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

REPLY MEMORANDUM IN SUPPORT OF CARBON SOLUTIONS GROUP LLC'S MOTION TO COMPEL DISCOVERY

Carbon Solutions Group, LLC's (CSG) motion to compel identifies each discovery request the Applicants have answered evasively, incompletely, or not at all; explains the relevance of the information requested; and demonstrates the utter lack of support for each of the

Applicants' objections. The Applicants have little to say about any *specific* requests, responses, or objections and, in customary fashion, devote most of their response to attacking CSG's motives. Most of what they've written is unresponsive to CSG's motion; what littles approaches the realm of responsiveness demonstrates a monumentally flawed understanding of not only the discovery rules, but the entire hearing process.[1] None of the Applicants' excuses justifies their continued refusal to answer a single interrogatory or produce a single document.

The Applicants' lead argument – that "CSG has failed to explain how the requested information is relevant"[2]—sets the tone for the rest of the Applicants' response. The Applicants claim that the *Koda* test defines the scope of relevant information in this case. As far as they are concerned, the only information properly discoverable in this proceeding (apart from whatever they want from CSG) is information publicly filed "as part of the application process" and the Staff Reports, which "confirmed compliance with the Commission's requirements."[3] This is exactly what the Applicants said when opposing CSG's motion to intervene and request to consolidate these proceedings for hearing: that the Commission's deliverability test is settled; that the Applicants and Staff satisfy the test; and that there is no reason to examine whether *Koda* remains a valid methodology or was validly applied to their applications. If the Commission agreed, it would have denied intervention, approved the applications, and everyone would have gone about their business. They only plausible reason for *rejecting* the Applicants' arguments and consolidated these cases for hearing was to put everyone on notice that the Commission is

[1] The Applicants' discussion of the signature and verification requirements for interrogatory responses exposes the full extent of their misunderstanding of litigation basics and lack of attention to detail. *See* Mem. Contra at 14-15. Counsel's uninformed or misinformed beliefs about "Commission precedent" are no substitute for the text of the rules and authorities cited by CSG on these matters.

[2] Mem. Contra at 5.

[3] *Id*. at 7.

interested in additional evidence and argument regarding the deliverability requirement. The Applicants are free to put all their eggs in the *Koda* basket, but they do not get to overrule the Commission on the proper scope of these proceedings.

Next, the Applicants claim that "CSG has failed to explain why the Application's Objections are not warranted."[4] This argument gets the burden of proof backwards. The Applicants have the burden to not only establish a legal basis for their objections, but to explain *why* each objection applies to the discovery requested here. They refuse to do so.

The Applicants then pivot to a procedural argument, claiming "CSG did not attempt to resolve any dispute before filing its Motion to Compel."[5] They promptly impeach themselves by confessing that CSG *did* attempt to resolve this dispute—but then suggest CSG's counsel was mean, so this effort should not count. "Good faith" does not require parties or counsel who get stiffed in discovery from undertaking futile acts or extending second chances before filing a motion to compel.

The motion to compel discovery should be granted.

ARGUMENT

A. CSG has demonstrated the relevance of the information requested.

The central issue in this case is whether the Applicants can show that electricity from their renewable energy facilities is "physically deliverable" into Ohio.[6] The Applicants' facilities are connected to MISO in states not to contiguous to Ohio. Information about the physical or

[4] *Id*. at 10.

[5] *Id*. at 12.

[6] O.A.C. 4901:1-40-01(F).

operating characteristics of the Applicants' facilities would enable the Commission to evaluate whether energy generated by these facilities is "physically deliverable." Every interrogatory and document request at issue is directly relevant to the key dispute in this case.

The Applicants insist that the only information relevant to these proceedings is what the Applicants provided "as part of the application process" and the Staff Reports, which "confirmed compliance with the Commission's requirements."[7] The Applicants are essentially claiming that the scope of discovery should be defined *as if* the Applicants have already prevailed on the very issues in dispute, which is absurd. If the Applicant's theory of relevance were correct, then granting intervention and consolidating the proceedings for hearing was a vain and futile act on the Commission's part.

The Commission did not grant intervention or schedule a hearing on a whim; it made this decision after considering the comments filed in response to the Staff Reports. The historical or customary way of determining deliverability through the *Koda* Test is not a statutory requirement, nor is it required by rule. If the Commission had the authority to adopt this approach in the first place, then it also has the authority to modify or change it. If the order granting consolidation and setting a hearing signals anything, it signals the Commission's receptiveness to new information and new ideas. Denying CSG the information it has requested is a direct afront to the very reason for allowing these cases to proceed.

Koda does not have the slightest thing to do with the proper scope of discovery in this proceeding. The governing statute requires a demonstration that energy from the Applicant's facilities is "deliverable into this state," and Commission rules put a finer point on

[7] Mem. Contra at 7.

"deliverability" by defining the term to mean "physically deliverable."[8] No statute or rule *requires* the Commission to rely on the *Koda* Test in *any* case, and even if the Commission chooses to rely on the test in *this* case, the Applicants bear the burden of proving that the test was properly applied and achieved a reliable result. CSG does not have the burden of proving an "alternative theory"[9] of deliverability but as a practical matter, CSG must respond to the Applicants' case. CSG's discovery requests seek information for exactly this purpose, and the Applicants must produce this information.

B. The Applicants have failed to support their objections.

In claiming that CSG has "utterly failed" to "explain, with citations to legal authorities, why the Applicants' Objections are unlawful or improper,"[10] is unclear whether the Applicants are trying to make a procedural argument, or whether they are arguing that CSG has failed to rebut the legal applicability of the objections. In either case, the Applicants are wrong.

As a procedural matter, CSG's motion explains the Applicants' discovery obligations with citations to legal authority. "The party seeking discovery bears the initial burden of showing that the information sought is relevant. Thereafter, the party resisting production bears the burden of persuasion. *The resisting party must show specifically how the information requested is not relevant or why it should be limited*."[11] To merely repeat unsubstantiated privilege claims and insist that CSG has the burden of disproving them is the exact *opposite* of the proper legal

[8] R.C. 4928.64(B)(3); O.A.C. 4901:1-40-01(F).

[9] *Id*. at 9.

[10] *Id*. at 10.

[11] *Wilkinson v. Greater Dayton Reg'l Transit Auth.,* No. 3:11CV00247, 2012 WL 3527871, at *5 (S.D. Ohio Aug. 14, 2012) (internal citations omitted, emphasis added).

standard applicable here. Having forced CSG to file a motion to compel, the Applicants have the burden of establishing both the legal basis for the objection *and* its applicability, and to the latter point, they have made no effort to do so.

The Applicants' discovery responses include a laundry list of "general objections," most of which are also incorporated in responses to specific requests. In every instance, the "objection" merely recites what the Applicants seem to view as magic words, where their mere incantation establishes the objection without additional explanation of *why* the objection applies to a specific request. Their response to the motion to compel is more of the same.

The Applicants begin by pointing out that they have "no duty to produce evidence already publicly filed in the docket in this case,"[12] but no one said they did. Rule 4901-1-19(C) does not require the reproduction of information previously filed in the docket, but the rule expressly forecloses the tactic being used here: the mere citation of the rule as an excuse for not answering an interrogatory. "Where the answer to an interrogatory may be derived for ascertained from public documents on file in the case," the responding party must "specify the title of the document, the location of the document or the circumstances under which it was furnished to the party submitting the interrogatory, and the page or pages from which the answer may be derived or ascertained." More importantly, the existence in the docket of some discoverable information does not render all other responsive information *not* in the docket non-discoverable.

Next, the Applicants argue that they are not obligated "to produce information or documents (if any even exist) that may have been shared as part of confidential settlement

[12] Mem. Contra at 10.

discussions."[13] This statement is proof-positive of the Applicants' spurious use of objections. If responsive documents do *not* exist, then *that* is the answer: that no responsive documents have been identified. If responsive documents exist but Applicants are claiming a privilege, the Applicants are required to provide information sufficient for CSG and, if necessary, the Attorney Examiner, to evaluate their claim. The Commission's rules do not differ from the analogous state and federal civil rules, which also do not expressly mention privilege logs. "[The Commission points out that the purpose of a privilege log is to assist the party contesting the privilege claim as well as the attorney examiner in evaluating the merits of the privilege claim to understand both the parameters of the claim and its legal sufficiency. This is the reason why it is common practice for a privilege log to be produced in response to a motion to compel."[14] The Applicants not only refuse to provide a privilege log; they refuse to provide *any* information to evaluate their privilege claim or, for that matter, make the minimum effort necessary to determine whether information even exists that could be subject to any privilege.

The excuse offered for not producing confidential information, even though a Protective Order has been signed and agreed to, is equally spurious. The Applicants claim that "Ohio law and Commission regulations treat competitively sensitive information (such as unpublished financial data, internal business or product plans), proprietary business information, and trade secrets differently than merely confidential information,"[15] but none of the statutes or rules cited in the footnote accompanying this claim recognize such a distinction, nor does the cited Ohio

[13] Mem. Contra at 10.

[14] *In the Matter of the Application of Ohio Edison Co., et al,* Case No. 10-176-EL-ATA, Order (Jan. 27, 2011) at ¶18.

[15] Mem. Contra at 11.

Supreme Court case. Moreover, the plain import of the parties' Protective Agreement is to allow each party to designate material "confidential" for *any* reason. The Applicants may characterize however they wish; whether the information is "confidential" or "proprietary" or whatever else the Applicants want to call it, merely stamping it "confidential" requires CSG and other parties to "prevent disclosure of such information to non-Parties, or to the public."[16] Moreover, "Each Party has sole discretion to assert that information produced to other Parties is confidential . . . as long as such assertion is consistent with Ohio law."[17]

The Applicants attempt to re-write that agreement *after* CSG has produced information that the Applicants now claim is not covered—*i.e.,* CSG's proprietary business information—is bad faith, plain and simple. *Even if* "proprietary" information is distinct from information deemed "confidential," this would only mean that Ohio law offers protection for both categories, so both categories would be covered by the Protective Agreement. The refusal to provide "proprietary" as opposed to "confidential" information is bogus and none of the Applicants other objections or alleged privileges are the least bit supported, either.

C. CSG made the required good-faith effort to resolve this dispute.

The Applicants have not called attention to any aspect of the motion to compel that was not previewed in CSG's counsel's July 1, 2022 letter to Applicants' counsel.[18] Nor have the Applicants explained what else CSG could have done to resolve this dispute but did not. The

[16] CSG Motion to Compel, Ex. C ¶ 2.

[17] *Id*. at ¶ 3.

[18] CSG Motion to Compel, Ex. B.

Applicants' hurt feelings over being called for their "sad" response to the opportunity presented to them to resolve this dispute does not render the motion to compel "procedurally defective."

The Applicants' focus on CSG's reaction to the response to counsel's July 1 letter ignores the most important part of CSG's efforts: the 5-page letter (not merely an "email") to Applicants' counsel explaining which specific discovery responses and objections CSG had a problem with, why, and what counsel wanted the Applicants to do about it. The last sentence of that letter says: "I'm happy to consider a compromise on some of these requests but you need to give me *something* to work with so that a motion to compel can be avoided."[19] Applicants' counsel responding by giving CSG *nothing*. To suggest the rule requiring parties to exhaust "reasonable means" of resolving discovery disputes before filing a motion required CSG's counsel to engage in a further, futile letter writing campaign over discovery that the Applicants continue to insist they do not have to answer turns the concept of "good faith" on its head. CSG's motion is not "procedurally improper" by any stretch of the imagination.

The Applicants' four-month effort to resolve their dispute with CSG's discovery responses proves the opposite point the Applicants are attempting to make. As the chain of correspondence plainly shows, CSG did not reflexively dismiss the Applicants' concerns. To the contrary, CSG spent considerable effort trying to understand those concerns—starting with getting the Applicants to explain which specific discovery requests and responses they were concerned with. That alone took several letters or emails and consumed three of the four months between the time the concerns were initially raised and the filing of the Applicants' motion to compel. Recognizing that bickering over written discovery was getting the parties nowhere, CSG proposed a compromise whereby the parties could agree to a schedule for disclosing and

[19] *Id*. at 5 (emphasis in original).

deposing experts.[20] Not only did Applicants' counsel reject this offer; the newly-asserted claim that CSG is withholding information or plans to sandbag the Applicants pretends these overtures were never made. In short, the correspondence regarding the Applicants' discovery illustrates a good faith attempt to resolve a discovery dispute—by CSG. Rather than approach this or any other issue constructively, Applicants' counsel apparently would rather defend a point a view.

Regarding its own discovery requests, CSG did what the Applicants should have done in the first place: it identified the specific requests at issue, explained why the answers are incomplete or evasive, and challenged the applicability of the objections asserted. The letter does not merely demand "answer or else," but leaves the door open for compromise. The Applicants' conclusory and dismissive response could be fairly described with certain four-letter words, but the three-letter word communicated to them is sufficient.

CONCLUSION

The Applicants are entitled to complete, non-evasive, and signed and verified answers to Interrogatory Nos. 2, 3, 7, 8 and 9, and to the documents requested in Request for Production Nos. 1-4, 7-10, and 14. An Entry should issue accordingly.

Dated: August 8, 2022

Respectfully submitted,

/s/ *Mark A. Whitt*

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[20] Applicants' Motion for Sanctions (July 11, 2022), Attachment H (last paragraph).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Motion to Compel Discovery was served by electronic mail this 8th day of August, 2022, to the following:

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Summary: Memorandum Reply Memorandum in Support of Carbon Solutions Group LLC's Motion to Compel Discovery electronically filed by Ms. Valerie A. Cahill on behalf of Carbon Solutions Group, LLC