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 Eligible Ohio Renewable Energy Resource Generating Facility.	)))))	Case No. 09-1877-EL-REN

REPLY TO DUKE ENERGY'S MEMORANDUM CONTRA
OCC'S MOTION TO INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") files this Reply to Duke Energy Ohio, Inc.'s ("Duke" or "Company") Memorandum Contra OCC's Motion to Intervene. OCC filed a Motion to Intervene on December 30, 2009, and Duke filed a memorandum contra on January 8, 2010.

I. INTRODUCTION

Midwest Generation Portfolio ("Applicant" or "MGP") seeks certification for its Miami Fort Generating Station as an eligible Ohio renewable energy resource generating facility under R.C. 4928.01(A)(35). 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 and sell renewable energy credits ("RECs") under R.C. 4928.65. Electric distribution utilities or electric services companies that need RECs to meet their renewable energy benchmarks under R.C. 4928.64 can purchase these RECs from certified renewable energy resources.

Duke asserts that this proceeding does not concern the "viability of the proposed biomass facility," but rather "whether a facility meets the criteria to be designated as a renewable resource."[1] Moreover, Duke argues that "all that the Commission is determining in this application process is that Duke's application demonstrates that its facility satisfies the requisite criteria to become certified as an eligible Ohio renewable energy resource generating facility."[2] Finally, Duke argues that OCC should not be permitted intervention in this certification case because it does not involve cost recovery.[3] Duke is wrong on all counts. OCC will address each of Duke's arguments in turn.

II. A PROCEDURAL MATTER

Under Ohio Adm. Code 4901-1-12(B)(2), a party may file a reply to a memorandum contra within seven days after the "service" of the memorandum contra, and if the pleading is served by mail service is not completed for another 3 days under Ohio Adm. Code 4901-1-07(B). But OCC did not receive service of the memorandum contra even though the certificate of service states that it was served by ordinary mail. In this regard, it should be noted that the copy of the memorandum contra that appears on the PUCO's online docketing shows that Duke did not sign or date the certificate of service attached to the memorandum contra as required under Ohio Adm. Code 4901-1-05(A). And Duke also did not sign the memorandum contra in its signature block for the pleading as required under Ohio Adm. Code 4901-1-04. Based on Duke's improper filing and non-service to OCC, the reply period for OCC has not yet begun to run. Accordingly, OCC files this Reply later than seven days after the filing date but within

[1] Memo Contra at 3.
[2] Memo Contra at 2.
[3] Memo Contra at 3.

time under the PUCO's rules. With regard to whether the PUCO should give any consideration to Duke's improperly filed memorandum contra, the Commission can address that determination as it finds appropriate.

III. ARGUMENT

A. Under The Definition Of Renewable Energy Source In R.C. 4928.02(A)(35) And Ohio Adm. Code 4901:1-40-04(A) A Coal Burning Facility That Contemplates Burning Biomass Does Not Qualify As A "Renewable Energy Resource."

Under the law, "biomass energy" is considered a renewable energy source. But a facility is not biomass energy. A facility is not energy. Energy is the output of a facility. Energy does not exist with a facility unless the facility has fuel. Accordingly, a facility should not be certified as a biomass-energy renewable energy source until it has demonstrated that it can burn the biomass fuel and until the operators demonstrate that they have a sustainable source of fuel. The point of requiring a renewable energy source is to ensure that the energy source will be sustainable, rather than an energy source that can be depleted. If there are currently insufficient supplies of a biomass material, it can be depleted and is not sustainable or renewable.

Additionally, under Ohio Adm. Code 4901:1-40-04(A), the Commission has defined a renewable source as:

> (A) The **following** resources or technologies, if they have a placed-in-service date of January 1, 1998, or after are qualified resources for meeting the renewable energy resource benchmarks:
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> (1) Solar photovoltaic or solar thermal energy.
> (2) Wind energy.
> (3) Hydroelectric energy.
> (4) Geothermal energy.
> (5) Solid waste energy derived from

fractionalization, biological decomposition, or other process that does not principally involve combustion.

(6) Biomass energy.

(7) Energy from a fuel cell.

(8) A storage facility, if it complies with the following requirements:

1. (a) The electricity used to pump the resource into a storage reservoir must qualify as a renewable energy resource, or the equivalent renewable energy credits are obtained.

2. (b) The amount of energy that may qualify from a storage facility is the amount of electricity dispatched from the storage facility.

(9) Distributed generation system used by a customer to generate electricity from one of the resources or technologies listed in paragraphs (A)(1) to (A)(8) of this rule.

(10) A renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998. (Emphasis added.)

Only one "facility" is listed under the qualified resources for meeting the renewable energy resource benchmarks and that is "a storage facility." Accordingly, a combustion facility such as Miami Fort that has been burning coal and has identified no specific source of biomass fuel cannot be "biomass energy" and therefore cannot be a renewable energy resource.

In addition the Commission has defined "biomass energy" under Ohio Adm. Code 4901:1-40-01(E) as:

> Energy produced from organic material derived from plants or animals and available on a renewable basis, including but not limited to: agricultural crops, tree crops, crop by-products and residues; wood and paper manufacturing waste, including nontreated by-products of the wood manufacturing or pulping process, such as bark, wood chips, sawdust, and lignin in spent pulping liquors; forestry waste and residues; other vegetation waste, including landscape or right-of-way trimmings; algae; food waste; animal wastes and by-products (including fats, oils, greases

> and manure); biodegradable solid waste; and biologically derived methane gas.

No facility at all is mentioned in the definition of biomass energy. Rather, energy produced by specific fuel types is all that is included.

Duke's contemplation of "between one percent and ten percent of its fuel to be supplied by biomass sources"[4] provides no reassurance that Miami Fort can even burn biomass let alone that biomass fuel will be available. Moreover, Duke did not assert that it had tested the burning of any biomass fuel in the Miami Fort Plant. Accordingly, the Commission cannot certify Miami Fort as "biomass energy."

B. OCC Should Be Permitted Intervention In This Case Because The Quality Of Renewable Resources Is At Issue And Because Only Those Renewable Energy Resources That Meet The Statutory And Rule Requirements Should Be Certified And Permitted To Collect The Premium Costs From Customers.

Duke states that OCC has confused the purpose of this proceeding because OCC is concerned about the premium residential customers must pay for renewable resources. Duke's opposition is misplaced. OCC well understands that this case is about certifying renewable energy sources that meet the criteria listed under the law and the rules. OCC understands that Duke will not be granted authority to collect any costs in this proceeding. But Duke may be granted the authority to use Miami Fort as a renewable energy resource when it does not really qualify under the law or the rules. Duke may also be granted the authority to use Miami Fort as a renewable energy resource to meet its benchmarks when Duke should be developing other renewable energy resources that do qualify and for which

[4] Memo Contra at 2.

they should be paid a premium. Additionally, Duke may request to collect the costs related to retrofitting Miami Fort in order to burn a non-sustainable and non-renewable fuel. Before Duke makes any such recoverable retrofits, Duke should be required to demonstrate to the Commission that it has a sustainable, renewable fuel source.

Thus, the premiums that Duke will attempt to collect from customers based upon the burning of questionable sources of biomass fuel are at issue. But also at issue is whether Duke will attempt to burn nonrenewable fuel—that is fuel that is not sustainable. If Duke does attempt to burn nonrenewable fuel, it will not meet the definition included in Ohio Adm. Code 4901:1-40-01(E) of "biomass energy." Before Miami Fort is certified as a renewable energy resource, Duke should be required to identify the biomass fuel it intends to burn. If Miami Fort will not be using a renewable fuel, it will not be a legitimate renewable energy resource.

III. CONCLUSION

The Commission should grant OCC's motion to intervene in this case where consumers can be adversely affected if the Miami Fort Station does not meet the legal criteria as a renewable energy resource. The residential customers that OCC represents should not be required to pay a premium in the future for a certified facility that is not a legitimate renewable energy resource. Moreover, the social benefits that the premium payments for renewable energy resources should bring to consumers should not be shortchanged by the certification of facilities or projects that are not legitimate renewable energy resources.

Beyond the issue of intervention, the Miami Fort Station should not be certified as a renewable energy source because it does not meet any of the criteria listed in R.C. 4928.02(A)(35) nor any of the criteria listed under Ohio Adm. Code 4901:1-40-04(A). Duke claims that the Miami Fort Station is "biomass energy" but a facility such as the Miami Fort Station is not "biomass energy" under definition in Ohio Adm. Code 4901:1-40-01(E). Accordingly, OCC's motion to intervene should be granted and the Miami Fort Station should not be granted a certificate as a renewable energy resource based on the Application as filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Reply to Duke Energy's Memorandum Contra OCC's Motion to Intervene by the Office of the Ohio Consumers' Counsel,* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 29th day of January, 2010.

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Summary: Reply Reply to Duke Energy's Memorandum Contra OCC's Motion to Intervene by OCC electronically filed by Mrs. Mary V. Edwards on behalf of Hotz, Ann M. Ms. and Office of the Ohio Consumers' Counsel