

**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. 21-516-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
)	

**MEMORANDUM CONTRA CARBON SOLUTIONS GROUP, LLC'S
APPLICATION FOR REHEARING
BY
BLUE DELTA ENERGY, LLC
AND
NORTHERN INDIANA PUBLIC SERVICE COMPANY LLC**

Respectfully Submitted,

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October 30, 2023

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**MEMORANDUM CONTRA CARBON SOLUTIONS GROUP, LLC'S
APPLICATION FOR REHEARING**

In accordance with Ohio Adm.Code 4901-1-35(B), Blue Delta Energy, LLC (Blue Delta) and Northern Indiana Public Service Company LLC (NIPSCO) jointly file this Memorandum Contra Carbon Solutions Group, LLC's (CSG) Application for Rehearing of the September 20,

2023 Opinion and Order (Order) of the Public Utilities Commission of Ohio (PUCO) and urge the PUCO to reject CSG’s rehearing efforts.

I. INTRODUCTION

In the Order, the PUCO correctly found that the Applicants¹ met their burden of proof and satisfied the three statutory criteria for REN certification in this proceeding. In so ruling, the PUCO affirmed its 2011 precedent for determining deliverability for out-of-state resources under Ohio Adm.Code 4901:1-40-01(F) via the *Koda* Test,² and approved the applications. Thus, the PUCO’s Order is just and reasonable, based upon well-established legal principles, and supported by the overwhelming record evidence.

Unable to overcome the foregoing, CSG nonetheless sought rehearing of the PUCO’s Order.³ CSG ignores PUCO precedent, misstates Ohio law, and misrepresents the factual record in this proceeding. What is missing from CSG’s rehearing application is telling – CSG offers no new arguments and fails to identify specific grounds that make the Order unreasonable or unlawful. Instead, CSG simply reprises old arguments previously rejected by the PUCO in the blind hope for a different outcome.

First, CSG claims that the PUCO’s finding on “deliverability” into this state is against the manifest weight of the evidence.⁴ Second, CSG also claims that it is entitled to rehearing because

¹ Applicants refers to Applicant Avangrid Renewables, LLC (Avangrid Renewables), and its wholly-owned subsidiaries, Applicants Moraine Wind LLC, Rugby Wind LLC, Elm Creek II Wind LLC, Barton Windpower 1, and Buffalo Ridge II Wind LLC in these consolidated proceedings.

² See *In the Matter of the Application of Koda Energy LLC for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-0555-EL-REN (*Koda*), Finding and Order (Mar. 23, 2011); see also Blue Delta Ex. 9, *Koda* Staff Report.

³ See Application for Rehearing and Memorandum in Support of Carbon Solution Group LLC (October 20, 2023) (hereinafter, CSG Rehearing).

⁴ See CSG Rehearing at 1.

it was unduly prejudiced by certain discovery and evidentiary rulings of the Attorney Examiners.⁵

CSG is wrong on both fronts, and its rehearing should be denied accordingly. The PUCO correctly concluded that:

- “Ultimately, the burden lies on the applicant to demonstrate satisfaction of the statutory criteria, including deliverability, and in these proceedings, Applicants produced the information necessary for Staff to determine deliverability. We decline to abandon a sound and long-standing rationale for determining deliverability simply because the Commission has seen an influx of these types of applications, as alleged by Carbon Solutions . . .”⁶; and
- “Carbon Solutions complains about due process, however, Carbon Solutions was granted intervention and provided ample due process to raise its objections to the applications, engage in discovery within the parameters of the Commission’s rules, and present testimony and evidence to demonstrate why it believed the Applicants failed to demonstrate satisfaction of the statutory criteria. With respect to the administrative error associated with Applicants’ failure to initially include the correct versions of the DFAX studies with its comments submitted in these cases, we note that the correct versions were produced and admitted into the record at the hearing, and Carbon Solutions had the ability to reference these studies during the briefing period as well during questioning of Staff witness Cross. Notably, this minor error did not impact the arguments made by Carbon Solutions during the hearing or in its briefs. Most importantly, Staff had access to the correct studies in its review of the applications.”⁷

In sum, at no point during this proceeding—in motions, during the hearing, or in brief—has CSG articulated any legitimate reason why the Applications should not be approved and the facilities not certified. The PUCO reasonably and lawfully rejected CSG’s arguments, as detailed more fully in its Order, after careful consideration of the actual facts and evidence presented in these cases.⁸ CSG does not even attempt to offer new reasons for why the Applicants’ certifications should be denied and instead repeats the same arguments that it has been making for

⁵ *Id.*

⁶ Opinion and Order at ¶ 48 (September 20, 2023) (Order).

⁷ *Id.* at ¶ 56.

⁸ Order at ¶ 52.

over two years now. Accordingly, Blue Delta and NIPSCO jointly oppose CSG's Application for Rehearing and urge the PUCO to re-affirm its approval of the Applicants' certifications.

II. ARGUMENT

An application for rehearing must set forth the ground(s) upon which the applicant considers the PUCO order to be "unreasonable or unlawful."⁹ Yet nothing in CSG's Application for Rehearing establishes that the PUCO's Order was unreasonable or unlawful. To the contrary, the PUCO's Order was reasonable and lawful, overwhelmingly supported by the record evidence, and the statutes applicable to this proceeding were properly followed.

A. CSG failed to establish that the PUCO finding that energy from the Applicants' facilities is "deliverable into this state" was unreasonable and unlawful or contrary to the record evidence.

The PUCO correctly determined that energy from the Applicants' facilities is "deliverable into the state" within the meaning of R.C. 4928.64(B)(3). To obtain REN certification in Ohio, a facility must meet three statutory criteria: (1) the energy from the facility must be deliverable to the state of Ohio, (2) the facility must use a renewable resource/technology, and (3) the facility must have been placed in service after a certain date.¹⁰ There are no other criteria for REN certification in Ohio,¹¹ and the record evidence demonstrates that all six of the Applicants' renewable wind facilities satisfy the three statutory criteria. Additionally, record evidence demonstrates that all six of the Applicants' renewable wind facilities satisfy the applicable PUCO

⁹ Ohio Adm.Code 4901-1-35; R.C. 4903.10.

¹⁰ R.C. 4928.01(A)(37); R.C. 4928.64(A)(1); R.C. 4928.64(B)(3); *see also* Staff Ex. 2, Prefiled Testimony of Kristin Clingan at 2–3 (August 26, 2022) (Clingan Testimony); Applicants Ex. 7, Direct Testimony of Pete Landoni at 5–6 (August 12, 2022) (Landoni Testimony); Joint Ex. 1, Testimony of John Chiles at 7 (August 12, 2022) (Chiles Testimony); Blue Delta Ex. 1, Testimony of Ken Nelson at 4–5 (August 12, 2022) (Nelson Testimony); Tr. Vol. II at 190–91 (Stewart Cross).

¹¹ *See* Staff Ex. 2, Clingan Testimony at 2–3; Applicants Ex. 7, Landoni Testimony at 5–6; Joint Ex. 1, Chiles Testimony at 7; Blue Delta Ex. 1, Nelson Testimony at 4–5; Tr. Vol. II at 190–91 (Stewart Cross).

regulations and long-standing precedent of the PUCO, including the deliverability test (i.e., the *Koda* Test).

CSG concedes that its opposition to the Applicants' certification is based solely on the deliverability requirement.¹² The PUCO acknowledged CSG's concession in its Order.¹³ As such, CSG renews its position that the DFAX studies presented in this case fail to satisfy the deliverability standard explained in *Koda* because the reports allegedly "assume deliverability into PJM."¹⁴ The only "evidence" that CSG offers to support its argument is its flawed interpretation of the language used in the cover letter of PJM's DFAX study, which CSG insists means that "PJM did *not* attempt to analyze whether the Applicants' facilities generate power flows that impact transmission in PJM."¹⁵ Using this flawed interpretation, CSG also attempts to argue that the PUCO incorrectly applied the *Koda* Test.¹⁶

These argument have been addressed by the Applicants,¹⁷ Staff,¹⁸ and Blue Delta/NIPSCO¹⁹ in their briefs and reply briefs, and the PUCO itself rejected these arguments in its Order.²⁰ Indeed,

¹² CSG Rehearing at 1 (stating that "[t]he issue in these cases is whether energy from the Applicants' six renewable energy facilities . . . are 'deliverable into this state' within the meaning of R.C. 4928.64(B)(3)").

¹³ Order at ¶ 42 (stating that "the only issue that remains is whether the facilities, which are in states non-contiguous to Ohio, can be shown to be deliverable into this state, pursuant to R.C. 4928.64(B)(3)").

¹⁴ *Id.* at 4; *see also* Initial Post-Hearing Brief of Carbon Solutions Group, LLC at 9, 14 (January 17, 2023) (CSG Brief).

¹⁵ CSG Rehearing at 4; *see also* CSG Brief at 2.

¹⁶ CSG Rehearing at 6–7.

¹⁷ Reply Brief By Applicants Moraine Wind LLC, Rugby Wind LLC, Elm Creek Wind II LLC, Buffalo Ridge II LLC, Barton Windpower 1, Barton Windpower, LLC, and Avangrid Renewables, LLC electronically filed by Mrs. Angela Whitfield on behalf of Moraine Wind LLC and Rugby Wind LLC and Elm Creek Wind II LLC and Buffalo Ridge II LLC and Barton Windpower 1 and Barton Windpower, LLC and Avangrid Renewables, LLC at 11 (February 7, 2023) (Applicants Reply Brief).

¹⁸ *See* Staff Reply Brief at 6 (February 7, 2023).

¹⁹ Post-Hearing Reply Brief By Blue Delta Energy, LLC And Northern Indiana Public Service Company LLC at 9–10 (February 7, 2023) (Blue Delta/NIPSC Reply Brief).

²⁰ Order at ¶ 21.

CSG's own witness acknowledged that CSG's assertion about the DFAX studies is false.²¹ As it did during the hearing and in its briefs, CSG intentionally misrepresents the facts when it claims that the DFAX studies used in this case assumed deliverability into the PJM region from the generation facilities.²² By the admission of CSG's own witness, the DFAX studies do not "assume 100 percent of that generation is deliverable to the end point in Ohio," and the DFAX studies model power flow into the State of Ohio, rather than presupposing deliverability.²³ Applicants have shown that the facilities passed the *Koda* Test and that energy from the facilities is deliverable in Ohio.

CSG has offered no new evidence to demonstrate that the DFAX studies used in this case were insufficient. The results of the DFAX studies for each of the Applicants' facilities plainly demonstrated that each facility satisfies the *Koda* Test, and that energy from each facility is deliverable into Ohio. CSG states that the validity of the *Koda* Test "depends entirely on the integrity of the DFAX values,"²⁴ and as has been explained repeatedly, the DFAX studies presented in this case provided "the information necessary for Staff to determine deliverability."²⁵

The Applicants' Applications in these cases were standard and compliant with applicable Ohio laws, PUCO regulations, and PUCO precedent. As demonstrated by the record evidence, and as determined by the PUCO in its Order, the Applicants' Applications met the statutory and regulatory requirements for REN certification. As such, the PUCO correctly determined that

²¹ Blue Delta/NIPSC Reply Brief at 10; see also Tr. Vol. II at 227–28 (During the hearing, when asked if "the DFAX studies presuppose a certain distribution factor impact on Ohio transmission lines," CSG Witness Stewart simply replied "No.").

²² CSG Rehearing at 4–6. *See also* Applicants Reply Brief at 22; Tr. Vol. II at 298 (Stewart Cross).

²³ Tr. Vol. II at 227–28 (Stewart).

²⁴ CSG Rehearing at 7.

²⁵ Order at ¶ 48.

“Applicants produced the information necessary for Staff to determine deliverability” and accordingly approved the certification applications.²⁶ There is no reason to have rehearing on this issue, and CSG’s rehearing request should therefore be denied.

B. CSG failed to establish that the PUCO finding that there was no undue prejudice to CSG was unreasonable and unlawful or contrary to the record evidence.

CSG claims that as an intervening party, it had the right to fully participate in these proceedings, including conducting discovery.²⁷ Yet, what CSG fails to mention in its rehearing request is that it did fully participate in these proceedings, it conducted discovery and did everything it could to delay and stall these proceedings for more than two years. The claim of undue prejudice and failure to follow the statutes and rules governing the proceedings are unfounded and should be rejected again by the PUCO.

As an initial matter, CSG’s complaints about the PUCO’s denial of CSG’s request for a subpoena is procedurally improper. Ohio Adm.Code 4901-1-27(D) states that to object to a ruling made at a hearing, “at the time the ruling or order is made,” the party must make “known the action which he or she desires the presiding hearing officer to take, or his or her objection to action which has been taken and the basis for that objection.” CSG neither objected at the time the PUCO rejected the requested subpoena and the Attorney Examiners issued their ruling on the record, nor preserved its rights on the record to challenge the ruling.²⁸ In any event, the PUCO’s denial of the subpoena was proper. As the Applicants and Blue Delta explained in their Joint Motion to Quash,²⁹ CSG did not provide a memorandum in support, or any other explanation demonstrating why a

²⁶ *Id.*

²⁷ *See* CSG Rehearing at 7-8.

²⁸ *See* Tr. Vol. I at 12.

²⁹ Joint Motion to Quash, Joint Memorandum Contra Motion to Permit Remote Testimony, and Request for Expedited Treatment and Memorandum in Support (Dec. 2, 2022).

subpoena of a non-party PJM representative is necessary or warranted, or why expedited treatment was necessary, in violation of Ohio Adm.Code 4901-1-12(A) and (C). Nor is there any indication that the PUCO has the authority to issue subpoenas for an out of state witness over which it does not have jurisdiction. And, “there is no indication” that the individual “has had any involvement in or knowledge of the” applications at issue in this proceeding, or that he “could contribute any input of value by his appearance.”³⁰ As such, the PUCO found that “no real demonstration made as to why this nonparty witness is necessary or warranted.”³¹ Moreover, despite the fact that the Applicants’ certification proceedings had been pending for almost two years,³² and that the hearing had been rescheduled, CSG requested to introduce an additional witness on the eve of hearing. The PUCO noted since “these cases have been pending for nearly two years, [it is] somewhat prejudicial...to have a witness that would come in here to testify having never been deposed, having never been noticed for a deposition to testify, and have no one else prepared as to any sort of testimony.”³³ CSG raises no new arguments as to how or why the PUCO’s findings are unjust or unreasonable or prejudicial. Thus, the PUCO’s decision finding no undue prejudice is just and reasonable and supported by the manifest weight of the evidence.³⁴

Similarly, CSG’s claims of “undue prejudice,” asserting that the statutes and rules governing this proceeding were not followed, should be rejected.³⁵ While an administrative error

³⁰ See *In the Matter of the Complaint of Brenda Fitzgerald and Gerard Fitzgerald*, Case No. 10-791-EL-CSS, Entry at ¶ 7 (Apr. 25, 2011).

³¹ Tr. Vol. I at 11.

³² See *In the Matter of the Complaint of the Ohio Consumers' Counsel, Stand Energy Corporation, Incorporated, Northeast Ohio Public Energy Council, and Ohio Farm Bureau Federation*, Case No. 10-2395-GA-CSS, Entry at ¶ 9 (Nov. 2, 2011).

³³ Tr. Vol. I at 11.

³⁴ See Order at ¶ 58 (“with Staff housing a specialized knowledge of these routine analyses, we find that Carbon Solutions was not prejudiced by the denial of its November 21, 2022 motion for subpoena for a representative of PJM.”).

³⁵ See CSG Rehearing at 7.

occurred with respect to the copies of the DFAX studies attached to Applicants' comments in these cases, when the error was discovered, the correct versions of the DFAX studies were provided to CSG's counsel and a recess of the hearing was provided to allow CSG time to review those documents.³⁶ CSG was then allowed to conduct additional cross examination of the witnesses.³⁷ The minor administrative error did not impact the arguments made by CSG during the hearing or in its briefs.³⁸ CSG's arguments have already been addressed by the PUCO and should be rejected.

III. CONCLUSION

The record evidence clearly demonstrates that each of the Applicants' facilities at issue satisfies the requirements for REN certification in Ohio, and the PUCO properly determined as much in its Order. The PUCO's analysis and application of applicable statutes, regulations, and PUCO precedent were reasonable and lawful, and CSG's arguments to the contrary should be rejected. Similarly, CSG's claim of undue prejudice resulting from an administrative error is without merit and should be rejected. Accordingly, the PUCO should deny CSG's Application for Rehearing in its entirety.

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³⁶ See Tr. Vol. II at 331.

³⁷ See Tr. Vol. III at 437 (Re-called Witness Chiles Cross), at 452 (Re-called Witness Nelson Cross), and at 476 (Re-called Witness Landoni Cross); see also Order at ¶ 56.

³⁸ *Id.*

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CERTIFICATE OF SERVICE

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Summary: Memorandum Blue Delta-NIPSC Memo Contra CSG AFR electronically
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and Blue Delta Energy, LLC.