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OEC files brief with Ohio Supreme Court challenging PUCO order in Burger biomass energy case

FirstEnergy intervention in renewable energy case signals utility giant's intention to go forward with massive biomass retrofit

(Columbus, OH)—In a merit brief filed with the Ohio Supreme Court on Monday, the Ohio Environmental Council (“OEC”) challenged the Public Utilities Commission of Ohio’s (“PUCO” or “Commission”) certification of FirstEnergy’s R.E. Burger power plant as a “renewable energy facility.”

In a controversial decision last August, the PUCO gave the utility permission to burn whole trees and other biomass fuel at the power plant located near the Ohio River in Shadyside, Ohio. The order sets the stage for the company to receive renewable energy credits for the electricity produced at the plant.

The decision could allow FirstEnergy to meet all or a portion of its obligations under Ohio’s Renewable Energy Standard, which mandates that all investor-owned electric utility companies must obtain a portion of their electricity sales from “renewable” energy sources such as wind, solar, or renewable biomass generation. By 2025, utilities must obtain 12.5 percent of their power sales from renewable sources.

While the OEC appeal challenges the Burger decision specifically, the eco group also contends that the Commission’s biomass energy certification procedure is unlawful.

“The PUCO continues to sign off on dubious biomass energy projects such as the Burger retrofit without knowing anything about the source of the biomass fuel,” said Will Reisinger, OEC staff attorney and lead counsel on the case. “We believe this procedure violates Ohio law.”

In its brief, the OEC argued that the PUCO’s decision to certify the Burger facility was both unlawful and unreasonable and should be reversed by the Ohio Supreme Court. The OEC argued that the PUCO’s certification of the biomass energy facility without knowing the type of fuel that would be used was inconsistent with Ohio law. Further, the OEC alleged that the Commission’s application of Ohio Revised Code Section 4928.65—which gives FirstEnergy’s Burger plant an extra special Renewable Energy Credit profit—results in economic discrimination in violation of the United States Constitution.

The PUCO decision last summer rejected warnings filed by the American Wind Energy Association (“AWEA”) that the Burger biomass project could drown out investment in Ohio in other renewable technologies. AWEA had argued in filings that the PUCO’s approval of FirstEnergy’s application could inflict “catastrophic effects on Ohio’s renewable energy marketplace” leading to a “‘death spiral’ for Ohio’s [Renewable Energy Standard].”¹

Solar, wind, hydropower, and other renewable energy industries—including other biomass facilities—could be placed at a severe disadvantage as a result of the PUCO decision.

In November, a FirstEnergy press release indicated that the company was cancelling the controversial project. But the utility has refused to withdraw its application for renewable energy certification for the facility. FirstEnergy even has filed for formal intervention in the OEC’s appeal at the Ohio Supreme Court, indicating its intent to defend the certification.

“If FirstEnergy intends to abandon this project, then why have they intervened in this case and why haven’t they pulled the plug on their application?” asked Reisinger. “Based on these facts, we have to assume that the company is planning to go ahead with the Burger retrofit.”

“The PUCO’s decision gave FirstEnergy a blank check to burn almost anything it wants without any regulatory oversight—and allows the company to receive a windfall profit for doing so,” said Reisinger.

“We believe the Ohio Supreme Court should reverse this decision and require the PUCO to evaluate biomass energy projects in a commonsense manner and in accordance with Ohio law.”

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The mission of the Ohio Environmental Council (OEC) is to secure healthy air, land, and water for all who call Ohio home. The OEC is Ohio’s leading advocate for fresh air, clean water, and sustainable land use. The OEC has a 40-year history of innovation, pragmatism, and success. Using legislative initiatives, legal action, scientific principles, and statewide partnerships, the OEC secures a healthier environment for Ohio’s families and communities. For more information, visit www.theOEC.org.

¹PUCO Case No. 09-1940-EL-REN, American Wind Energy Association Comments at pp. 2, 5.