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 APPLICANTS' MOTIONS FOR SANCTIONS

It is too bad the Applicants did not put the same effort into a renewed motion to compel that they put into their renewed sanctions motions; had they done so, the evidentiary hearing could have proceeded as originally scheduled and the past several months of motion practice

avoided. In any case, Carbon Solutions Group, LLC (CSG) has lost track of how many times the Applicants have "renewed" their motion for sanctions, so this memorandum contra applies to all outstanding motions on the subject.

Yesterday, the parties were informed by email that the relief requested in the outstanding motions for sanctions (*i.e.*, termination of CSG's right to participate in this proceeding) would not be granted. Given the informal nature of this communication and Applicants' counsel's proclivity for "renewed" motions, CSG is filing this memorandum contra to preserve its rights and protect the record; a record where three things are abundantly clear: (1) CSG made genuine, good faith efforts to avoid a discovery dispute and has done nothing sanctionable; (2) the Applicants did not properly raise their discovery issues; and (3) the Applicants cannot demonstrate prejudice. Each of these matters is addressed below.

ARGUMENT

Under Rule 4901-1-23(F), "any party or person [who] disobeys an order of the commission compelling discovery" is subject to a range of potential sanctions, ranging from whatever the Commission "deems appropriate" to dismissal from the proceeding. This rule is similar to Rule 37 of the Ohio and federal Rules of Civil Procedure, so caselaw construing Rule 37 is instructive.

As discussed below, CSG has not engaged in conduct even remotely warranting sanctions. Even when conduct is "clearly sanctionable," the sanction "must not be disproportionate to the seriousness of the infraction under the facts of the case."[1] "Dismissal of an action for failure to cooperate in discovery is a sanction of last resort that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness,

[1] *Transamerica Ins. Grp. v. Maytag, Inc.,* 99 Ohio App. 3d 203, 206–07 (1994).

bad faith, or fault."[2] Courts evaluate this sanction under a four-factor test: "(1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered."[3] The facts of this case do not warrant *any* sanctions against CSG.

A. CSG has acted in good faith.

The origins of this dispute are an important part of the story. Everything that follows is documented in the exhibits to the Applicants' July 11, 2022 motion for sanctions.

CSG served its supplemental responses on April 19, 2022.[4] The entry ordering CSG to serve these responses also established the procedural schedule, so the Applicants knew right away that they were on the clock to resolve any disputes.

The first indication the Applicants had a problem with the supplemental answers came on May 24—over a month after CSG served them. Nowhere in Applicants' counsel's laundry list of grievances is there any identification of specific requests or responses; the opening and closing paragraphs of the letter simply make a generalized demand "that CSG cure its discovery responses immediately."[5] *The very next day*, CSG's counsel responded to this demand with a

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[2] *Reg'l Refuse Sys. v. Inland Reclamation Co.,* 842 F.2d 150, 153–54 (6th Cir.1988) quoting *Patton v. Aerojet Ordnance Co.,* 765 F.2d 604, 607 (6th Cir.1985)). *See also United Holy Church of Am., Inc. v. Kingdom Life Ministries,* 2006-Ohio-708, ¶ 7, 165 Ohio App. 3d 782, 784 ("[D]ismissal on the merits is a harsh remedy that should be imposed only when the actions of the defaulting party create a presumption of willfulness or bad faith.").

[3] *Schafer v. City of Defiance Police Dep't,* 529 F.3d 731, 737 (6th Cir. 2008).

[4] Applicants' Motion for Sanctions, Ex. 1 Attach. A.

[5] *Id*., Attach. B.

request for Applicants' counsel to be more specific:[6]

> Angie,
>
> If there is a genuine issue with the discovery that you wish to resolve in good faith, I need you to: (1) tell me which specific requests you are talking about and why the information sought is relevant to the proceeding; and (2) explain why you believe the response is improper, deficient, etc. If you cannot or will not provide this information to me, how am I supposed to help you? The attorney examiner won't be able to help you either, because the information I'm asking for is the same information you would need to provide in a motion to compel.

About three weeks went by before Applicants' counsel followed up. On June 13, Applicants' counsel claimed that "Each and every discovery response" was deficient and repeated the generalized demand to "respond fully and completely to the discovery requests as ordered."[7] CSG's counsel replied *the same day*:[8]

> Angie-
>
> Avangrid served 29 interrogatories. Of these, 7 do not require a response because a previous interrogatory was not answered in the affirmative, and an additional 6 asked a "yes" or "no" question to which a "yes" or "no" answer was provided. Additionally, 2 interrogatories asking about the identify of witnesses were answered. This leaves a pool of 14 interrogatories and responses as potential candidates for dispute, but all of these were answered. Many of the answers are subject to objections, but the objections raised have not been ruled on and, more importantly, will never need to be ruled on unless Avangrid seeks to enter the answers into evidence. Merely characterizing unspecified answers to unspecified interrogatories as "evasive" does not advance the ball.
>
> Accordingly, I will ask you again: what information did you ask for that has not been provided? If you cannot answer that question, then you may report that we are at an impasse.

Later the same week (on June 16, 2022), Applicants' counsel backtracked on the demand to revise "each and every discovery response" and *finally* produced a chart of specific requests

[6] *Id*., Attach. C.

[7] *Id*., Attach. D.

[8] *Id*., Attach E.

and responses.[9] CSG's counsel wrote on Monday the following week (June 20) to address counsel's concerns and, importantly, offered additional disclosures *above and beyond* those required by the rules:[10]

> 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.

Applicants' counsel did not respond to this proposal, and three weeks later (on July 11) filed the motion for sanctions.

Despite the fact their testimony was due within a month, the Applicants did *not* seek an expedited ruling on the motion for sanctions. Nevertheless, recognizing the timing of this motion and out of a desire to avoid disrupting the procedural schedule, CSG responded to the motion just *two days* later. The Applicants had ample opportunity to request a prehearing or otherwise inform the Attorney Examiner of a need for a ruling before testimony was due, but never did so.

The record of the parties' interactions between mid-April and Mid-July shows a pattern of cooperation and diligence on CSG's part that far exceeds the rote, demanding and uncooperative attitude displayed by the Applicants. Indeed, CSG was more attentive to the Applicants' discovery than the Applicants themselves.

[9] *Id*., Attach. F, G.

[10] *Id*., Attach. H.

B. The Applicants' motions and related Entries are procedurally and substantively improper.

The Applicant's entire argument for sanctions is that in response to the April 5 Entry and subsequent entries, "CSG submitted vague, incomplete answers that essentially constitute non-answers."[11] Notice what is missing here: reference to specific language in a prior order or entry declaring the *supplemental responses* "vague" or "incomplete" and directing CSG to supplement or amend them. The April 5 Entry overruled certain prior *objections* but it did not address—and could not have addressed—the responses now being characterized as vague, incomplete, and therefore noncompliant.[12] The Applicants are trying to compress the two-stage process for the issuance of sanctions into one, and that is simply not allowed.

"For sanctions to be imposed under Fed.R.Civ.P. 37(b)(2), there must first be an order compelling discovery under Rule 37(a). Thus, sanctions cannot be imposed under Rule 37(b)(2) for the delay in producing the additional information."[13] Rule 4901-1-23 also requires a two-step process: issuance of an entry or order compelling a party to perform an act, followed by the party's failure to perform the act.[14] This two-step process is necessary to satisfy due process. "Notice of intention to dismiss with prejudice gives the non-complying party one last chance to obey the court order in full. The moving party should not be allowed to circumvent this

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[11] Applicants' Second Renewed Motion at 2.

[12] The September 1 Entry notes that CSG did not seek interlocutory review of the April 5 Entry, but the point of this statement is not clear. *See* Sept. 1 Entry ¶ 15 n.1. Even if objections to the discovery were overruled or waived, those rulings have nothing to do with the sufficiently of CSG's supplemental responses. Any suggestion that the April 5 Entry somehow precludes CSG from defending the sufficiency of its supplemental responses is plainly mistaken.

[13] *Kropp v. Ziebarth,* 557 F.2d 142, 146 (8th Cir. 1977).

[14] *See* O.A.C. 4901-1-23 (D) and (F).

protection by simply framing his motion in terms of a Civ.R. 37 sanction."[15]

The April 5 Entry directed CSG to "provide substantive responses" to the Applicants' discovery within two weeks.[16] The requirements of the *Entry* were complied with by the service of written supplemental responses within two weeks. The fact that the Applicants "may have disagreed" with the completeness of the responses is irrelevant.[17] In factually similar circumstances, courts have held that once a responding party responds to a directive issued in a motion to compel, "the trial court may not thereafter dismiss the action or claim on the basis of noncompliance with that order."[18]

The Applicants' request for sanctions is not grounded in any language or directive of the April 5 Entry; it is expressly grounded in *Commission rules* governing the sufficiency of discovery responses. Rule 4901-1-23(A) allows a party to "move for an order compelling discovery" with respect any failure to answer interrogatories, produce documents, or "[a]ny other failure to answer or respond to a discovery request [.]"[19] "For purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer."[20] Thus, the express remedy for *exactly* what the Applicants are complaining about—the service of "evasive or incomplete answers"—is

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[15] *Ohio Furniture Co. v. Mindala,* 22 Ohio St. 3d 99, 101 (1986).

[16] Nov. 1 Entry ¶ 8.

[17] *United Holy Church of Am., Inc. v. Kingdom Life Ministries,* 2006-Ohio-708, ¶¶ 8-9, 165 Ohio App. 3d 782, 784–85 ("Here, UHCA attempted to comply with the trial court's order by responding to discovery by December 15. Although not complete, UHCA's discovery responses do not establish a willfulness or bad faith under the circumstances before us. UHCA made few objections and represented that it would provide supplemental responses. Although Kingdom may have disagreed, UHCA believed that it had complied with the trial court's order.")

[18] *Id*., quoting *Sazima v. Chalko* (1999), 86 Ohio St.3d 151, 157.

[19] O.A.C. 4901-1-23(A)(1-4).

[20] *Id*. at (B).

a motion to compel.

Regardless of whether the Applicants' July 11 motion is characterized as a motion for sanctions, a motion to compel, or some combination thereof, the motion did not develop an argument explaining why any specific supplemental responses were "evasive or incomplete." The Applicants' failure to develop or present arguments on this critical point has led to the issuance of entries that direct CSG to answer or supplement unspecified and allegedly deficient responses without explaining the nature of the deficiencies or corrective action needed. Adding to this confusion is the insistence that "the September 1 Entry did not grant a motion to compel,"[21] which elevates form over substance. The September 1 Entry (issued on the eve of Labor Day weekend) directed CSG to provide discovery within seven days and the November 1 Entry (issued the day before undersigned counsel's Office Manager died unexpectedly) directed CSG to serve discovery in three days.[22] If these entries did *not* command the production of discovery, then why is anyone talking about sanctions?

The September 1 and November 1 Entries are partially correct in the observation that no motions to compel are currently pending. This is precisely the problem. Sanctions are being held over CSG's head to grant relief the Applicants simply have *not* asked for, and not even the Attorney Examiner knows what the Applicants *are* asking for. All this uncertainty stems from the fact that the Applicants themselves do not have a good sense for what they need or why, and this this brings us to the last issue.

[21] Nov. 1 Entry ¶ 26.

[22] *See id*. ¶ 27 ("Carbon Solutions should provide all substantive answers and documents in response to the pending discovery requests within three days of this Entry."); Sept. 1 Entry ¶ 15 ("Carbon Solutions should provide substantive answers and documents in response to the pending discovery requests within seven days of this Entry.").

C. The Applicants have not and cannot demonstrate prejudice.

Somewhere along the way, an important question has been forgotten: "What is the point of all of this?" A critical consideration in sanctioning discovery violations is "whether the adversary was prejudiced by the party's failure to cooperate in discovery [.]"[23] "Even if nondisclosure initially prejudiced the party, where the prejudice is subsequently remedied, sanctions are not appropriate."[24]

The discovery rules are important and should be obeyed, but these rules do not exist in a vacuum. Their purpose is to "facilitate thorough and adequate preparation for participating in commission proceedings."[25] Parties are expected to "minimize commission intervention in the discovery process" by compromising and conceding where practicable, and reserving motion practice for disputes that must be resolved to avoid actual, tangible prejudice. The Applicants have never explained how they have been prejudiced by CSG's supplemental responses, so even if they are deemed "incomplete' or "evasive," what exactly is the point of serving new answers? Just because?

For the avoidance of doubt, below are the interrogatories that have generated all the fuss:

INT-01-017:	Referring to page 4 of the Motion to Intervene filed by CSG in the above-captioned cases, what is the factual basis and/or support for the statement: "CSG is prepared to show that, like any modelling technique, the output of a power flow study is heavily influenced by the inputs?"

[23] *Brown v. Morganstern,* 2004-Ohio-2930, ¶ 51 (affirming denial of motion to strike discovery responses where "appellant did not endure any prejudice as a result of appellees' delayed response to appellant's discovery request.").

[24] *Est. of Thompson v. Kawasaki Heavy Indus., Ltd.,* 291 F.R.D. 297, 315 (N.D. Iowa 2013)

[25] O.A.C. 4901-1-16(A).

INT-01-018:	Referring to page 4 of the Motion to Intervene filed by CSG in the above-captioned cases, what is the factual basis and/or support for the statement: "there is no indication that these facilities have or intend to actually deliver electricity into Ohio?"
INT-01-019:	Referring to page 4 of the Motion to Intervene filed by CSG in the above-captioned cases, what is the factual basis and/or support for claiming that "'deliverability' under R.C. 4928.64 has both a physical and financial dimension?"
INT-01-024:	Are You aware of any new renewable energy resource generating facility projects that have gone into planning, development, or construction in response to the increased price for RECs which would not have gone into development absent the increased price for REC?

The issue here is *not* whether the requested information is within the scope of discovery.[26] That might have been a valid question had the Applicants' filed a motion to compel regarding the supplement responses, but they did not. If this information is supposedly important enough to justify multiple motions for sanctions *after* testimony was filed, it should have been important enough to pursue through a motion to compel *before* the Applicants filed testimony.[27] Tellingly, none of the Applicants', Staff's, or other intervenors' testimony even remotely addresses the subject matter of this discovery, once again begging the question: "What is the

[26] The Applicants finally acknowledge the obvious: that the motion referenced in the interrogatories are statements of CSG's counsel. *See* Second Renewed Motion at 2. The suggestion that CSG should be sanctioned for the very act of preparing revised supplemental responses is simply baffling. These are not proper interrogatories to being with and CSG freely concedes the responsive information is not "evidence." "Rule 33 authorizes interrogatories to parties to lawsuits, not to their attorneys. The parties are required to answer them under oath. It would be pointless and unfair to require laymen to swear to statements embodying the legal theories of their attorneys. The assertion and discussion of legal theories, and the classification of facts in support thereof, should be by the lawyers at trial and in whatever pre-trial procedures the Court may require." *United States v. Selby*, 25 F.R.D. 12, 14 (N.D. Ohio 1960) citing *Hickman v. Taylor* (1947*)*, 329 U.S. 495, 504.

[27] Suffice it to say, it is far too late for the Applicants to cure this defect by attempting to resurrect a motion to compel on the ve of hearing. "Rule 37 motions filed after a discovery deadline are tardy." *State ex rel. Rhodes v. Chillicothe,* 2013-Ohio-1858, ¶ 22.

point of all of this?"

The mere fact that CSG has pushed back on Applicants' counsel's unreasonable and confrontational demands during the discovery process does not equate to "bad faith." The rules contemplate and make allowance for differences of opinion and provide a forum and process for resolving these differences. At every step of this proceeding, CSG has followed the rules. The Applicants are essentially asking for a ruling that declares their opinion on discovery issues to be the only correct opinion, and which sanctions CSG for nothing more than having a different opinion.[28] Even making this request shows a disregard for the Commission's limited resources.

At this point, CSG is inclined to hand Applicants the pen and allow them to draft their own answers to whatever remaining interrogatory responses they have a problem with. It is hard to imagine how any responses that fairly meet the substance of the questions would make any difference anyway. The amount of briefing and motion practice over this discovery is monumentally disproportionate to any legitimate needs of the case, and on behalf of the Applicants, CSG apologizes that the Commission has had to deal with this nonsense.

CONCLUSION

The Applicants' quest for sanctions should be put to rest. All outstanding motions regarding CSG's supplemental discovery responses should be denied in full.

[28] If this case were in federal or state court, the Applicants would be opening their wallet to CSG. "The great operative principle of Rule 37(a)(4) is that the loser pays." *Rickels v. City of South Bend,* 33 F.3d 785, 786 (7th Cir.1994). Unfortunately, the Commission does not have the same tools in its toolkit to remedy frivolous conduct.

Dated: November 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Carbon Solutions Group, LLC's Memorandum Contra Applicants' Motions for Sanctions was served by electronic mail this 30th day of November, 2022, to the following:

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