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BEFORE THE
PUBLIC COMMISSION OF OHIO

FILE

In the Matter of the Application of Conesville Generating Station Unit 3 for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility	)))))	Case No. 09-1860-EL-REN

COLUMBUS SOUTHERN POWER COMPANY'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF BUCKEYE FOREST COUNCIL, THE OHIO ENVIRONMENTAL COUNCIL AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

BACKGROUND

On November 30, 2009 Columbus Southern Power Company (CSP) filed an application for certification of its Conesville Unit 3 generating station (Conesville Unit 3) as an eligible Ohio renewable energy resource generating facility. The Commission issued a March 31, 2010 Finding and Order granting the application and ordering the issuance of the requested certificate. On April 30, an application for rehearing was filed by the Buckeye Forest Council, the Ohio Environmental Council and the Office of the Ohio Consumers' Counsel (collectively the "Environmental Group"). CSP submits this memorandum in opposition to the Environmental Group's application for rehearing.

INTRODUCTION

Consistent with Sections 4928.64 and 4928.65, Revised Code, the Commission has applied a three-part test to determine qualification as a certified eligible Ohio renewable energy resource generating facility, such that a facility must demonstrate that it has satisfied all of the following criteria:

(a) The generation produced by the renewable energy resource generating facility can be shown to be deliverable into the state of Ohio, pursuant to Section 4928.64(B)(3), Revised Code.

(b) The resource to be utilized in the generating facility is recognized as a renewable energy resource pursuant to Sections 4928.64(A)(1) and 4928.01(A)(35), Revised Code, or a new technology that may be classified by the Commission as a renewable energy resource pursuant to Section 4928.64(A)(2), Revised Code.

(c) The facility must satisfy the applicable placed-in-service date, delineated in Section 4928.64(A)(1), Revised Code.

The Commission's straightforward use of these three factors in this case (and other similar cases) is appropriate and matches up with the applicable statutory requirements and definitions. The Environmental Group's application for rehearing improperly second-guesses the Commission's findings in this case but reveals that its real dispute is with the General Assembly; the Environmental Group clearly disagrees with the requirements set forth in R.C. 4928.66, as enacted by Am. Sub S.B. No. 221 (SB 221). Moreover, the Environmental Group also improperly attempts to present evidence in support of its positions at the rehearing stage, most of which would be improper hearsay evidence even if it were submitted in a timely manner (which it is not). The Commission should reaffirm its decision in this case and reject the Environmental Group's application for rehearing.

ARGUMENT

A. THE COMMISSION PROPERLY FOUND THAT FUEL BLENDING AT CONESVILLE UNIT 3 UTILIZING BIOMASS FUEL IS A RENEWABLE ENERGY RESOURCE UNDER R.C. 4928.66.

The Environmental Group first argues (at 3-4) that the Commission erred in granting a certificate for Conesville Unit 3 because it is a combustion generator and the definition of "renewable energy resource" does not include combustion turbine facilities.

As a related matter, the Environmental Group objects (at 4-5) to the Commission's certification prior to Conesville Unit 3 conducting test burns and lining up a specific fuel source. Building on these claims, the Environmental Group concludes (at 6) that the Commission's decision modifies the statutory definition and intention of a renewable energy resource. CSP submits that it is the Environmental Group misconstruing the controlling statutory provisions and that the Commission's decision was entirely lawful and reasonable.

First, there is no basis in RC 4928.01 or 4928.64 supporting the position that a combustion facility cannot serve as a renewable energy resource when using renewable fuel. On the contrary, RC 4928.01(A)(35) specifically includes combustion fuels in the statutory definition of "renewable energy resource": fuel derived from solid wastes, biologically derived methane gas, energy from nontreated by-products of the pulping process or wood manufacturing process. The Commission's rules specifically contemplate using co-firing of renewable and non-renewable fuels and provide that "the proportion of energy input comprised of a renewable energy resource shall dictate the proportion of electricity output from the facility that can be considered a renewable energy resource." Thus, the Commission has already contemplated and provided for the situation (such as here) where a utility is employing a fuel switching strategy to help meet the statutory mandates for renewable energy. Co-firing obviously involves a combustion facility.

One of the members of the Environmental Group, OCC, has made similar arguments in Case Nos. 09-891-EL-REN and 09-892-EL-REN (DP&L's Killen Station) and Case No. 09-1878-EL-REN (Zimmer Station operated by Duke). Ultimately, in the

Killen Station case, OCC's position on reply was that "DP&L's applications for certifications as an eligible Ohio renewable energy resource generating facilities should be approved for only the percentage of btus the biomass fuel produces at Killen." (OCC November 11, 2009 Reply Comments in Case Nos. 09-891 and 892, at 4.) This approach is exactly what CSP is proposing in this case [*i.e.*, producing RECs based on the proportion of energy input comprised of renewable energy resource]. CSP included the formula it will use to achieve this purpose, consistent with Ohio Admin. Code 4901:1-40-01(G), in Section G.10 of its application. The Commission appropriately recognized CSP's proposal in its Order. (Finding and Order at 3.)

The Environmental Group either ignores or fails to understand that CSP will only be able to create RECs for the proportion of biomass fuel burned and this failure goes to the heart of the Environmental Group's misapprehension of the controlling statutes. Whereas the Environmental Group's position is premised on the allegedly improper certification of the combustion facility as a whole, the reality is that the certification goes only to the capability of the facility as a resource to produce renewable energy. Whether and how much renewable energy is produced by the facility are matters that will dictate the actual number of RECs that can actually be used for compliance. As referenced above, the statutory definition of "renewable energy resource" in R.C. 4928.01(A)(35) includes multiple categories of renewable energy, including "biomass energy", without regard to whether the energy is produced by a combustion generating facility. The determination of whether a generating facility is a renewable energy resource is driven by the renewable character of the energy that can be produced, not the character of the facility from which it is produced. In other words, a generating facility that is capable of

producing renewable energy is a renewable energy resource under the definition set forth in R.C. 4928.01(A)(35), regardless of whether that same facility can also produce non-renewable energy. Elsewhere in their application for rehearing, the Environmental Group admits (at 5) that the statutory definition only lists a couple examples of specific facility types and agrees that "[a]ll other renewable energy resources listed under the statutory definition are *types of energy based upon the use of renewable fuel* – not based upon the facility without the fuel." (Emphasis added.)

By focusing on the combustion turbine aspect of Conesville Unit 3 facility instead of the fuel blending that is to occur using biomass fuel, CSP submits that the Environmental Group either misapprehends or purposefully misconstrues the Commission's Order in this regard. The Commission only certified Conesville Unit 3 as an *eligible* renewable energy resource generating facility and it did not certify all energy produced by Conesville Unit 3 as being renewable energy. Indeed, the Order explicitly recognized that the Commission "is indifferent about the percentage of biomass used in co-firing, because the RECs generated are proportionally metered and calculated based on the amount of biomass consumed." (*Id.*) As a related matter, the Order (at 5) also recognized Conesville Unit 3 as being considered a "multi-fuel source" of generation after the fuel blending modification.

Ultimately in evaluating the Environmental Group's criticisms of the certification process, it must be remembered that the REN facility certification process is not statutorily required but was created by the Commission, exercising its own administrative discretion to establish such a procedure. CSP understands the REN certification process as a useful administrative tool created by the Commission to promote efficiency and

fairness by giving parties an "up front" conditional declaration about the creation of RECs through a particular facility. But as a discretionary process that is not required by statute, it necessarily cannot violate any statutes by not being rigorous enough for the Environmental Group's liking.

In sum, the Environmental Group's argument that a combustion facility cannot be considered a renewable energy resource that can produce renewable energy is without basis in fact or law and, indeed, conflicts with the explicit allowance for fuel blending in the controlling statute and rules. The Commission should recognize this argument as merely disagreeing with the General Assembly's and the Commission's choice in allowing renewable fuel blending as one of the permissible methods for compliance. As such, the Commission should reject the Environmental Group's first rehearing argument.

B. THE COMMISSION'S DECISION DOES NOT CONFLICT WITH ITS STATEMENT IN THE 08-888 OPINION AND ORDER REGARDING CONSIDERATION OF FUEL OR FEEDSTOCK IN THE CERTIFICATION PROCESS.

The Environmental Group next argues (at 6-7) that the Commission did not adhere to its statement in the 08-888 Opinion and Order that the REN certification process would fuel or feedstock as applicable, would be considered. The statement in the 08-888 Opinion and Order about considering fuel, while it is non-binding dicta that does not control how the rule is interpreted or applied, was not violated by the Finding and Order in this case. CSP's application and its docketed responses to the Staff's data requests, discuss the proposed biomass fuel in detail. The Commission's Order, in turn, recognized and considered this information in fulfillment of its statement in the 08-888 Opinion and Order.

Both CSP's application and the docketed responses to Staff's data requests contained detailed information about the proposed biomass fuel. In the Finding and Order, the Commission noted (at 2) the specifics of CSP's proposed biomass fuel source:

> According to the application, Conesville Unit 3 plans to use solid biomass fuel as its renewable energy resource, by co-firing torrefied biomass, raw wood chips, sawdust, wood pellets, herbaceous crops, and/or agricultural waste along with coal and/or natural gas. Torrefied biomass is created by heating raw or green biomass, turning the biomass into a hardened, dried, and less volatile fuel.

The Commission's Order went on (at 3) the reinforce the required showing regarding fuel in an REN application and make a key finding in this regard:

> An applicant seeking certification as a renewable energy generating facility must demonstrate that the type of fuel used in the facility to generate renewable energy qualifies as a renewable resource. * * * The biomass energy materials Conesville Unit 3 proposes to use, specifically, torrefied biomass, raw wood chips, sawdust, wood pellets, herbaceous crops, and/or agricultural waste, meet the definition of biomass energy contained in Rule 4901:1-40-01 (E), O.A.C.

There can be no doubt that CSP presented, and the Commission considered, the proposed biomass fuel proposed for Conesville Unit 3. As referenced above, the Commission appropriately defined the scope of the appropriate REN fuel inquiry in Finding 7 by excluding cost matters and focusing on definitional criteria in the controlling statute. The fact that the Environmental Group was not satisfied with the information presented by CSP or the Commission's consideration of it does not bear upon the question of whether it was considered. Thus, the Environmental Group is simply mistaken in claiming that the Commission failed to adhere to its statement in the 08-888 Opinion and Order.

C. THE COMMISSION'S DECISION IS CONSISTENT WITH THE DEFINITION OF "BIOMASS ENERGY" IN RULE 4901:1-40-01(E), OHIO ADMINISTRATIVE CODE.

The Environmental Group next argues (at 8-10) that the Commission erred in approving the certificate without requiring AEP to demonstrate compliance with the definition of "biomass energy" set forth in Rule 4901:1-40-01(E), Ohio Administrative Code. The application for rehearing alleges in this regard (at 8) that CSP's application "does not describe with any detail the source of the biomass material, how it will be transported, or whether any contracts have been entered into." The Environmental Group also complains that the application does not describe the anticipated carbon footprint of the facility. CSP submits that the Environmental Group is wrong in claiming that CSP does not adequately demonstrate that Conesville Unit 3 will be using qualified biomass fuel, and is also misguided in suggesting that an REN applicant must demonstrate the carbon footprint of a facility in order to be certified.

First, the Environmental Group argues that a facility should not be certified unless the Applicant is able to demonstrate that it has sustainable access to the fuel necessary to produce renewable energy. CSP's fuel procurement activity, including renewable fuels, is not an issue for this certification case. The Commission agreed with this point already (on page 3 of the Order) and nothing new is being raised on rehearing in this regard. After all, the precise fuel specifications and the resulting procurement solution are not reasonably known or determined at this point in time. As stated in Section G.10(a) of the application:

> Solid biomass fuel including but not limited to Torrefied biomass, raw wood chips, sawdust, wood pellets, herbaceous crops, agricultural waste will be co-fired with coal and/or natural gas in proportions up to 100% of total heat input.
>
> Initially a testing period will be required to determine the optimal percentage of biomass that can be consumed.

> The long range goal will depend on the results of the initial tests as well as fuel availability and market economics. For the test burns, efforts have been made to minimize modifications that may be required for long term fuel consumption.
>
> CSP is seeking to qualify the output of Conesville Plant based on Btu input that is produced from renewable fuels. Due to issues with fuel availability and market conditions CSP does not intend to certify a fixed percentage.

Thus, the details concerning the precise fuel specifications and the resulting procurement solution to be developed by CSP is not presently known and is not relevant to this certification case. CSP's FAC proceeding would be a more appropriate case to address such issues, after they are ripe for review. The key point in this case is that the Commission recognized that only RECs generated from biomass fuel consumed at Conesville Unit 3 will be produced.

CSP fully understands that only biomass energy, as defined in Rule 4901:1-40-01(E), OAC, produced at Conesville Unit 3 will produce RECs that can be used for compliance with the renewable energy benchmarks. CSP directly stated in its March 3, 2010 response to Staff data request question 3 that the requested certification was merely to declare that renewable energy generated at Conesville Unit 3 "from renewable fuel consumed that qualifies under SB 221 and the PUCO's rules" will result in RECs on a heat input basis. Similarly, in response to question 4 regarding the measures to be taken to ensure an environmentally sustainable fuel supply for Conesville Unit 3, CSP stated as follows: "All fuels will be in compliance with the statutory definition of a renewable energy resource." Consistent with those representations, AEP intends to include contractual language in the fuel supply agreements linked to the

definition in Rule 4901:1-40-01(E) to ensure that biomass fuel utilized at Conesville Unit 3 will comply with the Commission's requirements. Hence, though it is not practical or appropriate to conclusively demonstrate *at this time* that all fuel procured and consumed *in the future* for Conesville Unit 3 will comply with Rule 4901:1-40-01(E), OAC, CSP is keenly aware of the requirements and fully intends to ensure compliance with them. Any concerns of the Environmental Group about the qualifications of biomass fuel used by CSP at Conesville Unit 3 should be addressed in future compliance-related proceedings – not in this certification case.

Second, the Environmental Group's position that a facility's carbon footprint must be examined before granting an REN certification is without any basis in the controlling statutes and rules. The Environmental Group's attempt to patch together passing and non-contextual references to emissions in various Commission rules that do not govern this certification is a transparent attempt to graft on requirements that simply do not exist. The Environmental Group uses the hypothetical example of being concerned if the biomass fuel were to be transported long distances using diesel fuel, thereby expanding the facility's carbon footprint.

If such matters were considered for biomass energy, they would also have to be comprehensively considered for the manufacture, procurement and shipment of wind turbines and other materials used in creating renewable energy. In its March 3, 2010 response to Staff data request question 1, CSP indicated that its goal is to minimize the onsite storage of the fuel to approximately 3-5 days and

indicated in response to question 3 that the biomass fuel it is likely that the fuel will come from Ohio or the surrounding states due to high transportation costs. In any case, the Environmental Group's example is hypothetical and without basis in the record. Implementing such a recommendation would be highly impractical, burdensome, costly and without basis in the definition of biomass energy in the controlling statutes and rules. For all of these reasons, the Environmental Group's carbon footprint argument should also be rejected.

D. IT WOULD BE INAPPROPRIATE FOR THE COMMISSION TO PRE-JUDGE OTHER PENDING CASES BASED ON ITS DECISION HERE OR TO MODIFY ITS DECISION IN THIS CASE BASED ON OTHER PENDING APPLICATIONS.

The Environmental Group also suggests (at 10-12) that the Commission should consider the effects of all of the pending REN applications involving biomass "on Ohio and the rest of the Country on an aggregate level." CSP submits that this argument suffers from numerous infirmities. As a threshold matter, CSP believes that the 2,100 MW number referenced in the application for rehearing is misleading because, among other reasons, most of the units listed as proposing 100% biomass actually include a stated goal of 1-100% biomass; based on that one error/mischaracterization, the 2,100 MW number could be falsely inflated by more than 1,000 MW. This gross error demonstrates one of the dangers in summarily incorporating factual information from other proceedings, especially at the rehearing stage of a case. These same parties filed comments prior to a decision in this case without making this argument and, instead, have raised it for the first time on rehearing. In any case, CSP also submits that such an approach would also violate the requirement that cases be decided based on the record in the proceeding, not based on information presented in other dockets.

Ironically, the Environmental Group's argument, if carried to its logical extreme, would also limit the production of renewable energy in Ohio through subjective, qualitative rationing. As a legal matter, any type of renewable energy resource permitted by statute should count toward compliance – even if would permit 2,100 MW of biomass energy in Ohio. A utility's incentive to pursue cost-effective compliance strategies serves the interests of all customers (who ultimately will be paying for the compliance costs). Restricting or preventing a utility from pursuing any statutorily-authorized methods of compliance is unwise and inappropriate.

E. IT IS APPROPRIATE TO CONSIDER THE ENVIRONMENTAL GROUP'S IMPROPER, EXTRA-RECORD EVIDENCE REGARDING FOREST RESIDUE CAPACITY, WHICH IS ALSO IMMATERIAL TO THIS CASE

The Environmental Group attempts (at 12-14) to submit evidence for the first time on rehearing regarding the capacity of forest residue resources in Ohio and other regions. Such information is improperly submitted on rehearing for the first time (there is no reason information could not have been presented earlier in this proceeding). Moreover, the evidence is unsubstantiated, hearsay evidence that would be improper even if it were presented earlier. In any case, it is immaterial to this case as it proves nothing about the merits of CSP's application or the lawfulness of the Commission's decision. As noted earlier, the use of forest residue is only one of the several options for qualifying biomass and it has not been determined to what extent forest residue will make up the biomass supply for the Conesville Unit 3 fuel blending. Even if the Commission were to accept the notion that forest residue capacity is limited, that does not undercut the certification of Conesville Unit 3.

F. IT IS APPROPRIATE TO CONSIDER THE ENVIRONMENTAL GROUP'S IMPROPER, EXTRA-RECORD EVIDENCE REGARDING MILL RESIDUE CAPACITY, WHICH IS ALSO IMMATERIAL TO THIS CASE

The Environmental Group attempts (at 14-15) to submit evidence for the first time on rehearing regarding the capacity of mill residue resources in Ohio. Such information is improperly submitted on rehearing for the first time (there is no reason information could not have been presented earlier in this proceeding). Moreover, even worse than the unsubstantiated, hearsay evidence proferred regarding forest residue capacity, the Environmental Group merely makes a statement regarding mill residue capacity in Ohio without any support whatsoever. In any case, it is immaterial to this case as it proves nothing about the merits of CSP's application or the lawfulness of the Commission's decision. As noted earlier, the use of mill residue is only one of the several options for qualifying biomass and it has not been determined to what extent mill residue will make up the biomass supply for the Conesville Unit 3 fuel blending. Even if the Commission were to accept the notion that mill residue capacity is limited, that does not undercut the certification of Conesville Unit 3.

CONCLUSION

For the foregoing reasons, the Commission should deny the Environmental Group's application for rehearing in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's Memorandum Contra Environmental Group's Application for Rehearing was served by U.S. Mail upon the individuals listed below this 10th day of May 2010.

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