ORIGINAL

IN THE SUPREME COURT OF OHIO

Buckeye Energy Brokers, Inc.,	:	**Ohio Supreme Court**
	:	**Case No. 2012-0668**
Appellant,	:	
	:	**On Appeal from the Public Utilities**
v.	:	**Commission of Ohio**
	:	
The Public Utilities Commission of Ohio,	:	**Public Utilities Commission of Ohio**
	:	**Case No. 10-693-GE-CSS**
Appellee.	:	

MERIT BRIEF OF INTERVENOR PALMER ENERGY COMPANY IN SUPPORT OF THE APPELLEE

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The Public Utilities Commission of Ohio,	:	**Public Utilities Commission of Ohio**
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STATEMENT OF FACTS

This case arises from the complaint filed by Buckeye Energy Brokers, Inc. ("the Appellant") in PUCO Case No. 10-693-GE-CSS alleging that Palmer Energy Company's activities as an energy consultant providing advice and services to local governments without being certified by the Public Utilities Commission of Ohio ("the Commission") violated R.C. 4928.08 and 4929.20. In its November 1, 2011 Opinion and Order (the "Opinion and Order") and its February 23, 2012 Entry on Rehearing, the Commission found that the Appellant had failed to satisfy its burden of proof that Palmer Energy Company ("Palmer Energy", "the Respondent" or "the Intervenor in Support of the Appellee") violated R.C. 4928.08 and 4929.20. The Appellant filed its notice of appeal with this Court on April 19, 2012.

The facts in this case are well developed and for the most part are not in dispute.

Palmer Energy was founded in 1980 as a brokerage firm but made the transition away from brokerage to energy management and consulting services prior to the time that Mark Frye acquired the business. (TR. 95 and 98; S-036 – 037)[1] Mark R. Frye, President of Palmer Energy, has worked in the energy field for 24 years and for clients in 20 states. (Palmer Energy

[1] References to the transcript will be designated as "TR." followed by the page numbers in the transcript and the citation to the Supplement to this Merit Brief.

Ex. 1, p. 1; S-001) Mr. Frye has appeared as an expert witness in major rate cases before the Public Utilities Commission of Ohio ("the Commission") because of his specialized knowledge of energy costs and rates. (Palmer Energy Ex. 1, pp. 1-2; S-001 – 002) When Senate Bill 3 passed, Mr. Frye and Palmer Energy did not seek to avoid Commission detection; rather, they filed comments concerning whether consultants should be regulated. (TR. 101-104, 137-142; S-038 – 041, S-042 - 047) The Commission responded in its Findings and Orders in Case Nos. 99-1609-EL-ORD and 01-1371-GA-ORD to Palmer Energy's comments and stated that it was not the intent of the Commission to regulate consultants, but if consultants performed aggregation or supplier duties, they would not be exempt. See *In re Commission's Promulgation of Rules for Certification of Providers of Competitive Retail Electric Services*, Pub. Util. Comm. Case No. 99-1609-EL-ORD, 2000 Ohio PUC Lexis 428 at 3 (March 30, 2000) and *In re Commission's Promulgation of Rules for Competitive Retail Natural Gas Service and its Providers,* Pub. Util. Comm. Case No. 01-1371-GA-ORD, 2001 Ohio PUC Lexis 862, 24 (November 20, 2001).

As part of its consulting services provided to governmental entities, Palmer Energy develops Requests for Proposals ("RFPs"), the issuance of RFPs, and the evaluation of various proposals that come back in response. As an energy consultant, Palmer Energy also estimates savings for customers and provides recommendations for various communities as to how they want to proceed with governmental aggregation policies. (TR. 18-19; S-011 – 012) While Mr. Frye has met with local governmental officials and explained what Palmer Energy can provide in the way of consulting services, Palmer Energy has never entered into a broker agreement with any governmental entity. (TR. 24; S-015) While not a party to the supplier contracts, Palmer Energy was compensated by some of its clients through the supplier contracts based on the volume of the gas and the electricity delivered. However, there is no evidence in

this record indicating that Palmer Energy played any role in negotiating this term in the supplier contracts or that the term itself was even negotiable.

While Palmer Energy provided information to local governments as to the rules and regulations governing governmental aggregation, it did not provide a template for ballot issues. (TR. 28-29; S-016 – 017) At the request of some communities, Palmer Energy would "fill in the blanks" on the certification application forms, renewal application forms, market monitoring reports and annual reports (TR. 30, 54-55; S-018, S-033 – 034) Palmer Energy also assisted communities in asking for information from utilities so that the RFP process could be improved. (TR. 38-39, 47-49; S-022 – 023, S-027 – 029) For example, Palmer Energy spent significant analytical time evaluating competing proposals for the Northwest Ohio Association of Communities (NOAC). (TR. 44-45; S-025 – 026) The ultimate result for two of NOAC's participating communities (City of Toledo and City of Oregon) was that they decided to have their electricity supplied by FirstEnergy Solutions while other NOAC communities such as Lucas County, Sylvania, Maumee, Perrysburg and the Village of Holland decided to be supplied by WPS Energy Services (TR. 44-45; S-025 – 026). This fact clearly demonstrated that the communities, not Palmer Energy, made the ultimate decisions. (TR. 47; S-027) Palmer Energy reviewed opt-out letters for communities but did not play a role in getting notices or press releases to the PUCO nor did it get involved with reviewing mailing lists (TR. 50-52; S-030 – 032).

On May 21, 2010, the Appellant filed a complaint with the Commission in Case No. 10-693-GE-CSS alleging that Palmer Energy violated R.C. 4928.08 and 4929.20, by providing competitive retail electric and natural gas service in Ohio without first being certified. The Appellant sought as its relief (a) rescission of all contracts entered into by Palmer for either the

providing of competitive retail electric service and/or the providing of retail natural gas service within Ohio; (b) restitution to all customers affected by the allegedly illegal contracts including awarding damages; (c) forfeiture to the state of a fine for each failure; and (d) such other relief as may be proper and just including attorney's fees, expert and consulting fees and such other relief.

On June 9, 2010, Palmer Energy filed an answer denying the allegations that it had violated Ohio law, claiming that because as a consultant, it was not required to obtain certification. Palmer Energy stated that it had and has acted as a consultant when working with local Ohio governments, not as an aggregator, marketer or broker. Palmer Energy also stated that when it provided consulting services, it had done so in conjunction with a certified aggregator and a certified competitive retail service provider, so rather than having no certified aggregator or supplier, the effect of Palmer Energy not having a certificate just clarified who had aggregation and supply responsibilities.

In August of 2010, Palmer Energy filed applications to be certified as a competitive retail electric service aggregator and a competitive retail natural gas service aggregator. (Palmer Energy Ex. 1, pp. 6-7; S-006 – 007) Palmer Energy filed the applications, not because it needed these certificates to act as a consultant, but because in the future, it might need to expand its role beyond that of being a consultant. (Palmer Energy Ex. 1, pp. 6-7; S-006 – 007) But since the time it obtained certification, Palmer Energy has never in any capacity utilized that certification for any business purpose. (TR. 204; S-050)

Discovery was served by the Appellant on Palmer Energy and by Palmer Energy on the Appellant. At the behest of the Appellant, the attorney examiner issued subpoenas to Mark Frye and Kirkland Mizerek of Palmer Energy directing them to attend the hearing. The subpoena issued to Mr. Frye directed him to bring certain documents with him. Palmer Energy moved to

quash or limit the scope of the subpoena. Subsequently, an Entry was issued on March 30, 2011 granting the motion to quash and limiting the scope of the subpoena to direct Mr. Frye to bring those documents with him that were provided during discovery.

On March 23, 2011, the Appellant filed the prepared testimony of its sole witness, Thomas M. Bellish. Palmer Energy filed the direct testimony of Mark R. Frye, Leigh Herrington, Executive Director of the Northeast Public Energy Council ("NOPEC"), and Larry Long, Executive Director of the County Commissioners' Association of Ohio ("CCAO").

The hearing was held on April 11, 2011 and subsequently completed on April 20, 2011. The four witnesses testified and over seventy-five exhibits were introduced into evidence. Initial briefs were filed on May 12, 2011 and reply briefs were filed on May 23, 2011.

On November 1, 2011, the Commission issued its Opinion and Order in Case No. 10-693-GE-CSS concluding that the Appellant had failed to sustain its burden of proving that, during the time period at issue in this complaint, Palmer Energy engaged in activities as a provider of CRES and CRNGS without obtaining a certificate from the Commission in violation of R.C. 4928.08(B) and 4929.20(A), respectively. See Appellant's Appendix A-024 reflecting page 18 of the November 1, 2011 Opinion and Order. Former Commissioner Paul Centolella dissented solely on the basis that some of Palmer Energy's compensation was contingent on the deliveries of electricity or natural gas. However, former Commissioner Centolella found no further remedy was appropriate beyond the certification that Palmer Energy alone had obtained. See Appellant's Appendix at A-030-032.

On December 1, 2011, the Appellant filed an application for rehearing of the Commission's November 1, 2011 Order. The Appellant alleged thirteen grounds for rehearing.

Palmer Energy filed a memorandum contra on December 8, 2011. On February 23, 2012, the Commission issued an Entry on Rehearing denying the application for rehearing.

The Appellant filed its Notice of Appeal on April 19, 2012 and its Merit Brief on July 23, 2012.

ARGUMENT

I. PROPOSITION OF LAW NO. I:

When an Energy Consultant acts to assist a Certified Governmental Electric or Natural Gas Aggregator in the Performance of the Aggregator's Regulatory Duties and Responsibilities, the Energy Consultant is not required to become Certified Itself so long as its Activities do not rise to the Level of Engaging in the Ultimate Decision Making Process and Entering into Contractual Obligations on behalf of its Clients with respect to the Provision of a Competitive Service. (Response to Appellant's Proposition of Law Nos. I and II)

At pages 8-17 of its Merit Brief, the Appellant argues that Palmer Energy was involved in "arranging" for the supply of competitive retail natural gas and electric service by virtue of being involved with assisting governmental entities with numerous activities such as providing information and assisting governmental entities with templates for the certification process and with the preparation of numerous documents for filing with the PUCO on behalf of governmental entities, etc.

There is no statutory definition of the term "arranging". This Court may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E. 2d 1370 (1979). The Commission, in its decision, did not attempt to define what constitutes a consultant nor did it attempt to define the activities of a consultant. Instead, it

simply interpreted the word "arranging" to be consistent with what it stated in 2000 and 2001 when it first established its rules. At pages 17-18 of its Opinion and Order, the Commission stated:

> Specific to the first two counts of this complaint, upon review of the evidence presented in this case, the Commission concludes that Buckeye has failed to sustain its burden of proving that, during the time period at issue in this complaint, Palmer engaged in activities as a provider of CRES and CRNGS without obtaining a certificate from the Commission, in violation of Sections 4928.08(B) and 4929.20(A), Revised Code, respectfully.
>
> In reviewing the record relative to the allegations set forth by Buckeye in the complaint, as amended, the Commission recognizes that our decision in this case is dependent on our interpretation of the definitions of electric services company and retail natural gas supplier, set forth in Sections 4928.01(A)(27) and 4929.01(N), Revised Code, respectively.
>
> In regard to the statutory definitions of "electric services company" and "retail natural gas supplier," based on the existence of the word "or" in both definitions, an entity satisfies the applicable definition by either being in the business of supplying or in the business of arranging for the supply of the service...
>
> Next, the Commission must focus its review on the question of whether Palmer was engaged in arranging for the supply of CRES to ultimate consumers in this state, from the point of generation to the point of consumption or arranging for the supply of CRNGS to consumers in this state that are not mercantile customers. In performing this analysis, the Commission notes that while the term "arranging," is utilized in both Title 49, Revised Code, and Chapter 49, O.A.C., it is not defined, and neither party in this proceeding offered a specific definition.
>
> For the purpose of properly defining the term "arrange," the Commission is cognizant of its prior determination recognizing the classification of a "consultant." Specifically, the Commission recognizes that it has previously determined that an entity may operate in the capacity of a consultant without the need to be certified as a public utility provided it is not engaged in the performance of a competitive service.
>
> <u>Specifically, the Commission agrees that the Respondent's activities related to assisting communities with the Commission</u>

> certification process, the completion of certification applications, and the filing of reports on behalf of clients were performed in the capacity as a consultant and that the evidence on the record in this case does not support a finding that Palmer's actions constitute the performance of a competitive service. In particular, the Commission notes that these activities are no different than the current treatment of consultants who perform similar services for clients across numerous utility industries regulated by the Commission. Additionally, we agree that the mere educating of communities regarding the aggregation process may be encompassed within its role of a consultant.
>
> The Commission notes that Buckeye focuses a great deal of its attention on the fact that Palmer developed an RFP process, issued RFPs on behalf of its aggregator clients; evaluated the proposals that came back in response to the RFPs; dealt with incumbent suppliers on behalf of governmental entities by obtaining and analyzing data related to the issuance of RFPs; and estimated savings potential and made recommendations to the various communities that it represented. (TR. at 18, 26, 32, 39-40, 204-205; Buckeye Ex. 9) While the record reflects that these activities were performed for the purpose of assisting in the clients' operations, the record does not reflect that the activities performed by Palmer in this regard rose to the level of Palmer itself engaging in the ultimate decision making process and entering into contractual obligations on behalf of its clients with respect to the provision of a competitive service. It is the Commission's duty to review the record in this case and determine if the evidence presented supports Buckeye's allegations of wrongdoing by Palmer. However, the evidence in this case indicates that Palmer served in the role as an advisor assisting its clients. (emphasis added)

See Appellant's Appendix at A-025-A-026.

The Commission went through a painstaking review of all of the evidence and drew specific conclusions:

- Assisting communities with the Commission certification process, the completion of certification applications, and the filing of reports on behalf of clients does not support a finding that Palmer's actions constituted the performance of a competitive service (See Appellant's Appendix A-025 reflecting page 18 of the Opinion and Order);

- The mere educating of communities regarding the aggregation process may be encompassed within its role of a consultant, not the performance of a competitive

service (See Appellant's Appendix A-025 reflecting page 18 of the Opinion and Order);

- If Palmer did not itself engage in the ultimate decision making process and enter into contractual obligations on behalf of its clients with respect to the provision of competitive service, then it can serve in the role of an advisor assisting its clients when it develops an RFP process, issues RFPs on behalf of its aggregator clients, evaluates the proposals that came back in response to the RFPs, in dealings with incumbent suppliers on behalf of governmental entities by obtaining and analyzing data relating to the issuance of RFPs, and estimating savings potential and making recommendations to various communities that it represented (See Appellant's Appendix A-025-A-26 reflecting pages 18-19 of the Opinion and Order); and

- Palmer did not contractually obligate its client for the supply of competitive retail electric service ("CRES") and competitive retail natural gas service ("CRNGS"). (See Appellant's Appendix A-026 reflecting page 19 of the Opinion and Order)

The Commission acknowledged that Palmer Energy raised the issue of whether its activities would be regulated a decade ago. See Appellant's Appendix A-023 reflecting page 16 of the Opinion and Order. It conceded that there is ambiguity relative to distinguishing the activities of consultants and brokers. See Appellant's Appendix A-026-027 reflecting pages 19-20 of the Opinion and Order. Instead of creating a new definition for "consultants", the Commission looked at what activities comprised being in the business of supplying or arranging for the supply of electricity or natural gas. Relying on its prior analysis and determinations, the Commission interpreted the statutes to mean that to be involved in "arranging" for the supply of competitive retail energy service or competitive retail natural gas service, an entity must be engaged in the ultimate decision making process and entering into contractual obligations on behalf of its clients with respect to the provision of a competitive service. See Appellant's Appendix A-025 reflecting page 18 of the Opinion and Order. The Commission concluded that the Appellant had not met its burden of proof in demonstrating that Palmer Energy's activities constituted being in the business of supplying or arranging for the supply of electricity or natural gas; rather, such activities were more akin to being a consultant or an advisor as those terms are

typically used in the industry. The Commission did not rely on labels or classifications and did not create any new definitions. Instead, it properly evaluated the evidence, recognized its prior determinations in interpreting the statutes and in promulgating rules, and concluded that Palmer Energy was not in the business of supplying or arranging for the supply of electricity or natural gas. The Court should reject the Appellant's first two Propositions of Law and should affirm the Commission's Opinion and Order and Entry on Rehearing.

II. PROPOSITION OF LAW NO. II:

The relationship of Principal and Agent or Master and Servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks.

Under Ohio law, the relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks. See *Hanson v. Kynast*, 24 Ohio St.3d 171, 494 N.E. 2d 1091 (1986), paragraph one of the syllabus ; *Councell v. Douglas*, 163 Ohio St. 292, 126 N.E. 2d 597 (1955); and *Baird v. Sickler*, 69 Ohio St.2d 652, 433 N.E. 2d 593 (1982). The case at bar illustrates a classic example of the relationship between an agent (Palmer Energy) and principals (certificated local governmental aggregators).

Throughout his cross examination, Mr. Frye explained that Palmer Energy provided assistance, advice or guidance and recommendations to governmental aggregators <u>when called upon to render such assistance, advice or guidance</u>. (TR. 30, 31, 33, 41, 45, 54, 55 and 56; S-018, 019, 021, 024, 026, 033, 034, and 035) Leigh Herington, Executive Director of the Northern Ohio Public Energy Council ("NOPEC"), a governmental aggregator, testified that Palmer Energy was NOPEC's energy consultant who was able to answer questions and provide detailed information about energy markets. (TR. 218-220; S-051 – S-053) Larry Long of the County Commissioners Association of Ohio ("CCAO") testified that Palmer was hired to assist

the CCAO in answering questions about electric opt-out aggregation and reducing the cost of natural gas to county facilities. (TR. 232; S-054) But Palmer Energy did not make the ultimate decisions involving supplying or arranging for commodity service.

One of the best examples in support of this argument was brought about early in the cross examination of Mr. Frye who testified as follows:

> Senate Bill 3, 1999 Senate Bill No. 3, which was the original deregulation, as it's generally called, of electricity in the State of Ohio.
>
> After the passage of that a number of communities in Northwestern Ohio were interested in working together and potentially doing governmental aggregation for their communities and for those residential and small business customers.
>
> Palmer Energy was--had conversations with those communities about the potential for that. We were hired as a consultant to evaluate those potentials, put out an RFP.
>
> The original RFP did fail. Eventually, the communities were approached by an entity now called Integrys, it was WPS Energy Services, about the potential for savings.
>
> And ultimately some of those communities elected to go with WPS, others ultimately ended up with FirstEnergy Solutions for governmental aggregation services.
>
> Those agreements that were signed were signed between the communities as governmental aggregators after they passed the balloting issue and the supplier. (TR. 22-23; S-013 – 014).

This testimony demonstrates that Palmer Energy was a consultant merely making recommendations. Palmer Energy did <u>not</u> make the ultimate decision. Some of the NOAC communities (the principals) selected WPS Energy (now known as Integrys) as their supplier of choice; others selected FirstEnergy Solutions as their supplier of choice. (TR. 44-45; S-025 – 026) If Palmer Energy were indeed making the ultimate decisions as to the selection of suppliers or arranging for suppliers, there would not have been a "split decision" among the NOAC

communities. Each elected body of the community, not Palmer Energy, made the ultimate decision as to who should be the supplier. (TR. 45; S-026)

The evidence clearly shows that Palmer Energy itself did not engage in the ultimate decision-making process nor did it enter into contractual obligations on behalf of its clients. Palmer acted as the agent of the local communities who were the principals. (Palmer Energy Ex. 1, p. 5; S-005) The local communities had the right of control over all of Palmer Energy's activities as an energy consultant/agent. (TR. 45; S-026)

Review of orders of the Public Utilities Commission on appeal is limited to a consideration of whether the order is unreasonable or unlawful, and, on questions of fact, this court will not substitute its judgment for that of the Commission unless it appears from the record that the finding and order was manifestly against the weight of the evidence. *Cremean v. Pub. Util. Comm.*, 48 Ohio St.2d 163, 357 N.E. 2d 1073 (1976), paragraph one of the syllabus; *Cleveland Elect. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E. 2d 1 (1975), paragraphs four and eight of the syllabus; *Akron v. Pub. Util. Comm.*, 5 Ohio St.2d 237, 215 N.E. 2d 366 (1966); and *Lorain-Amherst Transit, Inc. v. Pub. Util. Comm*, 147 Ohio St. 376, 71 N.E. 2d 705 (1947). Where a decision of the Public Utilities Commission is under attack, the burden of proof rests upon the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E. 2d 666 (1966); and *Consumers' Counsel v. Pub. Util. Comm.*, 18 Ohio St.3d 264, 265, 480 N.E. 2d 1105 (1975). The Commission's finding that Palmer Energy did not make the ultimate decision and did not enter into contractual obligations on behalf of clients is clearly supported by the record in this case. The Court should affirm the decision of the Commission that under the facts of this case, the local governmental communities, the principals, who were certificated as

governmental aggregators, had the right of control over the activities of Palmer Energy, the agent.

III. PROPOSITION OF LAW NO. III:

The Commission did not Effectively Recognize a "Consultant Loophole"; There is no Statute that Prohibits, Restricts, or Limits Competitive Retail Electric Service Providers ("CRES") or Competitive Retail Natural Gas Service Providers ("CRNGS") from Retaining Consultants (Response to Appellant's Proposition of Law No. III).

At pages 17-18 of its Merit Brief, the Appellant argues that Palmer Energy sought a "Consultant Loophole" at the time the rulemaking procedures relating to Chapters 4928 and 4929 of the Revised Code were taking place and that such an effort was explicitly rejected by the Commission. More accurately, Palmer Energy sought express clarification that consultants be excluded from the certification rules that the Commission was considering for both competitive retail electric service provider certificates and competitive retail natural gas service provider certificates.

The first rulemaking decision referenced was the Commission's Finding and Order in, *In re Commission's Promulgation of Rules for Certification of Providers of Competitive Retail Electric Services*, Pub. Util. Comm. Case No. 99-1609-EL-ORD, 2000 Ohio PUC Lexis 428 at 3 (March 30, 2000). The Commission stated in that case as follows:

> ...we note that Palmer Energy recommended that consultants be excluded from the certification rules. <u>We note that these rules do not contemplate certifying consultants</u>, 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.... (emphasis added)

The second case referenced by the Commission was its Finding and Order in *In re Commission's Promulgation of Rules for Competitive Retail Natural Gas Service and its Providers*, Pub. Util. Comm. Case No. 01-1371-GA-ORD, 2001 Ohio PUC Lexis 862, 24 (November 20, 2001), where the Commission stated as follows:

> Palmer Energy 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.

The Appellant claims at page 18 of its Merit Brief that the PUCO has now failed to apply its prior holding to the facts of this case and instead, has effectively recognized a consultant loophole in its analysis of the record and determined that Palmer did not engage in activities beyond those of a consultant even though there is no consultant loophole in the certification statutes.

Although the Appellant failed to grasp the concept, the Commission recognized that consultants have existed long before the Appellant ever filed its complaint. Indeed, it is hard to fathom an industry in today's society that does not retain or use consultants.

The Court must recognize that the General Assembly neither prohibited, restricted, nor limited a CRES provider or a CRNGS provider from retaining consultants.[2] There is no such statutory prohibition, restriction or limitation.

Consultants exist in the regulatory arena. Consultants often do more than just offer expert advice. They may make field investigations. They may hold "workshops." They may review documents. They may ask questions. They may analyze responses. They may prepare reports. They may make recommendations. They may testify at hearings. They also receive compensation for their services, which is not a violation of any law or rule. These activities do not convert consultants themselves into becoming competitive retail electrics service providers or competitive retail natural gas suppliers. There is an obvious need for consultants in today's world, especially for local governments who are responsible for making the ultimate decisions and entering into contractual obligations to provide energy options for their constituents. The General Assembly could have required consultants to be certified. The General Assembly, however, did not prohibit, limit or restrict the use of consultants by governmental aggregators, CRES providers or CRNGS providers nor require certification of such consultants.

At page 17 of its Merit Brief, the Appellant claims that the recent case of *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E. 2d 655 somehow supports its argument that the Commission abused its own jurisdiction and power by exceeding the authority granted by the General Assembly and then failing to follow its own rules. The *Columbus S. Power* case clearly is not applicable.

[2] Mr. Mark Frye, president of Palmer Energy Company, testified that in those situations where Palmer Energy Company has provided consulting services to local governments, it has done so in conjunction with a certified aggregator and a certified competitive retail service provider. (Palmer Energy Ex. 1, p. 6; S-006).

The Court, in the *Columbus S. Power* case, succinctly ruled upon OCC's sixth proposition of law that the Commission erred in determining that electric security plans ("ESPs") may include items not specifically authorized by statute.

> In its sixth proposition of law, OCC argues that R.C. 4928.143(B)(2) does not permit AEP to recover certain carrying costs associated with environmental investments. That section states, "The [electric security] plan may provide for or include, without limitation, any of the following: and then list nine categories of cost recovery. OCC argues that this section permits plans to include *only listed* items; the commission and AEP argue that (B)(2) permit *unlisted* items. We agree with OCC.
>
> By its terms, R.C. 4928.143(B)(2) allows plans to include only "any of the following" provisions. It does not allow plans to include "any provision." So if a given provision does not fit within one of the categories listed "following" (B)(2), it is not authorized by statute.
>
> The commission believes that the phrase "without limitation" allows unlisted items, asserting that the nine categories are illustrative, ***not exhaustive." But this phrase does not allow unlisted items. Rather, it allows unlimited inclusion of listed items. This list limits *the type* of categories a plan may include, while the phrase "without limitation" allows *as many or as much* of the listed categories as the commission finds reasonable -- subject to any other applicable limits, which we do not consider here.
>
> The plain language of the statute controls, and this interpretation leads to a reasonable result. However, the appellees' interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended.
>
> For the foregoing reasons, we reversed the commission's legal determination that R.C. 4928.143(B)(2) permits ESPs to include unlisted items. On remand, the commission may determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges.
>
> *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-520, 2011-Ohio-1788, 947 N.E. 2d 655.

The *Columbus S. Power Co* case -- an electric security plan case -- has no applicability in the matter at bar. The *Columbus S. Power Co.* case stands for the proposition that the Commission does not have authority to act beyond the scope of its statutory authority. Unlike the *Columbus S. Power Co.* case, the instant complaint case involves the Commission's interpretation of the word "arranging" where no statutory definition of that term exists. The Court can and should rely on the expertise of the Commission in interpreting the definition of the term "arranging".

The Appellant argues at page 18 of its Merit Brief that the Commission failed to apply this rule to the facts presented by this case. The Commission did not create a consultant loophole, but simply recognized its prior determination in interpreting its own rules. The Ohio Supreme Court has recognized the Commission's broad discretion to interpret its own rules, and, absent an extreme case, has declined to interfere with that discretion. See *Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio*, 69 Ohio St. 2d 559, 560, 433 N.E. 2d 212 (1982); *Sanders Transfer v. Public Utilities Commission of Ohio*, 58 Ohio St. 2d 21, 23, 387 N.E. 2d 1270 (1979). The Commission applied its rules fairly and rationally. The Appellant's third Proposition of Law must be rejected.

IV. PROPOSITION OF LAW NO. IV:

The Appropriate Test in Determining Whether an Energy Consultant was Engaged in the Provision of or Arranging for a Competitive Service is Whether the Energy Consultant Engaged in the Ultimate Decision Making Process and Entered into Contractual Obligations on behalf of its Clients (Response to Appellant's Proposition of Law No. IV).

The Appellant argues at pages 18-20 of its Merit Brief that Palmer Energy went beyond the dictionary definition of a "consultant" and performed a whole host of activities and services on behalf of its customers that made it subject to certification. The Appellant argues that if the Commission accepts a "consultant defense" every entity performing services and activities like

Palmer Energy will immediately start calling themselves consultants in order to avoid certification and ultimately the jurisdiction of the PUCO. But the Commission did not rely on a dictionary definition of "consultant" nor did it create one.

The Commission acknowledged at page 18 of its Opinion and Order that there is no specific definition of the word "arranging". See Appellant's Appendix A-025. It also recognized that its decision in this case was dependent on its interpretation of the definitions of electric services company and retail natural gas supplier. See Appellant's Appendix at A-024 reflecting page 17 of the Opinion and Order. The Commission also acknowledged its prior determinations that the rules that it was establishing did not contemplate certifying consultants. See Appellant's Appendix A-025 reflecting page 18 of the Opinion and Order. Instead, the Commission stated that "engaging in the ultimate decision making process and entering into contractual obligations in behalf of its clients" was the key in determining whether an entity was engaged in arranging for or providing a competitive service. See Appellant's Appendix A-026 reflecting page 19 of the Opinion and Order. Thus, the Commission did not use the actions or definition of a consultant as the key reference point in making its decision. If the activities performed rose to the level of engaging in the ultimate decision making process and entering into contractual obligations on behalf of its clients, then the Commission could find that the entity was providing a competitive service.

In this case, the Commission weighed all of the evidence and determined that Palmer's activities did not rise to the level of Palmer itself engaging in the ultimate decision making process and entering into contractual obligations on behalf of its clients. Instead, the Commission found that the activities performed by Palmer Energy to be in the role of an advisor assisting its clients and not as a provider of or an arranger for a competitive service. See

Appellant's Appendix A-025 and A-026 reflecting pages 18-19 of the Opinion and Order. Thus, the test should not be based on a dictionary definition, but rather on the Commission's pragmatic test of whether or not an energy consultant is making the ultimate decision and is contractually obligating its clients. The Commission's finding that Palmer Energy was not making the ultimate decision and was not contractually obligating its clients is supported by the evidence and should be affirmed. Proposition of Law No. IV of the Appellant should be rejected.

V. PROPOSITION OF LAW NO. V:

Equitable Estoppel Must Be Determined on the Particular Facts of Each Case and the Facts of this Case Do Not Support Its Application (Response to Appellant's Proposition of Law No. V.

At pages 20-25 of its Merit Brief, the Appellant argues that Palmer Energy made explicit admissions to broker status to the public during the pre-September, 2010. The Appellant goes on to argue that because of Palmer's website, certification application and response to Erie County's request for consultants, that the doctrine of equitable estoppel must apply.

The doctrine of equitable estoppel was not mentioned by the Appellant in its application for rehearing. See Appellant's Appendix, A-071-A-097. The Supreme Court cannot consider any matter which was not specifically set forth in an application to the Commission for rehearing as a ground on which the Appellant considered the order of the Commission to be unreasonable or unlawful. *Cincinnati v. Public Util. Comm.*, 151 Ohio St. 353, 86 N.E. 2d 10 (1949), paragraph seventeen of the syllabus.

Notwithstanding that fact, this Court has held that equitable estoppel must be determined on the particular facts of each case. *In re Election of November 6, 1990 for the Office of Attorney General of Ohio*, 58 Ohio St.3d 103, 113, 569 N.E. 2d 447 (1991); *Hampshire Cty. Trust Co. v. Stevenson*, 114 Ohio St. 1, 11, 150 N.E. 726 (1926). Further, this Court has stated that equitable estoppel generally requires actual or constructive fraud. See *State Ex. Rel. Elsass*

v. Shelby Cty. Bd. of Commis., 92 Ohio St. 3d 529, 535 751 N.E. 2d 1032 (2001). Where there is no showing of actual or constructive fraud, equitable estoppel does not apply. See *State Ex. Rel. Richard v. Bd. of Trustees of Police & Fireman's Disability & Pension Fund,* 69 Ohio St. 3d 409, 414, 632 N.E. 2d 1292 (1994) and *State Ex. Rel. Ryan v. State Teachers Retirement Sys.*, 71 Ohio St. 3d 362, 368 634 N.E. 2d 1122 (1994).

After reviewing the record in this case, the Court will find, as the Commission did, that there is no basis in fact to apply the doctrine of equitable estoppel. At page 22 of its Merit Brief, the Appellant first cites Palmer Energy's website in which Palmer described itself as "one of the first natural gas brokerage firms in the country." However, Mr. Mark Frye, President of Palmer Energy Company, explained that when the company was founded in 1980, it was a brokerage firm; it made the transition away from brokerage prior to Mr. Frye's acquisition of the business. (TR. 95; S-036) Likewise, in response to the Appellant's cross-examination on information contained in the certificate applications that Palmer Energy filed with the Commission, Mr. Frye explained that while Palmer Energy was founded in 1980 as one of the first natural gas brokerage firms in the country, the business evolved away from natural gas brokerage to energy management and to energy consulting. (TR. 98; S-037) The Commission also found these examples to be nothing more than circumstantial evidence without specific context for the referenced services and without the establishment that the Respondent actually engaged in the provision of such services. See Appellant's Appendix at A-026 reflecting page 19 of the Commission's Opinion and Order.

The Appellant also alleges at page 24 of its Merit Brief that Palmer responded to an Erie County RFP for broker services as evidence that Palmer has admitted its "broker status". While Palmer Energy did in fact respond to an Erie County proposal, the Appellant's own president,

Thomas Bellish, conceded that Palmer's response to Erie County was an offer for consulting services. (TR. 308-310; S-057 – S-058)

When asked on cross-examination what were the types of services that Palmer Energy provided in the period prior to September, 2010, Mr. Frye responded:

> We worked with those governmental entities to develop an RFP process, to issue an RFP, evaluate the various proposals that came back in from the providers.
>
> We estimated savings potential for various consumers, provided recommendations to the various communities on which potential direction they may want to go.
>
> We worked with those communities on determining how they wanted to proceed with the governmental aggregation policies and trying to determine that particular circumstances, did they really want to do governmental aggregation or not. (TR. 18-19).

At page 23 of its Merit Brief, the Appellant cites examples of Mr. Frye's and Mr. Mizerek's direct project experience prior to obtaining certification as examples of admissions that it was providing broker services and activities. These examples of negotiating contracts, working with governmental aggregation communities, and assisting in negotiations are all indicative of services that an energy consultant would ordinarily provide for a local governmental aggregator. Mr. Frye testified that in all the programs and projects in which there was an aggregation program, there was always a certificated aggregator that was in the program and that aggregator was never Palmer Energy. (TR. 197; S-049) Thus, Palmer Energy performed these activities and services under the right of control of the local governmental aggregators.

The facts in this case clearly do not support equitable estoppel. The Appellant's fifth Proposition of Law must be rejected.

VI. PROPOSITION OF LAW NO. VI:

The Attorney Examiner's Rulings on Discovery Issues and the Trial Subpoena were Correct and Appropriate. (Response to Appellant's Proposition of Law No. VI).

At pages 25-26 of its Merit Brief, the Appellant claims that the Commission erred by finding that the Appellant failed to meet its burden of proof, especially where it is the PUCO's rulings on the discovery issues and the trial subpoena that effectively prevented the Appellant from presenting all of the available evidence and rewarded Palmer Energy's "stonewalling" of the discovery and trial process. The Appellant claims that if it has not met its burden of proof, it is largely because the PUCO granted a significant Motion to Quash in favor of Palmer Energy on the eve of the trial, which significantly hampered the Appellant's ability to present certain evidence at trial. The Appellant claims that it was totally thwarted by the PUCO itself from producing that evidence, although it believes that the existing record evidence sufficiently establishes Palmer's violations of law. Unfortunately, the Appellant left out from its brief the background and the rationale for the Attorney Examiner's ruling as to why the Motion to Quash was granted.

On March 3, 2011, the Appellant moved to issue subpoenas to Mark R. Frye to attend the hearing and to bring five categories of documents with him. The attorney examiner issued the subpoena as a ministerial act pursuant to R.C. 4901.22 and Ohio Adm. Code 4901-1-25. The five categories of documents that were the subject of the subpoena were as follows:

1) All written contracts and/or agreements between Palmer Energy Company and Northeast Ohio Public Energy Counsel (sic) ("NOPEC"), Northwest Ohio Aggregation Coalition ("NOAC"), or any of the NOAC communities (the Cities of Toledo, Sylvania, Oregon, Northwood, Maumee, Perrysburg, the Village of Holland, Lake Township in Wood County, and Perrysburg Township in Lucas County, collectively the "NOAC Communities").

2) All memoranda and/or other documents memorializing informal and/or unwritten agreements between Palmer Energy Company and NOPEC, NOAC, or any of the NOAC Communities.

3) All written correspondence, electronic, or otherwise, by and between you, and/or any employee, agent, officer or director of Palmer Energy Company, and any owner, agent, officer, director, and/or employee of NOPEC, NOAC, or any of the NOAC Communities.

4) All documents and/or memoranda memorializing oral conversations by and between you, and/or any employee, agent, officer, or director of Palmer Energy Company, and any owner, agent, officer, director, and/or employee of NOPEC, or any of the NOAC Communities.

5) All written contracts and/or agreements, memoranda, and/or other documents memorializing informal and/or unwritten agreements, written correspondence, electronic, or otherwise, documents and/or memoranda memorializing oral conversation by and between you and/or any employee, agent, officer or director of Palmer Energy Company, and all other entities prior to 2010.

On March 16, 2011, Palmer Energy filed a motion to quash or limit the subpoena issued to Mr. Frye. Palmer Energy asked that the subpoena be quashed or limited so that Mr. Frye not be required to bring any documents to the hearing beyond what was already being produced in discovery. Palmer listed the following eight categories of documents that were provided to the Appellant during discovery:

1) The November, 1997 Natural Gas Procurement Agreement between the City of Maumee and Palmer Energy Company;

2) The professional services agreement for energy consulting services between the City of Toledo and Palmer Energy Company dated June 11, 2004;

3) A series of agreements and amendments between FirstEnergy Solutions Corp., on the one hand, and Northwood, Ohio; the City of Toledo, Ohio; the City of Perrysburg, Ohio; the City of Oregon, Ohio; the City of Maumee, Ohio; the Village of Holland, Ohio; the Township of Lake, Ohio; and Lucas County, Ohio, on the other.

4) A series of certificates issued by the Public Utilities Commission of Ohio to Competitive Retail Electric Service providers including the Village of Holland (Certificate No. 00-039E(6); Lake Township (Certificate No. 04-113E(4); Lucas County (Certificate No. 00-028E(6); The City of Maumee (Certificate No. 01-045E(6); the City of Oregon (Certificate No. 00-030E(6); The City of Perrysburg (Certificate No. 01-080E(5); Perrysburg Township (Certificate No. 10-313E(1); the City of Sylvania (Certificate No. 00-033E(6); and the City of Toledo (Certificate No. 00-026E(6).

5) Master agreements to provide certified natural gas services to a governmental aggregator between Interstate Gas Supply, on the one hand, and the City of Toledo; the Village of Holland; the City of Oregon; Lucas County; the City of Maumee; Lake Township; the City of Northwood; and Perrysburg Township, on the other.

6) Renewal certificates issued by the Public Utilities Commission of Ohio to the following Ohio Natural Gas Governmental Aggregators: the Village of Holland (Certificate No. 02-042G(5); Lake Township (Certificate No. 04-072G(4); Lucas County (Certificate No. 02-036G(5); the City of Maumee (Certificate No. 05-094G(4); the City of Northwood (Certificate No. 03-045G(5); the City of Oregon (Certificate No. 02-033G(5); Perrysburg Township

(Certificate No. 07-125G(2); the City of Sylvania (Certificate No. 02-041G(5); and the City of Toledo (Certificate No. 02-013G(5).

7) Copies of certificates issued in September, 2010.

8) Copies of the public version of the pre-filed testimony of Mark R. Frye filed in Case Nos. 08-1238, 08-1094, et al., 08-935, 03-2144 (prepared and surrebuttal), 08-917, et al., and 05-376.

Palmer Energy noted in its Motion to Quash that the documents sought in the subpoena were much broader than the universe of documents that was already provided to the Appellant. The additional information sought by the Appellant in the subpoena was confidential and proprietary to both Palmer and to the claims of third parties. Although neither the Appellant nor Palmer Energy are utilities, this Court has upheld the Commission's denial of an application for an order to compel production by one utility of its private books and documents for inspection by another utility which might harm the first utility's ability to serve the public. See *Southern Ohio Public Service Co. v. Public Utilities Commission of Ohio*, 115 Ohio St. 405, 154 N.E. 365 (1926). Palmer Energy had a contractual obligation not to disclose this information and also argued that it would be burdensome to comply with the overbroad subpoena and that some of the requested disclosure constituted harassment.

On March 24, 2011 the Appellant filed a Memorandum Contra Palmer Energy's Motion to Quash.

On March 25, 2011, Palmer Energy filed its Reply to the Appellant's Memorandum Contra. Palmer Energy indicated that while it did not object to Mr. Frye's testimony regarding documents produced during discovery, the categories of documents delineated in Exhibit A to the subpoena were much broader than the eight categories of documents that were provided to

the Complainant during discovery. Palmer Energy also noted that all of the discovery requests were to be served by February 14, 2011. It asked the attorney examiner not to allow the Appellant to circumvent the discovery deadline by using a subpoena to request additional documentation.

On March 30, 2011 the attorney examiner issued an Entry granting the motion to quash. The attorney examiner stated at Finding 5:

> . . . In reaching this determination, the attorney examiner finds that the documents addressed in Exhibit A to Mr. Frye's subpoena goes beyond the scope of the prior discovery and that to allow the subpoena to remain as drafted would in essence allow for the conducting of discovery beyond the previously established deadlines. Additionally, the attorney examiner notes that, in its motion to quash, Palmer Energy delineated the eight categories of documents that it provided to Buckeye Energy in response to its discovery requests. To the extent that Palmer Energy [sic] did not believe that the discovery provided was responsive to its requests, the appropriate remedy would have been to file a motion to compel.

The attorney examiner properly granted the motion to quash for the reasons set forth above. The Appellant neither filed a motion to compel to the earlier discovery nor took an interlocutory appeal from the March 30, 2011 Entry.

Given that the Appellant sought confidential documents, sought to the extend the discovery deadline and did not exhaust its administrative remedies by either filing a motion to compel as to the earlier discovery or taking an interlocutory appeal from the attorney examiner's Entry, Palmer Energy submits that the attorney examiner's ruling was appropriate. The Appellant's Sixth Proposition of Law must be rejected.

CONCLUSION

The record supports the Commission's decision. Palmer Energy acted as an energy consultant/agent on behalf of its principals who were certified local governmental aggregators.

CERTIFICATE OF SERVICE

I certify that the foregoing document was served upon the following persons via electronic mail and via U.S. first class mail, postage prepaid, this 20th day of August, 2012:

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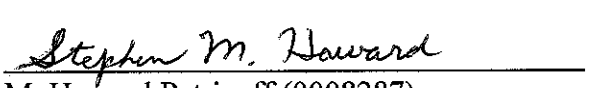
As an energy consultant, Palmer Energy was not engaged in the ultimate decision making process and did not enter into contractual obligations on behalf of its clients. Palmer Energy did not act as a broker, did not admit that it was acting as a broker, nor did it violate R.C. 4928.08 or 4929.09. Notwithstanding the fact that the Appellant did not mention equitable estoppel in its application for rehearing, there is no basis for applying the doctrine of equitable estoppel. The attorney examiner's ruling on discovery was appropriate because it did not allow the complainant to extend the discovery deadline nor did it allow the complainant to obtain confidential documents. The Court should affirm the Commission's Opinion and Order and Entry on Rehearing in all respects for the reasons set forth above.

Respectfully submitted on behalf of,
PALMER ENERGY COMPANY



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