

**IN THE
SUPREME COURT OF OHIO**

The Ohio Environmental Council,

Appellant,

v.

**The Public Utilities Commission of
Ohio,**

Appellee.

:
:
: 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.*
:

**MOTION TO DISMISS
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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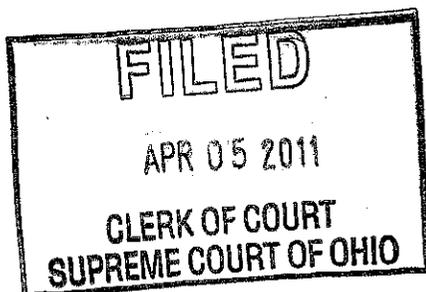
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**IN THE
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Appellant,	:	
	:	On appeal from the Public Utilities
v.	:	Commission of Ohio, Case No. 09-
	:	1940-EL-REN, <i>In the Matter of R E</i>
The Public Utilities Commission	:	<i>Burger Units 4 & 5 for</i>
of Ohio,	:	<i>Certification as an Eligible Ohio</i>
	:	<i>Renewable Energy Resource</i>
Appellee.	:	<i>Generating Facility.</i>

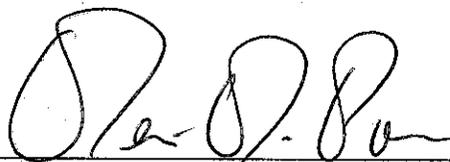
**MOTION TO DISMISS
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

The Public Utilities Commission of Ohio ("PUCO" or "Commission") moves this Honorable Court to dismiss this appeal of The Ohio Environmental Council ("OEC"). The application for certification at issue in this appeal has been withdrawn and the Commission's certification of R.E. Burger Plant Units 4 & 5 ("Burger Plant") as a renewable energy resource generating facility has been voided. OEC's appeal is moot and should be dismissed.

Respectfully submitted,

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Section Chief
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A handwritten signature in black ink, appearing to read 'T. W. McNamee', written over a horizontal line.

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MEMORANDUM IN SUPPORT

INTRODUCTION

This appeal should be dismissed as moot because the very action that the appellant is challenging in its appeal was voided by a March 30, 2011 Entry of the Public Utilities Commission of Ohio (“PUCO” or “Commission”). Simply, there are no issues left for this Court to consider.¹

Appellant Ohio Environmental Counsel (“OEC”) initiated this appeal because it did not agree that FirstEnergy Solutions’ (“Solutions”) facility should have been certified as an eligible renewable energy resource generating facility under R.C. 4968.64. Since the filing of OEC’s Notice of Appeal, two events have occurred that warrant dismissal of this appeal. First, on March 3, 2001, Solutions filed a motion to withdraw its application for certification, noting that it had cancelled its plans to repower the Burger Plant. Second, on March 30, 2011, the Commission issued an Entry revoking the Burger Plant certification and voiding the certification number that had been issued for the facility. Appendix at 1. Therefore, OEC’s appeal is moot and this case should be dismissed.

ARGUMENT

An appellate court need not consider an issue, and will dismiss the appeal when the court becomes aware of an event that has rendered the issue moot. *Miner v. Witt*

¹

See March 30, 2011 Entry of the Commission, Appendix at 1.

(1910), 82 Ohio St. 237, 238, 92 N.E. 21 (involving a completed annexation), followed by *Haggerman v. Dayton* (1947), 147 Ohio St. 313, 325-326, 71 N.E.2d 246 (involving payroll deductions). This proposition of law has long been applied to appeals from Commission orders as well. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm'n* (2004), 103 Ohio St. 3d 398, 816 N.E.2d 238; *Pollitz v. Pub. Util. Comm'n* (1916), 93 Ohio St. 483, 113 N.E. 1071. In addition, where there is no concrete dispute, or actual case or controversy, this Court has regularly refused to indulge requests for advisory opinions. *Armco, Inc. v. Pub. Util. Comm'n* (1982), 69 Ohio St. 2d 401, 406, 433 N.E.2d 923, 926. Appeals are allowed to correct errors that injuriously affect the appellant and not to settle abstract questions that lack any current factual support. *Ohio Domestic Violence Network v. Pub. Util. Comm'n* (1992), 65 Ohio St. 3d 438, 439, 605 N.E.2d 13 (1992). Stated another way, the duty of every judicial tribunal is to decide actual controversies affecting parties under specific facts. *Cincinnati Gas & Electric Co. v. Pub. Util. Comm'n* (2004), 103 Ohio St. 3d 398, 402-402, 816 N.E.2d 238, 242. These cases support a finding by the Court that withdrawal of Solutions application and decertification of the Burger Plant render OEC's appeal moot.

Although there are a few exceptions to the mootness doctrine, none of those exceptions apply here. One exception is where the issues are "capable of repetition, yet evading review." *State, ex rel. Dispatch Printing Co. v. Loudon* (2001), 91 Ohio St. 3d 61, 64, 741 N.E. 2d 517, 521. This exception applies only "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.” *Id.* This exception is not applicable to this case.

Under R.C. 4903.11, any party that seeks to challenge a Commission order is provided with an opportunity for meaningful review by the Court, by appeal of right, where statutory jurisdictional prerequisites are met. This opportunity was available to the OEC in this case and, in fact, OEC took advantage of this appeal of right. But in this particular case, there is no longer any action to be challenged by OEC because certification of the Burger Plant (the “challenged action” set forth in OEC’s Notice of Appeal and Merit Brief) has been reversed and, thus, is no longer an issue. Simply stated, there is no longer a controversy at issue for this Court to resolve.

OEC claims, however, that this Court should address the purported “issues” raised in its Notice of Appeal “for judicial economy” despite the fact the Burger Plant is going to close permanently. *See* OEC’s Reply to the Commission’s Response to the Court’s February 3, 2011 Order, at pg. 3. OEC contends that this Court still should address these issues because OEC believes that these issues may arise again at some point in the future. *Id.* But OEC has the statutory right to appeal these issues if they were to arise again in a subsequent case involving another biomass energy application, and nothing would preclude OEC from addressing these issues at that time.

Furthermore, the issues raised in OEC’s appeal do not have the potential of “evading review.” If these issues were to arise again in the future, OEC would then have the right to appeal to this court and this Court would, more than likely, be able to fully address these issues at that time. In this particular case, the reason these issues are

moot is because of an unusual set of circumstances - the applicant for certification voluntarily withdrew its application. This does not typically happen in these types of cases, and there is nothing inherent in the nature of these cases that make them evasive of review. Thus, this Court should not be forced to address moot issues today simply to relieve OEC of its fear of these issues arising again at some unknown point in the future.

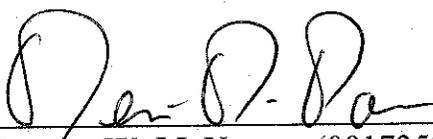
Another exception to the mootness doctrine exists for appeals that raise questions of great public or general interest. *Dannis Clarkco Landfill Co. v. Clark County Solid Waste Mgt. Dist.* (1995), 73 Ohio St. 3d 590, 598, 653 N.E. 2d 646, 653; *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St. 3d 28, 31, 505 N.E. 2d 966, 969. Cases to which this exception has been applied have typically involved issues which courts or public agencies must grapple with regularly, such as competitive bidding laws (*Dannis Clarkco Landfill*) or municipal zoning authority (*Franchise Developers*). This case presents no such issues. This case simply involves the Commission acting under its statutory authority in the normal course, determining whether an applicant should be certified as a renewable energy resource generating facility pursuant to R.C. 4968.64. Since neither of the aforementioned exceptions applies in this case, this appeal is moot and should be dismissed.

CONCLUSION

Based upon the foregoing, the Commission respectfully requests that the Court dismiss this case.

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Ohio Attorney General

William L. Wright (0018010)
Section Chief



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**Counsel for Appellee,
The Public Utilities Commission of Ohio**

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss, 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 5th day of April, 2011.



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Assistant Attorney General

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APPENDIX

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) On August 11, 2010, the Commission granted the application of R.E. Burger Units 4 & 5 (Burger) 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). The Burger facility was issued certification number 10-BIO-OH-GATS-0346.
- (2) On March 3, 2011, FES filed a motion to withdraw Burger's application. FES explains that, due to economic conditions, repowering the Burger facility to burn biomass is not economically feasible. Accordingly, FES requests that the Commission issue an order granting the withdrawal of Burger's application and cancelling the certificate issued to Burger.
- (3) As FES is not proceeding with its plans to repower the Burger facility to burn biomass fuel, the Commission finds that Burger's certification should be revoked and Staff shall notify the Generation Attribute Tracking System (GATS) that certification number 10-BIO-OH-GATS-0346 has been voided.

It is, therefore,

ORDERED, That Burger's certification be revoked. It is, further,

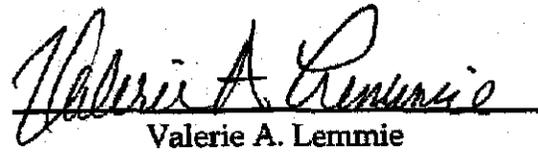
ORDERED, That Staff notify GATS that certification number 10-BIO-OH-GATS-0346 has been voided. It is, further,

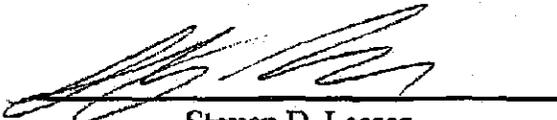
ORDERED, That a copy of this finding and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Smithler, Chairman

Paul A. Centolella


Valerie A. Lemmie

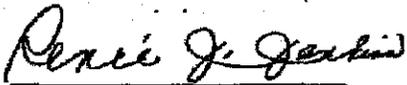

Steven D. Lesser


Cheryl L. Roberto

HFG/sc

Entered in the Journal

MAR 30 2011


Renee J. Jenkins

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Secretary