

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Review of Chapters :  
4901:5-17, 4901:5-19, 4901:5-21, 4901:5-23 : Case No. 06-1201-AU-ORD  
4901:5-25, 4901:5-29, 4901:5-33, 4901:5-35, and :  
4901:5-37 of the Ohio Administrative Code :

INITIAL COMMENTS OF AMERICAN MUNICIPAL POWER-OHIO, INC., ON BEHALF  
OF ITSELF AND ITS MEMBER OHIO MUNICIPALITIES

**I. INTRODUCTION**

On October 11, 2006, the Public Utilities Commission of Ohio ("PUCO" or "Commission") opened this docket to conduct its five year review of rules that govern fuel emergencies that are set forth in Ohio Administrative Code ("OAC") Chapters 4901:5-17 through 4901:5-37 (herein "Fuel Emergency Rules"). On that same date the Commission issued an Entry in this docket setting forth the Commission Staff's proposed revisions to the Fuel Emergency Rules. In a subsequent Entry extending the original filing deadlines, the Commission invited interested parties to file initial comments on the proposed revisions to the Fuel Emergency Rules by December 15, 2006, and reply comments to initial comments by January 16, 2007.

American Municipal Power-Ohio, Inc., ("AMP-Ohio") is a non-profit corporation formed pursuant to Ohio Revised Code Chapter 1702 organized for the benefit of its members, all of whom are municipal corporations, for the purpose of owning and operating electric generating facilities, to procure short and long term purchased power, and to furnish technical and professional services, all on a cooperative non-profit basis for the mutual benefit of its members. AMP-Ohio's membership is currently comprised of 119 municipalities located in the states of

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Ohio, Michigan, Pennsylvania, West Virginia, and Virginia, all of whom provide power and associated energy to end-user consumers within their corporate boundaries. AMP-Ohio has 81 member municipalities located in Ohio (herein "Members"), all of whom come within the definition of a Municipal Electric Utility as defined in R.C. §4928.01(A). AMP-Ohio itself and its Members are impacted by many of the proposed revisions to the Fuel Emergency Rules. AMP-Ohio files these initial comments on behalf of itself as well as Members.

## **II. COMMENTS OF AMP-OHIO AND ITS MEMBER MUNICIPALITIES**

AMP-Ohio and its Members are affected by the proposed amendments to the Fuel Emergency Rules identified in this docket in a number of ways. All AMP-Ohio Members provide and distribute electricity to end-user customers. As a result, all AMP-Ohio Members fall within the definition of Electric Provider set forth in the proposed revisions to OAC §4901:5-19 and the definition of Electric Entity set forth in the proposed revisions to OAC §4901:5-37. Additionally, some Members own or co-own, and operate, through municipal joint ventures with other Members, electric generating facilities. These facilities include coal, diesel, and natural gas fired generation, as well as, wind and hydroelectric generation. Those Members owning/co-owning generating facilities fall within the definition of Electric Producer set forth in the proposed revisions to OAC §4901:5-19. In addition, those Members that own/co-own electric generating facilities utilizing coal, natural gas, or diesel fuel supply also come within the definition of Customer or Consumer for purposes of the proposed revisions to OAC §4901:5-21, §4901:5-23, §4901:5-25, and §4901:5-33. As a Customer or Consumer under the proposed revisions to the rules, Members may be subject to curtailment of fuel supply during any declared emergency period.

Not only are AMP-Ohio's Members affected by the proposed revisions to the Fuel Emergency Rules, but AMP-Ohio itself is also impacted by the proposed revisions. AMP-Ohio itself owns and operates numerous electric generating facilities that use coal, natural gas, and diesel for fuel supply. AMP-Ohio also contracts for substantial amounts of electric power and energy, including coal-fired and landfill gas generation to serve both members in Ohio and other states. Therefore, AMP-Ohio itself comes within the definition of Electric Producer set forth in the proposed revisions to OAC §4901:5-19 and also comes within the definition of Customer or Consumer for purposes of the proposed revisions to OAC §4901:5-21, §4901:1-5-23, §4901:5-25, and §4901:33. As a Customer or Consumer under the proposed revisions to the rules, AMP-Ohio may be subject to curtailment of fuel supply during any declared emergency period.

Since AMP-Ohio and its Members will be substantially impacted if the proposed revisions to Fuel Emergency Rules are implemented, AMP-Ohio submits the following comments on its own behalf and its Members.

1. **The Commission Has Failed to Comply with R.C. §119.03 and R.C. §127.18 and Prepare a Fiscal Analysis Impact Statement**

Pursuant to R.C. §119.03(B), prior to filing a proposed or amended rule with the Secretary of State's office and the Director of Legislative Service, a rule-making agency, such as the Commission, shall also file a fiscal analysis prepared in accordance with R.C. §127.18. Revised Code §127.18(B) requires that the rule-making agency prepare a rule summary and a *fiscal analysis* if the proposed rule or revisions thereto has a fiscal impact on political subdivision, which includes municipal corporations such as AMP-Ohio's Members.<sup>1</sup> See R.C. §127.18(B)(8)-(10). If the proposed rule or revisions thereto has a financial effect on municipal corporations, R.C. §127.18(B) requires the rule-making agency to estimate in dollars the cost of

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<sup>1</sup> Revised Code §127.18(b) also requires a fiscal impact analysis if the proposed rule or revisions thereto will have a fiscal impact on other political subdivisions such as Townships, Counties, and School Districts.

compliance with the proposed rule or revisions thereto and to prepare a comprehensive cost estimate that includes the procedure and method of calculating costs compliance and identifies major costs categories including personnel costs, new equipment or other capital costs, operating costs, and indirect central services costs related to the proposed rule or revisions thereto. R.C. §127.18(B)(8) and (10). The fiscal analysis shall also include a written explanation of the agency's and the affected local government's ability to pay for the new requirements and a statement of any impact the rule will have on economic development.

The proposed revisions to OAC §4901:5-19 and OAC §4901:5-37 are applicable to those municipal corporations that are Electric Providers or are Electric Entities. The proposed revisions impose additional administrative burdens on AMP-Ohio Members through the creation, management, and filing of various reports, advertisements, and public notices during both the pre-emergency period and after declaration of an emergency. These burdens will result in increased costs for all AMP-Ohio Members. In addition, the proposed revisions to OAC §4901:5-21, §4901:5-23, §4901:5-25, and §4901:5-33 are also applicable to those municipal corporations that own/co-own and operate electric generation facilities that use coal, natural gas or diesel for fuel. Once again, the proposed revisions to the rules will have a financial impact on AMP-Ohio Member municipalities.

Since the proposed revisions financially impact municipalities, the Commission has an obligation to prepare and make available for review the fiscal analysis required by R.C. §127.18 and R.C. §119.03(B) and (H). Yet, there is no evidence in the Entry issued by the Commission that the Commission has prepared the statutorily required fiscal analysis. The Commission is prohibited from filing any revisions to the Fuel Emergency Rules with the Secretary of State's office and the Director of Legislative Service that have a financial impact on municipalities until

such time as the Commission has completed the required fiscal impact analysis and made the same available for comment. Therefore, this Commission should not proceed any further with the proposed revisions until the required fiscal analysis is complete.

2. **The Proposed Revisions to the Fuel Emergency Rules Are Unconstitutional to the Extent the Proposed Revisions Infringe Upon Municipal Utility Powers under the Ohio Constitution**

Section 4 of Article XVIII of the Ohio Constitution grants municipalities the right to operate public utilities. Such power comes from the people pursuant to the Ohio Constitution and not from the General Assembly. See *McCann v. Defiance* (1958), 167 Ohio St. 313, 316. “Unlike the power granted by Section 3 of Article XVIII to enact local police, sanitary and similar regulations, the municipal public utility power is not necessarily subordinate to conflicting general laws.” *City of Columbus v. Pub. Util. Comm. of Ohio* (1979), 58 Ohio St.2d 427, 431, citing *Pfau v. Cincinnati* (1943), 142 Ohio St. 101. As stated in *Columbus, supra*, the test for determining whether a statute runs afoul of the constitutional grant of authority to operate a public utility is determined by evaluating the following three factors:

1. Is the statute [regulation] promoting a valid and substantial interest in the public health, safety, morals or welfare?
2. Is the statute’s [regulation’s] impact upon the municipal utilities incidental and limited? and
3. Is the statute [regulation] not an attempt to restrict municipal power to operate utilities?

See *Columbus*, 58 Ohio St. 2d at 432. If each of the questions are answered in the affirmative, then the statute or regulation will be upheld. *Id.*

In this case not all of the questions can be answered in the affirmative. It is not disputed that the state has a valid and substantial interest in the public health, safety and welfare during the declaration of a fuel emergency. It is undisputed that Fuel Emergency Rules (with the

exception of Pre-emergency actions) will be invoked during a fuel emergency in an effort to preserve the public health, safety and welfare. Further, the proposed revisions to the Fuel Emergency Rules are not intended to be an attempt to restrict municipal power to operate utilities (although the practical effect will be to restrict a municipality's power to operate a utility).

However, it is beyond debate that the proposed revisions to the Fuel Emergency Rules will have a significant impact on municipal utilities and the proposed revisions impact is substantial. As described above, the proposed revisions impose a number of obligations on municipalities during a pre-emergency period and after the declaration of an emergency. These obligations include preparing and filing of various reports about the operation of the municipal utility with the Commission. Municipal utilities may also be required to produce and distribute an unlimited number of advertisements regarding reducing use of electricity. The proposed revisions to the rules also may require municipalities to curtail or increase operations of their utilities under certain circumstances and/or cease serving Customers that are deemed by the Commission or the rules to be non-priority Customers. The Commission's curtailment orders may apply to an Electric Producer's supply contracts with Customers who are located beyond the boundaries of this state over which the Commission may not have jurisdiction.

As currently drafted, the proposed revisions simply go too far, substantially and significantly impacting the operations of a municipal utility. The proposed revisions to the Fuel Emergency Rules infringe upon a municipality's constitutional utility powers reserved to the municipality pursuant to Section 4 of Article XVIII of the Ohio Constitution.

3. **This Commission Has No Authority to Impose Obligations on Non-Jurisdictional Entities such as Municipalities Prior to the Declaration of an Emergency**

Each of the proposed revisions to the Fuel Emergency Rules impose obligations upon various parties prior to the declaration of an emergency in a section entitled “Pre-Emergency Actions”. Ignoring the fact that the pre-emergency action period is undefined and vague,<sup>2</sup> there is no authority for this Commission to impose any obligations on any non-jurisdictional entities (such as AMP-Ohio and municipalities) during any time when an emergency has not been declared.

As a creature of statute, the Commission only has that authority that is granted by the General Assembly. *See Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 5. The Commission’s authority to promulgate rules to address shortages of electricity or of the fuel supplies necessary to generate electricity is found in R.C. §4935.03. R.C. §4935.03 only authorizes the Commission to promulgate rules that will be applicable once a fuel emergency is declared. Revised Code §4935.03 does not grant any authority to the Commission to promulgate rules or impose obligations on non-jurisdictional entities that are to be applied prior to the declaration of a emergency.

Yet, in the proposed revisions to the Fuel Emergency Rules, the Commission seeks to impose a number of obligations and duties on affected non-jurisdictional entities prior to any declaration of emergency. Accordingly, any proposed revisions to OAC Chapters 4901:5-19 through 4901:5-37 that seek to impose obligations on non-jurisdictional entities prior to the

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<sup>2</sup> Although it is not clear from the text of the proposed revisions to the rules, there appears to be no criteria as to what constitutes a pre-emergency period. Therefore, it appears that the pre-emergency period is all other times when an emergency has not been declared. For example, §4901:5-19-02 requires Electric Producers to calculate remaining days of fuel supply even with no declaration of emergency.

declaration of an emergency are outside the authority granted by R.C. §4935.03 and are unlawful.

**4. The Proposed Stages of Emergency Are Vague and Undefined**

In the proposed revisions to OAC §4901:5-23-05, §4901:5-25-05, §4901:5-29-05, and §4901:5-33-05, the revised rules reference four distinct stages of emergencies: 1) voluntary curtailment; 2) mandatory curtailment - stage one; 3) mandatory curtailment - stage two; and 4) mandatory curtailment - stage three.<sup>3</sup> Each stage of emergency declaration imposes greater and more severe restrictions upon jurisdictional and non-jurisdictional utilities. However, there is no definition of what constitutes each stage or when each stage is triggered. As a result, the proposed revisions to the rules are vague as to when jurisdictional and non-jurisdictional will be subject to certain restrictions and obligations. Accordingly, for each rule, the Commission needs to define what circumstances constitute voluntarily curtailment and the mandatory stage one, stage two and stage three curtailments and when obligations under those curtailments stages will be imposed. Until the rules contain clear and concise definitions for each of these stages, the rules are overbroad, vague, and otherwise unenforceable.

**5. The Proposed Revisions to Rules Do Not Address Potential Pricing Issues Caused by the Fuel Emergency Rules**

Once an emergency is declared, the proposed revisions to the Fuel Emergency Rules may result in various suppliers being ordered to supply certain customers. See, e.g., OAC §4901:5-23-05(D), §4901:5-25-06(B)(3), and §4901:5-33-05. However, the proposed revisions to the Fuel Emergency Rules do not address the price at which the fuel supply is to be sold to the Customer or Consumer who desperately needs the supply. As a result, there is opportunity for taking advantage of the tight supply to charge substantial premiums for the fuel supply, which will have

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<sup>3</sup> Each rule also has a pre-emergency period, which is not defined and vague. All of the arguments set forth in this section are generally applicable to the pre-emergency section of each rule as well.



an overall adverse impact on the economy. Further, certain Customers and Consumers may not have the ability to pass such unexpected substantial price increases for fuel supply along to end-users in a timely matter.

There is also a concern that the opposite problem may occur as well, which is the Commission may order a party to sell excess fuel supply inventory at a price below what the entity may have paid to acquire and inventory the fuel supply. The Commission should never require an entity to sell "excess" fuel supply held in inventory at a cost lower than the entity's purchase price plus actual storage costs incurred. To do otherwise would cause significant financial harm to the entity holding "excess" fuel supplies.

Additionally, the proposed revisions to the Fuel Emergency Rules do not address the situation where the Commission or a Regional Transmission Organization (RTO) such as MISO or PJM may impose differing obligations on an Electric Producer to run generation. The proposed revisions do not address the changes in the wholesale power market or the transmission markets since the last time these rules were revised. Additionally, the proposed revisions do not address how an Electric Producer will recoup its fuel costs under "must-run" orders imposed by the Commission. Further, appropriate allocation of the increased cost burdens resulting from orders to run higher cost units for the benefit of other Electric Producers, their customers or the State generally are simply not addressed. Who should pay is an important missing element.

**6. This Commission Should Convene an Industry Forum to Address Fuel Emergency Rules**

The proposed revised rules not only break new ground but are massive and complex. And, they are simply too important to adopt without thorough and careful consideration of their legality, appropriateness and impact on utilities, fuel suppliers, consumers, the economy of the State, and ultimately on the public, health and welfare of the residents of this State. In addition,

the issues surrounding the creation of workable Fuel Emergency Rules are extremely inter-related given the number of stakeholders the Fuel Emergency Rules affect. In AMP-Ohio's view, the comment process is not adequate to flesh out all of the issues, their inter-relationships and their potential impact on stakeholders.

Accordingly, AMP-Ohio recommends that this Commission convene an industry forum of interested stakeholders with representatives from the electric utilities (including representatives of municipal electric utilities), coal, natural gas, heating oil, and transportation fuel industries, along with significant Customers or Consumers of those industries, to discuss the proposed revisions to the Fuel Emergency Rules in detail and to suggest revisions as necessary to ensure that any revisions to the Fuel Emergency Rules will be legal, appropriate and effective.

### **III. CONCLUSION**

AMP-Ohio and its Members understand the need for, and the benefit of, rules to address availability of fuel supply during fuel emergencies or fuel shortages. AMP-Ohio recently came close to experiencing its own fuel emergency in the winter of 2005 when an accident on the Ohio River halted barge deliveries of coal to its Richard H Gorsuch Generating Station for nearly thirty (30) days. During the lengthy closure of the river to barge traffic, AMP-Ohio's on site coal inventory began to dwindle to dangerously low levels. That situation was resolved in time without requiring the Gorsuch Station to completely cease operations, but at considerable expense. So AMP-Ohio and its Members understand the ramifications of not having fuel supply readily available, but both have serious and legitimate concerns about the rules as proposed.

For all of the reasons set forth above, AMP-Ohio, on behalf of itself and its Member municipalities, request that this Commission continue to study, analyze and revise the proposed revisions to the Fuel Emergency Rules consistent with the comments set forth above.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Initial Comments of AMP-Ohio, Inc., pertaining to the proposed revisions to the Fuel Emergency Rules will be served on those parties designated by entry of the attorney examiner in these proceedings once such entry is issued.

  
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Todd M. Rodgers

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