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
In the Matter of The Application of Barton Windpower, LLC for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility.	))))	Case No. 22-0380-EL-REN

CARBON SOLUTIONS GROUP, LLC'S
MEMORANDUM CONTRA MOTION FOR SANCTIONS

Applicants' Counsel has succeeded in demonstrating sanctionable conduct, but not against the party charged. The honorable thing to do in this situation would be to withdraw the motion for sanctions. If it is not withdrawn, it must be denied.

Stripped of the rhetoric and hyperbole, here are the facts: Applicants' February 2022 motion to compel wasn't about deficient or evasive answers; it was about CSG's objection to providing *any* substantive answers before it knew whether it would be permitted to intervene in the case and whether there would be a hearing. The April 5, 2022 Entry resolved these uncertainties by granting intervention, consolidating the proceedings and setting a procedural schedule and hearing date. These decisions mooted CSG's primary objection, "as the proceeding has now been scheduled for hearing."[1] Nonetheless, the Entry directed CSG to "answer the interrogatories and provide the requested documents within two weeks [.]"[2] ***Two weeks later, CSG served supplemental answers to each of the Applicants' 29 interrogatories.***[3] Some answers are provided "subject to" certain objections, but all the interrogatories have been answered—nearly half with a simple "yes," "no," or "not applicable."[4] CSG supplemented its responses *again* after the parties finalized a protective agreement (a fact left unmentioned in the Applicants' motion).

To emphasize the directive to answer discovery within "two weeks" and claim "[m]ore than *three months* later, CSG gas failed to so,"[5] is to ignore the duty of candor every lawyer owes to a tribunal.[6] Applicants' motion eventually gets around to acknowledging the truth (or some version of it) but the narrative offered up to that point is cagey and dishonest. The April 5 Entry

[1] April 5, 2022 Entry ¶ 27.

[2] *Id*.

[3] Applicants' Motion for Sanctions, Attachment A.

[4] *See* Applicants' Motion for Sanctions, Attachment E.

[5] Applicants' Motion at iv. (emphasis in original).

[6] Under Rule 3.3(a)(1) of the Ohio Code of Professional Responsibility, "A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer [.]"

directed CSG to "answer" and "produce" within a certain period and CSG did so. Applicants' may not like the responses, but that is a different issue. The Entry has been complied with. There is no sanctionable conduct by CSG or its counsel.

The Applicants claim the Entry was *not* complied with because the supplemental responses are deficient, and therefore equivalent to no answers at all. This argument vastly overstates the scope of CSG's original objections and the clear import of the Entry. CSG generally objected to providing any information at the time because (1) the previously mentioned procedural issues had not been resolved and (2) no information about CSG's business or facilities has any relevance to whether the Applicants' facilities meet the deliverability requirement. The Entry did not parse each interrogatory and document request for individual determinations of relevance, opine on objections that had not been made, or issue an advisory opinion about the expected content of any answer. As a practical matter, the directive to "answer" interrogatories and "produce" documents did nothing more than confirm that with the procedural issues settled, CSG should respond substantively to the requests. CSG did so.

To prove CSG committed a "willful, bad-faith violation" of the April 5 entry requires the Applicants to show that the supplemental responses are deficient, and this is where their request for sanctions falls flat. Their entire argument is predicated on their *opinion* of the sufficiency of the answers and objections rather than any specific directive in the April 5 Entry. CSG served answers that comply with the generally applicable rules. Opposing counsel is entitled to a different opinion on the sufficiency of the answers, but in the end, neither counsel's opinions matter. When parties are at loggerheads over discovery responses, the appropriate course of action is to file a motion to compel to solicit the opinion that *does* matter—the Attorney Examiner's or the Commission's. If *that* opinion is rendered and someone subsequently acts

contrary to it, sanctions may be appropriate.[7] Applicants' counsel's failure to seek an order compelling CSG to provide the responses the Applicants now believe they are entitled to, followed by an opportunity for CSG to provide its arguments, renders the motion for sanctions procedurally improper and baseless.

Remarkably, despite half a year's letter writing and two motions, the Applicants are *not* seeking an order directing CSG to cure any incomplete or evasive answers or overruling any of CSG's objections. This begs the question of what practical significance the discovery even has in the case, if any. The correspondence attached to the motion certainly offers no insight, and neither does the motion itself. Apart from scattered "examples" of objections the Applicants' take issue with (ignoring the actual answers provided subject to those objections), the motion leaves to the readers' imagination exactly which responses or objections the Applicants have a problem with or how the problem relates to the merits of the case.[8] The Applicants' failure to move to compel and instead seek to prevent CSG from participating in the hearing signals two things: (1) they are content to proceed to hearing based on what they have, and that makes sense: these cases are about the Applicants' facilities and the Applicants know everything there is to know about their own facilities and the conditions of their operation; and (2) the potential upside, however slim, in getting CSG kicked out of the case exceeds any upside offered by a motion to

[7] The Commission may impose various sanctions "[i]f any party or person disobeys an order of the commission compelling discovery [.]" O.A.C. 4901-1-23(F). *See also Ohio Furniture Co. v. Mindala*, 22 Ohio St.3d 99, 101 (1986) ("A dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice.").

[8] Nor have the Applicants explained why *any* of the objections have any practical significance at this point. The Applicants *may* seek to enter the responses into evidence, or they may not. If they do, the objections may be addressed at that time. If they do not, then what is the point in fighting over these objections now? There mere presences of objections in discovery responses does not affect the admissibility of the responses in any way. The objections merely provide notice of issues that may need to be addressed if the responses are offered into evidence.

compel. The Applicants have swung at the fences, but they have whiffed.

The correspondence attached to the Applicants' motion speaks for itself and, out of respect for everyone's time, CSG's counsel will let it. The reader can decide for his or herself who has tried to be reasonable and practicable and who has not. CSG's counsel would simply call attention to the last thing said to Applicants' counsel before being served with a motion for sanctions alleging "willful, bad-faith" conduct:[9]

A discovery motion might resolve an argument between counsel about what the rules require, but there are more important considerations here than our pride. At the end of the day, we seem to be fighting about things that either no longer matter, or should be fought at a later date. I have no interest in playing "hide that ball" and will extend the benefit of the doubt that you do not, either. We now have a schedule in place that allows you to present your clients' evidence about deliverability, for my client to respond, and for both of us to make witnesses available for cross examination at hearing. If you would like to talk about deposing witnesses between the time they file testimony and appear at hearing, I'd be happy to have that discussion. If we can agree that the end game here should be for both sides to avoid surprises, surely we can find a better way to make that happen than fight about discovery from an earlier stage of the proceeding.

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Attachment H

The sentiment conveyed above stands in stark contrast to Applicants counsel's "Give-me-what-I-want-or-else" attitude and tells the Commission everything it needs to know about the origins of this dispute.

[9] The screenshot is an excerpt from the correspondence attached to the motion for sanctions as Attachment H.

Dated: July 13, 2022

Respectfully submitted,

/s/ *Mark A. Whitt*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Motion for Sanctions of Carbon Solutions Group, LLC was served by electronic mail this 13th day of July, 2022, to the following:

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Summary: Memorandum Contra Motion for Sanctions electronically filed by Ms. Valerie A. Cahill on behalf of Carbon Solutions Group, LLC