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I. INTRODUCTION

The present Appeal concerns the Public Utilities Commission of Ohio's ("PUCO" or "Commission") application and interpretation of Ohio's Renewable Energy Standard ("RES"), codified in Revised Code ("R.C.") Section 4928.64. Ohio's RES, enacted in 2008 as part of Ohio's landmark energy law, Amended Senate Bill 221 ("S.B. 221"), mandates that by the year 2024, all Ohio electric distribution utilities ("EDUs" or "utilities") must obtain at least 12.5 percent of their retail power sales from "renewable energy" sources, which can include wind, solar, hydroelectric power, and biomass energy facilities.¹ R.C. 4928.64 provides that EDUs must meet gradually increasing renewable energy benchmarks, culminating in a 12.5 percent benchmark in 2024.² Utilities may comply with the benchmarks either by building and owning renewable energy facilities—such as wind farms—or by purchasing renewable energy credits ("RECs"). Following the passage of S.B. 221, the Commission promulgated its alternative and renewable energy rules, Ohio Administrative Code ("O.A.C.") Sections 4901:1-40-01, *et. seq* (Appx. 61), which amplify R.C. 4928.64 and outline the manner in which the Commission will implement and enforce Ohio's RES.

This appeal stems from a utility application to have a biomass energy project certified as "renewable." FirstEnergy Service Corporation ("FES") applied to have its R.E. Burger power plant in Shadyside, Ohio, certified by the Commission as a renewable energy resource facility using biomass fuel. Certification would allow the company to use the energy generated at the facility to meet all or a portion of the company's renewable energy benchmarks mandated by R.C. 4928.64(B)(2) and to bank and sell renewable energy credits based on the energy produced. In a final Opinion and Order issued on August 11, 2010, the Commission certified the facility,

¹ R.C. 4928.01(A)(35). (Appx. 47).

² R.C. 4928.64(B)(2). (Appx. 53).

but in doing so failed to apply R.C. §§ 4928.64, 4928.65, and O.A.C. 4901:1-40-01, *et. seq.*, in a lawful and reasonable manner. Further, the Commission's Opinion and Order certifying FES's application is in conflict with itself, simultaneously employing two different interpretations of the renewable energy rules. The PUCO's misapplication of the renewable energy statute and rules is unlawful and unreasonable and could have a devastating impact on the development of alternative energy industries in the state of Ohio.

The PUCO must apply the renewable energy rules in a manner that is lawful, reasonable, and consistent. With regard to the rules pertaining to biomass energy, the Commission has failed to do so. The resolution of this appeal could determine whether Ohio's landmark renewable energy standard results in an economic and environmental boon for Ohioans. An unlawful, unreasonable, and inconsistent application of Ohio's RES and the associated rules could render the law effectively meaningless. For the reasons cited above and described more fully below, the PUCO's Opinion and Order is unlawful and unreasonable. The Commission's decision should be reversed and vacated pursuant to R.C. 4903.11 (Appx. 46) and remanded to the Public Utilities Commission of Ohio.

II. STATEMENT OF FACTS

On December 11, 2009, FES filed the present application to receive renewable certification for its Burger facility.³ On January 12, 2010, the Ohio Environmental Council ("OEC") filed a Motion to Suspend the automatic approval of the Application pursuant to O.A.C. 4901:1-40(F)(2).⁴ The OEC motion argued that FES had not provided sufficient information about its biomass energy project to allow certification by the Commission.⁵ O.A.C. 4901:1-40-

³ PUCO Case No. 09-1940-EL-REN, FES Application, December 11, 2009. (Appx. 94).

⁴ *Id.*, OEC Motion to Suspend, January 12, 2010.

⁵ *Id.*

04(F)(2), (3) provides that “the commission may approve, suspend, or deny an application within sixty days of it being filed” and that “[if] the commission suspends the application, the applicant shall be notified of the reasons for such suspension and may be directed to furnish additional information.” In accordance with O.A.C. 4901:1-40-04(F)(2), (3), the Commission granted OEC’s Motion to Suspend on February 3, 2010, finding that “additional information is required to satisfy the requirements for certification.”⁶

On May 20, 2010, the OEC, the Office of the Ohio Consumers’ Counsel (“OCC”), and the Environmental Law & Policy Center (“ELPC”) filed a Joint Motion to Dismiss the application and, in the alternative, a Motion for an Evidentiary Hearing on the application.⁷ The Joint Motion to Dismiss argued that FES had not met its burden of proof and failed to demonstrate that its facility qualified as a “renewable energy resource” facility under Ohio law. Among other arguments, the Joint Motion asserted that Ohio law requires utilities to disclose the type of fuel their facilities will utilize and to explain how the material will be obtained through renewable, sustainable processes.⁸

On August 11, 2010, the Commission issued an Opinion and Order certifying the Burger facility and rejecting the OEC/OCC/ELPC Joint Motion to Dismiss.⁹ On September 10, 2010, the OEC and the OCC filed a Joint Application for Rehearing alleging that the PUCO’s certification decision was unlawful and unreasonable for several reasons.¹⁰ The OEC/OCC Joint Application for Rehearing was never taken up by the Commission. Therefore, pursuant to R.C.

⁶ Id., Entry at 2, February 3, 2010. (Appx. 36).

⁷ Id., OEC/OCC Joint Motion to Dismiss, May 20, 2010. (Appx. 73).

⁸ Id.

⁹ Id., Opinion and Order, August 11, 2010. (Appx. 22).

¹⁰ Id., OEC/OCC Joint Application for Rehearing, September 10, 2010. (Appx. 6).

4903.10(B), the Joint Application for Rehearing was denied as a matter of law on October 11, 2010, which was thirty days after it was filed.¹¹

The OEC has made consistent arguments in all filings since its original Motion to Intervene in the Burger certification docket at the PUCO. FES's Burger facility, at a capacity of almost 300 megawatts ("MW"), would represent the largest biomass-based generation facility in Ohio and one of the largest in the world. FES could use the energy generated at the Burger plant to satisfy all or a portion of its RES benchmarks, or the company could package and re-sell the attributes of the renewable energy in the form of RECs.¹² Furthermore, pursuant to R.C. 4928.65, the energy generated at the Burger facility will be eligible for a higher REC unit rate—i.e. a "super-REC" calculation—making the electricity produced at the plant more economically valuable than all other renewable energy generated in Ohio and out of state. Using the higher REC rate calculation found in R.C. 4928.65, the electricity produced at FES's facility could, *in one year alone*, satisfy a majority of the Company's renewable benchmark obligations through the year 2025, and would represent a significant portion of the renewable energy generated in Ohio.¹³ Therefore, if the PUCO were to award renewable energy credit for a non-sustainable project, it could weaken or eviscerate the renewable energy standard enacted by S.B. 221 and codified in R.C. 4928.64.

III. STANDARD OF REVIEW

R.C. 4903.11 provides the standard of review this court must employ when considering appeals from the Public Utilities Commission of Ohio. R.C. 4903.11 provides that "A final order

¹¹ R.C. 4903.10(B) provides that "If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law." (Appx. 45).

¹² To comply with Ohio's RES, utilities may build and operate renewable energy facilities, or they may satisfy the benchmarks through REC purchases. Therefore, under an RES, RECs are tradable and have significant monetary value.

¹³ See Part IV, Proposition of Law No. 4, for explanation of how the Burger facility will reap a windfall profit on RECs when employing the calculation set forth in R.C. 4928.65. (Appx. 58).

made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.” This court has generally applied this “lawful and reasonable” standard of review in two parts. With regard to questions of fact, “this court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO’s determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show **misapprehension, mistake or willful disregard of duty.**”¹⁴ Therefore, with regard to factual questions, an appellant has the burden of demonstrating that the Commission’s decision is contrary to the manifest weight of the evidence “as to show misapprehension, mistake or willful disregard of duty.”¹⁵

When reviewing questions of law, however, this court’s discretion is much broader. When reviewing legal issues, this court possesses a “complete and independent power of review.”¹⁶ “Legal issues are, therefore, subjected to a more intensive examination than are factual questions.”¹⁷

The questions to be decided in this proceeding are questions of law. The OEC has challenged the PUCO’s application of Ohio law regulating biomass energy facilities. The OEC has argued that the Commission is applying the renewable energy statute and rules in a manner that is contrary to Ohio law and that the PUCO’s approval of the application results in a violation of the United States Constitution. After reviewing the propositions of law cited below, this court should find that the procedure used by the PUCO when applying the rules on biomass energy is

¹⁴ *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St.3d 549, 555 (emphasis added) (citing *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1988), 38 Ohio St.3d 266).

¹⁵ *Id.*

¹⁶ *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469.

¹⁷ *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1988), 38 Ohio St.3d 266, 268.

unlawful and unreasonable and that R.C. 4928.65 restrains interstate commerce in violation of the United States Constitution.

IV. ARGUMENT

A. PROPOSITION OF LAW NO. 1:

The Commission Erred When the Burger Application Was Certified Because the Certification Order Failed to Consider Ohio Administrative Code Rule 4901:1-40(E), Which Requires a Demonstration of the Type of Biomass Material That Will Be Utilized.

- 1. The PUCO's Review of the FES Application was Unlawful and Unreasonable Because the Commission Failed to Consider Requirements Outlined in the Ohio Administrative Code.**

The Commission's Opinion and Order approved FES's R.E. Burger facility as an eligible Ohio renewable energy resource generating facility without requiring FES to demonstrate that its application complied with O.A.C. rules regarding biomass energy, including O.A.C. 4901:1-40-01(E).¹⁸ Specifically, the Commission erred by certifying FES's facility without requiring the utility to disclose the type of fuel that it would utilize or requiring FES to demonstrate that the material would be "available on a renewable basis" in accordance with O.A.C. 4901:1-40-01(E).¹⁹

It is well-settled law in Ohio that "[an] Ohio Administrative Code section is a further arm, extension, or explanation of statutory intent implementing a statute passed by the General Assembly."²⁰ Importantly, an O.A.C. section "has the force and effect of a statute itself."²¹ Although R.C. 4928.64 contains Ohio's RES, and R.C. 4928.01(A)(35) provides that "biomass

¹⁸ PUCO Case No. 09-1940-EL-REN, Opinion and Order, August 11, 2010.

¹⁹ Eligible "biomass energy" must utilize materials that have been demonstrated to be "available on a renewable basis." O.A.C. 4901:1-40-01(E).

²⁰ *Derolph v. State of Ohio* (1997), 78 Ohio St. 3d 193, 206-07 (citing *Meyers v. State Lottery Comm.* (1986), 34 Ohio App. 3d 232, 234).

²¹ *Id.* at 207.

energy” qualifies as a renewable energy resource, the PUCO must also look to the relevant O.A.C. rules for further guidance on how to implement the statute.

The Commission’s Opinion and Order correctly identifies some of the criteria that must be used to certify biomass energy facilities as “renewable,” but neglects to consider other controlling law found in the O.A.C. As the Commission Opinion and Order correctly states, all applicants for renewable energy certification 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 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 application placed-in service date, delineated in Section 4928.64(A)(1), Revised Code.”²²

These criteria accurately reflect the requirements outlined in the Revised Code. But a utility is not entitled to renewable certification simply by satisfying these criteria; the Commission must also ensure that applications satisfy the requirements contained in the Ohio Administrative Code rules on Alternative and Renewable Energy, O.A.C. Sections 4901:1-40-01, *et. seq.*, which amplify R.C. 4928.64.

²² PUCO Case No. 09-1940-EL-REN, Opinion and Order at 2, August 11, 2010.

As stated above, although R.C. 4928.01(A)(35) makes clear that biomass energy facilities can qualify as renewable energy resources, the definition of “biomass energy” is not found in the Revised Code. The definition of biomass energy is found in O.A.C. 4901:1-40-01(E):

‘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).

This definition of biomass energy makes clear that qualifying energy must be produced from material that is “available on a renewable basis.” O.A.C. 4901:1-40(E) also lists many types of materials that may qualify as renewable biomass. The PUCO’s Opinion and Order dismisses this definition and its clear “renewability” requirement, finding that “the fact that one particular type of biomass energy may not be available is not a valid basis for denying certification.”²³ However, if FES chooses to employ a fuel type that is not available on a renewable basis, then it would be out of compliance with the rule. Therefore, the Commission must know the type of biomass fuel that will be utilized in order to determine whether that fuel type is available on a renewable basis and thus whether the application satisfies the rule. The Commission should have evaluated whether FES’s intended source 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

²³ Id. at 5.

facility to qualify as a “biomass energy” facility in accordance with the definition in the Ohio Administrative Code. The Commission’s evaluation was incomplete.

2. The Commission’s Final Opinion and Order is Unlawful and Unreasonable Because it Contradicts Previous Entries and PUCO Staff Interrogatories That Requested FES to Provide Additional Information in Accordance with O.A.C. 4901:1-40(E).

Entries by the Commission and PUCO staff discovery requests confirm the OEC’s contention that an application for renewable certification may not be certified until the applicant has provided sufficient information about its fuel type and a plan for obtaining that fuel in a sustainable manner. Prior to issuing its Opinion and Order certifying the Burger facility, two Commission entries as well as discovery requests issued by PUCO staff indicated that FES’s application could not be certified unless the company first disclosed more information about the source of its fuel. On two occasions, the Commission suspended the automatic approval of the Burger facility, each time stating that “additional information is required to satisfy the requirements for certification.”²⁴ The two suspension orders came, respectively, in response to the OEC’s Motion to Suspend and Joint Comments filed by the OEC, OCC, and ELPC.²⁵

Commission staff interrogatories also indicate that renewable certification cannot be granted until an application discloses its fuel type, source, and plan to obtain the fuel through environmentally sustainable processes. For example, in discovery questions issued to FES, the PUCO staff asked the company to “describe the content (fully characterize the fuel material) and sources of biomass resource[s]” and to “indicate the commitment and measures that will be undertaken by the Company to ensure long-term procurement of an environmentally-sustainable

²⁴ PUCO Case No. 09-1940-EL-REN, Entry Ordering Suspension at 2, February 3, 2010; Entry Ordering Suspension at 2, April 28, 2010. (Appx. 34).

²⁵ Id. See OEC/OCC/ELPC Joint Comments, April 12, 2010.

fuel supply.”²⁶ FES, however, responded to these questions by stating that “the specific types of material to be used has [sic] not yet been determined” and “The Company has not entered into contracts for the supply of biomass product, therefore [sic] it has not determined the protocols which may be in place relating to sustainability certifications or sourcing standards.”²⁷ The PUCO staff made clear in a preface to its discovery requests that information regarding FES’s fuel source would be a prerequisite to certification:

Responses to the following questions will be necessary for Commission Staff to perform a comprehensive review of your application for certification as an eligible Ohio renewable energy resource generating facility.²⁸

FES had not provided any additional information, either in response to Commission entries or staff discovery, about the source of its fuel at the time the Commission’s final Opinion and Order was issued on August 11, 2010.

The Commission’s Opinion and Order was unlawful and unreasonable because it certified FES’s Burger facility as a renewable energy resource facility without first knowing the type of fuel to be utilized at the plant. The Opinion and Order contradicted two previous entries on the Burger docket and discovery by PUCO staff, which indicated that the company must disclose information about its fuel source and a plan to obtain the fuel in a sustainable manner prior to certification. The Commission has used this improper certification procedure in at least eight other orders certifying biomass energy projects as renewable.²⁹ This court should remand the decision of the PUCO, with instructions to require all applicants to disclose the type of biomass fuel to be used when submitting applications for renewable certification. On remand,

²⁶ Id., Responses to Staff Data Requests at 3.

²⁷ Id. at 2-3.

²⁸ Id. at 1.

²⁹ See Opinions and Orders in PUCO Case Nos. 09-891-EL-REN; 09-1860-EL-REN; 09-933-EL-REN; 09-1042-EL-REN; 09-911-EL-REN; 09-1023-EL-REN; 09-1878-EL-REN; 09-1877-EL-REN.

the PUCO should be required to retract all previously certified biomass energy applications and modify their review processes in accordance with this court's decision.

B. PROPOSITION OF LAW NO. 2:

The Commission's Opinion and Order is Unlawful and Unreasonable by Finding that Biomass Energy Must be "Conditioned Upon Sustainable Forest Management" Without Enforcing this Condition in its Order or Explaining How it Will Be Applied.

The Commission's final Opinion and Order is unlawful and unreasonable because it is inconsistent with itself. The Commission's Opinion and Order states that "the use of forest resources as biomass energy is conditioned upon sustainable forest management operations."³⁰ This is a laudable statement that could help ensure that only sustainably sourced material is used in renewable energy facilities—in accordance with Ohio law. Simultaneously, however, the order authorizes renewable energy credit certification without any review of those "forest management operations" for the proposed fuel and facility.³¹ In this way, the Opinion and Order is in conflict with itself. The Commission's Opinion and Order certified the facility without even a basic knowledge about fuel composition and source. The Commission's inconsistent ruling that "the use of forest resources as biomass energy is conditioned upon sustainable forest management operations" and its certification of the facility without any review of forest management operations associated with fuel to be utilized at the facility is unreasonable and unlawful.

In certifying the facility without a demonstration or commitment on the sustainability of the fuel—i.e. its availability on a renewable basis—the Commission ignores the statute and administrative code. As discussed above, O.A.C 4901:1-40-01(E) requires as a pre-condition to

³⁰ PUCO Case No. 09-1940-EL-REN, Opinion and Order at 5, August 11, 2010.

³¹ Id.

renewable energy certification that biomass energy be established as a fuel for the production of power. Also, as noted above, biomass energy is defined as “energy produced from organic material derived from plants or animals and available on a renewable basis.”³² Accordingly, the Commission can only act consistently with the statute and the code by requiring a demonstration or commitment on the part of the applicant as to the renewable nature of its fuel. That renewable nature, in the Commission’s own words, must be “conditioned upon sustainable forest management operations.” Therefore, the PUCO states that renewable energy certification is contingent upon utilities using woody biomass that has been procured using sustainable processes. But the Commission does not describe how this contingency will be enforced, when, or by whom. Essentially, the Commission’s ruling recognizes the OEC’s interpretation of the law without enforcing it.

There is no dispute that FES failed to provide any detail regarding the type or source of its biomass fuel or any assurance that the material would be obtained through sustainable forest management operations. First, in responses to both PUCO staff and intervenor discovery, the applicant failed to identify in any detail the source of its biomass material, stating only that it intended to procure resources from “the United States and/or Canada.”³³ Second, the Commission through its final Opinion and Order failed to require, condition, or even inquire as to a showing of sustainability and availability “on a renewable basis” prior to certification. This failure is unreasonable and unlawful. O.A.C. 4901:1-40-01(E) is rendered meaningless if facilities may achieve certification without a basic showing of the renewable nature of its fuel source.

³² O.A.C. 4901:1-40-01(E)

³³ PUCO Case No. 09-1940-EL-REN, FES Responses to OEC’s First Set of Discovery. (Appx. 119).

The Court has ruled consistently that PUCO decisions on questions of fact will not be reversed unless seriously flawed or inconsistent with the record. However, this Court has also consistently held that the Commission abuses its discretion and acts unlawfully and unreasonably where it renders an opinion on an issue without record or support.³⁴ The certification of this facility, although accompanied by a lengthy opinion an order, contains no review of the renewable nature of the fuel to be utilized, and hence was issued without sufficient record or support. R.C. 4903.09 requires that Commission orders must set “forth the reasons prompting the decisions arrived at [and must be] based upon...findings of fact.” The Commission issued its ruling without any basic knowledge as to the composition, source, and sustainability of the fuel—attributes which are essential to a determination based on a record or supported by basic facts.

Accordingly, although the Commission’s Opinion and Order discusses the content of the law, it fails to apply it, and it fails to base its decision upon a viable record of any kind. As noted above, the application failed to identify the source of its proposed fuel or even its final content. 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. 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. Further, it means little for the Commission to say that the use of biomass is “conditioned upon sustainable forest management operations” without providing any discussion of how that condition will be enforced. The

³⁴ *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at 29; *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 90, 706 N.E.2d 1255, quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 163, 166, 666 N.E.2d 1372.

Commission acted unlawfully and unreasonably in issuing certification without any review of the content of the fuel or data and verifiable information to support that review. The Commission's Opinion and Order boldly asserts that "the use of forest resources as biomass energy is conditioned upon sustainable forest management operations," yet refuses to enforce or discuss this condition in any way. The "condition" is rendered meaningless by the Commission's certification. Thus, the Commission's Opinion and Order is unlawful and unreasonable.

B. PROPOSITION OF LAW NO. 3:

R.C. 4928.65 Results in Economic Discrimination and is a Violation of the United States Constitution.

1. R.C. 4928.65 and its "Super-REC" Formula.

R.C. 4928.65 establishes a system of calculating RECs that only applies to certain in-state generation facilities, resulting in economic discrimination that is a violation of the United States Constitution. The statute is unconstitutional as written and as applied. As described in Part II, *supra*, Ohio's RES provides that utilities can comply with the renewable mandates in one of two ways: either by building and owning renewable energy facilities or by purchasing RECs. RECs, therefore, are tradable commodities with monetary value; they allow utilities to comply with the law without building generation facilities. R.C. 4928.65 provides that one REC will equal one megawatt hour of energy generated from a renewable source, with an exception for certain biomass energy facilities located in the state of Ohio:

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.)

R.C. 4928.65, therefore, establishes that one megawatt hour of electricity generated from renewable sources shall equal one REC, with an exception for certain biomass energy facilities that meet the following additional criteria: located in Ohio; 75 MW or greater; committed by December 31, 2009 to burn “principally” biomass by June 30, 2013. For those sources that satisfy these additional criteria, the law assigns a special formula for calculating RECs. The special formula provides a potential REC “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. It is unlikely that any 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 in-state renewable energy facility, and neglects to give that economic advantage to all other renewable generation, including out-of-state power producers.

This issue is ripe for this court’s review. In its Opinion and Order certifying the facility, the Commission found 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.”³⁵ FES has not

³⁵ PUCO Case No. 09-1940-EL-REN, Opinion and Order at 8, August 11, 2010.

withdrawn its application for renewable energy certification or indicated that it does not intend to accept the favorable REC calculation authorized by R.C. 4928.65. When the statute is applied to the Burger facility, FES will reap a financial benefit not available to any other producer of renewable energy. This is economic discrimination.

2. R.C. 4928.65 Violates the “Negative Commerce Clause” of the United States Constitution.

R.C. 4928.65 is unconstitutional under a negative commerce clause analysis because it discriminates against out-of-state generation. The U.S. Constitution’s “dormant” or “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 while burdening out-of-state competitors.³⁶ The negative commerce clause power “prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby ‘imped[es] free private trade in the national marketplace.’”³⁷ The negative commerce clause has been described as “the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce.”³⁸ As this court has recognized, the fundamental purpose of this power is to “[preserve] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.”³⁹

³⁶ *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* (1970), 397 U.S. 137.

³⁷ *Gen. Motors Corp. v. Tracy* (1997), 519 U.S. 278, 287, (quoting *Reeves, Inc. v. Stake* (1980), 447 U.S. 429, 437).

³⁸ Erwin Chemerinsky, *CONSTITUTIONAL LAW*, 317 (2001).

³⁹ *Columbia Gas Transm. Corp. v. Levin* (2008), 117 Ohio St.3d 122 (quoting *Gen. Motors Corp. v. Tracy* (1997), 519 U.S. 278, 299).

This court has also held that “[state laws] which have as their purpose the protection of local economic interests” will be struck as unconstitutional.⁴⁰ In *New Energy Co. of Indiana v. Limbach*, Ohio’s regulations providing favorable tax treatment for in-state biofuel producers were challenged on commerce clause grounds.⁴¹ In a unanimous opinion drafted by Justice Scalia, the U.S. Supreme Court held that the disparate economic treatment established by the Ohio biofuel law was unconstitutional. According to the Court, the Ohio tax law deprived “certain products of generally available beneficial tax treatment because they are made in certain other States” and was thus unconstitutional.⁴² In other words, the biofuel law was unconstitutional because it conferred a financial benefit upon in-state biofuel production, a benefit 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. Both are attempts to favor in-state economic activity while disrupting free enterprise and interstate REC trading.

The State of Ohio cannot provide any persuasive justification that would allow R.C. 4928.65 to survive constitutional scrutiny. In order for a discriminatory law to survive a negative commerce clause analysis, a court must find that the state has a significant interest that outweighs

⁴⁰ *New Energy Co. v. Limbach* (1987), 32 Ohio St. 3d 206, 207.

⁴¹ *Limbach*, 486 U.S. 269.

⁴² *Id.* at 309.

the burden on commerce and that there are no non-discriminatory means available. The U.S. Supreme Court has held that “When discrimination against commerce...is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”⁴³ The State of Ohio cannot meet this burden. The economic benefit provided by R.C. 4928.65 may allow FES to keep one aging, out-dated, coal-fired power plant operational for an unknown period of time. The damage to the renewable energy marketplace and energy related commerce, however, far outweighs that dubious potential benefit.⁴⁴ The discriminatory economic treatment could prevent out-of-state generators from selling RECs in Ohio or otherwise investing in Ohio-based energy resources.⁴⁵

We recognize that many restrictions on interstate commerce can be justified under the Constitution. For instance, Ohio’s RES contains an in-state production requirement that *does* create local benefit and is obtainable through no other non-discriminatory method.⁴⁶ The transmission of power over long distances results in heavy losses; accordingly, laws and rules that encourage the development of in-state or adjacent state energy sources can be rationally justified for the purpose of conserving energy and reducing those line losses. Ohio’s in-state production requirement ensures that half of the renewable energy requirement of utilities must be produced in Ohio, and also requires that other half must be “deliverable” into the state, (i.e.

⁴³ *Dean Milk Co. v. Madison* (1951), 340 U.S. 349, 354; see also *Loren J. Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁴⁴ See Proposition of Law No. 4 for further discussion of the impact of R.C. 4928.65 on the renewable energy marketplace.

⁴⁵ The potential damage to the renewable energy marketplace in Ohio is further discussed under Proposition of Law No. 4, *infra*.

⁴⁶ R.C. 4928.64(B)(3).

derived from an adjacent state).⁴⁷ This, in contrast to the discrimination found in R.C. 4928.65, is a justified restriction with a rational aim that is obtainable through no other method.

Justice Cardozo famously said that the United States Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not disunion.”⁴⁸ The State of Ohio can have no persuasive justification for the in-state favoritism and economic discrimination authorized by R.C. 4928.65. FES will reap a profit that will not be available to out-of-state producers of renewable energy. The economic impacts of the special, unlawful, treatment afforded to FES’s Burger facility could be significant. The law does not promote the goals of the development of renewable energy sources in Ohio and does not support free enterprise and commerce among the states. R.C. 4928.65 is, therefore, unconstitutional as written and as applied, and the Commission’s application of the statute when certifying the Burger application was unlawful and unreasonable.

D. PROPOSITION OF LAW NO. 4:

The Commission Erred Because its Application of R.C. 4928.65 Will Achieve An Absurd, Unreasonable, and Unlawful Result Not Intended by the General Assembly.

The Commission’s application of R.C. 4928.65 and the “super-REC” multiplier described above will achieve a result that is absurd and contrary to the intent of S.B. 221 and the codified energy policy of the State of Ohio.⁴⁹ This court has stated that the “General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences.”⁵⁰

⁴⁷ Id.

⁴⁸ *Baldwin v. G. A. F. Seelig, Inc.* (1935), 294 U.S. 511, 523.

⁴⁹ See R.C. 4928.02, which describes the state policy of ensuring customer access to reliable electric service at reasonable prices and to promote “the continuing emergence of competitive electricity markets.”

⁵⁰ *State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367, 371.

Therefore, according to this court, laws may at times be judged using this “absurdity standard.” In such cases, it is the “duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, [to] construe the statute as to avoid such [an unreasonable or absurd] result.”⁵¹

R.C. 4928.65 will have such an absurd impact on the renewable energy market in Ohio, and on the effectiveness of the entire RES, that it must be struck. FES estimates in its Application for Renewable Certification that pursuant to R.C. 4928.65, it could receive a REC multiplier of 4.5.⁵² If this calculation holds true, this means that Burger RECs will be 4.5 times more valuable than all other non-solar RECs generated in Ohio. 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 2025.⁵³ Based on its application, FES would be able to satisfy all of its non-solar RES obligations through the year 2025 simply by fueling the Burger plant with biomass. The utility could also reap an unknown windfall profit.

However, there is no way to accurately predict the REC multiplier because the formula uses REC market prices. Because the equation set forth in R.C. 4928.65 is tied to the “market price” for non-solar RECs, the statute could result in what the American Wind Energy Association (“AWEA”) has called a “death spiral” for Ohio’s RES.⁵⁴ As Burger RECs flood the REC market in Ohio, REC prices will be depressed, further driving up the Burger multiplier, and increasing the number of RECs generated by the facility. Such a scenario would compound each

⁵¹ Id.

⁵² PUCO Case No. 09-1940-EL-REN, Application at p.26, December 11, 2009.

⁵³ See PUCO Case No. 09-1940-EL-REN, OEC/OCC Joint Application for Rehearing at 11, note 13, September 10, 2010 (“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.”)

⁵⁴ Id., American Wind Energy Association Comments at 5.

of the problems with R.C. 4928.65, resulting in the RES "death spiral" that AWEA has warned of. The Commission's application of R.C. 4928.65 threatens the viability of Ohio's RES and the state's renewable energy marketplace and is, therefore, unlawful and unreasonable.

V. CONCLUSION

The Public Utilities Commission of Ohio failed to properly administer Ohio law regarding the certification of biomass energy projects as renewable energy resource facilities pursuant to R.C. 4928.64. The Commission's procedure violated Ohio law, and its application of R.C. 4928.65 is a violation of the United States Constitution. The Commission's actions were unlawful and unreasonable and should be reversed and vacated.

Respectfully Submitted,

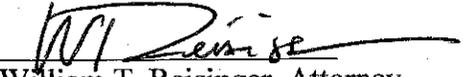

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of Appellant, Ohio Environmental Council, has been served upon the following parties by first class mail this 20th day of January, 2011.


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APPENDIX

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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CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

000001

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*.

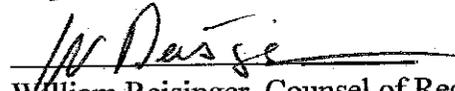
The Appellant complains and alleges that Appellee's August 11, 2010 Finding and Order, and Appellee's decision not to grant a rehearing within thirty days in PUCO case No. 09-1940-EL-REN are unlawful, unjust and unreasonable in the following respects, as set forth in Appellant's Application for Rehearing:

- 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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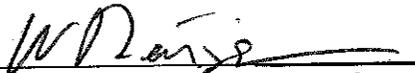
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Certificate of Service

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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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

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

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)

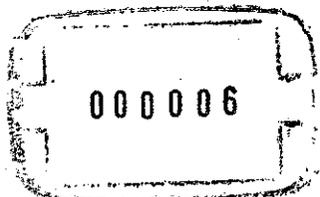
Case No. 09-1940-EL-REN

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,

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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
William Reisinger, Counsel of Record

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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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

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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, an 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).

- (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,

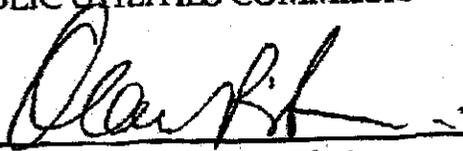
ORDERED, That Burger be issued certification number 10-BIO-OH-GATS-0106, in accordance with findings (14) and (25). It is, further,

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.

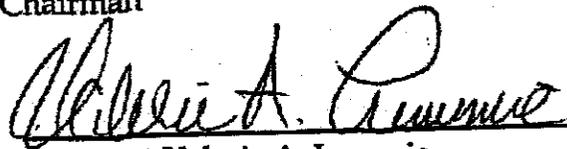
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



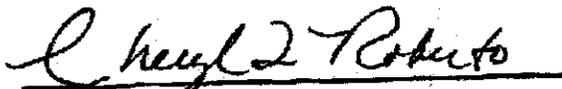
Paul A. Centolella



Valerie A. Lemmie



Steven D. Lesser

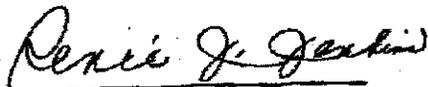


Cheryl L. Roberto

HPG/vrm

Entered in the Journal

AUG 11 2010



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The attorney examiner 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. According to the application, Burger plans to use biomass fuel as the renewable energy resource for two 156 MW generating units, by co-firing wood pellet/briquette chips and/or agricultural biomass fuels.
- (2) On March 4, 2010, FirstEnergy filed a motion for leave to file an amended application and an amended application. On March 10, 2010, FirstEnergy filed a corrected amended application. By entry issued on March 26, 2010, FirstEnergy's motion for leave to file an amended application was granted and FirstEnergy's amended application was deemed filed as of March 10, 2010.
- (3) Pursuant to the terms of Section 4928.65, Revised Code, and Rule 4901:1-40-04(F)(2), Ohio Administrative Code (O.A.C.), Burger's amended application is subject to a 60-day automatic approval process. The rule also provides that the Commission may suspend an application during the 60-day approval process.
- (4) The attorney examiner finds that 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.

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It is, therefore,

ORDERED, That the automatic approval process for the amended application of Burger for certification as an eligible Ohio renewable energy resource generating facility be suspended. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Henry H. Phillips-Gary
By: Henry H. Phillips-Gary
Attorney Examiner

grf/sc

Entered in the Journal

APR 28 2010

Renee J. Jenkins

Renee J. Jenkins
Secretary

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.)

ENTRY

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. According to the application, Burger plans to use biomass fuel as the renewable energy resource for two 156 MW generating units, by co-firing wood pellet/briquette chips and/or agricultural biomass fuels.
- (2) Pursuant to the terms of Section 4928.65, Revised Code, and Rule 4901:1-40-04(F)(2), Ohio Administrative Code (O.A.C.), Burger's application is subject to a 60-day automatic approval process. The rule also provides that the Commission may suspend an application during the 60-day approval process.
- (3) Rule 4901:1-40-04(F)(1), O.A.C., requires that motions to intervene be filed within twenty days of the filing of an application for certification. Since Burger's application was filed on December 11, 2009, the deadline for filing a motion to intervene in this case was December 31, 2009. Motions to intervene were timely filed by the Ohio Environmental Council (OEC), the Environmental Law and Policy Center, and the Sierra Club of Ohio. No memoranda contra were filed in opposition to these motions to intervene. The Commission finds that these motions to intervene are reasonable and should be granted.

In addition, on January 8, 2010, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and comments, arguing that Burger should not be certified as a renewable energy resource generating facility until Burger identifies a sustainable source for the biomass fuel it plans to burn to create renewable energy. Finally, on January 12, 2010, the American Wind Energy Association (AWEA) and Ohio

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Advanced Energy (OAE) filed a joint motion to intervene. No memoranda contra were filed in opposition to either motion to intervene. Given that these motions to intervene set forth reasonable grounds for intervention, were unopposed, and because the new Chapter 4901:1-40, O.A.C., which sets forth the intervention deadline, became effective the day before Burger's application was filed, the Commission finds that good cause exists to grant the motions to intervene filed by OCC, AWEA, and OAE.

- (4) On January 12, 2010, OEC filed a motion to suspend consideration of Burger's application. OEC argues that the nature and scale of this project necessitate higher scrutiny and intensive review, which cannot be accomplished under the limited time provided by the 60-day automatic approval process. On January 19, 2010, FirstEnergy Generation Corporation (FirstEnergy), which owns the Burger facility, filed a memorandum in opposition to OEC's motion to suspend. FirstEnergy argues that Burger's application should be subject to the same level of scrutiny as any other matter pending before the Commission, as there is no statutory or regulatory basis for OEC's claim that larger projects require additional review. In addition, FirstEnergy claims that OEC's motion to suspend was not timely filed and that OEC failed to identify any grounds for suspending Burger's application.
- (5) The Commission finds that 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 application for certification, in order for the Commission to further review this matter.
- (6) To this end, in addition to the comments already received, the Commission directs Staff to file comments on the application by March 15, 2010. FirstEnergy and intervenors may file reply comments and objections to the application by March 29, 2010.

It is, therefore,

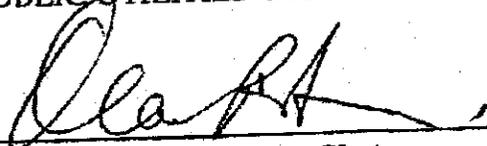
ORDERED, That the motions to intervene filed by various parties be granted in accordance with finding (3).

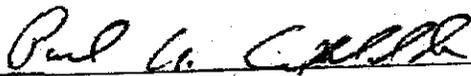
ORDERED, That the automatic approval process for the application of Burger for certification as an eligible Ohio renewable energy resource generating facility be suspended. It is, further,

ORDERED, That Staff file comments by March 15, 2010 and FirstEnergy and intervenors file reply comments and objections to the application by March 29, 2010. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Feigus

Valerie A. Lemmie


Cheryl L. Roberto

HPG:ct

Entered in the Journal

FEB 0 3 2010


Renee J. Jenkins
Secretary

THE UNITED STATES CONSTITUTION

(See Note 1)

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2.

Clause 1: The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

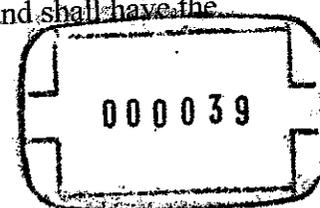
Clause 2: No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Clause 3: Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. *(See Note 2)* The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Clause 4: When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Clause 5: The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3.



Clause 1: The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, (*See Note 3*) for six Years; and each Senator shall have one Vote.

Clause 2: Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies. (*See Note 4*)

Clause 3: No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Clause 4: The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

Clause 5: The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

Clause 6: The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Clause 7: Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4.

Clause 1: The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Clause 2: The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, (*See Note 5*) unless they shall by Law appoint a different Day.

Section. 5.

Clause 1: Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Clause 2: Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Clause 3: Each House shall keep a Journal of its Proceedings, and from time to time publish the same,

excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Clause 4: Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6.

Clause 1: The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. (See Note 6) They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Clause 2: No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7.

Clause 1: All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Clause 2: Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Clause 3: Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8.

Clause 1: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Clause 2: To borrow Money on the credit of the United States;

Clause 3: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Clause 4: To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Clause 5: To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

Clause 6: To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

Clause 7: To establish Post Offices and post Roads;

Clause 8: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Clause 9: To constitute Tribunals inferior to the supreme Court;

Clause 10: To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Clause 11: To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Clause 12: To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Clause 13: To provide and maintain a Navy;

Clause 14: To make Rules for the Government and Regulation of the land and naval Forces;

Clause 15: To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Clause 16: To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Clause 17: To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;--And

Clause 18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9.

Clause 1: The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Clause 2: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Clause 3: No Bill of Attainder or ex post facto Law shall be passed.

Clause 4: No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken. (See Note 7)

Clause 5: No Tax or Duty shall be laid on Articles exported from any State.

Clause 6: No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Clause 7: No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Clause 8: No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10.

Clause 1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Clause 2: No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

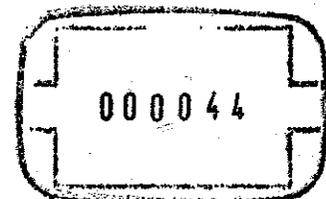
Clause 3: No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.**Section. 1.**

4903.09 Written opinions filed by commission in all contested cases.

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.

Effective Date: 10-26-1953



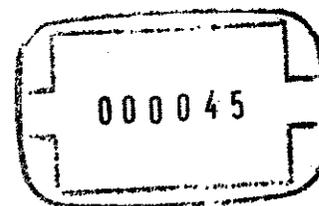
4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

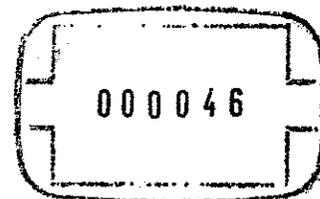
Effective Date: 09-29-1997



4903.11 Proceeding deemed commenced.

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.

Effective Date: 09-29-1997



4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

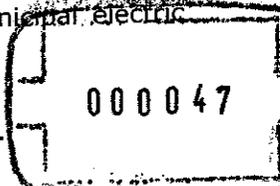
(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a



for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric

utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM).

(g) Demand-side management and any energy efficiency improvement.

(35) "Renewable energy resource" means solar photovoltaic or solar thermal energy, wind energy, power produced by a hydroelectric facility, geothermal energy, fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion, biomass energy, biologically derived methane gas, or energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors. "Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak; or distributed generation system used by a customer to generate electricity from any such energy. As used in division (A)(35) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(a) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(b) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(c) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(d) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(e) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(f) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(g) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(h) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

Amended by 128th General Assembly File No. 47, SB 181, § 1, eff. 9/13/2010.

Amended by 128th General Assembly File No. 48, SB 232, § 1, eff. 6/17/2010.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 10/16/2009.

Effective Date: 10-05-1999; 01-04-2007; 2008 SB221 07-31-2008

4928.64 Electric distribution utility to provide electricity from alternative energy resources.

(A)(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; a renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or a mercantile customer-sited advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division (A)(2) (c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

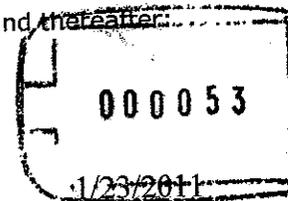
- (a) A resource that has the effect of improving the relationship between real and reactive power;
- (b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;
- (c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;
- (d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;
- (e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such an advanced energy resource or a renewable energy resource.

(B) By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract. That portion shall equal twenty-five per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the commission may reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in this state.

Of the alternative energy resources implemented by the subject utility or company by 2025 and thereafter:

- (1) Half may be generated from advanced energy resources;



(2) At least half shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

By end of year	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.010%
2011	1%	0.030%
2012	1.5%	0.060%
2013	2%	0.090%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%

2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.3%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after

notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more. The cost of compliance shall be calculated as though any exemption from taxes and assessments had not been granted under section 5727.75 of the Revised Code.

(4)(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) Within ninety days after the filing of a request by an electric distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or

company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing the compliance of electric distribution utilities and electric services companies with division (B) of this section and any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

Amended by 128th General Assembly File No. 48, SB 232, § 1, eff. 6/17/2010.

Amended by 128th General Assembly ch. 1, HB 2, § 101.01, eff. 7/1/2009.

Effective Date: 2008 SB221 07-31-2008

4928.65 Using renewable energy credits.

An electric distribution utility or electric services company may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition from any entity, including, but not limited to, a mercantile customer or an owner or operator of a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state, for the purpose of complying with the renewable energy and solar energy resource requirements of division (B)(2) of section 4928.64 of the Revised Code. 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. The rules also shall provide for this state a system of 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.

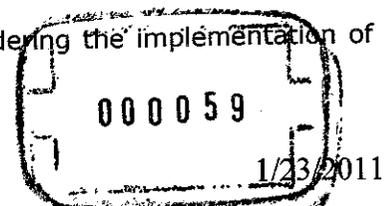
Effective Date: 2008 SB221 07-31-2008; 2009 HB2 07-01-2009

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4928.02 State policy.

It is the policy of this state to do the following throughout this state :

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (C) 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;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;
- (F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;
- (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;
- (L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;



(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy. In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4901:1-40-01	Definitions
4901:1-40-02	Purpose and Scope
4901:1-40-03	Requirements
4901:1-40-04	Qualified Resources
4901:1-40-05	Annual Status Reports and Compliance Reviews
4901:1-40-06	Force Majeure
4901:1-40-07	Cost Cap
4901:1-40-08	Compliance Payments
4901:1-40-09	Annual Report

4901:1-40-01

Definitions

Effective: 12/10/2009

- (A) "Advanced energy fund" has the meaning set forth in section 4928.61 of the Revised Code.
- (B) "Advanced energy resource" has the meaning set forth in division (A)(34) of section 4928.01 of the Revised Code.
- (C) "Alternative energy resource" has the meaning set forth in division (A)(1) of section 4928.64 of the Revised Code.
- (D) "Biologically derived methane gas" means landfill methane gas; or gas from the anaerobic digestion of organic materials, including animal waste, municipal wastewater, institutional and industrial organic waste, food waste, yard waste, and agricultural crops and residues.
- (E) "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.
- (F) "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 as identified in the control plan requirements in paragraph (C) of rule 4901:1-41-03 of the Administrative Code.
- (G) "Co-firing" means simultaneously using multiple fuels in the generation of electricity. In the event of co-firing, the proportion of energy input comprised of a renewable energy resource shall dictate the proportion of electricity output from the facility that can be considered a renewable energy resource.
- (H) "Commission" means the public utilities commission of Ohio.
- (I) "Deliverable into this state" means that the electricity originates from a facility within a state contiguous to Ohio. It may also include electricity originating from other locations, pending a demonstration that the electricity could be physically delivered to the state.
- (J) "Demand response" has the meaning set forth in rule 4901:1-39-01 of the Administrative Code.
- (K) "Demand-side management" has the meaning set forth in paragraph (F) of rule 4901:5-5-01 of the Administrative Code.
- (L) "Distributed generation" means electricity production that is on-site and is connected to the electricity grid.

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- (M) "Double-counting" means utilizing renewable energy, renewable energy credits, or energy efficiency savings to do any of the following:
- (1) Satisfy multiple Ohio state renewable energy requirements or such requirements for more than one state.
 - (2) Comply with both the energy efficiency and advanced energy statutory benchmarks.
 - (3) Support multiple voluntary product offerings
 - (4) Substantiate multiple marketing claims.
 - (5) Some combination of these.
- (N) "Electric generating facility" means a power plant or other facility where electricity is produced.
- (O) "Electric services company" has the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.
- (P) "Electric utility" has the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.
- (Q) "Energy efficiency" has the meaning set forth in rule 4901:1-39-01 of the Administrative Code.
- (R) "Energy storage" means a facility or technology that permits the storage of energy for future use as electricity.
- (S) "Fuel cell" means a device that uses an electrochemical energy conversion process to produce electricity.
- (T) "Geothermal energy" means hot water or steam extracted from geothermal reservoirs in the earth's crust and used for electricity generation..
- (U) "Hydroelectric energy" means electricity generated by a hydroelectric facility as defined in division (A)(35) of section 4928.01 of the Revised Code.
- (V) "Hydroelectric facility" has the meaning set forth in division (A)(35) of section 4928.01 of the Revised Code.
- (W) "Mercantile customer" has the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.
- (X) "MISO" means "Midwest Independent Transmission System Operator, Inc." or any successor regional transmission organization.
- (Y) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.
- (Z) "PJM" means "PJM Interconnection, LLC" or any successor regional transmission organization.
- (AA) "Placed-in-service" means when a facility or technology becomes operational.
- (BB) "Renewable energy credit" means the environmental attributes associated with one megawatt-hour of electricity generated by a renewable energy resource, except for electricity generated by facilities as described in paragraph (E) of rule 4901:1-40-04 of the Administrative Code.
- (CC) "Renewable energy resource" has the meaning set forth in division (A)(35) of section 4928.01 of the Revised Code.
- (DD) "Solar energy resources" means solar photovoltaic and/or solar thermal resources.
- (EE) "Solar photovoltaic" means energy from devices which generate electricity directly from sunlight through the movement of electrons.
- (FF) "Solar thermal" means the concentration of the sun's energy, typically through the use of lenses or mirrors, to drive a generator or engine to produce electricity.
- (GG) "Solid wastes" has the meaning set forth in section 3734.01 of the Revised Code.

- (HH) "Staff" means the commission staff or its authorized representative.
- (II) "Standard service offer" means an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.
- (JJ) "Wind energy" means electricity generated from wind turbines, windmills, or other technology that converts wind into electricity.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4905.04, 4905.06, 4928.01, 4928.02, 4928.64, 4928.65
Rule Amplifies: R.C. 4928.01, 4928.64, 4928.65

4901:1-40-02 Purpose and Scope Effective: 12/10/2009

- (A) This chapter addresses the implementation of the alternative energy portfolio standard, including the incorporation of renewable energy credits, as detailed in sections 4928.64 and 4928.65 of the Revised Code respectively. Parties affected by these alternative energy portfolio standard rules include all Ohio electric utilities and all electric services companies serving retail electric customers in Ohio. Any entities that do not serve Ohio retail electric customers shall not be required to comply with the terms of the alternative energy portfolio standard.
- (B) The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4905.04, 4905.06, 4928.01, 4928.02, 4928.64, 4928.65
Rule Amplifies: R.C. 4928.01, 4928.02, 4928.64, 4928.65

4901:1-40-03 Requirements Effective: 12/10/2009

- (A) All electric utilities and affected electric services companies shall ensure that, by the end of the year 2024 and each year thereafter, electricity from alternative energy resources equals at least twenty-five per cent of their retail electric sales in the state.
- (1) Up to half of the electricity supplied from alternative energy resources may be generated from advanced energy resources.
- (2) At least half of the electricity supplied from alternative energy resources shall be generated from renewable energy resources, including solar energy resources, in accordance with the following annual benchmarks:

Annual benchmarks for alternative energy resources generated from renewable and solar energy resources

By end of year:	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.01%
2011	1.0%	0.03%
2012	1.5%	0.06%
2013	2.0%	0.09%

By end of year:	Renewable energy resources	Solar energy resources
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.30%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each year thereafter	12.5%	0.50%

- (a) At least half of the annual renewable energy resources, including solar energy resources, shall be met through electricity generated by facilities located in this state. Facilities located in the state shall include a hydroelectric generating facility that is located on a river that is within or bordering this state, and wind turbines located in the state's territorial waters of Lake Erie.
 - (b) To qualify towards a benchmark, any electricity from renewable energy resources, including solar energy resources, that originates from outside of the state must be shown to be deliverable into this state.
- (3) All costs incurred by an electric utility in complying with the requirements of section 4928.64 of the Revised Code, shall be avoidable by any consumer that has exercised choice of electricity supplier, during such time that a customer is served by an electric services company.
- (B) The baseline for compliance with the alternative energy resource requirements shall be determined using the following methodologies:
- (1) For electric utilities, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold under its standard service offer to any and all retail electric customers whose electric load centers are served by that electric utility and are located within the electric utility's certified territory. The calculation of the baseline shall be based upon the average, annual, kilowatt-hour sales reported in that electric utility's three most recent forecast reports or reporting forms.
 - (2) For electric services companies, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold to any and all retail electric consumers served by the company in the state, based upon the kilowatt-hour sales in the electric services company's most recent quarterly market-monitoring reports or reporting forms.
 - (a) If an electric services company has not been continuously supplying Ohio retail electric customers during the preceding three calendar years, the baseline shall be computed as an average of annual sales data for all calendar years during the preceding three years in which the electric services company was serving retail customers.
 - (b) For an electric services company with no retail electric sales in the state during the preceding three calendar years, its initial baseline shall consist of a reasonable projection of its retail electric sales in the state for a full calendar year. Subsequent baselines shall consist of actual sales data, computed in a manner consistent with paragraph (B)(2)(a) of this rule.
 - (3) An electric utility or electric services company may file an application requesting a reduced baseline to reflect new economic growth in its service territory or service area. Any such

application shall include a justification indicating why timely compliance based on the unadjusted baseline is not feasible, a schedule for achieving compliance based on its unadjusted baseline, quantification of a new change in the rate of economic growth, and a methodology for measuring economic activity, including objective measurement parameters and quantification methodologies.

(C) Beginning in the year 2010, each electric utility and electric services company annually shall file a plan for compliance with future annual advanced- and renewable-energy benchmarks, including solar, utilizing at least a ten-year planning horizon. This plan, to be filed by April fifteenth of each year, shall include at least the following items:

- (1) Baseline for the current and future calendar years.
- (2) Supply portfolio projection, including both generation fleet and power purchases.
- (3) A description of the methodology used by the company to evaluate its compliance options.
- (4) A discussion of any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4905.04, 4905.06, 4928.02, 4928.64
Rule Amplifies: R.C. 4928.64

4901:1-40-04

Qualified Resources

Effective: 12/10/2009

- (A) The following resources or technologies, if they have a placed-in-service date of January 1, 1998, or after, are qualified resources for meeting the renewable energy resource benchmarks:
- (1) Solar photovoltaic or solar thermal energy.
 - (2) Wind energy.
 - (3) Hydroelectric energy.
 - (4) Geothermal energy.
 - (5) Solid waste energy derived from fractionalization, biological decomposition, or other process that does not principally involve combustion.
 - (6) Biomass energy.
 - (7) Energy from a fuel cell.
 - (8) A storage facility, if it complies with the following requirements:
 - (a) The electricity used to pump the resource into a storage reservoir must qualify as a renewable energy resource, or the equivalent renewable energy credits are obtained.
 - (b) The amount of energy that may qualify from a storage facility is the amount of electricity dispatched from the storage facility.
 - (9) Distributed generation system used by a customer to generate electricity from one of the resources or technologies listed in paragraphs (A)(1) to (A)(8) of this rule.
 - (10) A renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998.

- (B) The following resources or technologies, if they have a placed-in-service date of January 1, 1998, or after, are qualified resources for meeting the 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. In such an instance, it is the incremental increase in generation output that may be quantified and applied toward an advanced energy requirement.
 - (2) Any distributed generation system, designed primarily to meet the energy needs of the customer's facility that utilizes co-generation of electricity and thermal output simultaneously.
 - (3) Clean coal technology.
 - (4) Advanced nuclear energy technology, from:
 - (a) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission or other later technology.
 - (b) Significant improvements to existing facilities. In such an instance, it is the incremental increase in generation attributable to the improvement that may be quantified and applied toward an advanced energy requirement. Extension of the life of existing nuclear generation capacity shall not qualify as advanced nuclear energy technology.
 - (5) Energy from a fuel cell.
 - (6) Advanced solid waste or construction and demolition debris conversion technology that results in measurable greenhouse gas emission reductions.
 - (7) Demand-side management and energy efficiency, above and beyond that used to comply with any other regulatory standard or programs.
- (C) The following new or existing mercantile customer-sited resources may be qualified resources for meeting electric utilities' annual, renewable- or advanced-energy resource benchmarks, as applicable, provided that it does not constitute double-counting for any other regulatory requirement and that the mercantile customer has committed the resource for integration into the electric utility's demand-response, energy efficiency, or peak-demand reduction programs pursuant to rule 4901:1-39-08 of the Administrative Code.
- (1) Renewable energy resources from mercantile customers include the following:
 - (a) Electric generation equipment that uses a renewable energy resource and is owned or controlled by a mercantile customer.
 - (b) Any renewable energy resource of the mercantile customer that can be utilized effectively as part of an alternative energy resource plan of an electric utility and would otherwise qualify as a renewable energy resource if it were utilized directly by an electric utility.
 - (2) Advanced energy resources from mercantile customers include the following:
 - (a) A resource that improves the relationship between real and reactive power.
 - (b) A mercantile customer-owned or controlled resource that makes efficient use of waste heat or other thermal capabilities.
 - (c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics.
 - (d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource.

- (e) Any advanced energy resource of the mercantile customer that can be utilized effectively as part of an advanced energy resource plan of an electric utility and would otherwise qualify as an advanced energy resource if it were utilized directly by an electric utility.
- (D) An electric utility or electric services company may use renewable energy credits (REC) to satisfy all or part of a renewable energy resource benchmark, including a solar energy resource benchmark.
- (1) To be eligible for use towards satisfying a benchmark, a REC must originate from a facility that meets the definition of a renewable energy resource, including solar energy resources, and be measured by a utility-grade meter in compliance with paragraph B of rule 4901:1-10-05 of the Administrative Code, for facilities with generating capacity of more than six kilowatts. Such facilities could include a mercantile customer-sited resource that is not committed for integration into an electric utility's demand-response, energy efficiency, or peak-demand reduction program pursuant to rule 4901:1-39-08 of the Administrative Code but that otherwise qualifies under the terms of paragraph (A) of this rule.
 - (2) To use RECs as a means of achieving partial or complete compliance, an electric utility or electric services company must be a registered member in good standing of at least one of the following:
 - (a) The PJM's generation attributes tracking system.
 - (b) The MISO's renewable energy tracking system.
 - (c) Another credible tracking system approved for use by the commission.
 - (3) A REC may be used for compliance any time in the five calendar years following the date of its initial purchase or acquisition.
 - (4) Double counting is prohibited.
 - (5) The RECs must be associated with electricity that was generated no earlier than July 31, 2008.
- (E) 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, the number of RECs produced by each megawatt-hour of electricity generated principally from biomass energy shall equal the actual percentage of biomass feedstock heat input used to generate such megawatt-hour multiplied 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 REC, but such megawatt-hour shall not equal less than one credit.
- (F) An entity seeking resource qualification shall file an application for certification of its resources or technologies, upon such forms as may be prescribed by the commission. The application shall include a determination of deliverability to the state in accordance with paragraph (I) of rule 4901:1-40-01 of the Administrative Code.
- (1) Any interested person may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.
 - (2) The commission may approve, suspend, or deny an application within sixty days of it being filed. If the commission does not act within sixty days, the application is deemed automatically approved on the sixty-first day after the date filed.
 - (3) If the commission suspends the application, the applicant shall be notified of the reasons for such suspension and may be directed to furnish additional information. The commission may act to approve or deny a suspended application within ninety days of the date that the application was suspended.

- (4) Upon commission approval, the applicant shall receive notification of approval and a numbered certificate where applicable. The commission shall provide this certificate number to the appropriate attribute tracking system.
 - (5) Representatives of certified facilities must notify the commission within thirty days of any material changes in information previously submitted to the commission during the certification process. Failure to do so may result in revocation of certification status.
 - (6) Certification of a resource or technology shall not predetermine compliance with annual benchmarks, and does not constitute any commission position regarding cost recovery.
- (G) At its discretion, the commission may classify any new technology or additional resource as an advanced- or renewable-energy resource. Any interested person may request a hearing on such classification.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4901.13, 4905.04, 4905.06, 4928.02, 4928.64, 4928.65
Rule Amplifies: R.C. 4928.01, 4928.64, 4928.65

4901:1-40-05 Annual Status Reports and Compliance Reviews Effective: 12/10/2009

- (A) Unless otherwise ordered by the commission, each electric utility and electric services company shall file by April fifteenth of each year, on such forms as may be published by the commission, an annual alternative energy portfolio status report analyzing all activities undertaken in the previous calendar year to demonstrate how the applicable alternative energy portfolio benchmarks and planning requirements have or will be met. Staff shall conduct annual compliance reviews with regard to the benchmarks under the alternative energy portfolio standard.
- (1) Beginning in the year 2010, the annual review will include compliance with the most recent applicable renewable- and solar-energy resource benchmark.
 - (2) Beginning in the year 2025, the annual review will include compliance with the most recent applicable advanced energy resource benchmark.
 - (3) The annual compliance reviews shall consider any under-compliance an electric utility or electric services company asserts is outside its control, including but not limited to, the following:
 - (a) Weather-related causes.
 - (b) Equipment shortages for renewable or advanced energy resources.
 - (c) Resource shortages for renewable or advanced energy resources.
- (B) Any person may file comments regarding the electric utility's or electric services company's alternative energy portfolio status report within thirty days of the filing of such report.
- (C) Staff shall review each electric utility's or electric services company's alternative energy portfolio status report and any timely filed comments, and file its findings and recommendations and any proposed modifications thereto.
- (D) The commission may schedule a hearing on the alternative energy portfolio status report.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15

Statutory Authority: R.C. 4901.13, 4905.04, 4905.06, 4928.02, 4928.64, 4928.65
Rule Amplifies: R.C. 4928.64, 4928.65

4901:1-40-06 Force Majeure Effective: 12/10/2009

An electric utility or electric services company may seek a force majeure determination from the commission for all or part of a minimum renewable- or solar-energy benchmark.

- (A) A decision on a request for a force majeure determination will be rendered within ninety days of an electric utility or electric services company filing a request for such determination. The process and timeframes for such a determination shall be set by entry of the commission, the legal director, deputy legal director, or attorney examiner.
- (1) At the time of requesting such a determination from the commission, an electric utility or electric services company shall demonstrate that it pursued all reasonable compliance options including, but not limited to, renewable energy credit (REC) solicitations, REC banking, and long-term contracts.
- (2) The request shall include an assessment of the availability of qualified in-state resources, as well as qualified resources within the territories of PJM and the MISO.
- (B) If the commission determines that force majeure conditions exist, it may modify that compliance obligation of the electric utility or electric services company, as it considers appropriate to accommodate the finding.
- (1) Such modification does not automatically reduce future-year obligations.
- (2) The commission retains the right to increase a future year's compliance obligation by the amount of any under compliance in a previous year that is attributed to a force majeure determination.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4901.13, 4905.04, 4905.06, 4928.02, 4928.64
Rule Amplifies: R.C. 4928.64

4901:1-40-07 Cost Cap Effective: 12/10/2009

- (A) An electric utility or electric services company may file an application requesting a determination from the commission that its reasonably expected cost of compliance with an advanced energy resource benchmark would exceed its reasonably expected cost of generation to customers by three per cent or more. The process and timeframes for such a determination shall be set by entry of the commission, the legal director, deputy legal director, or attorney examiner.
- (1) The burden of proof for substantiating such a claim shall remain with the electric utility or electric services company.
- (2) An electric utility or electric services company shall pursue all reasonable compliance options prior to requesting such a determination from the commission.
- (3) In the case that the commission makes such a determination, the electric utility or electric services company may not be required to fully comply with that specific benchmark.
- (B) An electric utility or electric services company may file an application requesting a determination from the commission that its reasonably expected cost of compliance with a renewable energy resource benchmark, including a solar energy resource

benchmark, would exceed its reasonably expected cost of generation to customers by three per cent or more. The process and timeframes for such a determination shall be set by entry of the commission, the legal director, deputy legal director, or attorney examiner.

- (1) The burden of proof for substantiating such a claim shall remain with the electric utility or electric services company.
 - (2) An electric utility or electric services company shall pursue all reasonable compliance options prior to requesting such a determination from the commission.
 - (3) In the case that the commission makes such a determination, the electric utility or electric services company may not be required to fully comply with that specific benchmark.
- (C) Calculations involving a three per cent cost cap shall consist of comparing the total expected cost of generation to customers of an electric utility or electric services company, while satisfying an alternative energy portfolio standard requirement, to the total expected cost of generation to customers of the electric utility or electric services company without satisfying that alternative energy portfolio standard requirement.
- (D) Any costs included in a commission-approved unavoidable surcharge for construction or environmental expenditures of generation resources shall be excluded from consideration as a cost of compliance under the terms of the alternative energy portfolio standard and therefore, would not count against the applicable cost cap. Such costs should, however, be included in the calculation of the total expected cost of generation to customers described in paragraph (C) of this rule.
- (E) If the commission makes a determination that a three per cent provision is triggered, the electric utility or electric services company shall comply with each benchmark up to the point that the three per cent increment would be reached for each benchmark.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4901.13, 4905.04, 4905.06, 4928.02, 4928.64
Rule Amplifies: R.C. 4928.64

4901:1-40-08 Compliance Payments Effective: 12/10/2009

- (A) Any electric utility or electric services company that does not achieve an annual renewable energy resource benchmark, including a solar benchmark, shall remit a compliance payment based on the amount of noncompliance rounded up to the next megawatt hour (MWh), unless the commission has identified the existence of force majeure conditions or the commission has determined that the three per cent cost-cap provision would be exceeded in the event of full compliance.
- (1) The required payment for noncompliance with any solar energy resource benchmark shall be calculated by quantifying the level of noncompliance, rounded to the next MWh, and multiplying this figure by the per MWh amount in the table below.

Solar energy resources - compliance payment

Year	Payment per MWh
2009	\$450
2010 and 2011	\$400
2012 and 2013	\$350
2014 and 2015	\$300
2016 and 2017	\$250

2018 and 2019	\$200
2020 and 2021	\$150
2022 and 2023	\$100
2024 and beyond	\$50

- (2) The required payment for noncompliance with any renewable energy resource benchmark, excluding solar, shall be calculated by quantifying the level of noncompliance, rounded to the next MWh, and multiplying this figure by an amount determined by the commission.
- (a) The per MWh payment for renewable energy resources for the year 2009 is forty-five dollars.
- (b) Beginning in the year 2010, the per MWh payment for renewable energy resources will be adjusted annually to reflect the annual change to the consumer price index as defined in section 101.27 of the Revised Code. Such adjustment shall be performed by staff no later than June first of each calendar year. This annual adjustment shall be calculated using the following formula:
- $$((CPIYR2/CPIYR1) * \text{current per MWh payment})$$
- (c) In no event shall the compliance payment for renewable energy resources be less than forty-five dollars per MWh.
- (3) At least annually, the staff shall conduct a review of the renewable energy resource market, including solar, both within this state and within the regional transmission systems active in the state. The results of this review shall be used to determine if changes to the solar- or renewable-energy compliance payments are warranted, as follows:
- (a) The commission may increase compliance payments if needed to ensure that electric utilities and electric services companies are not using the payments in lieu of acquiring or producing energy or RECs from qualified renewable resources, including solar.
- (b) Any recommendation to reduce the compliance payments shall be presented to the general assembly.
- (B) Any compliance payment shall be submitted to the commission for deposit to the credit of the advanced energy fund. All compliance payments shall be delivered to the commission within thirty days of the imposition of any compliance payment requirement.
- (C) Compliance payments shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.
- (D) Any electric utility or electric services company found to be liable for a compliance payment is prohibited from passing compliance payments on to consumers. In the event that a compliance payment is required, an electric utility or electric services company shall submit an attestation, signed by a company officer or designee, indicating that it will not seek to recover the specific compliance payment from consumers. Such attestation shall be submitted to staff within thirty days of the imposition of any compliance payment requirement.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4901.13, 4905.04, 4905.06, 4928.02, 4928.64
Rule Amplifies: R.C. 4928.64, 101.68, 101.27

4901:1-40-09

Annual Report

Effective: 12/10/2009

- (A) Pursuant to division (D)(1) of section 4928.64 of the Revised Code, an annual report shall be submitted to the general assembly addressing at least the following topics:
- (1) The compliance status of electric utilities and electric services companies with respect to the advanced- and renewable-energy resource benchmarks.
 - (2) Suggested strategies for electric utility and electric services company compliance.
 - (3) Suggested strategies for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers:
 - (a) Available technology.
 - (b) Costs.
 - (c) Job creation.
 - (d) Economic impacts.
- (B) The report shall be submitted in accordance with section 101.68 of the Revised Code.
- (C) Prior to its submission to the general assembly, the report will be issued for public comment by interested persons for thirty days, unless otherwise ordered by the commission. The process and timeframes for soliciting public comment shall be set by entry of the commission, the legal director, deputy director, or attorney examiner.

Effective: 12/10/2009
R.C. 119.032 Review Date(s): 9/30/2013
Promulgated Under: R.C. 111.15
Statutory Authority: R.C. 4901.13, 4905.04, 4905.06, 4928.02, 4928.64, 4928.65
Rule Amplifies: R.C. 4928.64, 4928.65

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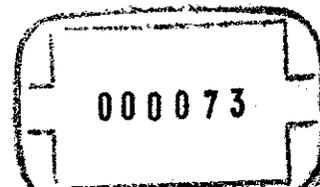
**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION TO DISMISS
OR IN THE ALTERNATIVE MOTION FOR AN EVIDENTIARY HEARING
BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

The Ohio Environmental Council ("OEC"), the Office of the Ohio Consumers' Counsel ("OCC"), and the Environmental Law & Policy Center ("ELPC") (collectively "OCEA") hereby move the Public Utilities Commission of Ohio ("Commission" or "PUCO") to dismiss the above-captioned Application because FirstEnergy Solutions Corporation ("FES" or "Company") has failed to meet its burden of proving that its Application has met the legal requirements as set forth in R.C. 4928. FES is seeking certification of its R.E. Burger facility, Units 4 and 5, as an Eligible Renewable Energy Resource Facility. FES is an affiliate of the FirstEnergy electric utilities and provides electric generation services. Commission approval of FES's Application would allow the Company to use the energy generated at the facility to meet a portion of the Company's renewable energy benchmarks established by Substitute Senate Bill 221 (S.B. 221), codified in R.C. 4928.64(B)(2), and to bank and sell renewable energy credits ("RECs") based on the energy produced.

As explained more fully in the accompanying Memorandum in Support, FES's Application is legally deficient. The Application has been suspended twice by the Commission for its deficiencies. It is currently suspended indefinitely. Moreover, FES has indicated in its filings that it does not intend to supplement its Application or discovery responses. Therefore,



FES has made clear that its interpretation of the requirements for renewable certification differs from the Commission's. However, it is the Commission's interpretation of the law -- not FES's - - which matters. Accordingly, the Application does not comply with Ohio law and must be dismissed. In the alternative, the PUCO should set this matter for an evidentiary hearing with a complete procedural schedule.

Respectfully submitted,

/s/ Will Reisinger

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**BEFORE
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Certification Of R.E. Burger Units 4)
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Energy Resource Facility.)

Case No. 09-1940-EL-REN

MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

FES's original Application was filed on December 11, 2009. On January 11, 2010, the OEC filed a Motion to Suspend the automatic approval of the facility. On January 19, 2010, FES filed a Memorandum Contra OEC's Motion to Suspend, calling OEC's Motion "devoid of facts or law that would justify suspension."¹ The Commission disagreed, and on February 3, 2010, OEC's Motion to Suspend was granted. In its Order suspending the Application, the Commission found that "additional information is required to satisfy the requirements for certification."² On April 12, 2010, OCEA filed Comments on the Burger Application, arguing that "the current Application does not contain sufficient information to justify Commission approval."³ The Comments further asserted that FES must provide additional information regarding the source of its biomass material in order for the facility to be eligible for renewable certification. On April 22, 2010, FES filed a Memorandum Contra OCEA's Comments, calling

¹ Memorandum in Opposition to Motion to Suspend at 1.

² Entry Ordering Suspension, February 3, 2010.

³ OCEA Comments at 5.

them "irrelevant and unproductive."⁴ FES further requested that the Commission "disregard OCEA's comments and grant the Application."⁵

The Commission, again, disagreed with FES. On April 28, 2010, the Commission entered an order suspending the Application for a second time:

The attorney examiner finds that 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.⁶

II. BURDEN OF PROOF AND STANDARD OF REVIEW

FES bears the burden of proof to demonstrate that its Application satisfies the requirements of R.C. 4928. The Company seeks to have its Burger facility certified as an eligible renewable energy resource facility, allowing the FirstEnergy companies to use the energy generated to meet their lawful renewable benchmark obligations and to bank and sell RECs. Consequently, FES must demonstrate that its Application satisfies the criteria outlined in R.C. 4928.64 and in the Admin. Code §§ 4901:1-40-01 through 4901:1-40-09 for renewable generation.

The Commission's rules provide the criteria that must be applied to an Application for certification of a renewable energy facility. FES describes the standard it believes should be applied:

A facility will be certified by the Commission if, under the circumstances presented here, the application demonstrates that the facility (i) will utilize a renewable resource, such as biomass energy; (ii) was created on or after January 1, 1998, by the modification or

⁴ FES Response to OCEA Comments at 2, April 22, 2010.

⁵ Id. (Emphasis added).

⁶ Entry Ordering Suspension, April 28, 2010.

retrofit of any facility placed in service prior to January 1, 1998; and (iii) is located in Ohio or deliverable into Ohio.⁷

Criteria (ii) and (iii) are not in dispute. However, FES believes that it has satisfied its criteria point (i) above simply by stating that it intends to procure biomass for its plant. Such a simple statement cannot and does not meet this statutory burden. Nonetheless, FES asserts that the Commission must certify its facility as a renewable energy resource. FES does not believe that any additional inquiry into the sustainability or renewable characteristics is appropriate.

The Commission's two suspension entries, however, contradict FES's view. The Commission's two suspension orders found that "additional information is required to satisfy the requirements for certification."⁸ FES's Application, even assuming that everything contained therein is true, has been shown to be legally inadequate for certification based on the PUCO Entries that have found the evidence submitted to date to be inadequate. In effect, the Commission's entries have established a standard of review showing that the criteria advanced by FES are inadequate.

III. ARGUMENT

A. FES's Application Is Facially Inadequate.

As OCEA has argued, renewable certification requires a demonstration of sustainability and renewability.⁹ This is a commonsense interpretation of the renewable energy provisions enacted by S.B. 221 and R.C. 4928.64. FES 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. In

⁷ Memorandum Contra OCEA Comments at 5-6.

⁸ Entry Ordering Suspension, April 28, 2010 (Emphasis added).

⁹ See OCEA's Comments.

short, FES must make some basic showing that the energy generated from its facility will be obtained through a "renewable" process.

B. The Commission Has Ample Justification To Scrutinize This Application In Order To Protect The Viability of Ohio's Renewable Energy Standard And Ensure The Feasibility Of This Project.

FES's filings suggest that any scrutiny of its proposal is improper. FES argues that its Application should be approved without additional information because other facilities have not been required "to provide any of the information sought by the OCEA."¹⁰ The Commission is within its prerogative to consider applications for renewable certification on a case by case basis. Moreover, FES has provided significantly less information than other applicants for renewable certification, and its Application seeks approval for a facility that will be far and away the largest in Ohio.¹¹

The unprecedented size of the Burger facility, at over 300 MW, means that it will require an unprecedented amount of biomass fuel to function. FES does not dispute OCEA's statement that the forest residues available in Ohio may only be able to support 38.5MW, far short of Burger's 312 MW, and that the resources available in the north-central U.S. may only be able to support 1116 MW, far short of the roughly 2000 MW that have been approved or are pending certification at the PUCO.¹² Further, the Burger facility will have a substantial impact on Ohio's renewable energy standard. Pursuant to 4928.65, the energy generated at the Burger facility will be eligible for a higher REC unit rate -- i.e. a "super-REC" -- making electricity produced at the plant more valuable than all other renewable generation. The electricity produced at FES's

¹⁰ Id. at 6.

¹¹ See, e.g., Case No. 09-1043-EL-REN. South Point Biomass, LLC provided substantially more detail regarding the source of its biomass fuel. South Point conveyed most of this data through filings on the public docket; sensitive information regarding contracts and other proprietary material was made available to the Commission and intervenors under protective seal. After reviewing this data, the OEC filed Comments supporting the South Point project.

¹² OCEA's Comments at 21.

facility in one year alone could satisfy a majority of the Company's renewable benchmark obligations through the year 2025, and a significant portion of the renewable energy generated in Ohio.¹³ Therefore, if the PUCO were to award renewable energy credit for a non-sustainable project, it could impact or eviscerate the renewable energy standard enacted by S.B. 221 and codified in R.C. 4928.64. Finally, due to its size, the project could place an unsustainable and unreasonable burden on Ohio's and the region's biomass resources.

It is reasonable to consider the renewable characteristics of a process and fuel source before determining that that process is "renewable" under the law. We note that the Supreme Court of Ohio has stated that the "General Assembly will not be presumed to have intended to enact a law producing absurd consequences,"¹⁴ and further, that laws must not be "interpreted to achieve an absurd result."¹⁵ If FES were to receive credit for processes that do not result in emissions reductions and do not satisfy any sustainability protocols, then it would be absurd to characterize its facility as "renewable."

There is ample justification for the Commission to scrutinize this facility.

C. The Commission And Its Staff Have Made It Clear That Sustainability Must Be Considered In Evaluating An Application For Renewable Certification.

As described above, the Commission has issued two orders suspending the Burger Application, each time stating that "additional information is required to satisfy the requirements

¹³ If the Burger plant is approved, FirstEnergy will be able to achieve the bulk of its renewable energy requirements from the Burger facility in one year. Using the super-REC formula found in R.C. 4928.65, it appears that Burger, operating at a 90 percent capacity factor, could satisfy its renewable generation obligations pursuant to R.C. 4928.64 through the year 2018 *in only one year of operation*. $312.4 \text{ MW} \times \text{total hours per year, at a 90 percent capacity factor} = 2,053,468 \text{ RECs}$. Applying the super-REC formula, at a 4.5 multiplier = $11,083,327 \text{ RECs}$ in one year of generation. FirstEnergy would need to achieve approximately 8, 200,000 RECs through 2018 and 17,000,000 RECs by 2025 to satisfy its benchmarks.

¹⁴ *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 371 (1950).

¹⁵ *Mishr v. Board of Zoning Appeals, Village of Poland*, 76 Ohio St. 3d 238 (1996).

for certification.”¹⁶ FES has failed to provide any such additional information. Staff has also made it clear through discovery requests that data such as the type of fuel to be used, the sustainability of those fuel sources, and relevant contracts for “environmentally- sustainable” fuel, must be evaluated before approval is granted. FES has failed to provide substantive responses to Staff discovery requests and has not supplemented those responses. Staff’s First Set of Interrogatories contained the following preface:

Responses to the following questions will be necessary for Commission Staff to perform a comprehensive review of your application for certification as an eligible Ohio renewable energy resource generating facility.¹⁷

In this set of interrogatories, Staff requested that FES “describe the content (fully characterize the fuel material) and sources of biomass resource.”¹⁸ FES responded by stating that “the specific types of material to be used has [sic] not yet been determined.”¹⁹ Staff also requested FES to “indicate the commitment and measures that will be undertaken by the Company to ensure long-term procurement of an environmentally-sustainable fuel supply.”²⁰ FES responded by stating that “The Company has not entered into contracts for the supply of biomass product, therefore [sic] it has not determined the protocols which may be in place relating to sustainability certifications or sourcing standards.”²¹

OEC has sought similar information through discovery, and FES has also failed to provide meaningful responses. For example, after OEC’s discovery requests sought information regarding the source of the biomass material, FES responded by stating that “it currently intends to utilize

¹⁶ Entry Ordering Suspension, April 28, 2010.

¹⁷ Staff Data Requests at 1.

¹⁸ Responses to Staff’s Data Requests at 3.

¹⁹ Id. at 2.

²⁰ Id.

²¹ Id.

biomass obtained from the United States and/or Canada.”²² This response has not been supplemented. FES also prefaces its response to several questions regarding the source of its biomass materials by objecting to the requests as “vague and ambiguous” and “seek[ing] information that is not reasonably calculated to lead to the discovery of relevant evidence.”²³ FES should not benefit from a lack of candid and complete responses to data requests. The Company had at least two opportunities to demonstrate the validity of its Application. The Company has failed to do so and now should be held accountable -- in the form of a dismissal of its Application.

D. The Application Should Be Dismissed.

As shown above, FES apparently disagrees with the Commission and intervenors that it must provide any additional information about its facility, or that any additional information about the source of its biomass could even be relevant.²⁴ FES appears to believe that it is entitled to certification of the Burger facility as a matter of right, the Commission’s contrary Entries notwithstanding.

Thus, the case stands at an impasse. The only reasonable step at this point is for the Commission to dismiss this Application. FES would then have the option of re-filing its Application with information regarding the sustainability and renewable characteristics of its facility.

IV. IN THE ALTERNATIVE, THE PUCO SHOULD SET THE MATTER FOR EVIDENTIARY HEARING, WITH A FULL PROCEDURAL SCHEDULE.

As the Commission’s second entry suspending the application states, FES’s Application does not currently “satisfy the requirements for certification,” and it should be dismissed. In the alternative to a dismissal of the Application, pursuant to Rule 4901-1-12 of the Ohio Admin. Code,

²² OCEA Comments at 14 (citing Answers to OEC Interrogatory No. 5, Exhibit 1).

²³ Id.

²⁴ FES Response to OCEA Comments at 1.

OCEA moves the Commission to set the above-captioned matter for an evidentiary hearing, with a full procedural schedule including ample time for discovery. Among the factual and legal questions at issue are whether the fuel for the Burger facility will meet the definition of "renewable" energy resource and whether the facility can be sustainably sourced using biomass resources. In the event that this Application is not dismissed, an evidentiary hearing would be appropriate. A hearing would allow for the development of a sufficient evidentiary record upon which to make a decision on the reasonableness and lawfulness of the Application.

V. CONCLUSION

FES's Application for certification of its Burger facility as an eligible renewable energy resource has been suspended by the Commission twice for insufficient information. FES has been given many opportunities and several months to revise its Application to comply with the Commission's requests. FES has chosen not to do so, and instead uses its memoranda contra to characterize the concerns raised by the Commission, Staff, and OCEA as "irrelevant."²⁵ FES's Application is facially inadequate and could have been dismissed at any point subsequent to its filing. At this point, the only appropriate step is for the Commission to dismiss this Application. FES would then have the option of re-filing its Application with more information about the source of its biomass fuel, or it may choose to find other means of generation through which to meet its renewable benchmark obligations under R.C. 4928.64.

Respectfully submitted,

/s/ Will Reisinger
Will Reisinger, Counsel of Record
Nolan Moser
Trent A. Dougherty
Megan De Lisi

Ohio Environmental Council

²⁵ FES Response to OCEA Comments at 1.

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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 or electronic mail this 20th day of May, 2010.

/s/ Will Reisinger

David Plusquellic
Manager of Renewable Energy Portfolio
FirstEnergy Solutions
341 White Pond Drive
Akron, Ohio 44320

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Porter Wright, Morris & Arthur, LLP
41 South High Street
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Jim Lang
Kevin P. Shannon
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5/20/2010 2:20:53 PM

in

Case No(s). 09-1940-EL-REN

Summary: Motion Motion to Dismiss, and in the Alternative Motion for Hearing, by the Ohio Environmental Council, the Ohio Consumers' Counsel, and the Environmental Law & Policy Center electronically filed by Mr. Will Reisinger on behalf of Ohio Environmental Council

TO: Mr. David L. Plusquellic, Manager of Renewable Energy Portfolio, FirstEnergy Solutions Corp.

Dear Mr. Plusquellic:

Responses to the following questions will be necessary for Commission Staff to perform a comprehensive review of your application for certification as an eligible Ohio renewable energy resource generating facility. As your responses will be used to supplement your application, please sign the attestation below when returning this document. Please file your responses in the PUCO Docketing Information System under case number 09-1940-EL-REN. Please feel free to copy and paste the questions and the attestation into a word document in order to provide your answers and for the purpose of e-filing the signed document. If you have any questions, please feel free to reply to this email.

Thank you.

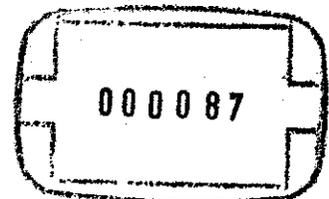
Anne Goodge
Energy & Environment Department
Public Utilities Commission of Ohio

DRAFT This document was created only for the purpose stated within it. It is for staff discussion only and does not reflect the view of the Commission.

Case No. 09-1940-EL-REN
R.E. Burger Units 4 & 5
Staff Interrogatories – Initial Set

Question 1: In Section G. 10, what is the expected heat content (BTU/lb.), moisture, ash, and sulfur content for each of the fuel types listed, coal, fuel oil and the wood pellet/briquette/chips/bales biomass resource?

	PRB	CAPP	NAPP4#	Fuel Oil	Wood (engineered)	Agricultural (engineered)
Heat (btu/lb)	8800	12000	12500	130,000 btu/gal	8000	7250
Moisture (%)	27	8	8	n/a	10	10
Ash (%)	5	13	8	n/a	3	6
Sulfur (%)	0.35	1	2.58	500 ppm	0.1	0.1



(1) Please describe the source and process for determining these heating values, how they may be verified, as well as the frequency of this calculation under a regular schedule of operation.

(2) Will the Company meet the documentation requirements for Multi-Fuel Generating Units in Section 6.5 and Appendix C of the GATS Operating Rules on an ongoing basis?

Answer 1:

(1) The heating values for each product will be determined by the fuel suppliers prior to the product's arrival, and is expected to be determined through use of fuel sampling, sample preparation, and fuel analysis conducted in accordance with the most recent standards contained in ASTM D 05.06 or other relevant standards. The heating values will be verified in accordance with ASTM D 05.06 or other appropriate standards. It is currently anticipated that the heating value calculations will be conducted for every shipment of fuel to the operating plant. This analysis will be used to perform all calculations required for GATS reporting.

(2) Yes

Question 2: In addition to the projected annual generation given for the units, what is the projected annual generation from each fuel type, including the biomass resource, for both the initial test phase and the longer term repowering goal?

Answer 2:

The projected annual generation from each fuel type has not yet been determined, as the annual generation from each fuel type is dependent on a number of factors, including but not limited to, the types of biomass material which are available, the heating values of those materials, and the moisture content of the biomass resource. Subject to the foregoing, it is currently anticipated that for the initial test phase of the project up to 40,000 tons of biomass material will be burned in 2010, which is estimated to produce roughly 56,000 MWhrs. During the long term repowering phase of the project, biomass fuel will constitute greater than 51% of the fuel types used. The exact amount of biomass material to be used is dependent on multiple factors. It is currently expected that the coal based generation will range from 0.08 to 0.26x10E6 MWhrs/yr. Biomass fuel will likely be 80% to 100% of the generation and will range from 0.32 to 1.3x10E6 MWhrs/yr.

Question 3: Please provide the date that the photograph of the facility was taken.

Answer 3: July 2007.

Question 4: Please indicate the frequency with which the generation (MWh) of the renewable biomass resource will be calculated and reported to the GATS tracking agency.

Answer 4: The generation (MWh) of the renewable biomass resource calculations will be performed and reported to the GATS tracking agency on a monthly basis. This is consistent with Appendix C of the GATS Operating Rules.

Question 5: Please describe the content (fully characterize the fuel material) and sources of the biomass resource.

Answer 5: As discussed in response to Question 2, the specific types of fuel material to be used has not yet been determined. See Response 2. Subject to the foregoing, for the test phase of the project the Company has procured a fuel supply consisting of wood based pellets for the 2010 test. In brief, these wood based pellets are 100% pine wood that was debarked, chipped, dried, ground and compressed into a pellet without binders.

For the long term repowering of the facility, the Company has developed a fuel supply strategy to procure wood, as well as agricultural products, in their raw form or engineered products such as pellets and/or briquettes. No firm contracts have been executed in order to describe the source or method of obtaining biomass supply.

Question 6: Please indicate the commitment and measures that will be undertaken by the Company to ensure long-term procurement of an environmentally sustainable fuel supply.

Answer 6 : The Company has not entered into contracts for the supply of biomass product, therefore it has not yet determined the protocols which may be in place relating to sustainability certifications or sourcing standards. However, the Company intends to consider standards such as the Sustainable Forest Initiative during the evaluation of potential suppliers. Moreover, FirstEnergy Solutions is a member of the Electric Power Research Institute (EPRI) and will be working with the EPRI and the National Renewable Energy Laboratories (NREL) to evaluate net carbon output.

Question 7: The Consent Decree and letter filed with this application refer to FirstEnergy Solutions' commitment to modify the R.E. Burger plant units 4 and 5 to enable the facility to generate principally from biomass energy by June 30, 2013. The terms of the consent decree include a limit of 20% low sulfur western coal co-fired with biomass fuels in Burger Units 4 and 5.

(1) With regard to Attachment 3 of the application, the formula for calculation of renewable energy credits for full biomass co-firing, please confirm that this formula is intended to be used only when the plant is generating power using 80% or greater biomass fuels.

(2) With regard to Attachment 1, the formula for calculation of renewable energy credits for test co-firing, please confirm that this is the formula that will be used for calculation of renewable energy credits during any period when the units are generating power using less than 80% biomass fuels.

Answer 7: This question incompletely describes the Consent Decree attached to the Application. While Staff is correct that the Company currently intends to operate with no more than 20% low sulfur western coal on a regular basis, with approval from the Plaintiffs to the

Consent Decree greater than 20% low sulfur western coal may be used. See Consent Decree ¶1(c)(vii), Case No. 2:99-cv-01181 (Document 480). Subject to the foregoing, the Company responds to the sub-parts of this question as follows:

(1) The conclusion contained in this question is incorrect. Under O.R.C. § 4928.65, so long as the facility is generating "principally" from biomass energy, the calculation would apply. The term "principally" means greater than 50%, therefore the formula would apply so long as greater than 50% of the energy is derived from biomass fuels. The formula included as part of Attachment 3 of the Application corrects both for the mass of the biomass material used and for the heating value of the biomass material used, as well as other relevant factors. Therefore the formula is still valid so long as between 50% and 100% of the generation is derived from biomass energy. The formula is not intended to be used if between 0%-50% of the generation is derived from biomass energy.

(2) Subject to the response provided in Response 7(1) above, the Company states that this is the formula to be applied during the testing phase only.

Question 8: With regard to Attachment 3, the formula for calculation of renewable energy credits for full biomass co-firing, please answer the following.

- (1) When would the Company propose to perform this calculation? On a quarterly basis? On an annual basis? Based on historical information, or projected? If projected, would there be any sort of reconciliation mechanism to true-up the projection to actual data when available?
- (2) What kind of process does the applicant propose when performing the calculation? Will it include a filing with the Commission to detail the proposed calculation?
- (3) How does the applicant propose to determine the REC market price? What source(s) would be used? Would the market price be for an in-state, non-solar "spot" REC?
- (4) How would the applicant propose to determine the following for purposes of the calculation: M_b (biomass mass), HHV_b (biomass heating value), m_c (coal mass), HHV_c (coal heating value)?

Answer 8:

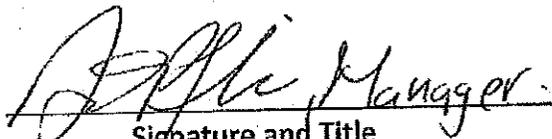
(1) O.R.C. 4928.65 requires the calculation to determine "the then existing market value." Therefore, the Company would propose performing this calculation on a monthly basis, which is also compliant with the PJM GATS Operating Procedures. The referenced calculation should be performed using the "then existing" best information available for the ACP and the market value of one REC price.

(2) The Company will make all source materials relevant to the calculation available to the Commission upon request. The Company does not anticipate making a filing providing this background information.

(3) For any given month, information can be derived from a variety of sources, for example, spot bid-ask spread. The Company is willing to work with the Commission to determine the right source of this information from now until 2012 when the calculation will be needed for the first time.

(4) The Company plans to adhere to the requirements of the PJM GATS Operating Rules on this matter. Currently, all fuels delivered to the Company's generating facilities arrive with fuel analysis information (e.g. mass and heat content) performed by a mutually agreeable lab that is recorded in the Fuelworx system. The Company performs random spot sampling for verification. The information in Fuelworx is used as described in the Company's initial application for certification, where the fuel is weighed as it is consumed and assigned the heating value from Fuelworx. The same process would be followed for any coal consumed.

1. I am the duly authorized representative of R.E. Burger Units 4 & 5.
2. I have personally examined and am familiar with all information contained in the foregoing responses, including any exhibits and attachments, and that based upon my inquiry of those persons immediately responsible for obtaining the information contained in the responses; I believe that the information is true, accurate and complete.
3. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.


Signature and Title

2-8-10
Date

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in

Case No(s). 09-1940-EL-REN

Summary: Answer to Staff Interrogatories - First Set - RE Burger Units 4 & 5 electronically filed by Mr. David L Plusquellic on behalf of FirstEnergy Solutions



Public Utilities Commission

Application for Certification as an
Eligible Ohio Renewable Energy
Resource Generating Facility

Case No.: 09-1940-EL-REN

A. Name of Renewable Generating Facility: R.E. Burger Units 4 & 5
The name specified will appear on the facility's certificate of eligibility issued by the Public Utilities Commission of Ohio.

Facility Location Belmont County, Ohio
Street Address: 57246 Ferry Landing Road
City: Shadyside State: OH Zip Code: 43947

Facility Latitude and Longitude

Latitude: 39 54 51.9192

Longitude: -80 45 41.0436

There are internet mapping tools available to determine your latitude and longitude, if you do not have this information.

*If applicable, U.S. Department of Energy, Energy Information Administration Form EIA-860
Plant Name and Plant Code.*

EIA-860 Plant Name: R.E. Burger Plant

EIA Plant Code: 2864

B. Name of the Facility Owner FirstEnergy Generation Corp.

Please note that the facility owner name listed will be the name that appears on the certificate. The address provided in this section is where the certificate will be sent.

If the facility has multiple owners, please provide the following information for each on additional sheets.

Applicant's Legal Name (First Name, MI, Last Name): David L. Plusquellic

Title: Manager of Renewable Energy Portfolio

Organization: FirstEnergy Solutions Corp.

Street Address: 341 White Pond Drive

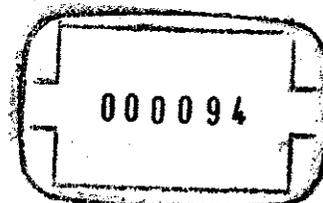
City: Akron State: OH Zip Code: 44320

Country: USA

Phone: 330-315-7225 Fax: 330-315-6749

Email Address: plusquellicd@firstenergycorp.com

Web Site Address (if applicable): www.firstenergysolutions.com



C. List name, address, telephone number and web site address under which Applicant will do business in Ohio.

Applicant's Legal Name: David L. Plusquellic
Title: Manager of Renewable Energy Portfolio
Organization: FirstEnergy Solutions Corp.
Street Address: 341 White Pond Drive
City: Akron State: OH Zip Code: 44320
Country: USA
Phone: 330-315-7225 Fax: 330-315-6749
Email Address: plusquellicd@firstenergycorp.com
Web Site Address (if applicable): www.firstenergysolutions.com

D. Name of Generation Facility Operating Company: FirstEnergy Generation
Legal Name of Contact Person (First Name, MI, Last Name): David L. Plusquellic
Title: Manager of Renewable Energy Portfolio
Organization: FirstEnergy Solutions Corp.
Street Address: 341 White Pond Drive
City: Akron State: OH Zip Code: 44320
Country: USA
Phone: 330-315-7225 Fax: 330-315-6749
Email Address: plusquellicd@firstenergycorp.com
Web Site Address (if applicable): www.firstenergysolutions.com

E. Contact person for regulatory or emergency matters
Legal Name of Contact Person (First Name, MI, Last Name): David L. Plusquellic
Title: Manager of Renewable Energy Portfolio
Organization: FirstEnergy Solutions Corp.
Street Address: 341 White Pond Drive
City: Akron State: OH Zip Code: 44320
Country: USA
Phone: 330-315-7225 Fax: 330-315-6749
Email Address: plusquellicd@firstenergycorp.com
Web Site Address (if applicable): www.firstenergysolutions.com

F. Certification Criteria 1: Deliverability of the Generation into Ohio
Ohio Revised Code (ORC) Sec. 4928.64(B)(3)

The facility must have an interconnection with an electric utility.

Check which of the following applies to your facility's location:

The facility is located in Ohio.

The facility is located in a state geographically contiguous to Ohio (Indiana, Kentucky, Michigan, Pennsylvania, or West Virginia).

The facility is located in the following state:

If the renewable energy resource generation facility is not located in Ohio, Indiana, Kentucky, Michigan, Pennsylvania, or West Virginia, you are required to submit a study by one of the regional transmission organizations (RTO) operating in Ohio, either PJM or Midwest ISO, demonstrating that the power from your facility is physically deliverable into the state of Ohio. The study may be conducted by someone other than the RTO provided that the RTO approves the study. This study must be appended to your application as an exhibit.

G. Certification Criteria 2: Qualified Resource or Technology

You should provide information for only one resource or technology on this application; please check and/or fill out only one of the sections below. If you are applying for more than one resource or technology, you will need to complete a separate application for each resource or technology.

G.1. For the resource or technology you identify in Sections G.4 – G.13 below, please provide a written description of the system.

See Attachment 2 for a description of the Test Co-Firing for Burger Units 4 and 5 and Attachment 4 for a description of the Full Biomass/Co Firing Burger Units 4 and 5

G.2. Please include a detailed description of how the output of the facility is going to be measured and verified, including the configuration of the meter(s) and the meter type(s).

The net generation from each unit is measured using the meters identified in Section N. Please see Attachments 1 and 3 for the requested descriptions.

G.3. Please attach digital photographs that depict an accurate characterization of the renewable generating facility. Please indicate the date(s) the photographs were taken. For existing

facilities, these photographs must be submitted for your application to be reviewed. For proposed facilities or those under construction, photographs will be required to be filed within 30 days of the on-line date of the facility.



The Applicant is applying for certification in Ohio based on the following qualified resource or technology (Sec. 4928.01 O.R.C.):

G.4 __ SOLAR PHOTOVOLTAIC

Total PV Capacity (DC):

Total PV Capacity (AC):

Expected Capacity Factor:

Capacity factor is the ratio of the energy produced to the maximum possible at full power, over a given time period. Capacity factor may be calculated using this formula:

Projected annual generation (kWh or MWh) divided by (the nameplate capacity kW or MW) times (8760 hours—annual)

Anticipated Annual output in kWh/yr:

Location of the PV array: Roof Ground Other

of Modules and/or size of the array:

G.4a PV Modules

For each PV module, provide the following information:

Manufacturer:

Model and Rating:

G.5 SOLAR THERMAL (FOR ELECTRIC GENERATION)

G.6 WIND

Total Nameplate Capacity (kilowatts AC): _____ or kW DC:

Expected Capacity Factor:

Anticipated Annual Output in kWh/yr or MWh/yr:

of Generators:

G.6a Wind Generators

If your system includes multiple generators, please provide the following information for each unique generator you have in your system

Manufacturer:

Model Name and Number:

Generator Nameplate Capacity (kilowatts AC):

Wind Hub Height (ft):

Wind Rotor Diameter (ft):

G.7 — HYDROELECTRIC ("hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state (Sec. 4928.01(35) O.R.C.)

Check each of the following to verify that your facility meets each of the statutory standards (Sec. 4928.01(35) O.R.C.):

- (a) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.
- (b) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.
- (c) The facility complies with mandatory prescriptions regarding fish passage as required by the Federal Energy Regulatory Commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromus fish.
- (d) The facility complies with the recommendations of the Ohio Environmental Protection Agency and with the terms of its Federal Energy Regulatory Commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.
- (e) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.
- (f) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its Federal Energy Regulatory Commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio Historic Preservation Office, to the extent it has jurisdiction over the facility.
- (g) The facility complies with the terms of its Federal Energy Regulatory Commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.
- (h) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

G.8 __ GEOTHERMAL

G.9 __ SOLID WASTE (as defined in ORC section 3734.01), electricity generation using fuel derived from solid wastes through fractionation, biological decomposition, or other process that does not principally involve combustion. (Sec. 4928.01(A)(35) O.R.C.)

Identify all fuel types used by the facility and respective proportions (show by the percent of heat input):

G.10 X BIOMASS (includes biologically-derived methane gas, such as landfill gas)

Identify the fuel type used by the facility: Wood Pellet/Briquette/Chips and/or agricultural biomass fuels in pellets, briquettes or bales.

If co-firing an electric generating facility with a biomass energy resource, the proportion of fuel input attributable to the biomass energy resource shall dictate the proportion of electricity output from the facility that can be considered biomass energy.

G.10a List all fuel types used by the facility and respective proportions (show by the percent of heat input):

TEST PHASE:

Sub-Bituminous/Bituminous coal	80% - 100%
Biomass Pellet/Briquette	0% - 20%
Fuel oil for flame stabilization and startup	<10%

REPOWER TO COMBUST PRINCIPALLY BIOMASS FUELS:

Sub-Bituminous/Bituminous coal	0% - 49%
Biomass Pellet/Briquette/chips/bales	51% - 100%
Fuel oil for flame stabilization and startup	<10%

G.10b Please attach the formula for computing the proportions of output per fuel type by MWh or kWh generated. Please see Attachments 1 and 3 for the calculations and Attachments 2 and 4 for a description of the projects.

G.11 __ FUEL CELL (any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; Sec. 4928.01(35)(A) O.R.C.).

Identify all fuel types used by the facility and respective proportions:

G.12 __ STORAGE FACILITY

If using compressed air or pumped hydropower, the renewable energy resource used to impel the resource into the storage reservoir is (include resource type and facility name):

H. Certification Criteria 3: Placed in Service Date (Sec. 4928.64. (A)(1) O.R.C.)

The Renewable Energy Facility:

__ has a placed-in-service date before January 1, 1998; (month/day/year):

__ has a placed-in-service date on or after January 1, 1998; (month/day/year):

X has been modified or retrofitted on or after January 1, 1998; (month/day/year):

Please provide a detailed description of the modifications or retrofits made to the facility that rendered it eligible for consideration as a qualified renewable energy resource. In your description, please include the date of initial operation and the date of modification or retrofit to use a qualified renewable resource. Please include this description as an exhibit attached to your application filing and identify the subject matter in the heading of the exhibit.

X Not yet online; projected in-service date (month/day/year):

The modifications required to co-fire are expected to be complete to allow co-firing to begin on or around February 1, 2010. See Attachment 1 and 2 for detailed description of co-firing

The full repower to combust principally biomass fuels will be complete prior to December 31, 2012. Please see attachments 3, 4 or the attached Modified Consent Decree for detailed descriptions of the repower

H.1 Is the renewable energy facility owner a mercantile customer?

ORC Sec. 4928.01 (19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

X No

__ Yes

Has the mercantile customer facility owner committed to integrate the resource under the provisions of Rule 4901:1-39-08 O.A.C?

No

Yes

If yes, please attach a copy of your approved application as an exhibit to this filing.

I. Facility Information

The nameplate capacity of the entire facility in megawatts (MW): See table below.

If applicable, what is the expected heat rate of resource used per kWh of net generation:

Historically, these units have operated at a heat rate in the range of 10,000 to 12,000. Future heat rates are expected to be in the range of 9,800 to 11,500

Number of Generating Units: 2

I.1 For each generating unit, provide the following information:

In-Service date of each unit	The nameplate capacity of each unit in megawatts (MW)	Projected Annual Generation (10E6 MWH/yr)	Expected Annual Capacity Factor %
Unit #4	156 MWs	0.4 to 1.3	30% to 90%
Unit #5	156 MWs	0.4 to 1.3	30% to 90%

(To expand the number of rows if more units need to be reported, place your cursor in the bottom right cell and hit tab).

J. Regional Transmission Organization Information

J.1 In which Regional Transmission Organization area is your facility located:

Within Geographic Area of PJM Interconnection, L.L.C.

Within Geographic Area of Midwest ISO

Other (specify):

J.2 Are you a member of a regional transmission organization?

Yes; specify which one: Mid-west ISO and PJM, LLC.

No; explain why you are not a member of a regional transmission organization:

J.3 Balancing Authority operator or control area operator for the facility:

PJM

Midwest ISO

Other (specify): American Transmission Systems, Incorporated, local balancing authority

K. Attribute Tracking System Information

Are you currently registered with an attribute tracking system: Yes No

In which attribute tracking system are you currently registered or in which do you intend to register (*the tracking system you identify will be the system the PUCO contacts with your eligibility certification*):

GATS (Generation Attribute Tracking System)

M-RETS (Midwest Renewable Energy Tracking System)

Other (specify):

K.1 Enter the generation ID number you have been assigned by the tracking system:
If the generation ID number has not yet been assigned, you will need to provide this number to the PUCO within 15 days of your facility receiving this number from the tracking system).

L. Other State Certification

Is the facility certified by another state as an eligible generating resource to meet the renewable portfolio standards of that state?

Yes

No

L.1 If yes, for each state, provide the following information:

Name of State	State Certification Agency	State Certification Number	Date Issued

(To expand the number of rows if more units need to be reported, place your cursor in the bottom right cell and hit tab).

M. Type of Generating Facility

Please check all of the following that apply to your facility:

Utility Generating Facility:

Investor Owned Utility

Rural Electric Cooperative

Municipal System

Electric Services Company (competitive retail electric service provider certified by the PUCO)

Distributed Generation with a net metering and interconnection agreement with a utility.
Identify the utility:

Distributed Generation with both on-site use and wholesale sales.
Identify the utility with which the facility is interconnected:

Distributed Generation, interconnected without net metering.
Identify the utility with which the facility is interconnected:

Note: if the facility does not yet have an interconnection agreement with a utility or transmission system operator, please note here the status of the application for such an agreement:

N. Meter Specifications

All facilities are required to measure output with a utility grade meter. Please provide this information for each meter used in your system.

Please see Attachment 5 for Meter Specifications

Manufacturer:

Serial Number:

Type:

Date of Last Certification:

Attach a photograph of the meter with date image taken. The meter reading must be clearly visible in the photograph.

Total kWh shown on meter at time of photograph: Unit #4 – 18,216.8 MWH, and
Unit #5 – 119,077.5 MWH

Report the total meter reading number at the time of the photograph and specify the appropriate unit of generation (e.g., kWh):

INSERT PHOTOGRAPH(S)

Please see Attachment 5 for a photograph of the meters

The Public Utilities Commission of Ohio reserves the right to verify the accuracy of the data reported to the tracking system and to the PUCO.

Attachment 1—Formula for calculation of Renewable Energy Credits for Test Co-Firing

Formula to calculate RECs:

$$MWH_{REC} = \left(\frac{m_b \cdot HHV_b}{m_b \cdot HHV_b + m_c \cdot HHV_c} \right) \cdot MWH_{NET,MEASURED}$$

Where,

MWH_{REC} = renewable energy credits

m_b = biomass mass

m_c = coal mass

HHV_b = biomass heating value

HHV_c = coal heating value

$MWH_{NET,MEASURED}$ = actual net megawatt hours measured for a given time period

Notes:

1. In the case of multiple biomass fuels this formula would be expanded to include $m_{b,1} \dots m_{b,x}$ and $HHV_{b,1} \dots HHV_{b,x}$ where x is the number of biofuels in use

Example Calculation:

During a 24 hour period, Burger Unit 4 generated steadily at 100 MWe based on its net meter. During the same 24 hour period 1,200 tons of coal was burned along with 60 tons of biomass. Lab analysis has shown the coal to have a HHV of 10,000 Btu/Lb and the biomass to have a HHV of 8,000 Btu/Lb

$$MWH_{REC} = \left(\frac{60\text{tons} \cdot 2,000\text{lb} / \text{ton} \cdot 8,000\text{Btu} / \text{lb}}{60\text{tons} \cdot 2,000\text{lb} / \text{ton} \cdot 8,000\text{Btu} / \text{lb} + 1,200\text{tons} \cdot 2,000\text{lb} / \text{ton} \cdot 10,000\text{Btu} / \text{lb}} \right) \dots$$

... • 100MWe • 24Hours

$$MWH_{REC} = 92$$

The number of Renewable Energy Credits generated during the 24 hour period is 92.

Attachment 2-Description of Test Co-fire Burger Units 4 and 5

OVERVIEW OF CURRENT OPERATIONS

Currently coal is transported by barge to the plant yard for fuel for Units 3, 4 & 5. Coal is stored in a stockpile and is reclaimed by underground equipment for use in the Plant. The reclaimed coal is subsequently conveyed above ground in the coal handling system and supplied to the plant bunkers. Coal is ground to fine particles in mills and then blown into the boiler where it is combusted and the heat is used to generate high pressure steam to run the turbine. Dust collection and mitigation sprays are installed at various points along the coal handling system. A deluge system protects the coal handling system from fire. All coal unloaded at the facility is accounted for using the FE Digital Fuel Tracking System.

RETROFITS FOR BIOMASS CO-FIRING TESTS

Biomass Transportation

Biomass will be transported using semi-tractor covered trailers with dump capability. Trucks will be weighed on site and the values will be logged on a physical printed ticket so that at any given time the delivered mass of biomass is known. This data will be entered manually into the Fuel Works database. Trucks will be routed to the plant yard operation through the existing main gate. Trucks will dump the biomass load into covered storage and then exit the plant site through the same gate.

Biomass may also be delivered by rail. This requires a shallow rail unloader to be retrofit to an existing plant rail spur. Biomass will be transported from the rail cars either by conveyor or truck to the covered storage.

Biomass Storage

A temporary indoor storage facility will be erected to minimize the absorption of moisture into the biomass from rainfall. This facility must be of sufficient size to hold about 100 tons of biomass and allow trucks to dump their loads. The differential between the mass of biomass delivered and mass of biomass burned will equal the mass of biomass in inventory.

Biomass Handling

A front end loader will be used to transport biomass from the temporary storage facility to a temporary fuel conveyor, which conveys the fuel to the units 4 and 5 bunkers. The biomass will flow from the bunker to a gravimetric feeder that will meter the biomass into the existing coal mill. The gravimetric feeder controls will track the amount of biomass burned and the data will be entered into the Fuel Works database. The weight log will allow the plant to determine the mass of biomass that has been

Attachment 2 (continued)

burned during a given time period. Biomass will be fed 100% through one mill providing up to 20% heat input on units 4 and/or 5.

Safety Measures

Biomass dust is more volatile than coal and its dust, in the specific concentration range in air, creates a risk of explosion given an ignition source. With this in mind, mechanical dust collectors and/or sprays may be added at significant dust points. In general, transfer points create dust more so than other points in the coal handling system. Therefore dust mitigation technology may be placed at the following locations:

1. Temporary storage facility where trucks are unloading
2. Temporary fuel conveyor where front-end loader dumps
3. First transfer point in the temporary fuel conveyor.

In addition to engineering controls, housekeeping will be a significant focus to prevent dust settling on horizontal surfaces where it can build up over time. Existing fire suppression systems will be used to protect areas of the coal handling system affected. Additionally administrative controls will be enforced including fire hoses placed strategically along with fire extinguishers.

On October 23, 2009, FirstEnergy Generation Corp. requested from the Ohio EPA a six month research and development permit exemption under O.A.C. Section 3745-31-03 (3) (d) to test co-firing of biomass fuels at Burger Units 4 and 5. The PTI exemption letter was received by FirstEnergy Generation Corp. on 11/25/09, which permits FirstEnergy to test burn biomass co-firing with coal. FirstEnergy Generation Corp. will commence test burn of biomass at these units on or around February 1, 2010. A copy of the acceptance letter from OEPA is attached with this application.

Attachment 3 -Formula for Calculation of Renewable Energy Credits for Full Biomass/Co-Firing

Formula to calculate RECS:

$$MWH_{REC} = \left(\frac{m_b \cdot HHV_b}{m_b \cdot HHV_b + m_c \cdot HHV_c} \right) \cdot MWH_{NET,MEASURED} \cdot ACF$$

Where,

MWH_{REC} = renewable energy credits

m_b = biomass mass

m_c = coal mass

HHV_b = biomass heating value

HHV_c = coal heating value

$MWH_{NET,MEASURED}$ = actual net megawatt hours measured for a given time period

ACF= Alternative Compliance Factor

If RECMARKET PRICE > or = ACP, ACF= 1.0

$$\text{If RECMARKET PRICE} < \text{ACP, } ACF = \left(\frac{ACP}{RECMARKET_PRICE} \right)$$

ACP = Alternative Compliance Payment (In 2009, ACP = \$45/MWH)

RECMARKET PRICE = Market value of one REC

Example Calculation

During a 24 hour period, Burger Unit 4 generated steadily at 100 MW based on its net meter. During the same 24 hour period 1,200 tons of coal was burned along with 60 tons of biomass. Lab analysis has shown the coal to have a HHV of 10,000 Btu/Lb and the biomass to have a HHV of 8,000 BTU/lb. Assume the ACP = \$45/MWH and the RECMARKET PRICE = \$10/MWH.

$$MWH_{REC} = \left(\frac{60\text{tons} \cdot 2,000\text{lb/ton} \cdot 8,000\text{Btu/lb}}{60\text{tons} \cdot 2,000\text{lb/ton} \cdot 8,000\text{Btu/lb} + 1,200\text{tons} \cdot 2,000\text{lb/ton} \cdot 10,000\text{Btu/lb}} \right) \dots$$

$$\dots \cdot 100\text{MWe} \cdot 24\text{Hours} \cdot \left(\frac{\$45}{\$10} \right)$$

$$MWH_{REC} = 92.5 \cdot 4.5 = 415$$

Attachment 4 – Description of Full Biomass/Co-Firing at Burger Units 4 and 5

REGULATORY

As required by R.C. Section 4928.65, please see attached commitment letter and *Joint Motion To Modify Consent Decree With Order Modifying Consent Decree*, which serve as the necessary commitment to modify the R.E. Burger Plant - a generating facility of greater than seventy-five megawatts situated in this state - to enable the facility to generate principally from biomass energy by June 30, 2013.

On October 23, 2009, FirstEnergy Generation Corp. requested from the Ohio EPA a six month research and development permit exemption under O.A.C. Section 3745-31-03 (3) (d) to test co-firing of biomass fuels at Burger Units 4 and 5. The PTI exemption letter was received by FirstEnergy Generation Corp. on 11/25/09, which permits FirstEnergy to test burn biomass co-firing with coal. FirstEnergy Generation Corp. will commence test burn of biomass at these units on or around February 1, 2010. A copy of the acceptance letter from OEPA is attached with this application.

OVERVIEW OF CURRENT OPERATIONS

Currently coal is transported by barge to the plant yard for fuel for Units 3, 4 & 5. Coal is stored in a stockpile and is reclaimed by underground equipment for use in the Plant. The reclaimed coal is subsequently conveyed above ground in the coal handling system and supplied to in plant bunkers. Coal is ground to fine particles in mills and then blown into the boiler where it is combusted and the heat is used to generate high pressure steam to run the turbine. Dust collection and mitigation sprays are installed at various points along the coal handling system. A deluge system protects the coal handling system from fire. All coal unloaded at the facility is weighed by belt meters which is used to determine the quantities that are burned by each unit or placed into reserve. The data are entered into the FE Digital Fuel Tracking System.

RETROFITS FOR BIOMASS

FirstEnergy is in the early engineering phase for the changes required on site for handling and burning biomass, so the concepts presented below are preliminary design plans.

Biomass Transportation

Biomass will be transported using barge, rail and semi-tractor covered trailers. Biomass being unloaded from the barges, rail cars and trucks will be tracked through the FE Digital Fuel Tracking System.

The biomass that has been processed into pellets or briquettes will be unloaded from the barges, rail cars and trucks and conveyed to a storage facility. The conveyors will be enclosed to keep the biomass dry and prevent fugitive dust issues. All of the necessary safety systems will be installed in the biomass handling system.

If biomass wood chips or agricultural crop bales are burned in the boilers, they will be unloaded primarily by truck and conveyed to an outdoor storage area.

Attachment 4 (continued)

Biomass Storage

A storage facility will be erected to minimize the absorption of moisture into the processed biomass from rainfall. This facility will store 26,000-30,000 tons of biomass. All of the necessary safety systems will be installed in the storage facility.

If biomass wood chips or agricultural crop bales are burned in the boilers, separate storage facilities would be installed for outdoor storage.

The differential between the mass of biomass delivered and mass of biomass burned will equal the mass of biomass in inventory. All of the necessary safety systems will be installed into the storage facility.

Biomass Handling

The processed biomass will be reclaimed from the storage facility through existing reclaim hoppers and be conveyed to the Plant bunkers by an enclosed conveyor system. The conveyors will feed both units 4 and 5 with up to 100% biomass. The capability to reclaim and convey up to 20% coal will be designed into the system for co-firing with the biomass.

The chipped or baled biomass, if used, will be reclaimed through new equipment specifically designed to properly handle this material.

Safety Measures for Handling of Biomass

Biomass dust is more volatile than coal and its dust, in the specific concentration ranges in air, creates a risk of explosion given an ignition source. Dust collection equipment will be added at significant dust points. In general, transfer points create dust more so than other points in the biomass handling system. Therefore dust mitigation technology will be placed throughout the system.

In addition to engineering controls, housekeeping will be a significant focus to prevent dust settling on horizontal surfaces where it can build up over time. Fire detection and suppression systems will be used to protect the biomass handling system. Additionally administrative controls will be enforced including fire hoses placed strategically along with fire extinguishers.

Expected Changes to Powerhouse

Equipment in the powerhouse is expected to be changed to handle and combust the biomass. Existing coal mills and burner systems will be changed to combust the biomass.

Supplemental firing systems may be added to meet the current boiler steaming rates while firing processed biomass due to the lower heat content of biomass compared to coal. The equipment added may include silos, hammer mills, pneumatic conveying systems, new burner systems and the proper safety equipment.

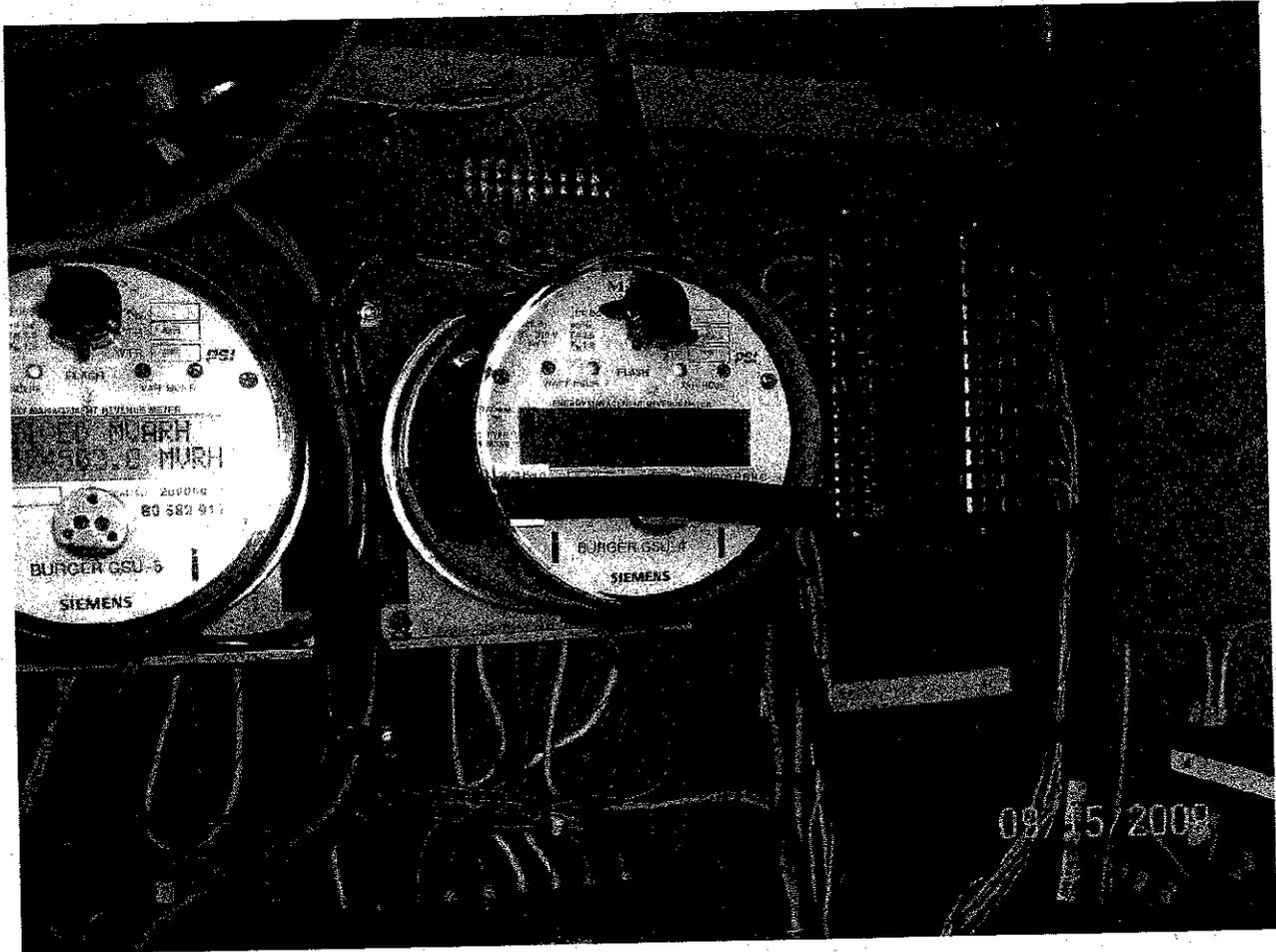
Equipment may also be added to allow the use of wood chips and baled biomass. The equipment may include a stoker, stoker feed system, stoker ash handling system, bale grinders, pneumatic conveying systems, biomass injection systems and proper safety equipment.

Attachment 5 – Meter Specifications and Photographs

Meter Specifications

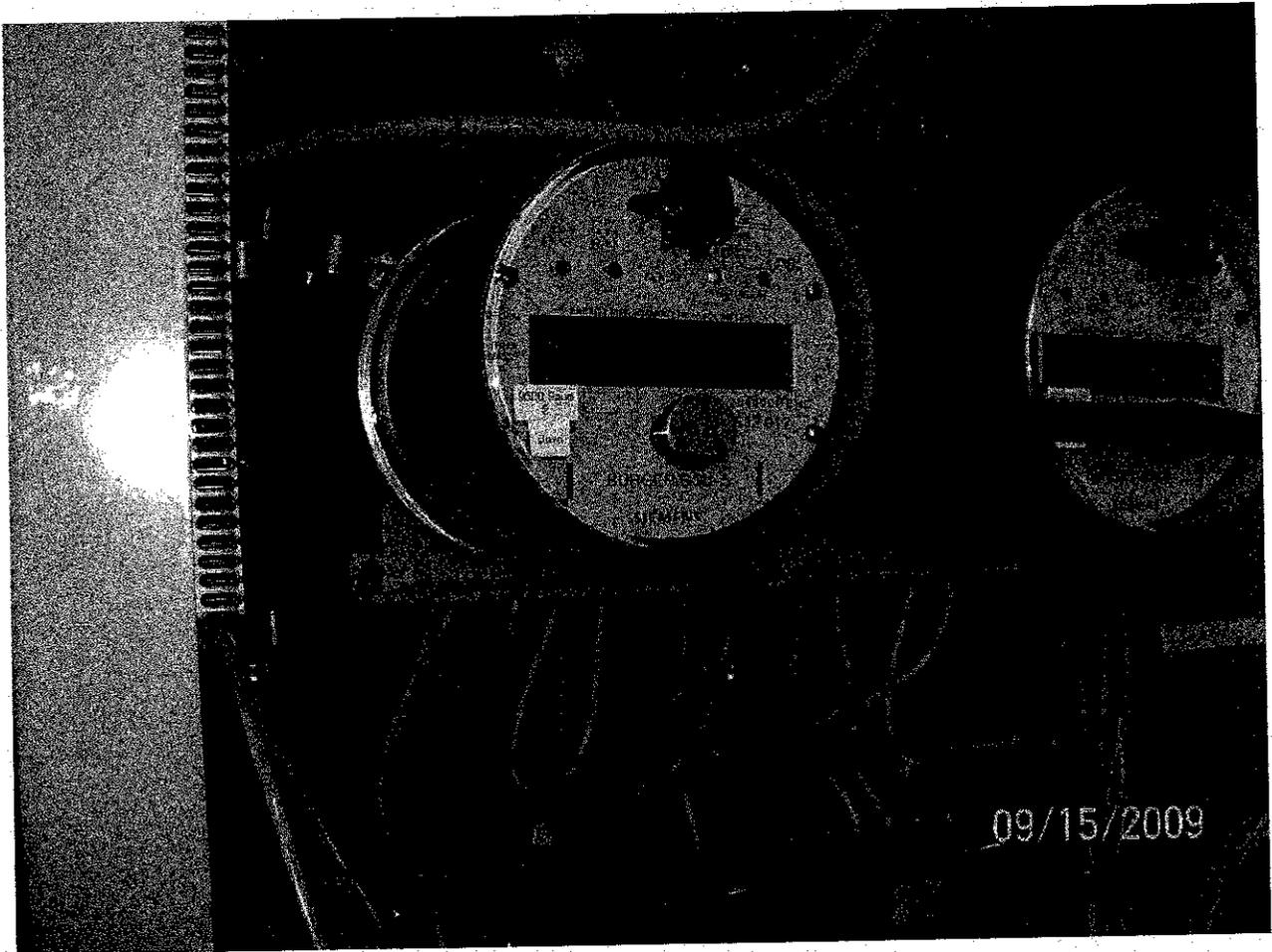
<u>Bay Shore Plant</u>		<u>Utility Grade Meter (Revenue Meter)</u>			<u>Next Certification Date</u>
<u>Generating Units</u>	<u>Manufacturer</u>	<u>Serial Number</u>	<u>Type</u>	<u>Date of Last Certification</u>	
Bu-4	Siemens	680-582-916	2510	October 15, 2008	October 2010
Bu-5	Siemens	680-582-917	2510	October 15, 2008	October 2010

Burger Unit #4 - Meter



Attachment 5 (continued)

Burger Unit #5 - Meter



This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/11/2009 11:00:35 AM

in

Case No(s). 09-1940-EL-REN

Summary: Application Application for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility electronically filed by Mr. Daniel R. Conway on behalf of FirstEnergy Generation Corp.



tal Alexander@calfee.com
614.621.7774 Direct

January 26, 2010

VIA REGULAR U.S. MAIL

Nolan Moser
Will Reisinger
The Ohio Environmental Council
1207 Grandview Ave., Suite 201
Columbus, Ohio 43212-3449

Re: 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, Case No. 09-1940-EL-REN

Dear Counselor:

Enclosed please find *FirstEnergy Generation Corp.'s Responses To The Ohio Environmental Counsel's First Set Of Interrogatories And Requests For Production Of Documents.*

Sincerely,

Trevor Alexander

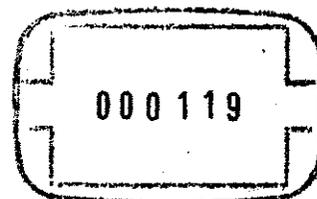
TA:dy

Enclosure

cc: Henry W. Ekhart (w/enc.)
Michael Heintz (w/enc.)
Joseph P. Serio (w/enc.)
Terrence O'Donnell (w/enc.)

Calfee, Halter & Griswold LLP
Attorneys at Law

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614.621.1500 Phone
614.621.0010 Fax
www.calfee.com



**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
And 5 As An Eligible Ohio Renewable
Energy Resource Facility**

)
) Case No. 09-1940-EL-REN
)
)
)
)

**FIRSTENERGY GENERATION CORP.'S RESPONSES TO THE OHIO
ENVIRONMENTAL COUNSEL'S FIRST SET OF INTERROGATORIES AND
REQUESTS FOR THE PRODUCTION OF DOCUMENTS**

Pursuant to O.A.C. 4901-1-16 through O.A.C. 4901-1-20, and in accordance with Ohio Rules of Civil Procedure 26, 33 and 34, FirstEnergy Generation Corp. ("FirstEnergy") states its responses and objections to the Ohio Environmental Council ("OEC") First Set of Interrogatories and Requests for Production of Documents ("Requests"):

GENERAL OBJECTIONS

A. These general objections are hereby incorporated by reference into the responses made with respect to each separate Request. The inclusion of any specific objection to any Request in a response below is not intended, nor shall in any way be deemed, as a waiver of any general objection or any specific objection made herein or that may be asserted at another date.

B. FirstEnergy objects to each Request to the extent that it seeks information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, trade secret privilege, and any other applicable statutory or common law privilege, prohibition, limitation or immunity from disclosure. Nothing contained in these answers is intended as a

waiver of the attorney-client privilege, work product doctrine, trade secret privilege or any other applicable privilege, immunity, prohibition, or limitation, and FirstEnergy reserves the right to assert objections based on such privileges, immunities, prohibitions, and limitations to the greatest extent permitted by law.

C. FirstEnergy objects to each Request to the extent that it seeks production of information that is confidential business, commercial, and/or proprietary information belonging to FirstEnergy in the absence of a protective order.

D. FirstEnergy objects to each Request to the extent that it seeks production of information that is neither relevant to the claims or defenses of any party to this action nor reasonably calculated to lead to the discovery of admissible evidence.

E. FirstEnergy's disclosure of information in any response to any Request is not intended to waive, nor does it constitute a waiver of, any objection that FirstEnergy may have to the admissibility, authenticity, competency, or relevance of the information produced. For all information produced in response to each Request, FirstEnergy reserves all objections or other questions regarding the competency, relevance, materiality, privilege, or admissibility of such information as evidence in this suit or any other proceeding, action, or trial.

F. FirstEnergy objects to the OEC's instructions and definitions to the extent they purport to impose upon FirstEnergy obligations greater than those contained in the Ohio Administrative Code or the Ohio Rules of Civil Procedure.

G. In responding to these Requests, FirstEnergy does not admit the truth, validity, completeness, or merit of any definition set forth in the Requests.

RESPONSES TO INTERROGATORIES

INTERROGATORY No. 1: Describe in detail the source and method of obtaining the wood pellets or other biomass product procured to create the energy asserted, including a description of any contracts to obtain biomass resources.

ANSWER: Objection. In addition to the General Objections, FirstEnergy objects to this Interrogatory on the grounds that it is vague and ambiguous, is overly broad, and seeks information that is not reasonably calculated to lead to the discovery of relevant information. Without waiving its objections, FirstEnergy states that it intends to procure wood, as well as agricultural products, in raw form or engineered product form such as pellets and/or briquettes. FirstEnergy has not entered into any contracts to obtain biomass resources.

INTERROGATORY No. 2: Describe any sustainability certifications, sourcing standards, or other protocol that will be used in conjunction with the production and transport of the wood pellets or other biomass product to be utilized.

ANSWER: Objection. In addition to the General Objections, FirstEnergy objects to this Interrogatory on the grounds that it is vague and ambiguous. Without waiving its objections, FirstEnergy states that since it has not entered into any contracts for the supply of biomass product, it has not yet determined the protocols which may be in place relating to sustainability certifications or sourcing standards. However, FirstEnergy intends to consider standards such as the Sustainable Forest Initiative during the evaluation of potential suppliers.

INTERROGATORY No. 3: Describe the anticipated net carbon output of the biomass-fueled energy cycle at the facility, taking into account harvesting or production, transportation, and combustion. In answering, describe the method of calculation used.

ANSWER: Objection. In addition to the General Objections, FirstEnergy objects to this Interrogatory on the grounds that it is vague, ambiguous, and seeks information that is not reasonably calculated to lead to the discovery of relevant information. Without waiving its objections, FirstEnergy states that it has not determined the anticipated net carbon output for the Burger facility. However, FirstEnergy Solutions (FES) is a member of the Electric Power Research Institute (EPRI) and will be working with the EPRI and the National Renewable Energy Laboratories (NREL) to evaluate net carbon output. FES

currently intends to use this information and apply site specific details (once the biomass supplier locations are identified) to complete the net carbon output calculation at a later date.

INTERROGATORY No. 4: Based on the answer to Interrogatory No. 3, explain whether the biomass based generation cycle contemplated by this application will result in a net reduction in carbon emissions when compared to a coal-fired power generation producing the same heat output?

ANSWER: See response to Interrogatory No. 3.

INTERROGATORY No. 5: Describe those geographic regions(s) or forests, including the state, that will provide the source of biomass to be utilized.

ANSWER: See response to Interrogatory No. 1. FirstEnergy further states that it currently intends to utilize biomass obtained from the United States and/or Canada.

INTERROGATORY No. 6: Describe in detail how the biomass material will be transferred or shipped to the facility, including the mode of transport and the type of fuel to be used in transport.

ANSWER: Objection. In addition to the General Objections, FirstEnergy objects to this Interrogatory on the grounds that it seeks information that is not reasonably calculated to lead to the discovery of relevant information. Without waiving its objections, FirstEnergy states that since it has not yet entered into any contracts with suppliers, it has not yet determined how the biomass material will be shipped to the facility. FirstEnergy is currently considering shipment options including, but not limited to, barge, rail and/or truck. Most forms of transportation are currently anticipated to utilize diesel fuel. The actual mix of transportation modes will be dependent upon the location of the biomass suppliers, which at this time has not been identified.

INTERROGATORY No. 7: Describe in detail how the biomass material will be combusted.

ANSWER: FirstEnergy has not yet conclusively determined how the biomass material will be combusted. FirstEnergy is evaluating different methods of combustion which may include suspension firing and stoker grate fired.

INTERROGATORY No. 8: Describe the percentage of anticipated annual generation that will come from each fuel type used at the facility, including biomass resources, at start-up and when the facility is at fully functioning capacity.

ANSWER: Please see the Application filed in Case No. 09-1940-EL-REN - *In the Matter of R E Burger Units 4 & 5 for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*. The project will combust principally biomass fuels and potentially some low sulfur western coal. The project is currently evaluating various design alternatives and forecasts for the delivered cost of fuel. The actual mix of various types of biomass fuels (wood, agricultural) to be used will not be determined until these studies are completed (approximately 3rd quarter of 2010).

INTERROGATORY No. 9: Describe in detail the modifications that have been made, or will be made, to the facility in order to allow it to qualify as an eligible renewable energy resource.

ANSWER: Please see the Application filed in Case No. 09-1940-EL-REN - *In the Matter of R E Burger Units 4 & 5 for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility* - for an explanation of the modifications that have been made, or will be made, to the facility in order to allow it to qualify as an eligible renewable energy resource.

INTERROGATORY No. 10: Describe the annual amount, in tonnage, of biomass material anticipated to be used for of each biomass fuel type to be used at the facility.

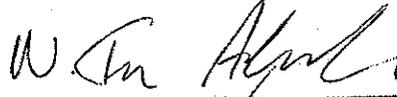
ANSWER: FirstEnergy estimates the consumption to be between 750 ktons/yr to 1,400 ktons/yr total on a dry biomass basis. It does not have estimates for each biomass fuel type to be used at the facility.

RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Provide all documents, contracts, and calculations referred to or used in answering the above interrogatories.

RESPONSE: N/A

As to objections,



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CERTIFICATE OF SERVICE

A copy of the foregoing FirstEnergy Generation Corp.'s Responses To The Ohio Environmental Counsel's First Set Of Interrogatories And Requests For The Production Of Documents has been served this 26th day of January, 2010, by first class United States mail, postage prepaid, upon:

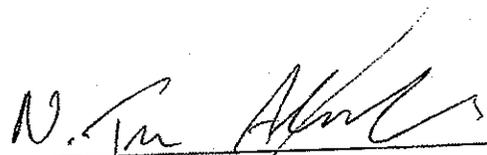
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