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. 21-0516-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. 21-0517-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. 21-0531-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. 21-0532-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. 21-0544-EL-REN

CARBON SOLUTIONS GROUP, LLC'S
MEMORANDUM CONTRA AMENDED JOINT MOTION TO CONSOLIDATE AND MEMORANDUM CONTRA JOINT MOTION FOR LEAVE TO FILE MEMORANDUM CONTRA CSG'S MOTION TO INTERVENE

The first and only motion filed by CSG in these cases was the May 7, 2021 motion to intervene and to consolidate the five applications at issue. The owners of the facilities did not enter an appearance of counsel until their filing of an amended motion to "consolidate" on August 6, 2021. The Joint Movants filed another motion on August 20, 2021, this time opposing CSG's intervention. To say that

CSG is the party "delaying, and prolonging numerous renewable facilities from becoming certified"[1] is ridiculous. It is the Joint Movants who are getting in their own way.

This memorandum contra responds to both the August 6 motion to consolidate[2] and August 20 motion for leave to file a memorandum contra CSG's motion to intervene. The motion to "consolidate" is a thinly-veiled attempt to challenge CSG's intervention; a fact confirmed by the more recent attempt to oppose CSG's intervention directly. Both motions are based on the very same argument—that CSG's supposed attempt to challenge "Commission precedent" should be heard in a rulemaking or COI and the pending applications rubber-stamped for approval in the meantime. The Joint Applicants cite no authority for this ill-advised course of action, other than to say they "continue to believe" that this is what the Commission should do. The motion must be denied.

I. INTRODUCTION

Each of the Joint Movants (or "Applicants") is an applicant in one of five REN applications coordinated by Avangrid Renewables, LLC. The Applicants filed their motion in all five dockets, so a ruling will necessarily apply in all five dockets. Thus, "consolidation" cannot be the Applicants' real aim. Instead, the Applicants want the Commission to adopt their legal theory *before* the presentation of comments or evidence rather than after.

The Applicants characterize CSG's intervention as "an improper attempt to challenge the Commission's rules and long-standing precedent in individual REN proceedings," which they claim is "more appropriate for a rulemaking or Commission-Ordered Investigation (COI)[.]"[3] The Applicants

[1] Mem. Contra Mot. to Intervene at 12.
[2] Blue Delta Energy, LLC filed a "memorandum in support" of the Joint Movants' motion on August 18, 2021. This filing is improper. The rule on motion practice allows "any party" to file a "memorandum contra" any motion. O.A.C. 4901-1-12(B)(1). The rule does not authorize the filing of memoranda *in support* of other parties' motions.
[3] Amend. Mot. at 3.

acknowledge that CSG's objections should be heard *somewhere*, just not here. There are three basic problems with the Applicants' argument.

First, the Applicants completely ignore Rule 4901:1-40-04(D)(1), which authorizes "any interested person" to "intervene and file comments and objections to any application." "Any" application means "all" applications. The rule specifically mandates that objections or comments be raised in response to a specific application, not deferred to a rulemaking or COI.

Second, the repeated characterization of CSG's interest in these proceedings as "improper" exposes the Applicants' motion to "consolidate" as an untimely challenge to CSG's intervention. The deadline for filing memoranda contra CSG's motion to intervene passed *months* ago. The closest the Applicants come to explaining why they should be permitted to file a memorandum contra at least three -and-a-half months late is that the "Applicants were caught off guard."[4] It is hard to imagine how this can be so since we are dealing with the *Applicants'* applications.

Third, CSG is not challenging any "Commission rule" or "precedent." The Commission has never heard arguments for or against the so-called *Koda* test. Commission Staff came up with this test, but the test has never been litigated. Commission *Staff's* method of determining deliverability is not binding on the *Commission*. Indeed, the Applicants admit that CSG's intervention raises a "novel" issue.[5] There simply is no "precedent" for addressing a contested REN application—even if there was, the Commission is not bound by it.

Whether electricity from the Applicants' facilities is "deliverable into this state" is not a "threshold question."[6] It is the ultimate issue in dispute. Once the Commission decides how these cases should proceed, the Applicants will have ample opportunity to argue that the *Koda* test is the only

[4] Mot. for Leave at 7.
[5] *Id*. at 4.
[6] Amend. Mot. at 3.

proper test to determine deliverability. The Applicants are not entitled to a preliminary order declaring that the Commission agrees.

Ironically, it is the Applicants who must confront several "threshold issues" before their applications proceed. Their motion reveals issues about their standing and capacity to pursue the applications in the first place. CSG will address these issues before turning to the arguments about intervention and consolidation.

II. ARGUMENT

When seeking certification of a facility as a renewable resource, *"[t]he application* shall include a determination of deliverability to the state in accordance with paragraph (F) of rule 4901:1-40-01 of the Administrative Code."[7] None of the five *applications* disclose how electricity from the respective facility is "physically deliverable to the state," meaning the facility is located within a state "contiguous to Ohio" or "electricity originating from other locations, pending a demonstration that the electricity is physically deliverable to the state."[8] "Deliverable into this state" means that the electricity or qualifying biologically derived methane gas originates from a facility within a state contiguous to Ohio. It may also include electricity originating from other locations, pending a demonstration that the electricity is physically deliverable to the state."[9]

"Any interested person may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application."[10] CSG filed its motion to intervene on May 7, 2021, which also asked for *real* consolidation*; i.e.,* that common issues of *relevant* fact and law be heard in one proceeding rather than multiple proceedings.

[7] O.A.C. 4901:1-40-04(D) (emphasis added).
[8] *Id*. at (F)
[9] *Id*.
[10] *Id*. at (D)(1).

The Applicants did not attempt to enter an appearance of counsel until August 3, 2021, when the original motion to consolidate was filed. The amended motion was filed on August 6, 2021. The Applicants' belated appearance in these dockets raises questions that must be addressed before deciding how these cases should proceed—or if they should proceed at all.

A. There are "threshold questions" about the Applicants' standing and capacity to seek certification as renewable facilities.

A threshold issue in any proceeding for any type of certificate is whether the applicant has *standing* and *capacity* to ask for the certification being sought. "'Standing' is defined at its most basic as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Ohio Pyro, Inc. v. Ohio Dep't of Com.,* 2007-Ohio-5024, ¶ 27, *quoting* Black's Law Dictionary (8th Ed.2004) at 1442. "The question of capacity to sue is whether the person bringing the suit has authority to use the courts of that jurisdiction." *Malibu Media, LLC v. Steiner*, 307 F.R.D. 470, 472 (S.D. Ohio 2015) *quoting Moore v. Matthew's Book Co.,* 597 F.2d 645, 647 (8th Cir.1979). "A person can have standing but have no capacity to sue." *CapitalSource Bank v. Hnatiuk*, 2016-Ohio-3450, ¶ 24.

1. Capacity to seek certification

Out-of-state business entities do not have the *capacity* to file suit in Ohio courts, or seek a license or certificate from an Ohio agency, unless the entity complies with certain business registration requirements of the Ohio Secretary of State. At least four of the five applicants have not registered to do business in Ohio, raising issues about whether they have the capacity to seek certification.

Each application lists a separate limited liability company as the "owner" of the respective facility. On August 3, 2021, Avangrid Renewables, LLC "as the owner through various subsidiaries of the facilities," filed a motion to consolidate.[11] When Avangrid realized that its sole ownership of these

[11] Aug. 3, 2021 Mot. at 1.

LLCs did not give Avangrid standing to represent these LLCs,[12] Avangrid filed an amended motion to consolidate listing each of the five LLCs, plus itself, as a moving party.

A search of the Ohio Secretary of State website reveals that none of the facility owners are organized under Ohio law. Avangrid Renewables, LLC, the purported owner of the Barton Wind facility, is registered to do business in Ohio as a foreign limited liability company. None of the other LLCs are so registered.

"Before transacting business in this state, a foreign limited liability company shall register with the secretary of state." R.C. 1705.54(A). "[A] foreign corporation is deemed 'transacting business' within the state when it has entered the state by its agents and is therefore engaged in carrying on and transacting through them some substantial part of its ordinary or customary business, usually continuous in the sense that it may be distinguished from merely casual, sporadic, or occasional transactions and isolated acts." *Premier Cap., L.L.C. v. Baker*, 2012-Ohio-2834, ¶ 27, 972 N.E.2d 1125, 1131 (internal quotation omitted).

The filing of the applications evidences each facility owner's intent to "transact business" in Ohio by delivering electricity into Ohio. Therefore, in order to establish legal capacity to seek certification, each LLC must register as a foreign LLC. R.C. 1705.54(A). The failure to register precludes the Applicants from proceeding with the applications. "A foreign limited liability company transacting business in this state may not maintain any action or proceeding in any court of this state until it has registered in this state in accordance with sections 1705.53 to 1705.58 of the Revised Code." R.C. 1705.58(A). *See also Malibu Media, LLC v. Steiner*, 307 F.R.D. 470, 474 (S.D. Ohio 2015) (by failing to comply with statute, plaintiff "did not, therefore, have capacity to sue in Ohio [.]")

The laws of Ohio governing business organizations apply to all entities transacting business in

[12]"[M]embers of a limited liability company, even if they are the sole members of the company, do not have standing to sue on its behalf." *Ohio Pyro, Inc. v. Ohio Dep't of Com.,* 2007-Ohio-5024, ¶ 27, 115 Ohio St. 3d 375, 381, citing *Ohio Contrs. Assn. v. Bicking* , 71 Ohio St.3d 318, 320 (1994).

this state. *See Belden v. Union Cent. Life Ins. Co.,* 143 Ohio St. 329, 329 (1944) ("Section 2, Article XIII of the Constitution grants full and complete authority to the General Assembly to provide, by general laws, for the formation of corporations and changes in the organization or structure of existing corporations."). Registration affords the Ohio Secretary of State and the public with basic information about the entity and contact information for a registered agent. Registration also facilitates the enforcement of laws and regulations governing licenses and permits, taxes, and other general obligations that go along with conducting business in Ohio. The Commission is the functional equivalent of a "court" with respect to REN certification, so the fact that the applicants are seeking to avail themselves of the benefits of Ohio law through a Commission filing rather than in "court" is of no consequence. The registration requirement is a pre-condition for a business to avail itself of the privileges and advantages granted by Ohio law and regulation. *See Columbus Steel Castings Co. v. Transportation & Transit Associates, LLC,* 2007–Ohio–6640, ¶¶ 62–73. Nothing in Ohio law grants special treatment or an exemption for foreign business organizations that seek REN certification.[13]

It is certainly conceivable that the applicants have not registered as foreign LLCs because they do *not* intend to transact business in Ohio. From what is known so far, none of the applicants intend to actually deliver power into Ohio, either directly to identified customers or indirectly into the PJM wholesale market. If the applicants believe they are exempt from registration, they must explain why. If they are not exempt, they must register.

The Commission should not proceed with the applications until the Applicants make their intentions and status clear. The Applicants are not entitled to the privileges and benefits afforded under Ohio law until they comply with Ohio law. *See Bosl v. First Fin. Inv. Fund I,* 2011-Ohio-1938, ¶ 17 ("A foreign limited liability company transacting business in this state may not maintain an action or

[13] The appearance in these REN dockets by intervenors who support or oppose certification, but are not themselves seeking certification, does not constitute "transacting business in this state" because the intervenors are not the parties seeking to "maintain" or initiate a proceeding or obtain certification.

proceeding in any court of this state until it has registered.").

2. Standing to seek certification

Even if Avangrid Renewables, LLC has the legal capacity to pursue certification as registered foreign LLC, there is still the issue of *standing*. The amended motion suggests that Avangrid does not have standing to pursue certification for the Barton Wind facility (Case No. 21-544-EL-REN).

In its original motion to consolidate, Avangrid explained that "although the facilities themselves are different and the REN Applications are filed under the names of separate LLCs, Avangrid Renewables is the ultimate stakeholder in each of the REN Applications."[14] The facility name and facility owner are the same for four of the facilities: The Moraine I Wind Energy Facility is owned by Moraine Wind LLC (Case No. 21-516-EL-REN), Rugby Wind LLC owns the Rugby Wind facility (Case No. 21-517-EL-REN), Elm Creek Wind II LLC owns the Elm Creek II facility (21-531-EL-REN), and Buffalo Ridge II LLC owns the Buffalo Ridge II facility (Case No. 21-532-EL-REN).

Ownership of the Barton Wind facility is less clear. The application lists "Avangrid Renewables LLC" as the owner. The amended motion to consolidate, however, lists "Barton Wind Power LLC" as one of the movants. If the Barton Wind facility is actually owned by an LLC of the same name (rather than Avangrid Renewables, LLC), then Avangrid Renewables is not a proper party, and Barton Wind Power LLC must also register with the Ohio Secretary of State.

Avangrid does not necessarily need to be the owner of a facility to obtain party status through intervention, but being the sole member of the LLC that owns the facility is not sufficient to give Avangrid party status *as if* Avangrid owned the facility directly. "A limited liability company . . . exists as an entity separate from its members and is capable of suing and of being sued." *Torrance v. Rom*, 2020-Ohio-3971, ¶ 38. Avangrid's interest in this case *may* possibly allow it to become a

[14] Aug. 3, 2021 Mot. at 5.

party through intervention, but Avangrid has not filed a motion to intervene. Avangrid needs to file one or withdraw from these cases.[15]

B. The Applicants' "consolidation" argument fails.

CSG continues to favor *real* consolidation. The applicants are not asking for consolidation; they are belatedly opposing CSG's intervention and asking the Commission to make a premature decision on the merits.

Avangrid directed the filing of the each of the five applications, so it can hardly be heard to complain about having to "simultaneously litigate five separate proceedings."[16] In any event, it is CSG, not Avangrid, who has asked the Commission to consolidate these cases for purposes of developing an evidentiary record to address common questions of fact and law. If the Applicants wish to present a case that their applications should be decided based on the *Koda* test, they are free to do so. The Applicants are not entitled to a ruling *before any comments are filed or evidence presented* that the Koda test is the *only* proper way to determine whether energy from their facilities is "physically deliverable" into Ohio.

The Applicants claim, "CSG seeks to challenge the Commission's long-standing precedent used for evaluating applications seeking REN certification of a renewable generating facility," which they argue is "more appropriate for a rulemaking of Commission-Order Investigation (COI) proceeding[.][17] This is just another way of saying that CSG's interest in this proceeding is invalid or improper so intervention should be denied. Apart from being wrong, this argument should have been made months ago in response to CSG's motion to intervene.

It is absurd to characterize the *Koda* test as "the Commission's long-standing precedent." The *Koda* test has never been litigated—in the *Koda* case or any case thereafter. No attorney for the

[15] Given Avangrid's lack of standing to even represent the Applicants, Avangrid's theory as to why unaffiliated applicants in other cases withdrew their applications is rank speculation. *See, e.g.,* Mot. for Leave at 5, 13.
[16] Amend. Mot. at 6.
[17] *Id*. at 2-3.

applicant or for anyone else entered an appearance in *Koda*, no parties sought intervention, and no party filed a brief.[18] The same can be said about every REN application filed thereafter that has been approved or disapproved based on the *Koda* test, as the Applicants themselves concede.[19] Given the lack of advocacy for or against Staff's "routine" approach to REN applications, the Commission has had little choice but to endorse Staff's recommendations. CSG is not aware of any final order in a REN proceeding being challenged on rehearing. To call what has happened in the past "precedent" is quite a stretch. Indeed, several parties and Attorney Examiners have observed during informal prehearing conferences that CSG's intervention in these dockets raises issues of first impression.

Nor is it accurate to say that the Commission "has already addressed challenges to the *Koda* Test . . . and decided to retain its test and uphold its interpretation of Ohio law."[20] The Commission has *never* said that the *Koda* test conclusively establishes whether electricity is "deliverable into this state." The test has never been litigated, and even if it had, the Commission is always free to depart from past practice when there is a reason to do so. *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 2007-Ohio-4276, ¶ 14 ("The commission may change or modify earlier orders as long as it justifies any changes."); *In re Application of Ohio Power Co.,* 2015-Ohio-2056, ¶ 16 ("The court has not set the explanatory hurdle very high.").

Whether the applicants meet the certification requirements is not a "threshold" issue of procedure. It is the ultimate issue in dispute. The applicants are not entitled to an advance ruling on how the Commission will decide this issue.

[18] *See generally* docket in 09-555-EL-REN.
[19] Mot. for Leave at 5-6.
[20] Amend. Mot. at 7.

C. The opposition to CSG's intervention is baseless and untimely.

The Joint Applicants filed another motion on August 20, this time challenging CSG's intervention. Although the Joint Applicants ask for leave to file their opposition out of time, they never explain why the Commission should do so. To the extent the "Applicants were caught off guard," that is their problem.[21]

CSG has already explained the nature of its interest and why intervention is otherwise appropriate. The Commission has granted intervention to CSG in other REN dockets.[22] CSG has participated *without objection* in all prehearing conferences to date and, anticipating further proceedings, Staff has issued its reports in these cases. There is nothing the Applicants can say about CSG's interest that does not also apply to Blue Delta, and the Applicants have not challenged Blue Delta's intervention. It is too late in the game to challenge CSG's intervention out of time.

III. CONCLUSION

The Applicants have *not* furnished information in their applications demonstrating that electricity from the facilities is physically deliverable into Ohio. The issue of deliverability is common to all of the applications, so consolidation would be appropriate for purposes of developing a record on that issue. The request to "consolidate" the cases for the sole purpose of getting an advance ruling on the ultimate issue in dispute must be rejected.

[21] Mot. for Leave at 7.
[22] *See* Case No. 21-110-EL-REN, June 3, 2021 Entry ¶ 14.

Dated: August 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Motion to Consolidate and Memorandum Contra Motion for Leave to File Memorandum Contra was served by electronic mail this 23rd day of August, 2021 to the following:

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Case No(s). 21-0516-EL-REN, 21-0517-EL-REN, 21-0531-EL-REN, 21-0532-EL-REN, 21-0544-EL-REN

Summary: Memorandum Contra Amended Joint Motion to Consolidate and Memorandum Contra Joint Motion for Leave to File Memorandum Contra CSG's Motion to Intervene electronically filed by Mr. Lucas A. Fykes on behalf of Carbon Solutions Group, LLC