

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

**FIRSTENERGY SOLUTIONS CORP.'S RESPONSE TO COMMENTS OF
THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

INTRODUCTION

The April 12, 2010 comments of the Ohio Consumer and Environmental Advocates (“OCEA”) contain numerous misstatements of both law and fact regarding FirstEnergy Solutions Corp.’s (“FES”) Application for certification of R.E. Burger Units 4 and 5 (the “Burger facility”) as an Ohio renewable energy resource facility. As set forth below, OCEA invents “obligations” that are not contained anywhere in either the Revised Code or the Commission’s rules. Further, OCEA misstates the facts regarding who will pay for retrofitting the Burger facility and how FES will obtain the necessary supply of biomass materials to run the facility. FES respectfully submits that the Commission should disregard OCEA’s comments and grant the Application.

OCEA misstates the legal requirements necessary for the Commission to certify the Burger facility as an eligible Ohio renewable energy resource generating facility. Contrary to OCEA’s assertions, neither R.C. §§ 4928.64 and 4928.65 nor O.A.C. 4901:1-40 require FES to prove that the Burger facility is sustainable in the long-term, will “meaningfully” reduce carbon dioxide emissions, or will be supplied using a favorable “emissions profile.” In fact, the Commission already has certified biomass facilities *without* the information that the OCEA now demands in relation to the Burger facility. Although OCEA clearly opposes large-scale biomass projects and is willing to inject irrelevant and misleading arguments in its attempt to prevent

them, the General Assembly's decision to qualify biomass energy as a renewable resource controls here.

In short, nearly all of OCEA's comments are irrelevant and unproductive to the question before the Commission presented by this Application. The Staff comments in this proceeding appropriately concluded that the Burger facility should be certified. Consistent with the Staff comments, the controlling law, and the facts before it, the Commission should certify the Burger facility.

FACTUAL BACKGROUND

FES will spend approximately \$200 million to retrofit units 4 and 5 of the R.E. Burger power plant so as to generate electricity principally from biomass. When this plan was announced on April 1, 2009, Governor Ted Strickland noted that the retrofit of the Burger plant could "jump-start the biomass renewable energy industry not just in Ohio, but throughout the U.S." Governor Strickland expressed his overwhelming approval of FES's plans and explained that the project "has the potential to spur additional jobs and investments, particularly as biomass fuel suppliers work to meet the needs of this operation and others that could be developed in Ohio." Since the announcement, FES has been actively involved in convening groups of interested stakeholders to help ensure that the Burger facility will have the biofuel required to support its Burger facility. Recently, FES convened a workshop with Ohio farmers, energy experts and agriculture experts to explain the promise and opportunity that the Burger facility can offer to Ohioans. FES has solicited requests for proposals and begun to solicit bids from biofuel suppliers.

On December 12, 2009, FES filed an application, which it amended on March 10, 2010, asking the Commission to certify the Burger facility as an eligible Ohio renewable energy

resource generating facility under Ohio law (“Application”). The Application was submitted on the form prescribed by the Commission pursuant to O.A.C. 4901:1-40-04, was filled out in full and contained all of the information required by the Commission.

On April 12, 2010, OCEA filed its comments (“Comments”) in this proceeding arguing that FES’s Application fails to demonstrate that the modifications to its Burger facility qualify as an eligible renewable energy resource facility under the Revised Code and the Commission’s rules, and asked the Commission not to certify the plant until FES provided more information. Specifically, and contrary to applicable law, OCEA argues that FES must:

- demonstrate that the Burger facility’s biomass energy must be renewable, carbon-neutral and produced from organic waste products (Comments, pp. 8-11);
- provide specific information regarding the sources of the biomass fuel to be utilized in the Burger facility (*Id.*, pp. 11-13);
- describe how the biomass material will be sourced and transported to the Burger facility (*Id.*, pp. 13-14); and
- prove that there will be sufficient biomass fuel available for the facility over some undefined, but presumably extended, period of time before the Commission certifies the Burger facility (*Id.*, pp. 15-18).

The remainder of OCEA’s Comments contain policy arguments about the current lack of availability and cost of sufficient quantities of biomass fuel in Ohio and other parts of the country. (*Id.*, pp. 16-26). OCEA then engages in unsupported speculation to argue that certifying the Burger facility and, in turn, increasing the demand for biomass fuel in Ohio and surrounding states could somehow negatively affect the Ohio paper industry. (*Id.*, pp. 26-27). OCEA ends with speculation that certifying the Burger facility will somehow discourage FES from making any additional investments in renewable energy, and by arguing that FES’s Application provides less information than the application of another proposed biomass

generator. (*Id.*, pp. 27-29). However, as demonstrated below, none of the OCEA's Comments is supported by Ohio law or the facts in the record.

LAW AND ARGUMENT

I. THE BURGER FACILITY SATISFIES ALL LEGAL REQUIREMENTS FOR CERTIFICATION AS A RENEWABLE RESOURCE.

The Burger facility qualifies as a renewable energy resource under both Chapter 4928 of the Revised Code and the Commission's rules, which contain clear requirements for certification of renewable energy resources. Indeed, the Commission already has approved similar applications without requiring the mass of information demanded by OCEA, and the Staff has determined that the Application as supplemented by FES's responses to Staff's data requests, satisfies all legal requirements. Thus, the Commission should approve the Application.

A. The Application Satisfies All Legal Requirements.

R.C. § 4928.64 requires electric distribution utilities and electric services companies to provide a portion of their kilowatt hours sold through alternative energy resources, with at least half generated from renewable energy resources.¹ The General Assembly has determined that "biomass energy" qualifies as a form of renewable energy resource.² The General Assembly did not qualify its endorsement of biomass energy as limited, for example, only to sources that are carbon-neutral with an attractive emissions profile. To the contrary, the General Assembly simply dictated through R.C. § 4928.01(A)(35) and R.C. § 4928.64(A) that biomass energy qualifies as a renewable energy resource provided it "has a placed-in-service date of January 1, 1998" or is "created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998." Once modified for co-firing as described in the Application, the Burger facility will be just such a facility.

¹ R.C. § 4928.64(B).

² R.C. § 4928.01(A)(35). *See also* O.A.C. 4901:1-40-04(A).

The Commission's rules define "biomass energy" as "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; [and] 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 . . .*"³ Again, the Commission rules do not, as imagined by OCEA, exclude biomass energy that is not sufficiently carbon neutral or transported in trucks using diesel fuel.⁴ To the contrary, energy produced from agricultural crops, tree crops and/or wood chips – which, as described in the Application, are the fuel alternatives that may be used in the Burger facility⁵ – is specifically defined as biomass energy. As stated in the rule, each of these biomass fuel sources is "derived from plants or animals and available on a renewable basis." There is no need for FES or any other applicant to prove that such a fuel source is "renewable," because the General Assembly and the Commission already have made that determination. There is similarly no need to prove that the biomass material should be predominantly "waste materials," another requirement that OCEA seeks to read into the rules.⁶ This argument again ignores the specific inclusion of agricultural crops, tree crops, and wood chips as sources of biomass energy in the Commission's rules.⁷

The Commission's rules require that an entity seeking to have its facility qualified as a renewable energy resource facility shall file an application with the Commission.⁸ 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)

³ O.A.C. 4901:1-40-01(E).

⁴ See Comments, pp. 8-13.

⁵ See Application, Attachments 2 and 4. See also Company's Responses to Staff Interrogatories – Initial Set, Answer 5 [hereinafter Responses to Interrogatories].

⁶ See Comments, p. 9.

⁷ O.A.C. 4901-40-01(E).

⁸ O.A.C. 4901:1-40-04(F).

was created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; and (iii) is located in Ohio or deliverable into Ohio.⁹

These, and these alone, are the requirements for the Commission to certify the Burger facility, and FES has satisfied each of these requirements. The Burger facility (i) will utilize biomass energy;¹⁰ (ii) was retrofitted after January 1, 1998;¹¹ and (iii) is located in Ohio.¹² FES has provided all of the information required by law and the Commission should approve its Application and certify the Burger plant.

B. The Commission's Past Approvals of Biomass Facilities Illustrate that the Information Sought by OCEA Simply Is Not Required Under Ohio Law.

The Commission already has certified the applications of other biomass facilities based upon the same information provided in this proceeding by FES. In fact, a brief review of the Commission's docket reveals that none of the most recent biomass facilities certified by the Commission submitted applications that contained any of the information that OCEA is requesting in relation to this Application.¹³ Each of the applications in these cases were submitted on the same forms and contained the same information as the Burger Application.¹⁴ The Commission has not required other facilities to provide any of the information sought by the OCEA. As evidenced by the Commission's approval of these other applications, FES clearly has satisfied all legal requirements for certifying the Burger facility as an eligible Ohio renewable energy resource facility.

⁹ R.C. § 4928.64(A), (B); O.A.C. 4901:1-40-04(A).

¹⁰ Application, § G.10; *see also* Responses to Interrogatories, Answers 2, 5.

¹¹ Application, § H.

¹² *Id.*, § F.

¹³ *See e.g. Domtar Hawesville Mill*, Case No. 09-695-EL-REN (Application, August 7, 2009); *University of Cincinnati*, Case No. 09-739-EL-REN (Application, August 24, 2009); *Granger Energy of Honey Brook*, 10-10-EL-REN (Application, January 19, 2010); *UGI Development Company*, Case No. 10-50-EL-REN (Application, January 19, 2010).

¹⁴ *See id.*

C. Comments From Other Interested Parties Show that the Burger Application Meets All Requirements for Certification as a Biomass Facility.

Other interested parties have reviewed FES's Application and confirmed that it meets all requirements for certification as a qualified resource for meeting the advanced energy resource benchmarks. The American Wind Energy Association took no issue with the certification requirements, choosing instead to engage only in speculative calculations of RECs that might result under R.C. § 4928.65.¹⁵ Most importantly, at the request of the Commission, Staff reviewed FES's Application and concluded that "the facility meets the criteria to qualify for certification as an eligible Ohio renewable energy resource generating facility."¹⁶ In contrast to the OCEA's misguided approach, Staff focused on whether the Application meets the requirements of the Revised Code and the Commission's rules.¹⁷ Notably, Staff found that the biomass material proposed to be used by FES meets the requirements of R.C. § 4928.01(A)(35), O.A.C. 4901:1-40-01(E) and 4901:1-40-04.¹⁸ Staff correctly did not require that FES identify where it would purchase the biomass to be burned or how it would be transported, only that FES identify the type of material it would be burning. The Commission is not required to conduct any further analysis before certifying the facility. After performing this review, Staff concluded that the Application did satisfy Ohio law and "recommend[ed] that the Commission certify this facility."¹⁹

II. OCEA'S COMMENTS MISSTATE THE REQUIREMENTS FOR CERTIFICATION OF A BIOMASS FACILITY UNDER OHIO LAW.

Despite the specific requirements under Ohio law for certification of the Burger facility, OCEA is seeking to impose new requirements that are not found anywhere in either the Revised

¹⁵ See Comments of The American Wind Energy Association, Case No. 09-1940-EL-REN (April 12, 2009).

¹⁶ Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio, at ¶ 3, Case No. 09-1940-EL-REN (March 15, 2009).

¹⁷ *Id.*, ¶¶ 3-9.

¹⁸ *Id.*, ¶ 5.

¹⁹ *Id.*, ¶ 10.

Code or the Commission's rules. Thus, the OCEA's comments are irrelevant and should be ignored.

A. OCEA's Information "Requirements" Are Contrary to Law.

OCEA seeks to impose requirements regarding the amount of carbon dioxide which will be generated by the Burger facility. (Comments, pp. 8-11). However, such a requirement is not found in the law or the rules. OCEA's assertion that FES must specify the type of biomass fuel it will use at the Burger facility is not a requirement of the rules and suffers from the same faulty reasoning. (*Id.*, pp.18-26). Likewise, there is no requirement that FES explain how and from where the biomass material will be transported to the Burger facility. (*Id.*, pp. 13-14).

To expect such information before the Burger facility has been certified is illogical and unreasonable. Indeed, certification is needed now to encourage the development of biomass fuel sources "to enable the facility to generate principally from biomass energy by June 30, 2013."²⁰ While FES has begun the process of meeting with Ohio farmers and other interested groups to develop sustainable fuel sources, certification of the Burger facility will provide additional certainty and incentivize the further development of this remarkable resource.

The remainder of OCEA's scatter-shot objections suffer from the same problem: they have absolutely no basis in the Revised Code or the Commission's rules. For instance, the OCEA seeks inappropriately to apply the definition of clean coal technology to biomass generation. (Comments, p. 10). It argues that since the rules define "clean coal technology" as technology that is capable of removing carbon dioxide and other pollutants from a coal fueled electric generating facility, that FES is somehow required to demonstrate that the Burger facility will be carbon-neutral. (*Id.*, p. 10-11). However, there is no basis upon which to transpose the "clean coal technology" requirements onto an unrelated renewable energy resource facility. It

²⁰ See R.C. § 4928.65.

further argues that the Commission should consider federal REC markets “[i]f and when a federal REC trading market is established.” (*Id.*, p. 14). It also wants the Commission to consider “the impact that the increase in demand generated by Burger will have on the price of [biomass] fuel” and the impact of the Burger facility on existing jobs and industry in Ohio. (Comments, p. 24-27). Again, *none* of the “requirements” that the OCEA claims should be in the Application are contained in Ohio law.

B. OCEA’s Comments Misstate the Facts Relevant to the Application.

In addition to misstating the law, OCEA misstates the facts surrounding the Burger facility. OCEA alleges that FES is going to pass on the costs of upgrading the facility to Ohio consumers. (Comments, pp. 17-26). This is inaccurate, as any costs incurred by FES to upgrade the facility will not be directly passed to Ohio consumers. Perhaps OCEA is unaware that energy produced by the Burger facility is sold through a competitive market, and FES is not entitled to earn a return on the substantial investments it is making to retrofit this facility. There is no mechanism to directly recover costs from customers through any rate-making mechanism at FES.

OCEA also inaccurately suggests that there is no sustainable source of biomass to operate the Burger facility. (*Id.*, pp. 16-26). While the myriad of forestry statistics cited by OCEA may or may not be accurate, the OCEA has wrongly implied that it is impossible for FES to obtain enough biomass fuel to operate this facility at capacity.²¹ While it may be true that the market for this fuel is not fully developed *today*, this argument is irrelevant for purposes of certification given that FES will receive credits only to the extent it burns biomass.

²¹ FES currently is working to obtain the biomass to operate this plant. FES formed a working group of forestry experts and others to plan for a sustainable supply of biomass to fuel the Burger facility. Certification is one step along the path of developing that supply and encouraging the necessary investments that will result in the Burger facility generating principally from biomass.

CONCLUSION

OCEA has not identified any provisions of the Revised Code or Administrative Code that FES has failed to satisfy. While OCEA finds many categories of additional information to be of academic interest, FES is not required to indulge OCEA's policy interests in order for the Burger facility to be certified as an eligible Ohio renewable energy resource generating facility. The Commission has not required this information from other biomass facilities, and it should not set such a precedent here. The Commission should reject the OCEA's comments and certify the Burger facility as an Ohio renewable energy resource facility.

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CERTIFICATE OF SERVICE

I hereby certify that this **Response to Comments of the Ohio Consumer and Environmental Advocates** was filed electronically this 22nd day of April, 2010, with the Public Utilities Commission of Ohio Docketing Information System. Notice of this filing will be sent via e-mail to the following subscribers by operation of the Commission's electronic filing system:

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