

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The Application of Moraine)
Wind LLC for Certification as an Eligible Ohio) Case No. 21-0516-EL-REN
Renewable Energy Resource Generating)
Facility.)

In the Matter of The Application of Rugby)
Wind LLC for Certification as an Eligible Ohio) Case No. 21-0517-EL-REN
Renewable Energy Resource Generating)
Facility.)

In the Matter of The Application of Elm Creek)
II for Certification as an Eligible Ohio) Case No. 21-0531-EL-REN
Renewable Energy Resource Generating)
Facility.)

In the Matter of The Application of Buffalo)
Ridge II for Certification as an Eligible Ohio) Case No. 21-0532-EL-REN
Renewable Energy Resource Generating)
Facility.)

In the Matter of The Application of Barton)
Windpower 1 for Certification as an Eligible) Case No. 21-0544-EL-REN
Ohio Renewable Energy Resource Generating)
Facility.)

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

REPLY BRIEF OF CARBON SOLUTIONS GROUP, LLC

Dated: February 7, 2023

TABLE OF CONTENTS

	Page No.
I. INTRODUCTION.....	1
II. REPLY TO STAFF.....	2
III. REPLY TO APPLICANTS.....	3
A. The Applicants have not and cannot explain PJM’s assumptions about deliverability (reply to Section III.A.4.).....	3
B. The <i>Koda</i> test is not a rule of evidence or procedure (reply to Sections III.A.1 and 3).....	5
C. The Applicants lose because of <i>Koda</i>, not in spite of it (reply to Section III.A.2).....	7
IV. REPLY TO BLUE DELTA.....	8
V. CONCLUSION.....	9

I. INTRODUCTION

The Applicants, Blue Delta, and Staff have demonstrated how many different ways they can say to the Commission, “Staff applied the *Koda*¹ test,” but they have next to nothing to say about the statutory deliverability standard or how the record evidence meets this standard. The Commission must either dismiss the applications or it must re-open the record to consider additional evidence of deliverability. Certification of these facilities is not an option.

No one disputes that “Staff applied the *Koda* test” but the “test” itself is not the problem. The problem is what Staff tested. Staff “applied” the *Koda* test to meaningless, hypothetical DFAX values showing the impact of the Applicant’s resources on transmission lines between the MISO/PJM seam (Point B) and Ohio transmission (Point C). How these resources impact power flows within MISO (Point A) remains a mystery and wholly unestablished. PJM *assumed* deliverability from Point A to Point B, and the DFAX values merely show *hypothetical* transmission system impacts based on this assumption.² DFAX values representing hypothetical power flows *after* resources are delivered to Ohio provides no meaningful information about how that resource is “physically deliverable” in the first place.

None of the proponents of certification have addressed PJM’s deliverability disclaimer. Ever. The Applicants initially tried to hide it by excluding the cover letters from its first filing of the spreadsheets.³ When the cover letters were finally disclosed by Staff, CSG called attention to this language,⁴ but everyone else ignored it. None of the proponents of certification addressed this language in their testimony. None of them addressed it at hearing. And none of them addressed it in their brief.

The DFAX values Staff relied on exceed the *Koda* thresholds, but this fact alone does not satisfy the statutory deliverable standard on the record of this case. Ignoring record evidence of what these DFAX values *actually represent* and blindly accepting assertions of deliverability as a substitute for evidence of deliverability would convert *Koda* from a valid deliverability methodology into a superficial, make-work math exercise decoupled from its intended statutory purpose.

¹ *Koda Energy LLC*, Case No. 09-555-EL-REN, March 31, 2011, Finding and Order.

² CSG Br. at 14-15.

³ See Applicants’ Initial Comments, filed Nov. 18, 2021, and attachments thereto.

⁴ See CSG Reply Comments, filed Dec. 8, 2021, at 6-7.

Re-affirming” the Commission’s “time honored precedent” and denying certification for lack of evidence of deliverability are not mutually exclusive. The record here forces the Commission to do both. The Commission is free to use *Koda* or some variation thereof as a “test” to determine deliverability, but it may not fashion or apply such a test in a manner that defeats the very purpose of the statutory deliverability requirement. The “evidence” of deliverability submitted here proves absolutely nothing. The applications must be denied.

CSG will first respond to Staff’s Initial Brief, then the Applicants’ Brief,⁵ and conclude with Blue Delta.⁶

II. REPLY TO STAFF

Staff provides a brief, uncritical summary of the application review process and Staff’s conclusions, but otherwise leaves the heavy lifting to the Applicants and Blue Delta. Staff has not addressed any issue CSG has not already covered in its Initial Brief or will cover below in response to the Applicants and Blue Delta.

The only commentary necessary on Staff’s brief is a statement of what should be obvious: nothing in the Staff Reports, Staff testimony, or Staff’s brief is conclusive, non-rebuttable, and non-reviewable by the Commission. CSG appreciates Staff’s role as technical advisors to the Commission, but Staff is not infallible, and its *recommendations* do not bind the Commission. Where the Commission adopts Staff recommendations that are not supported by the law or evidence, orders adopting such recommendations will be reversed.⁷

The Commission makes the final deliverability determination, not Staff, and the Commission cannot rely on Staff’s conclusions without examining the information Staff relied on to reach them. “Where an opinion and order of the Public Utilities Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the commission’s opinion and order were based, such order fails to comply with the requirements of R.C. 4903.09, and is, therefore, unlawful.”⁸ Staff’s recommendations do not carry the day here.

⁵ 3Degrees Group, Inc. generally supported the Applicants’ Brief without additional argument.

⁶ Northern Indiana Public Service Company (NIPSCO) joined Blue Delta’s brief.

⁷ See, e.g., *In re Ohio Edison Co.*, 2019-Ohio-2401, ¶ 19, 157 Ohio St. 3d 73, 78 (“The PUCO staff’s wishful thinking cannot take the place of real requirements, restrictions, or conditions imposed by the commission for the use of DMR funds.”).

⁸ *Ideal Transp. Co. v. Pub. Utilities Comm’n*, 42 Ohio St. 2d 195, 199 (1975).

III. REPLY TO APPLICANTS

Very little of what the Applicants have written is helpful to the Commission. Section III.A. of their brief presents four “arguments” for deliverability that essentially present one argument—“[e]ach facility satisfies the *Koda* test”—four different ways. The rest of the brief is a hodgepodge of procedural history, uncontested certification requirements, nonsensical “impeachment” of irrelevant points and—because no filing would be complete without it—a stand-alone section devoted to made-up grievances about CSG.⁹

As explained in CSG’s Initial Brief and again below, neither the *Koda* test itself nor its application in this case supports the Applicants’ claim of deliverability.

A. The Applicants have not and cannot explain PJM’s assumptions about deliverability (reply to Section III.A.4.)

According to the cover letters accompanying the DFAX reports the Applicants are relying on, “it was confirmed that there were a number of EHV transmission facilities on which at least 5% of the energy from these wind resources would be expected to flow *if they were to deliver their energy into PJM*.”¹⁰ Regardless of the general suitability of DFAX reports for showing deliverability, the reports in the record here *assume* deliverability into Ohio rather than prove it.

The Applicants dance around PJM’s disclaimer until page 23 of their brief, in a section labelled “CSG failed to demonstrate that the energy from each facility was not deliverable into Ohio.”¹¹ CSG does not have this burden in this case, but even if it did, that burden has been met—by the Applicants’ own evidence. And the Applicants’ attempt to rebut this evidence does not reflect highly on their duty of candor to the Commission. They write:

CSG’s sole witness acknowledged that the DFAX studies do not “assume 100 percent of that generation is deliverable to the end point in Ohio,” and that the DFAX studies model power flow into the State of Ohio, rather than presupposing deliverability.

⁹ See Applicants’ Br., Section III.D. In addition to being utterly irrelevant, everything complained of by Applicants ignores the lack of transparency or production by the Applicants and is easily debunked by the record, which CSG will allow to speak for itself.

¹⁰ CSG Initial Br. at 14-15 (discussing Staff Ex. 2A, Cover Letter p. 1).

¹¹ Applicants’ Br. at 23.

This blatant distortion of the record is remarkable.¹² Contrary to agreeing to these admissions, Mr. Stewart denied them:

Q. Okay. And you would also agree with me that PJM does not assume 100 percent of that generation is deliverable to the end point in Ohio, correct?

*A. That's correct, and that was not my testimony.*¹³

Q. Is it your testimony that the DFAX studies presuppose a certain distribution factor impact on Ohio transmission lines?

*A. No.*¹⁴

And most importantly, the DFAX cover letters directly contradict the Applicants' claim in their brief:

[I]t was confirmed that there were a number of EHV transmission facilities on which at least 5% of the energy from these wind resources would be expected to flow if they were to deliver their energy into PJM.¹⁵

¹² The Applicants have a difficult time even explaining the procedural history accurately. They claim, for example, that “Although Staff recommended approval of the Applications, CSG ignored the record evidence of the cases and opposed approval of the Applications.” (Applicants’ Br. at 9.) This suggests CSG entered the scene at the end of the process rather than the beginning, and this could not be further from the truth. CSG intervened within weeks of the Applicants’ filings and there was no “record evidence” of deliverability because the Applicants didn’t include any with their applications. When the Staff Reports were issued several months later, the reports did not attach the DFAX studies, nor were they filed in the dockets. When comments were filed a few months after that, the Applicants’ inaugural, partial filing of “record evidence” excluded the DFAX cover letters and included the wrong spreadsheets, and this error was repeated up through and including the hearing. For the Applicants to continue to insist that CSG has somehow “ignored the record evidence” is incredible. By all accounts, CSG is the only party who has paid attention to the record evidence.

¹³ Tr. II at 227:14-19.

¹⁴ *Id.* at 228:4-7.

¹⁵ Each Staff Report identifies the same EHV (extra high voltage) transmission line energy from each facility “would be expected to flow if they were to deliver their energy into PJM.” CSG Br. at 15; *see also, e.g.*, Staff Reply Comments, filed Dec. 8, 2021, Attachments at 1.

If the Commission considers the DFAX reports (and it should not, for the reasons explained in Sections III.A.1 and III.B. of CSG’s Initial Brief), it cannot accept the technical information in the spreadsheet portions of these reports and disregard the explanations and qualifications in the cover letters. The Commission would be well within its authority to re-open the record to enable the parties to hear from PJM, but the current record evidence is so lopsidedly against a finding of deliverability that it is difficult to conceive how a contrary finding would withstand appeal.

B. The *Koda* test is not a rule of evidence or procedure (reply to Sections III.A.1 and 3).

Section III.A.1 claims that Staff has “consistently applied the *Koda* test for over a decade” and Section A.3 claims that each facility “satisfies the *Koda* Test.”¹⁶ The Applicants’ focus on the application *process* rather than the *conclusion* reached at the end of this process reflects their view of *Koda* not as a test for deliverability, but a rule of evidence and procedure that creates an irrebuttable, nonreviewable presumption of deliverability based solely on the fact of whether the *Koda* test was “applied,” regardless of whether the DFAX values the test is applied to are valid measures of *all* relevant power flows. *Someone* in this case is urging the Commission to abandon precedent, but it is not CSG.

The application process is governed by Commission rules and “deliverability” is a statutory standard. A consistent theme from the Applicants (and Blue Delta) is that these authorities don’t really matter. According to Applicants, what matters is whether the applications here were processed the same way Staff usually handles applications from facilities in non-contiguous states. Blue Delta’s other clients didn’t submit DFAX studies with their applications, so the Applicants don’t need to either. DFAX studies that look like studies Staff has reviewed previously should be good enough here, too. Staff has always reviewed PJM DFAX studies for MISO facilities, so there should be no problem here. No one intervened in previous proceedings, so CSG’s intervention here is proof of “undue delay.”¹⁷ Blue Delta’s recent track record of obtaining certification for other clients requires certification here as well; to do otherwise would violate “long-standing Commission precedent.” But the Applicants miss the mark by a long shot.

Nothing in *Koda* or any subsequent, uncontested decisions purports to modify the Commission’s rules and the rules cannot be interpreted or applied contrary to statute. Policies and practices adopted in subsequent, uncontested cases

¹⁶ Applicants’ Br. at 21.

¹⁷ Applicants’ Br. at 25.

where the *Koda* test was applied do not somehow relate back to, and become part of, the “time honored precedent” that established the test. *Staff’s* informal, unwritten practices are not *Commission* precedent under any circumstances, let alone in circumstances where the policy or practice contradicts the Commission’s rules and decisions.

The “Koda test” merely describes the threshold to which DFAX values are compared to draw conclusions about deliverability. “[T]he absolute value of the impact on a transmission line in Ohio must be greater than 5 percent (%) and greater than 1 megawatt (MW), as determined by an *adequate* power flow study [.]”¹⁸ Merely “applying the *Koda* test” does not establish deliverability. The power flow study and DFAX values to which the test is applied must be “adequate” for their intended purpose. The DFAX report Staff relied on in *Koda* (obtained directly from the RTO, not an intermediary) was an “adequate” source of data because the values it contained measured power flows in a contiguous area that encompassed both the generating resource and Ohio transmission. The RTO that managed transmission impacted by the facility did not make any assumptions about delivery from a neighboring RTO. None of this is the case here.

Koda is not “longstanding precedent”¹⁹ for using literally any “power flow study” (labelled “DFAX” or otherwise) that comes into Staff’s possession through unknown intermediaries as a reliable or “adequate” source of information about power flows. “Millions of dollars”²⁰ are at stake and the integrity of the process and the Commission itself demand more. Even if such studies may be reliably traced to PJM or MISO, nothing in *Koda* purports to authorize Staff or the Commission to ignore important caveats and limitations included in such studies. The values Staff relied on here do not represent what the values relied on in *Koda* represented, so even though the values come from a DFAX study, the study itself is not “adequate.”

The Commission is free to develop a legal “test” for deliverability, but the test must be “moored in the statutory language”²¹ and *applied to the facts* to ensure

¹⁸ Staff Br. at 4. DFAX reports are one type of “power flow study” but they are not the only type, and neither *Koda* nor any subsequent Commission order limits the values used to calculate the *Koda* thresholds to those derived from DFAX reports.

¹⁹ Applicants’ Br. at 3, 12.

²⁰ *Id.* at 27.

²¹ *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 2020-Ohio-5583, ¶ 2, 163 Ohio St. 3d 208, 208-209 (“[I]n the decision below, the PUCO did not look to the statutory scheme to determine whether the submeterer is a public utility; instead, it applied a jurisdictional test of its own devising. This was improper. The General Assembly writes the laws determining the PUCO’s jurisdiction, not the PUCO.”).

consistency with statutory objectives.²² The statutory deliverability requirement demands more than a simplistic, rote exercise of looking for highlighted values and comparing them to the *Koda* thresholds. In *Koda*, these values meant something. Here, they are meaningless.

The mere application of a legal test does not prove the validity of conclusions reached.²³ Staff’s deliverability conclusions are invalid, and the record evidence on this point is clear.

C. The Applicants lose because of *Koda*, not in spite of it (reply to Section III.A.2).

This section of the Applicants’ brief “rebutts” arguments CSG hasn’t made; namely, that “the Commission’s application of the *Koda* Test is improper” and that “the Commission should modify its longstanding precedent.”²⁴ When properly applied to proper data, the *Koda* test *is* a proper measurement of deliverability. The Applicants facilities do not measure up to this test, so it is they who want the Commission to “alter its longstanding precedent,” not CSG.

The issue here is not whether the *Koda* test is a proper measurement tool; the issue is what was measured. *Koda* was developed and applied in a case where the values representing transmission line impacts meant something; here, it has been applied to values that represent hypothetical power flows *if* the resources were delivered into PJM. The test has been applied to faulty data, and that is why the results of the test do not demonstrate “deliverability into this state.” The “test” is not necessarily the problem, and no modification of *Koda* is necessary to see this.

The Applicants want the Commission to ignore what Staff tested—DFAX values based on an assumption of deliverability into PJM—and focus only on the test itself. This would render the test meaningless for the purpose it was developed. The test was developed to determine whether a resource *is* deliverable based on power flow impacts to transmission lines. It was not developed to determine what transmission line impacts would be *if* power flows migrated from MISO to PJM to Ohio. Stated differently, the DFAX values submitted by the Applicants do not represent the impact to Ohio transmission facilities when their facilities produce electricity delivered to the MISO system in Minnesota, South Dakota, and Iowa.

²² See *Application of Suburban Nat. Gas Co.*, 2021-Ohio-3224, 166 Ohio St. 3d 176, 184 (“Because the PUCO failed to properly apply the used-and-useful standard, we remand this case for it to do so.”).

²³ See *Wingo*, 2020-Ohio-5583, ¶ 23, 163 Ohio St. 3d at 215 (“Thus, we remand this case for the PUCO to determine whether it has jurisdiction based upon the jurisdictional statute, not the modified *Shroyer* test.”).

²⁴ Applicants’ Br. at 15.

The DFAX studies arbitrarily assume the Applicant’s facilities deliver electricity – unimpeded – to the PJM border and then assess how those electricity injections into PJM impact Ohio transmission.

Koda is based on a sensible premise—deliverability must be inferred because it cannot be measured directly. Whether the 5%/1 MW thresholds should equate to a “significant impact,” thus triggering a deliverability finding, is debatable. Staff has calculated an impact of around 16% for each facility, but certification would enable the facilities to sell 100% of their RECs to Ohio utilities and suppliers. The Commission would be well within its authority to raise or otherwise modify the *Koda* thresholds, but that is probably best left for a case where there is evidence of *any* impact, and this is not that case.

As CSG explained in its Initial Brief, the Commission may rely on the *Koda* test but is not required to do so. “[T]he PUCO may change or modify earlier orders as long as it justifies any changes.”²⁵ The Applicants offer no compelling reason for the Commission to constrain itself to this test, and CSG’s Mr. Stewart provided numerous additional data points the Commission could consider.²⁶ If the Commission “re-affirms” the *Koda* test, it should acknowledge how the world has since changed.²⁷ MISO no longer manages transmission in Ohio, so whatever power flow studies MISO used to be able to provide can now only be provided by PJM. PJM is the only transmission RTO in Ohio, and there is no evidence PJM is capable of modelling power flows within MISO or other RTOs—hence the reason for its caveat in the DFAX reports supplied to the Applicants. PJM’s ability to confirm that a resource exists in MISO is a far cry from establishing that PJM is capable of modelling power flows created by the facility *in MISO*.

IV. REPLY TO BLUE DELTA

Blue Delta’s brief reads much like the Applicants’ Brief. Procedural history, uncontested certification requirements, and the “rebuttal” of nonexistent arguments receive much more attention than any real arguments or evidence.²⁸ Like the Applicants, Blue Delta’s “arguments” for deliverability never go any further than quoting the Staff Reports. Everything said about the Applicants’ tortured interpretation of *Koda* also applies to Blue Delta.

²⁵ *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 2006-Ohio-4706, ¶ 25, 110 Ohio St. 3d 394, 399.

²⁶ See e.g., Dir. Testimony of T. Stewart, CSG Ex. 1.0 at 2:58-9:210; 10:231-11:244; Tr. II at 195:12-196:10; 198:4-8; 200:5-202:20; 220:1-4; 228:19-229:12; 231:25-234:22;

²⁷ See, e.g., *MISO Transmission Owners v. Midcontinent Independent System Operator*, 860 F.3d 837 (6th Cir. 2017) (explaining ATXI and Duke withdrawal from MISO during 2009-2011).

²⁸ Blue Delta Br. at 19.

Unlike the Applicants, however, Blue Delta stops short of outright misrepresenting PJM’s deliverability disclaimer, but its attempt to deflect the issue leads to the same result—the failure to explain or rebut this dispositive evidence. The best Blue Delta can come up with is that their DFAX study modelled over 3,000 facilities and the *Koda* study only modelled 77.²⁹ This proves nothing—except that *Koda* looked at a very different study. PJM could have modelled 3 million transmission lines but based on its cover letter, this would have only shown a greater number of hypothetical transmission line impacts if the resources were delivered into PJM. And unlike in *Koda*, Blue Delta failed to submit a DFAX study from MISO to demonstrate how electricity produced by their clients’ facilities impacts the MISO transmission system along the MISO/PJM seam.

Blue Delta takes great pains to assure the Commission that DFAX studies measure power flows and power flows are good measurements of deliverability, but these general principles are not disputed.³⁰ “Expert” testimony to the effect of, “DFAX reports are good and everybody uses them” does not establish the reliability or validity of the reports submitted here. The specific DFAX reports Blue Delta secured for its clients expressly assume deliverability into PJM and the consequence of this assumption cannot be explained away by technical jargon. If anything, the Applicants’ and Blue Delta’s joint expert has established that a power flow study is necessary to understand how the Applicants’ facilities impact transmission within MISO, and no such studies have been identified or produced here. Given that deliverability must be inferred through power flow studies, the absence of a power flow study encompassing *the very RTO regions in which these facilities are located* confirms that there is no evidence of deliverability.

Blue Delta’s arguments do nothing more than Applicants’ flawed arguments to establish the necessary elements for approval.

V. CONCLUSION

As CSG explained in its Initial Brief, the DFAX values Staff relied on here measure the hypothetical impact of the Applicants’ resources *if* they are delivered from MISO into PJM. There is no evidence the resources *are* deliverable into PJM, so to rely on these DFAX values as proof of deliverability into Ohio assumes the very issue in dispute. Staff did not have to make any such assumptions in *Koda* and pointing out this critical distinction does not represent a challenge to “time-honored precedent.” It represents the path to the right result. The applications must

²⁹ Blue Delta Br. at 15-16; 18-19.

³⁰ *Id.* at 16-17.

be denied for failure to demonstrate the resources at issue are “physically deliverable” to PJM and “deliverable into this state.”

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Respectfully submitted,

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Summary: Reply Reply Brief electronically filed by Ms. Valerie A. Cahill on behalf of
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