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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of Killen)
Generating Station for certification as an)
Eligible Ohio Renewable Energy) Case No. 09-891-EL-REN
Resource Generating Facility.)

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**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE OHIO ENVIRONMENTAL COUNCIL**

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of the Dayton Power and Light Company ("Company" or "DP&L"), and the Ohio Environmental Council ("OEC") pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), apply for rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on April 6, 2010. The parties submit that the Commission's Finding and Order in the above-captioned case is unreasonable and unlawful for the following reasons:

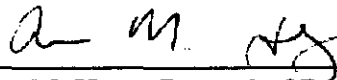
- A. The Commission Erred in Granting Dayton Power and Light Company a Renewable Energy Certificate for the Killen Generating Station When Killen Generating Station Does Not Meet the Definition of a Renewable Energy Resource Under R.C. 4928.64.
- B. The Commission Erred in Not Adhering to Its Decision In the Rule-Making Procedure That The Commission Would Consider the Validity of Renewable Fuel Sources In Certification Proceedings.

- C. The Commission Erred In Issuing A Renewable Energy Certificate Without Requiring DP&L To Demonstrate That Its Facility Complies With The Ohio Administrative Code.
- D. The Aggregate Amount of Large Biomass Proposals Require PUCO to Conduct a Thorough Review of Each Proposal, Which Must Include Each Applicant's Plan for a Sustainable Source of Fuel.
- E. Forest Residues Available in Ohio and Other Parts of the Country are Also Insufficient to Maintain a Consistent Supply of Fuel for Killen and the Other Proposals.
- F. Mill Residues may be Cost Prohibitive Due to Transportation Issues.
- G. Recent Commission Actions Make Clear That Utilities Must Provide Certain Information Regarding Source And Sustainability As A Prerequisite to Renewable Certification.

The reasons for granting this Application for Rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. HISTORY AND STATEMENT OF THE ISSUES

The Commission issued a March 31, 2010 Finding and Order in response to the Application of DP&L for the Killen Generating Station. DP&L filed an application for certification of Killen Generating Station as a renewable energy resource generating facility under Ohio Adm. Code 4901:1-40-04(F) on October 1, 2009. The OCC and the OEC filed motions to intervene and comments contesting the applicant's certification.¹ DP&L filed a reply,² and OCC filed reply comments to DP&L.³

In its Finding and Order, the Commission granted Killen Generating Station a certification as a renewable energy resource generating facility. This result should be rejected on rehearing as unlawful.

¹ OCC Motion to Intervene (October 21, 2009); OEC Motion to Intervene (November 17, 2009) .

² DP&L Reply (October 30, 2009).

³ OCC Reply Comments (November 9, 2009).

II. BURDEN OF PROOF

DP&L has the burden of demonstrating that its Killen facility should be certified as renewable resource facility. Certification would allow the company to use the energy generated to meet its lawful renewable benchmark obligations and to bank and sell renewable energy credits. Consequently, DP&L must demonstrate that its Application satisfies the criteria outlined in R.C. 4928.64 and in the Administrative Code §§ 4901:1-40-01 through 4901:1-40-09 for renewable generation. More specifically, DP&L must demonstrate that its facility will generate renewable energy from biomass resources in a sustainable, renewable fashion. The Application has not done so, and therefore the facility cannot be certified by the Commission.

III. ARGUMENT

A. The Commission Erred In Granting DP&L A Renewable Energy Certificate For The Killen Generating Station When Killen Generating Station Does Not Meet The Definition Of A Renewable Energy Resource Under R.C. 4928.64.

DP&L explained that it seeks to qualify the percentage of the output of Killen Station as a renewable resource rather than seeking to make some fixed percentage of the physical asset known as Killen Station.⁴ DP&L believes that it will be able to use its certification to sell RECs to other parties and to use them to meet its benchmarks. In establishing RECs for their use in meeting Ohio requirements, the General Assembly directed the Commission to:

Adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources. The rules also shall provide for this state a system of

⁴ DP&L Reply in Opposition at 4.

registering renewable energy credits by specifying which of any generally available registries shall be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits shall allow a hydroelectric generating facility to be eligible for obtaining renewable energy credits and shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits.

In this case, the Commission granted the Killen plant a certification of a combustion generator that has only produced power from nonrenewable fuel. The Commission granted the Killen plant a certification based upon DP&L's promise to obtain biomass fuel and attempt to burn it in Killen Generating Station.⁵ The Commission did not require DP&L to show that it does have a source of wood cellulose pellets, nor did it require DP&L to show that the Killen Generating Station can produce energy from whatever source of renewable fuel is available. Rather, DP&L simply promises to conduct test burns.⁶ In fact, DP&L admitted that it could not guarantee that the biomass "will be available, physically or economically, at the same percentage throughout any given period of time"⁷

Given the information provided to the Commission, the PUCO's decision suggests that a PUCO Ohio certification as a renewable energy resource means very little. For that reason, it appears that a renewable energy resource certification, as granted in this proceeding and others, may be misleading.

In its Entry, the Commission argues that DP&L has satisfied the three criteria required under R.C. 4928.64 to qualify as an eligible Ohio renewable energy resource

⁵ Application at ¶G.

⁶ Id.

⁷ Reply in Opposition at 4.

“facility.” First, the generation from the resource “facility” must be deliverable into the State of Ohio. Second the “resource to be utilized in the ‘generating facility’ is recognized as a renewable energy resource pursuant to Sections 4964(A)(1) and 4928.01(A)(35). Third “the ‘facility’ must satisfy the applicable placed-in-service date, delineated in Section 4928.64(A)(1).”

The Killen application in this case meets only the first criterion. The Killen application does not meet the second criterion as it is articulated under R.C. 4928.64(A)(1). R.C. 4928.64(A)(1) identifies a renewable energy resource as that defined under 4928.01.

R.C. 4928.01(A)(35) defines the meaning of the word “renewable energy resource” and that definition does not include any facilities except for fuel-cells, hydroelectric facilities or storage facilities. All other renewable energy resources listed under the statutory definition are different types of energy. Accordingly, the Commission’s certification of a coal-burning combustion generator that does not have an identifiable source of renewable fuel and has never burned renewable fuel is not a “renewable energy resource” as required under the law.

In attempting to extend the qualification to include facilities that do not have renewable fuel, the PUCO inserted the term “generating facility” to replace the law’s use of the term “resource” repeatedly in its paraphrasing of the law:

Given that Killen’s applications demonstrate that its facility satisfies the requisite statutory criteria to become certified as an eligible Ohio **renewable energy resource generating facility** * *

*⁸

⁸ Finding and Order at 5.

Killen is hereby issued certification number 1-BIO-OH-GATS-0106 as an eligible Ohio **renewable energy resource generating facility.**⁹

This improper paraphrasing and unreasonable interpretation of the law appears to be the Commission's attempt to revise the law to mean that any facility without a renewable fuel can be a renewable resource. That was not the intent of the law. For that reason, the Commission's decision is unlawful.

B. The Commission Erred In Not Adhering To Its Decision In The Rule-Making Procedure That The Commission Would Consider The Validity Of Renewable Fuel Sources In Certification Proceedings.

In the Rulemaking docket that established the certification process, OCEA and others expressed a great deal of concern about what materials should be included under biomass energy. At that time, OCEA expressed particular concern about the clearing of forests and natural areas simply for the production of energy.¹⁰ In its Opinion and Order in the Rulemaking docket that established the certification proceeding, the Commission stated:

With regard to wood biomass resources, the Commission believes the definition of biomass should include waste streams, such as wood and paper manufacturing waste, urban wood and tree residues, forestry residues from continuing forest management and harvest operations, or other land clearing. However, the Commission also conditions the use of forest resources upon **sustainable forest management operations**. Rule 40-04(E) introduces a certification process in which specific resources or technologies, **including consideration of fuel or feedstock as applicable, will be evaluated**. As indicated by 40-04(E)(2), such process would include the potential for interested persons to intervene and request a hearing.¹¹

⁹ Id at 6.

¹⁰ Reply Comments at 14-15.

¹¹ 08-888-EL-ORD, Opinion and Order at 26.

DP&L argues that the issue of fuel procurement is not relevant to certification of a renewable energy resource generating facility. The Commission agreed with DP&L and thus did not fulfill its promise to consider “fuel or feedstock” in the certification process. The Commission did not provide any reason for its change in practice. For this reason, the Commission’s decision is unlawful. And the Court has reversed the Commission for this reason on numerous occasions.¹²

C. The Commission Erred In Issuing A Renewable Energy Certificate Without Requiring DP&L To Demonstrate That Its Facility Complies With The Ohio Administrative Code

DP&L’s Application does not provide information sufficient to demonstrate that the Killen facility complies with the renewable energy requirements under the final rules. The Ohio Administrative code defines “biomass energy” for purposes of compliance with R.C. 4928.64:

‘Biomass energy’ means 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.¹³

This code section emphasizes two characteristics of eligible biomass: renewability and waste. Eligible renewable biomass must be both available on a renewable basis,

¹² See *Office of Consumers’ Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St. 3d 21; *Consumers Counsel v. Pub. Util. Comm.* (1984) 10 Ohio St. 3d 280, 287-288; 476 U.S. 1166, which addressed the same issues.

¹³ O.A.C. 4901:1-40-01 (E) (emphasis added.)

including waste products from timber harvesting or paper manufacturing. DP&L's Application does not describe with any detail the source of the biomass material, how it will be transported, or whether any contracts have been entered into. The Company's responses to Staff's interrogatory requests also failed to include this pertinent information.

Furthermore, the Application does not describe the anticipated carbon output of its facility. The Commission's rules make clear that carbon output is one of the criteria that should be considered when ruling on applications for renewable and advanced energy certifications. The rules reference carbon dioxide and/or greenhouse gas ("GHG") emissions at least four times when defining various advanced and renewable resource criteria:

'Clean coal technology' means any technology that removes or has the design capability to remove criteria pollutants and carbon dioxide from an electric generating facility that uses coal as a fuel or feedstock... O.A.C. 4901:1-40-01(F) (emphasis added.)

The rules further state that "The following resources or technologies [may be] qualified resources for meeting the advanced energy resource benchmarks":

- (1) Any modification to an electric generating facility that increases its generation output without increasing the facility's carbon dioxide emissions (tons per year) in comparison to its actual annual carbon dioxide emissions preceding the modification."
- (6) Advanced solid waste or construction and demolition debris conversion technology that results in measurable greenhouse gas emission reductions. O.A.C. 4901:1-40-04(B)(1), (6) (emphasis added.)

DP&L's Application, moreover, does not describe how far the biomass material will be delivered by truck to the plant, which will impact the renewability of the plant and

the criteria outlined above. The distance of transportation should also be considered in a renewable analysis. If biomass must be transported long distances using diesel fuel, for example, the carbon impact of the entire fuel procurement cycle could be substantial. The Commission is within its power to demand that DP&L explain how, and from where, it will obtain the biomass resources.

D. The Aggregate Amount of Large Biomass Proposals Require PUCO to Conduct a Thorough Review of Each Proposal, Which Must Include Each Applicant's Plan for a Sustainable Source of Fuel.

Even if the PUCO were to determine that Killen could obtain the biomass materials it proposes to rely upon, the Commission must acknowledge that the Application here represents but one of several potential certification requests proposing to use biomass fuel. Proposals to use biomass total just over 1700 MW demand for projects currently pending for renewable energy resource certification or recently approved for certification by the PUCO. The other proposals are equally daunting in their individual fuel requirements:

- First Energy Bayshore 1, 136 MW ten percent biomass = 13.6 MW¹⁴
- Duke Energy Beckjord, Unit 1, 94 MW 100% biomass = 94 MW¹⁵
- Duke Energy Beckjord, Unit 2, 94 MW 100% biomass = 94 MW¹⁶
- Duke Energy Beckjord, Unit 3, 128 MW 100% biomass = 128 MW¹⁷

¹⁴ *In the Matter of the Application of FirstEnergy Solutions for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-1042-EL-REN (November 3, 2009).

¹⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-1023-EL-REN

¹⁶ *Id.*

¹⁷ *Id.*

- Duke Energy Beckjord, Unit 4, 150 MW 100% biomass = 150 MW¹⁸
- Duke Energy Beckjord, Unit 5, 238 MW 100% biomass = 238 MW¹⁹
- Duke Energy Beckjord, Unit 6, 421 MW 100% biomass = 421 MW²⁰
- Duke Zimmer, 1300 MW 10% biomass= 130 MW²¹
- Duke Miami Fort Unit 7, 510 MW 10% biomass = 51MW²²
- Duke Miami Fort Unit 8, 510 MW 10% biomass= 51 MW²³
- South Point Biomass, 200MW 100% biomass = 200 MW²⁴
- FirstEnergy R.E. Burger Units 4 and 5, 300 MW 51% = 150 MW²⁵

The combination of a cursory approval process, which employs an incomplete review of a certification application, coupled with the lack of an aggregate view of similar types of proposals does not foster a serious determination of whether an applicant is ready for certification as a renewable energy generating facility. Further, the cumulative impact on Ohio and other forest ecosystems would be devastating. The PUCO must consider the substance of these applications individually to determine actual viability. The

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ *In the Matter of the Application of Duke Energy Ohio Inc. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-1878-EL-REN (October 1, 2009).

²² *In the Matter of the Application of Duke Energy Ohio Inc. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-1878-EL-REN (December 1, 2009).

²³ Id.

²⁴ *In the Matter of the Application of South Point Biomass for Certification as an eligible Ohio renewable energy resource generating facility*, Case No. 09-1043-EL-REN 9 (November 6, 2009).

²⁵ *In the Matter of the Application of FirstEnergy Generation Corp. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-1940-EL-REN (December 11, 2009).

Commission must also consider the effects of these applications will have on Ohio and the rest of the Country on an aggregate level.

E. Forest Residues Available in Ohio and Other Parts of the Country are Also Insufficient to Maintain a Consistent Supply of Fuel for Killen and the Other Proposals.

1. Ohio Forest Residues can sustain a total of 38.5MW of power.

Forest residues provide little potential as biomass feedstock. Forest residues are defined as “logging residues from conventional harvest operations, forest management and land clearing.” It also includes wood materials removed from timberlands and other forest lands as a result of fuel treatments (removal of excess biomass) and cutting of trees directly for fuel wood.”²⁶ Information obtained from the United States Department of Energy indicates that Ohio forests alone may be able to provide little more than 38.5MW of fuel total. Conversion of the total material stated in the 2007 Forest Inventory for Ohio indicates that 500,067 green tons are available.²⁷ Using the 13,000 green tons required to produce 1MW as stated above, Ohio Forest Residues are capable of sustaining the generation of 38.5MW of electricity.

2. Forest Residues in the North Central Region of the United States can support a total of only 1116MW.

The North Central region of United States, which includes Indiana, Iowa, Illinois, Michigan, Minnesota, Ohio and Wisconsin, contains an estimated total of 638,540 thousand cubic ft. forest residues.²⁸ Conversion from cubic feet results in a total of

²⁶ Bioenergy Feedstock Information Network, *Forestry Residue – Harvesting*, Oak Ridge National Laboratory; <http://bioenergy.ornl.gov/main.aspx>.

²⁷ <http://foatpp:s/fs/fed/is/fido/index.html> (500,074 bone dry tons forest residue) Half of which is available for use (I) 0.5=250,037/(1-45% moisture c green tons of residue (I) 13,000 tons per MW=38.5MW.

²⁸ *International Forest Industries*, December/January 2009 issue, page 15-16_ International Forest Industries Ltd; http://corporate.internationalforestindustries.com/PDFs/Issues/2009_12.pdf.

14,512,272 green tons of forest residues available in this region.²⁹ This seemingly large amount of residue would support the sustained generation of only 1,116 MW total. This amount falls far short of the certification projects currently proposed in Ohio, as presented above. Therefore, Ohio biomass projects appear to be unsustainable through forest residue alone. The PUCO must require specific information as to the sustainable source of biomass material before renewable certification of the Killen facility and the other facilities are approved.

3. Forest Residues in the Southeastern Region of the United States can support a total of only 2300MW – but competition exists for these resources.

Estimates indicate that even the forest rich Southeastern United States may only be able to generate thirty million tons of residues³⁰. Using calculations similar to those employed above, forest residues from this part of the Country would be enough to sustain the generation of an estimated 2300MW, or roughly the amount needed to sustain all of the Ohio biomass proposals. As a result of the lack of forest residues to supply feedstock and the confirmation by DP&L that it would be burning primarily woody biomass without burning leaves, branches and bark, this “white wood” that is preferred for fuel stock will likely come from whole trees.

However, there are numerous projects in other states competing for biomass resources discussed in these comments. International Forest Industries noted that during the three months leading up to the publication of their December/January issue, permits

²⁹ Calculation from the National Renewable Resources Laboratory: 1,000 ft³ of wood = 0.0125 MBDT (thousand bone dry tons). 638,540 thousand ft³ (x) 0.0125MBDT = 7,981,700 bone dry tons of forest residue, (/) 0.55 = 14,512,272 green tons. 14,512,272 green tons/13000 tons per MW = 1116 MW total sustained generation capacity from forest residues in the entire North Central US.

³⁰ *International Forest Industries*, December/January 2009 issue, page __, International Forest Industries Ltd; http://corporate.internationalforestindustries.com/PDFs/Issues/2009_12.pdf

for biomass fuel to energy generating facilities nearly doubled in the Southeastern region.³¹ As of 2009, eighty facilities located in 16 states currently use biomass as fuel for generating electricity.³² Unlike the massive projects being proposed in Ohio, the average size of these plants is 20MW.³³ The PUCO must require this Applicant and other Ohio Applicants to demonstrate specifics as to fuel source and delivery methods prior to approval of certification. In addition, the PUCO should consider the aggregate impact of all pending and approved Ohio biomass projects.

F. Mill Residues may be Cost Prohibitive Due to Transportation Issues.

As an alternative to woody biomass and forest residues, mill residues, in either pelletized or non-pelletized forms, and wood waste generated from sawmills or other wood processing plants provided little additional material for biomass feed stocks. International Forest Industries notes that, "Cellulosic ethanol companies, wood pellet plants, independent power companies, public utilities, corn ethanol producers, universities and paper companies are all sourcing wood fiber for energy production"³⁴. Wood Pellet facilities dependent on mill residues are typically located within 50 miles of

³¹ Id.

³² Spelter, Henry, et al: *North America's Wood Pellet Sector*, produced by the U.S. Department of Agriculture Forest Service and the Forest Products Laboratory, page 6 (Corrected September 2009).

³³ Bergman, Richard, et al: *Primer on Wood Biomass for Energy*, produced by the U.S. Department of Agriculture Forest Service and the Forest Products Laboratory, page 1 (January 2008)

³⁴ International Forest Industries, December January 2009 issue, page 15-16, International Forest Industries Ltd; http://corporate.internationalforestindustries.com/PDFs/Issues/2009_12.pdf

sawmills or wood processing plants because of the high moisture content and low bulk density (light weight, taking up a lot of space) of mill residues, making transportation over long distances cost prohibitive. Thus, this is not a significant source of material for Killen or the other proposals in Ohio.

G. Recent Commission Actions Make Clear That Utilities Must Provide Certain Information Regarding Source And Sustainability As A Prerequisite to Renewable Certification.

The Commission recently entered an order—*sua sponte*—suspending FirstEnergy Solutions’ (“FES”) Application for certification of its Burger facility as a renewable energy resource.³⁵ The Entry found that FES’s Application had not satisfied that requirements for certification and that additional information was necessary:

“additional information is required to satisfy the requirements for certification. Therefore, good cause has been shown to suspend the 60-day automatic approval process for Burger’s amended application for certification, in order for the Commission to further review this matter.”

Among other deficiencies, FES’s Application failed to include data regarding the source, sustainability, and carbon output of its facility. These deficiencies were highlighted in detailed Comments by the OCC and the OEC.³⁶ The Commission’s Entry suspending the Burger Application clearly indicates that a utility must provide certain information regarding the source and sustainability of its facility as a pre-requisite to renewable certification. It is precisely this sort of information that DP&L failed to provide in the present Application.

³⁵ Entry, Case No. 1940-EL-REN, April 28, 2010.

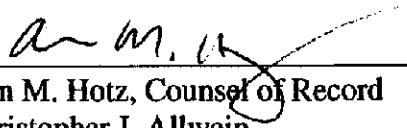
³⁶ OCEA’s Comments, Case No. 1940-EL-REN.

IV. CONCLUSION

The Commission's decision in this case was unlawful and the Commission should grant rehearing. First, the Commission's determination that the Killen Generating Station is a renewable energy resource is contrary to the definition provided in the law under R.C. 4928.01(A)(35). Second, the Commission's unwillingness to consider the renewable fuel source and its sustainability in a certification case after stating in its Opinion and Order in the rulemaking proceeding that it would, is unlawful. Third, the Application is facially deficient, as it fails to describe how it will comply with the Commission's rules. Pursuant to R.C. 4903.10, the PUCO should grant rehearing and modify its decision in this case.

Respectfully submitted,

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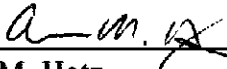
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Application for Rehearing* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 6th day of May 2010.



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