

IN THE SUPREME COURT OF OHIO

The Ohio Environmental Council,)
)
)
 Appellant,)
)
 v.)
)
 The Public Utilities Commission)
 of Ohio,)
)
)
 Appellee.)

Case No. 10-1977

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

**REPLY TO THE PUBLIC UTILITIES COMMISSION OF OHIO
 BY
 THE OHIO ENVIRONMENTAL COUNCIL**

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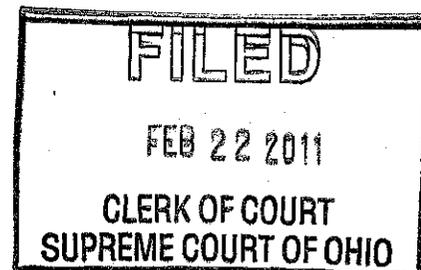
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I. INTRODUCTION

On February 3, 2011, this court requested the appellee Public Utilities Commission of Ohio (“PUCO” or “Commission”) to reply to the Motion to Dismiss filed by the intervening appellee, FirstEnergy Solutions Corporation (“FES”). FES’s motion argued that the present appeal is not ripe because the Commission has not yet entered a final order. FES asserts, as its sole justification for requesting that this case be dismissed, that this decision is not final because the Commission also solicited comments regarding how to determine the market price for renewable energy credits (“RECs”). The Memorandum in Response filed by the Commission supports and mirrors the arguments contained in FES’s Motion to Dismiss. Both pleadings are wrong to suggest that the PUCO has not entered a final order, and both pleadings fail to represent important facts to this court. The facts that FES and the PUCO fail to represent are indisputable and dispositive, leaving FES’s Motion to Dismiss void.

First, there was a final order. The Commission certified the Burger facility as a renewable energy resource facility and applied R.C. 4928.65. The application for rehearing filed by the Ohio Environmental Council (“OEC”) was denied, making the order final and appealable to this court. Second, FES has stated in recent weeks—both in the press and in official legal filings—that it will not go forward with the Burger biomass project and that it will permanently close the plant. Therefore, the REC calculation issue raised by FES and the PUCO is moot; because the calculation could only have applied to the Burger project, it is now irrelevant. The justification cited by FES and the PUCO is moot. The OEC’s Proposition of Law One¹ and

¹ OEC’s 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.” OEC Merit Brief at 6.

Proposition of Law Two² should be heard by this court. They affect the PUCO's procedure and application of the biomass energy rules in general. These issues are broadly applicable to all biomass energy applications and, for judicial economy, should be heard in this proceeding.

This court should reject the arguments raised by FES and the PUCO, and hear the OEC's Propositions of Law One and Two. The legal arguments raised in both pleadings are false, and both pleadings negligently fail to represent the important fact that the Burger project will not go forward, making the REC calculation issue moot. The FES/PUCO tactic to have this case dismissed should be rejected by this court.

II. ARGUMENT

A. **The Commission Entered a Final Order Certifying the R.E. Burger Facility as a Renewable Energy Resource Facility, and Later the OEC's Application For Rehearing Was Denied as a Matter of Law.**

FES supports its Motion to Dismiss by arguing that the Commission has failed to issue a final order in this matter; therefore, the OEC's appeal is "premature."³ The Public Utilities Commission responded by stating that "[FES] is correct."⁴ The FES/PUCO argument, however, is clearly false. R.C. 4903.13 provides that this court has jurisdiction to hear appeals of final orders issued by the Public Utilities Commission of Ohio. As this court has held, "an order of the commission affecting a 'substantial right' of a party is final and appealable pursuant to 4903.13."⁵ A "substantial right" requires a "concomitant prejudice to the party seeking review in this court."⁶ The Commission's certification order incorporated an unlawful and unreasonable

² OEC 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." Id. at 11.

³ FES Motion to Dismiss at 3.

⁴ Memorandum in Response at 1.

⁵ *Hall China Co. v. Pub. Util. Comm.*, 50 Ohio St. 206, 209 (1977).

⁶ *Cincinnati v. Pub. Util. Comm.*, 63 Ohio St. 3d 366, 368 (1992) citing *Cleveland, Columbus & Cincinnati Highway v. Public Utilities Com.* (1943), 141 Ohio St. 634; 49 N.E.2d 759.

interpretation of the Ohio Administrative Code rule sections regarding biomass energy sources. The OEC, as made clear in its merit brief, is prejudiced by the Commission's continued unlawful misapplication of those rules.

The OEC, therefore, is properly appealing a final opinion and order by the PUCO. Moreover, the OEC used its only right of appeal at the Commission before filing the present appeal at this court. Following the Commission's certification order on August 11, 2010, the OEC followed PUCO procedure and filed an Application for Rehearing pursuant to R.C. 4903.10 and Ohio Administrative Code ("O.A.C.") 4901-1-35(A). The Commission never acted on the Application for Rehearing. Pursuant to R.C. 4903.10, "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." Therefore, the Application for Rehearing was denied as a matter of law on October 11, 2010, which was thirty days after it was filed.

Both FES and the PUCO are attempting to argue that because the Commission requested parties to file comments on the proper way to calculate and award certain renewable energy credits ("RECs") on the Burger docket, the PUCO has not issued a final order certifying the Burger facility. As the OEC stated in its memorandum in response to FES's motion, this tactic "is a red herring that should be rejected by this court."⁷ The Commission's certification order certified the facility as "renewable" and applied R.C. 4928.65, the multiplier formula, to the Burger facility. Those decisions were final and appealable.

B. Because FES Has Repeatedly Stated in the Press and in Official Legal Filings That it Will Not Go Forward with the Project, The REC Calculation Issue is Moot and is Not a Reason to Dismiss This Case.

⁷ OEC Memorandum in Opposition to Motion to Dismiss at 4.

The Burger multiplier is codified in Ohio Revised Code Section R.C. 4928.65 (the “Burger Statute”). More specifically, the “Burger Statute” states 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 existing 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. . . the product obtained by multiplying the actual percentage of biomass feedstock by heat input [in btu’s] 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 [for the non-solar benchmarks] by the then existing market value of one renewable energy credit. (Emphasis added)

The Commission opened a 60-day comment period on the question of how to calculate the market value of RECs. Both the Commission and FES argue that this request for comments means there is still a “live” issue at the Commission and the OEC’s appeal is premature.

However, FES’s own statements and legal filings make the FES/PUCO argument void. FES has stated on numerous occasions that the Burger project will not go forward. On November 17, the company first announced plans to cancel the project:

FirstEnergy Corp. (NYSE: FE) announced today that it is cancelling plans to repower units 4 and 5 at its R.E. Burger Plant in Shadyside, Ohio, to generate electricity principally with biomass and will permanently shut down the units by December 31, 2010....

Burger Plant units 4 and 5 were included as part of a 2005 Consent Decree settlement with the U.S. Environmental Protection Agency (U.S. EPA) and other parties to the company’s New Source Review case involving its W. H. Sammis Plant. Under the 2005 Consent Decree, FirstEnergy was obligated to repower, scrub or shut down the units as part of an overall compliance plan to reduce system-wide emissions of sulfur dioxide. **FirstEnergy has**

notified the U.S. EPA and the plaintiffs in the case of its plans to close the Burger units.”⁸ (Emphasis added)

On a fundamental level, the PUCO’s memorandum does not make any sense. The Commission must not comprehend the argument it is attempting to make. First, the PUCO’s memorandum argues that there is still a “live” issue at the Commission because the Commission is still considering how to interpret R.C. 4928.65. Simultaneously, however, the PUCO’s memorandum concedes that the Burger retrofit will not go forward. These two aspects of the PUCO’s pleading are irreconcilable.

The following lines demonstrate the problem with the PUCO’s argument:

“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, [FES] cannot know how many RECs the plant would have produced. The determination would have been economically significant to [FES].”⁹

The OEC is incredulous. The lines quoted above argue that FES has an interest in knowing how many RECs the plant *would have* produced. First, there is no reason why FES needs to know how profitable a project that has been cancelled might have been—had the project not been cancelled. Second, the line of argument shows that the PUCO itself even recognizes that the project will never go forward. Therefore, the multiplier issue—and the FES/PUCO justification for seeking to have this case dismissed—is void. Because this issue was discussed in detail in the OEC’s Motion to Dismiss, we quote the following paragraphs from that pleading:

“It is undisputed that the multiplier calculation found in 4928.65 only applies to the Burger plant.¹⁰ Because the Burger retrofit will not go forward, the Burger REC calculation issue is moot, and the

⁸ See Attachment A., FirstEnergy Corp. Press Release, “FirstEnergy, Citing Lower Market Prices, Cancels Plans For Biomass Conversion Project, November 17, 2010.

⁹ Ohio Supreme Court Case No. 2010-1977, PUCO Staff Memorandum in Response to FES Motion to Dismiss at 4.

¹⁰ The criteria for the REC multiplier specifically apply to the Burger plant, and no other facility could take advantage of the multiplier.

Commission has no reason to consider it. The PUCO staff even acknowledges that the multiplier statute “would have applied to Burger and no other facility.”¹¹ Staff’s pleading repeatedly uses similar language referring to the Burger plant and the REC multiplier as issues that *might have been*, thus admitting that the project will not go forward (e.g. the multiplier statute “would have applied to Burger and no other facility”¹²; “Burger would have been...”¹³; the REC determination “would have been [significant to FES],”¹³ etc.) Therefore, even the PUCO staff recognizes that the Burger project will not go forward and, accordingly, that the multiplier is a moot issue. The portion of R.C. 4928.65 that sets forth the multiplier calculation in effect has been struck from the Ohio Revised Code. It is now meaningless. It cannot apply to any other facility.

Nonetheless, even though the Burger REC calculation—like the plant itself—is a dead issue, FES filed for leave to intervene in the OEC’s Supreme Court appeal and also filed a motion to dismiss the appeal. FES’s motion to dismiss claims, *as its only grounds*, that the appeal was not ripe because the Burger REC calculation issue is still being considered by the Commission.¹⁴ The OEC filed a memorandum in opposition to the motion to dismiss, arguing that the REC calculation issue did not make the appeal unripe.¹⁵ However, based on recent, and repeated, statements by the company, there can be no doubt that the Burger plant will be shut down and will not be co-fired with biomass. These facts make the Burger REC multiplier issue pending before this Commission moot.

The only logical conclusion we can draw is that FES is attempting to hold onto this multiplier issue so that it can represent to the Supreme Court of Ohio that there has not been a final order from the Commission. Such questionable litigation tactics should not be condoned by the Supreme Court of Ohio or the Commission.”¹⁶ (Emphasis original)

Resting their entire argument on the multiplier issue provides no justification for the dismissal of the OEC’s appeal. The appeal centers on the inadequate justification used by the Commission to

¹¹ Ohio Supreme Court Case No. 2010-1977, PUCO Staff Memorandum in Response to FES Motion to Dismiss.

¹² Id. at 2.

¹³ Id. at 3.

¹⁴ Ohio Supreme Court Case No. 2010-1977, FES Motion to Dismiss.

¹⁵ Ohio Supreme Court Case No. 2010-1977, OEC Memorandum in Opposition to FES Motion to Dismiss.

¹⁶ Attachment A, PUCO Case No. 09-1940-EL-REN, OEC Motion to Dismiss at 7-8.

certify the Burger facility as a renewable energy generating facility. Therefore, the OEC respectfully requests that this court should hear this appeal.

D. For Judicial Economy, this Court Should Consider These Issues Pertaining to Biomass Energy in This Proceeding.

The PUCO argues that “instant case is piecemeal” and should not be heard until “the Commission has issued a final and complete order.”¹⁷ As stated above, the OEC disagrees with the statement that the order is not final and that this case is “piecemeal.” However, the PUCO is correct to argue that this court “disfavors piecemeal appeals” and will only hear a final order from the commission. The reason behind this rule is that the court wants to avoid separating issues and reviewing the same questions multiple times. In other words, the court’s time is finite and in the interest of judicial economy, only final orders should be considered.

If the FES/PUCO tactic is successful, and this appeal is dismissed based on a dubious procedural argument, the issues raised by the OEC will have to be raised again. The issues raised by the OEC regarding the PUCO’s interpretation and application of the Ohio Administrative Code will apply any time a utility or other applicant seeks to receive renewable certification for a biomass energy project. Therefore, if this case is dismissed, these issues will evade review—only to be raised in a future appeal.¹⁸

III. CONCLUSION

FES’s Motion to Dismiss should be rejected by this court for two reasons. First, it is clear that the Public Utilities Commission of Ohio issued a final order certifying the R.E. Burger

¹⁷ PUCO Memorandum in Response at 4.

¹⁸ See *Smith v. Leis* (2006), 111 Ohio St. 3d 493, 2006-Ohio-6113, 857 N.E.2d 138, at ¶15: “This exception applies when the challenged action is too short in duration to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subject to the same action again.” (Citing *State ex rel. Dispatch Printing Co. v. Loudon* (2001), 91 Ohio St.3d 61, 64, 2001 Ohio 268, 741 N.E.2d 517

plant as a renewable energy facility and denied an application for rehearing challenging that certification. The order is final and the OEC may only appeal the decision to this court. Second, both FES's Motion to Dismiss and the PUCO's memorandum fail to disclose to this court that the Burger retrofit will not go forward, thus the REC calculation issue is moot. Because the Burger plant will be shut down, making the REC issue moot, the OEC has sought to have FES's application for renewable certification dismissed from the PUCO docket. The OEC's Motion to Dismiss is attached as Attachment A. Because the biomass project will not go forward and the REC issue is moot, FES's Motion to Dismiss is left without an argument to support it, and the PUCO's memorandum in response is also hollow.

This court should reject the litigation tactics and arguments raised by FES and the Commission. The OEC respectfully requests that the court deny FES's Motion to Dismiss and hear the OEC's Propositions of Law Numbers One and Two.

Respectfully Submitted,

/s/ William T. Reisinger

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I hereby certify that a true copy of the foregoing has been served upon the following parties by first class mail this 21st day of February, 2011.

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ATTACHMENT "A"

**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 WITH MEMORANDUM IN SUPPORT
BY THE
OHIO ENVIRONMENTAL COUNCIL**

The Ohio Environmental Council ("OEC") hereby moves the Public Utilities Commission of Ohio ("Commission" or "PUCO") to dismiss the above-captioned Application. As explained more fully in the accompanying Memorandum in Support, FirstEnergy Solutions Corporation ("FES" or "company") has represented in recent weeks—both in statements to the press and in official legal filings—that it will not go forward with the Burger biomass conversion project and will permanently close the plant. Based on these facts, the Commission should now revoke the Burger certificate, discontinue the evaluation of the pending comments regarding the calculation of the market value of renewable energy credits, and close this proceeding. All issues pertaining to the Burger renewable energy certificate and the calculation of weighted RECs are now moot. FES should have withdrawn this application itself, but has failed to do so. Allowing this docket to remain open, and the certification to remain valid, will only create confusion and, as discussed below, interferes with other pending cases.

Respectfully submitted,

/s/ William T. Reisinger
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**BEFORE
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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.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Ohio Environmental Council ("OEC") hereby moves the Public Utilities Commission of Ohio ("Commission" or "PUCO") to dismiss the above-captioned Application because FirstEnergy Solutions Corporation ("FES" or "Company") has made the business decision to not go forward with the retrofit that is the subject of this Application. FES had sought 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 have allowed 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 from approved biomass material. However, FES has cancelled this project, and has repeated that statement many times in the press and in official filings. Therefore, there is no reason why this PUCO case docket should not be closed. Allowing this docket to remain "live" only creates confusion and interferes with other pending cases.

II. BECAUSE FES HAS STATED THAT IT WILL NOT GO FORWARD WITH THIS PROJECT, THIS PROCEEDING SHOULD BE CLOSED AND THE APPLICATION SHOULD BE DISMISSED TO AVOID CONFUSION AND INTERFERENCE WITH OTHER CASES.

On August 11, 2010, the Commission approved FES's Application for certification of the Burger plant, but left open the question of how to calculate the market value of RECs—a vital component of the Burger multiplier codified in Ohio Revised Code Section R.C. 4928.65 (the "Burger Statute"). More specifically, the "Burger Statute" states 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 existing 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. . . the product obtained by multiplying the actual percentage of biomass feedstock by heat input [in btu's] 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 [for the non-solar benchmarks] by the then existing market value of one renewable energy credit. (Emphasis added)

The Commission then opened a 60-day comment period on the question of how to calculate the market value of RECs.

Although the interested parties' comments on how to calculate the market value of RECs remain pending before the Commission, FES has publicly acknowledged (through the media and legal filings) that its "commitment" to "modify or retrofit its existing generating unit or units to enable the facility to generate principally from biomass energy by June 30, 2013" has been rescinded. Therefore, while it announced plans before December 31, 2009, to co-fire the plant with biomass, it has now walked away from that "commitment" which was a condition precedent to receiving extra renewable energy credits.

FES has stated on numerous occasions that the Burger project will not go forward. On November 17, the company first announced plans to cancel the project:

FirstEnergy Corp. (NYSE: FE) announced today that it is cancelling plans to repower units 4 and 5 at its R.E. Burger Plant in Shadyside, Ohio, to generate electricity principally with biomass and will permanently shut down the units by December 31, 2010....

Burger Plant units 4 and 5 were included as part of a 2005 Consent Decree settlement with the U.S. Environmental Protection Agency (U.S. EPA) and other parties to the company's New Source Review case involving its W. H. Sammis Plant. Under the 2005 Consent Decree, FirstEnergy was obligated to repower, scrub or shut down the units as part of an overall compliance plan to reduce system-wide emissions of sulfur dioxide. **FirstEnergy has notified the U.S. EPA and the plaintiffs in the case of its plans to close the Burger units.**"¹

FES has reaffirmed this statement repeatedly in the press,² and has informed the U.S. EPA and other parties to the 2005 consent decree that the project will not go forward and that the plant will be permanently shut down.³ Further, as the PUCO staff has acknowledged, FirstEnergy has also indicated in filings with the Securities and Exchange Commission that the project will not go forward.⁴ Because the Burger plant is being permanently shut down and will never be co-fired with biomass material, the plant's certificate and the application are moot. FES is no longer going to retrofit the Burger plant and has rescinded its commitment to do so, making its certificate unnecessary and the Commission's consideration of the market value of RECs moot.

The application, certificate, and FES's comments on the market value of RECs should have already been withdrawn by the company. The company, however, has not done so for

¹ See Attachment A., FirstEnergy Corp. Press Release, "FirstEnergy, Citing Lower Market Prices, Cancels Plans For Biomass Conversion Project, November 17, 2010 (emphasis added).

² See, e.g., statements by spokeswoman Ellen Raines: "FirstEnergy Abandons Plan to Burn Wood, Will Close Boilers at R.E. Burger Plant," Cleveland Plain Dealer, November 17, 2010; "Dead Wood," Cleveland Scene, January 19, 2011, <http://www.clevescene.com/cleveland/dead-wood/Content?oid=2290776>.

³ See Attachment A, at 2.

⁴ See Ohio Supreme Court Case No. 2010-1977, PUCO Memorandum in Response to February 3 Finding and Order, at 2, note 1.

some reason. The Commission should now revoke the Burger certificate, discontinue its evaluation of the pending comments regarding the calculation of the market value of RECs, and close this proceeding. Allowing this docket to remain open, and the certification to remain valid, will only create confusion and, as discussed below, interferes with other pending cases.

III. FES SHOULD NOT BE ALLOWED TO USE THIS APPLICATION AS A TACTIC THROUGH WHICH TO "MOOT" AN APPEAL PENDING AT THE SUPREME COURT OF OHIO.

As stated above, although FES no longer intends to burn biomass at the Burger plant, and although this Application is now moot, FES has failed to withdraw its Application. There is no justification for this inaction. While there is no *justification* for this failure, the only *explanation* is that FES refuses to withdraw its Application because it is relying on this docket as a way to stifle a pending appeal at the Supreme Court of Ohio. On November 15, 2010, the Ohio Environmental Council filed an appeal at the Supreme Court of Ohio of a final order certifying the Burger facility. The OEC's appeal challenged the Burger certification specifically, but also challenged the procedure that the Commission uses when applying the renewable energy rules and evaluating biomass energy projects.

But because the Application has not been dismissed, FES is trying to use this docket to stifle the OEC's appeal at the Supreme Court of Ohio. In addition to certifying the facility, the Commission's certification order also sought comments on the ancillary issue of how to calculate REC market prices for use pursuant to R.C. 4928.65 (the "Burger REC" amendment). It is undisputed that the multiplier calculation found in 4928.65 only applies to the Burger plant.⁵ Because the Burger retrofit will not go forward, the Burger REC calculation issue is moot, and the Commission has no reason to consider it. The PUCO staff even acknowledges that the

⁵ The criteria for the REC multiplier specifically apply to the Burger plant, and no other facility could take advantage of the multiplier.

multiplier statute “would have applied to Burger and no other facility.”⁶ Staff’s pleading repeatedly uses similar language referring to the Burger plant and the REC multiplier as issues that *might have been*, thus admitting that the project will not go forward (e.g. the multiplier statute “would have applied to Burger and no other facility”⁷; “Burger would have been...”; the REC determination “would have been [significant to FES],”⁸ etc.) Therefore, even the PUCO staff recognizes that the Burger project will not go forward and, accordingly, that the multiplier is a moot issue. The portion of R.C. 4928.65 that sets forth the multiplier calculation in effect has been struck from the Ohio Revised Code. It is now meaningless. It cannot apply to any other facility.

Nonetheless, even though the Burger REC calculation—like the plant itself—is a dead issue, FES filed for leave to intervene in the OEC’s Supreme Court appeal and also filed a motion to dismiss the appeal. FES’s motion to dismiss claims, *as its only grounds*, that the appeal was not ripe because the Burger REC calculation issue is still being considered by the Commission.⁹ The OEC filed a memorandum in opposition to the motion to dismiss, arguing that the REC calculation issue did not make the appeal unripe.¹⁰ However, based on recent, and repeated, statements by the company, there can be no doubt that the Burger plant will be shut down and will not be co-fired with biomass. These facts make the Burger REC multiplier issue pending before this Commission moot.

The only logical conclusion we can draw is that FES is attempting to hold onto this multiplier issue so that it can represent to the Supreme Court of Ohio that there has not been a final order from the Commission. Such questionable litigation tactics should not be condoned by

⁶ Ohio Supreme Court Case No. 2010-1977, PUCO Staff Memorandum in Response to FES Motion to Dismiss.

⁷ *Id.* at 2.

⁸ *Id.* at 3.

⁹ Ohio Supreme Court Case No. 2010-1977, FES Motion to Dismiss.

¹⁰ Ohio Supreme Court Case No. 2010-1977, OEC Memorandum in Opposition to FES Motion to Dismiss.

the Supreme Court of Ohio or the Commission. However, the Commission can easily resolve this problem.

IV. CONCLUSION

The OEC requests that FES's Burger application be promptly dismissed and that the Commission certify this docket as closed. FES has acknowledged that the biomass plans for the Burger facility will not go forward. The cancellation of the project by FES moots the REC multiplier issue because the statute, as recognized by the PUCO, could only have applied to Burger. Therefore, the OEC respectfully requests that the Commission close this docket.

Respectfully submitted,

/s/ William T. Reisinger

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I hereby certify that a true copy of the foregoing has been served upon the following parties by first class or electronic mail this 16th day of February, 2010.

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**FIRSTENERGY, CITING LOWER MARKET PRICES, CANCELS
PLANS FOR BIOMASS CONVERSION PROJECT
Employees to be Reassigned to Other FirstEnergy Generation Facilities**

Akron, Ohio – FirstEnergy Corp. (NYSE: FE) announced today that it is cancelling plans to repower units 4 and 5 at its R.E. Burger Plant in Shadyside, Ohio, to generate electricity principally with biomass and will permanently shut down the units by December 31, 2010. Since the Burger biomass repowering project was announced, market prices for electricity have fallen significantly, and expected market prices no longer support a repowered Burger Plant.

“Despite our best efforts, we were unable to overcome the challenges of the difficult economy to cost-effectively repower the Burger Plant to burn biomass,” said Gary R. Leidich, executive vice president and president of FirstEnergy Generation. “We are disappointed that this groundbreaking project will not be realized, particularly because plant employees worked with such spirit and determination to find a way to keep the units operating.”

The 79 Burger Plant employees – including 62 members of Utility Workers Union of America Local 350 – will either continue at the Burger Plant during the shut-down process or be temporarily reassigned to other FirstEnergy facilities, including the W.H. Sammis Plant in Stratton, Ohio. As those activities wind down the company will offer impacted employees other job opportunities within the FirstEnergy system.

Burger Plant units 4 and 5 were included as part of a 2005 Consent Decree settlement with the U.S. Environmental Protection Agency (U.S. EPA) and other parties to the company's New Source Review case involving its W. H. Sammis Plant. Under the 2005 Consent Decree, FirstEnergy was obligated to repower, scrub or shut down the units as part of an overall compliance plan to reduce system-wide emissions of sulfur dioxide. FirstEnergy has notified the U.S. EPA and the plaintiffs in the case of its plans to close the Burger units.

In addition, the company is in the process of working with Shadyside, Belmont County and Shadyside School District officials to help minimize the impacts closing the Burger units could have on the community.

"Throughout this process we deeply appreciated the support we received from Belmont County, the State of Ohio, and the U.S. EPA in our efforts to keep the Burger units operating, and want to make the transition as smooth as possible for the local community," said Leidich.

As part of the original 2005 Consent Decree, FirstEnergy will complete a \$1.8 billion environmental retrofit of its W.H. Sammis Plant in Stratton, Ohio. This project is designed to reduce sulfur dioxide emissions by 95 percent at the plant and nitrogen oxides emissions by 90 percent at its two largest units. The Sammis project, among the largest air quality control retrofits in the United States, will be completed by the end of the year.

FirstEnergy is a diversified energy company headquartered in Akron, Ohio. Its subsidiaries and affiliates are involved in the generation, transmission and distribution of electricity, as well as energy management and other energy-related services. Its seven electric utility operating companies comprise the nation's fifth largest investor-owned electric system, based on 4.5 million customers served within a 36,100-square-mile area of Ohio, Pennsylvania and New Jersey; and its generation subsidiaries control approximately 14,000 megawatts of capacity.

Forward-Looking Statements: This news release includes forward-looking statements based on information currently available to management. Such statements are subject to certain risks and uncertainties. These statements include declarations regarding management's intents, beliefs and current expectations. These statements typically contain, but are not limited to, the terms "anticipate," "potential," "expect," "believe," "estimate" and similar words. Forward-looking statements involve estimates, assumptions, known and unknown risks, uncertainties and other factors that may cause actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. Actual results may differ materially due to the speed and nature of increased competition in the electric utility industry and legislative and regulatory changes affecting how generation rates will be determined following the expiration of existing rate plans in Pennsylvania, the impact of the regulatory process on the pending matters in Ohio, Pennsylvania and New Jersey, business and regulatory impacts from American Transmission Systems, Incorporated's realignment into PJM Interconnection, L.L.C., economic or weather conditions affecting future sales and margins, changes in markets for energy services, changing energy and commodity market prices and availability, financial derivative reforms that could increase our liquidity needs and collateral costs, replacement power costs being higher than anticipated or inadequately hedged, the continued ability of FirstEnergy's regulated utilities to collect transition and other charges or to recover increased transmission costs, operating and maintenance costs being higher than anticipated, other legislative and regulatory changes, revised environmental requirements, including possible greenhouse gas emission and coal combustion regulations, the potential impacts of the U.S. Court of Appeals' July 11, 2008 decision requiring revisions to the Clean Air Interstate Rules and the scope of any laws, rules or regulations that may ultimately take their place, the uncertainty of the timing and amounts of the capital expenditures needed to, among other things, implement the Air Quality Compliance Plan (including that such amounts could be higher than anticipated or that certain generating units may need to be shut down) or levels of emission reductions related to the Consent Decree resolving the New Source Review litigation or other similar potential regulatory initiatives or actions, adverse regulatory or legal decisions and outcomes (including, but not limited to, the revocation of necessary licenses or operating permits and oversight) by the Nuclear Regulatory Commission, Metropolitan Edison Company's and Pennsylvania Electric Company's transmission service charge filings with the Pennsylvania Public Utility Commission, the continuing availability of generating units and their ability to operate at or near full capacity, the ability to comply with applicable state and federal reliability standards and energy efficiency mandates, the ability to accomplish or realize anticipated benefits from strategic goals (including employee workforce initiatives), the ability to improve electric commodity margins and to experience growth in the distribution business, the changing market conditions that could affect the value of assets held in FirstEnergy's nuclear decommissioning trusts, pension trusts and other trust funds, and cause it to make additional contributions sooner, or in an amount that is larger than currently anticipated, the ability to access the public securities and other capital and credit markets in accordance with FirstEnergy's financing plan and the cost of such capital, changes in general economic conditions affecting the company, the state of the capital and credit markets affecting the company, interest rates and any actions taken by credit rating agencies that could negatively affect FirstEnergy's access to financing or its costs or increase its requirements to post additional collateral to support outstanding commodity positions, letters of credit and other financial guarantees, the continuing decline of the national and regional economy and its impact on the company's major industrial and commercial customers, issues concerning the soundness of financial institutions and counterparties with which FirstEnergy does business, the expected timing and likelihood of completion of the proposed merger with Allegheny Energy, Inc., including the timing, receipt and terms and conditions of any required governmental and regulatory approvals of the proposed merger that could reduce anticipated benefits or cause the parties to abandon the merger, the diversion of management's time and attention from our ongoing business during this time period, the ability to maintain relationships with customers, employees or suppliers as well as the ability to successfully integrate the businesses and realize cost savings and any other synergies and the risk that the credit ratings of the combined company or its subsidiaries may be different from what the companies expect and the risks and other factors discussed from time to time in its Securities and Exchange Commission filings, and other similar factors. The foregoing review of factors should not be construed as exhaustive. New factors emerge from time to time, and it is not possible for management to predict all such factors, nor assess the impact of any such factor on FirstEnergy's business or the extent to which any factor, or combination of factors, may cause results to differ materially from those contained in any forward-looking statements. The Registrant expressly disclaims any current intention to update any forward-looking statements contained herein as a result of new information, future events, or otherwise.

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

Summary: Motion Motion to Dismiss with Memorandum in Support electronically filed by Mr. Will Reisinger on behalf of Ohio Environmental Council