

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION TO TAKE ADMINISTRATIVE NOTICE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

This case involves a settlement that affects Ohioans who were harmed by the marketing and business practices of PALMco.¹ In April 2019, the Public Utilities Commission of Ohio ("PUCO") began an investigation of PALMco's marketing and business practices. As a result of that investigation, PALMco and the PUCO Staff filed a settlement in this case on July 31, 2019. But yesterday, the PUCO launched a second investigation of PALMco's marketing and business practices covering the first four months after the settlement was filed.² The PUCO is to be commended for opening a second investigation to protect Ohioans from rip-off artists like PALMco Energy. However, it does not surprise us that a bad actor like PALMco would continue to abuse consumers after the first investigation.

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential customers, asks the PUCO to take administrative notice of its new investigation of PALMco. There is good cause to grant this Motion because the PUCO did not initiate

¹ "PALMco" refers to PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy.

² See PUCO Press Release, "PUCO initiates second investigation into PALMco," December 16, 2019. The investigation has been initiated in Case No. 19-2153-GE-COI.

the second investigation of PALMco until after the hearing was held and initial briefs were filed in this case. Ohio Adm. Code 4901-1-12 allows for Motions and 4901-1-14 allows for rulings on procedural matters. Accordingly, this Motion should be granted for reasons more fully explained in the attached Memorandum in Support.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ Terry L. Etter
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MEMORANDUM IN SUPPORT

The PUCO has broad discretion to conduct its own hearings.³ The PUCO is not stringently confined to the rules of evidence,⁴ but is directed by statute to observe the practice and rules of evidence in civil proceedings.⁵

Under Rule 201 of the Ohio Rules of Evidence, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. This rule permits courts to fill gaps in the record. Accordingly, courts have judicially noted documents filed, testimony given, and orders or findings. Under subsection (F) of Rule 201, "Judicial notice may be taken at any stage of the proceeding."

The Supreme Court of Ohio has held that while there is no absolute right for the taking of administrative notice, there is no prohibition against the PUCO taking administrative notice of facts outside the record in a case.⁶ The important factors for applying administrative notice, according to the Court, are that the complaining party has

³ See, e.g., R.C. 4903.02, 4903.03, 4903.04; Ohio Adm. Code 4901-1-27.

⁴ See *Greater Cleveland Welfare Rights v. Pub. Util. Comm.* (1982), 2 Ohio St.3d 62.

⁵ R.C. 4903.22.

⁶ See *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 17-18 (citing to *Allen, D.B.A. J & M Trucking, et al., v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185.

prior knowledge of and an opportunity to rebut the materials judicially noticed.⁷ The appropriate scope of notice is broader in administrative proceedings than in trials.⁸

The PUCO itself has recognized that it may take administrative notice of adjudicative facts,⁹ cases,¹⁰ entries,¹¹ expert opinion testimony, and briefs and other pleadings filed in separate proceedings.¹² The PUCO has also taken administrative notice of the entire record¹³ and evidence presented in separate cases.¹⁴

In this case, OCC is asking the PUCO to take administrative notice of its second investigation of PALMco. The investigation involves complaints similar to those that

⁷ See, e.g., *Allen*, 40 Ohio St.3d at 186.

⁸ See *Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981).

⁹ *In the Matter of the Review of the Interim Emergency and Temporary PIP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies*, Case No. 83-303-GE-COI, Entry (February 22, 1989) at ¶6 (administrative notice taken of facts adduced at hearing in another investigation, information compiled by Staff from the 1980 Census Report, and customer information reported pursuant to the Ohio Administrative Code).

¹⁰ *In the Matter of the Amendment of Chapter 4901:1-13, Ohio Administrative Code, to Establish Minimum Gas Service Standards*, Case No. 05-602-GA-ORD, Entry on Rehearing (May 16, 2006) at 33 (administrative notice taken of case filed where utility presented problems with remote technology, and sought to discontinue new installation of remote meters).

¹¹ *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 89-1001-EL-AIR, Opinion and Order (August 19, 1990) at 110 (administrative notice taken by the Attorney Examiner of entries and orders issued in an audit proceeding and an agreement filed in the audit docket).

¹² See *In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) at 18-21 (finding that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and that it declined to impose such restrictions); *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 Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, *aff'd* by Entry on Rehearing (May 13, 2010) at ¶14 (both Entries allowing the entire record of a prior proceeding to be administratively noticed in the ESP proceeding and ruling that all briefs and pleadings “may be used for any appropriate purposes”).

¹³ Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, *aff'd* by Entry on Rehearing (May 13, 2010) at ¶14.

¹⁴ *Id.*; *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in its Service Area*, Case No. 91-410-EL-AIR, Opinion and Order (May 12, 1992) at 19 (administrative notice taken of the record in the Zimmer restatement case and evidence presented in the case).

prompted the investigation in this case. The PUCO received the new complaints after the settlement was filed in this case. OCC is asking only that the PUCO take administrative notice that the second investigation has been initiated.

The PUCO taking administrative notice of its second investigation of PALMco would not prejudice PALMco or the PUCO Staff. Both parties have been aware of the complaints that are the subject of the second investigation.¹⁵ PALMco will have an opportunity to respond to the investigation in that docket and will be able to state its case regarding administrative notice in this case.

Good cause exists for granting OCC's Motion because the PUCO initiated the second investigation after the hearing and the filing of initial briefs in this case. Taking administrative notice will provide the PUCO with additional insight as to whether the settlement in this case benefits consumers and the public interest. The PUCO should grant OCC's Motion.

Respectfully submitted,

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¹⁵ See Case No. 19-2193-GE-COI, Letter of Robert Fadley (December 16, 2019), Attachment.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Take Administrative Notice has been served electronically upon those persons listed below this 17th day of December 2019.

/s/ Terry Etter
Terry Etter
Assistant Consumers' Counsel

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

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Summary: Motion Motion to Take Administrative Notice by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.