**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 and PALMco Energy OH, LLC d/b/a Indra Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Action. | )  )  )  )  )  )  ) | Case No. 19-2153-GE-COI |

**MEMORANDUM CONTRA TO PALMCO’S MOTION TO STAY**

**BY**

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# INTRODUCTION

PALMco’s request to delay this proceeding is a tactic that works against consumers in this case and should not be enabled by the PUCO. PALMco is a marketer that is being investigated a second time for allegedly misleading customers and charging unconscionable rates in violation of the PUCO’s rules, Ohio law, and PUCO precedent. PALMco is now attempting to dodge the PUCO’s *second* investigation.To that end, PALMco has filed a Complaint in Prohibition with the Supreme Court of Ohio (“Court”) challenging the PUCO’s jurisdiction to investigate it.[[1]](#footnote-2) While awaiting a Supreme Court ruling, PALMco seeks to stay the PUCO’s investigation (for an unknown period of time) until the Court rules on the Complaint (which could be many months). The PUCO should deny PALMco’s motion for stay and instead establish a procedural schedule that provides ample opportunity to develop the record for consumer protection.

The public interest weighs heavily in favor of moving forward with this case to bring some remedy to those customers who may have been injured by PALMco between August 1, 2019 and December 10, 2019. Denying PALMco’s motion and moving forward with this proceeding could benefit customers by expediting potential refunds to PALMco’s former customers who are particularly vulnerable in these difficult times caused by the coronavirus pandemic. In addition, moving forward will send a clear message to other suppliers in Ohio that the PUCO will not tolerate misleading or deceptive business conduct and unconscionable acts. Proceeding with this case is also necessary to preserve evidence that may go stale or be destroyed when it is no longer protected by the PUCO’s record retention rules.

# ARGUMENT

PALMco acknowledges in its motion that the PUCO generally favors a four-factor test in determining whether it will grant a motion to stay a proceeding.[[2]](#footnote-3) These factors include:

whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits; whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; whether the stay would cause substantial harm to other parties; and where lies the public interest.[[3]](#footnote-4)

PALMco fails to establish that a stay of the proceedings is warranted under these factors. PALMco’s motion should be denied.

## The PUCO has jurisdiction to investigate PALMco’s business practices that resulted in unconscionable rates charged to customers while it operated as a competitive electric and natural gas supplier in Ohio. Thus, PALMco’s claim that the PUCO has no jurisdiction is unlikely to succeed on the merits and the PUCO should not stay the proceeding.

PALMco claims that a stay of the investigation is appropriate because it is likely to succeed on the merits of this case. PALMco claims that the PUCO has no jurisdiction

to investigate the rates PALMco charged customers while it operated in Ohio.[[4]](#footnote-5) PALMco is wrong. The PUCO should deny PALMco’s motion.

PALMco argues that competitive electric and natural gas rates should be regulated by the market, not the PUCO. According to PALMco, a competitive supplier should be able to charge customers whatever it wants, even if the rates are several times higher than the utilities’ standard service offer rates.

But even assuming *arguendo* that PALMco is correct that a competitive supplier can charge exorbitant rates (it cannot), the PUCO still has the unequivocal authority to regulate and investigate a competitive supplier’s business *conduct* to determine if it is unfair, misleading, deceptive, and unconscionable. Misleading and deceiving customers and not providing them with sufficient information to make an informed decision that results in customers taking service from PALMco at unfair, excessive, and unconscionably high rates constitutes an unfair, misleading, deceptive, and unconscionable act and practice prohibited by Ohio law. For example, if PALMco did not provide customers with information to make informed choices or to understand that their monthly variable rates could be several times higher than the utility’s standard service offer, or if PALMco provided inaccurate market information, it would be a violation of the PUCO’s rules.[[5]](#footnote-6) If PALMco failed to provide customers with proper notifications that their fixed-rate contracts would automatically renew to unconscionably high monthly variable rate contracts, it would be a violation of the PUCO’s rules.[[6]](#footnote-7) There is no question that the PUCO has the authority under Ohio law[[7]](#footnote-8) to investigate PALMco’s conduct in this respect, and PALMco does not argue otherwise.

PALMco claims that it did not engage in any marketing or solicitation practices during the relevant timeframe (August 1, 2019 to December 10, 2019).[[8]](#footnote-9) However, even if PALMco was not actively soliciting new customers during that timeframe, PALMco likely engaged in other conduct (*e.g.*,not properly providing customers with information regarding monthly variable rates or contract renewals) in violation of the PUCO’s rules that resulted in customers paying the unconscionable rates at issue in this case. That is what this case is about. Accordingly, PALMco’s claim that the PUCO’s investigation is an unlawful attempt to regulate competitive *rates* has little merit. PALMco’s motion should be denied.

Further, even if the PUCO’s investigation was based solely on evidence of PALMco’s exorbitant rates charged to consumers, the PUCO would still have jurisdiction. Under R.C. 4928.10, the PUCO is required to adopt rules for electric marketers that “include a prohibition against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of ... a competitive retail electric service and in the administration of any contract for service....” Applying this law, the PUCO could review the rates that a marketer charges and conclude that those rates are so high that to charge a customer such a rate would be an “unfair” and “unconscionable act” in the “sale of ... a competitive retail electric service.” For this independent reason, PALMco is unlikely to succeed on the merits of its claim that the PUCO lacks jurisdiction to perform this investigation.

PALMco also argues that a stay of the investigation is warranted because the

PUCO’s investigation in this case is barred by *res judicata*.[[9]](#footnote-10) PALMco asserts that its settlement with the PUCO Staff resolving claims raised in Case No. 19-957-GE-COI for a different time period (the first investigation into PALMco’s deceptive business practices (“PALMco I”)) bars the PUCO’s investigation in this case. That argument fails too. PALMco I concerned customer complaints regarding PALMco’s egregious conduct occurring between December 1, 2018 through April 15, 2019.[[10]](#footnote-11)

This *second* investigation (“PALMco 2”) concerns separate customer complaints regarding PALMco’s *additional* egregious conduct occurring between August 1, 2019 through December 10, 2019. There are separate claims, separate issues of fact, and separate issues of law. Thus, *res judicata* does not bar the PUCO’s investigation of the customer complaints in PALMco 2. Indeed, nothing in PALMco’s settlement with the PUCO Staff in PALMco I authorized PALMco to continue to engage in deceptive, misleading, and unconscionable acts and practices or to violate the law and PUCO rules additional times in different ways. PALMco’s suggestion that once a regulated entity settles a case about certain rule violations, it could never be accused of additional rule violations at a later time concerning different customers is absurd. More fundamentally, even where *res judicata* applies, it is an affirmative defense and does not divest the PUCO of jurisdiction.[[11]](#footnote-12) Accordingly, PALMco’s motion to stay the proceeding should be denied.

## **Proceeding with the second investigation of PALMco is in the public** **interest, whereas staying the proceeding would unfairly reward PALMco for its gamesmanship in this case.**

PALMco claims that no one would be harmed by staying the proceeding because it no longer does business in Ohio.[[12]](#footnote-13) That argument should be rejected. The public interest weighs heavily in favor of moving forward with this case so that any consumers harmed within the relevant timeframe can receive an appropriate refund as the PUCO Staff recommended in its Notice of Probable Non-Compliance. Moving forward with this proceeding is also necessary to send a message to other bad actor suppliers that the PUCO will not tolerate unconscionable, deceptive, and misleading tactics to enroll and serve customers.

Further, it is unclear when the Court will rule on PALMco’s Complaint. It could be months before the Court renders its decision. And in the meantime, evidence relevant to the issues in this investigation could be destroyed or lost, impeding OCC’s ability to present its case for consumer protection. While the PUCO’s rules generally require competitive suppliers to retain records for no less than two years,[[13]](#footnote-14) some records,

including enrollment/third party verification audio recordings and customer complaint records, may be disposed of after only one year.[[14]](#footnote-15)

This investigation concerns customer complaints between August 1, 2019 through December 10, 2019, so as it stands PALMco may have already disposed of relevant information related to this investigation. The PUCO has jurisdiction to investigate PALMco in this case. Staying this proceeding for an unknown period of time pending the Court’s decision on PALMco’s Complaint could do great harm to OCC’s ability to gather evidence to present its case for consumers, especially given PALMco’s delay tactics and outright refusal to provide discovery to OCC to date.

PALMco also claims that a stay is proper because it has addressed all outstanding discovery requests.[[15]](#footnote-16) That claim is also false. Asserting its lawful right to discovery under Ohio Adm. Code 4901-1-16(H), OCC served discovery requests on PALMco early in this case on January 14, 2020 and February 14, 2020. But in defiance of the PUCO’s rules, PALMco flatly refused to respond to *any* of OCC’s discovery, prompting OCC to file two separate Motions to Compel.[[16]](#footnote-17) And when the PUCO granted OCC’s Motions to Compel and ordered PALMco to respond to OCC’s discovery,[[17]](#footnote-18) PALMco defied the PUCO’s order too, prompting OCC to file a Motion for Sanctions and Forfeitures[[18]](#footnote-19) (which is still under consideration by the PUCO).

Following a status conference with the Attorney Examiners in this case on July 23, 2020, PALMco finally produced some (but not all) discovery responsive to OCC’s January and February discovery requests on July 31, 2020. Not surprisingly, the production that PALMco did make was deficient. Among other baseless objections, PALMco claims that it cannot provide responses to many of OCC’s requests (which were served in January and February) because it is not willing to return to its offices in

Brooklyn, New York for fear of the coronavirus. PALMco also cites the coronavirus pandemic as a reason to stay this proceeding.[[19]](#footnote-20)

The coronavirus pandemic does not prevent PALMco from participating in this proceeding or answering OCC’s discovery. To restate the obvious, OCC served its discovery on PALMco in January and February, *over a month before* states began issuing stay-at-home orders related to the pandemic. PALMco also cites no state or local executive orders or restrictions that currently preclude it from returning to its offices in Brooklyn. To the contrary, New York Governor Andrew Cuomo recently announced that due to the decline in coronavirus cases in New York, schoolchildren throughout the state (which includes Brooklyn) may return to in-person classes.[[20]](#footnote-21) If children can attend school in-person in Brooklyn, PALMco’s employees can return to work. At a minimum, PALMco could send a limited number of individuals to its offices in Brooklyn for a brief period, while maintaining best practices for social distancing and safety, to access information to respond to discovery requests. The PUCO should not reward PALMco for

its abject gamesmanship (which began long before the coronavirus pandemic) by granting its request to stay the procedural schedule.

## **Any harm that PALMco suffers as a result of the PUCO’s** **investigation is of its own making because it engaged in the unlawful conduct while already under investigation by the PUCO. By contrast, innocent Ohio consumers will be harmed if the PUCO does not move forward with this case.**

PALMco complains in its motion that it suffers harm every time it has to expend its resources on litigation in this proceeding.[[21]](#footnote-22) But that is no reason for the PUCO to stay the proceedings in this case. The PUCO should instead consider the interests of the consumers that PALMco misled and deceived, while it was already being investigated by the PUCO for unlawful business conduct. The consumers PALMco misled and deceived will be best served by moving this case forward.

PALMco states that it “has upheld its end the bargain” regarding its settlement with the PUCO Staff in the PALMco I investigation. But the “bargain” PALMco struck with the PUCO Staff did *not* include a license to continue violating the PUCO’s rules, PUCO precedent, and Ohio law and abusing Ohio consumers. Nothing in the settlement authorized PALMco to continue to mislead and deceive its customers and engage in unfair and unconscionable acts, including charging unfair and unconscionable rates to customers. That is why the PUCO Staff issued its Notice of Probable Non-Compliance and requested a second investigation. And the PUCO Staff should be commended for doing so. Customer complaints regarding *PALMco’s* unconscionable conduct – not the PUCO Staff’s and not OCC’s – precipitated this investigation. PALMco cannot now cry foul because it is being required to account for its bad behavior.

PALMco’s former customers, Ohio consumers, and Ohio’s competitive market in general will be harmed if the PUCO grants PALMco’s motion and stays this investigation. PALMco should be required to answer for its violations of the PUCO’s rules, PUCO precedent, and Ohio law, as well as its mistreatment of Ohio consumers, without undue delay. The PUCO should deny PALMco’s motion to stay the proceeding.

# III. CONCLUSION

PALMco’s motion to stay the proceeding should be denied. The PUCO has jurisdiction to investigate PALMco’s business practices that resulted in Ohio consumers paying unfair and unconscionable rates for competitive natural gas and electric services to make certain that PALMco complied with PUCO rules and Ohio law and did not mislead or deceive customers. Therefore, the PUCO should deny PALMco’s motion for stay, move forward with this proceeding, and establish a new procedural schedule that allows ample discovery and a full development of the record for consumer protection.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra PALMco’s Motion to Stay was served on the persons stated below via electronic transmission, this 18th day of August 2020.

*/s/* *Angela D. O’Brien*

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

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1. *See* *State Ex Rel. PALMco Energy OH, LLC and PALMco Power OH, LLC v. PUCO*, Case No. 20-0564, Complaint for Writ of Prohibition (April 28, 2020) (“Complaint”). [↑](#footnote-ref-2)
2. Motion Memo in Support, at 5. [↑](#footnote-ref-3)
3. *In the Matter of the Complaint of the Northeast Ohio Public Energy Council v. The Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS (July 8, 2009), at ¶6. [↑](#footnote-ref-4)
4. Motion Memo in Support at 7-8. [↑](#footnote-ref-5)
5. PUCO Staff Letter and Notice of Probable Non-Compliance, (Dec. 16, 2019). [↑](#footnote-ref-6)
6. *See e.g.* Ohio Adm. Code 4901:1-21-11(G); Ohio Adm. Code 4901:1-29-10(G). [↑](#footnote-ref-7)
7. *See e.g.* R.C. 4928.10; Ohio Adm. Code 4901:1-21-03(A); 4901:1-21-11(A); 4901:1-29-03(A); and 4901:1-29-10(A). [↑](#footnote-ref-8)
8. Motion Memo in Support, at 8. [↑](#footnote-ref-9)
9. Motion Memo in Support, at 8. [↑](#footnote-ref-10)
10. Case No. 19-957-GE-COI, Entry (April 17, 2019), at ¶8. [↑](#footnote-ref-11)
11. *See In re Ohio Power Co.*, 144 Ohio St.3d 1, 6 (2015). [↑](#footnote-ref-12)
12. Motion Memo in Support, at 9-10. [↑](#footnote-ref-13)
13. *See e.g.* Ohio Adm. Code 4901:1-21-04(B); Ohio Adm. Code 4901:1-29-04(B). [↑](#footnote-ref-14)
14. *See e.g.* Ohio Adm. Code 4901:1-21-06(D)(1)(h)(iv), 4901:1-21-06(D)(2)(b)(ii), 4901:1-21-06(D)(3)(f), 4901:1-21-08(B)(5); 4901:1-29-06(D)(6)(b)(iv); and 4901:1-29-06(E)(2)(b). [↑](#footnote-ref-15)
15. Motion, at 1-2; Motion Memo in Support, at 1. [↑](#footnote-ref-16)
16. *See* OCC Motion to Compel Discovery (February 14, 2020) and OCC Motion to Compel Discovery (March 17, 2020). [↑](#footnote-ref-17)
17. Entry (April 6, 2020). [↑](#footnote-ref-18)
18. OCC Motion for Sanctions and Forfeitures (May 7, 2020). [↑](#footnote-ref-19)
19. Motion Memo in Support, at 10. [↑](#footnote-ref-20)
20. <https://www.cnn.com/2020/08/07/us/new-york-schools-reopen-cuomo/index.html>. [↑](#footnote-ref-21)
21. Motion Memo in Support, at 9. [↑](#footnote-ref-22)