

IN THE SUPREME COURT OF OHIO

12-0668

Buckeye Energy Brokers, Inc.,

Appellant,

v.

The Public Utilities Commission of Ohio and  
Palmer Energy Company,

Appellees.

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:  
: Ohio Supreme Court  
: Case No. \_\_\_\_\_  
:  
: Appeal from the Public Utilities  
: Commission of Ohio  
:  
: Public Utilities Commission of Ohio  
: Case No. 10-693-GE-CSS  
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:  
:

NOTICE OF APPEAL OF APPELLANT  
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**NOTICE OF APPEAL OF APPELLANT BUCKEYE ENERGY BROKERS, INC.**

Appellant Buckeye Energy Brokers, Inc. (“Appellant”) hereby gives its notice of appeal as of right, pursuant to R.C. 4903.11 and 4903.13, to the Supreme Court of Ohio and the Appellees from the Opinion and Order entered on November 1, 2011 (Attachment A), and Entry on Rehearing entered on February 23, 2012 (Attachment B) of the Public Utilities Commission of Ohio (“Commission”) in PUCO Case No. 10-693-GE-CSS.

Appellant was and is a party of record in PUCO Case No. 10-693-GE-CSS, and timely filed its Application for Rehearing of the Commission’s November 1, 2011, Opinion and Order in accordance with R.C. 4903.10. Initially, the Commission granted the Application for Rehearing in its Entry on Rehearing entered on December 14, 2011. Later, Appellant’s Application for Rehearing was denied by the Commission’s Entry on Rehearing entered on February 23, 2012.

The Commission’s Opinion and Order entered on November 1, 2011, and the Commission’s Entry on Rehearing entered on February 23, 2012, are unlawful and unreasonable for the reasons set out in the following assignments of error complained of:

1. The Commission erred by determining that Appellee Palmer Energy Company (“Palmer”) was not a retail natural gas supplier that provided competitive retail natural gas services (“CRNGS”) prior to obtaining certification from the Commission in September 2010.
2. The Commission erred by finding that Palmer was not an electric services company that provided competitive retail electric service (“CRES”) prior to obtaining certification in September 2010.
3. The Commission erred by determining that there is a consultant loophole in the statutory certification requirements provided by R.C. 4928 and R.C. 4929.

4. The Commission erred in determining that Palmer qualified for the consultant loophole to the statutory certification requirements, assuming that the consultant loophole exists.

5. The Commission erred by not holding Palmer to its public admissions that it was a broker prior to obtaining certification in September 2010.

6. The Commission erred in failing to find and ignoring the substantial evidence clearly establishing that Palmer was providing substantial broker services for its various clients since the certification laws were passed for years prior to obtaining certification from the PUCO.

7. The Commission exceeded its powers and jurisdiction in the Opinion and Order by effectively creating a consultant loophole which is not provided for by the General Assembly in either R.C. 4928.01 et seq. or R.C. 4929.01 et seq. (the "Certification Statutes").

8. The Commission's Opinion and Order is internally inconsistent in its interpretation and application of the terms "competitive service" and "arranging" and its creation of the consultant loophole.

9. The Commission attempts to define the activities of a consultant in its Opinion and Order, despite admitting that the Commission's rules contain an ambiguity relative to distinguishing the activities of consultants and brokers.

10. The Commission attempted to define the activities of a consultant under its rules, despite the fact that the Commission's rules do not even contain the term consultant.

11. The Commission erred by finding that "arranging," as defined by the Certification Statutes, must exceed the level of involvement of a consultant when that is not a reference point under the Certification Statutes.

12. The Commission erred by using the actions of a consultant as a reference point for what constitutes arranging, without any support under the Certification Statutes.

13. The Commission erred by finding that actions taken by a consultant and actions that are competitive services are mutually exclusive, without any support under the Certification Statutes.

14. The Commission erred by excluding certain actions from the definition of “arranging,” including Palmer’s admitted participation in the request for proposal (“RFP”) process on behalf of all its customers.

15. The Commission erred by failing to adequately consider the significance of the mode of Palmer’s compensation when determining that Palmer was acting as a consultant as opposed to a broker – a matter which was considered significant by Commission member Centolella in his dissenting opinion.

16. The Commission erred by finding that Palmer’s numerous admissions that it is a broker, which are contained in its website, its company letterhead, and its certification application, are merely circumstantial evidence, as opposed to admissions against interest, which are direct, conclusive and binding evidence establishing Palmer’s true broker status.

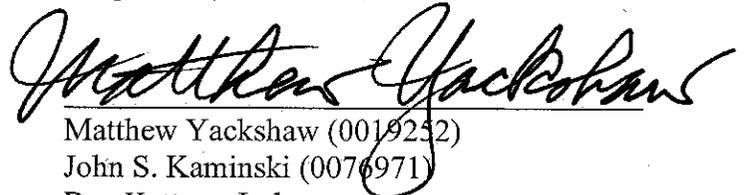
17. The Commission erred by finding that Palmer’s 2010 applications for certification were merely anticipatory of future actions, as opposed to a corrective measure designed to cut its losses for its failure to follow the law and become certified in the past.

18. The Commission erred by finding that Buckeye failed to meet its burden of proof that Palmer was engaging in competitive services and arranging for the provision of CRES or CRNGS prior to receiving its certification.

19. The Commission erred by finding that Buckeye failed to meet its burden of proof, especially where it is the Commission’s rulings on discovery issues and the trial subpoena that effectively prevented Buckeye from presenting all of the available evidence and rewarded Palmer’s stonewalling of the discovery and trial process.

WHEREFORE, Appellant respectfully submits that the Commission's Opinion and Order entered on November 1, 2011, and the Commission's Entry on Rehearing entered on February 23, 2012, are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,



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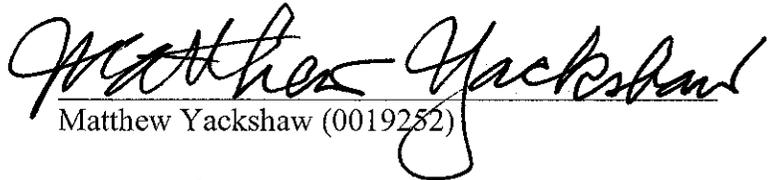
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal of Appellant Buckeye Energy Brokers, Inc., was served by hand-delivery on the Chairman or other member of the Public Utilities Commission of Ohio or left at the Commission's office on April 19, 2012, and served by regular U.S. Mail, postage prepaid, on April 19, 2012 on the following:

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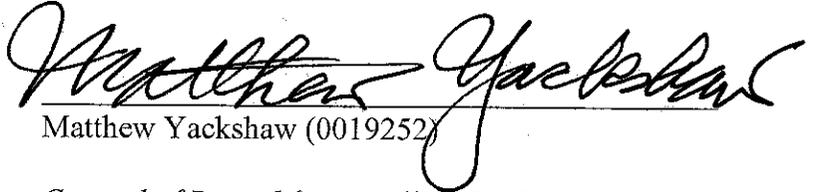
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**CERTIFICATE OF FILING**

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal of Appellant Buckeye Energy Brokers, Inc., has been filed with the docketing division of the Public Utilities Commission in accordance with Sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code on April 19, 2012.



Matthew Yackshaw (0019252)

*Counsel of Record for Appellant Buckeye Energy  
Brokers, Inc.*

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of	)	
Buckeye Energy Brokers, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 10-693-GE-CSS
	)	
Palmer Energy Company,	)	
	)	
Respondent.	)	

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, hereby issues its Opinion and Order.

APPEARANCES:

Day Ketterer Ltd. by Matthew Yackshaw, Millennium Centre, Suite 300, 200 Market Avenue North, Canton, Ohio 44701, on behalf of Buckeye Energy Brokers, Inc.

Vorys, Sater, Seymour, and Pease, LLP, by M. Howard Petricoff, and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43215, on behalf of Palmer Energy Company.

OPINION:

I. INTRODUCTION

Pursuant to Certificate No. 00-002E(6), Buckeye Energy Brokers, Inc. (Buckeye or complainant) is a certified retail electric service (CRES) provider authorized to provide aggregation and power broker services within the state of Ohio. Pursuant to Certificate No. 02-006G(6), Buckeye is certified as a competitive retail natural gas service (CRNGS) aggregator/broker to provide retail natural gas aggregator/broker services in the state of Ohio.

In its initial complaint filed May 21, 2010, Buckeye alleged that Palmer Energy Company (Palmer or respondent) held itself out to be an aggregator of electric and natural gas in the state of Ohio prior to becoming certified, resulting in Palmer successfully obtaining various contracts from public entities (i.e., counties, townships,

incorporated areas) and from members of the public to provide electric and natural gas services.

In the first count of its initial complaint, the complainant alleged that Palmer was in violation of Section 4928.08, Revised Code, inasmuch as, despite the offering of CRES as an electric services company, the respondent was not identified on the Commission's website listing of CRES providers as of the filing date of the complaint (May 21, 2010).

In the second count of its initial complaint, Buckeye alleged that Palmer was in violation of Section 4929.20, Revised Code, due to the fact that, as of May 21, 2010, it failed to obtain the required certification to be a CRNGS gas supplier in the state of Ohio.

As a result of Palmer's alleged failure to obtain the required certification as a CRES and CRNGS provider, Buckeye believed it should be entitled to the following remedies: (1) rescission of all of Palmer's contracts to provide CRES and CRNGS within the state of Ohio; (2) restitution to all customers covered by those contracts, including damages; (3) forfeiture to the state of Ohio for each violation; and (4) any other relief that may be proper or just.

On September 24, 2010, Buckeye filed a motion for leave to amend its complaint in order to incorporate the term "broker" in addition to the previously stated term "aggregator." The motion for leave to amend was granted pursuant to the attorney examiner Entry of January 18, 2011.

On June 9, 2010, Palmer filed its answer to Buckeye's initial complaint. On October 5, 2010, Palmer filed its answer to Buckeye's amended complaint. Palmer denied the majority of Buckeye's allegations and set forth a number of affirmative defenses. For example, while Palmer acknowledged that, as of the filing of the complaint, its name was not listed on the Commission's website as a CRES or CRNGS provider, it contended that it was not required to obtain such certifications due to the nature of its business operations at that time. The respondent also submitted that, while it did obtain its CRES and CRNGS certifications subsequent to the filing of the complaint in this matter, it was not required to do so.<sup>1</sup> Specifically, Palmer asserted that it acted in the capacity of a consultant while working with local governments. Further, the respondent explained that, while it held agency and/or power of attorney status for the purposes of working with CRNGS suppliers, natural gas companies, and transmission companies, it did not act independently of its principal. (Answer to Amended Complaint at 5.)

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<sup>1</sup> The CRES and CRNGS certification applications were filed on August 5, 2010, in Case Nos. 10-1081-EL-AGG (10-1081) and 10-1082-GA-AGG (10-1082). Certificates 10-265E(1) and 10-194G(1) were issued on September 8, 2010, and September 15, 2010, respectively.

Palmer filed a counterclaim on June 9, 2010, alleging that Buckeye had engaged in practices that were unfair, misleading, deceptive, or unconscionable relative to the marketing, solicitation, or sale of competitive retail services. Palmer submitted that these practices were in violation of Rules 4901:1-21-05(C), and 4901:1-29-05(C), Ohio Administrative Code (O.A.C.). Specifically, Palmer alleged that a representative of Buckeye improperly told the Sandusky County Commissioners that Palmer needed to be certified by the Commission. Palmer asserted that these representations were untrue. (June 9, 2010, Palmer Answer at 4.) Buckeye filed its answer to Palmer's counterclaim on June 24, 2010, denying these allegations.

A settlement conference in this matter was held on September 10, 2010, in order to explore the parties' willingness to negotiate a resolution of the complaint in lieu of an evidentiary hearing. On December 13, 2010, counsel for Buckeye filed a letter indicating that, despite the parties' efforts to enter into a stipulation of facts that would permit this case to be decided solely on the briefs, no such stipulation was agreed upon.

An evidentiary hearing was held in this matter at the offices of the Commission on April 11, 2011, and April 20, 2011. Initial briefs and reply briefs were filed on May 12, 2011, and May 23, 2011, respectively.

## II. APPLICABLE LAW

The following statutory references provide the basis for determining whether an entity is a provider of CRES or CRNGS:

- (1) Section 4928.01(A)(9), Revised Code, defines an electric services company as:

[A]n electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state . . . includes a power marketer, power broker, aggregator, or independent power producer, but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

- (2) Section 4928.01(A)(27), Revised Code, defines retail electric service as:

[A]ny service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption . . . retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

- (3) Section 4928.01, Revised Code, defines competitive retail electric service as:

[A] component of retail electric service that is competitive as provided under division (B) of this section.

- (4) Section 4929.01(N), Revised Code, defines a retail natural gas supplier as:

[A]ny person . . . that is engaged . . . in the business of supplying or arranging for the supply of a competitive retail natural gas service to consumers in this state that are not mercantile customers. Retail natural gas supplier includes a marketer, broker, or aggregator . . . .

- (5) Section 4929.01(M), Revised Code, defines retail natural gas service as:

[C]ommodity sales service, ancillary service, natural gas aggregation service, natural gas marketing service, or natural gas brokerage service.

- (6) Section 4929.01(I), Revised Code, defines competitive retail natural service as:

[A]ny retail natural gas service that may be competitively offered to consumers in this state as a

result of revised schedules approved under division (C) of the Revised Code, a rule or order adopted or issued by the public utilities commission under Chapter 4905, of the Revised Code, or an exemption granted by the commission under sections 4929.04 to 4929.08 of the Revised Code.

- (7) Rule 4901:1-21-01(BB), O.A.C., defines a "power broker" as:

[A] person certified by the commission, who provides power brokerage.

- (8) Rule 4901:1-21-01(CC), O.A.C., defines "power brokerage" as:

[A]ssuming the contractual and legal responsibility for the sale and/or arrangement for the supply of retail electric generation service to a retail customer in this state without taking title to the electric power supplied.

- (9) Rule 4901:1-27-01(X), O.A.C., defines "retail natural gas marketing" service as:

[A]ssuming the contractual and legal responsibility for the sale and provision of competitive retail natural gas service to a retail natural gas service customer in this state and having title to natural gas at some point during the transaction.

- (10) Rule 4901:1-27-01(Y), O.A.C., defines "retail natural gas marketer" as:

[A] person who provides retail natural gas marketing service.

In order to provide CRES to consumers, an entity must be certified by the Commission pursuant to Section 4928.08(B), Revised Code. In order to provide CRNGS to consumers, an entity must be certified by the Commission pursuant to Section 4929.20(A), Revised Code.

In accordance with Section 4928.10, Revised Code, Rule 4901:1-21-05(C), O.A.C., states that no CRES provider may engage in marketing, solicitation, sales acts, or practices which may be unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRES. Similarly, in accordance with Section 4929.22,

Revised Code, Rule 4901:1-29-05(C), O.A.C., provides that no CRNGS provider may engage in marketing, solicitation, sales acts, or practices which may be unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a CRNGS.

The complaint in this proceeding was filed pursuant to Sections 4928.16 and 4929.24, Revised Code. The Commission notes that Section 4928.16, Revised Code, extends the Commission's jurisdiction under Section 4905.26, Revised Code, to CRES providers. Additionally, Section 4929.24, Revised Code, extends the Commission's jurisdiction under Section 4905.26, Revised Code, to CRNG providers. Section 4905.26, Revised Code, provides, in relevant part, that the Commission will hear a case upon the filing a complaint against any public utility that any service rendered is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any practice affecting or relating to any service or in connection with such service is unreasonable, unjust, unjustly discriminatory, or unjustly preferential. In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189. Therefore, it is the responsibility of Buckeye to present evidence in support of the allegations made in its complaint.

### III. SUMMARY OF EVIDENCE

Initially, the Commission notes that this complaint case was filed on May 21, 2010, and amended on September 24, 2010. On September 8, 2010, and September 15, 2010, Palmer was certified as a provider of CRES and CRNGS, respectively. In considering Buckeye's allegations in this complaint, the Commission will only review the activities of Palmer prior to the time it was certified to provide CRES and CRNGS. Accordingly, the question before the Commission is whether, during the time period at issue in this complaint, Palmer operated as a provider of CRES and CRNGS without obtaining a certificate from the Commission, in violation of Sections 4928.08(B) and 4929.20(A), Revised Code, respectively.

#### A. Buckeye's witnesses

##### 1. Thomas M. Bellish

Thomas M. Bellish, an energy consultant and president of Buckeye, testified on behalf of the complainant (Buckeye Ex. 77 at 1). Buckeye is a certified broker of natural gas and electricity in Ohio. Buckeye's responsibilities consist of bringing buyers and sellers together to transact the purchase and sale of natural gas and electricity (Tr. at 266). According to Mr. Bellish, Buckeye is a competitor of Palmer and there are approximately 90 other brokers and aggregators in the state of Ohio that are certified (*Id.* at 281-283; Buckeye Ex. 77 at 4, 5).

Mr. Bellish explained that, while an energy consultant represents an "umbrella of services" from brokering power and natural gas to conducting studies, implementing projects, and working with companies to implement deregulated services, a broker is more narrowly defined and refers to bringing a buyer and seller together for the purchase and sale of natural gas or electricity (Tr. at 266, 267). Mr. Bellish stated that, if a party is providing a competitive service, it must be certified by the Commission as either a (1) supplier/marketer, (2) aggregator/broker, or (3) governmental aggregator (Buckeye Ex. 77 at 3). According to Mr. Bellish, if the consultant is hired by a natural gas aggregator, it must be certified as a CRNGS. If the consultant is hired by electric governmental aggregator, it must be certified as a CRES. (*Id.* at 6.)

The witness defined a competitive service as:

A service such as energy procurement, negotiating rates, arranging for the supply of energy, writing, reviewing and sending requests for proposals, reviewing contracts, filing documents with the commission, advising governmental aggregations, reviewing opt-out notices and mailing lists and meeting with suppliers and governmental aggregators at the same time, identifying gas/electric suppliers to consumers, identifying consumer load for gas electric suppliers (sic) become contractually obligated to find a supplier or consumer, enter into agreements that allow obtaining and compiling load data or billing history of a consumer for the purpose of seeking bids for consumers, selecting gas/electric suppliers for consumers or suppliers, sign contracts on behalf of either consumers or gas/electric suppliers, act as or (sic) advising agent for either consumers or gas/electric suppliers making purchasing decisions, being involved after a consumer and supplier agree on a transaction and paid by consumers and/or gas/electric suppliers.

(Buckeye Ex. 77 at 4.)

Mr. Bellish testified that a consultant loophole does not exist in the Commission rules. He interpreted the Commission's March 30, 2000, Opinion and Order in Case No. 99-1609-EL-ORD (99-1609), *In the Matter of the Commission's Promulgation of Rules for Certification of Providers of Competitive Retail Electric Services, Pursuant to Chapter 4928, Revised Code*, to signify that any consultant who performs a competitive service must be certified. (Tr. at 269.) In support of his position, Mr. Bellish stated that, in order to protect the public, any individual performing a competitive service must be certified (*Id.* at 273, 274; Buckeye Ex. 77 at 7). According to the witness, an entity should be

certified if it is engaged in an activity for the purpose of completing an arrangement and receives a fee for the activity (Tr. at 291-294).

Further, Mr. Bellish explained that, despite Palmer presently being certified, the issue raised in the complaint is not moot. In particular, he stated that, because Palmer was performing activities that require a person or entity to be certified by the Commission, there are certain penalties that should be imposed, including fines and the rescission of contracts. Mr. Bellish also acknowledged that he previously informed potential customers, whose business Palmer and Buckeye had both been competing for, that Palmer was required to be certified by the Commission. (*Id.* at 285.)

B. Palmer's witnesses

1. Mark R. Frye

Mr. Frye,<sup>2</sup> president and majority owner of Palmer, testified at the hearing. He is involved in the day-to-day management and operation of the company (Tr. at 14-18.). Mr. Frye explained that Palmer provides consulting services to a number of industrial, commercial, educational, institutional, and governmental clients regarding energy procurement and utilization matters (Palmer Ex. 1 at 1). As a consultant, Palmer gives energy advice and services to local governments and customers. In those situations in which Palmer has provided consulting services, it has done so in conjunction with a certified aggregator and a certified competitive retail service provider (*Id.* at 5-6). He stated that Palmer's typical duties are to work with government entities to develop request for proposals (RFP) processes, issue the RFPs, and evaluate the various proposals submitted to the entities. According to Mr. Frye, Palmer also estimates the savings potential for consumers and makes recommendations to the communities (*Id.* at 2-6; Tr. at 17-19).

In addition to developing RFPs for various communities, Mr. Frye indicated that, during the period of time in question, Palmer engaged in conversations with elected and administrative officials in municipalities about the potential for governmental aggregation. Specifically, Mr. Frye stated that, following the passage of Senate Bill (S.B.) 3, several communities were interested in working together and implementing governmental aggregation for their communities and subsequently formed the Northwest Ohio Aggregation Coalition (NOAC). (*Id.* at 21-27.)

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<sup>2</sup> Mr. Frye offered prefiled direct testimony on behalf of Palmer and was also called as a witness as-on-cross for Buckeye. In order to avoid repetition and to provide an orderly and logical recitation of Mr. Frye's testimony, this summary includes both his prefiled direct testimony and his testimony at the hearing itself.

Mr. Frye testified that Palmer consulted for the NOAC communities, as well as for the County Commissioners Association of Ohio (CCAO), providing information about rules and regulations concerning governmental aggregation, and the actions needed to be taken for the purpose of placing aggregation on the local ballot. If the local aggregation legislation ultimately passed, Mr. Frye stated that, upon a community's request, Palmer would assist the community in obtaining Commission certification. Mr. Frye noted that, on several occasions, Palmer has filled in parts of the certification applications, but he assumed that the designated counsels and officials would perform a review prior to the applications being submitted to the Commission. Once a community obtained Commission certification, Mr. Frye explained that Palmer would contact various utilities and suppliers in order to gather data on behalf on the community and then analyze and review the information to create recommendations for the community. (*Id.* at 30-34.)

According to the witness, at the request of a community aggregator, Palmer would issue an RFP and then negotiate with potential suppliers to determine if a better rate was available. Once a community ultimately chose a supplier, the aggregator and the supplier would work out the details of the contract, while Palmer would remain as a consultant relative to technical issues associated with the agreement. Mr. Frye explained that the supplier agreements included an administrative fee, a portion of which would go to Palmer for its services. After the contracts were finalized, Palmer would receive information from the suppliers on the savings results and would file the information with the Commission on behalf of the individual communities. (*Id.* at 38-49.) Additionally, Mr. Frye discussed the quarterly electric market monitoring reports that Palmer assisted the aggregator communities to complete and file with the Commission. According to Mr. Frye, he completed the reports and electronically submitted them based on the data provided by the supplier. (*Id.* at 197-200.)

Once a community was certified as a governmental aggregator, Mr. Frye testified that Palmer would review letters to residents of communities explaining the opt-out aggregation structure. In particular, Palmer's responsibilities were typically to review the technical aspects of the letters. The community lists would also be checked by Palmer to ensure that the letters were only going to individuals within the community. (*Id.* at 50-51.)

In addition, Palmer currently acts as a consultant to Northeast Ohio Public Energy Council (NOPEC). Mr. Frye explained that Palmer's role is more limited with NOPEC, as the NOPEC communities are a council of governments working in conjunction with each other as a governmental aggregator. Specifically, Palmer's consulting duties for NOPEC include assisting with technical issues, pricing, savings analysis, and hedging decisions. Mr. Frye also stated that a large portion of Palmer's consulting work in the last 18 months has been with the CCAO. In particular, Palmer has met with elected officials and county representatives to evaluate a proposal to

FirstEnergy Solutions (FES) to put governmental aggregation on the ballot. Palmer did not create an RFP, but did assist in the bidding process. (*Id.* at 57-61.)

Mr. Frye testified that Palmer has also been hired by large commercial mercantile consumers and industrial manufacturers to make recommendations on natural gas and electric supply. Mr. Frye explained that Palmer assisted with the RFP process, and made recommendations to the private entities about the proposed rates, terms, and conditions. The private entities would typically pay a flat fee for Palmer's services, but, on occasion, payments would be based on an hourly rate. (*Id.* at 75-85.) These mercantile customers include the Toledo Public School District and the Cleveland Municipal School District<sup>3</sup> (Palmer Ex. 1 at 5). Mr. Frye explained that, inasmuch as school districts do not have the ability to engage in government aggregation, the consulting services focused on recommendations of various suppliers following the RFP process, assisting in contract negotiations, and evaluating consumption needs for the individual facilities. As an example of the typical consulting process for the individual school districts, Mr. Frye explained that, when the school groups were approached by FES, Palmer requested information from FES and then made recommendations to the school groups. Mr. Frye stated that, prior to a contract being signed between the school districts and the supplier, Palmer would assist with any technical terms in the contract. Once the agreements were reached, Palmer no longer had any involvement in the contract process. Mr. Frye explained there was no contract between Palmer and the school groups. Rather, Palmer would be paid from affinity payment fees from the supplier which would go to the school groups, with a portion of the fee going to Palmer. Mr. Frye also noted that Palmer has also performed consulting work for the Toledo Lucas County Public Library. (Tr. at 63-75.)

Specific to the allegations set forth in this complaint regarding the provisioning of electric service, Mr. Frye asserted that, since the passage of S.B. 3 on October 4, 1999, Palmer has not held itself out to the public as an electric services company, including as a power marketer, power broker, aggregator, or independent power producer. Additionally, Mr. Frye denied that, since October 4, 1999, Palmer has engaged in the business of supplying or arranging for the supply of only CRES so as to be a power marketer, power broker, aggregator, or independent power producer. Mr. Frye also denied that, on or after October 4, 1999, Palmer assumed the contractual and legal responsibility for the sale and/or arrangement for the supply of retail electricity without title to the electric power supplied. Further, with the exception of for its own use at facilities rented by Palmer, Mr. Frye denies that Palmer ever assumed the contractual and legal responsibility for the sale and/or arrangement for the supply of

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<sup>3</sup> These customers were defined as customers that consume, other than for residential use, more than 500 thousand cubic feet (Mcf) of natural gas per year at a single location within the state of Ohio or that consume natural gas, other than for a residential use, as part of an undertaking having more than three locations within or outside Ohio.

retail electricity with title to the electric power provided at some point during the transaction on or after October 4, 1999. (Palmer Ex. 1 at 1-3.)

Specific to the allegations set forth in the complaint regarding the provisioning of natural gas service, Mr. Frye asserted that, since the passage of House Bill (H.B.) 9 on June 26, 2001, Palmer has not engaged in the business of supplying or arranging for the supply of CRNGS to consumers in the state of Ohio that are not mercantile customers. Additionally, Mr. Frye stated that, since the passage of H.B. 9, Palmer has not contracted with customers to combine their natural gas load for purposes of purchasing CRNGS on an aggregated basis. Further, Mr. Frye submitted that, since the passage of H.B. 9, Palmer has not engaged in the activity of assuming the contractual and legal responsibility for the sale and/or arrangement for the supply of CRNGS to a retail customer without taking title to the natural gas. Mr. Frye also represented that, since June 26, 2001, other than relative to its own use at facilities rented by Palmer for its own business purposes, the company has not engaged in the activity of assuming the contractual and legal responsibility for the sale and provision of CRNGS to a retail natural gas customer in Ohio and having title to natural gas at some point during the transaction. (*Id.* at 3-4.)

Mr. Frye acknowledged that other entities, such as Buckeye, competed with Palmer for the purpose of receiving business from governmental entities. In particular, Mr. Frye recalled attending a meeting with Sandusky County officials in 2010, at which at least one commissioner and several township trustees were present, as well as the complainant, Buckeye. (Tr. at 85.)

Finally, Mr. Frye acknowledged that Palmer filed an application to become certified as a CRES and a CRNGS broker and aggregator in August 2010. The witness explained that, although it does not need certification to serve as a consultant, it sought the certifications in the event that it decides to expand its role beyond that of being a consultant and pursue the provision of CRES and CRNGS. (Palmer Ex. 1 at 6-7.)

## 2. Leigh Herrington

Leigh Herrington, director of NOPEC, testified on behalf of Palmer. Mr. Herrington identified NOPEC is a regional council of governments consisting of 133 communities situated in northeast Ohio. NOPEC is certified by the Commission as an electric and natural gas governmental aggregator. According to Mr. Herrington, NOPEC has retained Palmer as an energy consultant to provide services such as testifying in energy proceedings, making natural gas price and basis recommendations, assisting in energy contractual matters, maintaining a 12-month weighted average natural gas pricing, making electric supply and analysis determinations, and producing power pricing evaluations. (Palmer Ex. 2 at 2-4.)

Mr. Herrington explained that Palmer serves as a resource to answer his questions and that he typically utilizes Palmer four to five times a month. Specifically, Mr. Herrington stated that Palmer provides advice to NOPEC regarding the natural gas marketplace, including whether NOPEC should or should not buy natural gas. Mr. Herrington notes that Palmer has made modifications to NOPEC's hedging policies, including partial purchases of natural gas. (Tr. at 219-227.)

3. Larry L. Long

Larry L. Long, executive director of CCAO, testified on behalf of Palmer. According to the witness, CCAO represents Ohio's boards of county commissioners and executive councils. Mr. Long explained that CCAO has retained Palmer as a consultant regarding energy matters for the last four years. In particular, Palmer has assisted counties with electric and natural gas aggregation, specifically advising on questions relating to opt-out options. Mr. Long explained that Palmer's assistance has allowed counties to become better informed on energy issues, such as reducing energy costs and the implementation of conservation measures. In response to an inquiry from a CCAO member county, CCAO will advise the county that Palmer provides advisory services to the organization. A CCAO staff member and a Palmer representative will then go to the specific county to discuss options and procedures pertaining to the services in question. (Palmer Ex. 3 at 1-2; Tr. at 232-235.)

IV. PARTIES' LEGAL ARGUMENTS

- A. Count I - Palmer is in violation of Section 4928.08(B), Revised Code, which requires that any electric services company defined in Sections 4928.01(A)(9) and 4929.08, Revised Code, obtain certification to provide CRES within the state of Ohio. As a result of this alleged violation, Buckeye Energy seeks (1) the recession of all of the respondent's contracts to provide CRES within the state of Ohio, (2) restitution to all customers covered by those contracts, including damages, and (3) the payment of forfeitures for each violation.
- B. Count II - Palmer is in violation of Section 4929.20, Revised Code, which requires certification of a natural gas supplier and retail natural gas supplier. As a result of this alleged violation, Buckeye Energy seeks (1) the recession of all of the respondent's contracts to provide retail natural gas services within the state of Ohio, (2) restitution to all customers covered by those contracts, including damages, and (3) the payment of forfeitures for each violation.

1. Buckeye's legal arguments

Buckeye contended that Palmer's activities prior to its certification as a CRES and CRNGS provider constitute brokerage activities; thus, requiring that Palmer should have been certified for these activities during the time period at issue in the complaint. Specifically, Buckeye alleged that the respondent's conduct in the course of its business from the time of the passage of S.B. 3 in 2000 and H.B. 9 in 2001 through its certifications in September 2010 indicate that Palmer was a retail natural gas supplier and electric services company requiring certification by the Commission. (Buckeye Br. at 1-2.)

With respect to Palmer's electric activities, Buckeye focused on the definitions of an electric services company and retail electric service, which are defined in Sections 4928.01(A)(9) and 4928.01(A)(27), Revised Code, respectively. In particular, Buckeye highlighted that the retail electric service definition utilizes the language "any service" and encompasses "power brokerage service," "ancillary service," and "power marketing service." The complainant submitted that all of these services were actually performed by Palmer prior to its CRES certification in September 2010. (*Id.* at 4-5.)

With respect to Palmer's natural gas activities, the complainant focused on the definitions of retail natural gas supplier and retail natural gas service, pursuant to Sections 4929.01(M) and (N), Revised Code, respectively. In particular, Buckeye noted that a retail natural gas supplier encompasses anyone in the business of arranging for the supply of a CRNGS service to consumers and, specifically, includes a "marketer," "broker," and "aggregator." Additionally, Buckeye noted that, in accordance with Rule 4901:1-27-01(V), O.A.C., a retail natural gas brokerage service means assuming the contractual and legal responsibility for sales and/or arrangement for supply of competitive natural gas. (*Id.* at 2-3.)

Buckeye opined that Palmer falls under the classification of a retail natural gas supplier as it arranged for the supply of CRNGS during the time frames set forth in the complaint. Relative to the statutory language pertaining to the "arranging" of the supply of CRNGS, Buckeye submitted that there were numerous examples of arranging or arrangement services offered and performed by Palmer prior to obtaining certification. As examples, Buckeye pointed out that Palmer:

- (1) Assisted government entities to become certified governmental aggregators or recertified as governmental aggregators by providing advice and/or templates used in the aggregator certification process.
- (2) Prepared and/or reviewed documents that were filed with the Commission in order to become certified.

- (3) Dealt with incumbent and potential suppliers on behalf of governmental aggregators by obtaining and analyzing data related to the issuance of RFPs.
- (4) Negotiated terms and contracts, helped write or review notices or press releases in connection with the governmental aggregation programs, filed notices and press releases, and prepared or reviewed quarterly and annual report filings with the Commission.

(*Id.* at 3-4; Tr. at 32.)

Buckeye also identified several scenarios in which it believes Palmer acted as a broker and held itself out to the public as such. First, it pointed to Palmer's letterhead from May 8, 2002, which referenced "energy consultation, natural gas brokerage, and electrical rate management." (Buckeye Ex. 2; Tr. at 95-96.) Next, it referenced Palmer's website as it existed on May 21, 2010, in which the company described itself as "one of the first natural gas brokerage firms in the county" (Buckeye Exs. 1, 1-a, 1-b; Tr. at 95). Buckeye stated that the activities identified on Palmer's website, prior to it being certified by the Commission, denote that it was engaged in broker activities. Buckeye pointed out that Palmer indicated that its energy services included energy procurement, which encompassed buying, selling, and transporting; energy investment; energy contract negotiation for natural gas supply, interstate pipeline capacity, local utility delivery, electric purchase and sales, and gas utility pipeline bypasses. (Buckeye Ex. 1 at 2.)

As further support for its position, the complainant cited the testimony of Buckeye witness Bellish, reflecting that he witnessed a Palmer representative discuss broker services at a meeting with Sandusky government officials in January 2010 (Tr. at 303-310). Buckeye also relied on testimony of Mr. Bellish regarding the existence of competition between the complainant and Buckeye in Lucas, Medina, and Erie counties, Ohio for the provision of energy procurement services, including, but not limited to, arranging a power supply, negotiating rates, assisting in the certification process, assisting with the ballot process, and collecting load data. (Tr. at 305-306.)

Buckeye considered that Palmer's application filed on August 5, 2010, requesting authority to provide natural gas brokerage service, (10-1082) to be self-incriminating, inasmuch as it was filed after the commencement of this complaint. In addition, Buckeye noted Palmer's admission that it has provided no new or additional services to its customers since obtaining certification. (Buckeye Br. at 9, citing Buckeye Exs. 27, 65; Tr. at 17.)

Buckeye asserted that there is little doubt that Palmer is more than simply a consultant. In support of its position, Buckeye referenced the language in the

Commission's March 30, 2000, Finding and Order at 3, 99-1609, wherein the Commission stated, in response to Palmer's recommendation that consultants be excluded from the certification rules:

[T]hese rules do not contemplate certifying consultants, but . . . are not intended to list the entities that are not covered by the rules. . . . if an applicant will rely on consultants or contractors to meet various requirements in these rules, the applicant may be required to provide evidence that the consultant or contractor can meet the requirements. Further, if a consultant or contractor performs any competitive service, it must be certified.

Buckeye opined that the language of the Commission's order in 99-1609 was written to prevent situations such as the one presented in this case. Buckeye interpreted the Commission's language as being very clear that an entity labeling itself as a consultant, but performing competitive services, must be certified. In support, Buckeye pointed to the activities and services Palmer provided in a competitive marketplace. Buckeye asserted that, if the Commission accepts Palmer's position in this case, a consultant loophole would be created, and many entities performing competitive services could avoid certification. (Buckeye Br. at 12-13.)

Regarding Palmer's assertion that there has been no demonstration of harm to the public, Buckeye responded that actual public harm is not a prerequisite for the purpose of satisfying the natural gas or electricity certification statutes. Rather, according to Buckeye, "it can and must be argued that violating a clear legal obligation . . . causes inherent harm to the public" (Buckeye Reply Br. at 2). Buckeye stated that it is important that entities, such as Palmer, be certified because they are relied upon by governmental aggregators, which are not professionals in the energy industry (*Id.* at 9, 10). Further, Buckeye pointed out that Palmer is actively competing against other broker entities, such as Buckeye (*Id.* at 6).

## 2. Palmer's legal arguments

Palmer asserted that it has not held itself out to the public as a power marketer, broker, aggregator, or independent power producer during the time frames addressed in the complaint. Specifically, Palmer stated that it has never engaged in the business of supplying or arranging for the supply of CRES in the state of Ohio. Further, Palmer represented that it never assumed the contractual and legal responsibility for the sale and/or arrangement for the supply of retail electricity with or without title. Additionally, Palmer stated that it did not act or hold itself out to the public as a CRNGS supplier and never engaged in the business of supplying or arranging for the supply of CRNGS to consumers in this state that are not mercantile customers. (Palmer Br. at 20-21, citing Palmer Ex. 1 at 2-3.)

Specific to its actual operations, Palmer stated that it has been providing energy and utility consulting services for more than 20 years to numerous governmental bodies, as well as industrial and commercial customers, through the offering of advice on energy markets and energy purchasing strategies (Palmer Br. at 1). According to the respondent, these consulting services included the development of an RFP process, the issuance of an RFP, and the evaluation of the various responses to the RFP. As part of its offered services, Palmer requested information from utilities so that the RFP process could be improved. (*Id.* at 7-8.) Palmer also estimated the savings for customers and provided recommendations for various communities on how to proceed with governmental policies (*Id.*, citing Tr. at 18-19). Palmer provided information as to the rules and regulations governing aggregation and, at the request of some communities, filled in the blanks on application forms, renewal forms, market monitoring reports, and annual reports (Tr. at 30, 54-55). While Palmer was involved with the process of reviewing opt-out letters for communities, it did not play a role in the filing of notices or press releases with the Commission (*Id.* at 8, citing Tr. at 50-52).

The respondent noted that, in response to comments it filed in 99-1609 and in *In the Commission's Promulgation of Rules for Competitive Retail Natural Gas Service and its Providers Pursuant to Chapter 4929, Revised Code*, Case No. 01-1371-GA-ORD, Finding and Order (November 20, 2001)(01-1371), the Commission found that the respective electric and natural rules did not contemplate certifying consultants (Palmer Reply Br. at 2-3). Palmer rejected the proposition that anyone who provides assistance with energy contracts, RFPs, or provides energy advice is a supplier of CRES or CRNGS. While Palmer acknowledged that it rendered advice and recommendations, it asserted that it never made the ultimate decision on how to arrange for or supply electric or natural gas service to consumers. Rather, each community made the decision as to who should be the supplier. In support of this assertion, Palmer pointed to evidence that the NOAC communities, for whom Palmer provided consulting services, selected different suppliers. (Palmer Br. at 8, citing Tr. at 44-45.)

Based on the definition of retail electric service set forth in Section 4928.01(A)(27), Revised Code, and the definition of retail natural gas supplier set forth in Section 4929.01(N), Revised Code, Palmer interpreted the retail electric service and retail natural gas supplier status as requiring the certified person or entity to make the ultimate decision as to how to arrange for or how to supply such commodity service to consumers. Therefore, Palmer claimed that, since it was not responsible for making the ultimate decision, it was not performing retail electric or natural gas service. (Palmer Br. at 26-27.) Similarly, Palmer stated that, while it held agency status and/or power of attorney for the purposes of working with CRNGS suppliers, natural gas companies, and transmission companies, it did not act independently of its principal (*Id.* at 21-22, citing Palmer Exs. 1, 4, 5).

The respondent averred that there is no legal foundation for Buckeye's claim of a violation of the Commission's rules by Palmer. Additionally, Palmer submitted that there is no record evidence of harm being incurred by the public. (Palmer Br. at 2.) Palmer offered that the complainant's definition of who should be certified by the Commission is extremely broad and would lead to absurd results. In support of its claim, Palmer pointed out that, if the Commission were to follow Buckeye's interpretation of the statute, that, if a third-party performs an array of services, it must be certified by the Commission, then all "attorneys, consultants, couriers and those who identify electric and natural gas suppliers as potential recipients of RFPs" would need to be certified. (*Id.* at 28-30.) Palmer also submitted that, to require consultants to be certified, would be problematic, since it would result in two schedulers having authority to make arrangements for power coming into the aggregation program (*Id.* at 26-27, citing Tr. at 198).

Palmer also argued that its activities as an energy consultant were known by the Commission, the Ohio Consumers' Counsel, aggregators, government aggregators, CRES and CRNGS suppliers, and that there have been no complaints by any of these entities regarding Palmer's consulting services. Palmer reasoned that all of these parties recognize and understand that energy consultants have a necessary role in the energy field and should not be required to be certified. (Palmer Br. at 30-31.)

Finally, Palmer asserted that it provided consulting services to many customers and entities that would be considered mercantile customers.<sup>4</sup> According to Palmer, mercantile customers may be served by entities that are not certified by the Commission. (*Id.*)

### 3. Commission ruling

Specific to the first two counts of this complaint, upon review of the evidence presented in this case, the Commission concludes that Buckeye has failed to sustain its burden of proving that, during the time period at issue in this complaint, Palmer engaged in activities as a provider of CRES and CRNGS without obtaining a certificate from the Commission, in violation of Sections 4928.08(B) and 4929.20(A), Revised Code, respectively.

In reviewing the record relative to the allegations set forth by Buckeye in the complaint, as amended, the Commission recognizes that our decision in this case is dependent on our interpretation of the definitions of electric services company and retail natural gas supplier, set forth in Sections 4928.01(A)(27) and 4929.01(N), Revised Code, respectively.

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<sup>4</sup> See Sections 4928.01(A)(19), and 4929.01(L), Revised Code.

In regard to the statutory definitions of "electric services company" and "retail natural gas supplier," based on the existence of the word "or" in both definitions, an entity satisfies the applicable definition by either being in the business of supplying or in the business of arranging for the supply of the service. See Applicable Law Section, *supra*. Based on a review of the record in this case, Buckeye has not shown that Palmer was involved in the actual supply of service prior to its certification.

Next, the Commission must focus its review on the question of whether Palmer was engaged in the business of arranging for the supply of CRES to ultimate consumers in this state, from the point of generation to the point of consumption or arranging for the supply of CRNGS to consumers in this state that are not mercantile customers. In performing this analysis, the Commission notes that while the term "arranging," is utilized in both Title 49, Revised Code, and Chapter 49, O.A.C., it is not defined, and neither party in this proceeding offered a specific definition.

For the purposes of properly defining the term "arrange," the Commission is cognizant of its prior determinations recognizing the classification of a "consultant." Specifically, the Commission recognizes that it has previously determined that an entity may operate in the capacity of a consultant without the need to be certified as a public utility provided it is not engaged in the performance of a competitive service. See 99-1609, Opinion and Order, March 30, 2000, at 3; 01-1371, Finding and Order, November 20, 2001, at 24. Based on this clarification, the Commission believes that, to be involved in "arranging" for the supply of CRES or CRNGS, an entity must be engaged in activity that exceeds the level of involvement of a consultant.

Specifically, the Commission agrees that the respondent's activities related to assisting communities with the Commission certification process, the completion of certification applications, and the filing of reports on behalf of clients were performed in the capacity as a consultant and that the evidence on the record in this case does not support a finding that Palmer's actions constitute the performance of a competitive service. In particular, the Commission notes that these activities are no different than the current treatment of consultants who perform similar services for clients across numerous utility industries regulated by the Commission. Additionally, we agree that the mere educating of communities regarding the aggregation process may be encompassed within its role of a consultant.

The Commission notes that Buckeye focuses a great deal of its attention on the fact that Palmer developed an RFP process; issued RFPs on behalf of its aggregator clients; evaluated the proposals that came back in response to the RFPs; dealt with incumbent suppliers on behalf of governmental entities by obtaining and analyzing data related to the issuance of RFPs; and estimated savings potential and made recommendations to the various communities that it represented (Tr. at 18, 26, 32, 39-40, 204-205; Buckeye Ex. 9). While the record reflects that these activities were performed

for the purpose of assisting in the clients' operations, the record does not reflect that the activities performed by Palmer in this regard rose to the level of Palmer itself engaging in the ultimate decision making process and entering into contractual obligations on behalf of its clients with respect to the provision of a competitive service. It is the Commission's duty to review the record in this case and determine if the evidence presented supports Buckeye's allegations of wrongdoing by Palmer. However, the evidence in this case indicates that Palmer served in the role of an advisor assisting its clients.

While the record does reflect that Palmer held agency status and/or power of attorney for the purpose of working with CRNGS suppliers, natural gas companies, and transmission companies, Buckeye failed to establish that Palmer contractually obligated its client for the supply of CRES and CRNGS. Furthermore, the evidence reflects that Palmer, while not a party to the supplier contracts, was compensated by some of its clients through the supplier contracts based on the volume of the gas and electricity delivered. However, there is no evidence on the record indicating that Palmer played any role in negotiating this term in the supplier contracts or that the term itself was even negotiable. Buckeye has presented no evidence that the manner of payment is dispositive as to whether an entity is operating as a consultant or a broker. Without further evidence to the contrary on the record, the Commission is not able to conclude that the mode of compensation alone is indicative that Palmer was operating as a broker and not merely a consultant.

Although Palmer's letterhead of May 8, 2002, noted that the respondent was engaged in natural gas brokerage and its web site, prior to Palmer becoming a certified provider, indicated that the company's services encompassed energy procurement, including buying, selling, and transporting and energy contract negotiation for services pertaining to natural gas supply and electric purchase and sales, the Commission finds these examples to be nothing more than circumstantial evidence (Buckeye Exs. 1-b, 2; Tr. at 93-96). In particular, the Commission finds that citations to Palmer's letterhead and website fail to establish the specific context for the referenced services. Specifically, it fails to establish that the respondent actually engaged in the provision of service consistent with Sections 4928.01(A)(27) and 4929.01(N), Revised Code.

Moreover, while the Commission recognizes that Palmer filed applications in 10-1081 and 10-1082 to become certified to provide electric aggregator/power broker and retail natural gas aggregator/broker services, respectively, such action does not signify that Palmer previously engaged in regulated activity in the absence of certification. Rather, in the absence of evidence to the contrary, the filing for certification is assumed to be an intention of a prospective business activity.

Notwithstanding the determinations set forth supra, the Commission recognizes that, pursuant to the Commission's existing electrical and natural gas rules (e.g.,

Chapters 4901:1-21 and 4901:1-29), there is ambiguity relative to distinguishing the activities of consultants and brokers. Therefore, the Commission believes it would be appropriate to further explore this issue in a subsequent Commission proceeding, including possibly in the context of the upcoming five-year review of Chapter 4901:1-29, O.A.C. One of the issues to be incorporated within this examination is the manner in which entities are compensated for their services and whether they receive compensation notwithstanding the fact that an aggregator program may not actually commence or is short-lived. Another possible issue for consideration could be an analysis of what are the obligations of the consultant to the extent that a supplier fails to provide the commodity required for the aggregation program.

As a final matter, the Commission notes Palmer's counterclaim that the Commission should suspend Buckeye's certification inasmuch as the complainant has engaged in deceptive and misleading acts by telling others that Palmer was required to be certified before engaging in consulting services. The Commission finds that this counterclaim should be denied inasmuch as, based on the record in this case, Palmer failed to meet its burden of proof regarding the alleged violations of Rules 4901:1-27-05 and 4901:1-29-05, O.A.C.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Buckeye is certified as a CRES provider and CRNGS aggregator/broker in the state of Ohio.
- (2) Palmer has been certified as a CRES provider and CRNGS aggregator/broker since September 8, 2010, and September 15, 2010, respectively.
- (3) Buckeye filed its complaint on May 21, 2010, as amended on September 24, 2010.
- (4) The complainant alleges that Palmer is in violation of Sections 4928.08 and 4929.20, Revised Code, by failing to obtain certification as a provider of CRES and CRNGS prior to September 5, 2010.
- (5) Palmer filed its counterclaim on June 9, 2010.
- (6) Palmer's counterclaim alleges that Buckeye violated Rules 4901:1-21-05(C) and 4901:1-29-05(C), O.A.C., resulting from its statements that were false, unfair, misleading, deceptive, or unconscionable in the marketing, solicitation, or sale of a competitive retail service.

- (7) An evidentiary hearing was held on April 11, 2011, and April 20, 2011.
- (8) Initial briefs were filed on May 12, 2011. Reply briefs were filed on May 23, 2011.
- (9) Section 4928.16, Revised Code, extends the Commission's jurisdiction under Section 4905.26, Revised Code, to CRES providers.
- (10) Section 4929.24, Revised Code, extends the Commission's jurisdiction under Section 4905.26, Revised Code, to CRNG providers.
- (11) In a complaint such as this one, the burden of proof rests with the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St. 2d, 189, 190, 214 N.E.2d 666, 667 (1966).
- (12) Based on the record in this matter, the complainant has failed to sustain its burden of proving that, prior to its certification on September 5, 2010, Palmer engaged in activities as a provider of CRES and CRNGS without obtaining certification from the Commission, in violation of Sections 4928.08(B) and 4929.20, Revised Code.
- (13) Based on the record in this matter, Buckeye has failed to sustain its burden of proof relative to its counterclaim

It is, therefore,

ORDERED, That, consistent with this Opinion and Order, Buckeye has failed to satisfy its burden of proof that Palmer violated Sections 4928.08 and 4929.20, Revised Code, by failing to obtain certification prior to September 5, 2010. It is, further,

ORDERED, That Palmer's counterclaim that Buckeye violated Rules 4901:1-21-05(C) and 4901:1-29-05(C), O.A.C., is denied, consistent with this Opinion and Order. It is, further,

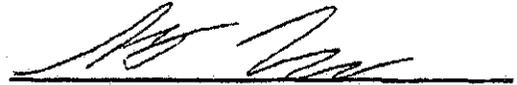
ORDERED, That, to the extent not addresses in this Opinion and Order, all other allegations and requested remedies are denied. It is, further,

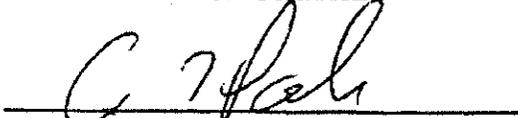
ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

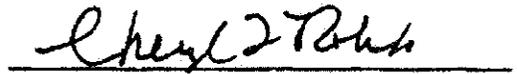
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Switchler, Chairman

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Paul A. Centolella

  
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Steven D. Lesser

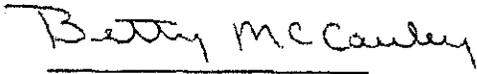
  
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Andre T. Porter

  
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Cheryl L. Roberto

JSA/JJT/dah

Entered in the Journal

**NOV 01 2011**

  
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Betty McCauley  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of )  
Buckeye Energy Brokers, Inc., )  
 )  
Complainant, )  
 )  
v. ) Case No. 10-693-GE-CSS  
 )  
Palmer Energy Company, )  
 )  
Respondent. )

DISSENTING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

Under the Commission's current Rules, I believe Palmer should have sought earlier certification as a power broker and a retail natural gas broker.

The case turns on whether, in the relationships with its municipal aggregation clients, Palmer engaged in the provision of competitive services as a power broker by "assuming the contractual and legal responsibility for the... arrangement for the supply of retail electric generation service to a retail customer..." or as a retail natural gas broker by "assuming the contractual and legal responsibility for the ... arrangement for the supply of competitive retail natural gas service to a retail customer ..." that is not a mercantile customer. Sections 4901:1-21-01(CC) and 4901:1-27-01(V), Ohio Administrative Code. The record indicates that Palmer developed the Request for Proposal (RFP) process for its clients, issued RFPs on behalf of its aggregator clients, evaluated proposals that came back in response to the RFPs, and negotiated with potential suppliers to determine if a better rate was available (Tr. at 38-49). These are steps that either a broker or consultant could perform in arranging for retail electric or natural gas supplies. When such actions are performed under a contract between a broker and a client (other than a mercantile gas customer), the broker would be providing a competitive retail electric or natural gas service under the Commission's rules.

The issue in this case is the underlying nature of the relationship between Palmer and its municipal aggregation clients. Palmer has characterized the relationship as a consulting relationship. However, the electric and gas aggregation supply contracts that are at the core of the complaint indicate that this characterization does not accurately depict the nature of the relationship. The complainant introduced electric supply contracts entered into in 2009 between First Energy Solutions Corporation and the following Palmer Energy municipal aggregation clients: Board of Lucas County

Commissioners (Exhibit 42), City of Maumee (Exhibit 43), City of Oregon (Exhibit 44), Lake Township (Exhibit 45), City of Perrysburg (Exhibit 46), City of Toledo (Exhibit 47), Village of Holland (Exhibit 48) and City of Norwood (Exhibit 50). Each agreement called for Palmer to be paid a fee of \$.00007 per kWh delivered to retail consumers under the contract. The complainant also introduced gas supply agreements entered into prior to Palmer's September 2010 certification between Interstate Gas Supply and the following Palmer clients: City of Toledo (Exhibit 15), Village of Holland (Exhibit 16), City of Oregon (Exhibit 17), Lucas County (Exhibit 18), City of Maumee (Exhibit 19), Lake Township (Exhibit 20), City of Norwood (Exhibit 21) and Perrysburg Township (Exhibit 22). Each of these agreements specified that Palmer is to be paid a fee of \$.0015 per CCF of gas delivered to retail consumers. These provisions were included at the request of Palmer's clients (Tr. at 120). And, other than a separate agreement between Palmer and NOAC that had ended by 2001, there were no agreements in which Palmer would be paid up front by any aggregation client in advance of a supply contract (*Id.* at 26 -28). Although Palmer was not itself a party to the supply agreements, the specified payments to Palmer are persuasive evidence of the existence and nature of verbal or implicit agreements between Palmer and its aggregation clients.<sup>1</sup> It is apparent that under verbal or implied contracts between Palmer and its aggregation clients Palmer would take steps to arrange for supply contracts in exchange for fees that would be paid contingent upon the successful delivery of electricity or gas to retail consumers. The distinguishing feature of a broker's contract, as opposed to a consultant relationship, is that the broker is paid a brokerage, commission, or fee that is contingent on the successful completion of a contract for the purchase or sale of a good or service. Contingent compensation alters the financial incentives and gives the broker a financial interest in the completion of a transaction. By contrast, a consultant that was paid solely for its service and expertise would be financially neutral regarding whether the supply contract and retail deliveries were completed. Palmer's compensation was contingent on the deliveries of electricity or gas under successfully completed supply contracts. When Palmer first entered into agreements or understandings that its compensation would be contingent upon the completion of the supply contracts that it was helping to negotiate and the successful delivery of electricity or gas to retail consumers, the firm should have sought certification as a retail power broker or a retail natural gas broker under the Commission's current Rules.

Although it initially failed to seek certification, Palmer subsequently has been certified to provide competitive retail electric and natural gas service. This is a case of first impression. The Commission has not previously provided guidance regarding the distinction between a consultant and a broker involved in competitive retail supply of

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<sup>1</sup> A contract may be implied in fact where the surrounding circumstances make it inferable that the contract exists as a matter of tacit understanding. *Hummel v. Hummel* (1938), 133 Ohio St. 520, 525, 14 N.E.2d 923, 925-926; *Legros v. Tarr* (1989), 44 Ohio St.3d 1, 540 N.E.2d 257, 263.

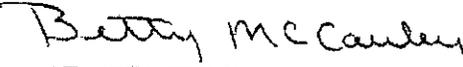
electricity and natural gas. Given the testimony from Palmer's clients and the lack of evidence of complaints from consumers served under the aggregation agreements that Palmer helped to set up, I find that no further remedy is appropriate at this time, beyond the certifications which Palmer already has obtained.

  
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Paul A. Centolella

/dah

Entered in the Journal

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Betty McCauley  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Buckeye )  
Energy Brokers, Inc., )  
 )  
Complainant, )  
 )  
v. ) Case No. 10-693-GE-CSS  
 )  
Palmer Energy Company, )  
 )  
Respondent. )

ENTRY ON REHEARING

The Commission finds:

- (1) On November 1, 2011, the Commission issued its Opinion and Order (Order) in this case. Among other things, the Commission found that, based on the record in this matter, Buckeye Energy Brokers, Inc. (Buckeye or complainant) failed to sustain its burden of proving that during the time period at issue in the complaint, Palmer Energy Company (Palmer or respondent) engaged in activities as a provider of competitive retail electric service (CRES) and competitive retail natural gas service (CRNGS) without obtaining a certificate from the Commission in violation of Sections 4928.08(B) and 4929.20(A), Revised Code, respectively.
- (2) On December 1, 2011, Buckeye filed an application for rehearing of the Commission's November 1, 2011, Order. Buckeye asserts that the Order is unjust and unreasonable based on the following assignments of error:
  - (a) The Commission exceeded its powers and jurisdiction in its Order by effectively creating a consultant loophole, which is not provided for by the General Assembly in either Section 4928.01, Revised Code, et seq. or Section 4929.01, et seq., Revised Code.
  - (b) The Commission's Order is internally inconsistent in its interpretation and application of the terms

ATTACHMENT B

"competitive service" and "arranging," and its creation of the consultant loophole.

- (c) The Commission attempted to define the activities of a consultant, while at the same time acknowledging that its rules contain an ambiguity relative to distinguishing the activities of consultants and brokers.
- (d) The Commission attempted to define the activities of a consultant under its rules despite the fact that the Commission rules do not reference the term "consultant."
- (e) The Commission erred by finding that "arranging," as defined by the applicable statutes, must exceed the level of involvement of a consultant when that is not a reference point under the statutes.
- (f) The Commission erred by using the actions of a consultant as a reference point for determining what constitutes "arranging," absent any support under the applicable statutes.
- (g) The Commission erred by finding, without any support under the applicable statutes, that actions taken by a consultant and actions that are competitive services are mutually exclusive.
- (h) The Commission erred by excluding certain actions from the definition of "arranging," including Palmer's admitted participation in the Request for Proposal (RFP) process on behalf of its customers.
- (i) The Commission erred by failing to adequately consider the significance of the manner of Palmer's compensation when determining that Palmer acted as a consultant rather than a broker.
- (j) The Commission erred by finding that Palmer's admissions that it was a broker contained on its website, company letterhead, and certification application were merely circumstantial evidence, and not admissions against interest.

- (k) The Commission erred by finding that Palmer's 2010 certification applications were merely anticipatory of future actions, as opposed to a corrective measure designed to cut its losses for failure to follow the law and become certified in the past.
  - (l) The Commission erred by finding that Buckeye failed to meet its burden of proof that Palmer was engaging in competitive services and arranging for the provision of CRES or CRNGS prior to receiving its certification.
  - (m) The Commission erred by finding that Buckeye failed to meet its burden of proof, especially when it was the Commission's rulings on discovery issues and the hearing subpoena that effectively prevented the complainant from presenting all available evidence.
- (3) On December 8, 2011, Palmer filed its memorandum contra Buckeye's application for rehearing.
  - (4) Pursuant to its Entry on Rehearing of December 14, 2011, the Commission granted Buckeye's application for rehearing for further consideration of the matters specified therein.
  - (5) In its first assignment of error, Buckeye contends that, in its Order, the Commission exceeded its powers and jurisdiction by effectively creating a consultant loophole which is not provided for by the General Assembly in either Section 4928.01, Revised Code, et seq. or Section 4929.01 et seq., Revised Code.

In support of its first assignment of error, Buckeye focuses on the Commission's statement that "to be involved in 'arranging' for the supply of CRES and CRNGS, an entity must be engaged in activity that exceeds the level of involvement of a consultant" (Application for Rehearing at 2, citing Order at 18). In particular, Buckeye submits that a consultant loophole does not exist, inasmuch as no such loophole was created by the applicable statutes or rules without focusing on the activities of the entity [i.e., Chapters 4928, 4929, Revised Code; Chapters 4901:1-21, 4901:1-29, Ohio Administrative Code (O.A.C.)] (Application for Rehearing, Memorandum in Support at 2-3).

Buckeye opines that, through its Order, the Commission has created a loophole whereby an entity that calls itself a consultant

may avoid the applicable statutory requirements (*Id.* at 2). Specifically, Buckeye avers that the Commission has “improperly placed its focus on Palmer’s self-professed label of consultant, rather than upon its undeniably competitive services and actions during the precertification period” (*Id.*).

Buckeye reiterates its belief that the Commission previously addressed the consultant loophole argument in context of arguments raised by Palmer in Case Nos. 99-1609-EL-ORD, *In the Matter of the Commission’s Promulgation of Rules for Certification of Providers of Competitive Retail Electric Services, Pursuant to Chapter 4928, Revised Code (99-1609)*, and 01-1371-GA-ORD, *In the Matter of the Commission’s Promulgation of Rules for Competitive Retail Natural Gas Service and its Providers Pursuant to Chapter 4929, Revised Code (01-1371)*. In particular, Buckeye asserts that, in these cases, the Commission indicated that a contractor will be required to be certified if it performs a competitive service (*Id.* at 3, citing 99-1609, Finding and Order, March 30, 2000, at 3; 01-1371, Finding and Order, November 20, 2001, at 24).

Consistent with its position relative to this assignment of error, Buckeye asserts that the Ohio Supreme Court recently addressed whether the Commission can create and apply a classification by an opinion and order when the classification is not specifically delineated in a statute or rule. Specifically, Buckeye opines that, based on *In re Application of Columbus Southern Power Co.* (2011), 128 Ohio St.3d 512, 520, 2011-Ohio-1788, at 31-35, the Ohio Supreme Court determined that the Commission’s creation of categories and classifications which were not contemplated by the Revised Code or the O.A.C. was not a result that the General Assembly intended and, therefore, the plain language of the statute controls. (*Id.* at 3-4.)

- (6) In response to Buckeye’s first assignment of error, Palmer submits that the Commission did not create a loophole for consultants through its Order. Rather, Palmer asserts that consultants have existed long before Buckeye filed its complaint in this proceeding and that there is no statute prohibiting, restricting, or limiting a CRES provider or CRNGS provider from retaining a consultant (Memorandum Contra at 2-3). Palmer asserts that, to the extent a consultant engages in typical consultant-related activities, it is not converted into a CRES or CRNGS supplier. In support of its position, Palmer recognizes that, while the General Assembly could have required consultants who are retained by CRES or CRNGS

providers to be certified, it did not. Additionally, Palmer asserts that the General Assembly did not prohibit, restrict, or limit the use of consultants by CRES or CRNGS providers or limit the type of consultant that could be retained. (*Id.* at 4, 6.)

Palmer dismisses Buckeye's claim that *In re Application of Columbus Southern Power Co.*, supports the argument that the Commission abused its own jurisdiction and power by exceeding the authority granted by the General Assembly and then by failing to follow its own rules. In particular, Palmer states that the facts and applicable statutes in the current case are distinguishable from that of the cited proceeding. Further, Palmer opines that, rather than creating a consultant loophole, the Commission simply interpreted its own rules. (*Id.* at 6.)

- (7) With respect to Buckeye's first assignment of error, the application for rehearing should be denied. Contrary to Buckeye's assertions regarding the establishment of a consultant loophole in this case, the Commission concludes that its determination in this case was consistent with our March 30, 2000, Finding and Order in 99-1609 and our November 20, 2001, Finding and Order in 01-1371. Specifically, in both of these orders, the Commission stated that, while the applicable rules do not contemplate certifying consultants, this clarification does not apply to instances where a consultant or contractor performs a competitive service consistent with the rules. In those scenarios, the Commission indicated that the consultant or contractor will be required to be certified (99-1609, Finding and Order at 3; 01-1371, Finding and Opinion and Order at 24). Therefore, the Commission in this case did nothing more than apply the existing rules and determined that, based on the record presented in this case, Palmer was not engaged in the provision of a competitive service.
- (8) In its second assignment of error, Buckeye contends that the Commission's Order is internally inconsistent in its interpretation and application of the terms "competitive service" and "arranging" and its creation of the consultant loophole.

In support of its second assignment of error, Buckeye submits that, while the Commission recognizes its prior holdings with respect to the classification of a consultant, discussed *supra*, the Commission disregarded its prior holdings and, instead, issued an Order that is internally inconsistent and effectively permits the creation of a consultant loophole which is in conflict with the applicable

certification statutes. (Application for Rehearing, Memorandum in Support at 4).

Relative to its position on this issue, Buckeye notes that the Commission, in its Order, recognized that the key question to be decided is whether or not Palmer arranged for the supply of CRES or CRNGS to customers (*Id.* at 5, citing Order at 18). Buckeye also highlights that in its decision in this case, the Commission ultimately determined that, since a consultant does not arrange for the supply of CRES or CRNGS, it does not need to be certified. Buckeye submits that this determination is inconsistent with the Commission's determinations in 99-1609 and 01-1371 that the classification of a consultant is irrelevant to the questions of whether the consultant is engaged in the performance of a competitive service or arranging for the supply of CRES or CRNGS. (*Id.* at 4-5.)

- (9) In response, Palmer submits that, rather than simply relying on the respondent's self-defined classification of "consultant," the Commission reviewed the record and determined that Palmer acted in the role of consultant/adviser and not as the ultimate decision-maker (Memorandum Contra at 7-8).
- (10) With respect to Buckeye's second assignment of error, the application for rehearing should be denied. In reaching this determination, the Commission finds that Order in this case is consistent with its determinations in both 99-1609 and 01-1371. In particular, the Commission highlights that, pursuant to 99-1609 and 01-1371, a consultant is not required to be certified unless it is engaged in the provision of a competitive service, which includes the arranging of CRES or CRNGS. Therefore, it is not the mere claim of being a consultant that results in the need for certification as CRES or CRNGS provider. Rather, an analysis must be performed as to the nature of an entity's operations in order to ascertain whether certification is required. Based on the analysis performed in our Order, the Commission determined that the record in this case did not support Buckeye's allegation that the nature of Palmer's activities during the time in question did not rise to the level of provisioning a competitive service.
- (11) In its third assignment of error, Buckeye asserts that the Commission attempted to define the activities of a consultant, while at the same time acknowledging that its rules contain an

ambiguity relative to distinguishing the activities of consultants and brokers.

In support of its position, Buckeye submits that it is inappropriate for the Commission to recognize that the current electrical and natural gas rules contain an ambiguity relative to distinguishing the activities of consultants and brokers, while at that same time determining that Palmer's activities were that of a consultant and, therefore, not competitive. Specifically, Buckeye questions how the Commission can resolve the identified ambiguity by simply defining the pivotal term of consultant in the context of this case. Buckeye submits that the reason why the rules do not distinguish the activities of a consultant from those of a broker is because the rules do not even contemplate the classification of a consultant. Based on its position, Buckeye believes that the Commission's focus should be on Palmer's actions and not on its self-defined label as a consultant. (Application for Rehearing, Memorandum in Support at 6.)

- (12) Palmer responds that, rather than attempting to define the activities of a consultant or relying on the self-defined "consultant" classification, the Commission analyzed the activities that comprise being in the business of supplying or arranging for the supply of electricity or natural gas and then determined that the complainant had not satisfied its burden of proof relative to the allegations set forth in the complaint. According to Palmer, instead of finding that Buckeye's activities constituted being in the business of supplying or arranging for the supply of electricity or natural gas, the Commission determined that Palmer's activities were more akin to being a consultant or advisor. (Memorandum Contra at 7-8.)
- (13) With respect to Buckeye's third assignment of error, the application for rehearing should be denied. As discussed supra, the Commission, in its orders in 99-1609 and 01-1371, recognized that a "consultant" may or may not require certification depending on whether or not it performs a competitive service. Rather than relying on Buckeye's self-defined label as a consultant, our Order reflects a detailed analysis of the nature of Buckeye's activities, as set forth in the record, with respect to the statutory definitions of electric services company and retail natural gas supplier as set forth in Sections 4928.01(A)(27) and 4929.01(N), Revised Code, respectively. From this analysis, the Commission determined that Buckeye's activities, as described on the record in this case, for the

time frame in question, did not signify the provision of a competitive service.

In response to the concern raised by Buckeye regarding the Commission reaching its determination in this case, while at the same time identifying the ambiguity regarding consultants and brokers, the Commission notes that its decision is premised on the current record in both this case and the existing rules resulting from the proceedings in 99-1609 and 01-1371. To the extent there is a change in the rules relative to the definition of brokers, this will occur on a going forward basis subsequent to the completion of any future applicable rules proceedings.

- (14) In its fourth assignment of error, Buckeye avers that the Commission attempted to define the activities of a consultant under its rules despite the fact the Commission rules do not reference the term "consultant."

In support of this assignment of error, Buckeye points out that, in its Order, the Commission reviewed the activities of Palmer and determined that they are encompassed within the role of a consultant. Notwithstanding this determination, Buckeye asserts that there is no rule, statutory provision, or any guidance to determine whether certain activities constitute that of a consultant. Therefore, Buckeye believes the Commission has overstepped its authority by attempting to define a term. (Application for Rehearing, Memorandum in Support at 7.)

- (15) Palmer responds that the Commission did not attempt to define a "consultant" or what activities constituted a consultant. Instead, Palmer submits that the Commission relied upon its interpretation of the definitions of electric services company and retail natural gas supplier as set forth in Sections 4928.01(A)(27) and 4929.01(N), Revised Code. (Memorandum Contra at 9-10).
- (16) With respect to Buckeye's fourth assignment of error, the application for rehearing should be denied. As discussed supra, the Commission's analysis in its Order was not premised on an undefined term of "consultant" but, instead, focused on the nature of Palmer's activities, as explained on the record in this case, in the context of Sections 4928.01(A)(27) and 4929.01(N), Revised Code. See, e.g. Order at 19.
- (17) In its fifth assignment of error, Buckeye contends that the Commission erred by finding that "arranging," as defined by the

applicable statutes, must exceed the level of involvement of a consultant. Specifically, Buckeye contends that the relied upon standard is not a reference point under the applicable statutes.

In support of its position, Buckeye asserts that there is no support for the proposition that a consultant cannot be involved in arranging. Buckeye opines that the operative analysis in this case is to determine if an entity is engaged in providing competitive services through the arranging to provide electrical or natural gas service. Rather than performing such analysis, Buckeye concludes that the Commission simply found that arranging and consulting are mutually exclusive and that Palmer is merely consulting. Rather than determining whether arranging and consulting are mutually exclusive, Buckeye opines that the Commission should have determined whether Palmer's actions constitute arranging for the provision of CRES or CRNGS. (Application for Rehearing, Memorandum in Support at 8.)

- (18) Palmer asserts that the Commission, relying upon its March 30, 2000, Finding and Order in 99-1609 and its November 20, 2001, Finding and Order in 01-1371, properly defined the term "arranging" in its Order in this matter consistent with its previous rulings (Memorandum Contra at 10-11).
- (19) With respect to Buckeye's fifth assignment of error, the application for rehearing should be denied. As discussed supra, the Commission's Order focused on the analysis of the nature of Palmer's activities during the time frame in question as set forth in the evidence in this case. As part of its analysis, the Commission engaged in exactly what Buckeye advocates, an analysis of whether Palmer's actions constitute arranging for the provision of CRES or CRNGS. See Order at 18-19. Further, the Commission notes that the intent of its Order at p. 18 was to establish that generally consultants are not required to be certified, unless they engage in activity that is proven to rise to a level that satisfies the requisite statutory criteria.
- (20) In its sixth assignment of error, Buckeye contends that the Commission erred by using the actions of a consultant as a reference point for determining what constitutes "arranging," absent any support under the applicable statutes. In support of its position, Buckeye contends that, in actuality, the Commission has, absent any legal foundation, classified certain activities as consulting services. Similarly, Buckeye believes the Commission

has used the term "consultant" as a reference point for what constitutes arranging, inasmuch as, based on the Commission's Order, in order to be involved in arranging, an entity must exceed the level of involvement of an consultant. (Application for Rehearing, Memorandum in Support at 8-9.)

- (21) In response to Buckeye's fifth assignment of error, Palmer asserts that the Commission did not use the actions of a consultant as the key reference point in making its decision. Rather, Palmer contends that, if the activities performed rose to the level of engaging in an ultimate decision-making process and entering into contractual obligations on behalf of its clients, then the Commission could find that the entity was providing a competitive service. Palmer opines that the Commission, upon weighing the evidence in this case, determined that the respondent's activities did not rise to level of ultimate decision-making and entering into contractual obligations on behalf of clients. (Memorandum Contra at 12-13.)
- (22) With respect to Buckeye's sixth assignment of error, the application for rehearing should be denied. As discussed supra, the Commission's analysis in its Order was not premised on an undefined term of "consultant" but, instead, focused on the nature of Palmer's activities, as set forth on the record, in the context of Sections 4928.01(A)(27) and 4929.01(N), Revised Code. Based on the record presented in this case, the Commission found that Palmer was not engaged in the supplying or arranging for the supply of a competitive service in the state of Ohio.
- (23) In its seventh assignment of error, Buckeye contends that the Commission erred by finding, without any support under the applicable statutes, that actions taken by a consultant and actions that are competitive services are mutually exclusive. In support of its position, Buckeye opines that the Commission's decision results in the conclusion that certain activities are either consulting services or competitive services, but never both. Buckeye finds this determination to be problematic in light of the fact that the term "consultant" is not defined. Buckeye also believes that such an approach provides the public with no guidance as to which actions will be considered consulting services and which actions are competitive services. (Application for Rehearing, Memorandum in Support at 10.)
- (24) Citing to the Commission's Orders in 99-1609 and 01-1371, Palmer responds that the Commission did not find that actions taken by a

consultant and actions that are competitive services are mutually exclusive. Rather, Palmer believes the Commission contemplated that, to the extent a consultant or contractor performed any competitive service, it must be certified. (Memorandum Contra at 13-14.)

- (25) With respect to Buckeye's seventh assignment of error, the application for rehearing should be denied. In reaching this determination, the Commission agrees with Palmer that our Finding and Orders in 99-1609 and 01-1371 do not stand for the proposition that actions taken by a consultant and actions that are competitive services are mutually exclusive. Rather, although many activities that a consultant may engage in do not constitute a competitive service, to the extent that it does perform a competitive service, it must be certified.
- (26) In its eighth assignment of error, Buckeye contends that the Commission erred by excluding certain actions from the definition of "arranging," including Palmer's admitted participation in the RFP process on behalf of its customers. In support of its position, Buckeye notes that Palmer admitted that it had extensive participation in its clients' RFP processes. Buckeye believes that it is unduly restrictive to determine that, while an entity has performed a number of functions, it is not a broker simply because it did not make the final decision on behalf of the client. Specifically, Buckeye points out that Palmer developed the proposal process, prepared and issued RFPs, evaluated the proposals, analyzed data on behalf of clients, and eventually made recommendations to the client. (Application for Rehearing, Memorandum in Support at 11.)
- (27) Palmer responds that the testimony reflects that, as a consultant, it merely made recommendations and did not make the ultimate decisions involving supplying or arranging for commodity service. Palmer submits that, if it was indeed making the ultimate decision as to the selection of suppliers or arranging for suppliers, certain community members of the Northwest Ohio Aggregation Coalition would not have selected different suppliers. (Memorandum Contra at 14-16.)
- (28) With respect to Buckeye's eighth assignment of error, the application for rehearing should be denied inasmuch as the complainant has failed to raise any new arguments for the Commission's consideration. Moreover, the Commission continues

to emphasize that our conclusion in this case is based on the evidence of record, which did not indicate that Buckeye acted inappropriately during the time period in question.

- (29) In its ninth assignment of error, Buckeye contends that the Commission erred by failing to adequately consider the significance of Palmer's compensation when determining that Palmer was acting as a consultant and not a broker. In support of its position, Buckeye notes that the Order identified that Palmer was compensated by some clients through the supplier contracts based on the volume of gas and electricity delivered. Buckeye believes that this fact should not have been viewed in a vacuum but, rather, in conjunction with the other evidence supporting the claim that Palmer was either acting as a broker or otherwise arranging to provide competitive services. (Application for Rehearing, Memorandum in Support at 12-13)
- (30) Palmer responds that the Commission did consider the mode of compensation and determined that the mode of compensation alone was not determinative of whether an entity was operating as broker or as a consultant (Memorandum Contra at 16-18).
- (31) With respect to Buckeye's ninth assignment of error, the application for rehearing should be denied inasmuch as the complainant has failed to raise any new arguments for the Commission's consideration. As stated in our Order, there is no evidence of record indicating that Palmer played any role in negotiating the compensation provision in the contracts or that such provision was even negotiable. Moreover, Buckeye presented no evidence that would indicate that the manner of payment alone is indicative that Palmer operated as a broker.
- (32) In its tenth assignment of error, Buckeye asserts that the Commission erred by finding that Palmer's numerous admissions that it is a broker (i.e., website, letterhead, certification applications) were merely circumstantial evidence, as opposed to admissions against interest. Specifically, Buckeye submits that an admission against interest is not circumstantial evidence but, rather, is direct evidence and is conclusive of an issue in dispute in this case and should not be disregarded. At the very least, Buckeye contends that Palmer is guilty of misleading the public by holding itself out to be a broker, when it is not certified to do so. (Application for Rehearing, Memorandum in Support at 14.)

- (33) Palmer responds that there is no admission against interest with respect to the letterhead, the website, or the application for a certificate. Palmer asserts that the Commission properly weighed all of the evidence and determined that the website, the May 2002 letter, and the certificate application did not reflect any evidence that Palmer was engaging in CRES or CRNGS. (Memorandum Contra at 19-20.)
- (34) With respect to Buckeye's tenth assignment of error, the application for rehearing should be denied. As we noted in the Order, mere citation to Palmer's letterhead and website by Buckeye does not establish that Palmer engaged in the provision of CRES or CRNGS. On rehearing, Buckeye has not raised any argument that was not thoroughly considered in the Order.
- (35) In its eleventh assignment of error, Buckeye states that the Commission erred by finding that Palmer's applications for certification were merely anticipatory of future action instead of remedial in nature to address its failure to comply with existing requirements. In support of its position, Buckeye highlights that Palmer's certification applications were filed after the commencement of this complaint case. Additionally, Buckeye calls attention to the fact that Palmer acknowledged that it has provided no new or additional services since obtaining certification. (Application for Rehearing, in Memorandum in Support at 15.)
- (36) Palmer, in response to this assignment of error, asserts that there is no evidence to suggest that the certification applications were filed to validate prior activity or "to cut losses" (Memorandum Contra at 20).
- (37) With respect to Buckeye's eleventh assignment of error, the application for rehearing should be denied. Buckeye failed to substantiate its allegation concerning Palmer's motives for requesting certification when it did. As we concluded in the Order, in the absence of evidence to the contrary, the filing of certification is assumed to be in anticipation of a prospective business activity.
- (38) In its twelfth assignment of error, Buckeye argues that the Commission erred by finding that Buckeye failed to meet its burden of proof that Palmer was engaging in competitive services and arranging for the provision of CRES or CRNGS prior to receiving its certification. Based on the evidence in this case, Buckeye submits that there is no legal basis for the Commission to find that Buckeye did not meet its burden of proof. In particular,

Buckeye submits that Palmer admitted that it took every action to arrange for the contracts except for making the final decision and signing the final contract. Based on the various activities that Palmer engaged in, Buckeye questions what else it would take for an entity to be engaged in the arranging of service. (Application for Rehearing, in Memorandum in Support at 15-17.)

- (39) In response, Palmer believes that, based on the Commission's analysis, it is clear that the Commission was attempting to determine whether Palmer engaged in competitive services or arranged for the provision of CRES or CRNGS (Memorandum Contra at 20-21, citing Order at 18). Palmer believes that the Commission analyzed each of the arguments raised and presented clear reasons why Palmer's activities did not constitute a service involving the supplying and arranging for the supply of electricity or natural gas service to consumers (*Id.* at 23). Palmer calls attention to the fact that, while the Commission considered the respondent's RFP activities, it determined that they did not perform the function of engaging in the ultimate decision-making process and entering into contractual obligation on behalf of its clients (*Id.* at 21).

Additionally, Palmer asserts that there is no specific definition of "arrange" and the Commission recognized that its decision in this case was dependent upon its interpretation of the definitions of electric services company and retail natural gas supplier. Palmer also highlights that the Commission recognized that it had previously determined that an entity may operate in the capacity of a consultant without the need to be certified as a public utility, provided it was not engaged in the performance of a competitive service. (*Id.* at 22.)

- (40) With respect to Buckeye's twelfth assignment of error, the application for rehearing should be denied. Contrary to Buckeye's opinion, there was not definitive evidence presented on the record in this case to establish that Palmer acted inappropriately in contravention of statutes and/or Commission's rules. The Commission must rely squarely on the evidence presented in this case and not on speculation or conjunction. In that the complainant has failed to raise any arguments for the Commission's consideration, which were not thoroughly considered in our Order, Buckeye's twelfth assignment of error is without merit.

(41) In its thirteenth assignment of error, Buckeye avers that the Commission erred by finding that the complainant failed to meet its burden of proof. Buckeye believes that this is especially true in light of the Commission's rulings on discovery issues and the trial subpoena. In particular, Buckeye believes that such rulings prevented it from presenting all of the available evidence and rewarded Palmer's stonewalling of the discovery and trial process. Buckeye recounts how, prior to the hearing in this case, a subpoena duces tecum was issued compelling Mark Frye's attendance and testimony in this case, as well requiring him to bring specified documentation. Buckeye appears to argue that, although the Commission granted Palmer's motion to quash, the information addressed in the motion is the very information that the Buckeye required in order to satisfy the burden of proof that the Commission has determined that the complainant did not meet. (Application for Rehearing, Memorandum in Support at 17-18).

(42) In regard to the issuance of the trial subpoena and the requested five categories of documents, Palmer responds that the issuance of subpoenas is ministerial in nature. Palmer notes that, on March 16, 2011, it filed a motion to quash or limit the subpoena issued to Mr. Frye in order that Mr. Frye not be required to bring any documents to the hearing beyond what was already produced in discovery. Palmer highlights that, in its March 16, 2011, motion, it had asserted that the documents sought in the subpoena were much broader than the scope of documents previously provided to Buckeye.

Palmer contends that the attorney examiner's Entry of March 30, 2011, granting Palmer's motion to quash was correct and appropriate. Palmer further points out that Buckeye neither filed a motion to compel nor took an interlocutory appeal from the Entry of March 30, 2011. (Memorandum Contra at 28).

(43) With respect to Buckeye's thirteenth assignment of error, the Commission concludes that application for rehearing should be denied. To the extent that Buckeye sought to object to the attorney examiner's Entry of March 30, 2011, it should have filed an interlocutory appeal of that ruling or raised the issue in its brief, or another appropriate filing as provided in Rule 4901-1-1-15(F), O.A.C.

It is, therefore,

ORDERED, That the application for rehearing be denied in accordance with the findings above. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

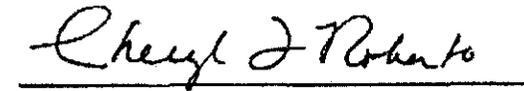
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

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Paul A. Centolella

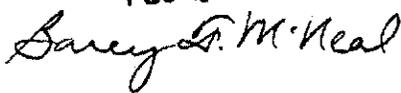
  
Steven D. Lesser

  
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Entered in the Journal

FEB 23 2012  
  
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Barcy F. McNeal

Barcy F. McNeal  
Secretary