

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The Application of Moraine Wind LLC for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility.)	Case No. 21-516-EL-REN
)	
In the Matter of The Application of Rugby Wind LLC for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility.)	Case No. 21-517-EL-REN
)	
In the Matter of The Application of Elm Creek II for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility.)	Case No. 21-531-EL-REN
)	
In the Matter of The Application of Buffalo Ridge II for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility.)	Case No. 21-532-EL-REN
)	
In the Matter of The Application of Barton Windpower 1 for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility.)	Case No. 21-544-EL-REN

**MOTION FOR LEAVE TO FILE, INSTANTER,
MEMORANDUM CONTRA CARBON SOLUTIONS GROUP, LLC’S
MOTION FOR LEAVE TO INTERVENE, CONSOLIDATE,
AND ESTABLISH A PROCEDURAL SCHEDULE
BY
MORaine WIND LLC, RUGBY WIND LLC,
ELM CREEK WIND II LLC, BUFFALO RIDGE II LLC,
BARTON WINDPOWER LLC, AND AVANGRID RENEWABLES, LLC**

Pursuant to Ohio Adm.Code 4901-1-12(B) and 4901-1-13(A), and for good cause shown, Applicant Avangrid Renewables, LLC (Avangrid Renewables), and its wholly-owned subsidiaries, Applicants Moraine Wind LLC, Rugby Wind LLC, Elm Creek Wind II LLC, Buffalo

Ridge II LLC, and Barton Windpower LLC (collectively, the Applicants) respectfully request leave to file, instant, a memorandum contra Carbon Solutions Group, LLC's (CSG) Motion to Intervene, Consolidate, and Establish a Procedural Schedule (CSG's Motion), filed on May 7, 2021 in the above-captioned cases. The reasons for granting Applicants' Motion to file out-of-time are set forth in the attached Memorandum in Support.

Respectfully Submitted,

/s/ Angela Paul Whitfield

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**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE
TO FILE OUT-OF-TIME**

Given CSG's persistent, baseless opposition to otherwise routine renewable energy (REN) resource generating facilities' certification proceedings, which has raised a novel threshold issue in each of the REN certification cases, the varying procedural schedules of the above-captioned cases with multiple prehearing conferences and deadlines, and the multiple motions to consolidate, good cause exists to allow Applicants to file, instant, their Memorandum Contra CSG's Motion out-of-time. Pursuant to Ohio Adm.Code 4901-1-13(A), extensions of time to file pleadings may

be granted upon motion of any party for good cause shown. Furthermore, Ohio Adm.Code 4901-1-12(B) grants the Commission discretion to waive the standard response period and to establish a new time period for a party to file a memorandum contra any motion filed by another party.¹ Therefore, the Applicants respectfully request that the Commission grant for good cause shown their Motion for Leave to File, Instantly, a Memorandum Contra CSG's Motion. As described herein, unique circumstances exist regarding this novel challenge to long-standing Commission precedent, which gives rise to good cause for the Commission to grant such a Motion.

Applicants filed various applications for certification as eligible REN facilities, as defined in R.C. 4928.01, 4928.64, and the Commission's rules in each facility's respective case.² An out-of-state facility may qualify for REN certification in Ohio if the facility demonstrates that the energy produced at the facility "can be shown to be deliverable into this state," pursuant to R.C. 4928.64(B)(3) and Ohio Adm.Code 4901:1-40-01(F) and 4901:1-40-04. To determine if a resource is deliverable into the state, the Public Utilities Commission of Ohio (Commission) applies a deliverability test, first established in *In the Matter of Koda Energy LLC*.³ This test requires "a demonstration of delivery via a powerflow study and/or deliverability study should be

¹ Ohio Adm.Code 4901-1-12(B)(1) ("Any party may file a memorandum contra within fifteen days after the service of a motion, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires.").

² See *In the Matter of The Application of Moraine Wind LLC for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-516-EL-REN, Application (Apr. 30, 2021); *In the Matter of The Application of Rugby Wind LLC for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-517-EL-REN, Application (Apr. 30, 2021); *In the Matter of the Application of Elm Creek II for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-0531-EL-REN, Application (May 3, 2021); *In the Matter of The Application of Buffalo Ridge II for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-532-EL-REN, Application (May 3, 2021); and *In the Matter of The Application of Barton Windpower 1 for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-544-EL-REN, Application (May 4, 2021).

³ *In the Matter of the Application of Koda Energy LLC for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-0555-EL-REN, Finding and Order (Mar. 23, 2011). CSG's Motion incorrectly identifies *Koda* as Case No. 05-0555-EL-REN.

necessary, although not to the extent of requiring signed contracts.”⁴ The power flow study must show “the absolute value of a facility’s impact on a transmission line in Ohio must be greater than 5 percent and greater than 1 megawatt (MW).”⁵

Subsequent to the filing of the Applicants’ REN certification applications, CSG filed its Motion.⁶ CSG seeks to challenge the Commission’s long-standing precedent used for evaluating applications seeking REN certification as a qualifying renewable generating facility. It is clear from CSG’s Motion that the sole purpose of its participation in the five cases is to challenge the Commission’s long-standing policy and precedent regarding the determination of “deliverability” pursuant to R.C. 4928.01 and R.C. 4928.64.

CSG has filed similar motions to intervene in numerous recent REN certification proceedings, citing its interest in the precedent that the cases may establish if approved by the Commission. And in various REN certification proceedings, the applicant in those cases has chosen to withdraw their application instead of engage in a legal battle with CSG.⁷

It is important to note that the Commission has been issuing certificates to REN facilities that it deems to satisfy the Commission’s rules and Ohio law utilizing the same deliverability standard and test for approximately 11.5 years.⁸ And during that 11.5 years, CSG has not challenged the deliverability standard and test in those individual REN cases. In fact, the only

⁴ *In the Matter of the Commission’s Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*, Case Nos. 12-2156-EL-ORD, *et al.*, Finding and Order at ¶ 181 (Dec. 19, 2018).

⁵ *See In the Matter of the Application of Wessington Springs Wind Energy Center for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-0110-EL-REN, Staff Report (Mar. 1, 2021).

⁶ *See* Motion to Intervene, Motion to Consolidate, and Motion to Establish a Procedural Schedule of Carbon Solutions Group, LLC (May 7, 2021) (CSG’s Motion).

⁷ *In the Matter of the Application of Wessington Springs Wind Energy Center for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-0110-EL-REN, Notice of Withdrawal of Application (June 29, 2021).

⁸ The Commission’s rules implementing R.C. 4928.64 became effective December 10, 2009, after S.B. 221 was passed in 2008.

challenges that have occurred to date to the Commission's long-standing policy and application of the deliverability test have been in previous rulemaking dockets, which were raised by utilities and others, but not CSG.⁹ Given this history, the Applicants believed that individual REN certification cases were not the proper forum for CSG's challenge. The Applicants continue to believe that a Commission-ordered investigation or a rulemaking proceeding would be the more proper forum to raise challenges to the Commission's legal standard, application of that standard to certification applications, and Commission precedent. Nonetheless, given that the Commission has not yet opened a separate docket to consider the novel issue raised by CSG or determined that CSG's challenge to the deliverability standard is inappropriate in the individual REN certification proceedings, the Applicants believe that it is necessary to oppose CSG's participation in their individual REN certification cases as CSG has failed to establish any direct, real, or substantial interest that would give it standing in the Applicants' cases.

Although the Commission initially granted CSG's intervention in one of the previous REN certification proceedings,¹⁰ the applicant in that case did not challenge CSG's intervention and the applicant has subsequently withdrawn its application.¹¹ Unlike that proceeding, the Applicants are now challenging CSG's intervention in the above-captioned REN proceedings. As will be further explained in the Memorandum Contra CSG's Motion, the Applicants submit that CSG does not have standing to participate in the Applicants' cases, and, therefore, Applicants oppose CSG's request to intervene.

⁹ *In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*, Case Nos. 12-2156-EL-ORD, *et al.*, Finding and Order at ¶ 181 (Dec. 19, 2018).

¹⁰ *See, e.g., In the Matter of the Application of Wessington Springs Wind Energy Center for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 21-0110-EL-REN, Entry at ¶ 14 (June 3, 2021).

¹¹ *Id.*, Notice of Withdrawal of Application (June 29, 2021).

Given the unusual circumstances of these REN certification cases, the fact that CSG's challenges are a case of first impression, the fact that Applicants incorrectly assumed that the Commission would not allow policy challenges in the individual REN certification cases, the fact that Applicants were caught off guard by the challenge asserted in their individual REN certifications cases, and given that the Applicants needed to secure Ohio counsel to defend their applications, good cause exists to allow the Applicants to file, instantner, a memorandum contra CSG's Motion out-of-time. As such, the Applicants respectfully request permission to file, instantner, a memorandum contra CSG's Motion out-of-time for good cause shown, pursuant to Ohio Adm.Code 4901-1-12(B) and 4901-1-13(A).

Respectfully Submitted,

/s/ Angela Paul Whitfield

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MEMORANDUM CONTRA CSG’S MOTION TO INTERVENE

I. INTRODUCTION

CSG’s Motion fails to satisfy the relevant intervention standard set by R.C. 4903.221, Ohio Adm.Code 4901-1-11 and 4901:1-40-04(D). Pursuant to R.C. 4903.221, a person “who may be adversely affected” by a Commission proceeding is entitled to seek intervention in that proceeding. R.C. 4903.221(B) further requires the Commission to consider the nature and extent of the prospective intervenor’s interest, the legal position advanced by the prospective intervenor and its

probable relation to the merits of the case, whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding, and whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues. Only an affected party who demonstrates a real and substantial interest in the proceeding and who is so situated that the disposition of the proceeding may impair or impede its ability to protect that interest and whose interest is not adequately represented by an existing party may intervene under Ohio Adm.Code 4901-1-11.

CSG has not demonstrated that it meets any of the intervention criteria. First, CSG is unable to articulate any real or substantial interest in the outcome of the five certification proceedings, beyond a general interest in the Commission's policy. CSG also fails to demonstrate any nexus to the particular REN facilities or facts surrounding the deliverability of the individual facilities. Additionally, CSG has not demonstrated that the disposition of the individual REN certification applications may impair or impede its ability to protect its interest. Finally, CSG's participation in numerous REN certification proceedings has in fact unduly prolonged and delayed the proceedings and has not led to a just and expeditious resolution of the issues involved. As such, CSG cannot satisfy the intervention standard. A routine REN certification proceeding is not the proper forum for CSG to bring its meritless challenge to the Commission's long-standing policy and precedent.¹²

¹² At this time, Avangrid Renewables takes no position as to the intervention of Blue Delta Energy, LLC (Blue Delta). Blue Delta expressed an interest in this case based on opposing CSG's challenge. As such, Blue Delta and CSG are on opposite sides of the proceeding. Furthermore, absent CSG's challenge, Blue Delta will not have an interest in any of the Avangrid Renewables REN certification proceedings.

II. ARGUMENT

A. CSG does not have a direct, real, or substantial interest in any of the above-captioned cases.

In its Motion, CSG does not even attempt to articulate a direct, real, or substantial interest in the outcome of the Applicants' REN certification proceedings, the Applicant, or the facility itself, because no such interest exists. CSG instead advances a broad legal challenge to long-standing Commission policy and precedent, seeking to block REN certifications from proceeding in general. CSG's sole interest is in challenging long-standing Commission precedent to block further REN certifications, and therefore artificially inflate the market value of its own assets or renewable energy credits (RECs).

According to CSG, its "interest is in preserving the value of [RECs] to renewable generators located in Ohio and PJM."¹³ To achieve this goal, CSG seeks to limit the approval of many qualifying REN resources (effectively, revising the definition of what constitutes a qualifying REN resource), which will increase the value of Ohio RECs of existing certified facilities and limit those facilities that can qualify in the future.¹⁴ Since CSG's clients include renewable energy facilities located outside of Ohio, but within PJM,¹⁵ CSG arbitrarily seeks to exclude facilities located on other regional transmission organizations (RTO), even those in adjacent states, from obtaining REN certification.¹⁶ To block their certification, CSG challenges the *Koda* Test, the Commission's long-standing precedent regarding deliverability pursuant to R.C. 4928.64(B)(3) and Ohio Adm.Code 4901:1-40-01(F). Despite the fact that the Commission

¹³ CSG's Motion at 5.

¹⁴ See CSG's Motion at 3 ("All other things being equal, where RECs are plentiful the price is low; when RECs become more scarce, the price increases.").

¹⁵ *Id.*

¹⁶ See *id.* at 4 ("None of the facilities described in the REN Applications are located within PJM.").

has already affirmed the *Koda* Test,¹⁷ CSG raises a number of meritless arguments against the *Koda* Test.¹⁸

As such, CSG has no direct, real, or substantial interest in any of the facilities in the five REN certification proceedings at issue here, in Avangrid Renewables or any of the other five Applicants, or in any other certification proceeding CSG has intervened in as, to Avangrid Renewables' knowledge, it does not own the facilities, is not a consultant to the facilities, or was not part of the application process. Instead, CSG only has a general, policy-based interest in challenging long-standing Commission precedent to artificially limit the market of qualifying renewable resources in Ohio for its own financial gain. CSG's proposal will have the effect of allowing CSG's clients, which, according to CSG, are located on PJM, to become certified without meeting the *Koda* Test and would exclude competitors located in neighboring states.¹⁹ At best, CSG has a self-professed interest in strengthening its bottom line while eliminating or narrowing the competition by seeking to create a novel deliverability standard, which lacks any support in statutory law, Commission regulations, or Commission precedent. This can hardly be called a direct, real, or substantial interest in the certification of any of the five facilities at issue in the Applicants' REN certification proceedings. CSG will not be "adversely affected"²⁰ by the facilities' receiving certification as a qualifying REN resource. Since CSG does not have a direct, real, or substantial interest in the proceedings, its intervention is improper pursuant to R.C. 4903.221(B) and Ohio Adm.Code 4901-1-11.

¹⁷ *In the Matter of the Commission's Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*, Case Nos. 12-2156-EL-ORD, *et al.*, Finding and Order at ¶ 181 (Dec. 19, 2018).

¹⁸ See CSG's Motion at 4-5.

¹⁹ See *id.* at 3 ("CSG's clients include renewable energy developers and facilities located throughout Ohio and PJM."); *id.* at 4 ("All generation within PJM is "deliverable" anywhere else in PJM, physically as well as financially.").

²⁰ See R.C. 4903.221.

B. CSG's intervention will unduly prolong and delay numerous REN certification proceedings, and will not contribute to full development and equitable resolution of the factual issues.

CSG attempts to artificially restrict the REC market to benefit itself and its clients by inventing new law, which the Commission has rejected in the past.²¹ However, it is noteworthy that CSG is currently achieving its goal simply by intervening in, delaying, and prolonging numerous renewable facilities from becoming certified by the Commission as qualifying resources. Pursuant to R.C. 4903.221(B), intervention is improper when intervention will unduly delay and prolong the proceeding, or where intervention will not contribute to a full development and equitable resolution of the factual issues.

Under the Commission's certification process applying the long-standing *Koda* Test, REN certification cases were typically routine proceedings. The *Koda* Test permits Commission Staff to make a straightforward evaluation and recommendation based on examination of a flow study, pursuant to the text of R.C. 4928.64(B)(3) and Ohio Adm.Code 4901:1-40-01(F) and 4901:1-40-04. However, by challenging this test, CSG has attempted to create a new test and, consequently, an additional threshold question for each new REN certification proceeding in which it intervenes.

CSG's challenge to the existing test lacks any basis in statute, regulation, or precedent, and needlessly and unfairly complicates the REN certification proceedings. CSG ignores that the Applicants do not produce flow studies themselves, and that many facilities located in neighboring states which are outside of PJM are physically closer to Ohio than some facilities in more distant states located inside PJM. Since "it is impossible to physically track energy from a specific generating facility to a specific load location,"²² the straightforward analysis under the *Koda* Test

²¹ See *supra* Part II.D.

²² In the *Matter of Koda Energy LLC*, Pub. Util. Comm. Case No. 09-0555-EL-REN, Finding and Order at 3 (Mar. 23, 2011).

is the best standard to determine deliverability. Additionally, the so-called “financial dimension” of deliverability under CSG’s proposed standard has no textual basis in R.C. 4928.64. As such, CSG’s proposed participation in this case does not contribute to a just and expeditious resolution of the proceedings—in fact, it has precluded *any* resolution and has delayed qualifying renewable resources from becoming certified, causing financial harm to those facilities.

Since CSG began intervening in numerous REN certification proceedings, multiple applicants have withdrawn their certifications rather than expend the significant resources required to defend against CSG’s meritless challenge.²³ As such, CSG has been able to effectively block the REN certification of numerous facilities. CSG, by intervening, has unduly delayed and prolonged the REN certification docket as a whole, and prevented a full development and equitable resolution of the factual issues involved in multiple REN certification proceedings, including the five above-captioned proceedings. As such, CSG’s request for intervention fails to meet the standard required by R.C. 4903.223(B).

C. This is not the proper procedural method for CSG to challenge Commission precedent as CSG has failed to demonstrate that the disposition of the Applicants’ REN certification applications may impair or impede its ability to protect its interest.

Lastly, CSG’s challenge to the long-standing Commission precedent and Commission Staff’s application of the *Koda* Test—if it even warrants addressing at all—is more suited for a COI or rulemaking proceeding as CSG has not demonstrated that the disposition of the Applicants’ REN certification applications may impair or impede its ability to protect its interest. Without such showing, CSG’s intervention is improper. Where a disposition of a Commission proceeding

²³ See, e.g., Case No. 21-0110-EL-REN, Notice of Withdrawal of Application (June 29, 2021).

will not impair or impede upon the interest of a party seeking intervention, then the party “does not meet the requirements for intervention under [Ohio Adm.Code] 4901-1-11(A) or (B).”²⁴

CSG has not shown that certification of any of the five facilities involved in the above-captioned cases will materially affect its own interests. The fact that CSG would prefer not to have any competition in the REC market does not mean that routine REN certification of the five facilities will impair or impede CSG’s ability to protect any direct, real, or substantial interest. CSG should not be permitted to block the resolution of the Applicants’ REN certification proceedings, by intervening in cases in which it has no direct, real, or substantial interest, and in which its participation does not contribute to a just and expeditious resolution.

CSG’s challenge of the existing deliverability standard and test, which lacks any support from Ohio law, regulations or Commission precedent, is a broad policy-based attack on Commission precedent, rather than a challenge to the merits of or supporting the certification of any of the Applicants’ specific facilities. As such, CSG’s challenge does not belong in the proceedings in which CSG seeks to intervene.

Presumably, CSG attempts to raise this issue in REN proceedings because the Commission has already rejected the challenge in past rulemaking proceedings when it instead affirmed the *Koda* Test for deliverability. As the Commission noted in the most recent rulemaking proceeding, the Commission has already addressed challenges to the *Koda* Test for determining deliverability in multiple prior proceedings and decided to reject these challenges and retain its long-standing precedent.

²⁴ *In the Matter of the Application of Hyway Trucking Co. to Amend Contract Permit No. 62535*, Case No. 93-2008-TR-APP, Entry at ¶ 11 (Mar. 8, 1994).

For example, where intervenors challenged the *Koda* Test, the Commission rejected these challenges by holding:

the comments regarding the definition of “deliverable into this state” have been thoroughly addressed in previous rulemaking cases, and the Commission maintains its position that this definition does not need to be expanded to include any generation originating within the PJM or MISO transmission systems. We continue to believe that “a demonstration of delivery via a powerflow study and/or deliverability study should be necessary, although not to the extent of requiring signed contracts.”²⁵

The fact that attacks on the Commission’s *Koda* Test have failed in the proper procedural context does not grant CSG authority to try again in a different, improper procedural context. REN proceedings are not the proper venue for this challenge, and the Commission has rejected this challenge in past rulemaking proceedings. As such, the Commission should deny CSG’s Motion.

III. CONCLUSION

CSG’s Motion fails to demonstrate that CSG has a real and substantial interest in the proceeding, that its participation will contribute to a just and expeditious resolution of the proceedings, or that its intervention will not unduly delay or prolong the proceedings. CSG’s Motion also fails to demonstrate that the disposition of the Applicants’ REN certification applications may impair or impede its ability to protect its interest. Additionally, CSG improperly attempts to bring a policy issue into the Applicants’ routine REN proceedings rather than in a dedicated COI or rulemaking proceeding. As such, pursuant to R.C. 4903.221, and Ohio Adm.Code 4901-1-11 and 4901:1-40-04(D), the Commission should reject CSG’s improper attempt to intervene in the above-captioned cases.

Respectfully Submitted,

²⁵ *In the Matter of the Commission’s Review of its Rules for Energy Efficiency Programs Contained in Chapter 4901:1-39 of the Ohio Administrative Code*, Case Nos. 12-2156-EL-ORD, *et al.*, Finding and Order at ¶ 181 (Dec. 19, 2018).

/s/ Angela Paul Whitfield

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on August 20, 2021 upon the parties listed below.

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0069402)

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Summary: Motion For Leave To File, Instantly, Memorandum Contra Carbon Solutions Group, LLC's Motion For Leave To Intervene, Consolidate, And Establish A Procedural Schedule By Moraine Wind LLC, Rugby Wind LLC, Elm Creek Wind II LLC, Buffalo Ridge II LLC, Barton Windpower LLC, And Advangrid Renewables, LLC electronically filed by Mrs. Angela Whitfield on behalf of Advangrid Renewables, LLC and Moraine Wind LLC and Rugby Wind LLC and Elm Creek Wind II LLC and Buffalo Ridge II LLC