tr. Vol. II at 286-287. [↑](#footnote-ref-138)
138. Ohio Adm. Code 4901-1-01(N) (emphasis added). [↑](#footnote-ref-139)
139. Ohio Adm. Code 4901-1-25(A) (emphasis added). [↑](#footnote-ref-140)
140. *See also Hoerig v. Tiffin Scenic Studios, Inc.*, 2011-Ohio-6103 (Ohio Ct. App. 2011), ¶¶ 21-22 (“Courts have long considered a corporation a person for the purposes of the law,” including the Ohio Civil Rules regarding subpoenas); *McGirr v. Rehme*, 2018 U.S. Dist. LEXIS 130673, at \*22-23 (Aug. 3, 2018) (under Federal Rule of Civil Procedure 45, which allows subpoenas for purposes of trials, when a corporation is subpoenaed, the corporation must identify the relevant person within its organization to respond to the subpoena); *A.O. Smith Corp. v. Perfection Corp.*, 2004-Ohio-4041 (Ohio Ct. App. 2004), ¶¶ 22-24 (service of a subpoena under Ohio Rule of Civil Procedure 45 on a corporation is valid). [↑](#footnote-ref-141)
141. R.C. 4928.09(a)(1)(a) (emphasis added); R.C. 4929.21(A)(1)(a) (emphasis added). [↑](#footnote-ref-142)
142. *Prouse, Dash & Crouch L.L.P. v. Dimarco*, 116 Ohio St.3d 167, 168 (2007) (“It is axiomatic that Ohio courts can exercise jurisdiction over a person who is a resident of Ohio.”). [↑](#footnote-ref-143)
143. *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 309 (2011) (“We must give effect to every term in a statute and avoid a construction that would render any provision meaningless, inoperative, or superfluous.”). [↑](#footnote-ref-144)
144. 1988 Ohio App. LEXIS 2867 (June 29, 1988). [↑](#footnote-ref-145)
145. R.C. 3909.05(A). [↑](#footnote-ref-146)
146. *Burgess*, 1988 Ohio App. LEXIS 2867 at \*14 (emphasis added). [↑](#footnote-ref-147)
147. R.C. 4928.09(A)(1)(b); R.C. 4929.21(A)(1)(b). [↑](#footnote-ref-148)