

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (0016973)
Consumers' Counsel
Amy Botschner O'Brien (0074423)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-3485
Telephone: (614) 466-9575
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Counsel of Record
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, Ohio 43215
Telephone: (614) 365-4124
bojko@carpenterlipps.com
(willing to accept service by e-mail)

February 28, 2020

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

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	5
II. ASSIGNMENTS OF ERROR	7
ASSIGNMENT OF ERROR NO. 1: The PUCO Erred by Unlawfully, Unreasonably, and Unfairly Shifting the Burden of Proof in this Proceeding to OCC while Simultaneously Restricting and Limiting OCC's Ability to Prove the Violations Set Forth in the 373 Customer Contacts and Complaints and in the Staff Report.....	
	7
A. OCC Did Not Bear the Burden of Proof in this Commission-Ordered Investigation Proceeding Requested by Staff and Instituted by the PUCO Requiring PALMco to Respond and Show Cause Why its Certifications Should Not be Suspended or Rescinded.....	
	7
B. Assuming, <i>Arguendo</i> , that OCC Had the Burden of Proof in this Proceeding, the PUCO Improperly, Unfairly and Unlawfully Restricted OCC's Rights to Prove the Violations Set Forth in the Complaints and Staff Report.....	
	10
C. The PUCO Erred by Blaming OCC for the Lack of Evidence About PALMco's Bad Acts When the PUCO Should Use its Considerable Resources, Including the Call Center Which it Has and Which OCC is Prohibited by Law from Having, to Obtain and Use Evidence from Consumers throughout Ohio Who Otherwise Lack the Resources and Experience to Participate in a PUCO Legal Proceeding in Columbus (Like PALMco Can, in a Case that is About the Abusive Practices of PALMco).	
	14
ASSIGNMENT OF ERROR NO. 2: The PUCO erred in Finding that the Settlement was in the Public Interest and Benefits Consumers.....	
	17
A. 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.....	
	18
B. The Settlement is Not in the Public Interest and Does Not Benefit Consumers because PALMco might Avoid Paying a Forfeiture for its Unlawful Actions.....	
	20

	ASSIGNMENT OF ERROR NO. 3: The PUCO Erred in Approving the Settlement Without any Modifications that Would Protect Consumers and Further the Public Interest.....	24
IV.	CONCLUSION.....	27

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

Under Section 4903.10, Revised Code (R.C.), and Rule 4901-1-35, Ohio Administrative Code (O.A.C), the Office of the Ohio Consumers' Counsel (OCC) files this application for rehearing of the Public Utilities Commission of Ohio's (PUCO) January 29, 2020 Opinion and Order (Order) to give residential consumers adequate consumer protections from the unfair, misleading, deceptive, and unconscionable marketing practices of PALMco.¹

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

² OCC. Ex. 6 (PUCO Staff Report (May 10, 2019)) at 19 (“Staff Report”).

directed PALMco to respond to the findings in the Staff Report and show cause why its certificates to serve electricity and natural gas customers in Ohio should not be suspended, rescinded, or conditionally rescinded.³ Staff filed its Staff Report, recommending that the PUCO: (i) suspend or rescind PALMco's certificates to provide utility service to consumers;⁴ (ii) order PALMco to refund overcharges to consumers and pay a \$1.4 million forfeiture;⁵ and (iii) prohibit PALMco from transferring any customer contracts until all affected customers have been notified and recompensed for PALMco's unlawful actions.⁶

Notwithstanding those recommendations, on July 31, 2019, Staff entered into a Settlement with PALMco that fell woefully short of its recommended consumer protections.⁷ OCC opposed the Settlement, arguing that it failed to protect consumers, and did not guarantee refunds for all consumers who were harmed by PALMco's unfair, misleading, deceptive, and unconscionable marketing practices.⁸ Because of these inadequacies, the Settlement failed to satisfy the three-prong test for settlements under Ohio law.

³ See April 17, 2019 Entry at ¶¶ 9-10.

⁴ See Staff Report at 17-20.

⁵ See *id.* at 17.

⁶ See *id.* at 18.

⁷ Jt. Ex. 1 (Stipulation and Recommendation (July 31, 2019)) ("Settlement").

⁸ See Initial Brief for the Protection of Consumers from PALMco's False, Misleading, Deceptive, and Unconscionable Practices by OCC (December 2, 2019) ("OCC's Initial Brief"); Reply Brief for the Protection of Consumers from PALMco's False, Misleading, Deceptive, and Unconscionable Practices by OCC (December 17, 2019) ("OCC's Reply Brief").

Despite these failings, on January 29, 2020, the PUCO approved the Settlement.⁹

The Order approving the Settlement is unlawful and unreasonable in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO Erred by Unlawfully, Unreasonably, and Unfairly Shifting the Burden of Proof in this Proceeding to OCC while Simultaneously Restricting and Limiting OCC's Ability to Prove the Violations Set Forth in the 373 Customer Contacts and Complaints and in the Staff Report.

- D. OCC Did Not Bear the Burden of Proof in this Commission-Ordered Investigation Proceeding Requested by Staff and Instituted by the PUCO Requiring PALMco to Respond and Show Cause Why its Certifications Should Not be Suspended or Rescinded.
- E. Assuming, *Arguendo*, that OCC Had the Burden of Proof in this Proceeding, the PUCO Improperly, Unfairly and Unlawfully Restricted OCC's Rights to Prove the Violations Set Forth in the Complaints and Staff Report.
- F. The PUCO Erred by Blaming OCC for the Lack of Evidence About PALMco's Bad Acts When the PUCO Should Use its Considerable Resources, Including the Call Center Which it Has and Which OCC is Prohibited by Law from Having, to Obtain and Use Evidence from Consumers throughout Ohio Who Otherwise Lack the Resources and Experience to Participate in a PUCO Legal Proceeding in Columbus (Like PALMco Can, in a Case that is About the Abusive Practices of PALMco).

ASSIGNMENT OF ERROR NO. 2: The PUCO erred in Finding that the Settlement was in the Public Interest and Benefits Consumers.

- C. 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.
- D. The Settlement is Not in the Public Interest and Does Not Benefit Consumers because PALMco might Avoid Paying a Forfeiture for its Unlawful Actions.

⁹ See Order (Jan. 29, 2020).

ASSIGNMENT OF ERROR NO. 3: The PUCO Erred in Approving the Settlement Without any Modifications that Would Protect Consumers and Further the Public Interest.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its January 29, 2020 Opinion and Order as requested by OCC.

Respectfully submitted,

/s/ Kimberly W. Bojko

Bruce Weston (0016973)

Consumers' Counsel

Amy Botschner O'Brien (0074423)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215-3485

Telephone: (614) 466-9575

amy.botschner.obrien@occ.ohio.gov

(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)

Counsel of Record

Carpenter Lipps & Leland LLP

280 Plaza, Suite 1300

280 N. High Street

Columbus, Ohio 43215

Telephone: (614) 365-4124

bojko@carpenterlipps.com

(willing to accept service by e-mail)

Counsel for the

Office of the Ohio Consumers' Counsel

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

I. INTRODUCTION

5

that PALMco customers contacted the PUCO regarding billing inquiries, misleading and deceptive marketing practices, enrollment disputes, spoofing, and contract inquiries.¹⁴

Despite the plethora of evidence demonstrating that PALMco engaged in unfair, misleading, deceptive, and unconscionable marketing practices harming Ohio consumers, the PUCO adopted and approved the Settlement entered into between PALMco and Staff that falls woefully short of protecting consumers from PALMco's predatory marketing tactics.¹⁵ The Settlement fails to: (1) protect consumers from the marketer's predatory utility practices, (2) redress the approximate 373 unfair, misleading, deceptive, and unconscionable acts and practices of PALMco that customers complained of during late 2018 and early 2019, and (3) prevent the unconscionable acts and practices from reoccurring for the customers that PALMco continues to serve before its operation certificate expires in Ohio. And, the Settlement does not guarantee refunds for all consumers who were harmed by PALMco's deceptive marketing practices.

The PUCO's approval of the Settlement in this proceeding is unlawful and unreasonable because it fails to enforce and fulfill the consumer protections required by Ohio law and PUCO rules. 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 utility service,¹⁶ and the PUCO has rules that provide similar protections for natural gas service consumers.¹⁷

¹⁴ *Id.*

¹⁵ *See* Order.

¹⁶ 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).

¹⁷ 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).

Specifically, the PUCO erred by approving a Settlement that is unjust, unreasonable, inadequate, not in the public interest, and does not benefit consumers because all consumers harmed by PALMco will not receive the refunds that they deserve. In addition, the Settlement makes payment of any forfeiture contingent on the sale of PALMco's customer contracts leaving 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 fails to satisfy the PUCO's criteria for considering settlements. As such, the PUCO should have rejected or modified the Settlement as recommended by the OCC. To fail to do so is unlawful, unjust, and unreasonable, and constitutes reversible error.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO Erred by Unlawfully, Unreasonably, and Unfairly Shifting the Burden of Proof in this Proceeding to OCC while Simultaneously Restricting and Limiting OCC's Ability to Prove the Violations Set Forth in the 373 Customer Contacts and Complaints and in the Staff Report.

A. OCC Did Not Bear the Burden of Proof in this Commission-Ordered Investigation Proceeding Requested by Staff and Instituted by the PUCO Requiring PALMco to Respond and Show Cause Why its Certifications Should Not be Suspended or Rescinded.

This case was instituted as a "Commission Ordered Investigation" (COI) at the request of Staff and PALMco was directed to respond to the findings in the Staff Report and show cause why its CRES/CRNGS certifications should not be suspended, rescinded, or

conditionally rescinded.¹⁸ The PUCO initiated this case and directed PALMco to carry the burden of responding to the Staff Report. But, the PUCO's Order is silent upon the fact that this COI proceeding issued a "show cause" to PALMco, thereby placing the burden of proof upon PALMco:

The April 16, 2019 letter filed by Staff alleges a pattern of unfair, deceptive, or unconscionable acts or practices by PALMco. Therefore, the Commission finds that a hearing should be held at which PALMco shall, among other things, have the opportunity to respond to the findings contained in the Staff Report and *show cause* why its certification as a CRES provider and its certification as a CRNGS supplier should not be suspended, rescinded, or conditionally rescinded.¹⁹

Thus, PALMco should have the burden to come in and show why the allegations set forth by Staff and detailed in the Staff Report did not warrant suspension or rescission.

PALMco did not carry that burden.

Alternatively, as the PUCO noted in its Order, the alleged violations must be proven by the complainant in this proceeding, Staff, inasmuch as R.C. 4928.16 and 4929.24 authorize the PUCO to bring this action under R.C. 4905.26.²⁰ "It is well established that, in proceedings brought under R.C. 4905.26, the complaining party bears the burden of proof. *Grossman v. Pub. Util. Comm.*, 5 Ohio St. 2d 189, 214 N.E.2d 666 (1966)."²¹

¹⁸ See April 17, 2019 Entry at ¶¶ 9-10.

¹⁹ April 17, 2019 Entry at ¶ 10 (emphasis added).

²⁰ *Id.* at ¶ 43.

²¹ *Id.*

OCC did *not* institute this case.²² As such, by the very authority cited and relied upon by the PUCO in its Order, OCC did not, and cannot, bear the burden of proof in this proceeding. Notwithstanding the foregoing, the PUCO unilaterally and unlawfully shifted the burden of proof to OCC and concluded that OCC's failure to satisfy this burden of proof warranted the approval of the Settlement. Indeed, the PUCO concluded that OCC's testimony was not specific enough to identify which complaint files were reviewed, which customers were harmed, how the customers were harmed, and which rules were violated.²³ The Order stated that there was not sufficient evidence in the record to prove, by a preponderance of evidence, many of the violations raised by OCC because OCC failed to specifically identify each rule that was violated, how many times each rule was violated, and what evidence in the complaint files support each alleged violation, which precluded PALMco from the opportunity to respond to those allegations and due process.²⁴

However, these findings by the PUCO are irrelevant because they are premised upon an erroneous conclusion of law: that OCC bears the burden of proof in this case. It does not. And, thus, any such alleged proof failings could not be cited or relied upon by the PUCO as justification to approve the Settlement.²⁵ Yet, that is precisely what the PUCO did in its Order. On this basis alone, rehearing should be granted.

²² See OCC's Motion to Intervene (April 24, 2019).

²³ Order at ¶ 44.

²⁴ *Id.*

²⁵ For example, with respect to the \$1.4 million forfeiture that was recommended in the Staff Report and which OCC supported, the PUCO held that OCC failed to present any evidence supporting the requested forfeiture beyond the Staff Report. The PUCO went on to note that the Staff would have had to present a witness to support and establish the \$1.4 million amount but because Staff entered into the Settlement, it did not present such testimony. Order at ¶ 51. This is a failing of Staff, not OCC, and should not be cited as a basis to approve a Settlement that contains a mere conditional forfeiture well below the \$1.4 million amount. *Id.*

Finally, with respect to the Settlement, it is well-established that PALMco and the PUCO Staff, as signatories to the Settlement, carry the burden in this case of demonstrating that the Settlement was the result of serious bargaining, benefits customers and the public interest, and does not violate important regulatory principles.²⁶ OCC does not carry the burden of proof on these issues either as a matter of law.

In sum, OCC does not bear the burden of proof in this proceeding. Because the PUCO's approval of the Settlement was premised upon alleged proof failings by OCC, the PUCO should grant rehearing.

B. Assuming, *Arguendo*, that OCC Had the Burden of Proof in this Proceeding, the PUCO Improperly, Unfairly and Unlawfully Restricted OCC's Rights to Prove the Violations Set Forth in the Complaints and Staff Report.

Even if OCC does shoulder the burden of proof in this proceeding (which it does not), the PUCO erred in improperly, unfairly and unlawfully restricting OCC's rights to prove the violations set forth in the complaints and the Staff Report. The PUCO cannot on the one hand tie OCC's proverbial hands behind its back preventing it from fully exploring and developing the complaints and violations against PALMco by claiming this is a "Commission-ordered investigation as opposed to a rate or tariff proceeding initiated by a public utility,"²⁷ while then citing OCC's alleged proof failings as justification and reasons for approving the Settlement and rejecting OCC's arguments.

For example, on September 19, 2019, the Attorney Examiner granted PALMco's motion to quash OCC's subpoenas for certain PALMco officers and employees to appear

²⁶ See, e.g., *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt.*, Case No. 14-1693-EL-RDR, Opinion & Order at 18 (March 31, 2016).

²⁷ Order at ¶ 64.

and provide testimony at the hearing.²⁸ The PUCO affirmed this ruling in the Order.²⁹ In so ruling, however, the PUCO relied upon an inaccurate fact. Contrary to the PUCO's statement, the three subpoenas in question were *not* only addressed to PALMco's statutory agent.³⁰ OCC did serve the PALMco individuals personally in New York.³¹ OCC followed the proper procedure and should have been entitled to cross-exam those officers and employees of PALMco. During those cross examinations, OCC would have been able to establish additional evidence and admissions relating to the complaints and the Staff Report that the PUCO cites as proof failings in its Order.

Similarly, the PUCO noted in its Order that OCC was not prejudiced or unduly harmed by the quashing of the subpoenas because it got to depose two of the individuals, one of which took place after the hearing and the other one of which was taken before OCC knew that it would not be allowed to cross-exam that individual during the hearing. As such, the latter deposition was a discovery deposition designed to obtain information. Cross-examination questions to prove the numerous customer complaints and violations of the Ohio Adm. Code were reserved for the hearing, but OCC never had the opportunity to cross-exam that witness.

Finally, the PUCO's Order notes that OCC "should have requested the Company to designate witnesses who could testify regarding specific topics on behalf of the

²⁸ *Id.*; *see also* Tr. Vol. I at 99.

²⁹ Order at ¶ 64.

³⁰ *Id.*

³¹ *See* Returns of Service for Keenia Joseph, Robert Palmese, and Alan Bashe dated September 17, 2019 served in New York filed on September 18, 2019. *See also* Returns of Service for Keenia Joseph, Robert Palmese, and Alan Bashe dated September 16, 2019 served on PALMco's statutory agent in Ohio filed on September 18, 2019.

entity.”³² OCC did *exactly* that.³³ By way of entry dated September 3, 2019, the Attorney Examiner “notes that the Amended Notice properly seeks individuals to be designated by PALMco pursuant to Ohio Adm.Code 4901-1-21. The attorney examiner also notes that the information and documents sought through the Amended Notice are reasonably calculated to lead to the discovery of admissible evidence.”³⁴

Notwithstanding the foregoing, the Attorney Examiner denied the motion to compel those corporate designee depositions during which OCC could have obtained additional information to support the violations set forth in the customer complaints and the Staff Report.³⁵ Again, the PUCO unjustly and unreasonably restricted OCC’s ability to investigate, establish, and/or support the additional evidence of violations by PALMco.

Moreover, OCC was limited in which Staff witnesses it was allowed to subpoena and the cross examination questions that it could ask of the second and third witnesses.³⁶ OCC was also prohibited from asking Staff witnesses about certain statements or findings made in the Staff Report and prohibited from crossing Staff witnesses on the three prong test.³⁷ These limitations placed on OCC directly contradict Ohio Adm. Code 4901-1-28(E). Under Ohio Adm. Code 4901-1-28(E), OCC properly filed motions on September 13, 2019, asking the PUCO to issue subpoenas for two PUCO employees to testify at the upcoming hearing in this case. OCC sought subpoenas for Barbara Bossart, Chief,

³² Order at ¶ 64.

³³ See Amended Notice to Take Depositions (August 2, 2019).

³⁴ September 3, 2019 Entry at ¶ 30.

³⁵ *Id.*

³⁶ Tr. I at 98.

³⁷ See *e.g.*, Tr. I at 53; 85; 122.

Reliability and Service Analysis Division, Service Monitoring and Enforcement Department; and Robert Fadley, Director, Service Monitoring and Enforcement Department. Based on information and belief, these two PUCO employees made or contributed to the Staff Report filed in this case and may be subpoenaed to testify at the hearing, as permitted by Ohio Adm. Code 4901-1-28(E). As OCC noted in its motion for the subpoenas of Mr. Fadley and Ms. Bossart, OCC requested that they be called as witnesses because of their knowledge of the underlying commission-ordered investigation and Staff Report filed in this case.³⁸ OCC explained that under Ohio Adm. Code 4901-1-28(E), in cases where the PUCO orders an investigation to be performed by the Staff, the Staff Report shall be deemed admitted into evidence at the time of its filing at the PUCO. Further under this rule, if a hearing is scheduled in the case in which the Staff Report is filed, any person making or contributing to the Staff Report may be subpoenaed to testify at the hearing in accordance with Ohio Adm. Code 4901-1-25(A). OCC's motion for the subpoenas was based on OCC's information and belief that Mr. Fadley and Ms. Bossart made or contributed to the Staff Report. Given that this is the only limitation set forth in Ohio Adm. Code 4901-1-28(E), Mr. Fadley and Ms. Bossart are persons who were properly subpoenaed under Ohio Adm. Code 4901-1-28(E) and their testimony should not have been restricted.

In short, the PUCO improperly, unfairly, and unlawfully restricted OCC's rights to prove the violations set forth in the customer complaints and the Staff Report. On this basis, rehearing should be granted to allow OCC the right to prove such violations inasmuch as the PUCO cited in its Order that the Settlement was reasonable and satisfied

³⁸ OCC's Motion for Subpoenas at 1-2 (September 13, 2019).

the three-prong criterion for evaluating settlements because of the many proof failings by OCC relating to PALMco's misconduct. Additionally, the PUCO based its decision on incorrect facts and information that is not supported by the record before it contrary to R.C. 4903.09.

C. The PUCO Erred by Blaming OCC for the Lack of Evidence About PALMco's Bad Acts When the PUCO Should Use its Considerable Resources, Including the Call Center Which it Has and Which OCC is Prohibited by Law from Having, to Obtain and Use Evidence from Consumers throughout Ohio Who Otherwise Lack the Resources and Experience to Participate in a PUCO Legal Proceeding in Columbus (Like PALMco Can, in a Case that is About the Abusive Practices of PALMco).

The PUCO ruled that OCC had not met its burden of proving that PALMco violated PUCO rules and Ohio law. In particular, the PUCO faults OCC for relying upon the complaint files compiled by its PUCO Staff that contain hundreds of records of customer contacts with the PUCO's call center concerning the misdeeds of PALMco. The PUCO characterized the information collected by its Staff (including its call center) as hearsay and hearsay upon hearsay. Accordingly, the PUCO appears to have given little weight, if any, to its Staff's evidence.³⁹ The PUCO should rehear its conclusions about the lack of evidence, and adopt OCC's recommendations.

Under the PUCO's approach, the victims' complaints to the PUCO's call center are to be considered hearsay and not evidence of marketer misconduct. These Ohioans who were deceived and ripped off generally lack the wherewithal for such things as hiring counsel (which PALMco doesn't lack) and/or being excused from their job, arranging childcare or eldercare, and traveling to Columbus to appear in the foreign

³⁹ However, these records kept in the normal course of the PUCO's business should have been treated as an exception to the hearsay rule under Ohio Rules of Evidence 803(6), the business records exception.

experience of a PUCO hearing room to testify and be cross-examined. Under these circumstances, the PUCO should use its resources to develop a real opportunity for them to give evidence that the PUCO will not consider hearsay.

One approach would be for the PUCO to schedule local hearings for testimony. Another approach would be for the PUCO's call center to use other means, such as listening to third-party verifications and to documenting PALMco's use of spoofing Caller ID for calls to consumers, that would be evidence without leaning on consumers and OCC for overcoming the natural impediments for consumers to be participants in the PUCO's processes.

The PUCO's ruling is unfortunate both for Ohioans who are victims of PALMco and for Ohioans who could be victims of other bad-acting marketers. In essence, the PUCO has adopted a standard that gives advantage to the regulated violator of its rules over the Ohio consumers who are its victims. And that message will be favorably received by any other disreputable marketers going forward.

Note that, under R.C. 4905.261, the PUCO "shall operate a telephone call center for consumer complaints, to receive complaints by any person, firm, or corporation against any public utility." The PUCO's call center is the one and only call government center for handling utility consumer complaints in Ohio. As the PUCO well knows, OCC has been prohibited under R.C. 4911.021 from "operat[ing] a telephone call center for consumer complaints." OCC merely receives information from the PUCO about its complaint calls from Ohioans (R.C. 4905.261) but the complaint contact is between the consumer and the PUCO. The PUCO's special arrangement for call center contacts with consumers should be elevated, by the PUCO, toward converting those contacts into

whatever the PUCO deems necessary to meet its evidentiary standards. This is especially so given the limits on OCC's resources including the prohibition against operating a call center to help Ohio consumers.

As some unfortunate irony given the significance of a call center in consumer complaints against PALMco and other marketers, it was reported in a Columbus Dispatch story that at least one marketer was vocally involved when, in 2011, the Kasich Administration dealt a significant blow against OCC's consumer advocacy through a major budget cut.⁴⁰ What OCC and consumers lost at that time was what remained of the OCC call center for non-complaint calls involving education and information for consumers, which had to be closed for lack of funds after the budget cut. Accordingly, given the PUCO's standard against treating the customer complaints as evidence, the PUCO should activate its call center to find solutions now on rehearing and in the future for developing information that will stand up as evidence and stand up for the Ohio consumers that the PUCO serves.

Moreover, the PUCO does not allow OCC or others to conduct discovery on its employees (its staff), under Ohio Admin. Code 4901-1-16(I). That makes the challenge of obtaining evidence even more difficult to overcome. The rule prohibiting discovery on the PUCO Staff should not apply to these types of cases and should be lifted for rehearing.

⁴⁰ The Columbus Dispatch, *Kasich friends in high demand* (May 23, 2011): <https://www.dispatch.com/article/20110523/NEWS/305239825>

Finally, the Ohio Power Siting Board has had a recent initiative to “improve public participation” in the siting process.⁴¹ The PUCO also should be making participation on utility matters easier for customers, not more difficult, on this rehearing and in other cases involving bad acts by disreputable marketers.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred in Finding that the Settlement was in the Public Interest and Benefits Consumers.

In its Order, the PUCO noted that the evidence of “PALMco’s unconscionable conduct in the competitive retail electric and gas marketplace . . . warrant[s] serious consequences.”⁴² The PUCO went on to warn that “[t]his proceeding should serve as a reminder that the Commission, through its Staff, will monitor the competitive marketplace to identify unconscionable behavior, such as PALMco’s, and we will promptly address such behavior, as we have done here.”⁴³ But, while the PUCO “talks the talk,” its Order in this proceeding approving the Settlement does not “walk the walk.” In essence, the PUCO approved a Settlement that is not in the public interest and does not benefit consumers.⁴⁴

⁴¹ <https://www.opsb.ohio.gov/rules/2020-rule-review/>

⁴² Order at ¶ 42.

⁴³ *Id.*

⁴⁴ *Id.* at ¶¶ 42-55.

A. 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. Contrary to the PUCO's conclusions, 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.⁴⁵ As explained previously, the Settlement indicates 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...."⁴⁶ 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.⁴⁷ 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

⁴⁵ R.C. 4928.16(B)(1) and R.C. 492.24(B)(1).

⁴⁶ Settlement at 2.

⁴⁷ Adkins Testimony at 13-17.

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. 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.

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 erred by approving an unlawful and unreasonable Settlement that did not require 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 with that provision could the Settlement truly and fully "provide redress for the consumers that were harmed" by PALMco.⁴⁸ As such, the PUCO should have concluded that the Settlement is unjust and unreasonable and insufficient to address the harm caused.

Of note, 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 have ordered full refunds to consumers even if PALMco must liquidate its assets in order to do so. The PUCO failed to do so, which is an error.

The record also provides no basis to make refunds for some customers and the forfeiture contingent upon the sale of PALMco's Ohio business. Nothing in the

⁴⁸ Settlement at 2.

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.⁴⁹ 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.

The PUCO erred by failing to require that 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. The approved Settlement 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 have rejected the Settlement, and its failure to do so, renders its Order unlawful and unreasonable.

B. 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

⁴⁹ *Id.* at 6 (¶III.8).

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.⁵⁰

In this case, the payment of a forfeiture appears to be a part of the Settlement's redress for the harm PALMco caused to consumers, but the forfeiture provision is contingent on the sale of its customer contacts and completing restitution for some, but not all, consumers harmed by PALMco. Thus, the forfeiture is not guaranteed and is illusory. 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 and 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.⁵¹ 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).⁵²

While the PUCO recognizes PALMco's "unconscionable conduct"⁵³ warranting forfeiture, the PUCO acknowledged that the Settlement merely provides a "conditional

⁵⁰ R.C. 4928.16 (electric) and R.C. 4929.24 (natural gas).

⁵¹ Adkins Testimony at 21.

⁵² *Id.* See also Palmese Deposition Transcript at 36, line 9.

⁵³ Order at ¶ 42.

forfeiture.”⁵⁴ Nonetheless as justification for its approval of the Settlement, the PUCO claims that it was more important to get more refunds for PALMco customers.⁵⁵ Yet, as noted above and as conceded by the PUCO, such additional refunds are also merely “potential” and not guaranteed.⁵⁶ So, in essence, the PUCO approved the Settlement that had a “conditional forfeiture” because it wanted to secure merely “potential refunds.” This is not in the public interest and does not benefit consumers.

Simply stated, the PUCO erred in not requiring a mandatory forfeiture because of PALMco’s pattern of deceptive actions against consumers. Additionally, the PUCO erred in not requiring a mandatory forfeiture because of PALMco’s similar pattern of 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.⁵⁷ 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.⁵⁸ 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

⁵⁴ *Id.* at ¶ 52.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Alexander Testimony at 2.

⁵⁸ *Id.*

prices charged under the variable rate contracts that conflict with representations of PALMco's sales agents.⁵⁹ 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.⁶⁰

As explained in the Staff Report,⁶¹ violations in other states are extremely relevant as to a marketer's managerial, financial, and technical capability to provide competitive retail services. During its review of an application for certification or recertification of a CRES/CRNGS, the PUCO assesses an applicant's managerial, financial, and technical capability to provide the service it intends to offer, and its ability to comply with the PUCO rules or orders.⁶² In addition, under Ohio Adm. Code 4901:1-24-13(E)(4) and 4901:1-27-13(E)(4), the Commission may suspend, conditionally rescind, or rescind a CRES or CRNGS provider's certificate if the Commission finds that the company is not fit or capable of providing service. Therefore, the PUCO may consider PALMco's violations in other states to determine if PALMco is incapable of managing a competitive retail utility service. After Staff's investigation, Staff concluded that PALMco was incapable of managing a competitive retail utility service in Ohio. 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.⁶³ Thus, in the other states that have

⁵⁹ *Id.* at 2-3.

⁶⁰ *Id.* at 3-9.

⁶¹ Staff Report at 15-16, 18-20 (May 10, 2019).

⁶² Ohio Adm.Code 4901:1-24-05, 4901:1-24-10, 4901:1-27-05, and 4901:1-27-10.

⁶³ *See* Palmese Deposition Transcript at 53, line 15 through 55, line 12.

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 erred in failing to reject the Settlement. Instead, the PUCO should have directly imposed the original \$1.4 million civil forfeiture that the PUCO Staff recommended in the Staff Report.

ASSIGNMENT OF ERROR NO. 3: The PUCO Erred in Approving the Settlement Without any Modifications that Would Protect Consumers and Further the Public Interest.

As discussed above, the Settlement does not meet the PUCO's criteria for approving settlements and should have been rejected by the PUCO. It was not and as set forth above, that constitutes an error. Moreover, it was also an error by the PUCO to

approve the Settlement without first modifying it to protect consumers and further the public interest. Specifically, OCC proposed several recommendations for modifications to the Settlement that would have made it satisfy the criterion for evaluating settlements. But, the PUCO erred in rejecting each one of those proposed modifications. Those recommended modifications that the PUCO should have included if it was going to approve the Settlement in this case include the following:

First, the PUCO should have required 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 have included 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 have included 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 have included 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 have provided price protection to those consumers currently served by PALMco. The PUCO should have protected 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 have prohibited 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.

Because the PUCO failed to reject the Settlement in its entirety, the PUCO erred in failing to modify the Settlement as proposed herein to protect consumers and further the public interest.

IV. CONCLUSION

The PUCO erred in shifting the burden of proof to OCC in a complaint investigation proceeding instituted by the PUCO and its Staff and as it relates to a show cause order directed at PALMco, neither of which put the burden of proof on OCC as a matter of law. And, even if OCC did shoulder the burden of proof (which it did not), the PUCO erred by limiting and restricting OCC's ability and rights to prove the violations of the customer complaints and the Staff Report.

In sum, the Settlement should have protected consumers. It did not. For the foregoing reasons, the PUCO's Order approving the Settlement without modification is unlawful and unreasonable. The PUCO should grant rehearing to ensure PALMco's

unconscionable conduct is fully addressed and there are adequate consumer protections for customers.

Respectfully submitted,

/s/ Kimberly W. Bojko

Bruce Weston (0016973)

Consumers' Counsel

Amy Botschner O'Brien (0074423)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215-3485

Telephone: (614) 466-9575

amy.botschner.obrien@occ.ohio.gov

(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)

Counsel of Record

Carpenter Lipps & Leland LLP

280 Plaza, Suite 1300

280 N. High Street

Columbus, Ohio 43215

Telephone: (614) 365-4124

bojko@carpenterlipps.com

(willing to accept service by e-mail)

Counsel for the

Office of the Ohio Consumers' Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Rehearing was served via electronic transmission to the persons listed below on this 28th day of February 2020.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

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

SERVICE LIST

Jodi.bair@ohioattorneygeneral.gov
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Keenia Joseph
PALMco Energy OH, LLC,
dba Indra Energy
8751 18th Avenue
Brooklyn, NY 11214
regulatory@indraenergy.com

Attorney Examiners:

Gregory.price@puco.ohio.gov
Anna.Sanyal@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/28/2020 5:24:21 PM

in

Case No(s). 19-0957-GE-COI

Summary: Application for Rehearing by The Office of the Ohio Consumers' Counsel
electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Consumers' Counsel