

**In The
SUPREME COURT OF OHIO**

Buckeye Energy Brokers, Inc.,

Appellant,

v.

**The Public Utilities Commission of
Ohio**

and

Palmer Energy Company,

Appellees.

Case No. 2012-668

On appeal from the Public Utilities
Commission of Ohio, Case No. 10-693-
GE-CSS, *In the Matter of the Complaint
of Buckeye Energy Brokers, Inc. v.
Palmer Energy Company.*

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Matthew Yackshaw (0019252)

Counsel of Record

John S. Kaminski (0076971)

Day Ketterer Ltd.

Millennium Centre-Suite 300

200 Market Avenue North

P.O. Box 24213

Canton, OH 44701-4213

330.455.0173 (telephone)

330.455-2633 (fax)

myackshaw@day-ketterer.com

jskaminski@day-ketterer.com

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

Michael DeWine (0009181)

Ohio Attorney General

William L. Wright (0018010)

Section Chief

Thomas W. McNamee (0017352)

Counsel of Record

Devin D. Parram (0082507)

Assistant Attorneys General

Public Utilities Section

180 East Broad Street, 6th Fl.

Columbus, OH 43215-3793

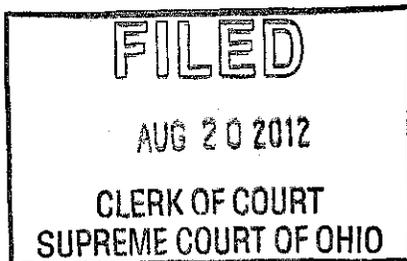
614.466.4397 (telephone)

614.644.8764 (fax)

thomas.mcnamee@puc.state.oh.us

devin.parram@puc.state.oh.us

**Counsel for Appellee,
The Public Utilities Commission of Ohio**



M. Howard Petricoff (0008287)

Counsel of Record

Stephen M. Howard (0022421)

Vorys, Sater Seymour & Pease

52 East Gay Street

P.O. Box 1008

Columbus, OH 43215

614.464.5414 (telephone)

614.719.4904 (fax)

mhpetricoff@vorys.com

smhoward@vorys.com

Counsel for Appellee,

Palmer Energy Company

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	:	
v.	:	On appeal from the Public Utilities
	:	Commission of Ohio, Case No. 10-693-
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Ohio	:	<i>of Buckeye Energy Brokers, Inc. v.</i>
	:	<i>Palmer Energy Company.</i>
and	:	
	:	
Palmer Energy Company,	:	
	:	
Appellees.	:	

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

This case is a simple example of the Public Utilities Commission of Ohio (“Commission”) performing its statutory duty by making a factual determination. A complaint was filed by Appellant Buckeye Energy Brokers, Inc. (“Buckeye” or “Appellant”) alleging that a competitor, Palmer Energy Company (“Palmer”), was acting as a certified retail electric service (“CRES”) and competitive retail natural gas service (“CRNGS”) provider without receiving prior authorization to do so from the Commission. Discovery was had, a hearing was held, and evidence was taken. The Commission

considered the evidence presented and found that the respondent had not acted as either a CRES or a CRNGS in the past. While the case was pending, the respondent became certified as a CRES and CRNGS. Because the respondent did not violate any registration requirement, is currently registered and cannot violate a registration requirement in the future, there is nothing to be done in this appeal. The matter is moot.

Buckeye failed to prove its case before the Commission. In this appeal, Buckeye merely asks the Court to reweigh evidence. This Court should not do so. Buckeye had its opportunity and failed. As such, the Court should affirm the Commission's order.

STATEMENT OF THE FACTS AND CASE

Buckeye is a certified competitive retail electric service ("CRES") and competitive retail natural gas service ("CRNGS") provider. In 2010, Buckeye filed a complaint with the Commission alleging that Palmer Energy Company ("Palmer") was in violation of R.C. 4928.08(B) and 4929.20(A). Buckeye Merit Brief at 1. Buckeye claimed that Palmer, who was not certified as a CRES or CRNGS provider when Buckeye filed its complaint, was performing CRES and CRNGS services. *Id.* More specifically, Buckeye claimed that Palmer performed electric and natural gas "brokerage" services while not

being certified with the Commission.¹ *Id.* at 10 and 15. Buckeye did not contend that Palmer actually supplied natural gas or electricity to consumers. *In the Matter of the Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Company*, Case No. 10-693-GE-CSS (Opinion and Order at 17-18) (November 1, 2011) (hereinafter “Opinion and Order”), Appellant’s App. at A-024 – A-025.² Thus, the central focus of the hearing was to determine if Palmer was “arranging” for the supply of natural gas or electricity for consumers.³ *Id.*

While the case was pending below, Palmer became certified as a CRES and CRNGS provider with the Commission. Opinion and Order at 6, Appellant’s App. at A-013. Palmer contends that it obtained certification during the hearing because it may

¹ O.A.C. 4901:1-21-01(CC) defines “power brokerage” as “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.” (emphasis added).

O.A.C. 4901:1-27-01(V) defines “retail natural gas brokerage service” as “the means assuming the contractual and legal responsibility for the sale and/or *arrangement* for the supply of competitive retail natural gas service to a retail customer in this state without taking title to the natural gas.” (emphasis added).

² References to appellee’s appendix (attached hereto) are denoted “App. at ___;” references to appellant’s appendix are denoted “Appellant’s App. at ___;” reference to appellee’s supplement are denoted “Supp. at ___.”

³ Although slightly unclear from its merit brief, Buckeye admits that the only factual dispute before the Commission was whether Palmer, as a broker, was *arranging* for the supply of natural gas or electric services. On page 16 of its merit brief, Buckeye claims that “Palmer was the quintessential *electric broker*” (emphasis added). On page 10 of its merit brief, Buckeye admits “the focus is on ‘arrangement’ for the supply CRNGS” while referring to the definition of “retail natural gas brokerage service.” Although Buckeye refers to “power marketing services” on page 15 of its merit brief, it undisputed that Palmer was not acting as a “marketer” because there is no evidence that Palmer ever sold retail electric generation services to customers or took title to electric power that was ultimately supplied to customers.

choose to perform competitive retail services in the future. Direct Testimony of Mark Frye at 6-7, Supp. at 16-17; Tr. 203-204, Supp. at 35-36. The focus of the hearing, however, was Palmer's conduct *before* becoming certified with the Commission. Opinion and Order at 6, Appellant's App. at A-013. During the hearing, Buckeye failed to introduce any evidence that Buckeye, Palmer's clients, or any member of the public was harmed by the Palmer's alleged failure to become certified. In addition, the evidence showed that Palmer was not arranging for the supply of natural gas or electricity. *Id.* at 18-19, Appellant's App. at A-025 - A-026. Rather, the evidence showed that Palmer merely assisted consumers and provided expert energy advice. *Id.* at 18-20, Appellant's App. at A-025 - A-027. The president of Palmer and two of Palmer's clients testified to this effect. *Id.* at 8-12, Appellant's App. at A-015 - A-019.

Based upon the evidence, the Commission determined that Buckeye failed to prove that Palmer arranged for the supply of natural gas or electric supplies to consumers. *Id.* at 17, Appellant's App. at A-024. Buckeye failed to show that Palmer made the ultimate decisions with regard to the supply of natural gas or electricity on behalf of its clients or that Palmer ever entered into contractual obligations on behalf of its clients regarding the provision natural gas or electric supplies. Thus, the Commission determined that Buckeye failed to prove that Palmer violated R.C. 4928.08(B) or 4929.20(A). *Id.* at 17, Appellant's App. at A-024. Buckeye then filed an Application for Rehearing, which was denied by the Commission. *In the Matter of the Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Company*, Case No. 10-693-GE-CSS (Entry on Rehearing

at 16) (February 23, 2012) (hereinafter “Entry on Rehearing II”), Appellant’s App. at A-048. Buckeye now brings this appeal.

ARGUMENT

Proposition of Law No. I:

The Court will not reverse a Commission decision unless prejudice is shown. *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 439, 605 N.E.2d 13 (1992).

Buckeye’s appeal should be dismissed because Buckeye did not suffer any prejudicial harm due to the Commission’s decision. Buckeye failed to allege that it suffered any harm in its merit brief. It also failed to clearly indicate what remedy it would like the Court to provide. This Court has long recognized that an “[a]ppeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors *injuriously affecting the appellant. . . .*” *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 439, 605 N.E.2d 13 (1992) (emphasis added). In *ODVN*, the Commission provisionally approved a phone company’s plan to offer caller ID and automatic callback services. *Id.* at 438. Although the phone company did not seek final approval of the new services and the Commission did not grant final approval of these services, the Ohio Domestic Violence Network (ODVN) appealed the Commission’s order granting provisional approval of the new services. *Id.*

The Court held that ODVN lacked standing to bring the appeal. The Court concluded that the orders complained of did not affect the ODVN’s substantial rights

because “ODVN’s present and immediate interests [were] not... affected.” *Id.* at 440.

The Court stated that “if we were to decide the merits of the commission’s orders on the basis of the record before us, we would be rendering the type of advisory opinion we found improper in *Ohio Contract Carriers Assn.*” *Id.* See also, *Ohio Contract Carriers Ass’n v. Pub. Util. Comm.*, 140 Ohio St. 160, 161, 42 N.E.2d 758 (1942) (“It is fundamental that appeal lies only on behalf of a party aggrieved. Unless an appellant can show that his rights have been invaded, no error is shown to have been committed by the court or body which entered the final order.”); and *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302, 595 N.E.2d 873 (1992) (the Court refused to reverse a Commission order where the appellant failed to establish that he was harmed by the Commission’s alleged due process violation).

Buckeye bears the burden of proving that it was harmed by the Commission’s decision. *Willoughby Hills v. C. C. Bar’s Sahara*, 64 Ohio St.3d 24, 26, 591 N.E.2d 1203 (1992). Buckeye failed to meet this burden. It did not allege, let alone identify any harm it suffered due to the Commission’s decision. Buckeye offered no evidence of harm in the hearing below. Further, there is no evidence that any of Palmer’s customers or the public was harmed by Palmer’s alleged failure to become certified. To the contrary, two of Palmer’s customers testified in support of Palmer and stated that Palmer provides valuable services. Direct Testimony of Leigh Herington at 2-4, Supp. at 20-22; Direct Testimony of Larry Long at 1-2, Supp. at 24-25; Tr. at 219, Supp. at 38.

Because Buckeye was not harmed, it is unable to identify any remedy that the Court could possibly provide. Rather, Buckeye simply asks the Court to “reverse and

remand” the case in order for the Commission to determine the appropriate “remedies.” Buckeye Merit Brief at 27. But Palmer is already certified. There is nothing left for the Commission to do. “Reversing and remanding” the Commission’s decision would be pointless, except to perhaps provide Buckeye with a moral victory against one of its competitors. This Court, however, should not be used to resolve quarrels between competitors. No justiciable case or controversy exists in this case and Buckeye’s appeal should be dismissed.

Proposition of Law No. II:

The Court will dismiss an appeal when the Court becomes aware an event that has rendered the appeal moot and will avoid performing a vain act when there is no real issue presented in the appeal. *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5990, 816 N.E.2d 238.

Not only has Buckeye failed to show prejudicial harm, but its appeal is moot because Palmer is now certified by the Commission. There is nothing for this Court or the Commission to do. Buckeye is simply seeking an advisory opinion from this Court regarding the correctness of the Commission’s decision. This Court, however, has long refused to entertain purely academic questions. The Court need not consider an issue, and will dismiss the appeal when an event renders the issue moot. *Miner v. Witt*, 82 Ohio St. 237, 238, 92 N.E. 21 (1910), followed by *Haggerman v. Dayton*, 147 Ohio St. 313, 325-326, 71 N.E.2d 246 (1947). This proposition of law has been applied to appeals from Commission orders. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238. The purpose of appeals is to correct errors

that injuriously affect the appellant, not to settle abstract questions that lack any current factual support. *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 605 N.E.2d 13 (1992). The duty of the Court is to decide actual controversies affecting parties under specific facts. *Cincinnati Gas & Electric Co.*, 103 Ohio St.3d at ¶ 17.

The Court has previously dismissed appeals from the Commission where a moot question is presented. In *Travis v. Pub. Util. Comm.*, 123 Ohio St. 355, 175 N.E. 586 (1931), a variety of parties appealed a Commission order allowing a railroad to cease operation. *Id.* at 357. After the Commission's order was entered, the railroad's assets were sold for scrap and its employees were laid off. *Id.* at 358. The Court dismissed the appeal, stating:

[T]he time and energy of this court should not be expended in doing a vain thing.... It is only the duty of this court to decide actual controversies where the judgment can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter at issue in the case before it.

Id. at 359.

The Court recently reaffirmed this principle. In *Cincinnati Gas & Electric*, the Commission directed a utility to provide a village with customer information. *Cincinnati Gas & Electric Co.*, 103 Ohio St.3d at ¶¶ 1-6. The utility complied and provided the village with the customer information. Subsequently, the utility appealed the Commission's initial order. *Id.* The Court held that the utility's appeal was moot because the utility had already provided the disputed customer information to the village and, thus, there was no

remedy the Court could provide. *Id.* at ¶¶ 17-19. The Court concluded that none of the remedies proposed by the utility were within the Court’s power and, in the absence of an effective remedy, the appeal constituted merely a request for an advisory ruling. *Id.* at ¶ 21.

In this case, Buckeye’s appeal boils down to one issue – did Palmer violate the law by not becoming certified as a CRES and CRNGS provider? Buckeye believes Palmer violated the law by not previously becoming certified as a CRES/CRNGS supplier. The Commission disagreed. Regardless, this issue is moot because Palmer is now certified with the Commission.

Assuming, *arguendo*, that the Court ordered the Commission to hear more evidence on this matter and the Commission came to the opposite conclusion, absolutely nothing would change. It would be pointless for the Commission to order Palmer to become certified because *Palmer has already done so*. Because Palmer is already certified, any decision from this Court on the merits of Buckeye’s appeal would amount to a purely advisory opinion regarding the correctness of the Commission’s decision. The Court has stated on numerous occasions that it “does not indulge itself in advisory opinions.” *Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St. 2d 401, 406, 433 N.E.2d 923 (1982). The Court should avoid issuing such an opinion in this case. Rather, the Court should dismiss this appeal as moot and avoid declaring any principle or rule of law that would have no practical affect on the parties.

Proposition of Law No. III:

The Ohio Supreme Court will not reverse or modify a Commission decision as to questions of fact where the record contains sufficient probative evidence to show the Commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St.3d 269, 2008-Ohio-2762, 888 N.E.2d 1055, ¶ 12.

The Court need not consider the merits of Buckeye's appeal because it is moot and Buckeye suffered no harm due to the Commission's decision. If, however, the Court decides to consider the merits of Buckeye's arguments, Buckeye's appeal still must fail. This case presents a question of fact and the Commission's decision is based upon the record. Buckeye, however, asks the Court to reweigh the evidence in the record. This request is inappropriate and contrary to well-established Court precedent. The Court should reject Buckeye's appeal because the Commission's decision is reasonable, lawful, and fully supported by the record.

A. Standard of Review

Ohio Revised Code Section 4903.13 provides that a Commission order shall be reversed, vacated, or modified by the Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50. The Court "will not reverse or modify a PUCO decision as to questions of fact if the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the

record as to show misapprehension, mistake, or willful disregard of duty.” *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-7109, 820 N.E.2d 921, ¶ 29 (citations omitted). Buckeye, as the appellant, has the burden of demonstrating that the Commission’s decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* This is a heavy burden because the Court has consistently refused to substitute its judgment for that of the Commission on evidentiary matters. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 84, 765 N.E.2d 862, 866 (2002).

1. Buckeye failed to prove that Palmer arranged for the supply of competitive retail natural gas or electric services to retail customers.

To prove Palmer violated R.C. 4928.08(B) and 4929.20(A), Buckeye had the burden of proving that Palmer acted as a “broker” by “*arranging*” for the supply of competitive retail services. Opinion and Order at 18, Appellant’s App. at A-025. Even Buckeye admits that this was the central issue in this case. Buckeye Merit Brief at 9, 10, 14, 15. The Commission had to explore the definition of “arranging” in this case because the term is not defined in Title 49 or in the Commission’s rules. Opinion and Order at 18, Appellant’s App. at A-025. In addition, there was no Commission precedent addressing the definition of “arranging” prior to the case below. The Commission examined the facts and determined that Palmer was not “arranging” for supplies to ultimate customers because Buckeye did not make the “ultimate decision” and “enter[] into contractual obligations on behalf of its clients with respect to the provision of a competitive service.” *Id.*

at 19, Appellant's App. at A-026. This fact-based determination is reasonable and lawful because it is fully supported by the record.

- a. **The testimony of Mark Frye, the president of Palmer, shows that Palmer did not ultimately decide which supplier would provide the aggregators or local communities with natural gas or electric services. Rather, Palmer merely advised aggregators and local communities to enable them to make the ultimate decision.**

The evidence in the record is clear. Palmer did not act independently from the ultimate customer when providing energy-related services and did not make the ultimate decision regarding the provision of electric or natural gas supplies. Opinion and Order at 17, Appellant's App. at A-024. Rather, Palmer acted as an advisor to its clients by providing them with expert energy advice and assistance. *Id.* at 17-19, Appellant's App. at A-024 - A-026. Mark Frye, president of Palmer, testified that Palmer provided energy advice and services to local communities and governmental aggregators. Direct Testimony of Mark Frye at 5, Supp. at 15. When advising local governments or customers on energy issues, Palmer always acted in conjunction with a certified aggregator and certified competitive retail provider. *Id.* at 6, Supp. at 16. As Mr. Frye explained, many of Palmer's clients were governmental aggregators. Palmer helped some of these governmental entities become certified with the Commission by assisting them with the required certification documentation. Tr. at 31-32, Supp. at 28-29.

Although Palmer assisted governmental entities develop Request for Proposals ("RFPs") for natural gas and electricity suppliers, Palmer never made independent deci-

sions about the ultimate purchase and provision of natural gas or electricity. Opinion and Order at 18-19, Appellant's App. at A-025 - A-026; Direct Testimony of Mark Frye at 5, Supp. at 15. Palmer approached competitive retail service providers to discuss potential supply options on behalf of governmental aggregators and local communities. *Id.* When helping its clients issue RFPs and analyze responses to RFPs, Palmer was always acting at the behest of a governmental aggregator. Direct Testimony of Mark Frye at 6, Supp. at 16; Tr. at 197, Supp. at 34. Although Palmer assisted clients in the RFP process, Palmer's clients always made the ultimate decision regarding which supplier to contract with. Tr. at 42, Supp. at 30. For example, Palmer helped Northwest Ohio Association of Communities' ("NOAC") members analyze competing electric supply proposals from FirstEnergy Solutions and IGS Energy. Tr. at 44-45, Supp. at 31-32. A number of NOAC member communities decided to enter into contracts with FirstEnergy Solutions, while others decided to contract with IGS Energy. *Id.* Palmer merely analyzed the suppliers' proposals and discussed the proposals with the member communities. Palmer did not decide which communities should contract with FirstEnergy Solutions or IGS Energy. The member communities ultimately decided which supplier they would contract with. *Id.*

The Commission thoroughly discussed Mr. Frye's testimony in its Opinion and Order and explained that "the record reflects that [Palmer's] activities were performed for the purpose of assisting in the clients' operations." Opinion and Order at 19, Appellant's App. at A-026. Based upon Mr. Frye's testimony, the Commission concluded that Palmer did not engage in "the ultimate decision making process" or enter into "contrac-

tual obligations on behalf of its clients with respect to the provision of a competitive service.” Opinion and Order at 18-19, Appellant’s App. at A-025 - A-026. The record supports the Commission’s findings.

- b. Two of Palmer’s clients testified that Palmer did not arrange for the supply of electric or natural gas services but merely provided expert advice and technical assistance regarding energy related matters.**

The Commission’s decision is also supported by the testimony of two of Palmer’s clients who testified that Palmer was simply advising clients on energy matters and not arranging for the supply of natural gas or electricity.

Leigh Herington, director of Northeast Ohio Public Energy Council (“NOPEC”), testified on behalf of Palmer. 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. Direct Testimony of Leigh Herington at 2-4, Supp. at 20-22. Mr. Herington testified that NOPEC previously retained Palmer as an energy consultant to provide services such as testifying in energy proceedings, making natural gas price recommendations, assisting in energy contracting matters, and analyzing and creating power pricing evaluations. *Id.* Mr. Herington testified that he was aware that Palmer was not previously certified with the Commission. Tr. at 217, Supp. at 37. He still believed, however, that Mr. Frye was “one of the finest experts” he ever worked with regarding the energy markets. *Id.* at 219, Supp. at 38. Mr. Herington testified that a CRES provider acts as a “vendor” of electricity and will typi-

cally provide electric generation or transmission services. Direct Testimony of Herington at 3, Supp. at 21. Palmer, on the other hand, simply provided information and administrative services related to electricity matters. *Id.*

Larry L. Long, executive director of the County Commissioners' Association of Ohio ("CCAO"), also testified on behalf of Palmer. CCAO represents Ohio's eighty-seven Boards of County Commissioners and the Summit County Executive Council. Direct Testimony of Larry Long at 1, Supp. at 24. CCAO advocates on behalf of its counties and provides training, technical assistance, and cost savings programs related to energy matters. Mr. Long testified that CCAO retained Palmer on numerous occasions to provide energy consulting services. *Id.* at 2, Supp. at 25. Mr. Long testified that Palmer, unlike a CRES provider, did not sell generation or electric transmission services to CCAO or its members. *Id.* Mr. Long testified that Palmer merely provided information, advice, and administrative assistance to CCAO members regarding energy related matters. Tr. at 232, Supp. at 39. Mr. Long explained that Palmer helped counties become better informed on energy issues, such as reducing energy costs and the implementation of conservation measures. Opinion and Order at 12, Appellant's App. at A-019; Tr. at 232-234, Supp. at 39-41. Palmer, along with a CCAO staff member, would meet with county representatives to discuss options and procedures pertaining to particular energy related services. Opinion and Order at 12, Appellant's App. at A-019.

This testimony supports the Commission's conclusion that Palmer was not acting as a "broker" and was not arranging for the supply of competitive retail natural gas or electric services. The record shows that Palmer did not make the ultimate decision with

regard to the supply of electric or natural gas supplies. Rather, Palmer only provided expert energy advice while its clients ultimately decided which supplier to contract with. Based on the record evidence, the Commission determined that Palmer did not violate R.C. 4928.08(B) or 4929.20(A).

c. Buckeye asks the Court to reweigh the evidence and second-guess the Commission's factual findings.

Buckeye's request for this Court to reweigh the evidence is inappropriate and should be denied based upon well-settled Court precedent. This Court has stated on numerous occasions that it "will not second-guess the Commission on questions of fact absent" a showing that "the Commission's findings . . . are manifestly against the weight of evidence." *Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, 276, ¶ 29; *New Par v. Pub. Util. Comm.*, 98 Ohio St.3d 277, 2002-Ohio-7245, 781 N.E.2d 1008, ¶ 17; see also *Stephens v. Pub. Util. Comm.*, 102 Ohio St. 3d 44, 2004-Ohio-1798, 806 N.E.2d 527, ¶ 16 ("It is apparent from [appellant's] arguments that he is asking this court to examine in minute detail the record below and to weigh the evidence. We decline to do so.").

The Commission thoroughly considered the evidence and based its decision upon the record.⁴ Buckeye, however, asks the Court to substitute its decision for that of the Commission. Buckeye wants this Court to reweigh evidence already considered by the

⁴ On page 17 of its merit brief, Buckeye refers to testimony of Mark Frye from Commission Case No. 08-1238-EL-AEC. This testimony is not part of the record in this case. Thus, this testimony should not be considered by the Court.

Commission, such as statements contained on Palmer's website and letterhead that indicated that Palmer was a "natural gas brokerage firm." Buckeye Merit Brief at 12, 22. This alleged "admission" was rebutted by Mr. Frye. Tr. at 95, Supp. at 33. He explained that Palmer originally provided "natural gas brokerage services" when it was founded in 1980, long before the CRES and CRNGS statutes were implemented. *Id.* Further, although Palmer's website and letterhead still indicated that Palmer was providing "natural gas brokerage services," Mr. Frye testified that Palmer transitioned away from these services prior to him acquiring the company. *Id.* After considering this evidence, the Commission concluded that Buckeye failed to show that Palmer actually engaged in brokerage services. Opinion and Order at 19, Appellant's App. at A-026.

Buckeye is incorrect in its assertion that Palmer's certification during the hearing automatically proves that Palmer violated R.C. 4928.08(B) and 4929.20(A). Simply because an entity files an application to become a CRES or CRNGS supplier does not mean that entity is currently engaged in "competitive retail services." As Palmer indicated, it does not currently perform "competitive retail services" but obtained certification just in case it wants to do so in the future. Direct Testimony of Mark Frye at 6-7, Supp. at 16-17; Tr. at 203-204, Supp. at 35-36. The Commission stated that without "evidence to the contrary, the filing for certification is assumed to be an intention of prospective business activity." Opinion and Order at 19, Appellant's App. at A-026. Whether or not Palmer was *actually arranging* for the supply of natural gas and electric services before becoming certified is a question of fact. It was Buckeye's burden to prove Palmer was engaged in such conduct. Buckeye failed to do so.

The Court's role is not to second-guess factual determinations made by the Commission. Rather, it is to determine whether there is some support for the Commission's decision. In this case, there is no question that the Commission's decision is supported by the record. Buckeye simply disagrees with the Commission's conclusion. However, the Commission's decision is lawful and reasonable. As such, the Court should affirm.

2. The Commission's decision's was based upon evidence of Palmer's activities and not based upon the fact Palmer calls itself a "consultant."

In its Propositions of Law 3 and 4, Buckeye argues about a "consultant loophole" and whether such a loophole applies in this case. Buckeye's arguments regarding a "consultant loophole" are baseless. There is no such thing as a "consultant loophole." The Commission's Opinion and Order and Entry on Rehearing make this clear. Opinion and Order at 18-19, Appellant's App. at A-025 -A-026; Entry on Rehearing II at 5-7, Appellant's App. at A-037 - A-038. The Commission, based on the evidence, determined that Palmer's pre-certification activities did not require Palmer to be certified as a CRES or CRNGS provider. The Commission's analysis was not based upon labels. This fact-based examination was consistent with the Commission's prior statements regarding certification of consultants.

The Commission previously discussed whether or not consultants needed to be certified when drafting the CRES and CRNGS rules. When discussing the CRES rules, the Commission previously stated:

It should be noted that, under these rules, if [CRES] applicant will rely on consultants or contractors to meet various requirements in the 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, then it must be certified.*

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, Case No. 99-1609-EL-ORD (Finding and Order at 3) (March 30, 2000) (emphasis added) (hereinafter "CRES rulemaking case"), App. at 18.

In the CRNGS rulemaking case, the Commission echoed these comments, stating:

As we found in [the CRES rulemaking case], we find that these rules do not contemplate certifying consultants. However, we must note that the rules are not intended to list all entities that are covered by the rules. Moreover, this clarification does not apply to instances where a consultant or contractor performs a competitive service; *when a consultant or contractor performs a competitive service, they will be required to be certified under these rules.*

In the Matter of the Commission's Promulgation of Rules for Certification of Providers of Competitive Retail Natural Gas Services, Pursuant to Chapter 4929, Revised Code, Case No. 01-1371-GA-ORD (Finding and Order at 24) (November 20, 2001) (emphasis added) (hereinafter "CRNGS rulemaking case"), App. at 21.

These comments clearly show that there is no "consultant loophole" and consultants must be certified *if* they are performing competitive retail services. Further, the Commission has consistently found that a party's actual conduct determines whether the party must be certified as a CRES/CRNGS provider and *not* whether the party labels itself a "consultant." Consistent with its previous rulemaking orders, the Commission

applied these principles to the facts of this case. Entry on Rehearing II at 7, Appellant's App. at A-039. In its Entry on Rehearing, the Commission stated:

[In the CRES and CRNGS rulemaking cases], 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 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.

Id. at 5, Appellant's App. at A-037.

The Commission stated that "it is not the mere claim of being a consultant" that excuses a party from becoming a certified CRES or CRNGS provider. *Id.* at 6, Appellant's App. at A-038. "Rather, an analysis must be performed as to the nature of an entity's operations in order to ascertain whether certification is required." *Id.* The Commission performed this analysis in the case below and based its decision on the record evidence.

The Commission's actions in this case prove that Buckeye's fears regarding a "consultant loophole" are unfounded. If a party believes an entity is violating R.C. 4928.08(B) or 4929.20(A) by not obtaining certification from the Commission, that party can file a complaint with the Commission. The Commission will then conduct a fact-based analysis to determine if the entity is, in fact, in violation of R.C. 4928.08(B) or 4929.20(A). The Commission will conduct such an analysis regardless of whether the entity labels itself as a "consultant." *Id.* at 7, Appellant's App. at A-039. Ultimately, the

Commission will decide whether or not the entity is required to be certified as a CRES or CRNGS based upon that entity's conduct. That is exactly what happened in this case and the Commission's decision is fully supported by the record. Thus, the Court should reject Buckeye's third and fourth Propositions of Law.

Proposition of Law No. IV:

Setting forth specific grounds for rehearing is a jurisdictional prerequisite to review by the Supreme Court. *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, ¶ 16.

Appellant's fifth proposition of law asserts that Palmer should be "equitably and judicially estopped" from denying broker status prior its certification. As will be discussed *infra*, it is difficult to understand what doctrine Appellant means to invoke but the Court need not consider this issue at all.

As this Court has noted:

According to R.C. 4903.10, rehearing applications shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. This court held in *Office of Consumers' Counsel v. Pub. Util. Comm'n.* (1994) 70 Ohio St. 3d 244 that setting forth specific grounds for rehearing is a jurisdictional prerequisite to our review.

Ohio Partners for Affordable Energy v. Pub. Util. Comm., 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, ¶ 16. Palmer's application for rehearing, although lengthy, does not include any estoppel claim. Application for Rehearing, Appellant's App. at A-071 - A-075; Memorandum of Law in Support of Application for Rehearing, Appellant's App. A-077 -A-096. In fact the word "estoppel" does not even appear. As there was no

estoppel claim made in the application for rehearing, this Court's jurisdiction is not invoked and the Court should reject Appellant's proposition of law V.

Even if the Court were to consider Appellant's claim, it lacks merit. There are three doctrines to which Appellant might refer: equitable; judicial; and collateral estoppel. None have any application to the case at bar.

This Court has determined that:

Equitable estoppel precludes recovery when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.

State ex rel. Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland, 114 Ohio St. 3d 183, 2007-Ohio-3831, 870 N.E.2d 1174, ¶ 64.

Stated differently:

To succeed on an equitable estoppel claim a plaintiff must prove the following elements:

- 1) Defendant made a factual claim;
- 2) That claim was misleading;
- 3) That induced actual reliance that was reasonable and in good faith; and
- 4) Caused detriment to the relying party.

Haskett v. Paulig, 131 Ohio App. 221, 226-7, 722 N.E.2d 142 (3rd Dist. 1999). Appellant failed to claim or prove these elements.

Appellant has failed to claim either that it relied upon any representation by Palmer or that it was harmed by reliance on a claim by Palmer. While it might be said that Palmer's customers relied on representations, Appellant did not. This is insufficient

to make out the elements of equitable estoppel and, therefore, no relief could be granted on this basis even if the issue were properly before the Court, and, as noted above, it is not.

Likewise collateral estoppel has no application here. This Court has noted:

The Doctrine of collateral estoppel operates to preclude the relitigation of a point of law or fact that was at issue in a former action between the parties and passed upon by a court of competent jurisdiction.

Consumers' Counsel v. Pub. Util. Comm., 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985);

Consumers' Counsel v. Pub. Util. Comm., 114 Ohio St.3d 340, 342, 2007 Ohio 4276, 872

N.E.2d 269, ¶ 11. Appellant has alleged no previous litigation between these parties.

Any such litigation would have had to have occurred at the Commission as only entity

competent to determine Palmer's status under Title 49. Palmer's status under Title 49

determines the jurisdiction of the Commission over it and the Commission must be

allowed to determine its own jurisdiction in the first instance. *State ex rel. Cleveland*

Electric Illuminating Co. v. Pub. Util. Comm., 173 Ohio St. 450, 183 N.E.2d 782 (1962).

Because the issue of Palmer's status under Title 49 has not been litigated before the

Commission previously, it cannot have been *relitigated* below and, therefore, the doctrine

of collateral estoppel cannot apply. Thus, even if the issue were properly before this

Court, the argument has no merit.

Judicial estoppel similarly has no merit. This Court has stated that:

Judicial estoppel prevents a litigant who has successfully taken a position in one action from taking a contradictory position in a subsequent action.

Scioto Memorial Hospital Assn. v. Price Waterhouse, 74 Ohio St.3d 474, 481, 659

N.E.2d 1268 (1996). As noted previously, Appellant has alleged no previous litigation between the parties below. Because there has been no previous litigation in which Palmer could have taken a position, it could not have taken a successful position. The elements of judicial estoppel have not even been alleged. Judicial estoppel therefore has no application in this case.

In sum, the Court should reject Appellant's Proposition of Law V. It is not properly before the Court. The issue of estoppel was not raised in an application for rehearing and this failure deprives the Court of jurisdiction to consider the argument. Even if the issue were properly before the Court, Appellant has failed to even allege the elements of any of the three estoppel doctrines to which it might intend to refer.

Proposition of Law No. V:

The Public Utilities Commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, audits, inspections, investigations, and hearings relating to parties before it. R.C. 4901.13, App. at 1.

The Commission is authorized by statute to establish procedural rules to govern its proceedings. R.C. 4901.13, App. at 1. It has done so. Ohio Adm. Code Chapter 4901-1.

This Court has determined that:

R.C. 4901.13 provides that the “commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all * * * hearings relating to parties before it.” Under R.C. 4901.13 the commission has broad discretion in the conduct of its hearings.” *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367, 379, 10 Ohio Op. 3d 493, 500, 384 N.E.2d 264, 273. “It is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort. *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 559, 560, 23 Ohio Op.3d 474, 475, 433 N.E.2d 212, 214.

Weiss v. Pub. Util. Comm., 90 Ohio St.3d 15, 19, 734 N.E.2d 775 (2000). Appellant now wishes to evade the Commission’s rules. It should not be permitted to do so.

Commission rules allow discovery to begin immediately on the filing of a case. Ohio Adm. Code 4901-1-17(A), App. at 13. The complaint in the case below was filed on May 21, 2010. By order of the Attorney Examiner, pursuant to O.A.C. 4901-1-14, discovery was to end February 14, 2011. *In the Matter of the Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Company*, Case No. 10-693-GE-CSS (Entry at 5, ¶ 11) (January 18, 2011), Supp. at 5. Appellant was provided with nearly nine months to complete discovery and discovery was had. Appellant timely submitted two sets of interrogatories to Palmer to which answers were provided. *In the Matter of the Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Company*, Case No. 10-693-GE-CSS (Entry) (March 30, 2011), Supp. at 7-10. Appellant was apparently dissatisfied with the responses it obtained. At that point, Appellant had several options. Appellant could have filed a motion to compel answers to discovery if it believed the answers were inadequate.

Ohio Adm. Code 4901-1-23, App. at 14-16. If Appellant believed that the Attorney Examiner provided insufficient time for discovery in the January 18 Entry, Appellant could have sought an interlocutory appeal of the Entry. Ohio Adm. Code 4901-1-15, App. at 12-13. Finally, Appellant could have filed a motion attempting to show good cause why discovery should have been extended. Ohio Adm. Code 4901-1-17(A), App. at 13. Appellant did none of these things. Instead, on February 28, 2011, after the close of the discovery period, Appellant sought a subpoena for the president of Palmer requiring the production of much broader documents than had been sought through the earlier discovery. *In the Matter of the Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Company*, Case No. 10-693-GE-CSS (Entry at 4, ¶ 5) (March 30, 2011), Supp. at 10. This subpoena was properly quashed as an attempt to evade the earlier discovery cutoff date ruling. *Id.* If Appellant was dissatisfied with this ruling, its option at that point was to file an interlocutory appeal. Ohio Adm. Code 4901-1-15, App. at 12-13. Appellant filed no such interlocutory appeal.

In sum, Appellant, having taken none of the multitude of steps provided for under the Commission's procedural rules to protect its interests, now asks this Court to step into this discovery dispute. It should not do so. Ample discovery has been provided. R.C. 4903.082, App. at 1. Appellant merely seeks to avoid the application of the Commission's reasonable rules. Its argument should be rejected.

CONCLUSION

The question presented is whether Palmer should be registered as either a CRES or a CRNGS. Palmer is currently registered as both a CRES and a CRNGS provider. The Commission made a factual determination, based on evidence adduced at hearing, that Palmer's prior activities did not require it to be certified with the Commission. There is nothing that need be done either prospectively or retrospectively. This matter is moot. The Commission's decision is supported by the record and should be affirmed.

Respectfully submitted,

Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief



Thomas W. McNamee (0017352)
Counsel of Record

Devin D. Parram (0082507)
Assistant Attorneys General
Public Utilities Section

180 East Broad Street, 6th Fl
Columbus, OH 43215-3793

614.466.4397 (telephone)

614.644.8764 (fax)

thomas.mcnamee@puc.state.oh.us

devin.parram@puc.state.oh.us

**Counsel for Appellee,
The Public Utilities Commission of Ohio**

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 20th day of August, 2012.



Thomas W. McNamee
Assistant Attorney General

Parties of Record:

Matthew Yackshaw
John S. Kaminski
Day Ketterer Ltd.
Millennium Centre-Suite 300
200 Market Avenue North
P.O. Box 24213
Canton, OH 44701-4213

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater Seymour & Pease
52 East Gay Street
P.O. Box 1008
Columbus, OH 43215

APPENDIX

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§ 4901.13. Publication of rules governing proceedings

The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public.

§ 4903.082. Right of discovery

All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.

§ 4903.13. Reversal of final order - notice of appeal

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4928.08. Certification to provide retail electric competitive service

(A) This section applies to an electric cooperative, or to a governmental aggregator that is a municipal electric utility, only to the extent of a competitive retail electric service it provides to a customer to whom it does not provide a noncompetitive retail electric service through transmission or distribution facilities it singly or jointly owns or operates.

(B) No electric utility, electric services company, electric cooperative, or governmental aggregator shall provide a competitive retail electric service to a consumer in this state on and after the starting date of competitive retail electric service without first being certi-

fied by the public utilities commission regarding its managerial, technical, and financial capability to provide that service and providing a financial guarantee sufficient to protect customers and electric distribution utilities from default. Certification shall be granted pursuant to procedures and standards the commission shall prescribe in accordance with division (C) of this section, except that certification or certification renewal shall be deemed approved thirty days after the filing of an application with the commission unless the commission suspends that approval for good cause shown. In the case of such a suspension, the commission shall act to approve or deny certification or certification renewal to the applicant not later than ninety days after the date of the suspension.

(C) Capability standards adopted in rules under division (B) of this section shall be sufficient to ensure compliance with the minimum service requirements established under section 4928.10 of the Revised Code and with section 4928.09 of the Revised Code. The standards shall allow flexibility for voluntary aggregation, to encourage market creativity in responding to consumer needs and demands, and shall allow flexibility for electric services companies that exclusively provide installation of small electric generation facilities, to provide ease of market access. The rules shall include procedures for biennially renewing certification.

(D) The commission may suspend, rescind, or conditionally rescind the certification of any electric utility, electric services company, electric cooperative, or governmental aggregator issued under this section if the commission determines, after reasonable notice and opportunity for hearing, that the utility, company, cooperative, or aggregator has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.

(E) No electric distribution utility on and after the starting date of competitive retail electric service shall knowingly distribute electricity, to a retail consumer in this state, for any supplier of electricity that has not been certified by the commission pursuant to this section.

§ 4928.20. Local aggregation of retail electric loads - limitations

(A) The legislative authority of a municipal corporation may adopt an ordinance, or the board of township trustees of a township or the board of county commissioners of a county may adopt a resolution, under which, on or after the starting date of competitive retail electric service, it may aggregate in accordance with this section the retail electrical loads located, respectively, within the municipal corporation, township, or unincorporated area of the county and, for that purpose, may enter into service agreements to facilitate for those loads the sale and purchase of electricity. The legislative authority or board also may exercise such authority jointly with any other such legislative authority or

board. For customers that are not mercantile customers, an ordinance or resolution under this division shall specify whether the aggregation will occur only with the prior, affirmative consent of each person owning, occupying, controlling, or using an electric load center proposed to be aggregated or will occur automatically for all such persons pursuant to the opt-out requirements of division (D) of this section. The aggregation of mercantile customers shall occur only with the prior, affirmative consent of each such person owning, occupying, controlling, or using an electric load center proposed to be aggregated. Nothing in this division, however, authorizes the aggregation of the retail electric loads of an electric load center, as defined in section 4933.81 of the Revised Code, that is located in the certified territory of a nonprofit electric supplier under sections 4933.81 to 4933.90 of the Revised Code or an electric load center served by transmission or distribution facilities of a municipal electric utility.

(B) If an ordinance or resolution adopted under division (A) of this section specifies that aggregation of customers that are not mercantile customers will occur automatically as described in that division, the ordinance or resolution shall direct the board of elections to submit the question of the authority to aggregate to the electors of the respective municipal corporation, township, or unincorporated area of a county at a special election on the day of the next primary or general election in the municipal corporation, township, or county. The legislative authority or board shall certify a copy of the ordinance or resolution to the board of elections not less than ninety days before the day of the special election. No ordinance or resolution adopted under division (A) of this section that provides for an election under this division shall take effect unless approved by a majority of the electors voting upon the ordinance or resolution at the election held pursuant to this division.

(C) Upon the applicable requisite authority under divisions (A) and (B) of this section, the legislative authority or board shall develop a plan of operation and governance for the aggregation program so authorized. Before adopting a plan under this division, the legislative authority or board shall hold at least two public hearings on the plan. Before the first hearing, the legislative authority or board shall publish notice of the hearings once a week for two consecutive weeks in a newspaper of general circulation in the jurisdiction or as provided in section 7.16 of the Revised Code. The notice shall summarize the plan and state the date, time, and location of each hearing.

(D) No legislative authority or board, pursuant to an ordinance or resolution under divisions (A) and (B) of this section that provides for automatic aggregation of customers that are not mercantile customers as described in division (A) of this section, shall aggregate the electrical load of any electric load center located within its jurisdiction unless it in advance clearly discloses to the person owning, occupying, controlling, or using the load center that the person will be enrolled automatically in the aggregation program and will remain so enrolled unless the person affirmatively elects by a stated procedure not to be so enrolled. The disclosure shall state prominently the rates, charges, and other terms and

conditions of enrollment. The stated procedure shall allow any person enrolled in the aggregation program the opportunity to opt out of the program every three years, without paying a switching fee. Any such person that opts out before the commencement of the aggregation program pursuant to the stated procedure shall default to the standard service offer provided under section 4928.14 or division (D) of section 4928.35 of the Revised Code until the person chooses an alternative supplier.

(E)(1) With respect to a governmental aggregation for a municipal corporation that is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.41 of the Revised Code.

(2) With respect to a governmental aggregation for a township or the unincorporated area of a county, which aggregation is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.40 of the Revised Code, except that:

(a) The petitions shall be filed, respectively, with the township fiscal officer or the board of county commissioners, who shall perform those duties imposed under those sections upon the city auditor or village clerk.

(b) The petitions shall contain the signatures of not less than ten per cent of the total number of electors in, respectively, the township or the unincorporated area of the county who voted for the office of governor at the preceding general election for that office in that area.

(F) A governmental aggregator under division (A) of this section is not a public utility engaging in the wholesale purchase and resale of electricity, and provision of the aggregated service is not a wholesale utility transaction. A governmental aggregator shall be subject to supervision and regulation by the public utilities commission only to the extent of any competitive retail electric service it provides and commission authority under this chapter.

(G) This section does not apply in the case of a municipal corporation that supplies such aggregated service to electric load centers to which its municipal electric utility also supplies a noncompetitive retail electric service through transmission or distribution facilities the utility singly or jointly owns or operates.

(H) A governmental aggregator shall not include in its aggregation the accounts of any of the following:

(1) A customer that has opted out of the aggregation;

(2) A customer in contract with a certified electric services company;

(3) A customer that has a special contract with an electric distribution utility;

(4) A customer that is not located within the governmental aggregator's governmental boundaries;

(5) Subject to division (C) of section 4928.21 of the Revised Code, a customer who appears on the "do not aggregate" list maintained under that section.

(I) Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits, as determined by the commission, that electric load centers within the jurisdiction of the governmental aggregation as a group receive. The proportionate surcharge so established shall apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge shall apply. Nothing in this section shall result in less than full recovery by an electric distribution utility of any surcharge authorized under section 4928.144 of the Revised Code. Nothing in this section shall result in less than the full and timely imposition, charging, collection, and adjustment by an electric distribution utility, its assignee, or any collection agent, of the phase-in-recovery charges authorized pursuant to a final financing order issued pursuant to sections 4928.23 to 4928.2318 of the Revised Code.

(J) On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(d) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section. Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom competitive retail electric generation service is provided by another supplier under the governmental aggregation for the standby service. Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer. Such market price shall include, but not be limited to, capacity and energy charges; all charges associated with the provision of that power supply through the regional transmission organization, including, but not limited to, transmission, ancillary services, congestion, and settlement and administrative charges; and all other costs incurred by the utility that are associated with the procurement, provision, and administration of that power supply, as such costs may be approved by the commission. The period of time during which the

market price and alternative energy resource amount shall be so assessed on the consumer shall be from the time the consumer so returns to the electric distribution utility until the expiration of the electric security plan. However, if that period of time is expected to be more than two years, the commission may reduce the time period to a period of not less than two years.

(K) The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charges that relate to any cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

4901:1-21-01 Definitions.

As used in chapter:

(A) "Aggregation" means combining the electric load of multiple retail customers via an agreement with the customers or formation of a governmental aggregation pursuant to section 4928.20 of the Revised Code for the purpose of purchasing retail electric generation service on an aggregated basis.

(B) "Aggregator" means a person, certified by the commission, who contracts with customers to combine the customers' electric load for the purpose of purchasing retail electric generation service on an aggregated basis.

(C) "Billing and collection agent" shall have the meaning set forth in division (2) of section 4928.01 of the Revised Code.

(D) "Biomass power" means a renewable generation resource that is primarily derived from the combustion of organic matter. Biomass fuels may be solid, liquid, or gas and are derived from feedstocks. Examples of such feedstocks include, but are not limited to: agricultural crops and residues, industrial wood and logging residues, farm animal wastes, the organic portion of municipal solid waste, and methane gas from landfills.

(E) "Commission" means the public utilities commission of Ohio.

(F) "Competitive retail electric service" (CRES) shall have the meaning set forth in division (A)(4) of section 4928.01 of the Revised Code, and includes the services provided by an electric services company, retail electric generation providers, power marketers, power brokers, aggregators, and governmental aggregators.

(G) "Complaint" means any customer/consumer contact when such contact necessitates follow-up by or with the supplier of electric service or electric utility to resolve a point of contention.

(H) "Consumer" means a person who uses CRES.

(I) "Contract" means an agreement between a customer and an electric services company that specifies the terms and conditions for provision of CRES or services.

(J) "Certified electric services company" means a person or entity, under certification by the commission, who supplies or offers to supply CRES. This term does not apply to an electric distribution utility in its provision of standard offer generation service.

(K) "Customer" means a person who contracts with or is solicited by a CRES provider for the provision of CRES.

(L) "Deposit" means a sum of money a CRES provider collects from a customer as a pre-condition for initiating service.

(M) "Direct solicitation" means face-to-face solicitation of a customer initiated by a certified electric services company at the home of a customer or at a place other than the normal place of business of the provider, and includes door-to-door solicitations.

(N) "Distribution service" means the physical delivery of electricity to consumers through facilities provided by an electric distribution utility.

(O) "Electric cooperative" shall have the meaning set forth in division (A)(5) of section 4928.01 of the Revised Code.

(P) "Electric distribution utility" shall have the meaning set forth in division (A)(6) of section 4928.01 of the Revised Code.

(Q) "Electric generation service" means retail electric generation service.

(R) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(S) "Environmental disclosure data" means both generation resource mix and environmental characteristics.

(T) "Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years.

(U) "Governmental aggregator" shall have the meaning set forth in division (A)(13) of section 4928.01 of the Revised Code.

(V) "Market development period" shall have the meaning set forth in division (A)(17) of section 4928.01 of the Revised Code.

(W) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(X) "Net metering" shall have the meaning set forth in division (A)(31) of section 4928.01 of the Revised Code.

(Y) "OCC" means the Ohio consumers' counsel.

(Z) "Other sources" means known electric energy generation resources that cannot reasonably be included within any of the specific fuel categories.

(AA) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(BB) "Power broker" means a person certified by the commission, who provides power brokerage.

(CC) "Power brokerage" means assuming 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.

(DD) "Power marketer" means a person, certified by the commission, who provides power marketing services.

(EE) "Power marketing" means assuming the contractual and legal responsibility for the sale and provision of retail electric generation service to a retail customer in this state and having title to electric power at some point during the transaction.

(FF) "Residential customer" means a customer of a competitive retail electric service for residential purposes.

(GG) "Retail electric service" shall have the meaning set forth in division (A)(27) of section 4928.01 of the Revised Code.

(HH) "Retail electric generation service" means the provision of electric power to a retail customer in this state through facilities provided by an electric distribution utility and/or a transmission entity in this state. The term encompasses the services performed by retail electric generation providers, power marketers, and power brokers, but does not encompass the service provided by an electric utility pursuant to section 4928.14 or division (D) of section 4928.35 of the Revised Code.

(II) "Small commercial customer" means a commercial customer that is not a mercantile commercial customer.

(JJ) "Solicitation" means any communication intended to elicit a customer's agreement to purchase or contract for a CRES.

(KK) "Staff" means the commission staff or its authorized representative.

(LL) "Toll-free" means telephone access provided to a customer without toll charges to the customer.

(MM) "Unknown purchased resources" means electric energy generation resources neither owned nor operated by a competitive retail generation supplier where the electric energy generation source(s) or process cannot be identified after making all reasonable efforts to identify the source or process used to produce the power.

4901:1-27-01 Definitions.

As used in this chapter:

(A) "Abandonment" means to cease being a retail natural gas supplier or governmental aggregator in this state.

(B) "Ancillary service" has the meaning set forth in division (B) of section 4929.01 of the Revised Code.

(C) "Applicant" means a person who files an application for certification or certification renewal under this chapter.

(D) "Application form" means a form, approved by the commission, that an applicant seeking certification or certification renewal as a retail natural gas supplier or as a governmental aggregator shall file with the commission as set forth in this chapter.

(E) "Billing or collection agent" has the meaning set forth in division (I) of section 4929.01 of the Revised Code.

(F) "Commission" means the public utilities commission of Ohio.

(G) "Commodity sales service" has the meaning set forth in division (C) of section 4929.01 of the Revised Code.

(H) "Comparable service" has the meaning set forth in division (D) of section 4929.01 of the Revised Code.

(I) "Competitive retail natural gas service" has the meaning set forth in division (J) of section 4929.01 of the Revised Code.

(J) "Consumer" has the meaning set forth in division (E) of section 4929.01 of the Revised Code.

(K) "Contract" means an agreement between a customer and retail natural gas supplier or governmental aggregator that specifies the terms and conditions for provision of competitive retail natural gas service.

(L) "Customer" means a person who contracts with or is solicited by a retail natural gas supplier or governmental aggregator for the provision of a competitive retail natural gas service.

(M) "Existing customer" means a person who has a contract with a retail natural gas supplier or governmental aggregator for the provision of competitive retail natural gas service.

(N) "Governmental aggregator" has the meaning set forth in division (K)(1) of section 4929.01 of the Revised Code. For purposes of this chapter, "governmental aggregator" specifically excludes a municipal corporation acting exclusively under Section 4 of Article XVIII, Ohio Constitution, as an aggregator for the provision of competitive retail natural gas service.

(O) "Mercantile customer" has the meaning set forth in division (L) of section 4929.01 of the Revised Code.

(P) "Natural gas company" has the meaning set forth in division (G) of section 4929.01 of the Revised Code.

(Q) "Person" has the meaning set forth in division (H) of section 4929.01 of the Revised Code.

(R) "Regulated sales service" means the provision of natural gas commodity service to consumers at the gas cost recovery rate or any alternate gas cost pricing mechanism approved by the commission pursuant to Chapter 4901:1-19 of the Administrative Code.

(S) "Regulated sales service customer" means a person who has an agreement by contract and/or tariff with a natural gas company or gas company to receive regulated sales service.

(T) "Retail natural gas aggregation service" means combining the natural gas load of multiple retail residential customers or small commercial customers via an agreement with the customers for the purpose of purchasing competitive retail natural gas service on an aggregated basis.

(U) "Retail natural gas aggregator" means a person who contracts with customers to combine the customers' natural gas load for the purposes of purchasing competitive retail natural gas service on an aggregated basis.

(V) "Retail natural gas brokerage service" means assuming the contractual and legal responsibility for the sale and/or arrangement for the supply of competitive retail natural gas service to a retail customer in this state without taking title to the natural gas.

(W) "Retail natural gas broker" means a person who provides retail natural gas brokerage service.

(X) "Retail natural gas marketing service" means assuming 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.

(Y) "Retail natural gas marketer" means a person who provides retail natural gas marketing service.

(Z) "Retail natural gas service" has the meaning set forth in division (M) of section 4929.01 of the Revised Code.

(AA) "Retail natural gas supplier" has the meaning set forth in division (N) of section 4929.01 of the Revised Code.

(BB) "Small commercial customer" means a commercial customer which is not a mercantile customer under paragraph (O) of this rule.

4901-1-15 Interlocutory appeals.

(A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference that does any of the following:

- (1) Grants a motion to compel discovery or denies a motion for a protective order.
- (2) Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony.
- (3) Refuses to quash a subpoena.
- (4) Requires the production of documents or testimony over an objection based on privilege.

(B) Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that: the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

(C) Any party wishing to take an interlocutory appeal from any ruling must file an application for review with the commission within five days after the ruling is issued. An extension of time for the filing of an interlocutory appeal may be granted only under extraordinary circumstances. The application for review shall set forth the basis of the appeal and citations of any authorities relied upon. A copy of the ruling or the portion of the record which contains the ruling shall be attached to the application for review. If the record is unavailable, the application for review must set forth the date the ruling was issued and must describe the ruling with reasonable particularity.

(D) Unless otherwise ordered by the commission, any party may file a memorandum contra within five days after the filing of an application for review.

(E) Upon consideration of an interlocutory appeal, the commission may, in its discretion either:

(1) Affirm, reverse, or modify the ruling.

(2) Dismiss the appeal, if the commission is of the opinion that the issues presented are moot, the party taking the appeal lacks the requisite standing to raise the issues presented or has failed to show prejudice as a result of the ruling in question, or the issues presented should be deferred and raised at some later point in the proceeding.

(F) Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.

4901-1-17 Time periods for discovery.

(A) Except as provided in paragraph (E) of this rule, discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.

(B) In general rate proceedings, no party may serve a discovery request later than fourteen days after the filing and mailing of the staff report of investigation required by section 4909.19 of the Revised Code.

(C) In emergency rate proceedings, no party may serve a discovery request later than twenty days prior to the commencement of the hearing.

(D) In purchased gas adjustment proceedings, no party may serve a discovery request later than thirty days after the filing of the audit report required by rule 4901:1-14-07 of the Administrative Code.

(E) In long-term forecast report proceedings, no party may serve a discovery request later than twenty-five days prior to the commencement of the evidentiary hearing. Discovery may begin in long-term forecast report proceedings:

(1) Immediately after the filing with the commission of a long-term forecast report which contains a substantial change from the preceding report as defined by section 4935.04 of the Revised Code.

(2) Immediately after the filing with the commission of a long-term forecast report when the most recent hearing on a forecast report by the reporting person has been more than four years prior.

(3) Immediately after good cause to conduct a hearing on a long-term forecast report has been determined by order of the commission.

(4) Immediately after a reporting person files its first long-term forecast report under section 4935.04 of the Revised Code.

(F) The restrictions set forth in paragraphs (B), (C), (D), and (E) of this rule do not apply to requests for the supplementation of prior responses served under paragraph (D)(5) of rule 4901-1-16 of the Administrative Code.

(G) Notwithstanding the provisions of paragraphs (B), (C), (D), and (E) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner may shorten or enlarge the time periods for discovery, upon their own motion or upon motion of any party for good cause shown.

4901-1-23 Motions to compel discovery.

(A) Any party, upon reasonable notice to all other parties and any persons affected thereby, may move for an order compelling discovery, with respect to:

(1) Any failure of a party to answer an interrogatory served under rule 4901-1-19 of the Administrative Code.

(2) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under rule 4901-1-20 of the Administrative Code.

(3) Any failure of a deponent to appear or to answer a question propounded under rule 4901-1-21 of the Administrative Code.

(4) Any other failure to answer or respond to a discovery request made under rules 4901-1-19 to 4901-1-22 of the Administrative Code.

(B) For purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer.

(C) No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought. A motion to compel discovery shall be accompanied by:

(1) A memorandum in support, setting forth:

(a) The specific basis of the motion, and citations of any authorities relied upon.

(b) A brief explanation of how the information sought is relevant to the pending proceeding.

(c) Responses to any objections raised by the party or person from whom discovery is sought.

(2) Copies of any specific discovery requests which are the subject of the motion to compel, and copies of any responses or objections thereto.

(3) An affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought.

(D) The commission, the legal director, the deputy legal director, or an attorney examiner may grant or deny the motion in whole or in part. If the motion is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may issue such protective order as would be appropriate under rule 4901-1-24 of the Administrative Code.

(E) Any order of the legal director, the deputy legal director, or an attorney examiner granting a motion to compel discovery in whole or in part may be appealed to the commission in accordance with rule 4901-1-15 of the Administrative Code. If no application for review is filed within the time limit set forth in that rule, the order of the legal director, the deputy legal director, or the attorney examiner becomes the order of the commission.

(F) If any party or person disobeys an order of the commission compelling discovery, the commission may:

(1) Seek appropriate judicial relief against the disobedient person or party under section 4903.04 or 4905.60 of the Revised Code.

(2) Prohibit the disobedient party from further participating in the pending proceeding.

(3) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing evidence or conducting cross-examination on designated matters.

(4) Dismiss the pending proceeding, if such proceeding was initiated by an application, petition, or complaint filed by the disobedient party, unless such a dismissal would unjustly prejudice any other party.

(5) Take such other action as the commission considers appropriate.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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.)
)
) Case No. 99-1609-EL-ORD
)
)

FINDING AND ORDER

The Commission finds:

BACKGROUND:

On July 6, 1999, the governor of the state of Ohio signed Amended Substitute Senate Bill 3 (SB3). That legislation requires Ohio's electric industry to change from a monopoly environment to a competitive electric environment for generation services. The legislation established a starting date for competitive retail electric service in the state of Ohio and required this Commission to establish rules and make a number of key decisions before the start of competitive retail electric service. During the period of time leading up to the start of competitive retail electric service, the Commission is required to establish rules for a variety of issues related to a competitive retail electric environment. The Commission is required by Section 4928.08, Revised Code, to establish rules for the certification of competitive retail electric service providers.

On December 7, 1999, the Commission formally initiated this proceeding in order to establish rules for the certification of competitive retail electric service providers. On December 21, 1999, we issued for public comment our staff's proposal, which suggested proposed rules by which the Commission should establish the form and process under which certification should be granted. The Commission received numerous initial and reply comments to the staff's proposal from various stakeholders on January 31 and February 14, 2000. The following entities submitted initial and/or reply comments in this proceeding: Allegheny Energy Supply Company (Allegheny Energy), The American Association of Retired Persons (AARP), The Ameren Corporation (Ameren), the cities of Brook Park and Eastlake, The Coalition for Choice in Electricity (CCE), Ohio Citizens Action, The Dayton Power and Light Company (DP&L), Ohio Environmental Council, The Electric Power Supply Company, The FirstEnergy Corporation (FirstEnergy), Greater Cleveland Growth Association, Columbia Energy Services, Columbia Energy Power Marketing, Exelon Energy, Mid-Atlantic Power Supply Association, Strategic Energy L.L.C., Unicom Energy (collectively referred to as "Midwest Marketers"), Ohio Consumers' Counsel (OCC), The Association for Hospitals and Health Systems, Palmer Energy Company (Palmer), the city of Parma, The Buckeye Association of School Administrators, The Ohio Association of School Business Officials, and The Ohio Association of School Boards Association (collectively referred

OCC. The Commission believes that through SB3 the legislature has directed the Commission to certify governmental aggregators providing competitive electric services to customers that are not also served by the governmental aggregator's municipal electric system. We can only assume that the legislature provided for this certification under the broad police powers of the state for the protection of the public. Consequently, we cannot agree with the municipalities that the Commission has no authority to adopt rules that cover governmental aggregators under certain conditions mentioned above.

We note that, while we firmly believe that governmental aggregators are subject to the certification requirements, the city of Toledo raised concerns that the functions of energy marketers and governmental aggregators are distinct and not capable of a one-size-fits-all rule when it comes to certification. Upon consideration of these comments, we have effectively reduced the amount of information that governmental aggregators must provide to the Commission. Under this rule, a municipal corporation, township, or county seeking to be certified as a governmental aggregator is only required to file a limited amount of information with the Commission. This information includes: a statement that it will provide retail electric generation, power marketing, or power brokerage services; a copy of the ordinance or resolution authorizing the formation of a governmental aggregation program; a copy of its plan for operation; a copy of the disclosures required by Section 4928.20, Revised Code; and a detailed description of its experience and plan for providing aggregation services. By minimizing these requirements we have acknowledged and responded to the concerns expressed by the cities.

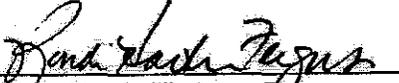
OCC expressed concerns over certain aspects of the rules regarding liability. It stated that, under these rules, billing and collection agents that are fully independent but contracting with an electric utility, electric services company, electric cooperative, or governmental aggregator are exempted from the certification rules. OCC cited to Section 4905.55, Revised Code, that requires that utilities be held liable for the acts of their agents. It indicated that this is appropriate if the contracting entity will be held liable for the acts of the billing and collection agents with whom it is in contract. We agree with these comments and have added a new provision under the purpose and scope of the rules to address these concerns. This rule now provides that nothing in this rule exempts an electric utility, electric services company, electric cooperative, or government aggregator from liability for the acts of its billing and collection agents. We note that Palmer Energy recommended that consultants be excluded from the certification rules. We note that these rules do not contemplate certifying consultants, but these rules are not intended to list the entities that are not covered by the rules. It should be noted that, under these rules, if an applicant will rely on consultants or contractors to meet various requirements in the 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, then it must be certified.

ORDERED, That all of the adopted rules be effective as of the earliest date permitted by law. Unless otherwise ordered by the Commission, the review date for rules 4901:1-24-01 to 4901:1-20-13, O.A.C., shall be September 30, 2002. It is, further,

ORDERED, That a copy of this finding and order be served upon all parties and interested persons of record.

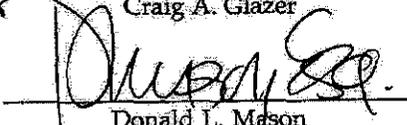
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus


Craig A. Glazer


Judith A. Jones


Donald L. Mason

SEF/RRG:geb

Entered in the Journal

MAR 30 2000

A True Copy


Gary E. Pigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Promul-)
gation of Rules for Competitive Retail Natu-) Case No. 01-1371-GA-ORD
ral Gas Service and its Providers Pursuant to)
Chapter 4929, Revised Code.)

FINDING AND ORDER

The Commission finds:

BACKGROUND:

On March 27, 2001, Governor Taft signed Amended Substitute House Bill 9 (hereinafter H.B. 9), which among other things: 1) requires certain governmental aggregators and retail natural gas suppliers to be certified by the Commission; 2) authorizes governmental aggregation for competitive retail natural gas service; 3) authorizes the Commission to order large natural gas companies to provide distribution service on a fully open, equal and nondiscriminatory basis; and 4) consolidates consumer protection authority over certain retail natural gas transactions.

On June 19, 2001, the Commission issued for comment a set of proposed rules addressing: 1) the minimum requirements for competitive retail natural gas service certification (proposed Chapter 4901:1-27); 2) governmental aggregation (proposed Chapter 4901:1-28); 3) minimum service requirements for competitive retail natural gas service (proposed Chapter 4901:1-29); 4) reporting requirements (proposed Chapter 4901:1-30); 5) opening areas to competitive retail natural gas service (proposed Chapter 4901:1-31); 6) competitive retail natural gas migration cost recovery (proposed Chapter 4901:1-32); 7) not-for-profit customer declarations of nonmercantile status (proposed Chapter 4901:1-33); and 8) enforcement (proposed Chapter 4901:1-34). The June 19, 2001, entry instructed interested stakeholders to file initial comments by July 10, 2001, and reply comments by July 24, 2001.

On July 3, 2001, the Cincinnati Gas & Electric Company (hereinafter CG&E); Columbia Gas of Ohio, Inc. (hereinafter Columbia), East Ohio Gas Company dba Dominion East Ohio (hereinafter East Ohio), Vectren Energy Delivery of Ohio (hereinafter VEDO), and Ohio Partners for Affordable Energy (hereinafter OP&E) filed a motion to bifurcate the proceedings and for an extension of time to file comments. Also, on July 3, 2001, the Ohio Natural Gas Marketers (hereinafter Marketers), which consists of the NewPower Company, MidAmerican Energy Company, Vectren Retail, Interstate Gas Supply (hereinafter IGS), the National Energy Marketers Association, and FSG Energy Services, filed a motion for an extension of time to file comments. On July 6, 2001, the examiner issued an entry that granted a one-week extension for filing comments, but denied the motion to bifurcate.

On July 17, 2001, Marketers filed a motion for a one-day extension to file its comments in this case. Marketers' motion for a one-day extension is granted.

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to follow minimum service standards adopted under Section 4929.22, Revised Code. We have the authority to enforce compliance with these rules by revoking the governmental aggregator's certification. Therefore, we have modified the rule accordingly.

OCC argues that subsection (D) of proposed Rule 4901:1-34-04, which allows for full payment of civil forfeitures proposed by the staff prior to the execution of a settlement agreement, should be deleted since it fails to provide for adequate public notice of violations (OCC's Initial Comments at 40). We disagree. We find that the Ohio Public Records Law, which makes all records of enforcement actions public records subject to release to any interested parties, provides adequate public notice of violations.

V. Miscellaneous

CG&E recommends that the Commission modify Rule 4901-1-02, O.A.C., by adding the four new case codes that this rulemaking creates: 1) MCR (Mitigation Cost Recovery); 2) DCR (Decertification Cost Recovery); 3) POM (Petition to Open Markets); and 4) NMS (Nonmercantile Status) (CG&E's Initial Comments at 31). We agree. Therefore, we have modified Rule 4901-1-02, O.A.C., accordingly.

Palmer requests that the Commission state in this finding and order that the rules being promulgated in this docket do not contemplate the certification of consultants (Palmer's Initial Comments at 2). As we found in Case No. 99-1609-EL-ORD, being *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*, we find that these rules do not contemplate certifying consultants. However, we must note that the rules are not intended to list all entities that are covered by the rules. Moreover, this clarification does not apply to instances where a consultant or contractor performs any competitive services; when a consultant or contractor performs a competitive service, they will be required to be certified under these rules.

CONCLUSION:

The regulatory principles outlined above and in Attachment I represent, in this Commission's view the appropriate rules for competitive retail natural gas service and its providers.

ORDER:

It is, therefore,

ORDERED, That Helen L. Liebman's September 4, 2001, motion for admission *pro hac vice* on behalf of Stephen E. Williams is granted. It is, further,

ORDERED, That Marketer's July 17, 2001, motion for a one-day extension to file comments in the above-captioned docket is granted. It is, further,

ORDERED, That the attached modified proposed rules for Chapters 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30, 4901:1-31, 4901:1-32, 4901:1-33, and 4901:1-34, O.A.C., are hereby adopted. It is, further,

ORDERED, That Rule 4901-1-02, O.A.C., be amended as discussed *supra* and reflected in the attachment. It is, further,

ORDERED, That the Commission is the ultimate arbiter of the meaning of these rules. It is, further,

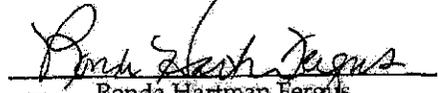
ORDERED, That copies of the adopted rules contained in Attachment I to this finding and order, be filed with the Joint Committee on Agency Rule Review, the Legislative Service Commission, and the Secretary of State in accordance with divisions (D) and (E) of Section 111.15, Revised Code. It is, further,

ORDERED, That the adopted rules be effective on the earliest day permitted by law. Unless otherwise ordered by the Commission, the review date for Chapter 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30, 4901:1-31, 4901:1-32, 4901:1-33, and 4901:1-34, O.A.C., shall be November 30, 2006.

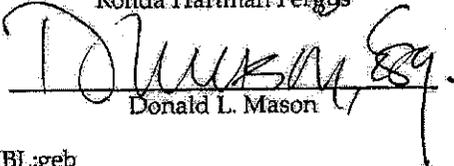
ORDERED, That a copy of this finding and order and the rules adopted be served upon all parties who filed comments in this docket and all interested parties that were served a copy of the June 19, 2001, entry that issued the staff's proposed rules in this docket for comment.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus


Judith A. Jones


Donald L. Mason

Clarence D. Rogers, Jr.

MBL:geb

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Gary E. Vigorito
Secretary