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 MOTION TO COMPEL DISCOVERY

The Applicants are not entitled to an order compelling "substantive responses"[1] to discovery regarding Carbon Solutions Group, LLC's (CSG) business interests and clients because CSG has already responded. The rules allow a party to "answer" or "object" to discovery, and CSG did both: CSG answered the Applicants' requests for admission but objected

[1] Avangrid Mot. to Compel at iii.

to the interrogatories and document requests. What the Applicants actually seek is an order overruling CSG's objections, but they are not entitled to that either. The Applicants have yet to explain why CSG should withdraw its objections or why the Commission should overrule them. The motion to compel must therefore be denied.

I. BACKGROUND

The Applicants have a habit of characterizing every good-faith disagreement or difference of opinion as proof that CSG is stooping to unfair or unprofessional tactics to "manipulate the REC market" or "undermine fair competition."[2] This sort of hyperbolic nonsense needs to stop. The Applicants' own conduct in the market and in these proceedings says a lot—and not in a way that helps their cause.

The Applicants began filing REN applications in April 2021, and CSG promptly moved to intervene. The Applicants did not challenge CSG's intervention until retaining counsel in August 2021. In October 2021, the Commission invited comments to the Staff Reports.[3] It is fair to assume that if the Applicants believed they needed discovery responses to prepare initial comments, they would have served discovery well in advance of the comment deadline. They did not. The Applicants served their discovery on November 11, making responses due after initial comments but before reply comments. Neither set of comments referenced outstanding fact issues that needed to be resolved through discovery. Both sets of comments argue that no hearing is necessary because the material facts are undisputed.[4]

[2] *See* Avangrid Init. Comments at 16; Avangrid Reply Comments at 13; Avangrid Mot. to Compel at iii.

[3] Entry at 2 (Oct. 19, 2021).

[4] *See* Avangrid Init. Comments at 16-19; Avangrid Reply Comments at 4-7, 16.

The Applicants' discovery consists of interrogatories, requests for admission, and requests for production of documents. CSG provided written admissions that the Commission issued orders in certain previous REN cases (facts easily established regardless of any "admission" by CSG). The interrogatories and document requests ask for information about CSG's business and operations, focused primarily on ownership or operation of renewable facilities (whether in Ohio or elsewhere) and REC purchase activity. CSG objected as follows:

1. The purpose of discovery is to enable parties to prepare for hearing. The Commission has not scheduled a hearing. Therefore, this discovery request is premature.

2. CSG's business and operations, in Ohio or elsewhere, are irrelevant to whether any applicant meets the criteria for certification as an Ohio renewable energy resource. Nor is such information reasonably calculated to lead to the discovery of admissible evidence.

In the correspondence that followed, the Applicants failed to address the substance of CSG's objections. Their motion to compel is more of the same.

II. ARGUMENT

When a party is served with interrogatories, "Each interrogatory shall be answered separately and fully, in writing and under oath, *unless it is objected to*, in which case the reason for the objection shall be stated in lieu of an answer."[5] With regard to requests for production, "The response shall state, with respect to each item or category, that the inspection and related activities will be permitted as requested, *unless the request is objected to*, in which case the reason for the objection shall be stated."[6] The party serving interrogatories or document requests "may move for an order under rule 4901-1-23 of the Administrative Code with respect to any objection[.]"[7]

[5] OAC 4901-1-19(A) (emphasis added).

[6] OAC 4901-1-20(C).

[7] *Id.*; *See also* OAC 4901-1-19(A).

CSG is not "refusing, without any legal basis, to participate in any form of discovery."[8] The rules require CSG to "answer" or "object" to discovery requests, and CSG did so. CSG elaborated on its objections when confronted about them by the Applicants' counsel. The Applicants have yet to explain why these objections should be withdrawn or overruled.

A. The discovery is premature (Objection 1).

REN proceedings require an opportunity to file "comments" in opposition to a certificate, but a hearing is not specifically mandated.[9] CSG has asked the Commission to exercise its discretion to hold hearings. The Applicants have steadfastly opposed this request. As stated in CSG's first objection, the discovery is premature and improper until the Commission decides whether there will be hearings. This objection is the equivalent of a "not yet" rather than a hard "no." If the Commission schedules a hearing, CSG will obviously have to revisit the objection. But the Commission has not scheduled a hearing, so the objection is valid.

The Applicants' only response to this timing issue is to cite Rule 4901-1-17(A), which allows discovery to begin upon commencement of a proceeding.[10] There are two problems, though. First, the Commission has consistently interpreted the term "proceeding" to mean a case that will include an evidentiary hearing.[11] In proceedings where a hearing is required but has not been scheduled, the lack of a hearing date is not, by itself, a valid objection to discovery. But in cases where a hearing is not statutorily required, the Commission routinely waits to address

[8] Avangrid Mot. to Compel at iii.

[9] OAC 4901:1-40-04(D)(1).

[10] *Id.* at 8-9.

[11] *See In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code,* 06-685-AU-ORD, Finding and Order ¶ 9 (rejecting OCC proposal to add the definition of "proceeding" to the rules and define it as "any filing, hearing, investigation, inquiry or rulemaking which the Commission is required or permitted to make, hold or rule upon[,]" while noting that "if OCC's proposal were adopted, any interested person would have the right to… conduct discovery… in any Commission case.).

discovery issues until this determination is made. Where the Commission has the discretion to hold a hearing but decides not to, objections to answering discovery are routinely sustained, or the lack of responses deemed moot.[12]

Second, Rule 4901-1-17(A) establishes nothing more than the right to serve discovery. The rule does not address the rights or obligations of the responding party. The issue here is not whether the Applicants have a right to serve discovery; the issue is whether CSG has raised valid objections. To merely say that the rules permit discovery is not responsive to CSG's objection.

The Applicants' inability to claim prejudice as a result of not receiving "substantive responses" also illustrates why their requests are premature. The Applicants' comments to the Staff Report impliedly recognize that the outcome they seek in this proceeding does not depend on responses to outstanding discovery. If the Commission does as the Applicants ask—grant the certificates without a hearing—then "substantive responses" to the discovery serve no useful purpose. CSG should not be forced to spend time and money responding to discovery until there is a reason for doing so. "Because we want answers" is not a good reason, nor a legally valid one.

This is *not* an instance of an applicant or litigant serving discovery "prompt[ly] and expeditious[ly]" upon commencement of a proceeding.[13] The Applicants served discovery at what they claim should be the end of the proceeding. There is absolutely no reason for CSG to

[12] *See In re Triennial Review Regarding Local Circuit Switching*, 03-2040-TP-COI, Entry on Rehearing at ¶ 8 (October 28, 2003) (In denying OCC and CLEC's application for rehearing claiming it has full discovery rights in a proceeding, the Commission held: "The Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required.")

[13] *See* OAC 4901-1-16(A).

endure the time and expense of responding to discovery unless the Commission decides that comments are *not* the end of the proceeding and that hearings will be held.

B. The discovery seeks irrelevant information (Objection 2).

Not a single one of the Applicants' discovery requests seeks information relevant to the subject matter of the proceeding, so CSG objected accordingly. The Applicants still have not connected the dots between CSG's business and operations and whether the Applicants' facilities meet the REN certification requirements.

Discovery may be had concerning "any matter, not privileged, which is relevant to the subject matter of the proceeding."[14] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[15] Relevant evidence is discoverable if it is admissible at hearing or "reasonably calculated to lead to the discovery of admissible evidence."[16]

The Applicants' businesses and operations are self-evidently relevant to whether the Applicants meet these requirements for the facilities at issue. The Applicants are seeking certificates, not CSG; likewise, the facilities belong to the Applicants, not CSG. So *even if* CSG had elected to answer the Applicants' discovery requests, none of the answers would be "of consequence to the determination of" whether the *Applicants* are entitled to certificates. In other words, CSG's business and operations are irrelevant.

[14] OAC 4901-1-16(B).

[15] Ohio Evid. R. 401.

[16] *Id*.

The Applicants claim that "[a]lthough CSG now attempts to argue that information regarding its business interests is irrelevant, CSG has previously argued that those interests *are* relevant to these proceedings."[17] CSG's interests are obviously relevant to the intervention question, and those interests are not a mystery (evidenced by the Applicant's quotations of the intervention briefing).[18] The "subject matter of the proceeding," however, is whether the Applicants meet the certification requirements. Whether CSG should be permitted to intervene and whether the Applicants meet the certification requirements are entirely different issues; one has nothing to do with the other. Pointing this out in an objection can hardly be said to represent an "underlying motive" to "delay and restrict the creation of new qualifying resources."[19] Even if that *was* CSG's motive (it is not), the Applicants never explain why CSG's motive is relevant, either.

Discovery regarding "CSG's purported interest in these proceedings" is not only irrelevant, but untimely.[20] The motion to intervene was filed in April 2021 has been fully briefed. If there were a legitimate need for discovery about the nature of CSG's interest, the Applicants should have served discovery in time for responses before filing their comments in mid-November 2021.

To say that the information requested is "relevant to proving or disproving CSG's various claims" also misses the mark.[21] As the Applicants themselves admit, all of the "claims" they seek to challenge pertain to CSG's prior statements about the nature and extent of its interest in these

[17] *Id*. at 9.

[18] Avangrid Mot. to Compel at 6.

[19] *Id*. at 10.

[20] *Id*. at 5.

[21] *Id*. at 6.

proceedings. *Even if* the Commission determined that CSG's interests do not warrant intervention, that finding would have no bearing on whether the Applicants meet the certification requirements. The Commission could deny intervention *and* deny the certificates. The Commission could grant intervention *and* grant the certificates. The standards for intervention and standards for granting the certificates are distinct issues, and the resolution of one does not dictate the resolution of the other.

The discovery rules define the scope of relevant and discoverable information, not the Applicants. The rules permit the Applicants to ask for virtually anything they want, but they do not require CSG to play along. CSG does not have a duty to provide information that is of no consequence to the determination of these proceedings.

III. CONCLUSION

CSG followed the rules by objecting to irrelevant and premature discovery requests. The Applicants bear the burden of demonstrating that CSG's objections are invalid and should be overruled. Having failed to do so, their motion should be denied.

Dated: February 16, 2022

Respectfully submitted,

/s/ *Mark A. Whitt*
Mark A. Whitt (0067996)
Lucas A. Fykes (0098471)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3946
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Attorneys for Carbon Solutions Group, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Motion to Compel Discovery was served by electronic mail this 16th day of February, 2022 to the following:

Stuart.Siegfried@puco.ohio.gov
Kelli.King@puco.ohio.gov
bojko@carpenterlipps.com
paul@carpenterlipps.com
wygonski@carpenterlipps.com
donadio@carpenterlipps.com
blittle@nisource.com
john.ryan@nisource.com
Christopher.miller@icemiller.com
Nicole.woods@icemiller.com
David.hicks@puco.ohio.gov
Jacqueline.St.John@puco.ohio.gov
Kristin.clingan@puco.ohio.gov

/s/ Lucas A. Fykes
One of the Attorneys for Carbon Solutions Group, LLC

Summary: Memorandum Contra Applicants' Motion to Compel electronically filed by Mr. Lucas A. Fykes on behalf of Carbon Solutions Group, LLC