

**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
OR IN THE ALTERNATIVE MOTION FOR AN EVIDENTIARY HEARING
BY THE OHIO CONSUMER AND ENVIRONMENTAL ADVOCATES**

The Ohio Environmental Council (“OEC”), the Office of the Ohio Consumers’ Counsel (“OCC”), and the Environmental Law & Policy Center (“ELPC”) (collectively “OCEA”) hereby move the Public Utilities Commission of Ohio (“Commission” or “PUCO”) to dismiss the above-captioned Application because FirstEnergy Solutions Corporation (“FES” or “Company”) has failed to meet its burden of proving that its Application has met the legal requirements as set forth in R.C. 4928. FES is seeking 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 allow 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.

As explained more fully in the accompanying Memorandum in Support, FES’s Application is legally deficient. The Application has been suspended twice by the Commission for its deficiencies. It is currently suspended indefinitely. Moreover, FES has indicated in its filings that it does not intend to supplement its Application or discovery responses. Therefore,

FES has made clear that its interpretation of the requirements for renewable certification differs from the Commission's. However, it is the Commission's interpretation of the law -- not FES's - - which matters. Accordingly, the Application does not comply with Ohio law and must be dismissed. In the alternative, the PUCO should set this matter for an evidentiary hearing with a complete procedural schedule.

Respectfully submitted,

/s/ Will Reisinger

Will Reisinger, Counsel of Record
Nolan Moser
Trent A. Dougherty
Megan De Lisi

Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
will@theoec.org
nolan@theoec.org
trent@theoec.org
megan@theoec.org

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

/s/ Christopher J. Allwein (WR)

Joseph P. Serio, Counsel of Record
Christopher J. Allwein
Assistant Consumers' Counsel

Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-8574
serio@occ.state.oh.us
allwein@occ.state.oh.us

Michael E. Heintz

Staff Attorney
Environmental Law & Policy Center
1207 Grandview Ave.
Suite 201
Columbus, Ohio 43212
614-488-3301 – telephone
614-487-7510 – fax
mheintz@elpc.org

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MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

FES's original Application was filed on December 11, 2009. On January 11, 2010, the OEC filed a Motion to Suspend the automatic approval of the facility. On January 19, 2010, FES filed a Memorandum Contra OEC's Motion to Suspend, calling OEC's Motion "devoid of facts or law that would justify suspension."¹ The Commission disagreed, and on February 3, 2010, OEC's Motion to Suspend was granted. In its Order suspending the Application, the Commission found that "additional information is required to satisfy the requirements for certification."² On April 12, 2010, OCEA filed Comments on the Burger Application, arguing that "the current Application does not contain sufficient information to justify Commission approval."³ The Comments further asserted that FES must provide additional information regarding the source of its biomass material in order for the facility to be eligible for renewable certification. On April 22, 2010, FES filed a Memorandum Contra OCEA's Comments, calling

¹ Memorandum in Opposition to Motion to Suspend at 1.

² Entry Ordering Suspension, February 3, 2010.

³ OCEA Comments at 5.

them “irrelevant and unproductive.”⁴ FES further requested that the Commission “disregard OCEA’s comments and grant the Application.”⁵

The Commission, again, disagreed with FES. On April 28, 2010, the Commission entered an order suspending the Application for a second time:

The attorney examiner finds that **additional information is required to satisfy the requirements for certification**. Therefore, good cause has been shown to suspend the 60-day automatic approval process for Burger's amended application for certification, in order for the Commission to further review this matter.⁶

II. BURDEN OF PROOF AND STANDARD OF REVIEW

FES bears the burden of proof to demonstrate that its Application satisfies the requirements of R.C. 4928. The Company seeks to have its Burger facility certified as an eligible renewable energy resource facility, allowing the FirstEnergy companies to use the energy generated to meet their lawful renewable benchmark obligations and to bank and sell RECs. Consequently, FES must demonstrate that its Application satisfies the criteria outlined in R.C. 4928.64 and in the Admin. Code §§ 4901:1-40-01 through 4901:1-40-09 for renewable generation.

The Commission’s rules provide the criteria that must be applied to an Application for certification of a renewable energy facility. FES describes the standard it believes should be applied:

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) was created on or after January 1, 1998, by the modification or

⁴ FES Response to OCEA Comments at 2, April 22, 2010.

⁵ Id. (Emphasis added).

⁶ Entry Ordering Suspension, April 28, 2010.

retrofit of any facility placed in service prior to January 1, 1998; and
(iii) is located in Ohio or deliverable into Ohio.⁷

Criteria (ii) and (iii) are not in dispute. However, FES believes that it has satisfied its criteria point (i) above simply by stating that it intends to procure biomass for its plant. Such a simple statement cannot and does not meet this statutory burden. Nonetheless, FES asserts that the Commission must certify its facility as a renewable energy resource. FES does not believe that any additional inquiry into the sustainability or renewable characteristics is appropriate.

The Commission's two suspension entries, however, contradict FES's view. The Commission's two suspension orders found that **"additional information is required to satisfy the requirements for certification."**⁸ FES's Application, even assuming that everything contained therein is true, has been shown to be legally inadequate for certification based on the PUCO Entries that have found the evidence submitted to date to be inadequate. In effect, the Commission's entries have established a standard of review showing that the criteria advanced by FES are inadequate.

III. ARGUMENT

A. FES's Application Is Facially Inadequate.

As OCEA has argued, renewable certification requires a demonstration of sustainability and renewability.⁹ This is a commonsense interpretation of the renewable energy provisions enacted by S.B. 221 and R.C. 4928.64. FES must provide information regarding the source and location of the biomass material to be utilized; the sustainability protocol that will be used; the method and distance of transportation; and the net carbon emissions that will be generated. In

⁷ Memorandum Contra OCEA Comments at 5-6.

⁸ Entry Ordering Suspension, April 28, 2010 (Emphasis added).

⁹ See OCEA's Comments.

short, FES must make some basic showing that the energy generated from its facility will be obtained through a “renewable” process.

B. The Commission Has Ample Justification To Scrutinize This Application In Order To Protect The Viability of Ohio’s Renewable Energy Standard And Ensure The Feasibility Of This Project.

FES’s filings suggest that any scrutiny of its proposal is improper. FES argues that its Application should be approved without additional information because other facilities have not been required “to provide any of the information sought by the OCEA.”¹⁰ The Commission is within its prerogative to consider applications for renewable certification on a case by case basis. Moreover, FES has provided significantly less information than other applicants for renewable certification, and its Application seeks approval for a facility that will be far and away the largest in Ohio.¹¹

The unprecedented size of the Burger facility, at over 300 MW, means that it will require an unprecedented amount of biomass fuel to function. FES does not dispute OCEA’s statement that the forest residues available in Ohio may only be able to support 38.5MW, far short of Burger’s 312 MW, and that the resources available in the north-central U.S. may only be able to support 1116 MW, far short of the roughly 2000 MW that have been approved or are pending certification at the PUCO.¹² Further, the Burger facility will have a substantial impact on Ohio’s renewable energy standard. Pursuant to 4928.65, the energy generated at the Burger facility will be eligible for a higher REC unit rate -- i.e. a “super-REC” -- making electricity produced at the plant more valuable than all other renewable generation. The electricity produced at FES’s

¹⁰ Id. at 6.

¹¹ See, e.g., Case No. 09-1043-EL-REN. South Point Biomass, LLC provided substantially more detail regarding the source of its biomass fuel. South Point conveyed most of this data through filings on the public docket; sensitive information regarding contracts and other proprietary material was made available to the Commission and intervenors under protective seal. After reviewing this data, the OEC filed Comments supporting the South Point project.

¹² OCEA’s Comments at 21.

facility **in one year alone could satisfy a majority of the Company’s renewable benchmark obligations through the year 2025**, and a significant portion of the renewable energy generated in Ohio.¹³ Therefore, if the PUCO were to award renewable energy credit for a non-sustainable project, it could impact or eviscerate the renewable energy standard enacted by S.B. 221 and codified in R.C. 4928.64. Finally, due to its size, the project could place an unsustainable and unreasonable burden on Ohio’s and the region’s biomass resources.

It is reasonable to consider the renewable characteristics of a process and fuel source before determining that that process is “renewable” under the law. We note that the Supreme Court of Ohio has stated that the “General Assembly will not be presumed to have intended to enact a law producing absurd consequences,”¹⁴ and further, that laws must not be “interpreted to achieve an absurd result.”¹⁵ If FES were to receive credit for processes that do not result in emissions reductions and do not satisfy any sustainability protocols, then it would be absurd to characterize its facility as “renewable.”

There is ample justification for the Commission to scrutinize this facility.

C. The Commission And Its Staff Have Made It Clear That Sustainability Must Be Considered In Evaluating An Application For Renewable Certification.

As described above, the Commission has issued two orders suspending the Burger Application, each time stating that “additional information is required to satisfy the requirements

¹³ If the Burger plant is approved, FirstEnergy will be able to achieve the bulk of its renewable energy requirements from the Burger facility in one year. Using the super-REC formula found in R.C. 4928.65, it appears that Burger, operating at a 90 percent capacity factor, could satisfy its renewable generation obligations pursuant to R.C. 4928.64 through the year 2018 *in only one year of operation*. 312.4 MW x total hours per year, at a 90 percent capacity factor = 2,053,468 RECs. Applying the super-REC formula, at a 4.5 multiplier = 11,083,327 RECs in one year of generation. FirstEnergy would need to achieve approximately 8, 200,000 RECs through 2018 and 17,000,000 RECs by 2025 to satisfy its benchmarks.

¹⁴ *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 371 (1950).

¹⁵ *Mishr v. Board of Zoning Appeals, Village of Poland*, 76 Ohio St. 3d 238 (1996).

for certification.”¹⁶ FES has failed to provide any such additional information. Staff has also made it clear through discovery requests that data such as the type of fuel to be used, the sustainability of those fuel sources, and relevant contracts for “environmentally- sustainable” fuel, must be evaluated before approval is granted. FES has failed to provide substantive responses to Staff discovery requests and has not supplemented those responses. Staff’s First Set of Interrogatories contained the following preface:

Reponses to the following questions will be necessary for Commission Staff to perform a comprehensive review of your application for certification as an eligible Ohio renewable energy resource generating facility.¹⁷

In this set of interrogatories, Staff requested that FES “describe the content (fully characterize the fuel material) and sources of biomass resource.”¹⁸ FES responded by stating that “the specific types of material to be used has [sic] not yet been determined.”¹⁹ Staff also requested FES to “indicate the commitment and measures that will be undertaken by the Company to ensure long-term procurement of an environmentally-sustainable fuel supply.”²⁰ FES responded by stating that “The Company has not entered into contracts for the supply of biomass product, therefore [sic] it has not determined the protocols which may be in place relating to sustainability certifications or sourcing standards.”²¹

OEC has sought similar information through discovery, and FES has also failed to provide meaningful responses. For example, after OEC’s discovery requests sought information regarding the source of the biomass material, FES responded by stating that “it currently intends to utilize

¹⁶ Entry Ordering Suspension, April 28, 2010.

¹⁷ Staff Data Requests at 1.

¹⁸ Responses to Staff’s Data Requests at 3.

¹⁹ Id. at 2.

²⁰ Id.

²¹ Id.

biomass obtained from the United States and/or Canada.”²² This response has not been supplemented. FES also prefaces its response to several questions regarding the source of its biomass materials by objecting to the requests as “vague and ambiguous” and “seek[ing] information that is not reasonably calculated to lead to the discovery of relevant evidence.”²³ FES should not benefit from a lack of candid and complete responses to data requests. The Company had at least two opportunities to demonstrate the validity of its Application. The Company has failed to do so and now should be held accountable -- in the form of a dismissal of its Application.

D. The Application Should Be Dismissed.

As shown above, FES apparently disagrees with the Commission and intervenors that it must provide any additional information about its facility, or that any additional information about the source of its biomass could even be relevant.²⁴ FES appears to believe that it is entitled to certification of the Burger facility as a matter of right, the Commission’s contrary Entries notwithstanding.

Thus, the case stands at an impasse. The only reasonable step at this point is for the Commission to dismiss this Application. FES would then have the option of re-filing its Application with information regarding the sustainability and renewable characteristics of its facility.

IV. IN THE ALTERNATIVE, THE PUCO SHOULD SET THE MATTER FOR EVIDENTIARY HEARING, WITH A FULL PROCEDURAL SCHEDULE.

As the Commission’s second entry suspending the application states, FES’s Application does not currently “satisfy the requirements for certification,” and it should be dismissed. In the alternative to a dismissal of the Application, pursuant to Rule 4901-1-12 of the Ohio Admin. Code,

²² OCEA Comments at 14 (citing Answers to OEC Interrogatory No. 5, Exhibit 1).

²³ Id.

²⁴ FES Response to OCEA Comments at 1.

OCEA moves the Commission to set the above-captioned matter for an evidentiary hearing, with a full procedural schedule including ample time for discovery. Among the factual and legal questions at issue are whether the fuel for the Burger facility will meet the definition of “renewable” energy resource and whether the facility can be sustainably sourced using biomass resources. In the event that this Application is not dismissed, an evidentiary hearing would be appropriate. A hearing would allow for the development of a sufficient evidentiary record upon which to make a decision on the reasonableness and lawfulness of the Application.

V. CONCLUSION

FES’s Application for certification of its Burger facility as an eligible renewable energy resource has been suspended by the Commission twice for insufficient information. FES has been given many opportunities and several months to revise its Application to comply with the Commission’s requests. FES has chosen not to do so, and instead uses its memoranda contra to characterize the concerns raised by the Commission, Staff, and OCEA as “irrelevant.”²⁵ FES’s Application is facially inadequate and could have been dismissed at any point subsequent to its filing. At this point, the only appropriate step is for the Commission to dismiss this Application. FES would then have the option of re-filing its Application with more information about the source of its biomass fuel, or it may choose to find other means of generation through which to meet its renewable benchmark obligations under R.C. 4928.64.

Respectfully submitted,

/s/ Will Reisinger
Will Reisinger, Counsel of Record
Nolan Moser
Trent A. Dougherty
Megan De Lisi

Ohio Environmental Council

²⁵ FES Response to OCEA Comments at 1.

1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
(614) 487-7506 – Telephone
(614) 487-7510 – Fax
will@theoec.org
nolan@theoec.org
trent@theoec.org
megan@theoec.org

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

/s/ Christopher J. Allwein (WR)
Joseph P. Serio, Counsel of Record
Christopher J. Allwein
Assistant Consumers' Counsel

Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-8574
serio@occ.state.oh.us
allwein@occ.state.oh.us

/s/ Michael E. Heintz (WR)
Michael E. Heintz
Staff Attorney
Environmental Law & Policy Center
1207 Grandview Ave.
Suite 201
Columbus, Ohio 43212
614-488-3301 – telephone
614-487-7510 – fax
mheintz@elpc.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class or electronic mail this 20th day of May, 2010.

_____/s/ Will Reisinger

David Plusquellic
Manager of Renewable Energy Portfolio
FirstEnergy Solutions
341 White Pond Drive
Akron, Ohio 44320

Daniel R. Conway
Porter Wright, Morris & Arthur, LLP
41 South High Street
Columbus, Ohio 43215

Jim Lang
Kevin P. Shannon
Trevor Alexander
Calfee, Halter & Griswold LLP
1400 KeyBank Center 800 Superior
Avenue
Cleveland OH 44114-2688

Mark Hayden
FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308

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Summary: Motion Motion to Dismiss, and in the Alternative Motion for Hearing, by the Ohio Environmental Council, the Ohio Consumers' Counsel, and the Environmental Law & Policy Center electronically filed by Mr. Will Reisinger on behalf of Ohio Environmental Council