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
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

Respectfully Submitted,

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0069402)
CARPENTER LIPPS LLP
280 Plaza, Suite 1300
280 North High St.
Columbus, Ohio 43215
Telephone: (614) 365-4112
paul@carpenterlipps.com
(willing to accept service by email)

Counsel for Applicants Moraine Wind LLC, Rugby Wind LLC, Elm Creek Wind II LLC, Buffalo Ridge II LLC, Barton Windpower 1, Avangrid Renewables, LLC, and Barton Windpower LLC

October 30, 2023

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

Pursuant to Ohio Adm.Code 4901-1-35(B), 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 (collectively, the Applicants), hereby file this Memorandum Contra Carbon Solutions Group,

LLC's (CSG) Application for Rehearing of the Public Utilities Commission of Ohio's (Commission) September 20, 2023 Opinion and Order (Order).

I. INTRODUCTION

On October 20, 2023, CSG filed an Application for Rehearing in which it continued its persistent practice of ignoring basic, well established legal principles and misrepresenting key indisputable facts.[1] Significantly, CSG's rehearing request fails to raise any specific grounds upon which it considers the Commission's well-reasoned, thoughtful, and clear Order to be unreasonable or unlawful. Because it cannot. The Order is just and reasonable and consistent with Commission precedent and Ohio law. Nonetheless, CSG attacks the Commission's analysis and findings, and reprises arguments previously rejected by the Commission in the hope that continued repetition will somehow end in a different result this time that it is stated. It should not.

Specifically, CSG attempts to argue that rehearing is appropriate because the Commission's finding that energy from the Applicants' facilities is "deliverable into this state" is against the manifest weight of the evidence.[2] CSG further asserts that rehearing is warranted because it was unduly prejudiced and the Commission wrongly concluded that CSG was "provided ample due process."[3] However, neither of these reasons is sufficient to grant rehearing, and the rehearing should be denied accordingly.

First, the Commission's Order approving the Applicants' applications for certification as renewable energy (REN) resource generating facilities was reasonable and lawful because the record evidence clearly demonstrates that Applicants satisfy Ohio law, the Commission's rules

[1] *See* Application for Rehearing and Memorandum in Support of Carbon Solution Group LLC (October 20, 2023) (hereinafter, AFR).

[2] *See* AFR at 1.

[3] *Id.*

regarding REN certification, and the Commission's *Koda* Test. At no point during these proceedings – 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. CSG did not produce any evidence during the hearing to suggest that the Applicants' facilities were not renewable energy resources, or did not satisfy the applicable placed-in-service date requirement.[4] In fact, CSG's sole witness offered at the hearing did not challenge or offer testimony about what type of renewable resources the Applicants' facilities are, or when they were placed into service.[5] Nor did this witness object to the actual results of the DFAX studies themselves.[6] CSG only offered testimony that challenged the Commission's precedent as it is currently applied, rather than the actual facts supporting the Applications.

Second, on rehearing, CSG renews its claims of "undue prejudice," asserting that the statutes and rules governing this proceeding were not followed.[7] These arguments are nothing more than a red herring. Specifically, while CSG renews its complaint that its request for a subpoena was denied, CSG does not dispute – and thus, concedes – that its complaint is procedurally improper pursuant to Ohio Adm.Code 4901-1-27(D). Likewise, while a minor clerical error occurred with respect to the copies of the DFAX studies attached to Applicants' comments in these cases, CSG does not, and cannot, dispute that when the error was discovered, the correct versions of the DFAX studies were provided to CSG's counsel and a recess of the hearing for more than a day, from Tuesday, December 6, 2022 at 5:00 p.m. until Thursday,

[4] Tr. Vol. II at 303 (Stewart Cross).

[5] *See* Tr. Vol. II (Stewart Cross).

[6] *Id.*

[7] *See* AFR at 7.

December 8, 2022 at 10:00 a.m., was provided to allow CSG time to review those documents.[8] CSG was then afforded the opportunity to re-examine witnesses[9] and refer to those corrected copies in questioning of witnesses and in briefing.[10] As the Commission stated, "[n]otably, 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."[11] In short, CSG's renewed arguments in this regard have already been addressed by the Commission and fall woefully short of satisfying the standard for a rehearing request.

The Commission 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.[12] In fact, the Commission even stated that "any arguments not specifically addressed in this Order have been thoroughly considered by the Commission and are, hereby, rejected."[13] CSG does not even attempt to offer novel reasons for why the Applicants' certifications should be denied and instead repeats the same arguments that it has been making for over two years now.

Accordingly, CSG's continued, baseless opposition to the Applicants' certifications ignores the overwhelming record evidence and attempts to cause additional delay.[14] The Commission should not allow CSG to further drag out these cases that have been reasonably and lawfully decided. CSG's latest attempt to overturn Commission precedent and established

[8] *See* Tr. Vol. II at 331.

[9] *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).

[10] *See* Opinion and Order at ¶ 56 (September 20, 2023) (Order).

[11] *Id.*

[12] Order at ¶ 52.

[13] *Id.*

[14] *See* Carbon Solution's Motion to Intervene filed over two years and five months ago on May 7, 2021.

regulations governing REN certification should be rejected, and its Application for Rehearing denied.

II. LAW AND ARGUMENT

A party or affected corporation may file an application for rehearing within thirty days after issuance of a Commission order.[15] The application must set forth the ground(s) upon which the applicant considers the Commission order to be "unreasonable or unlawful."[16] However, nothing in CSG's Application for Rehearing establishes that the Commission's Order was unreasonable or unlawful. To the contrary, the Commission's Order was reasonable and lawful, overwhelmingly supported by the record evidence, and the statutes applicable to this proceeding were properly followed.

A. The Commission's conclusion that energy from the Applicants' facilities is "deliverable into this state" was reasonable and lawful and is supported by the manifest weight of the evidence and overwhelmingly supported by the record.

The Commission 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.[17] There are no other criteria for REN certification in Ohio,[18] and the record evidence demonstrates that all six of the Applicants'

[15] Ohio Adm.Code 4901-1-35; R.C. 4903.10.

[16] *Id.*

[17] 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).

[18] *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).

renewable wind facilities satisfy the three statutory criteria. Additionally, record evidence demonstrates that all six of the Applicants' renewable wind facilities satisfy the applicable Commission regulations and long-standing precedent of the Commission, including the deliverability test (aka the *Koda* Test).

As noted by the Commission,[19] and as admitted by CSG in its rehearing request,[20] CSG's opposition to the Applicants' certification is based solely on the deliverability requirement. Once again, CSG raises the argument that the DFAX studies presented in this case fail to satisfy the deliverability standard explained in *Koda* because the reports supposedly "assume deliverability into PJM."[21] 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 somehow means that "PJM did *not* attempt to analyze whether the Applicants' facilities generate power flows that impact transmission in PJM."[22] Using this flawed supposition, CSG also attempts to argue that the Commission incorrectly applied the *Koda* Test.[23]

[19] 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)").

[20] AFR at 1 (stating that "[t]he issue is 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)").

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

[22] AFR at 4; *see also* CSG Brief at 2.

[23] AFR at 6–7.

These argument have been addressed by the Applicants,[24] Staff,[25] and other intervenors[26] in their briefs and reply briefs, and the Commission itself rejected these arguments in its Opinion and Order.[27] "Neither of these arguments is supported by the record evidence,"[28] and CSG's own witness acknowledged that CSG's assertion about the DFAX studies is false.[29] 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."[30]

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.[31] 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.[32] CSG could not overcome the fact that the Applicants *did* prove that the facilities passed the *Koda* Test and that energy from the facilities is deliverable in Ohio during the hearing, and it cannot overcome that fact now.

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[24] 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).

[25] *See* Staff Reply Brief at 6 (February 7, 2023).

[26] 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).

[27] Order at ¶ 21.

[28] Applicants Reply Brief at 11.

[29] Blue Delta/NIPSC Reply Brief at 10.

[30] Tr. Vol. II at 227–28.

[31] AFR at 4–6. *See also* Applicants Reply Brief at 22; Tr. Vol. II at 298 (Stewart Cross).

[32] Tr. Vol. II at 227–28 (Stewart Cross).

CSG has offered no new evidence to demonstrate that the DFAX studies used in this case were insufficient because they were not. 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,"[33] and as has been explained ad nauseam, the DFAX studies presented in this case provided "the information necessary for Staff to determine deliverability."[34]

Additionally, as CSG itself notes, this was "the first contested proceeding to address the proper interpretation and application of the statutory deliverability standard."[35] CSG's attempt to transform these routine REN certification cases was itself grossly improper. As the Commission noted in the most recent rulemaking proceeding, the Commission has already addressed challenges to the *Koda* Test for determining deliverability in multiple prior proceedings and decided to retain its test and uphold its interpretation of Ohio law. If CSG disapproves of how the Commission interprets and applies the statutory deliverability standard, then it should raise these challenges the next time the Commission reviews its rules, or CSG should request that a Commission Ordered Investigation be opened to address the issue if it does not wish to wait for the next rulemaking proceeding. CSG should not be permitted to continue to challenge the *Koda* Test in these routine REN certification cases.

The Applicants' Applications in these cases were standard and compliant with applicable Ohio laws, Commission regulations, and Commission precedent. CSG's attempts to argue otherwise have cost the Applicants millions of dollars in lost income and frivolous and unnecessary

[33] AFR at 7.

[34] Order at ¶ 48.

[35] AFR at 11.

litigation expenses. As demonstrated by the record evidence, and as determined by the Commission in its Order, the Applicants' Applications met the statutory and regulatory requirements for REN certification. The Commission correctly determined that "Applicants produced the information necessary for Staff to determine deliverability" and accordingly approved the certification applications.[36] There is no reason to have rehearing on this issue, and CSG's rehearing request should therefore be denied. To do otherwise would "abandon a sound and long-standing rationale for determining deliverability," which the Commission has already refused to do in its Order.[37]

B. The Commission's conclusion that CSG was not unduly prejudiced during the proceedings was reasonable and lawful and is supported by the manifest weight of the evidence and overwhelmingly supported by the record.

Once again, CSG fails to demonstrate how it was prejudiced during these proceedings. CSG claims that as an intervening party, it had the right to fully participate in these proceedings, including conducting discovery.[38] 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 complaint of undue prejudice and failure to follow the statutes and rules governing the proceedings are simply without basis and should be rejected out of hand by the Commission.

For example, CSG's attempt in its rehearing request to appeal the Commission'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

[36] *Id.*

[37] *Id.*

[38] *See* AFR at 7–8.

objection to action which has been taken and the basis for that objection." CSG neither objected at the time the Commission 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.[39] Moreover, the Commission's denial of the subpoena was proper. As the Applicants and Blue Delta explained in their Joint Motion to Quash,[40] CSG did not provide a memorandum in support, or any other explanation demonstrating why a 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).[41] However, "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."[42] As such, the Commission found that "no real demonstration made as to why this nonparty witness is necessary or warranted outside of a—and I will quote, 'believed to be knowledgeable about certain studies.'"[43] Moreover, despite the fact that the Applicants' certification proceedings had been pending for almost two years,[44] and that the hearing had been rescheduled, CSG requested to introduce an additional witness on the eve of hearing. The Commission 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,

[39] *See* Tr. Vol. I at 12.

[40] Joint Motion to Quash, Joint Memorandum Contra Motion to Permit Remote Testimony, and Request for Expedited Treatment and Memorandum in Support (December 2, 2022).

[41] On this basis alone, CSG's reliance upon the decision in *Kappan v. Dep't of Job & Fam. Servs*., 2013-Ohio-4964, ¶ 21, 4 N.E.3d 1082 is misplaced. Therein, the appellant had, "[p]rior to the hearing, . . . properly subpoenaed the information." For the reasons set forth above, CSG did not "properly" subpoena the witness.

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

[43] Tr. Vol. I at 11.

[44] *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 (November 2, 2011).

having never been noticed for a deposition to testify, and have no one else prepared as to any sort of testimony."[45] CSG raises no new arguments as to how or why the Commission's findings are unjust or unreasonable or prejudicial. Thus, the Commission's decision finding that no undue prejudice occurred is just and reasonable and supported by the manifest weight of the evidence.[46]

Similarly, as discussed above, while incorrect versions of certain DFAX spreadsheets were inadvertently filed on the docket, the Applicants' and Blue Delta's witnesses reviewed the correct spreadsheets, and their conclusions remained unchanged when the corrected attachments were submitted during the hearing and entered into the record at hearing.[47] The Applicants, Blue Delta, and Staff all relied on the correct spreadsheets, rather than the ones filed on the docket, when conducing their analyses and drafting their testimony. The incorrect spreadsheets were not sent to Staff, and were therefore not part of Staff's analyses and recommendations, concluding that each of the six facilities should be approved for REN certification.[48]

In its rehearing request, like in its post-hearing briefs, CSG simply ignores the fact that the Applicants moved to enter the corrected attachments into the record as soon as they recognized the error, which they brought to the Commission's attention.[49] The corrected DFAX studies were

[45] Tr. Vol. I at 11.

[46] *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").

[47] Tr. Vol. III at 465 (Landoni Cross); Tr. Vol. III at 434 (Chiles Cross); Tr. Vol. III at 451 (Nelson Cross).

[48] Tr. Vol. III at 354 (Clingan Cross); Tr. Vol. III at 420–21 (Cross Cross); Staff Ex. 2A, Emails and DFAX Reports for Moraine, Rugby, Buffalo Ridge II, and Elm Creek; Staff Ex. 2B, Emails and DFAX Reports for Barton 1; Staff Ex. 2C, Emails and DFAX Reports for Barton 2.

[49] Applicants Ex. 7A, Corrected Attachment A to Landoni Testimony; Applicants Ex. 7B, Corrected Attachment B to Landoni Testimony; Blue Delta Ex. 1A, Corrected Attachment A to Nelson Testimony; Joint Ex. 1A, Corrected Attachment A to Chiles Testimony; Tr. Vol. III at 463 (Landoni Cross); Tr. Vol. III at 434 (Chiles Cross); Tr. Vol. III at 451 (Nelson Cross).

admitted into the record, and subsequently filed in the docket at the conclusion of the hearing.[50] While the Applicants regret that the incorrect versions were filed due to an inadvertent document compilation error, CSG's counsel never indicated it may have received and reviewed incorrect DFAX studies, and did not provide any detailed analysis of any of the studies themselves in testimony. As a result of the foregoing, the Commission correctly concluded that:

> 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.[51]

Nothing in CSG's rehearing request changes this result.

Finally, despite its claims of prejudice, CSG is the party that has been causing prejudice through undue delay. As the Applicants explained in their post-hearing briefs, CSG's "participation" in these proceedings has turned a simple, straightforward application process into a two-year ordeal.[52] CSG's actions resulted in delays in the procedural schedule which only rewarded CSG and prejudiced the Applicants by keeping the Applicants' facilities out of the Ohio REC market. This has cost the Applicants millions of dollars, and has impacted the Ohio REC market in a way that harms CSG's competitors, including the Applicants, and Ohio customers.[53] The Commission should reject CSG's arguments as meritless and deny rehearing.

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[50] Tr. Vol. III at 481–82; Applicants Ex. 7A, Corrected Attachment A to Landoni Testimony; Applicants Ex. 7B, Corrected Attachment B to Landoni Testimony; Blue Delta Ex. 1A, Corrected Attachment A to Nelson Testimony; Joint Ex. 1A, Corrected Attachment A to Chiles Testimony.

[51] Order at ¶ 56.

[52] Applicants Brief at 24–27.

[53] Blue Delta Ex. 1, Nelson Testimony at 11–14.

III. CONCLUSION

Throughout this entire proceeding, CSG has failed to present a coherent argument challenging the Applicants' Applications for REN certification. And, CSG has not presented anything new or novel in its rehearing request. It simply continues to fail to present a coherent challenge to the Applicants' certification applications. While CSG appears to have an objection to the prevailing law in Ohio and the *Koda* Test standard applied by the Commission, those objections have been considered – and rejected repeatedly – in this case. The *only* things that CSG's efforts have yielded are more than two years of undue delay and millions of dollars in additional costs to Applicants. The record evidence clearly demonstrates that each of the Applicants' facilities at issue satisfies the requirements for REN certification in Ohio, and the Commission properly determined as much in its Order. The Commission's analysis and application of applicable statutes, regulations, and Commission precedent were reasonable and lawful, and CSG should not be allowed to drag this proceeding out even further with its baseless rehearing request. Additionally, CSG's claim of undue prejudice resulting from a clerical error is nothing more than a red herring and does not satisfy the standard for rehearing. Accordingly, the Commission should deny CSG's Application for Rehearing in its entirety.

Respectfully Submitted,

/s/ Angela Paul Whitfield

Angela Paul Whitfield (0069402)
CARPENTER LIPPS LLP
280 Plaza, Suite 1300
280 North High St.
Columbus, Ohio 43215
Telephone: (614) 365-4112
paul@carpenterlipps.com
(willing to accept service by email)

Counsel for Applicants Moraine Wind LLC, Rugby Wind LLC, Elm Creek Wind II LLC, Buffalo Ridge II LLC, Barton Windpower 1, Avangrid Renewables, LLC, and Barton Windpower LLC

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the cases. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on October 30, 2023 upon the parties listed below.

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0069402)
Counsel for Applicants Moraine Wind LLC, Rugby Wind LLC, Elm Creek II Wind LLC, Buffalo Ridge II Wind LLC, Barton Windpower 1, Avangrid Renewables, LLC, and Barton Windpower LLC.

demonte@whitt-sturtevant.com
whitt@whitt-sturtevant.com
bojko@carpenterlipps.com
blittle@nisource.com
johnryan@nisource.com
Christopher.miller@icemiller.com
Nicole.woods@icemiller.com
nbagnell@reedsmith.com
Jodi.bair@ohiosttorneygeneral.gov

Attorney Examiners:
David.hicks@puco.ohio.gov
Jacqueline.St.John@puco.ohio.gov

Summary: Memorandum Applicants' Memorandum Contra Carbon Solution Group, LLC's Application for Rehearing 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.