

ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1977

The Ohio Environmental Council
:
:
Appellant,
:
:
v.
:
:
The Public Utilities Commission of Ohio
:
:
Appellees.

On Appeal from the Public Utilities
Commission of Ohio

Public Utilities Commission of Ohio
Case No. 09-1940-EL-REN

NOTICE OF APPEAL OF APPELLANT THE OHIO ENVIRONMENTAL COUNCIL

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SUPREME COURT OF OHIO

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Notice of Appeal of Appellant the Ohio Environmental Council

Appellant, the Ohio Environmental Council, hereby gives notice of its appeal, pursuant to *R.C. 4903.11* and *4903.13*, to the Supreme Court of Ohio from a Finding and Order of the Public Utilities Commission of Ohio, entered on August 11, 2010 in PUCO case No. 09-1940-EL-REN.

Appellant was and is a party of record in PUCO case No. 09-1940-EL-REN, and timely filed its Application for Rehearing of the Appellee's August 11, 2010 Finding and Order in accordance with *R.C. 4903.10*. Appellant's Application for Rehearing was denied, with respect to the issues on appeal herein, by operation of law when not granted or denied within thirty days of August 11, 2010. *R.C. 4903.10*.

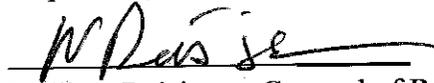
The Appellant complains and alleges that Appellee's August 11, 2010 Finding and Order, and Appellee's decision not to grant a rehearing within thirty days in PUCO case No. 09-1940-EL-REN are unlawful, unjust and unreasonable in the following respects, as set forth in Appellant's Application for Rehearing:

- A. The Commission erred when the Burger Application was certified because it was in violation of the Ohio Adm. Code Rule 4901:1-40-01(E), which requires a demonstration of the type of biomass material that will be utilized.**
- B. The Commission's order is inconsistent and unreasonable by finding that biomass energy is "Conditioned Upon Sustainable Forest Management" without enforcing this condition in its order or explaining how it will be applied.**
- C. The Commission's application of O.R.C. 4928.65, Using Renewable Energy Credits, results in economic discrimination and is a violation of the United States Constitution.**
- D. The Commission's application of O.R.C. 4928.65 will achieve an absurd, unreasonable, and unlawful result not intended by the legislature.**

Wherefore, Appellant respectfully submits that the Appellee's August 11, 2010 Finding and Order and Appellee's decision not to grant a rehearing in PUCO case No. 09-1940-EL-REN are unlawful, unjust and unreasonable and should be reversed. The case should be remanded to

the Public Utilities Commission of Ohio with instructions to correct the errors complained of herein.

Respectfully submitted,



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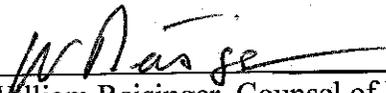
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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to all parties to the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code on November 15, 2010.


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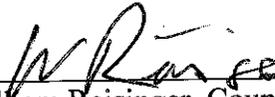
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Certificate of Filing

I certify that a Notice of Appeal has been filed with the docketing division of the Public Utilities Commission in accordance with *sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.*



William Reisinger, Counsel of Record

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
R.E. Burger Units 4 & 5 for Certification) Case No. 09-1940-EL-REN
as an Eligible Ohio Renewable Energy)
Resource Generating Facility.)

FINDING AND ORDER

The Commission finds:

- (1) On December 11, 2009, R.E. Burger Units 4 & 5 (Burger) filed an application for certification as an eligible Ohio renewable energy resource generating facility. The Burger facility is owned by the FirstEnergy Generation Corporation, which in turn is a subsidiary of FirstEnergy Solutions (FES).
- (2) Motions to intervene were filed by the Ohio Environmental Council (OEC), the Environmental Law and Policy Center (ELPC), the Sierra Club of Ohio, the Ohio Consumers' Counsel (OCC), the American Wind Energy Association (AWEA), and Ohio Advanced Energy. OEC also filed a motion to suspend Burger's application on January 12, 2010.
- (3) By entry issued on February 3, 2010, the Commission suspended Burger's application, granted all pending motions to intervene, and also established a procedural schedule for the filing of comments in this matter.
- (4) By entry issued on March 26, 2010, Burger's motion for leave to file an amended application was granted, and Burger's amended application was deemed filed as of March 10, 2010. Commission Staff timely filed comments on March 15, 2010, while the Ohio Consumer and Environmental Advocates (OCEA) (which is comprised of ELPC, OCC, and OEC) and AWEA separately timely filed comments on April 12, 2010. FES filed a response to OCEA's comments on April 22, 2010.
- (5) By entry issued on April 28, 2010, Burger's amended application was suspended.
- (6) On May 20, 2010, OCEA filed a motion to dismiss or, in the alternative, a motion for an evidentiary hearing. FES filed a

memorandum contra the motion to dismiss on June 4, 2010, and OCEA filed its reply on June 11, 2010.

- (7) Consistent with Sections 4928.64 and 4928.65, Revised Code, in order to qualify as a certified eligible Ohio renewable energy resource generating facility, a facility must demonstrate in its application that it has satisfied all of the following criteria:
- (a) The generation produced by the renewable energy resource generating facility can be shown to be deliverable into the state of Ohio, pursuant to Section 4928.64(B)(3), Revised Code.
 - (b) The resource to be utilized in the generating facility is recognized as a renewable energy resource pursuant to Sections 4928.64(A)(1) and 4928.01(A)(35), Revised Code, or a new technology that may be classified by the Commission as a renewable energy resource pursuant to Section 4928.64(A)(2), Revised Code.
 - (c) The facility must satisfy the applicable placed-in-service date, delineated in Section 4928.64(A)(1), Revised Code.
- (8) Burger seeks certification of two 156 MW generating units, located at 57246 Ferry Landing Road, Shadyside, Ohio 43947. The application explains that Burger proposes to co-fire wood pellets/briquettes and/or agricultural biomass fuels in pellets, briquettes, or bales with coal, while relying on fuel oil for start-up and flame stabilization. Burger will initially conduct a six-month test burn of biomass fuel, which according to the application was scheduled to begin around April 5, 2010. During the test phase, biomass energy will provide from zero to 50 percent of the heat input, with coal supplying another 50 to 100 percent, and fuel oil contributing less than ten percent. After the test phase is completed, the application states that Burger will become a full biomass co-firing facility, relying on biomass energy for 51 to 100 percent of its heat input, coal for zero to 49 percent, and fuel oil for less than ten percent.

The application describes how the amount of biomass fuel used at the facility will be weighed on-site and tracked in a database. In addition, the application states that the heating values of all

biomass fuels will be determined, in accordance with the relevant standards, by the fuel suppliers prior to delivery. The application also includes detailed formulas explaining how the amount of electricity generated from biomass energy, as well as the resulting renewable energy credits (RECs), will be calculated, during both the testing phase (test phase formula) and when generating principally from biomass energy (REC multiplier formula), in accordance with Rule 4901:1-40-01(G), Ohio Administrative Code (O.A.C.).

OCEA's Comments and Motion to Dismiss

- (9) In its comments, OCEA contends that Burger should not be certified until additional information is provided regarding the source and location of the biomass material to be utilized, including whether the biomass material will be obtained in a sustainable manner; the method and distance of transporting the biomass material; the net carbon emissions that will be generated; the projected costs that FES will incur; and the implications for the compliance of the FirstEnergy electric distribution utilities with Ohio's renewable energy requirements (OCEA Comments at 5). OCEA questions whether a sufficient supply of biomass exists to provide the facility with a reliable source of fuel and argues that the large quantities of biomass needed by Burger would deplete forest resources and negatively impact Ohio's existing forest products industry (*Id.* at 16-27). OCEA complains that Burger has not provided the same amount of information required of other applicants for certification as renewable energy resource generating facilities (*Id.* at 15-16, 25-26, 28-29).

In support of its motion to dismiss, OCEA avers that Burger has not met its burden of proving that its application has met the legal requirements set forth in Sections 4928.64 and 4928.65, Revised Code (OCEA Motion to Dismiss at 1). OCEA specifically argues that Burger's application is facially inadequate, as it does not include a demonstration of sustainability and renewability. OCEA reiterates its contention that Burger must provide information regarding the source and location of the biomass material to be utilized, the sustainability protocol that will be used, the method and distance of transportation, and the net carbon emissions that will be generated. (*Id.* at 6.) OCEA cites to the definition of

biomass energy contained in Rule 4901:1-40-01(E), O.A.C., to support its contention that a demonstration of source sustainability is required for any proposed use of biomass energy (OCEA Reply to FES Memo Contra at 3). OCEA states that the unprecedented size of the Burger facility, at over 300 MW, means that it will have a substantial impact on Ohio's renewable energy standard, especially since the energy generated at the Burger facility will be eligible for a higher REC unit rate (OCEA Motion to Dismiss at 7). According to OCEA, Burger has not provided substantive responses to Staff discovery requests and has not supplemented those responses (*Id.* at 9). OCEA notes that, even after the Commission suspended Burger's amended application, Burger did not provide any additional information (OCEA Reply at 3-4). In the absence of such information, OCEA contends that the Commission should dismiss Burger's application or, in the alternative, set this matter for hearing, with a full procedural schedule, including ample time for discovery (OCEA Motion to Dismiss at 10-11).

In response to OCEA's arguments, FES argues that OCEA misstates the legal requirements necessary for certification of the Burger facility as an eligible Ohio renewable energy resource generating facility. FES maintains that neither Sections 4928.64 and 4928.65, Revised Code, nor Rule 4901:1-40, O.A.C., require an applicant to prove sustainability, a reduction in carbon dioxide emissions, or a favorable emissions profile. (FES Response to OCEA Comments at 1.) In addition, FES argues that the Commission has already certified other biomass facilities based on the same information provided in this proceeding by Burger and contends that OCEA's concerns about the costs of upgrading the Burger facility are misplaced because any costs incurred by FES to upgrade Burger will not be directly passed to Ohio consumers (*Id.* at 6, 9).

- (10) The Commission finds that the arguments raised by OCEA in its comments and in support of its motion to dismiss lack merit. There is no requirement for an applicant for certification as an eligible Ohio renewable energy generating facility to provide the type of information desired by OCEA. OCEA's contentions regarding carbon emissions, either related to co-firing biomass fuels or the emissions resulting from transportation of the biomass fuels to the facility, lack foundation; nothing in

Chapter 4928, Revised Code or in the Commission's rules makes consideration of carbon emissions a relevant factor when determining whether to certify a facility as an eligible Ohio renewable energy resource generating facility. In addition, the Commission notes that, according to the application, Burger will be working with the Electric Power Research Institute and the National Renewable Energy Laboratory to evaluate net carbon output and Burger indicates that it is considering standards related to environmental sustainability during the evaluation of potential biomass fuel suppliers. Moreover, the United States Environmental Protection Agency has agreed to the use of biomass energy in the Burger facility in the consent decree in *United States v. Ohio Edison Company*, No. 2:99-cv-1181 (S.D. Ohio).

While an applicant bears the responsibility to demonstrate that its proposed fuel type qualifies as a renewable resource, the availability of that renewable energy resource is not a relevant consideration when evaluating an application for certification. This is particularly true when, as in this case, a facility proposes to use biomass energy as its renewable energy resource. Since the definition of biomass energy includes a wide variety of qualifying materials, the fact that one particular type of biomass energy may not be available is not a valid basis for denying certification. Since the amount of RECs generated by a facility are proportionally metered and calculated as a proportion of the electrical output equal to the proportion of the heat input derived from qualified biomass fuels, the applicant bears the risk that sufficient quantities of biomass fuels may not exist to consistently create renewable energy.

Nonetheless, as the Commission has previously stated, the use of forest resources as biomass energy is conditioned upon sustainable forest management operations. *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill 221, Case No. 08-888-EL-ORD, Opinion and Order (April 15, 2009) at 26. See also, In the Matter of the Application of Bay Shore Unit 1 for Certification as an Eligible Ohio Renewable Energy Resources Generating Facility, Case No. 09-1042-EL-REN, Entry on Rehearing (June 16, 2010) at 4, 5. The Commission recognizes that the applicant issued a*

request-for-proposal (RFP) on January 28, 2010, that required bidders to provide information establishing that the raw material harvest can be completed in a sustainable manner and, if possible, provide an independent certification of sustainability and that the period for responding to the RFP ended on March 5, 2010.

The Commission further notes that an application for certification is not the appropriate forum for addressing cost issues. Although OCEA additionally raises the concern that the scale of the Burger facility will inhibit the development of other sources of renewable energy in the state of Ohio, while also negatively impacting Ohio's existing forest products industry, the Commission finds that there is no basis under Chapter 4928, Revised Code, or the Commission's rules for even considering the potential economic impact of a renewable energy resource generating facility when evaluating that facility's application for certification.

OCEA's contention that other applicants for certification, such as residential solar applications, are required to make a much more exacting demonstration that their facility generates renewable energy also lacks merit. The Commission recognizes that renewable energy resource generating facilities that have not yet gone on-line are sometimes unable to provide details about all aspects of their proposed operations. Under those circumstances and regardless of the renewable resource, the Commission has granted certification to those facilities whose applications adequately demonstrate that the proposed facility will generate energy from renewable resources in compliance with the Revised Code and the Commission's rules while requiring the applicants to update their application as new information becomes available. See, e.g., *In the Matter of the Application of Wyandot Solar L.L.C. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-521-EL-REN, Finding and Order (September 9, 2009); and *In the Matter of the Application of the University of Toledo Scott Park Campus PV Facility*, Case No. 09-827-EL-REN, Finding and Order (November 24, 2009).

Having concluded that there is no merit to the arguments raised by OCEA, the Commission finds that OCEA's motion to dismiss should be denied.

Consideration of the Statutory Criteria for Certification

- (11) We now turn to consideration of whether Burger's application satisfies the three statutory criteria for certification as an eligible Ohio renewable energy resource generating facility. With regard to the first criterion, which requires a showing that generation produced by the renewable energy resource generating facility is deliverable into the state of Ohio, we find that, based upon the application, and the facility's location in Ohio, the electricity generated from the Burger facility is deliverable into Ohio. Accordingly, the Commission finds that the application satisfies the first criterion.
- (12) The second criterion requires that the resource to be utilized in the generating facility be recognized as a renewable energy resource pursuant to Sections 4928.64(A)(1) and 4928.01(A)(35), Revised Code, or else be a new technology classified by the Commission as a renewable energy resource pursuant to Section 4928.64(A)(2), Revised Code. Biomass energy is specifically recognized as a renewable resource pursuant to Section 4928.01(A)(35), Revised Code. The biomass energy materials Burger proposes to use, specifically, wood pellets or briquettes and/or agricultural biomass fuels in pellets, briquettes or bales, meet the definition of biomass energy contained in Rule 4901:1-40-01(E), O.A.C. Therefore, the Commission finds that the second criterion is satisfied.
- (13) The third criterion, the placed-in-service requirement imposed by Section 4928.64(A)(1), Revised Code, can be met through the creation of a renewable energy resource on or after January 1, 1998, by the modification of any facility placed in service prior to January 1, 1998. The application maintains that the modifications made to the facility in order to commence co-firing biomass fuels satisfy the placed-in-service requirement. The Commission finds, that as described in the application, the conversion of the Burger facility to the use of renewable fuels, such as biomass, constitutes a modification that creates a renewable energy resource. The Commission finds that the Burger facility meets the third criterion.
- (14) Given that Burger's application demonstrates that its facility satisfies the requisite statutory criteria to become certified as an eligible Ohio renewable energy resource generating facility, as

well as the Commission's rules, the Commission finds that Burger's application should be approved.

- (15) Section 4928.65, Revised Code, provides for an increase in the quantity of RECs produced by an Ohio generating facility of 75 megawatts or greater that has committed, by December 31, 2009, to modify or retrofit its generating units to enable generation principally from biomass energy by June 30, 2013. The application which was originally filed on December 11, 2009, includes a commitment to modify the Burger facility to enable generation principally from biomass energy by December 31, 2012, as required by the consent decree in *United States v. Ohio Edison Company*, No. 2:99-cv-1181 (S.D. Ohio), the Commission finds that the Burger facility satisfies the requirements set forth under the statute and thus is eligible to receive an increase in the quantity of RECs created when generating principally from biomass energy.
- (16) Staff contends that the Burger facility should be found to be operating "principally" from biomass energy only when the plant is generating power using no more than a total of 20 percent coal and fuel oil (based on heat input), co-fired with biomass fuels (Staff Comments at 8). In support of its position, Staff notes that, the Burger facility is subject to a 2009 consent decree, which commits the facility to operate on a regular basis using no more than 20 percent low sulfur western coal, in addition to biomass fuels, unless the plaintiffs in that proceeding approve the use of a larger amount of coal (*Id.* at 5-6, 8, citing to *United States v. Ohio Edison Company*, No. 2:99-cv-1181 (S.D. Ohio)). Staff recommends that the REC multiplier formula only be used when the facility is generating power using no more than 20 percent coal and fuel oil (based on heat input) along with biomass fuels and that the test phase formula be used for calculating RECs whenever Burger operates with more than 20 percent coal and fuel oil (*Id.*). In its comments, AWEA supports Staff's interpretation of "principally" (AWEA Comments at 7).
- (17) The Commission finds that the Burger facility should be deemed to be generating principally from biomass fuels, and thus that the REC multiplier formula should be applied, only when the Burger facility is operating with no more than 20 percent low-sulfur western coal and fuel oil, co-fired with

biomass fuels. At all other times, the test phase formula should be used to calculate the number of RECs generated through the use of biomass fuels at the Burger facility.

- (18) Section 4928.65, Revised Code, states that, when a facility qualifies for the increase in the value of RECs, the number of RECs produced by each megawatt-hour of electricity generated principally from the biomass energy shall equal "the product obtained by multiplying the actual percentage of biomass feedstock heat input used to generate such megawatt hour by the quotient obtained by dividing the then existing dollar amount used to determine a renewable energy compliance payment [as provided under Section 4928.64(C)(2)(b), Revised Code] by the then existing market value of one REC" (REC multiplier formula). The statute establishes one REC as the minimum value for any megawatt hour of electricity generated from biomass energy.

In its comments, AWEA urges the Commission to alter the REC multiplier formula even when the Burger facility is generating principally from biomass energy. Rather than dividing the amount of the alternative compliance payment by the average market value of one REC, as required by Section 4928.65, Revised Code, AWEA advocates that the average market value of a REC should be set to equal the amount of the alternative compliance payment. (AWEA Comments at 3-4.) In other words, AWEA proposes eliminating the increase in value for any RECs created by the Burger facility. AWEA takes this position because it believes that if the renewable energy generated by the Burger facility is tallied on the basis of the REC multiplier formula, the FirstEnergy electric distribution utilities would likely be able to satisfy all of their renewable energy resource benchmarks under Section 4928.64, Revised Code, through 2025, just from the RECs created by the Burger facility. AWEA maintains that the REC market in Ohio would be devastated by the impact of the REC multiplier formula, as the large number of RECs created by the Burger facility would flood the market and depress prices. (*Id.* at 4-6.) AWEA believes that following the plain language of Section 4928.65, Revised Code, leads to an absurd result and negates the renewable energy benchmarks (*Id.* at 6-7).

- (19) The Commission disagrees with AWEA. The REC multiplier formula is established by the plain, unambiguous language of Section 4928.65, Revised Code, and thus the Commission must apply the statute as written. See *State ex rel. Columbus Southern Power v. Fais* (2008), 117 Ohio St.3d. 340, 345. Section 4928.65, Revised Code, clearly states that, for purposes of the REC multiplier formula, "the then existing market value" for RECs must be used, and therefore AWEA's proposed reading of the statute lacks merit.
- (20) In its application, Burger proposes determining the number of RECs generated on the basis of the REC multiplier formula on a monthly basis, in accordance with the operating procedures for the Generation Attribute Tracking System (GATS). Burger also offers to make all source materials relevant to the REC multiplier formula available to Staff upon request. In addition, as the REC multiplier formula references the "then existing" market values of a REC, Burger suggests working with Staff to create an appropriate methodology for determining the existing market value of a REC. In its comments, Staff agrees with Burger's proposal and notes that clear data on the market values of RECs will not exist until after the April 15, 2010, annual compliance filings are reviewed (Staff Comments at 9).
- (21) With respect to the creation of a methodology to determine the existing market value of a RECs, the Commission finds that additional comments are necessary to address this issue. Accordingly, the Commission will establish a 60-day comment period, followed by a 30-day period for reply comments, for interested persons to submit proposals for, or comments regarding, a methodology to determine the existing market value of RECs. Such proposals and comments may include market-based alternatives, such as auctions, to determine the value of RECs. However, this additional comment period will not delay our approval of the certification of the Burger facility as an eligible Ohio renewable energy resource generating facility.
- (22) Finally, Staff recommends that Burger's proposed test phase formula should be revised to include the volume and the heating value of the fuel oil used in the denominator of the formula, along with the weight and heating values of the biomass fuel and coal (Staff Comments at 6-7).

- (23) The Commission agrees with Staff and finds that with Staff's modification, the test phase formula is consistent with the one the Commission approved for use when it has previously certified co-firing facilities. See *In the Matter of the Application of Conesville Generating Station Unit 3 for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-1860-EL-REN, and *In the Matter of the Application of Killen Generating Station for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case Nos. 09-891-EL-REN and 09-892-EL-REN.
- (24) In addition to satisfying the above-cited criteria, Section 4928.65, Revised Code, requires a renewable energy resource generating facility to be registered with an approved attribute tracking system, such as GATS or the Midwest Renewable Energy Tracking System (M-RETS), for the facility's renewable energy credits to be used for compliance with Ohio's alternative energy portfolio standards. Burger provided its GATS identification number in its application and stated that it would meet all the documentation and reporting requirements mandated by GATS for multi-fuel generating units.
- (25) Burger is hereby issued certification number 10-BIO-OH-GATS-0106 as an eligible Ohio renewable energy resource generating facility. Within 30 days after the conclusion of the test phase, Burger must file notification with the Commission that discloses any changes to the information provided in its application, or additional information that might not have been available at the time of the initial filing. Additionally, in the event of any substantive changes in the facility's operational characteristics or proposed fuel type, or if the results of any testing show that co-firing biomass fuel is not feasible, Burger must notify the Commission within 30 days of such changes. Failure to do so may result in revocation of its certification.

It is, therefore,

ORDERED, That OCEA's motion to dismiss be denied, in accordance with finding (10). It is, further,

ORDERED, That Burger's application for certification as an eligible Ohio renewable energy resource generating facility be granted as set forth herein. It is, further,

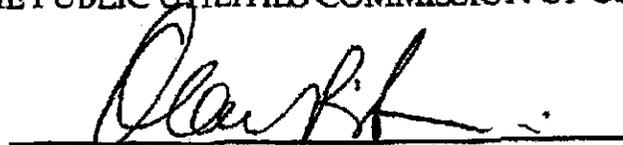
ORDERED, That Burger be issued certification number 10-BIO-OH-GATS-0106, in accordance with findings (14) and (25). It is, further,

ORDERED, That the RECs generated through the use of biomass fuels at the Burger facility be calculated through the use of the REC multiplier and test phase formulas approved in accordance with findings (17), (22), and (23). It is, further,

ORDERED, that a comment period be established in accordance with finding (21). It is, further,

ORDERED, That a copy of this finding and order be served upon all parties of record.

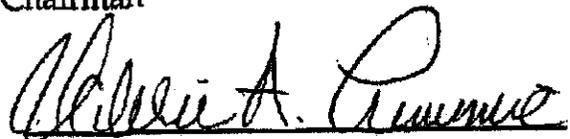
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



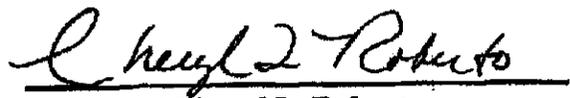
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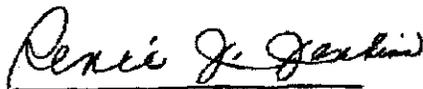


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Renee J. Jenkins
Secretary

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter Of The Application Of)
FirstEnergy Generation Corp. For)
Certification Of R.E. Burger Units 4)
And 5 As An Eligible Ohio Renewable)
Energy Resource Facility)

PUCO

Case No. 09-1940-EL-REN

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

The Ohio Environmental Council ("OEC") and the Office of the Ohio Consumers' Counsel ("OCC") hereby respectively submit this Application for Rehearing pursuant to R.C. 4903.10 and O.A.C. 4901-1-35(A) regarding the Finding and Order issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on August 11, 2010, in the above-captioned case. The undersigned parties maintain that the Commission's decision to certify FirstEnergy Solutions' ("FES") R.E. Burger plant as an eligible renewable energy resource generating facility utilizing biomass fuel was unlawful and unreasonable for the following reasons:

- A. **Assignment of Error 1: The Commission Erred When the Burger Application Was Certified In Violation of Ohio Adm. Code Rule 4901:1-40-01(E).**
- B. **Assignment of Error 2: The Commission Erred by Certifying the Burger Application Without Elaborating on its Finding That Biomass Energy is "Conditioned Upon Sustainable Forest Management" in Violation of R.C.4903.09.**
- C. **Assignment of Error 3: The Commission Erred in its Application of R.C. 4928.65 Because it Results in Economic Discrimination and is a Violation of the United States Constitution.**

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D. Assignment of Error 4: The Commission Erred Because its Application of R.C. 4928.65 Will Achieve an Absurd, Unreasonable, and Unlawful Result Not Intended by the Legislature.

The reasons for granting the Application for Rehearing are more fully explained in the accompanying memorandum in support.

WHEREFORE, the undersigned parties respectfully request that the Commission grant their Application for rehearing in the above-captioned matter.

Respectfully submitted,

/s/ William T. Reisinger
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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter Of The Application Of)
FirstEnergy Generation Corp. For)
Certification Of R.E. Burger Units 4) Case No. 09-1940-EL-REN.
And 5 As An Eligible Ohio Renewable)
Energy Resource Facility)

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

The undersigned parties maintain that the Commission's decision to grant FES's Application for Certification of its R.E. Burger facility was unlawful and unreasonable because: (1) The application fails to include important required information; (2) The Commission failed to review the application in accordance with the Ohio Adm. Code; (3) The certification results in economic discrimination in violation of the United States Constitution; and (4) Approval could result in absurd and unreasonable consequences that deny consumers the intended benefits of Ohio's renewable energy mandates. For the foregoing reasons, a rehearing on this matter is proper.

I. Assignment of Error 1: The Commission Erred When the Burger Application Was Certified In Violation of Ohio Adm. Code Rule 4901:1-40-01(E).

The Commission's order approved FES's application without requiring FES to demonstrate that the application fully complies with Ohio law regarding biomass energy, violating Ohio Administrative Code 4901:1-40-01(E). The Commission correctly identified the criteria that must be satisfied by applicants for renewable certification. As the Commission order stated, applicants must demonstrate that the subject facility satisfies the following criteria:

- (a) The generation produced by the renewable energy resource generating facility can be shown to be deliverable into the

state of Ohio, pursuant to Section 4928.64(B)(3), Revised Code.

- (b) The resource to be utilized in the generating facility is recognized as a renewable energy resources pursuant to Sections 4928.64(A)(1) and 4928.01(A)(35), Revised Code, or a new technology that may be classified by the Commission as a renewable energy resources pursuant to Section 4928.64(A)(2), Revised Code.
- (c) The facility must satisfy the applicable placed-in service date, delineated in Section 4928.64(A)(1), Revised Code.

R.C. 4928.01(A)(35), referenced in paragraph (b) above, includes “biomass energy” as an eligible renewable resource, and the above criteria accurately reflect the requirements outlined in the Revised Code.

However, the Commission must also consider its own Alternative and Renewable Energy rules, found in the Ohio Administrative Code, for the precise definition of the eligible resources listed in the statute. Paragraph (b) does not reference the Ohio Adm. Code 4901:1-40-01(E), which contains the definition of “biomass energy”:

‘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. (Emphasis added.)

The rule unambiguously states that the material utilized must be “available on a renewable basis.” FES provides a list of possible biomass types to be used. While the list contains types of biomass, FES avoids identifying what specific type of fuel will actually be used. Further, the Application provides no information on whether any of the fuels on the list is

actually available on a renewable basis. This is critical when the size of the project and the amount of fuel that will be utilized for this project are considered. Therefore, the Commission's evaluation of FES's application was incomplete.

In the order, the PUCO states that "Since the definition of biomass energy includes a wide variety of qualifying materials, the fact that one particular type of biomass energy may not be available is not a valid basis for denying certification."¹ But if the Company chooses to employ a material that is unavailable on a renewable basis, it would be out of compliance with the rule. To determine whether a particular fuel satisfies the rule, the Commission must necessarily know what that fuel is and its origin.

Further, the PUCO's observation that the Company lists a "wide variety of qualifying materials" demonstrates uncertainty on the part of FES as to what type of fuel may be used. The Commission should have evaluated whether FES's intended source(s) of biomass fuel satisfies the definition of "biomass energy" found in 4901:1-40-01(E). The Commission only inquired into whether FES intended to utilize biomass material, not whether FES's material would allow the facility to qualify as a "biomass energy" facility in accordance with the definition in the Ohio Adm. Code.

Moreover, 4901:1-40-01(E) explicitly states that biomass energy must be produced from organic material that is "available on a renewable basis." The Commission's order describes the renewable basis criterion as irrelevant:

While an applicant bears the responsibility to demonstrate that its proposed fuel type qualifies as a renewable resource, the availability of that resource is not a relevant consideration when evaluating an application for certification.²

¹ Opinion and Order at 5.

² Opinion and Order at 5 (emphasis added).

The order contradicts 4901:1-40-01(E), which clearly states that eligible biomass fuel must be “available on a renewable basis.” FirstEnergy made no attempt in its application, or in response to intervenor discovery, to describe its intended fuel source, or to show that all of the possible fuel types listed are available on a renewable basis. Thus, there is no way the Commission could have known what type of biomass FirstEnergy intended to use, and therefore no way to know whether that fuel would satisfy the PUCO’s own criterion that any fuel listed by FES as a possibility was “available on a renewable basis.” The Commission’s order was unlawful and unreasonable because the Commission did not require FES to demonstrate that its facility would utilize “biomass energy” as defined in the Ohio Adm. Code.

II. Assignment of Error 2: The Commission Erred by Certifying the Burger Application Without Elaborating on its Finding That Biomass Energy is “Conditioned Upon Sustainable Forest Management” in Violation of R.C.4903.09.

The Commission’s order states that “the use of forest resources as biomass energy is conditioned upon sustainable forest management operations.”³ However, the order fails to elaborate on what this condition will entail in practice and when and how the oversight will occur. The failure of the Commission to outline how this oversight will be exercised or outline the Company’s commitment to comply with this position in its order violates R.C. 4903.09 and is cause for concern for all parties to this and future biomass energy applications.

The Commission recognizes that “the use of forest resources as biomass energy is conditioned upon sustainable forest management operations.”⁴ This important, laudable statement is unsupported by a basic structure for determination of sustainability. Therefore, the problem with the Commission’s order is a basic one. The Commission’s Opinion and Order rejects arguments raised by OCEA which contend that detailed information about biomass

³ Id.

⁴ Id.

sourcing and procurement sustainability must be included in an application.⁵ Yet, as noted above, the order states that certification of biomass resources is conditioned upon sustainable forest management operations. These two features of the Opinion and Order cannot be reconciled.

The Opinion and Order fails to provide findings of fact demonstrating the material listed by FES is available on a renewable basis in violation of R.C. 4903.09, which states that:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

The Order states that the Company's request for proposal ("RFP") "requires bidders to provide information" on the sustainability of the material.⁶ However, the Opinion and Order does not set forth the reasons prompting the certification approval and is insufficient for several reasons.

First, there is no specific sustainability criteria established by the Commission or the Company providing a foundation or explanation as to what is meant by sustainability in this case. Second, there is no commitment by the Company to use any of the bidders responding to this RFP. Third, the Commission, in its order, does not state that it will follow-up in any way to ensure this condition has been met. Thus, the Opinion and Order is insufficient because it provides no explanation on what "sustainable forest management operations" means as a condition of approval and provides no findings of fact that FES will comply with this condition. Therefore, the Opinion and Order violates R.C. 4903.09 because it provides no reasons

⁵ Opinion and Order at 4.

⁶ Opinion and Order at 6.

prompting the decision by the PUCO to certify the facility or any substantiation to demonstrate Company compliance with its condition for approval.

In order to demonstrate that biomass energy is derived from sources where sustainable forest management practices are utilized, the biomass energy source must be identified in order by the Company to demonstrate whether it was harvested using sustainable forest management operations; or in the alternative, procurement standards must be enumerated. Only then can an applicant, the Commission, or an interested party determine whether or not sustainable forest management operations are practiced at the source location.

The Commission has ruled that an applicant need not describe where biomass is derived or its composition, much less describe what precautions are taken to establish its environmental and economic sustainability. As the Commission's certification order demonstrates, general representations will suffice for certification. This makes the Commission's parallel ruling, that "the use of forest resources as biomass energy is conditioned upon sustainable forest management operations" essentially meaningless.

Accordingly, and unless the Commission wished to render this important point permanently meaningless, some structure for review of sustainable forest management operations by the Commission or interested parties must be crafted as a part of this proceeding. Without the development of such a structure or review process, the Commission's Opinion and Order violates R.C. 4903.09 and cannot be reconciled with itself.

III. Assignment of Error 3: The Commission Erred in its Application of R.C. 4928.65 Because it Results in Economic Discrimination and is a Violation of the United States Constitution.

R.C. 4928.65 sets forth a renewable energy credit ("REC") calculation that only applies to certain biomass energy facilities and discriminates against others. The relevant portion of the REC calculation statute is excerpted below:

The public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources, except that, for a generating facility of seventy-five megawatts or greater that is situated within this state and has committed by December 31, 2009, to modify or retrofit its generating unit or units to enable the facility to generate principally from biomass energy by June 30, 2013, each megawatt hour of electricity generated principally from that biomass energy shall equal, in units of credit, the product obtained by multiplying the actual percentage of biomass feedstock heat input used to generate such megawatt hour by the quotient obtained by dividing the then existing unit dollar amount used to determine a renewable energy compliance payment as provided under division (C)(2)(b) of section 4928.64 of the Revised Code by the then existing market value of one renewable energy credit, but such megawatt hour shall not equal less than one unit of credit. (Emphasis added.)

The law establishes that one megawatt hour of electricity generated from renewable sources shall equal one REC.⁷ However, the statute also provides an exception for certain biomass generation that meets additional criteria: located in Ohio; 75 MW or greater; and has committed by December 31, 2009 to burn “principally” biomass by June 30, 2013. For the sources that satisfy these additional criteria, the statute assigns a special formula for calculating RECs. The special formula provides a potential “multiplier” to any facility that satisfies these criteria.

In practice, however, this statute can only apply -- and was only intended to apply -- to one facility: FES’s R.E. Burger power plant. No other biomass energy facility could possibly meet these criteria, and thus no other facility could be eligible for the higher REC unit rate. Therefore, R.C. 4928.65 -- “the Burger Amendment” -- gives an economic advantage to one renewable energy facility, and neglects to give that economic advantage to all other renewable generation, including out-of-state power producers. This is economic discrimination.

⁷ R.C. 4928.65

R.C. 4928.65 is unconstitutional under a commerce clause analysis because it discriminates against out-of-state generation. The U.S. Constitution's "negative commerce clause," a corollary to Article I, Section 8, clause 3, limits the power of states to discriminate against interstate commerce by enacting regulatory measures designed to benefit in-state economic interests and burdening out-of-state competitors.⁸ For example, in *New Energy Co. of Indiana v. Limbach*, Ohio's regulations providing favorable tax regulations for in-state biofuel producers were challenged on commerce clause grounds.⁹

In a unanimous opinion drafted by Justice Scalia, the U.S. Supreme Court held that the disparate economic treatment was unconstitutional. According to the Court, the Ohio law deprived "certain products of generally available beneficial tax treatment because they are made in certain other States" and was thus unconstitutional.¹⁰ In other words, the biofuel law was unconstitutional because conferred a financial benefit upon in-state biofuel production, which was not conferred upon out-of-state production.

Likewise, R.C. 4928.65 is unconstitutional on its face. By allowing one in-state biomass generator a favorable calculation of RECs not available to out-of-state generators, out-of-state competitors are put at an economic disadvantage. In-state generation receives an economic advantage that is unavailable to similar facilities located out of the state. Just as the Ohio statute in *Limbach* gave a favorable tax treatment for biofuels that were produced in Ohio, R.C. 4928.65 only gives favorable economic treatment for biomass generation located in Ohio, and specifically

⁸ *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1998). A non-discriminatory law that nonetheless burdens interstate commerce may still be struck as unconstitutional. In such cases, the court must balance the benefits of to the government against the burden on interstate commerce. *Loren J. Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁹ *Id.*

¹⁰ *Id.*

to one Ohio Company. Thus, the statute is unconstitutional and should not be enforced or allowed by the PUCO.

IV. Assignment of Error 4: The Commission Erred Because its Application of R.C. 4928.65 Will Achieve an Absurd, Unreasonable, and Unlawful Result Not Intended by the Legislature.

The Commission's interpretation and application of the Burger Amendment will achieve results that are absurd and contrary to the intent to the S.B. 221. The Ohio Supreme Court has stated that the "General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences."¹¹ FirstEnergy estimates in its Application for Renewable Certification that using the formula outlined in R.C. 4928.65, it will receive a REC multiplier of 4.5.¹² This means that Burger RECs will be 4.5 times more valuable than all other non-solar RECs generated in Ohio.

Applying the REC multiplier formula to the Burger plant will produce results that are astounding and utterly absurd. Most notably, the application of R.C. 4928.65 could obviate the need for the FirstEnergy utilities to undertake any additional renewable energy projects through 2025. Based on its application, FES would be able to satisfy all of its non-solar renewable portfolio standard obligations through the year 2025 simply by fueling the Burger plant with biomass. In fact, the company may even be able to satisfy its 2025 obligations in only one year of operation at the Burger plant.¹³ In addition, because the equation set forth in the Burger Amendment is tied to the market price for non-solar RECs, the statute could result in what the

¹¹ *State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367, 371, 92 N.E.2d 390, 392

¹² Application at p.26.

¹³ FirstEnergy's Application assumes a REC market price of \$10, which results in a 4.5 multiplier for 2010. Using a 4.5 multiplier, and assuming that the Burger plant operates at a 90 percent capacity factor, FirstEnergy could satisfy its non-solar renewable portfolio standard obligations through 2017 in one year of operation. The number of RECs would likely increase substantially, however, because the multiplier is tied to the market price for non-solar RECs; therefore, as Burger RECs enter the market, depressing REC prices, the multiplier will increase.

American Wind Energy Association (“AWEA”) has called a “death spiral” for Ohio’s renewable portfolio standard.¹⁴ As Burger RECs flood the REC market in Ohio, REC prices will be depressed, further driving up the Burger multiplier, resulting in the renewable portfolio standard “death spiral” that AWEA has warned of. As stated in *Cooper*, a court must act to avoid unreasonable or absurd results:

Hence it is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result.¹⁵

Here, the PUCO must act to prevent the Burger Amendment from compromising Ohio’s REC market and the development of other forms of renewable energy.

Finally, the likely effect of the Burger multiplier, as presented in the statute, is a result contrary to the stated policy of S.B. 221, which is the development of “a diversity of supplies and suppliers.”¹⁶ The statute also intended electric distribution utilities to obtain a steadily increasing amount of their standard service offer electricity to customers from “alternative energy resources.”¹⁷ While this may include energy produced from biomass, it certainly was not the intention of the legislature to obtain all of the alternative energy, other than the separately mandated solar amounts, from one source. Ohio Revised Code 1.49(E) notes that a court, when considering the intent of the legislature, may consider, *inter alia*, “the consequences of a particular construction.” Here, the Burger Amendment shows a real potential to harm Ohio’s nascent renewable energy development. A true diversity of supplies and suppliers, including wind and solar development, is an important part of Ohio’s energy future, as required in R.C. 4928.02(C). Specifically, R.C. 4928.02(C) requires, as Ohio policy, to:

¹⁴ American Wind Energy Association, Comments at p. 5.

¹⁵ *State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367, 371, 92 N.E.2d 390, 392.

¹⁶ R.C. 4928.02(C).

¹⁷ R.C. 4928.64(B).

Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities.

While the Burger plant modification may sustain employment in the area, it is clear that the solar and wind industries developing in Ohio have demonstrated potential to create employment that would benefit Ohioans.¹⁸ Thus, all forms of renewable energy should be on equal footing, and the PUCO should encourage the development and utilization of all forms of renewable energy. The Commission should not employ the Burger Amendment in a way that discriminates against other forms of renewable energy and leads to unreasonable and absurd consequences.

V. CONCLUSION

The undersigned parties request a rehearing on the renewable energy certification of the Burger plant. The Commission's decision to grant FES's Application for Certification of its R.E. Burger facility was unlawful and unreasonable because the application did not properly address the statutory criteria or the Commission's own rules. In addition, the certification results in economic discrimination in violation of the United States Constitution. Finally, the approval will likely result in absurd and unreasonable consequences that deny residential and other consumers the intended benefits of Ohio's renewable energy mandates. For these reasons, the Commission should grant a rehearing in this matter.

Respectfully submitted,

/s/ William T. Reisinger
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¹⁸ See McGinn, Daniel: *Project Green: The Power of the Sun – The Search for Renewable-Energy Sources is Making Clean-Tech Jobs Hot*, Newsweek, October 8, 2007: The article notes that “[T]he Toledo area already has nearly 6,000 people employed in the solar industry.”

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class and/or electronic mail this 10th day of September, 2010.

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