

In the Matter of the Application of)
FirstEnergy Solutions Corp. for)
Certification of R.E. Burger Units 4 and 5) Case No. 09-1940-EL-REN
As an Eligible Ohio Renewable Energy)
Resource Generating Facilities.)

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene¹ and comments in this case in which the development of certain diversity in electricity supplies to consumers may be constrained and costly additions to plant may result with potential requests later for consumers to pay the associated costs without receiving adequate benefits.

OCC is filing on behalf of the residential electric utility consumers in Ohio. FirstEnergy Solutions Corp. (“Applicant” or “FE”) seeks certification for its R.E. Burger Units 4 and 5 as eligible Ohio renewable energy resource generating facilities under R.C. 4928.01(A)(35).² The Public Utilities Commission of Ohio (“Commission” or “PUCO”) should deny the Applicant a renewable certificate because the Application, as currently framed, does not meet the requirements of R.C. 4928.64.

¹ See R.C. Chapter 4911, R.C. 4903.221 and Ohio Adm. Code 4901-1-11.

² The granting of this certificate would allow the Applicant to register a portion of the power produced from its facilities as a renewable energy resource and to produce and sell renewable energy credits (“RECs”) under R.C. 4928.65. Electric distribution utilities or electric services companies that need RECs to meet their renewable energy benchmarks under R.C. 4928.64 can purchase these RECs from certified renewable energy resources as a means of meeting these benchmarks.

The reasons the Commission should grant OCC's Motion to Intervene ("Motion") and deny the Applicant its certificate are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case involves review of the reasonableness and lawfulness of the Applicant's request for approval of its Application filed under R.C. 4928.01(A)(35) and R.C. 4928.65. OCC has authority under law to represent the interests of the residential electric utility customers of Ohio, pursuant to R.C. Chapter 4911. The Applicant is requesting certification of the R.E. Berger Units 4 and 5 as a renewable energy resource generating facilities that will sell the renewable energy credits they produce to electric distribution utilities. Residential customers cannot be required, under Ohio law, to contribute to the costs of producing and/or purchasing RECs unless the certified renewable sources or RECs actually represent power generated from renewable sources. Moreover, residential customers are not obligated to pay costs for the Applicant's power that is generated with nonrenewable resources because such power will not provide long-term benefits of decreased demand for nonrenewable sources, nor will it promote the development of a diversity of electric supplies and suppliers.³

³ R.C.4928.02(C)

The application should not be granted because the Applicant has not demonstrated that it has a sustainable supply of renewable fuel to produce a renewable resource.

II. INTERVENTION

R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential consumers may be “adversely affected” by this case, especially if the consumers were unrepresented in a proceeding that results in the certification of a power generating facility as an eligible renewable energy resource when it may not meet the requirements under R.C. 4928.01(A)(35) and R.C. 4928.64. Such a certification could result in residential electric customers paying the extra costs of a renewable resource without receiving the long-term benefits of renewable resources as contemplated under R.C. 4928.01(A)(35) and R.C. 4928.64.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC’s interest is representing the residential consumers of Ohio to ensure that when they pay a premium for a renewable resource, that renewable resource will provide the long-term benefits in reduced energy costs as

contemplated under R.C. 4928.64 and R.C. 4928.01(A)(35). This interest is different than that of any other party and especially different than that of the Applicant whose advocacy includes its financial interests.

Second, OCC's advocacy for consumers will include advancing the position that residential customers should not have to pay a premium for renewable energy resources that do not actually provide the long-term benefits in reduced energy costs as contemplated under R.C. 4928.01(A)(35). This position ensues from the requirement that utilities must meet specific benchmarks in using renewable resources and the fact that renewable resources are limited in supply. The position results from the likelihood that utilities will have to pay a premium for power from those resources for the near term and will collect the premium from all customers, including residential customers. In other words, residential customers should pay rates that are no more than what is reasonable and lawful under Ohio law, for service that is adequate under Ohio law. OCC's position is therefore directly related to the merits of this case that is pending before the PUCO, the authority with regulatory control of the terms under which public utilities provide their services.

Third, OCC's intervention will not unduly prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest. Although this Motion to Intervene is filed outside the 20-day intervention period, the PUCO has the authority to waive that requirement for good cause shown.⁴ OCC asserts that the confusion surrounding the implementation of the new Green Rules combined

⁴ Ohio Adm. Code 4901:1-40-02(B).

with the press of other matters and the holiday season caused this Motion to Intervene to be filed out of time. Moreover, the magnitude of this case and the potential to establish important precedent is sufficient reason for the PUCO to have the opportunity to consider all viewpoints, including those represented by the OCC. Finally, the OCC accepts the record as it stands, thus intervention out of time will not cause any delay.

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues, consistent with any matters that OCC determines to be issues for PUCO consideration and for deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Adm. Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a very real and substantial interest in this case where rates for service to residential customers are at issue. In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio's residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC's intervention and that OCC should have been granted intervention.⁵

III. COMMENTS

The Applicant is requesting the certification of a combustion facility as a renewable resource. However, under the definition of a renewable resource at R.C. 4928.01(A)(35), a combustion facility, such as the one at issue in this case, is not a renewable resource. Only the energy produced by a renewable resource, such as "energy derived from non-treated by-products of the pulping process or wood manufacturing process" is a renewable resource.⁶ Therefore, a combustion facility should not be certified unless the Applicant is able to demonstrate that it has the sustainable access to the fuel necessary to produce the renewable energy.

The Applicant indicates that it intends to use wood pellet/briquette chips and/or agricultural biomass fuels in pellets, briquettes or bales to be co-fired in proportions ranging from 51 per cent up to 100 per cent of the total heat supplied.⁷ The facilities include two generating units with nameplate capacity of 156 megawatts.⁸ In order to replace the coal with biomass for up to 100 per cent of the power generated, the Applicant will need a massive amount of biomass material. The Applicant does not identify this

⁵ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20 (2006).

⁶ R.C.4928.01(A)(35)

⁷ Application at 7.

⁸ Application at 10.

needed source of biomass material. If the Commission grants this Applicant a certificate for a renewable source, the Applicant may commence with costly modifications on the generating unit identified in its application. If the Applicant is unable to obtain the huge supply of biomass materials it claims it will employ to produce renewable power in this plant, any potential retrofit will not provide the benefits intended and consumers should not bear the costs associated with these potential retrofits or modifications. In order to prevent such a wasteful project, the Applicant should be required to identify its source of biomass materials before receiving certification.

The application also states that the biomass plant will eventually “combust principally biomass fuels.” It is expected that this will take place prior to 2013. R.C. 4928.65 it states:

* * * 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.

This section of the Revised Code could potentially allow the Burger project to hinder job creation or expansion associated with the new energy industries (wind and solar especially) that Senate Bill 221 is trying to stimulate. In order to prevent this type of unintended consequences, it is important to monitor progress of this retrofit to verify whether the second phase of this plant is actually met and proven to be generating

renewable energy according to the language in R.C. 4928.65 before going forward.

IV. CONCLUSION

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of residential consumers, the Commission should grant OCC's Motion to Intervene, should require the Applicant to identify its source of biomass materials, before granting the Applicant certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Intervene and Comments* was served on the persons stated below by regular U.S. Mail, postage prepaid, on this 8th day of January, 2010.

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Summary: Motion Motion to Intervene and Comments by the Office of the Ohio Consumers' Counsel electronically filed by Mrs. Mary V. Edwards on behalf of Serio, Joseph P. Mr. and Office of the Ohio Consumers' Counsel