

IN THE SUPREME COURT OF OHIO

Buckeye Energy Brokers, Inc.,	:	
	:	
Appellant,	:	Case No. 2012-0668
	:	
v.	:	
	:	On Appeal from the Public Utilities
The Public Utilities Commission of Ohio	:	Commission of Ohio
and Palmer Energy Company,	:	Case No. 10-693-GE-CSS
	:	
Appellees.	:	

REPLY BRIEF OF APPELLANT BUCKEYE ENERGY BROKERS, INC.

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## ARGUMENT

### I. Reply in Opposition to PUCO's Proposition of Law No. I.

Under its Proposition of Law No. I, Appellee Public Utilities Commission of Ohio ("PUCO") makes a whole laundry list of arguments: that Appellant Buckeye Energy Brokers, Inc. ("Buckeye") did not suffer any prejudicial harm as a result of the PUCO's decision, that Buckeye failed to allege that it suffered any harm, that Buckeye failed to indicate what remedy it would like the Court to provide, and that Buckeye lacked standing to bring the appeal. In addition to the fact that none of these arguments were made before the PUCO or entered into its Decisions, none of these arguments have any merit whatsoever.

First, it is not necessary to show evidence of harm attributable to Appellee Palmer Energy Company's ("Palmer") violations of law. No such showing of harm must be made to require a person to be certified under either the natural gas or electricity certification statutes. (R.C. 4928.08 and 4929.20.) If a person is going to engage in the natural gas or electricity industries and in the kind of activities that Palmer engaged in prior to certification, then that person must be certified regardless of whether there will be any harm caused to anyone. It does not matter whether anyone has been harmed or not. It can and must be argued that violating a clear legal obligation, such as has been done here by Palmer, of necessity, caused inherent harm to the public because the General Assembly has so determined that without requiring any allegation or showing of prejudice or harm when it comes to the application of the certification statutes. This is no different than a person claiming that they do not have to stop for a red light at a traffic intersection as long as they do not cause any harm to the public or anyone in particular in or approaching the intersection. That is not how the law works. One must obey any all laws

applicable to that person and the industries in which they work regardless of whether failure to obey that law has caused harm or prejudice to anyone.

Second, and assuming that a generalized harm must be shown (which is denied), it is clear that such a showing has been made here. There was substantial testimony about how during the pre-certification period Palmer was providing substantial broker, aggregation and “arranging” services to its various clients when it had failed to obtain certification from the PUCO in order to do so. This meant that Palmer had failed to demonstrate its proficiency, financial stability, and other required information to the PUCO as required by the certification statutes to obtain the PUCO’s approval and yet was offering numerous services subject to regulation here in the State of Ohio. The General Assembly explicitly requires that all parties engaging in this business would have to seek and obtain appropriate certifications from the PUCO in order to engage in that business. To the extent that specific harm must be shown at this stage of the case (which Buckeye denies), one of the more recent examples of that harm is evidenced by the Complaint filed in *Joseph A. Wolf v. NOPEC, et al.*, Case 11-1056-EL-CSS (PUCO), which was specifically cited in the PUCO proceedings below.

Third, and assuming that Buckeye must show prejudice or harm to itself (which is denied), it is clear that Buckeye has been harmed by the numerous violations of law by Palmer. Buckeye showed that it was harmed because it was competing with Palmer throughout Palmer’s pre-certification period while itself being certified and Palmer was not certified. This put Palmer at an unfair competitive advantage as to Buckeye. Furthermore, Palmer had repeatedly and explicitly stated to its prospective and actual customers that no certification was needed which was in direct contradiction of the expressed views taken by Buckeye (and other competitors).

Palmer did so without any consequence for a number of years. This had an adverse impact upon Buckeye's ability to compete with Palmer.

Fourth, Buckeye has always clearly indicated what remedies were being sought in this case. On behalf of itself and the general public who has been adversely impacted by Palmer's numerous violations of law, Buckeye sought rescission of Palmer's contracts, imposition of damages suffered by the public and others as a result of Palmer's violations of law, and imposition of forfeitures in the initial Complaint. All of these remedies are specifically provided by the General Assembly for violations of the certification statutes: R.C. 4928.16 and 4929.24. It must be presumed that the General Assembly wanted some or all of these remedies to be imposed in all instances in which a person has violated the certification statutes. These remedies were specifically identified and addressed in Buckeye's Complaint and Amended Complaint, as well as in its post-trial briefs, its Application for Rehearing, and in its Merit Brief. Even Palmer admitted and recited the remedies sought in its Merit Brief, pp. 3-4.

The cases relied upon by the PUCO are inapposite. *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438 (1992) ("*ODVN*"), involved a situation where a motion to dismiss an appeal was granted, dismissing an appeal filed by intervening party Ohio Domestic Violence Network (ODVN) from a PUCO order that affected tariff applications submitted by Ohio Bell Telephone Company. The Court determined that the order complained of did not affect ODVN's substantial rights, that the order is not final and appealable as to ODVN, and that ODVN lacks standing to bring the appeal. None of that situation exists with respect to Buckeye. Buckeye is the original party who filed the Complaint in this case. Buckeye has been directly adversely affected by the PUCO's ruling dismissing Buckeye's Complaint. Clearly, Buckeye

has standing to appeal the dismissal of its own Complaint. Clearly, *ODVN* cannot be used as any kind of precedent for dismissal in this case.

*Ohio Contract Carriers Assn. v. Pub. Util. Comm.*, 140 Ohio St. 160 (1942), involved dismissal of an appeal by an association whose membership is composed of approximately 10% of the contract carriers operating under permits issued by the PUCO. The Appellant Association itself did not hold any permit from the Commission, nor was it an owner of any stock or interest in any permit holder. It did not claim to represent any specific permit holder. It was not affected by the order issued by the PUCO from which it had appealed. Not surprisingly, the appeal was dismissed on the grounds that the association was not an aggrieved party whose substantial right had been affected by the questioned order. This stands in marked contrast to the situation here where it is Buckeye's complaint about Palmer that was dismissed, and whose substantial rights have been adversely affected for a number of years because of Palmer's unlawful conduct.

The third and final case relied upon by the PUCO is *Willoughby Hills v. C.C. Bar's Sahara*, 64 Ohio St.3d 24 (1992), where the Court rejected an attempt to claim that a municipality did not have standing to appeal a decision by its board of zoning appeals. The Court found that the fundamental interests in protecting the integrity of its zoning ordinances was a sufficient basis to support standing for the appeal on behalf of the municipality. The case cannot be read to support rejection of Buckeye's appeal as is being suggested by the PUCO.

Finally, Buckeye objects to the assertion of this proposition of law at this late stage of the case. It is clear from an examination of the PUCO's original Decision and in its Decision of the application for rehearing that the PUCO did not make any determination against Buckeye based upon a failure to allege and/or prove prejudice. Nor did the PUCO determine that Buckeye

lacked standing to file its Complaint or that there were no remedies addressed or provided for the alleged violations of law by Palmer. The PUCO simply went ahead in its Decisions to address the merits of the Complaints filed by Buckeye and whether the substantive allegations had been proven. It should be clear to the Court that these lack of prejudice, lack of standing, and lack of remedies arguments are belated concoctions being desperately asserted by counsel for the PUCO to avoid the reversal on the merits that they fear.

It is pretty clear under well-settled law that a party is prohibited from making a point for the first time in the Court as opposed as to while the case was before the PUCO. See, for example, *City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353 (1949); R.C. 4903.10. See also *BancOhio Nat. Bank v. Rubicon Cadillac, Inc.*, 11 Ohio St.3d 32, 33 (1984) (“This court cannot address a proposition which was not raised at the intermediate level.”). The Court finds such tactics to be unfair and has traditionally refused to consider such arguments. Of course, the reason for this is that this would encourage others to withhold claimed errors that could be corrected by the Commission until the case had been filed in Court and thus removed from the Commission’s control. There is no reason why this same principle cannot be applied to the PUCO itself. The PUCO is master of its own Decisions. If the PUCO truly believed in this argument or thought it was applicable, it could and should have set it forth as one of the reasons for deciding the case in favor of Palmer and against Buckeye. But it did not. Its counsel cannot raise those new grounds at this point in the case.

If the PUCO’s counsel truly believed that these new grounds represent a separate and independent basis upon which the Court can affirm the PUCO’s ruling, then it should have availed itself of the cross-appeal procedure. The docket in this case shows that the PUCO did

not avail itself of the cross-appeal procedure. Of course, the cross-appeal procedure would have involved the PUCO filing a notice of cross-appeal attempting to assert these new and additional arguments concocted by its attorneys in that cross-appeal. Clearly, the PUCO did not. As a result, it is blatantly unfair and in contravention of the law to permit the PUCO's attorneys to now raise additional grounds, which were never included in the PUCO's Decisions or even addressed before the PUCO. That would be unfair and a clear violation of due process.

Given the complete failure of the PUCO to include these reasons as a reason for denying Buckeye's Complaints in its Decisions, and furthermore failing to include these arguments at any point in the briefing related to the rehearing application, or even to attempt to put the matter in issue in a notice of cross-appeal, it would appear that the Court lacks jurisdiction to consider these new arguments. See, *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 211, 2007-Ohio-4790, ¶ 18. See also, *Travis v. Publ. Util. Comm.*, 123 Ohio St. 355 (1931); *Forest Hills Utility Co. v. Publ. Util. Comm.*, 31 Ohio St.2d 46 (1972); and *Lake Conneaut Telephone Co. v. Publ. Util. Comm.*, 10 Ohio St.2d 269 (1967).

## **II. Reply in Opposition to PUCO's Proposition of Law No. II.**

The PUCO argues that the appeal is moot because Palmer has now complied with the certification statutes. The PUCO argues that the post-complaint certification of Palmer makes all the issues here to be purely academic questions. Once again, the PUCO is wrong.

There is no question of fact that Palmer did not seek or obtain certification until more than six months after the original Complaint was filed by Buckeye. However, the evidence in this case shows that Palmer had been engaging in broker, aggregating and "arranging" activities

for approximately 10 years prior to certification. It is those illegal activities by Palmer over a sustained period of time which very much remain an issue in this case.

This situation is no different than the person who operated a motor vehicle without a driver's license for a 10-year period of time and then applied for and obtained a driver's license after meeting all qualifications required to obtain a driver's license. The unlicensed driver (like the unlicensed broker) must answer for his/her illegal and unauthorized conduct during the time period that it engaged in activities for which it was not certified and/or licensed. Such a person does not get a free pass because he or she has finally decided to comply with the law after a sustained period of lawlessness. Thus, the question of whether Palmer should have been certified by the PUCO for the 10 years prior to obtaining certification remains very much a live and real controversy.

The PUCO argues that even if this Court were to determine that Palmer should have been certified for the 10 year time period prior to becoming certified, that such a determination would be pointless because Palmer now is certified. This ignores the fact that the General Assembly has provided a whole host of remedies applicable to a situation where someone has participated in the natural gas and/or electric industry without becoming certified prior to engaging in those activities. Making a determination that Palmer should have been certified during the 10 year period prior to certification does not constitute an advisory opinion because then a determination would have to be made as to which of the many statutory remedies provided by the General Assembly should be applied to the facts and circumstances in this case. Thus, determining this appeal on the merits is important and necessary because an actual controversy still exists concerning Palmer's conduct during the pre-certification period.

Finally, as noted with respect to PUCO's Proposition of Law No. I, this is another situation where the attorneys for the PUCO are making an argument which was not made or considered by the PUCO itself. At no point in any of its Decisions in this case did the PUCO declare that no controversy existed in this case or that the Complaint was rendered moot by Palmer's belated post-filing certification. Because that did not enter into or affect the PUCO's analysis in this case, it cannot and should not become the basis of the Court's decision of this appeal. For all the reasons previously stated in Section I, the Court should reject the PUCO's counsel's attempt to raise new arguments or justifications for the PUCO's Decision which were not, in fact, raised or considered below, let alone decided by the PUCO in its Decisions.

### **III. Reply in Support of Buckeye's Proposition of Law Nos. I and II,**

The PUCO Brief argues that this case presents a question of fact and that the Court is being asked to reweigh the evidence. That is an incorrect characterization of the appeal and the record in support of the appeal. Indeed, the PUCO fails to point out a single question of fact that exists in this case. Even Palmer agrees that "the facts of the case are . . . for the most part . . . not in dispute." (Palmer Brief, p. 1.) What this case really involves is an interpretation and application of the certification statutes to a series of admitted activities engaged in by Palmer prior to obtaining certification to engage in those activities from the PUCO. The fact that the activities occurred during the pre-certification period is not, and cannot be, disputed. Therefore, this case does not involve reweighing the evidence at all. Instead, it involves interpreting and applying the law as it was passed by the General Assembly to an undisputed set of facts. That is exactly what the Court does on a routine basis. No deference is due to the PUCO in that situation. If the Court interprets and applies the law as it was passed by the General Assembly,

then the only conclusion that can flow from such an application and analysis of the law is a finding that Palmer had been a broker, aggregator and “arranger” of competitive retail electricity services (CRES) and competitive retail natural gas services (CRNGS) for many years.

It is interesting to note that both PUCO’s brief and Palmer’s brief almost completely sidesteps the legal analysis set forth by Buckeye in support of its Propositions of Law Nos. 1 and 2, including the citations, the quotations, and the discussion of the applicable sections of the certification statutes. The only fair assumption that can be drawn from that approach is that the PUCO and Palmer do not quarrel with Buckeye’s discussion of the applicable law.

The focus of the merits of the appeal is upon whether Palmer was “arranging” for the supply of CRNGS and/or arranging for the supply of a CRES. After examining the evidence of record, the PUCO determined that Palmer was not “arranging” within the meaning of the certification statutes because it 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. However, this completely ignores an integral part of each of the certification statutes. The certification statutes not only apply to just those that make the decision and enter into contractual obligations to provide either electricity or natural gas; the certification statutes are much more expansive than that. They also apply to a “power broker” in the case of electricity and a “broker” in the case of natural gas. Thus, the reading of the certification statutes by the PUCO and argued for by its attorneys in its Merit Brief is far too narrow.

By any dictionary definition of what a broker is, we all know that a broker does not make the ultimate decision and does not enter into any contractual obligations on behalf of its clients. A broker is simply an intermediary between one party and another in negotiating agreements.

See *The Random House Dictionary Of The English Language*, Second Edition, p. 265. (Copy is attached hereto and marked as A-125 and A-126.) That is exactly the function in which Palmer acted during the pre-certification period. Palmer was alleged to be a broker acting in an intermediary capacity on behalf of numerous governmental and commercial entities. The evidence produced in the record overwhelmingly establishes that Palmer did function as a broker intermediary on behalf of those governmental entities. In essence, Palmer brought together the suppliers of electricity and natural gas with Palmer's customers and clients who are the governmental and commercial entities to form various and numerous contracts. That is the essence of what a broker does. Palmer was paid by the supplier not the customer. This is a key difference between broker and consultant. Brokers are explicitly covered in the certification statutes as shown in Buckeye's opening brief.

By interpreting and applying the certification statutes in the way that it does, the PUCO effectively reads out of the certification statutes the broker concept and/or category. Words used in a statute must be read in context and construed according to the rules of grammar and common usage. R.C. 1.42; *Indep. Ins. Agents of Ohio, Inc. v. Fabe*, 63 Ohio St.3d 310, 314 (1992). The PUCO is not allowed to interpret and administer a public utility statute in such a way as to render key language set forth in those statutes to be essentially a nullity and of no effect. It is the duty of the Court to give effect to the words used and not to insert words not used. *State v. S.R.*, 63 Ohio St.3d 590, 595 (1992). The PUCO Decisions clearly show violations of these basic principles of statutory construction.

The evidence of record clearly shows that Palmer performed literally every broker function on behalf of its clients during the pre-certification period. The fact that it did not make

ultimate decisions for its customers or enter into contractual obligations on behalf of its customers is irrelevant to the question about whether it is a broker within the meaning of the statute. The PUCO is powerless to effectively rewrite any statute so as to render material parts of the statute to be ineffective. The General Assembly drafted both the electricity and natural gas certification statutes in an expansive way because when it wrote the statutes it clearly referred to those that supply the electricity and natural gas, as well as retailer natural gas suppliers and retail electricity suppliers, and used expansive language such as “including marketers, brokers or aggregators” (emphasis added), which naturally infers that those would be minimal inclusions to the certification statutes and that there may be those that do not technically fit into those categories that would also be covered by the certification statutes. The Court does not need to determine the outer limits of who is a “supplier” within the meaning of the electricity and natural gas certification statutes because there is no question that Palmer clearly is swept-up in the broker designation which appears in both the electricity and natural gas statutes.

The PUCO argues in its brief that Palmer did not act independently from its ultimate customers when providing them with services. No one has alleged that it did. Furthermore, a broker does not act independently, but is always bound to act in the best interest of the client whom it represents in the potential business transaction.

One of the points argued by the PUCO and more strenuously by Palmer itself is that Palmer always acted on behalf of certified governmental aggregators as though that somehow exempted Palmer from the reach of the certification statutes. However, that is a misleading argument because, in point of fact, Palmer was the entity that advised and assisted its customers in becoming certified in the first place. It is Palmer that is the purported expert who is trying to

assist its clients in complying with the numerous and complex laws applicable to those engaging in the electricity and natural gas businesses in the State of Ohio. It is Palmer to whom its various customers looked to for assistance and advice in complying with those laws. Therefore, it is disingenuous for Palmer to dodge its own certification responsibilities by claiming that it was only acting on behalf of the governmental entities that it was trying to help become certified governmental aggregators. The evidence of record shows that in each and every case it was Palmer that advised and assisted the governmental entities in becoming certified aggregators to provide natural gas and electricity in the first place. Palmer also admitted to having worked with commercial customers. This fact was left out of the PUCO's brief. Palmer also admitted to being paid by energy suppliers. This fact was also ignored in the PUCO's brief.

The PUCO argues that Palmer has been exonerated by the testimony of two of its clients who said that Palmer acted only as a consultant with respect to them. The testimony largely referred to is the prepared direct testimony of these individuals that was filed with the PUCO in advance of the hearings that occurred in this case. But as Paul Harvey would say: "Here is the rest of the story."

During the cross-examination of Mr. Lee Herington, it was established that Mr. Herington had never reviewed the certification statutes and was completely unaware of the various categories established for certification purposes. (Tr., p. 216.) As Mr. Herington so succinctly put it, "All I know is that NOPEC is a governmental aggregator in electricity." (Tr., p. 216.) Mr. Herington readily admitted that he is not familiar with the electric power broker classification, and has had no occasion to work or be involved in that area (Tr., p. 216.) On the other hand, it is very interesting to note that Mr. Herington readily admitted the various

substantial services provided by Palmer to NOPEC over the years prior to Palmer becoming certified. (Tr., pp. 217-222, 225-6.) All of those services and activities took place in the context of substantial competition in the industry. (Tr., p. 222.) Thus, Mr. Herington's testimony actually provides further support for the basic complaint filed by Buckeye against Palmer in this case that Palmer was providing competitive services during the pre-certification period.

Palmer's reliance upon Mr. Larry L. Long is also misplaced. Mr. Long is not an expert on what the certification statutes provide or mean. Indeed, he has never read the certification statutes that were passed into law. (Tr., pp. 230-1.) Mr. Long is not even involved in the governmental aggregation program for his organization. (Tr. p. 235.) More importantly, Mr. Long corroborated the numerous activities and services provided by Palmer prior to obtaining certification, and that all of the services were competitive in the sense that many competitors contacted his organization to try to provide those very same services. (Tr., pp. 232-7.) As Mr. Long put it: "There's a lot of people in the utility industry generally . . . that call, ask us, what they can do. And we're approached monthly probably by somebody." (Tr., p. 237.)

One must ask what is the purpose of all of this advice, activities, and services being provided by Palmer to its various prospective and actual customers and clients during the pre-certification period if it was not to help "arrange" for the providing of electricity and/or natural gas to the various citizens and businesses located within the confines of the various governmental entities? The PUCO also admits that Palmer is a competitor to Buckeye by stating:

"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.  
(PUCO Brief, p. 7.)

If Palmer is an admitted competitor of Buckeye, then it follows that Palmer must be providing competitive services like Buckeye.

Although the PUCO argues otherwise in its brief, Buckeye is not asking this Court to second guess the PUCO on questions of fact. What Buckeye is requesting is that the Court properly interpret and apply the certification statutes to the facts shown of record, which the PUCO completely failed to do. Buckeye is requesting the Court to reject the erroneous and unfaithful interpretation of the certification statutes made by the PUCO and instead read and apply the law as written by the General Assembly to what amounts to an agreed statement of activities engaged in by Palmer during the pre-certification period. Interpreting and applying the law as it is written is truly within the sweet spot of what a court does, particularly the Supreme Court of Ohio, when it comes to a matter of interpreting and applying a state statute such as the certification statutes at issue in this case.

The record of this case shows that Palmer did everything other than make the decision to contract with the particular suppliers and other than actually signing the contracts. There is nothing else which Palmer failed to do with respect to the numerous substantial business transactions that are in evidence in this case.

The PUCO tries to make an argument that because Palmer is good at what it does (according to two customers) that somehow that exempts Palmer from the certification statutes. However, no such expert exemption or grandfather provision exists in the certification statutes. The certification statutes do not differentiate between good and/or successful brokers and those

who are not. If one is going to participate in the business of electricity and natural gas in the State of Ohio, then they are required to be certified by the PUCO according to the statutes passed by the General Assembly. Buckeye is only requesting that the law be enforced as written.

**IV. Reply in Support of Buckeye's Propositions of Law Nos. III and IV.**

The PUCO's brief argues against the "consultant loophole" arguments set forth in Buckeye's brief. The PUCO argues that the PUCO did not rely upon such label and decided the case based upon what Palmer actually did during the pre-certification period. We do not agree with this erroneous characterization of what the PUCO did.

In its lengthy Decisions, the PUCO constantly referred to the term "consultant". It would not be an exaggeration to say that word appears almost as many times in the Decisions as there are pages to the various Decisions. More importantly, the PUCO explicitly said it did not find evidence that Palmer did more than what a consultant would do, and that was one of the reasons why it ruled in favor of Palmer and against Buckeye. This demonstrates that the consultant concept did play an explicit role in the PUCO's decision. However, Palmer was not paid by the client like a consultant anyway. Palmer was paid by the supplier like a broker is.

The point of Buckeye's Propositions of Law Nos. III and IV is that the category of consultant is in no way addressed, let alone exempted, in the certification statutes. Furthermore, the PUCO specifically rejected an attempt by Palmer itself to explicitly write into the PUCO rules a consultant exemption from certification. Indeed, at the rulemaking stage the PUCO made it clear that a consultant or contractor performing any competitive service must be certified. This appears in the rulemaking discussion for both electricity and natural gas.

After paying lip service to these important points, the PUCO then proceeds to decide this case in favor of Palmer by saying that it did not engage in activities beyond what a consultant would do. This effectively imports a consultant exemption into the certification statute analysis without even defining what is a consultant. It should be clear to the Court that the PUCO has gone far astray from the statute when it speaks repeatedly about consultants and activities beyond what a consultant supposedly does, when the General Assembly in no way recognized any exemption or other special treatment for somebody who calls themselves a consultant.

Palmer's attempt to distinguish the Court's relatively recent decision in *In Re Application of Columbus S. Power Company*, 128 Ohio St.3d 512, 2011-Ohio-1788, ("CSP") is of no avail. First, there never was a claim by Buckeye that the CSP case involved the same facts or issues as this case so the multi-page attack on Buckeye's use of CSP was unnecessary. The importance of CSP to this case is that it clearly illustrates that the Court will not allow the PUCO to change the words of statutes, which is exactly what the PUCO has effectively done in the Decisions it made in this case. Most intriguingly, the PUCO's Merit Brief completely ignores and sidesteps this critical case.

Palmer's cases on the Court deferring to PUCO discretion are clearly inapplicable. *Toledo Coalition for Safe Energy v. Public Util. Comm.*, 69 Ohio St.2d 559 (1982), involved the intervention statute which explicitly vests the PUCO with considerable discretion on who is allowed to intervene. *Sanders Transfer, Inc. v. Pub. Util. Comm.*, 58 Ohio St.2d 21 (1979), determined that the explicit refusal to presently respond to a request for certification raised at the hearing was within the discretion of the PUCO under long-standing case law. Neither one of

these procedural rulings justify deferring to the rewriting of the certification statutes, which the PUCO has effectively done in this case.

Perhaps more importantly than that, it is clear that whether there is a consultant exemption or not, Palmer certainly cannot qualify for it. Although the term “consultant” is not defined anywhere in the certification statutes or rules, it is defined in the dictionaries. One definition is set forth in Buckeye’s Merit Brief. We will simply say that a consultant advises but does not act. In this case, Palmer both advised and performed numerous activities for its clients and selected suppliers. This takes Palmer far beyond what a consultant is.

**V. Reply in Support of Buckeye’s Proposition of Law No. V.**

In an incredible attempt to exalt form over substance, the PUCO’s attorneys argue that Buckeye’s rehearing application bars the assertion of this proposition of law. The PUCO’s hyper-technical argument should be rejected on its face.

Buckeye refers to Item No. 10 of its Application for Rehearing in which it is stated:

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

For all intents and purposes, this is the same as the statement of the Proposition of Law No. V except that the word “estopped” is not in that particular sentence of the Application for Rehearing.

This quoted language of the rehearing application shows that the PUCO’s attention was squarely focused upon the numerous admissions made by Palmer about its broker status which are painstakingly set forth in great detail in Buckeye’s Merit Brief, pp. 20-25, and will not be

repeated here. Surely, it can be stated that the admissions argument made by Buckeye was squarely and exhaustively asserted in the Application for Rehearing. Moreover, the admissions/estoppel argument was likewise set forth in the post-trial briefs filed by Buckeye which are also in the record of this case.

This Court should reject the PUCO's attempt to re-characterize this argument and act as though the admissions/estoppel argument is somehow something new which was never before presented to the PUCO for its consideration. Clearly, the argument was. It was also explicitly ruled upon by the PUCO. Therefore, it is a fair argument for the Court's consideration.

The PUCO's attorneys then argue that there is some mystery pertaining to this proposition of law concerning what Buckeye is arguing with respect to this proposition of law. We do not understand how there could be any mystery about the source upon which Buckeye is relying herein, given the fact that Buckeye cites five cases in its discussion and extensively quotes from one of those five cases. How could there be any mystery concerning what it is that Buckeye is arguing with respect to this proposition of law?

Of course, we all know what the PUCO is trying to accomplish by making the arguments that it does. The PUCO wants to distract the Court's attention from the overwhelming evidence of record establishing the admissions of broker status by Palmer made on a repeated basis during the pre-certification period. It is interesting to note that the PUCO fails to challenge a single one of the well-supported statements of admissions set forth under Buckeye's Proposition of Law No. V. Of course, that is because it cannot do so because the evidence cited and discussed concerning Palmer's repeated admissions of broker status is there for anyone to see and cannot

be denied. The Court cannot allow itself to be distracted by the irrelevant arguments raised by the PUCO from the substantial admissions evidence that clearly exists against Palmer.

Generally, a party's admission against its own interest is one of the most damning pieces of evidence that can be presented in a lawsuit. It is often considered conclusive evidence of an issue because a party's testimony or evidence against its own interest is believed to be the most credible and unbiased.

Although there is a very comprehensive discussion of the admissions evidence of record in this case contained in Buckeye's Merit Brief, we will simply point out that Palmer's letterhead that was used during the relevant timeframe clearly states that it is holding itself out to be a "natural gas broker." Palmer also promoted itself to the public as a "natural gas broker" on its website in 2010 prior to the filing of the Complaint. Furthermore, Palmer admitted that it was a natural gas broker in its own 2010 certification application that was submitted to the PUCO. In any other tribunal, admissions like these would be dispositive evidence that Palmer was indeed what it says that it is: namely, a broker.

The conduct of Palmer is particularly disingenuous when one considers the certification statutes in issue. The purpose of the certification statutes are to provide the public with the assurance that companies that are involved in the industry have been certified and qualified by the competent authority in the State of Ohio. An entity that is holding itself out to be a broker to the public, when it is not, is committing the exact wrong that the certification statutes aim to guard against. At the very least, Palmer is guilty of misleading the public by holding itself out to be a broker when it now says that it was not. These admissions, along with all of the other activities and services performed by Palmer, make for an overwhelming case against Palmer.

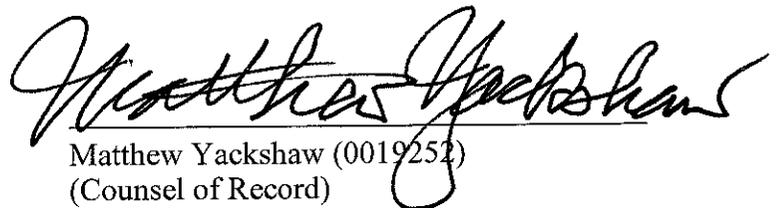
**VI. Reply in Support of Buckeye's Propositions of Law No. VI.**

Appellees' joint argument that Buckeye is the party trying to evade the PUCO's rules truly boggles the mind. The record in this case clearly shows that it is Palmer that has willfully and intentionally evaded the PUCO's rules on both discovery and hearing practice. The record of this case shows that Palmer obstinately stonewalled Buckeye's attempts to obtain relevant discovery in this case. Then, when information relevant to the determination of the issues was sought by way of subpoena for the trial, Palmer again stonewalled the request.

Fortunately, Buckeye was able to obtain through various public record requests directed to governmental entities which it knew Palmer was involved with, some records pertaining to Palmer's pre-certification activities. Of course, Buckeye (and the Court) do not know if that is only the tip of the iceberg concerning Palmer's activities during the pre-certification period. Because of Palmer's total lack of cooperation in the discovery and hearing process concerning providing information, we will never know unless the Court rejects Palmer's stonewalling and orders that the information be produced on remand as it should have been in the first place. Then, and only then, will the entire truth of Palmer's pre-certification activities be known.

**CONCLUSION**

For all the foregoing reasons as well as for the reasons set forth in its Merit Brief, Appellant Buckeye Energy Brokers, Inc. respectfully requests that the Court reverse the Decisions of the PUCO to date in this case and order that the PUCO enforce the certification statutes as written.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Reply Brief of Appellant Buckeye Energy Brokers, Inc. was served upon the following by regular U.S. mail on this 7<sup>th</sup> day of September, 2012:

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Attachment 2

