

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke     )  
Energy Ohio - Miami Fort Generating     )  
Station Units 7 & 8 for Certification as an     ) Case No. 09-1877-EL-REN  
Eligible Ohio Renewable Energy Resource     )  
Generating Facility.     )

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**MOTION TO INTERVENE AND COMMENTS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene<sup>1</sup> moves the waiver of Ohio Adm. Code Chapter 4901:1-40-4 and files comments in this case in which the development of diverse electricity supplies for consumers may be constrained and costly additions to plant may result with potential requests later for consumers to pay the associated costs without receiving adequate benefits. OCC is filing on behalf of the residential electric utility consumers in Ohio. Midwest Generation Portfolio ("Applicant" or "MGP"), seeks certification for its Miami Fort Generating Station Units 7 & 8, operated by Duke Energy Ohio ("Duke"), as an eligible Ohio renewable energy resource generating facility under R.C. 4928.01(A)(35).<sup>2</sup> The Public Utilities Commission of Ohio ("Commission" or "PUCO") should deny the Applicant a renewable certificate because the Application, as currently framed, does not meet the requirements of R.C. 4928.64.

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<sup>1</sup> See R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11.

<sup>2</sup> The granting of this certificate would allow the Applicant to register the power production of its facilities as a renewable energy resource and to produce or sell renewable energy credits ("RECs") under R.C. 4928.65 or use the renewable power to meet its benchmarks. Electric distribution utilities or electric services companies that need to meet the renewable energy benchmarks under R.C. 4928.64 can purchase RECs from certified renewable energy resources as a means of meeting these benchmarks.

The reasons the Commission should grant OCC's Motion to Intervene ("Motion") and deny the Applicant its certificate (until and unless the Applicant meets the statutory standards that include identifying its source of biomass materials) are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

*/s/ Christopher J. Allwein*

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This case involves the review of the reasonableness and lawfulness of the Applicant's request for approval of its Application filed under R.C. 4928.01(A)(35) and R.C. 4928.65. OCC has authority under law to represent the interests of the residential electric utility customers of Ohio, pursuant to R.C. Chapter 4911. The Applicant is requesting certification of the Miami Fort Generating Station Units 7 & 8 as a renewable energy resource generating facility that will sell the power it produces to electric distribution utilities.

Under certain circumstances electric utilities can charge residential customers for the extra costs of electric distribution utilities or electric services companies to produce renewable energy or to purchase renewable energy credits ("RECs") to meet their renewable energy benchmarks. Residential customers cannot be required, under Ohio law, to contribute to the extra costs of producing and/or purchasing RECs unless the certified renewable sources or RECs actually represent power generated from renewable sources. Residential customers are not obligated to pay extra costs for the Applicant's power that is generated with nonrenewable resources because such power will not provide

long-term benefits of decreased demand for nonrenewable sources, nor will it promote the development of a diversity of electric supplies and suppliers.<sup>3</sup>

The Commission should not grant the Applicant the certificate until the Applicant demonstrate that it has sufficient renewable fuel to produce renewable energy.

## **II. INTERVENTION**

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. The interests of Ohio’s residential consumers may be “adversely affected” by this case, especially if the consumers were unrepresented in a proceeding that results in the certification of a power generating facility as an eligible renewable energy resource when it may not meet the requirements under R.C. 4928.01(A)(35) and R.C. 4928.64. Such a certification could result in residential electric customers paying the extra costs of a renewable resource without receiving the long-term benefits of renewable resources as contemplated under R.C. 4928.01(A)(35) and R.C. 4928.64.

R.C. 4903.221(B) requires the Commission to consider the following criteria in 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.

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<sup>3</sup> R.C.4928.02(C)

First, the nature and extent of OCC's interest is representing the residential consumers of Ohio to ensure that when they pay a premium for a renewable resource, that renewable resource will provide the long-term benefits in reduced energy costs as contemplated under R.C. 4928.64 and R.C. 4928.01(A)(35). This interest is different than that of any other party and especially different than that of the Applicant whose advocacy includes its financial interests.

Second, OCC's advocacy for consumers will include advancing the position that residential customers should not have to pay a premium for renewable energy resources that do not actually provide the long-term benefits in reduced energy costs as contemplated under R.C. 4928.01(A)(35). This position ensues from the requirement that utilities must meet specific benchmarks in using renewable resources<sup>4</sup> and the fact that renewable resources are limited in supply. The position results from the likelihood that utilities will have to pay a premium for power from those resources and will collect the premium from all customers, including residential customers. In other words, residential customers should pay rates that are no more than what is reasonable and lawful under Ohio law, for service that is adequate under Ohio law. OCC's position is therefore directly related to the merits of this case that is pending before the PUCO, the authority with regulatory control of the terms under which public utilities provide their services.

Third, OCC's intervention will not unduly prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

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<sup>4</sup> R.C. 4928.64(B)(2)

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues, consistent with any matters that OCC determines to be issues for PUCO consideration and for deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a very real and substantial interest in this case where rates for service to residential customers are at issue. In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio's residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.<sup>5</sup>

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<sup>5</sup> See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20 (2006).

OCC's Motion is timely under R.C. 4903.221(A). In this regard, the Application was filed on December 1, 2009, prior to the effective date (December 10, 2009) of Ohio Adm. Code 4901-1-40-04(F)(1). This new Administrative Code rule requires filing for intervention within twenty days of the filing of an Application. but the rule was not in effect and therefore was inapplicable for the twenty days to run from the filing date of the Application.<sup>6</sup>

### **III. COMMENTS**

The Applicant is requesting the certification of a combustion facility as a renewable resource. But under the definition of a renewable resource at R.C. 4928.01(A)(35), a combustion facility, such as the one at issue in this case, is not a renewable resource. Only the energy produced by a renewable resource, such as “energy derived from non-treated by-products of the pulping process or wood manufacturing process” is a renewable resource.<sup>7</sup> Therefore, a combustion facility should not be certified unless the Applicant is able to demonstrate that it has the fuel necessary to produce the energy.

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<sup>6</sup> Even if Ohio Adm. Code 4901-1-40-04(F)(1) had been in effect, there would be “good cause” under R.C. 4903.221(A) to intervene past the deadline. The problem of the sustainability of biomass fuel as a renewable resource was not as evident when the first applicants began to file their applications. But when successive applicants filed for biomass renewable energy certificates for their very large base load plants such as Zimmer, the sustainability of the biomass fuel for production of a renewable resource came in to question.

<sup>7</sup> R.C.4928.01(A)(35)

The Applicant indicates that it intends to use a variety of biomass fuels as fuel for up to 10% of its generation.<sup>8</sup> The facility includes a two generating units with a combined nameplate capacity of 1,020 megawatts.<sup>9</sup> In order to use 10% biomass to produce the power generated, the Applicant will need a massive amount of biomass material. The Applicant does not identify its source of biomass material. If the Commission grants this Applicant a certificate for a renewable source, the Applicant may commence with costly modifications on the generating unit identified in its application. If the Applicant is unable to obtain the huge supply of biomass it claims it will employ to produce renewable power in this plant, any potential retrofit will not provide the benefits intended and consumers should not bear the costs associated with these potential retrofits or modifications. In order to prevent such a wasteful project, the Applicant should be required to identify its source of solid biomass before receiving certification.

Moreover, the application does not indicate that a post January 1998 retrofit will be conducted. The facility does not meet the requirements under R.C. 4928.64(A)(1) if the Applicant does not complete a retrofit after January 1998. Therefore, unless the Applicant demonstrates that the project will involve an actual retrofit, the Applicant should not be granted certification.

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<sup>8</sup> Application at Section G.

<sup>9</sup> Application, Section II.



#### IV. CONCLUSION

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of residential consumers, the Commission should grant OCC's Motion to Intervene and should require the Applicant to identify its source of biomass materials before granting the Applicant certification. The Commission should not grant certification to the Applicant if no retrofits occur.

Respectfully submitted,

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CONSUMERS' COUNSEL

/s/ Christopher J. Allwein

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Motion to Intervene and Comments* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 30<sup>th</sup> day of December, 2009.

/s/ Christopher J. Allwein

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