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**

SECOND ENTRY ON REHEARING

Entered in the Journal on February 7, 2024

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Carbon Solutions Group, LLC.

II. DISCUSSION

A. Procedural Background

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

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

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

{¶ 5} Staff filed its review and recommendation in each respective docket. In each report, Staff recommended the application be approved. Specifically, Staff determined that

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[1] While the caption for Case No. 21-544-EL-REN references the project name, Barton Windpower, Avangrid Renewables LLC was the project applicant. As for Case No. 22-380-EL-REN, the project name is Barton 2 and the applicant is Barton Windpower LLC.

each facility satisfies the Commission's requirements for certification as a renewable energy facility.

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

{¶ 7} On various dates, motions to intervene in all or some of the above-captioned cases were filed by Blue Delta Energy, LLC (Blue Delta); 3Degrees Group, Inc. (3Degrees); and Northern Indiana Public Service Company LLC (NIPSCO).

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

{¶ 9} On April 5, 2022, the attorney examiner consolidated Case Nos. 21-516-EL-REN, 21-517-EL-REN, 21-531-EL-REN, 21-532-EL-REN, and 21-544-EL-REN and granted the motions to intervene filed by Blue Delta, 3Degrees, Carbon Solutions, and NIPSCO.

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

{¶ 11} On June 28, 2022, the attorney consolidated all the above-captioned cases and ruled that the procedural schedule already established will apply to all the consolidated cases.

{¶ 12} On December 5, 2022, the evidentiary hearing commenced and continued on December 6, 2022 and December 8, 2022.

{¶ 13} In its September 20, 2023 Opinion and Order, the Commission approved each application filed by the Applicants for certification as eligible Ohio renewable energy resource generating facilities.

{¶ 14} Pursuant to R.C. 4903.10, any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the Commission's order is journalized.

{¶ 15} On October 20, 2023, Carbon Solutions filed an application for rehearing, asserting that the Opinion and Order was unlawful and unreasonable based upon two grounds for rehearing outlined therein.

{¶ 16} On October 30, 2023, Applicants filed a memorandum contra Carbon Solutions' application for rehearing. Also on October 30, 2023, Blue Delta and NIPSCO filed a joint memorandum contra Carbon Solutions' application for rehearing.

{¶ 17} On November 16, 2023, the Commission issued an Entry on Rehearing granting Carbon Solutions' application for rehearing for the limited purpose of further consideration of the matters specified in that application.

{¶ 18} On January 17, 2024, Carbon Solutions filed a notice of appeal to the Ohio Supreme Court.

B. Application for Rehearing and Memoranda Contra

{¶ 19} In its application for rehearing, Carbon Solutions argues that the Commission misapplied the applicable standard for deliverability in its Opinion and Order, citing *In re Koda Energy LLC*, Case No. 09-555-EL-REN (*Koda*), Finding and Order (Mar. 23, 2011). Carbon Solutions also contends that it was unduly prejudiced by a failure to follow the statutes and rules governing the procedure of the original proceeding.

{¶ 20} Specifically, in its first assignment of error, Carbon Solutions argues the Commission's finding that Applicants' energy is deliverable into the state is unsupported

by the record evidence and that the Commission misapplied the *Koda* standard to the evidence presented at hearing. Carbon Solutions first states that it agrees with the Commission's interpretation of the term "deliverable" but adds that there must be evidence of actual impact of the facility on Ohio transmission, which the Applicants did not provide. Carbon Solutions contends that requiring evidence of actual impact on Ohio transmission is different from requiring evidence of actual delivery. According to Carbon Solutions, the Commission erred in finding that standard was met with the DFAX studies, which represent transmission line impacts if the facilities "were to deliver their energy into PJM," as stated on the DFAX cover pages. Thus, Carbon Solutions purports that the DFAX studies assume deliverability and model the hypothetical impact rather than measuring the actual, demonstrable impact of the facilities. The DFAX studies used as evidence of deliverability, Carbon Solutions argues, did not demonstrate actual transmission line impacts. Without physical transmission demonstrated, Carbon Solutions posits, the Applicants could not satisfy *Koda*. Carbon Solutions questions the reliability of DFAX studies, noting that the DFAX values show virtually the same impact for the various facilities across four states and two regional transmission organizations, citing Opinion and Order at ¶ 49. Carbon Solutions further questions the values by asserting that the Barton 1 and Barton 2 facilities were modelled together, which resulted in the same purported impact as when Barton 2 was studied separately, citing Tr. Vol III at 358-359. Therefore, Carbon Solutions maintains that no evidence of deliverability exists in the record, and the Commission's finding to the contrary was in error and in violation of R.C. 4903.09. (App. for Rehearing at 1, 3-7.)

{¶ 21} Carbon Solution also argues in its second assignment of error that it was prejudiced by the Commission's failure to properly govern the proceedings according to applicable statutes and rules. Carbon Solutions reiterates its position from its post-hearing briefing that it was prejudiced by Applicant's failure to notice and correct the error in the DFAX studies it produced in discovery and introduced at hearing until after the hearing began. Specifically, Carbon Solutions avers that although Staff had the correct DFAX studies throughout the proceeding, Carbon Solutions did not get the correct studies until

after the hearing commenced, which denied Carbon Solutions its opportunity for thorough and adequate preparation. Also, Carbon Solutions states that its inability to subpoena PJM Interconnection Inc. (PJM) staff to inquire into the studies was prejudicial error. Carbon Solutions contends that testimony from PJM would be highly relevant, as the entity that created the DFAX reports, so denying Carbon Solutions' subpoena essentially prioritized uncorroborated hearsay, the DFAX reports, over sworn testimony. Carbon Solutions adds that enforcement of out-of-state subpoenas is governed by the state where the witness is located, so enforcement is a separate issue that the Commission should not have considered. As a result of the procedural issues in this case, Carbon Solutions argues, it could not develop its own case and build a record. (App. for Rehearing at 7-10.)

{¶ 22} NIPSCO and Blue Delta jointly filed a memorandum contra, and Applicants also filed a memorandum contra, which will be summarized collectively. The parties fault Carbon Solutions for not introducing new arguments or identifying specific grounds upon which the Commission's Opinion and Order should be deemed unlawful or unreasonable. Applicants, NIPSCO, and Blue Delta point out that Carbon Solutions' application repeats earlier arguments that the DFAX studies presume deliverability, although the evidence on record demonstrates that the studies provide the necessary information to determine deliverability, citing Opinion and Order at ¶ 48. Specifically, the parties note that Carbon Solutions' own witness testified that DFAX studies do not presuppose a certain impact on Ohio transmission lines or assume that the energy is deliverable to an end point in Ohio, citing Tr. Vol. II at 227-228. Applicants assert that Carbon Solutions' objections to the Commission's application of the *Koda* test are better suited for a case in which the Commission reviews the applicable rules, not in routine REN certification cases. (App. Memo. Contra at 5-9; NIPSCO and Blue Delta Memo. Contra at 4-7.)

{¶ 23} Turning to the procedural issues, the parties argue that Carbon Solutions' objection to the denial of its subpoena request is procedurally improper, since Carbon Solutions did not object when the attorney examiners denied the request at the hearing, thereby failing to preserve the issue for later challenge as required by Ohio Adm.Code

4901-1-27(D). Applicants add that the denial of the subpoena was proper because Carbon Solutions did not provide a memorandum in support or explanation as to why the subpoena is warranted, which is required by Ohio Adm.Code 4901-1-12(A) and (C). Finally, regarding the error in the Applicants' DFAX studies, NIPSCO and Blue Delta argue that the attorney examiners called a recess to the hearing when it was brought to their attention, allowing Carbon Solutions more time to review them and then conduct further cross-examination of the appropriate witnesses. Additionally, Applicants point out what they say Carbon Solutions repeatedly ignores: that Applicants corrected the incorrect attachments and alerted the Commission as soon as the issue was realized. Applicants note that Carbon Solutions never represented to any parties that it had received and reviewed the incorrect DFAX studies, nor did it provide a detailed analysis of the DFAX studies. Applicants, NIPSCO, and Blue Delta emphasize that Carbon Solutions fully participated in the proceeding for two years and cannot, therefore, complain that it was denied due process. (Applicants' Memo Contra at 9-13; NIPSCO and Blue Delta Memo Contra at 7-9.)

C. Conclusion

{¶ 24} The Commission will address both of Carbon Solutions' grounds for rehearing, as well as responsive memoranda, below. As was the case in the Opinion and Order, any argument raised in the application for rehearing that is not specifically addressed herein has nevertheless been fully considered and weighed by the Commission and is hereby denied. Opinion and Order (Sept. 20, 2023) at ¶52.

{¶ 25} In applying R.C. 4903.09, the Ohio Supreme Court has found that, although strict compliance is not required, an order of the Commission must contain sufficient detail for the Court to determine the factual basis and reasoning relied on by the Commission. *In re the Application of Ohio Power Co. for an Increase in Elec. Distr. Rates*, Case No. 20-585-EL-AIR, et al., Second Entry on Rehearing (Feb. 8, 2023), citing *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425, ¶ 19. In our Opinion and Order, we engaged in a thorough analysis of what is meant to be "deliverable into the state" and then applied the appropriate test to the six facilities

requesting certification (Opinion and Order at ¶¶ 43-51). Disagreement with the Commission's rationale does not make it an impermissible summary ruling.

{¶ 26} Initially, we find that the application for rehearing should be denied for failing to raise any argument that we did not already thoroughly address in our Opinion and Order. In disagreeing with our application of the *Koda* standard for deliverability and the rulings of the attorney examiners while managing these proceedings, Carbon Solutions asks us to reconsider our analysis without presenting any new arguments to persuade us to do so. While Carbon Solutions may not agree with the Commission's review and resolution of these proceedings, its disagreement to the ultimate decision does not negate the point that the Commission appropriately weighed all of the evidence of the record, including the correct DFAX studies for all of the subject facilities, and provided detailed reasoning for our final decision in the Opinion and Order. The Commission will not overturn its thorough analysis based merely on already-rejected arguments. *See In re the Application of Columbia Gas of Ohio, Inc.,* Case No. 12-2637-GA-EXM, Entry on Rehearing (Mar. 20, 2013) at 28; *In re the Motion of The East Ohio Gas Company dba Dominion Energy Ohio*, Case No. 20-600-GA-UNC, Entry on Rehearing (July 29, 2020) at ¶ 32; *In re the Commission's Review of Chapter 4901:1-25 of the Ohio Adm.Code*, Case No. 21-478-EL-ORD, Entry on Rehearing (Mar.8, 2023) at ¶¶ 29-30, *In re the Application of Ohio Power Co.*, Case No. 20-585-EL-AIR, et al., Second Entry on Rehearing (Feb. 8, 2023) at ¶ 70.

{¶ 27} Nonetheless, the Commission feels it necessary to reiterate certain aspects of our Opinion and Order for the benefit of the parties involved in these proceedings. As to Carbon Solutions' first assignment of error, we decline to abandon our rationale for demonstrating deliverability. Despite questioning our means of determining the plain language of the statute, Carbon Solutions concedes that it "does not challenge the Commission's legal conclusions regarding meaning the of the term 'deliverable,' or the type of evidence needed to demonstrate deliverability." The *Koda* test remains valid and, for the reasons stated in the Opinion and Order, was applied appropriately to confirm deliverability in this matter. Ultimately, we agree with Carbon Solutions that the evidence

presented at hearing demonstrates *capability* of delivery rather than *actual* delivery. However, we acknowledge that Carbon Solutions persists in conflating these concepts and misinterpreting *Koda* to require the latter. (Opinion and Order at ¶¶ 45-48.) To the extent that Carbon Solutions argues that the Commission should consider "actual impact" as part of its deliverability analysis, we note that Carbon Solutions has cited no statute or case law for this additional requirement. As noted in the Opinion and Order, "this argument is in direct contradiction with its earlier concession that the statute does not require a demonstration of actual delivery, but rather that the generation produced is capable of being physically delivered into Ohio." Opinion and Order at ¶48. Importantly, the DFAX studies do not assume deliverability, as conceded by Carbon Solutions' own witness (Tr. Vol. II at 227-228). Further, the Commission already directly addressed Carbon Solutions' interpretation of the DFAX cover pages. Opinion and Order (Sept. 20, 2023) at ¶48. We relied heavily on the persuasive testimony of Staff witnesses Clingan and Cross, who demonstrated their familiarity with these types of applications and the use of power flow studies, like the subject DFAX reports, to assist with the deliverability analysis for each respective facility. We also reject Carbon Solutions' allegation that the DFAX reports are unreliable because they calculate similar impacts for all the facilities as conclusory and unpersuasive. Similarly, we find unconvincing Carbon Solutions' allegation that the DFAX reports show that the impacts of Barton 1 and Barton 2 being modelled together are the same as the impact when Barton 2 was analyzed separately. Carbon Solutions cited Tr. Vol. III at 358-359 as evidence of its assertion, but those portions of the transcript fail to demonstrate Carbon Solutions' claim. Contrarily, the Opinion and Order expressly provided that the power flow studies utilized in the proceedings show the facilities met the *Koda* thresholds and, notably, that the energy delivery value was different for Barton 1 and Barton 2. These values were not contested during the hearing and Staff relied on these values, among other things, in its ultimate determination that the facilities met the deliverability requirement. Opinion and Order (Sept. 20, 2023) at ¶¶49-50.

{¶ 28} As for its second assignment of error regarding due process, Carbon Solutions also raises only arguments we have already rejected. Carbon Solutions did not provide a memorandum in support of its motion for subpoena or explanation as to why the subpoena was needed, which is required by Ohio Adm.Code 4901-1-12(A). The subpoenas Carbon Solutions sought to issue were unsupported by any argument justifying their issuance under applicable law (Tr. Vol. I at 10-12). Further, Carbon Solutions did not preserve the issue at the time of the ruling as contemplated in Ohio Adm.Code 4901-1-27(D). As to the DFAX reports, Applicants promptly alerted the Commission to the error in Applicant's DFAX studies document, and the attorney examiners overseeing the hearing wisely recessed the proceedings for more than a day before allowing Carbon Solutions the opportunity to question witnesses about the corrected document (Tr. Vol. II at 327-331). We note that after the correct spreadsheets were produced at the hearing, Carbon Solutions did not amend or suggest it would like to amend any of its pre-filed testimony. Carbon Solutions fully participated not only in these issues before the Commission, but also in every procedural step in these matters for the two years they have been pending on the Commission's docket. To find that Carbon Solutions was denied due process would be to make a gross mischaracterization of the docket and record evidence in this case. (Opinion and Order (Sept. 20, 2023) at ¶¶ 56-58.)

{¶ 29} As noted above, without novel arguments to consider, the Commission has no reason to reconsider its original decision. Therefore, Carbon Solutions' application for rehearing should be denied.

III. ORDER

{¶ 30} It is, therefore,

{¶ 31} ORDERED, That Carbon Solutions' October 20, 2023, application for rehearing be denied. It is, further,

{¶ 32} ORDERED, That a copy of this Second Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters

CRW/dr

Case No(s). 21-0516-EL-REN, 21-0517-EL-REN, 21-0531-EL-REN, 21-0532-EL-REN, 21-0544-EL-REN, 22-0380-EL-REN

Summary: Entry on Rehearing denying the application for rehearing filed by Carbon Solutions Group, LLC electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.