

**FILE**

**FirstEnergy.**

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*Via Federal Express  
and Facsimile (614-466-0313)*

August 28, 2009

Ms. Renee J. Jenkins  
Director, Administration Department  
Secretary to the Commission  
Docketing Division  
The Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215-3793

PUCO

RECEIVED-DOCKETING DIV  
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Dear Ms. Jenkins:

*Re: Ohio Edison Company's Memorandum Contra the Office of the Ohio Consumers'  
Counsel Motion to Intervene  
Case No. 09-1201-EL-EEC*

Enclosed for filing, please find the original and twelve (12) copies of Ohio Edison Company's Memorandum Contra the Office of the Ohio Consumers' Counsel Motion to Intervene. Please file the enclosed Motion in the above-referenced docket, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

*Kathy J. Kolich*

kag  
Enclosures

cc: Parties of Record

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**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Heinz Frozen Food Company, a	)	
Division of H. J. Heinz Company, L.P.	)	
and Ohio Edison Company For	)	Case No. 09-1201-EL-EEC
Approval of a Special Arrangement	)	
Agreement With A Mercantile	)	
Customer	)	

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**MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
MOTION TO INTERVENE**

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**I. Introduction**

Pursuant to §4901-1-12(B)(1), and for the reasons more fully discussed below, Ohio Edison Company ("Ohio Edison") hereby respectfully asks the Commission to deny the Motion to Intervene submitted by the Office of the Ohio Consumers' Counsel ("OCC") that was filed on August 13, 2009.

**II. Background**

On or about July 29, 2009, Applicants, Heinz Frozen Food Company ("Customer") and Ohio Edison jointly applied for approval of a special arrangement contract and authority to waive recovery from Customer of certain rider charges ("Application") consistent with R.C. 4928.66(A)(2)(c). On August 13, 2009, the OCC filed a motion to intervene, claiming that it meets the prerequisites for intervention set forth in R.C. 4903.221, Ohio Administrative Code § 4901-1-11, and the precedent established by the Supreme Court of Ohio.<sup>1</sup> (OCC MTI, p.

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<sup>1</sup> The case to which OCC refers, *Office of Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 2006-Ohio-5853, ¶¶ 13-20, involves intervention in an accounting matter for the deferral of certain Regional Transmission

4.) As more fully discussed below, the customers represented by OCC will not be adversely affected by the outcome of this proceeding, and OCC cannot meet the other statutory criteria set forth in R.C. 4903.221(B) that are to be considered by this Commission when evaluating OCC's motion.<sup>2</sup> Accordingly, said motion should be denied.

### III. Arguments

As OCC correctly states, R.C. 4903.221 provides in part that any person "who may be adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding. Subsection B of this same statute requires the Commission to consider the following criteria when ruling on motions to intervene:

- 1) The nature and extent of the prospective intervenor's interest;
- 2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- 3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- 4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

As explained below, OCC does not meet the above criteria and therefore, their request for intervention should be denied.

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Organization costs, and has nothing to do with an application for approval of a mercantile customer energy efficiency project.

<sup>2</sup> Section 4901-1-11, Ohio Administrative Code, mirrors the statutory requirements and, accordingly, all discussions regarding the criteria set forth in R.C. 4903.221(B) equally apply to the criteria set forth in the Code. OCC argues that it has a real and substantial interest and that its interests cannot be adequately represented by other parties. (OCC MTI, p. 3.) As demonstrated above, the interests to which OCC refers involve the amount of costs included in the residential customer portion of Rider DSE and whether the amount of energy savings resulting from the Customer's project is accurate. Under the circumstances, the first interest is irrelevant given that costs are recovered on a class/rate schedule basis; the second, is more than addressed both by the Commission's M&V expert and through other proceedings contemplated by the Commission's energy efficiency rules. Therefore, OCC also fails the requirements set forth in Section 4901-1-11, O.A.C.

**A. Residential customers will not be adversely affected by the outcome of this proceeding.**

OCC represents the residential customers of the Company. OCC claims at page 1 of its memorandum in support of its motion that the interests of these customers "may be 'adversely affected' by this case, especially if the consumers were unrepresented in a proceeding that results in [the Customer] not paying its share of environmental remediation costs either through Ohio Edison's Rider DSE2 or through a special arrangement it has with Ohio Edison that does not result in sufficient energy savings. For the same reason, the application could also result in consumers having to pay additional costs toward Ohio Edison's Rider DSE2." (OCC MTL, p. 1.)

Inasmuch as Paragraph E(6)(f) of the Company's stipulation entered into in Case No. 08-935-EL-SSO requires that costs associated with the Company's energy efficiency and demand reduction program be recovered by class and rate schedule, it would be other industrial customers, and not the residential customers represented by OCC, that would have to pay "additional costs towards Ohio Edison's Rider DSE2" in the unlikely event that the Customer was erroneously granted a waiver from paying such costs. Therefore, OCC's rationale underlying its claim that residential customers may be adversely affected by having to pay additional costs if not granted intervention is simply wrong.

**B. OCC's interests and legal positions to be advanced do not warrant intervention.**

OCC's rationale underlying its claim that it meets the first two R.C. 4903.221(B) criteria for consideration by the Commission (OCC's interest and the legal position

advanced by OCC) is equally flawed. In essence, its rationale is identical to that supporting its claim that the residential customers will be adversely affected if intervention is denied; namely, that it wants to ensure that "an opt-out for [the Customer] from paying the energy efficiency rider is justified by the energy savings achieved under the special arrangement" and that it will advance "the position that the rates customers pay should be no more than what is reasonable and lawful under Ohio law...." (OCC MTI, p. 2.) However, as already explained, OCC's interest and legal position are irrelevant in this instance, given that residential customer rates will not be affected by the outcome of this proceeding.

OCC also makes a passing reference to "environmental consequences" should energy savings be insufficient to justify the Customer's waiver from DSE2. (OCC MTI, p. 2.) OCC, however, confuses the waiving of the Rider with the amount of energy savings achieved by the Customer's energy efficiency project being considered in the Application. The first, as already demonstrated, does not affect the rates paid by residential customers, while the latter, as will be discussed below, is sufficiently addressed through other means.

**C. OCC's intervention will not significantly contribute to the full development of the issues.**

The Application involves the approval of an energy efficiency project implemented by the Customer. It is the role of the Commission and its Staff, and not that of OCC, to determine the actual energy savings resulting from the project. Indeed, as the Company understands it, the Commission is paying an expert consultant to measure and verify such results. This review will be in addition to any reviews made by the

Company's measurement and verification experts and Commission staff. To allow yet another review by OCC is redundant and a waste of time, money and resources for all involved. Accordingly, OCC fails to make its case that it will *significantly* contribute to the full development and equitable resolution of the facts as required under R.C. 4903.221(B)(4).

Moreover, OCC's concerns surrounding the actual amount of savings achieved through the mercantile customer projects can be addressed in another proceeding. Although not yet effective, the energy efficiency rules established in PUCO Docket No. 08-888-EL-ORD contemplate a reporting process in which the Company will submit an annual status report. This report will include, among other things, a compliance demonstration with a section "detailing its achieved energy savings and demand reductions relative to its corresponding baselines. At a minimum, this section ...[will] include... (b) a comparison with the applicable benchmark of actual energy savings...." (Rule 4901:1-39-05(C)(1)(b)). Rules 4901:1-39-06(A) and (C) set forth the review process for such annual reports, including a comment period and, if deemed necessary, a hearing. Therefore, if OCC is concerned about the amount of energy savings achieved by mercantile customer projects, its concerns should be addressed at the time the Company files its annual reports, and not through this application process.

**D. Granting OCC's request for intervention will unduly prolong or delay the proceedings.**

OCC claims that the granting of its request for intervention will not unduly prolong or delay the proceedings due to its "longstanding expertise and experience in PUCO proceedings." (OCC MTI, p. 3.) The Application involves the evaluation of an

energy efficiency project implemented by a large industrial customer. OCC's "longstanding expertise and experience in PUCO proceedings" does nothing to advance the resolution of this issue – an issue that will be addressed by the Commission's expert consultant being paid to make the same analyses as those contemplated by OCC. OCC has no resident expertise in this area, which, if similar to other proceedings, will require a lengthy discovery process and potentially the holding of evidentiary hearings in order for OCC to gain such knowledge.<sup>3</sup> While certainly there is a time and place for such activities, this is not one of them, especially when residential customers' rates will not be impacted by the outcome and there will be other opportunities for OCC to evaluate the results of the mercantile customer projects. Further, it should be kept in mind that this is just one of many applications that are expected to be filed for Commission consideration. Given OCC's history, it is anticipated that OCC will seek intervention in each and every application. To establish a precedent that allows intervention in these types of proceedings will bring the process to a grinding halt with any such delay postponing the effective date of the waiver, thus causing the Customer to pay more than it otherwise would without such a delay.<sup>4</sup>

**E. The granting of OCC's request for intervention will cause undue hardship and unnecessary expense to large industrial and commercial customers.**

By granting intervention, OCC will have the opportunity to conduct discovery. In

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<sup>3</sup> One need only review the events in *In re: Application for Establishment of a Reasonable Arrangement Between Ohio Edison Company and V&M Star*, Case No. 09-08-EL-AEC for a preview of what is likely to come should OCC's request for intervention be granted.

<sup>4</sup> With the current condition of Ohio's economy, such a delay could be devastating to large customers, especially as the costs included for recovery through Rider DSE2 increase.

order to achieve what OCC claims that it must, it will have to obtain project information and other operating information from customers, much of which is viewed by customers as proprietary. OCC, as a government agency, is subject to public records requests. While such information can be filed under seal at the Commission and protected from public disclosure, such is not the same should OCC obtain such information through discovery. If OCC receives a public records request, such information may have to be made public. Indeed, OCC has on numerous occasions insisted on an exemption from non-disclosure in such situations when negotiating confidentiality agreements. The potential disclosure of such information may chill a customer's desire to commit its projects to the Company and, even if the Customer chooses to proceed, it will undoubtedly require the Customer to expend resources complying with such requests and possibly incur unnecessary legal fees in what is sure to become a litigious process if intervention is granted.

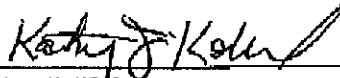
#### F. Summary

In sum, OCC fails to meet any of the prerequisites to intervention. Because costs of the Company's energy efficiency and demand response program will be allocated on a customer class/rate schedule basis per the stipulation entered into in Case No. 09-935-EL-SSO, the outcome of this proceeding will have no effect on the rates paid by the residential customers represented by OCC. Further, the expertise required to assess the application in this proceeding is not resident in OCC and will be adequately addressed by the Commission's measurement and verification expert who will be paid specifically to resolve the issues that give rise to OCC's concerns. Therefore, OCC's intervention will



not significantly advance the full development of the facts. And finally the results of all mercantile customer projects, as well as all other energy efficiency programs created by the Company will be provided through an annual reporting process wherein OCC will have the opportunity to address any of its concerns voiced in its memorandum in support of its motion to intervene. When weighing these facts against the undue delay and potential harm and expense that the Customer may face should intervention be granted, the Commission must deny OCC's motion to intervene.

Respectfully submitted,

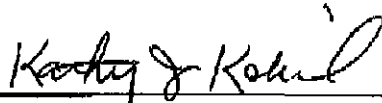


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Attorney for Ohio Edison Company

**CERTIFICATE OF SERVICE**

This is to certify that a copy of Ohio Edison's Memorandum Contra OCC's Motion to Intervene was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 28<sup>th</sup> day of August 2009.

  
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