

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company)	
For Certification As an Eligible Ohio)	Case No. 10-911-EL-REN
Renewable Energy Resource Generating)	
Facility.)	

**MOTION FOR LEAVE TO FILE OUT OF TIME AND MOTION TO
INTERVENE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") moves for leave to file out of time its motion to intervene¹ as a party in this case in which the diversity of electricity supplied to Ohio consumers may be affected. OCC also is filing its motion to intervene. Ohio Power Company ("Applicant" or "Ohio Power") seeks certification for its Muskingum River plant as an eligible Ohio renewable energy resource generating facility under R.C. 4928.01(A)(35). OCC is filing on behalf of residential utility consumers.

The granting of Ohio Power's Application 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 or use the renewable power to meet its benchmarks. 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.

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

Ohio Revised Code allows for Commission to grant motions to intervene out of time for good cause shown.² In addition, the Supreme Court of Ohio has held that statutes and rules governing intervention should be “generally liberally construed in favor of intervention.”³

The reasons the Public Utilities Commission of Ohio (“Commission” or “PUCO”) should grant OCC’s Motion for Leave to file out of time and grant its Motion to Intervene (“Motion”) are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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² R.C. 4903.221(A)(2).

³ *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384, 2006 Ohio 5853, 856 N.E.2d 940, at ¶16 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. Of Elections* (1995), 74 Ohio St.3d. 143, 144).

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MEMORANDUM IN SUPPORT

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 utility customers of Ohio.⁴ The Applicant is requesting certification of the Muskingum River Plant, Units 1-5 as a renewable energy resource generating facility that will contribute the power it produces to electric distribution utilities.

II. MOTION TO FILE OUT OF TIME

Rule 4901:1-40-04(F)(1) states that "any interested person may file a motion to intervene and file comments to any application filed under this rule within twenty days of the date of the filing of the application." The Application was filed by Ohio Power on June 29, 2010. Intervention and Comments were due on July 19, 2010.

The Commission's rules allow a motion to intervene which is not timely to be granted "only under extraordinary circumstances."⁵ But the Ohio Revised Code allows

⁴ R.C. 4911.

⁵ Ohio Adm. Code 4901-1-11(F)

the Commission discretion to grant an untimely motion for “good cause shown.”⁶ As presented below, the OCC has good cause for being granted intervention out of time and respectfully requests the PUCO grant its motion to intervene out of time.

The Application filed by Ohio Power stems from the requirement that electric distribution utilities provide a percentage of their standard service offer electricity supply from alternative energy resources.⁷ This requirement for a percentage of alternative energy is intended to benefit utility customers, including residential utility customers. OCC’s intervention in this case will provide input on the Application and how this may affect Ohio residential utility consumers’ interests. These interests are not represented by any other party in this proceeding.

As an advocate for residential utility customers’ interests, OCC has intervened and participated in all of the biomass applications submitted to the Commission by various parties.⁸ In all but one of the previous applications, the abbreviated time frame mandated by 4901:1-40-04(F)(1) was not applicable because the rule was not in effect. In the *Burger* case, in which the rule was in effect, the PUCO suspended the application and provided an extended procedural schedule, which allowed interested parties and the Commission additional time to analyze the application and comment.⁹ The short time frame, in effect for this application, was insufficient to properly analyze this application, which contains new information not provided in previous biomass applications.

⁶ R.C.4903.221(A)(2).

⁷ R.C. 4928.64(B).

⁸ See PUCO Case Nos. 09-717-EL-REN, 09-1023-EL-REN, 09-1042-EL-REN, 09-1043-EL-REN, 09-1860-EL-REN, 09-1877-EL-REN, 09-1878-EL-REN, and 09-1940-EL-REN.

⁹ *In the matter of the Application of R.E. Burger Units 4 and 5 for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-1949-EL-REN, Entry at 2 (Feb. 3, 2010).

The Application will not be delayed by OCC's intervention. In fact, Rule 4901:1-40-04(F)(2) provides the Applicant with a safeguard that automatically grants the application after sixty days, unless it is suspended or denied by the Commission. Therefore, OCC respectfully requests the Commission, in consideration of the extended time frame provided in all previous biomass cases, find good cause¹⁰ to grant OCC's Motion for Leave to file out of time and grant OCC's Motion to Intervene.

III. 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 that would compete for limited resources required by other, similarly approved and pending, facility applications. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

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

¹⁰ In a recent case, the PUCO Attorney-Examiner noted the Ohio Supreme Court standard and granted a motion to intervene out of time because the party "demonstrated good cause," *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-REN, Entry at 3 (Feb. 5, 2009).

- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing the residential consumers of Ohio in this case where the PUCO must consider whether consumers will receive the intended benefits of renewable energy under Ohio law. This interest is different than that of any other party and especially different than that of the utility whose advocacy includes the financial interest of stockholders.

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 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.

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.¹¹

IV. CONCLUSION

OCC regrets that this Motion to Intervene is out of time and not in accordance with Rule 4901:1-40-04(F)(1). However, OCC meets the statutory standard of good cause for acceptance of its motion to intervene out of time. And 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. The OCC respectfully requests the PUCO to grant its motion for leave to file out of time and grant its Motion to Intervene. OCC appreciates the PUCO's consideration of these motions.

Respectfully submitted,

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CONSUMERS' COUNSEL

/s/ Christopher J. Allwein

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¹¹ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20 (2006).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion for Leave to File Out of Time and Motion to Intervene* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 27th day of July 2010.

/s/ Christopher J. Allwein
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Summary: Motion Motion for Leave to File Out of Time and Motion to Intervene by the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of Allwein, Christopher J. and Office of the Ohio Consumers' Counsel