

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE APPLICATION OF
MORAINÉ 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

**IN THE MATTER OF THE APPLICATION OF
BARTON WINDPOWER, LLC FOR
CERTIFICATION AS AN ELIGIBLE OHIO
RENEWABLE ENERGY RESOURCE
GENERATING FACILITY.**

CASE NO. 22-380-EL-REN

ENTRY

Entered in the Journal on November 1, 2022

{¶ 1} In this Entry, the attorney examiner denies the request for Carbon Solutions' request for an interlocutory appeal.

{¶ 2} On various dates, Moraine Wind LLC, Rugby Wind LLC, Elm Creek II Wind LLC, Buffalo Ridge II Wind LLC, Avangrid Renewables LLC, and Barton Windpower LLC (Applicants) filed their applications pursuant to Ohio Adm.Code 4901:1-40-04(D), for the certification of each named facility as an eligible Ohio renewable energy resource generating facility as defined in R.C. 4928.01.

{¶ 3} The attorney examiner suspended the automated approval process for the applications pursuant to Ohio Adm.Code 4901:1-40-04(D), which provides that upon good cause shown, the Commission may suspend the certification of an application to allow the Commission and its Staff to further review the application.

{¶ 4} Prehearing conferences were conducted on various days in July and August 2021.

{¶ 5} Staff filed its review and recommendation in each respective docket. In each report, Staff recommended the application be approved. Specifically, Staff determined that each facility satisfies the Commission's requirements for certification as a renewable energy facility.

{¶ 6} On May 7, 2021, Carbon Solutions Group, LLC (Carbon Solutions) filed motions to intervene, motions to consolidate, and motions to establish a procedural schedule.

{¶ 7} On August 3, 2021, Avangrid Renewables, LLC, the owner of Applicants, filed a motion to consolidate the cases. On August 6, 2021, Applicants, rather than their parent company, filed an amended joint motion to consolidate.

{¶ 8} On April 5, 2022, the attorney examiner consolidated Case Nos. 21-516-EL-REN, 21-517-EL-REN, 21-531-EL-REN, 21-532-EL-REN, and 21-544-EL-REN and granted the motions to intervene filed by Blue Delta Energy, LLC, 3Degrees Group, Inc., Carbon Solutions, and Northern Indiana Public Service Company LLC. The Entry also set a procedural schedule, scheduled an evidentiary hearing to take place on September 12, 2022,

granted Applicants' motion to compel, and ordered that Carbon Solutions provide substantive responses within two weeks.

{¶ 9} On April 13, 2022, Barton Windpower, LLC filed an application pursuant to Ohio Adm.Code 4901:1-40-04(D), for certification as an eligible Ohio renewable energy resource generating facility as defined in R.C. 4928.01, which was assigned Case No. 22-380-EL-REN. The attorney examiner suspended the automated approval process for the application pursuant to Ohio Adm.Code 4901:1-40-04(D) on May 2, 2022.

{¶ 10} On May 3, 2022, Carbon Solutions filed a motion for leave to intervene and motion to consolidate Case No. 22-380-EL-REN with the previously consolidated cases. On May 18, 2022, Applicants filed a memorandum contra. On May 20, 2022, Carbon Solutions filed a reply. On June 24, 2022, Applicants filed a notice of withdrawal of their memorandum contra the motion to consolidate.

{¶ 11} On June 28, 2022, the attorney consolidated all the above-captioned cases and ruled that the procedural schedule already established will apply to all the consolidated cases. The attorney examiner also adjusted the procedural schedule, determining that parties supporting certification should file testimony by August 12, 2022.

{¶ 12} On July 11, 2022, Applicants filed a motion for sanctions against Carbon Solutions, arguing that Carbon Solutions refused to comply with a Commission directive to answer and produce discovery.

{¶ 13} On July 13, 2022, Carbon Solutions filed a memorandum contra stating that rather than file a motion for sanctions, Applicants should have filed a motion to compel.

{¶ 14} On July 20, 2022, Applicants filed a reply, arguing that Carbon Solutions misinterprets the April 5, 2022 Entry.

{¶ 15} On July 18, 2022, Carbon Solutions filed a motion to compel discovery. On August 1, 2022, Applicants filed a memorandum contra, and on August 8, 2022, Carbon Solutions filed a reply.

{¶ 16} On September 1, 2022, the attorney examiner issued an entry that deferred the Applicants' motion for sanctions, ordered Carbon Solutions to provide discovery responses within seven days, granted Carbon Solutions' motion to compel, and rescheduled the hearing to take place on December 5, 2022.

{¶ 17} On September 6, 2022, Carbon Solutions filed a request for an interlocutory appeal pursuant to Ohio Adm.Code 4901-1-15(A). Specifically, Carbon Solutions disagrees with the order requiring them to provide discovery responses within seven days of the September 1, 2022 Entry and disputes the continuance of the hearing. Carbon Solutions asserts that it has already answered all the discovery requests. Carbon Solutions also contends that some of the discovery requests are now irrelevant and defends its response that Carbon Solutions "is unable to speak for its counsel." Carbon Solutions states that it supplemented its responses in accordance with the April 5, 2022 Entry, and Applicants did not file a motion to compel, which would have been the proper remedy. Carbon Solutions then states that the "supplemental responses contain entirely new and different answers and objections, so they cannot possibly be encompassed by the motion to compel or [the] April 5 Entry." Carbon Solutions also adds that the attorney examiner should have separately addressed the substantive responses and the objections. Carbon Solutions also asserts that it was an abuse of discretion for the attorney examiner to order that the objections in Carbon Solutions' supplemental responses had been waived because they were not raised within 20 days of service of discovery, stating that the attorney examiner should have waived that requirement for Carbon Solutions. Carbon Solutions also asserts that answering the discovery subject to additional objections does not prejudice the Applicants. Turning to the hearing continuance, Carbon Solutions asserts that the discovery disputes do not justify supplemental testimony or a continuance of the hearing date. To support this claim, Carbon Solutions notes that the testimony filed by the Applicants and Blue Delta do

not rely on discovery responses or state that they are unable to address a material point because of outstanding discovery, nor have any motions for continuance been filed by any party. Carbon Solutions states that supplemental testimony would allow the Applicants and Staff to file rebuttal testimony and argues that the scope of supplemental testimony should be limited to previously undisclosed information. As for the hearing date of December 5, 2022, Carbon Solutions argues that the date would cause disruptions to holiday plans, so the hearing should be moved to September or October instead.

{¶ 18} On September 12, 2022, Applicants filed a memorandum contra the interlocutory appeal, arguing that Carbon Solutions failed to meet the procedural requirements for an interlocutory appeal. Specifically, Applicants state that the Entry subject to the interlocutory appeal is not a ruling that allows for an appeal of right under Ohio Adm.Code 4901-1-15(A), noting also that the Entry did not grant a motion to compel discovery that adversely affected Carbon Solutions. Rather, Applicants note that the Entry deferred a motion for sanctions. Additionally, Applicants assert that Carbon Solutions did not meet the framework for certifying under Ohio Adm.Code 4901-1-15(B), as it did not allege that the appeal presents a new or novel question of interpretation, law, or policy; is taken from a ruling that is a departure from past precedent; or an immediate determination is needed. As to Carbon Solutions' assertion that Applicants should have filed a motion to compel, Applicants state that the law does not require them to file additional motions to compel, and Applicants believe that approach would have wasted additional time and resources. As to Carbon Solutions' relevancy arguments, the Applicants assert that argument was already addressed and denied in the April 5, 2022 Entry. Applicants also state that the objection that Carbon Solutions is "unable to speak for its counsel" is not a valid ground to withhold information. Applicants note that supplemental testimony will be helpful to the Commission and parties, and if Carbon Solutions believes that supplemental testimony would be a burden, they are not required to file any. As to the rescheduled hearing date, Applicants agree that an earlier hearing date would be preferred, but the current hearing date should not be vacated before a new hearing date is set.

{¶ 19} To briefly summarize the order of events, the Applicants filed a motion to compel on February 1, 2022, which the attorney examiner granted on April 5, 2022. In that Entry, Carbon Solutions was ordered to provide discovery responses within two weeks. Carbon Solutions provided supplemental responses by raising additional objections. On July 11, 2022, Applicants filed a motion for sanctions due to Carbon Solutions' lack of responses, which the attorney examiner deferred on September 1, 2022, and again ordered Carbon Solutions to provide discovery responses.

{¶ 20} Ohio Adm.Code 4901-15 governs interlocutory appeals taken from rulings issued by an attorney examiner. Ohio Adm.Code 4901-1-15(A) provides that an immediate interlocutory appeal to the Commission may be taken from any ruling issued under Ohio Adm.Code 4901-1-14 that does any of the following:

1. Grants a motion to compel discovery or denies a motion for a protective order.
2. Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony.
3. Refuses to quash a subpoena.
4. Requires the production of documents or testimony over an objection based on privilege.

{¶ 21} Except as provided in the four subsections above, an interlocutory appeal from a ruling may not be taken unless the appeal is certified to the Commission by the legal director, deputy legal director, or attorney examiner. Ohio Adm.Code 4901-1-15(B) states that such an interlocutory appeal shall not be certified unless it is found that the appeal presents a new and novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the

Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question.

{¶ 22} Carbon Solutions filed its motion for an interlocutory appeal pursuant to Ohio Adm.Code 4901-1-15(A). However, Carbon Solutions does not specify which of the four ruling types it believes the September 1, 2022 Entry includes, and the attorney examiner notes that the appeal does not fall within any of the four circumstances set forth in subsection (A) of the rule. The motion to compel was granted on April 5, 2022, and Carbon Solutions did not file an interlocutory appeal of that ruling. Therefore, the attorney examiner finds that Carbon Solutions interlocutory appeal should not be granted as a matter of right.

{¶ 23} Furthermore, the attorney examiner finds that the interlocutory appeal should not be certified to the Commission pursuant to Ohio Adm.Code 4901-1-15(B), as Carbon Solutions has not articulated why the appeal should be certified based on that standard. Even if Carbon Solutions had articulated an argument for certification pursuant to Ohio Adm.Code 4901-1-15(B), the appeal would be denied. The September 1, 2022 Entry deferred a pending motion for sanctions, which was not a “ruling” by the attorney examiner. Rather, the attorney examiner expressly deferred ruling on the motion for sanctions, which is not a ruling issued under Ohio Adm.Code 4901-1-14. *See, e.g., In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Entry (Feb. 10, 2022) at ¶ 25; *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al., Opinion and Order (Mar. 31, 2016) at 11. Additionally, the Entry ordered Carbon Solutions to provide discovery responses within seven days, which does not represent a departure from past precedent. In fact, this ruling is in conformity with the attorney examiner’s April 5, 2022 Entry, in which Carbon Solutions was first ordered to provide discovery responses. The September 1, 2022 Entry also rescheduled the hearing to be held on a later date to allow time for the discovery issues to be resolved, which does not present a new or novel question of interpretation, law, or policy. It is well established that the Commission and its attorney examiners have extensive experience with respect to establishing procedural schedules and

addressing other procedural issues, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. See, e.g., *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Entry (Feb. 10, 2022) at ¶ 21; *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. Accordingly, the interlocutory appeal will not be certified to the Commission for review.¹

{¶ 24} On October 11, 2022, Applicants filed a renewed motion for sanctions. Applicants note that the attorney examiner deferred ruling on the motion for sanctions on September 1, 2022, but invited the Applicants to renew the motion if Carbon Solutions fails to provide discovery responses yet again. Applicants state that Carbon Solutions has not provided the Applicants with any meaningful discovery responses or produced any documents and instead filed a procedurally improper interlocutory appeal. Applicants also emphasize that the filing of an interlocutory appeal does not automatically impose a stay by operation of law, and Carbon Solutions did not request a stay of the September 1, 2022 directive to provide discovery responses within 7 days.

{¶ 25} On October 25, 2022, Carbon Solutions filed a memorandum contra the renewed motion for sanctions. Carbon Solutions states that sanctions may be imposed if a

¹ Because the interlocutory appeal will not be certified to the Commission, the attorney examiner declines to respond to each of the arguments raised by Carbon Solutions in its motion except to point out that many of these arguments have already been directly addressed and rejected in the April 5, 2022 Entry and the September 1, 2022 Entry.

party disobeys an order of the Commission compelling discovery, but the September 1, 2022 Entry was issued by an attorney examiner. Carbon Solutions adds that, pursuant to Ohio Adm.Code 4901-1-23(E), any order of “an attorney examiner granting a motion to compel discovery may be appealed,” but if it is not properly appealed “becomes an order of the commission.” Carbon Solutions reasons that because it filed an interlocutory appeal within five days of the Entry, the ruling did not become an “order of the Commission” and therefore its delay is not subject to sanctions. Carbon Solutions argues that because it filed an interlocutory appeal, there was an automatic stay of the September 1, 2022 Entry. Also in its memorandum contra, Carbon Solutions suggests that a prehearing conference be arranged to resolve any additional discovery disputes.

{¶ 26} At this time, the attorney examiner again finds it appropriate to again defer the motion for sanctions. Although Carbon Solutions did not request a stay of the directive to provide discovery responses, the interlocutory appeal has been pending. As stated in the September 1, 2022 Entry, should Carbon Solutions fail to follow the attorney examiner’s directive to provide answers and documents yet again, the attorney examiner invites Applicants to renew their motion for sanctions. The attorney examiner also finds it important to clarify that the September 1, 2022 Entry did not grant a motion to compel, as was suggested in Carbon Solutions’ memorandum contra. Despite this inaccuracy, the renewed motion for sanctions will be deferred as described above. It is also important to note that Carbon Solutions did not file an interlocutory appeal of the April 5, 2022 Entry, which granted Applicants’ motion to compel, thus the April 5, 2022 Entry has become an “order of the Commission.” Applicants filed the currently deferred motion for sanctions after Carbon Solutions did not provide discovery responses after the April 5, 2022 Entry. In other words, the deferred motion for sanctions is properly before the Commission and may be renewed should Carbon Solutions again fail to provide complete discovery responses.

{¶ 27} For the reasons articulated above and in prior entries, the attorney examiner finds that Carbon Solutions should provide all substantive answers and documents in response to the pending discovery requests within three days of this Entry. To the extent

that Carbon Solutions has asserted that it has already answered all the discovery requests, it must clearly convey to the Applicants which requests have been answered in full. However, based on Applicants' assertion that Carbon Solutions has not produced any documents, the attorney examiner notes apprehension as to how many discovery requests have been answered in full. As already articulated in the September 1, 2022 Entry, Carbon Solutions' timely objections to the discovery requests were overruled by the attorney examiner on April 5, 2022, and any additional objections were waived. The time to provide meaningful responses to the discovery requests has come.

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That the interlocutory appeal filed by Carbon Solutions on September 6, 2022, be denied. It is, further,

{¶ 30} ORDERED, That Applicants' renewed motion for sanctions be deferred at this time. It is, further,

{¶ 31} ORDERED, That Carbon Solutions provide substantive responses to the pending discovery requests within three days, as set forth in Paragraph 27. It is, further,

{¶ 32} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John
Attorney Examiner

GAP/dmh

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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, 22-0380-EL-REN

Summary: Attorney Examiner Entry that the interlocutory appeal filed by Carbon Solutions on September 6, 2022, be denied; Applicants' renewed motion for sanctions be deferred at this time; Carbon Solutions provide substantive responses to the pending discovery requests within three days, as set forth in Paragraph 27 electronically filed by Ms. Donielle M. Hunter on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio