

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP. REGARDING THE  
CALCULATION OF THE MARKET VALUE OF RENEWABLE ENERGY CREDITS**

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**INTRODUCTION**

In its Finding & Order dated August 11, 2010 (the “Finding and Order”), the Commission approved the FirstEnergy Solutions Corp. (“FirstEnergy”) application for R.E. Burger Units 4 & 5 (“Burger”) as an eligible Ohio renewable energy resource generating facility and requested that interested persons submit comments regarding the appropriate method to determine the “then existing market values” of a Renewable Energy Credit (“REC”) for purposes of O.R.C. § 4928.65. Finding and Order at ¶¶ 20-21. Comments were filed by the Commission’s Staff, the American Wind Energy Association (“AWEA”) and the Ohio Consumer and Environmental Advocates (“OCEA”). FirstEnergy supports Staff’s comments as reasonable and consistent with the statutory requirements.

The comments filed by Staff are well considered, appropriate, and on topic. FirstEnergy replies to Staff’s comments only to provide additional suggestions for the process suggested by Staff. The comments filed by AWEA and OCEA largely ignore the relevant statutory language, and even ignore the topic on which these comments were requested. As described in detail below, FirstEnergy respectfully requests that the Commission adopt the process recommended by Staff and reject the comments of AWEA and OCEA.

## PROCEDURAL BACKGROUND

In its Finding and Order, the Commission recognized that Burger met all relevant statutory criteria and approved FirstEnergy's application for certification of Burger as an eligible Ohio renewable energy resource. Id. at ¶ 25. The Commission rejected AWEA's comments attempting to modify the REC multiplier formula, and correctly held that "[t]he REC multiplier formula is established by the plain, unambiguous language of Section 4928.65, Revised Code, and thus the Commission must apply the statute as written." Id. at ¶ 19.

The sole issue on which the Commission requested comment involves a single provision of that statute – calculation of the biomass incentive credit. The statute provides that this calculation is performed in part based on "the then existing market value of one renewable energy credit." O.R.C. § 4928.65. The Commission requested comments regarding only "a methodology to determine the existing market value of RECs." Finding and Order at ¶ 21.

## ARGUMENT

### **I. Staff's Comments Are Well Considered, Appropriate, And Should Be Accepted By The Commission.**

The comments submitted by Staff appropriately address the one issue raised by the Commission. FirstEnergy largely agrees with all of Staff's proposals, with two additional suggestions.<sup>1</sup>

Staff recommended that a regulatory process "be established surrounding the determination of the market value each year, in the event that interested parties contest the Staff's determination." Staff Comments at 5. FirstEnergy believes that additional detail regarding this process is appropriate and recommends that the regulatory process suggested by

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<sup>1</sup> Staff's example calculation in its comments incorrectly accounted for the biomass percentage twice in the calculation. See Staff Comments at 7. Staff recognized this mistake, and in its reply comments used the correct calculation. See Staff Reply Comments at 1. FirstEnergy supports Staff's corrected calculation provided in the Reply Comments.

Staff follow that already in place for the Alternative Compliance Payment (“ACP”). See O.A.C. § 4901:1-40-08. Just as with the calculation of the ACP, FirstEnergy recommends that Staff calculate the appropriate “then current market value” of one REC pursuant to the process outlined in Staff’s comments. Staff’s calculation would then be subject to Commission review and approval. This is the established procedure for the ACP calculation, which is extremely similar to this calculation, and has been used by the Commission in the past. See Case No. 10-469-EL-ACP.

As far as the timing of this regulatory process, Staff recommends that “such process seek resolution as early in the calendar year as practicable so as to remove uncertainty going forward into the year.” Staff Comments at 5. FirstEnergy agrees with this recommendation, and proposes that this regulatory process be concluded by no later than March 31st of each calendar year so as to prevent unnecessary uncertainty regarding the REC calculation for each calendar year.

**II. OCEA’s Comments Are Largely Irrelevant To The Issue Raised By The Commission, And Its Recommendations Are Inconsistent With The Clear Statutory Language And This Commission’s Finding And Order.**

OCEA’s wide ranging comments encompass a range of issues wholly unrelated to the Commission’s request for proposals regarding the correct method to calculate the “then current market value” of a REC. OCEA’s issues already have been extensively briefed and/or rejected by this Commission, and they should be rejected as non-responsive to the Commission’s request.

**A. OCEA’s Constitutional Argument Is Wholly Unresponsive And Legally Incorrect.**

OCEA first alleges that O.R.C. § 4928.65 is unconstitutional. See OCEA Comments at 3-7. As a preliminary matter, this argument is wholly unresponsive to the narrow technical issue raised by the Commission, and should be rejected on that basis alone. To the extent the

Commission is inclined to consider this argument, it already has been extensively briefed in connection with OCEA's Application for Rehearing filed on September 10, 2010. In the interests of brevity, FirstEnergy hereby incorporates by reference its response to this issue in FirstEnergy's Memorandum Contra the OCEA's Application for Rehearing, which was filed on September 20, 2010. See Memorandum Contra at 5-10. In brief, O.R.C. § 4928.65 is not unconstitutional because it does not relate to interstate commerce, the OCEA lacks standing to pursue this argument, and because O.R.C. § 4928.65 constitutes a permissible direct subsidy to qualifying suppliers. Id.

**B. OCEA's Attacks On The Choices Of The Ohio Legislature Already Have Been Considered And Rejected By This Commission.**

OCEA next alleges that there is currently no liquid or transparent REC market in Ohio. OCEA Comments at 7-10. This argument is not based on any lack of data about REC prices, or about the availability of REC's in this state. Instead, OCEA argues that Ohio does not have a sufficient REC market because "[t]he newness of the Ohio REC market coupled with the weighted REC exception creates additional uncertainty in an already uncertain market." Id. at 8. OCEA then argues for an entirely new auction system which is not based on the statute or actual market prices, but instead is based on an artificial construct created by OCEA which ignores any RECs produced by the Burger facility. Id. at 8-10. OCEA believes that this will eliminate the "death spiral" identified by the AWEA where REC prices drop precipitously as Burger comes on line. Id. at 8, 12-16. OCEA also suggests that FirstEnergy be prohibited from trading RECs generated by Burger, or alternatively that a proxy be used instead of the actual "then existing market value" for a REC, such as 75% of the ACP. Id. at 15-16.

These arguments already have been considered and rejected by the Commission. "The REC multiplier formula is established by the plain, unambiguous language of Section 4928.65,

Revised Code, and thus the Commission must apply the statute as written.” Finding and Order at ¶ 19. O.R.C. § 4928.65 does not contain any of the recommendations included in the OCEA brief, such as eliminating Burger RECs from the statutory calculation, requiring four or more bidders, requiring a certain bidder profile, or requiring five years of data. See OCEA Comments at 9. Instead, this statute merely requires that the Commission determine the “then current market value” of a REC. The similar requirements suggested by AWEA already were expressly rejected by the Commission, and OCEA’s resubmission of similar arguments should similarly be rejected as inconsistent with the plain language of the statute.

**C. OCEA’s Suggestion That The REC Price Be Set At 75% Of The ACP Lacks Any Statutory Support.**

OCEA next suggests that the REC price should be set at 75% of the ACP value as a substitute for market price for at least the next two years. OCEA Comments at 10-12. Once again, this argument lacks statutory support of any kind. Nothing in O.R.C. § 4928.65 suggests the Commission should simply assign a value for the “then current market value” of a REC when actual data is available. As pointed out by Staff in its Comments, publicly-available REC market data already exists, and should be used to make this statutory calculation. See Staff Comments at 5. Because actual data exists regarding the value of Ohio non-solar RECs, there is no reason to use a fictitious placeholder value in this calculation.

**III. AWEA’s Comments Are Inconsistent With The Clear Statutory Language And This Commission’s Finding And Order.**

AWEA’s Comments are also inconsistent with the plain statutory language and this Commission’s Finding and Order. AWEA argues that the market value of a REC should not be tied to the short term or spot REC market. AWEA Comments at 5-6. AWEA suggests that even though this data is easily available, it should not be used because it would lead to a gradual

reduction in REC prices as Burger RECs enter the marketplace. Id. at 5. Instead, AWEA suggests that the market value of a REC should equal the avoided cost of purchasing power from another existing renewable generation source, and suggests a complex new system where REC prices would be determined through the use of a consultant or through long-term contracts for Ohio non-solar RECs. Id. at 6-7. In the event neither of these recommendations are deemed practical, AWEA recommends that the market value of a REC be set as equal to the ACP. Id. at 7.

Quite simply, AWEA's comments conflict with O.R.C. § 4928.65. The statute requires that the Burger RECs be calculated based on "the then existing market value of one renewable energy credit." O.R.C. § 4928.65. There is nothing in this language relating to avoided cost, and AWEA's comments are simply inconsistent with the statutory language.

AWEA's suggestions also have been rejected by this Commission. As pointed out in the Finding and Order, AWEA already has asked this Commission to alter the REC multiplier to set the market value of a REC as equal to the ACP. Finding and Order at ¶ 18. AWEA argued that this departure from the statute was warranted because the REC market in Ohio would be devastated by using actual market data. Id. The Commission expressly rejected this position, finding that "[t]he REC multiplier formula is established by the plain, unambiguous language of Section 4928.65, Revised Code, and thus the Commission must apply the statute as written." Finding and Order at ¶ 19 (citing State ex. rel. Columbus Southern Power v. Fais, 117 Ohio St. 3d. 340, 345 (2008)). In light of the Commission's previous ruling on this precise issue, AWEA's comments should be rejected.

## CONCLUSION

FirstEnergy believes that Staff's comments are appropriate, and accurately reflect the

intent of the Ohio General Assembly and this Commission. The comments from OCEA and AWEA completely ignore the plain statutory language and this Commission's Finding and Order. Therefore, FirstEnergy respectfully recommends that the Commission institute the process recommended by Staff, with the additional suggestions identified by FirstEnergy above.

Respectfully submitted,

/s/ Kevin P. Shannon

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**CERTIFICATE OF SERVICE**

I hereby certify that the **REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP. REGARDING THE CALCULATION OF THE MARKET VALUE OF RENEWABLE ENERGY CREDITS**; was filed electronically this 10th day of November, 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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A copy of the Response also has been served by first class United States mail, postage prepaid, upon:

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Summary: Reply Comments of FirstEnergy Solutions Corp. Regarding the Calculation of the Market Value of Renewable Energy Credits electronically filed by Mr. Kevin P. Shannon on behalf of FirstEnergy Solutions Corp.