

ORIGINAL

In The
Supreme Court of Ohio

The Ohio Environmental Council,

Appellant,

v.

**The Public Utilities Commission of
Ohio,**

Appellee.

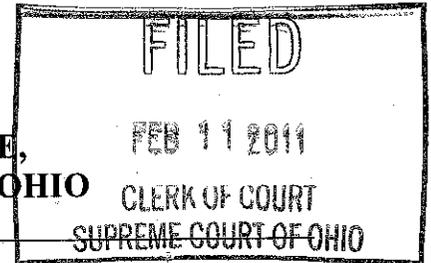
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Case No. 10-1977

On appeal from the Public Utilities
Commission of Ohio, 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.*

MEMORANDUM IN RESPONSE
TO

FEBRUARY 3, 2011 ORDER
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO



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**In The
Supreme Court of Ohio**

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	:	<i>Resource Generating Facility.</i>
Appellee.	:	

**MEMORANDUM IN RESPONSE
TO
FEBRUARY 3, 2011 ORDER
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

On January 18, 2011, intervening Appellee FirstEnergy Solutions (Solutions) filed a motion to dismiss this appeal. On February 3, 2011 the Court directed the Public Utilities Commission of Ohio (PUCO or the Commission) to submit a response to this motion. The Commission's response is quite simple. Solutions is correct. Because the case on appeal is still under consideration at the Commission, this appeal is premature and should be dismissed.

DISCUSSION

As discussed in its Motion to Dismiss, Solutions filed an application asking the Commission to grant a certificate to designate units 4 and 5 of the R.E. Burger plant (Burger) as a renewable energy resource generating facility. These sorts of facilities produce, in addition to electricity, what are termed “renewable energy credits” (RECs). A REC can be used to help a utility achieve renewable energy sourcing requirements imposed under R.C. 4928.64(B)(2) and provides an alternative to the utility actually building an alternative energy facility itself. Generally speaking, each megawatt hour of electricity produced in such a facility creates one REC. Burger, had it been converted to burn biomass,¹ would have been a *unique* renewable energy resource generating facility. It would have been the only such facility which would have qualified to be credited with more than one REC per megawatt hour of electricity generation. The statutory time limit to qualify for this treatment has now passed and no other facilities have applied. Thus the REC multiplier effect under the statute would have applied to Burger and no other facility.

The REC multiplier is not a trivial matter. RECs have a value and the number of RECs that a facility will produce is important in determining whether that facility will be

¹ The likelihood of the Burger Project moving forward has been called into question by FirstEnergy Corp. in a filing made with the Securities and Exchange Commission in late 2010. *See*, <http://investors.firstenergycorp.com/phoenix.zhtml?c=102230&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDEwMzEyOTYtMTAtMDAwMDM1L3htbA%3d%3d>.

constructed or operated. The statute provides the formula for determining the multiplier for Burger, specifically:

...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.

Ohio Rev. Code Ann. § 4928.65 (West 2010), Appendix at 1. The key input to this formula is determining the “then existing market value of one renewable energy credit.”

This is the very issue which is still pending before the Commission and the issue is not simple. Burger would have been sufficiently large, compared to other alternative energy sources, that its operation would, of itself, have changed the market price. The Commission has taken comments but has not yet issued a decision on that issue.

The issue is premature. As this Court has observed:

R.C. 4903.13 provides that “[a] *final order* 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.” (Emphasis added.) An interim order on appeal in a pending commission proceeding will not be considered by this court. *Cincinnati v. Pub. Util. Comm.* (1992), 63 Ohio St.3d

366, 369, 588 N.E.2d 775. “Timeliness, as well as an effect on substantial rights, is necessary for a valid appeal.” *Senior Citizens Coalition v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 329, 332, 533 N.E.2d 353.

Accordingly, this court has consistently dismissed premature appeals. *E.g.*, *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 90 Ohio St.3d 1447, 737 N.E.2d 52; *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 1436, 676 N.E.2d 1184; *Ohio Domestic Violence Network v. Pub. Util. Comm.* (1992), 65 Ohio St.3d 438, 605 N.E.2d 13.

Cincinnati Gas and Electric Co. v. Pub. Util. Comm’n, 103 Ohio St. 3d 398 (2004). This Court disfavors piecemeal appeals. *Senior Citizens Coalition v. Pub. Util. Comm’n*, 40 Ohio St. 3d 329, 332, 533 N.E.2d 353 (1988). The instant case is piecemeal. The point of the conversion of Burger was to create RECs. In the absence of a Commission decision about the multiplier, Solutions cannot know how many RECs the plant would have produced. The determination would have been economically significant to Solutions. The determination is significant to the Appellant as well. Two of its propositions of law address this multiplier provision.

In short, Appellant can show no prejudice if this case is dismissed. It can file an appeal when the Commission has issued a final and complete order.

CONCLUSION

This Court's time is valuable and should not be taken up with partially formed cases or incomplete determinations. The Commission has not completed its action in the situation now before the Court. It should be permitted to do so. The appeal should be dismissed.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Response to February 3, 2011 Order , submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 11th day of February, 2011.



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APPENDIX

§ 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.