

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into PALMco Power)	
OH, LLC, d/b/a Indra Energy and)	Case No. 19-2153-GE-COI
PALMco Energy OH, LLC d/b/a)	
Indra Energy's Compliance with the)	
Ohio Administrative Code and)	
Potential Remedial Action.)	

**MEMORANDUM CONTRA PALMCO'S MOTION FOR EXTENSION
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

From the beginning of this proceeding, PALMco¹ has done everything it can to prevent OCC – the statutory legal representative of the Ohio residential consumers PALMco abused – from preparing a case for consumer protection. PALMco vigorously opposed OCC's intervention in this case and it has refused to abide by the Attorney Examiner's orders to produce discovery to OCC, forcing OCC to expend considerable resources to advocate for consumers. PALMco now asks the Public Utilities Commission of Ohio ("PUCO") for a 14-day extension to respond to OCC's *third* Motion to Compel and renewed Motion for Sanctions. A request that will further delay discovery while PALMco has a motion pending for an expedited procedural schedule.

PALMco's motion should be denied and the PUCO should (again) order PALMco to respond to OCC's discovery *immediately*. There is no good cause to allow PALMco to

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

continue withholding discovery that OCC needs to prepare its case and doing so would severely prejudice Ohio consumers.

II. ARGUMENT

A. Granting PALMco's motion to further delay discovery would severely prejudice Ohio consumers.

PALMco correctly represents that it is involved in settlement discussions with OCC and the PUCO Staff. However, that is no reason for interrupting OCC's case preparation for consumer protection. Discovery is an important tool needed for both litigation and settlement. Discovery is needed to flesh out a party's litigation and settlement positions.

Additionally, OCC, the PUCO Staff, and other parties to PUCO proceedings often pursue settlement and litigation simultaneously. As stated in OCC's third Motion to Compel, OCC is still waiting on responses to discovery that OCC served on PALMco in January and February. Granting PALMco's requested extension would further delay OCC's receipt of this information and hinder OCC's ability to prepare its case, as well as formulate settlement positions.

The prejudice to consumers in granting PALMco's motion is compounded by PALMco's October 13, 2020 motion to establish an expedited procedural schedule. In that motion, PALMco proposed a procedural schedule that unreasonably short-circuits OCC's ability to conduct any additional discovery by requesting a discovery cutoff of November 9, 2020 (including notices for deposition).² PALMco's proposed schedule also requests an evidentiary hearing date of December 7, 2020 – less than three weeks from

² See PALMco's Motion to Establish a Procedural Schedule (Oct. 13, 2020).

now.³ Yet PALMco still refuses to respond fully to OCC's discovery served at the beginning of this year.

OCC filed a memorandum contra opposing PALMco's motion and proposing a more reasonable schedule that would allow OCC time to receive, review, and conduct follow up discovery if necessary in preparation for an evidentiary hearing.⁴ The PUCO Staff also opposed PALMco's motion for a procedural schedule.⁵ PALMco's current motion for a 14-day extension to respond to OCC's third Motion to Compel would further delay resolution of discovery issues causing more prejudice to Ohio consumers.

Before PALMco filed its motion for extension, PALMco asked OCC to agree to an extension of 14 days. OCC generally attempts to cooperate with parties on extension requests. However, PALMco's continued refusal to abide by the Attorney Examiner's orders to produce discovery to OCC,⁶ along with the unreasonably expedited procedural schedule proposed by PALMco, made OCC's "unconditional"⁷ agreement to PALMco's extension impossible. Nevertheless, in the spirit of cooperation, OCC explained to PALMco that OCC would agree to a 10-day extension if PALMco would withdraw its unnecessarily restrictive motion for procedural schedule. PALMco did not respond and instead filed its motion for a 14-day extension.

³ *Id.*

⁴ See OCC's Memorandum Contra PALMco's Motion to Establish a Procedural Schedule (Oct. 28, 2020).

⁵ See PUCO Staff Memorandum Contra PALMco's Motion to Establish a Procedural Schedule (Oct. 28, 2020).

⁶ See April 6 Entry, at ¶19; August 6 Entry, at ¶21.

⁷ PALMco Motion for Extension Memorandum in Support, at 2.

Simply put, because of PALMco's continued delay (almost 10 months) in producing discovery and its reluctance to comply with PUCO directives compelling discovery, OCC does not have the luxury of suspending its case preparation for two weeks, including during settlement negotiations. PALMco should know this, as the Attorney Examiner in the first investigation by the PUCO into PALMco's unconscionable and deceptive marketing practices (Case No. 19-957-GE-COI ("PALMco 1")) made clear that OCC *must* continue to pursue discovery even while participating in settlement negotiations to prevent prejudice to consumers.⁸ OCC is doing exactly that, and PALMco should not be allowed to impose further delay on OCC's case preparation while the parties discuss settlement. This is especially true given PALMco's own admission that it is withholding discovery from OCC based solely on the fact that the PUCO has not ruled on PALMco's Motion for Waiver of Rules Governing Disclosure of Customer Information.⁹ The Attorney Examiner unequivocally *ordered* PALMco to respond to OCC's January and February discovery in the April 6, 2020 and the August 6, 2020 Entries. It is now near the end of November and PALMco still has not provided the requisite discovery. PALMco should be required to respond immediately.

In the interest of consumers (and to prevent other marketers from engaging in similar behavior), the PUCO should put an end to PALMco's delay tactics and defiance of the Attorney Examiner's orders and the PUCO's rules. The PUCO should protect

⁸ See *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 Actions for Non-Compliance*, Case No. 19-957-GE-COI, Sept. 11, 2019 Hearing Tr. at 25: 8-15.

⁹ PALMco Motion for Extension Memorandum in Support, at 1.

OCC's ability to prepare its case. Granting PALMco's motion for extension would force OCC to wait even longer for responses to discovery (served 10 months ago) and would seriously harm consumers. PALMco's motion should be denied.

B. There is no good cause for delaying the resolution of the discovery dispute pending settlement negotiations.

PALMco asserts that there is good cause for delaying resolution of the discovery dispute because PALMco should (in its view) be allowed to "conserve its resources" during settlement negotiations.¹⁰ PALMco is wrong and its motion should be denied.

In this case, there actually is good cause to deny PALMco's motion given its delay tactics and refusal to comply with the Attorney Examiner's orders and the PUCO's rules. Indeed, PALMco's opposition to OCC's intervention in this case to protect consumers and PALMco's refusal to respond and baseless objections to OCC's lawful discovery have forced OCC to devote significant time and resources to this case. PALMco cannot now cry foul because it does not want to spend the time or money to provide an answer as to why it *still* refuses to produce discovery to OCC in defiance of the Attorney Examiner's orders.

As noted above, not only is discovery needed for the settlement phase of a proceeding, OCC, the PUCO Staff, and other parties routinely proceed on dual settlement and litigation tracks in PUCO proceedings. And as the Attorney Examiner in PALMco I noted, OCC is expected to continue pursuing discovery during settlement negotiations because if a contested settlement is filed, there will not be much time between the filing of the settlement and the evidentiary hearing to continue discovery.¹¹

¹⁰ PALMco Motion for Extension Memorandum in Support, at 1.

¹¹ PALMco I, Sept. 11, 2019 Hearing Tr. at 25: 8-15.

Finally, OCC offered to agree to a 10-day extension for PALMco to respond if PALMco agreed to withdraw its unreasonable motion for an expedited procedural schedule. But PALMco refused. This demonstrates that PALMco's true motives in seeking an extension are not to conserve resources for a potential settlement, but to impede OCC's ability to prepare its case. In sum, there is no good cause for granting PALMco's motion and it should be denied.

III. CONCLUSION

For the reasons explained above, the PUCO should deny PALMco's motion for an extension to respond to OCC's third Motion to Compel and renewed Motion for Sanctions. The PUCO should grant OCC's motions and order PALMco to respond to OCC's outstanding discovery requests immediately so that OCC can fully prepare its case for consumers.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien
Angela D. O'Brien (0097579)
Counsel of Record
Christopher Healey (0086027)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone [O'Brien]: (614) 466-9531
Telephone [Healey]: (614) 466-9571
angela.obrien@occ.ohio.gov
christopher.healey@occ.ohio.gov
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 19th day of November 2020.

/s/ Angela D. O'Brien
Angela D. O'Brien
Assistant Consumers' Counsel

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SERVICE LIST

jodi.bair@ohioattorneygeneral.gov

Attorney Examiners:

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

mmcguire@HuntonAK.com
cpardo@HuntonAK.com
egallon@porterwright.com
acarter@porterwright.com

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Summary: Memorandum Memorandum Contra PALMco's Motion for Extension by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of O'Brien, Angela Ms.