IN THE SUPREME COURT OF OHIO

CARBON SOLUTIONS GROUP, LLC,	:	
	:	CASE NO. 2024-0098
APPELLANT,	:	
	:	APPEAL FROM THE PUBLIC UTILITIES
V.	:	COMMISSION OF OHIO
	:	
PUBLIC UTILITIES COMMISSION OF OHIO,	:	PUCO CASE NOS.
	:	21-516-EL-REN
APPELLEE.	:	21-517-EL-REN
	:	21-531-EL-REN
	:	21-532-EL-REN
	:	21-544-EL-REN
	:	22-380-EL-REN

AMENDED MERIT BRIEF SUBMITTED ON BEHALF OF APPELLEE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

This is a straightforward appeal from the Public Utilities Commission of Ohio's ("PUCO" or "Commission") order granting Intervening Appellees Moraine Wind LLC, Rugby Wind LLC, Elm Creek II Wind LLC, Buffalo Ridge II Wind LLC, Avangrid Renewables LLC, and Barton Windpower LLC ("Applicants")[1] applications to be certified as eligible renewable energy resource generating facilities for the State of Ohio under R.C. 4928.64.

Appellant Carbon Solutions Group, LLC ("Carbon Solutions"), primarily challenges the Commission's factual finding that the generation produced by the Applicants' windfarms was shown to be physically deliverable to Ohio, as required by R.C. 4928.64(B)(3). Carbon Solutions insists that this factual finding is unsupported by the record and against the manifest weight of the evidence. To the contrary, this finding is supported by power flow studies prepared by the regional transmission organization ("RTO") charged with administering electricity transmission in Ohio, the testimony of multiple witnesses confirming the RTO's power flow studies established that these windfarms are capable of delivering power to Ohio, and a third-party report concluding that the power flow studies satisfied the deliverability criterion for each of the windfarms.

In contrast, Carbon Solutions relies on a single sentence from the cover letters to the power flow studies to claim that the windfarms do not meet the deliverability criterion. That is, the cover letters to the power flow studies state that the Applicants' wind resources "would be expected to flow" to certain transmission facilities "if they were to deliver their energy into PJM." Carbon Solutions contends that this sentence demonstrates the power flow studies were based on hypothetical transmission paths and that the studies presume deliverability to Ohio. But

[1] Intervening Appellee Avangrid Renewables, LLC is the owner of the other Applicants. (Order ¶ 11.)

this sentence does not mean that the Applicants are incapable of delivering power from the windfarms to Ohio. In fact, both Staff witness Kristin Clingan and Carbon Solutions' own witness testified that the power flow studies do not merely presume deliverability. The Commission relied upon this testimony in its deliverability analysis. Carbon Solutions ignores this testimony and all the other evidence that supports the Commission's factual finding that energy is deliverable from the Applicants' generating facilities to Ohio. The Commission's deliverability analysis is fully supported by the testimony presented at hearing.

Carbon Solutions also raises several evidentiary and procedural challenges. For instance, Carbon Solutions claims that its right "to be heard" and "enforce the attendance of witnesses" under R.C. 4905.26 was violated because the Commission denied its motion to compel the attendance of a non-party, out-of-state witness. Carbon Solutions again ignores the fact that the Commission denied this motion because the motion plainly violated Ohio Adm.Code 4901-1-12(A) for failure to provide a memorandum in support or a brief explanation of the grounds in support of the motion. The Commission certainly has the authority to deny a motion that violates Ohio Adm.Code 4901-1-12(A).

Carbon Solutions also claims that the Commission erred by admitting the power flow studies into evidence, arguing that the power flow studies constitute inadmissible hearsay. But Carbon Solutions did not object to the admission of the power flow studies, thus waiving this claim on appeal. Even if Carbon Solutions had timely objected to the admission of the power flow studies, it would have been within the Commission's discretion to overrule the objection and admit the studies. The Commission is not strictly confined by the Rules of Evidence.

Ultimately, Carbon Solutions' first and second propositions of law should both fail. The record contains sufficient probative evidence to support the Commission's factual finding that

the generation produced by the Applicants' windfarms is capable of being physically delivered into Ohio. Likewise, Carbon Solutions has failed to demonstrate that the Commission committed any procedural or evidentiary errors that caused it to suffer undue prejudice. The Appealed Order should be affirmed in full.

STATEMENT OF THE CASE AND FACTS

A. Applicable Law

Ohio law requires any entity wishing to be designated an eligible renewable energy resource generating facility for the State of Ohio to file an application for certification that demonstrates the facility meets the requirements of R.C. 4928.64.[2] (Appellee's App. at 1.)

Pursuant to R.C. 4928.64(B)(3), a qualifying renewable energy resource implemented by a utility or company shall be met either (a) through facilities located in this state; or (b) with resources that can be shown to be deliverable into this state.[3] The deliverability criterion established under R.C. 4928.64(B)(3) "is satisfied if the facility is located within Ohio, or a state contiguous to Ohio, or . . . if a generating facility located outside of Ohio or a contiguous state can demonstrate that electricity from the facility is physically deliverable into Ohio." *In re Koda Energy LLC* (*Koda*), Case No. 09-0555-EL-REN, Finding and Order at ¶ 4 (Mar. 23, 2011).[4] In *Koda*, the Commission adopted a deliverability test based on a measured change in generation having a significant impact on power flows over transmission lines with a threshold value greater than five percent and a megawatt equivalence greater than one megawatt. *Id*. at ¶ 8. If any

[2] References to appellee's appendix attached to this brief are denoted "Appellee App. at ___"; references to the appendix of appellant Carbon Solutions Group, LLC are denoted "Appellant's App. at ___."

[3] R.C. 4928.64 contains two additional requirements for certification as an eligible Ohio renewable energy resource generating facility. (Appellant's App. at 061, Order ¶ 4.) However, the parties have acknowledged that these two requirements are not at issue here. (*Id.* ¶ 40; Tr. Vol. II at 303.)

[4] The *Koda* decision is available in the Appellant's Appendix beginning at page thirty-eight.

significant impact was evident from a distribution factor analysis ("DFAX") study or power flow study that satisfies the deliverability test, this impact is considered as evidence of physical deliverability into Ohio. *Id*. If the value on a transmission line is below five percent the impact is considered insignificant and, for billing purposes, there is no charge under an agreement that exists in both PJM and MISO. *Id*. at ¶ 7. The megawatt equivalence of the impact is calculated by multiplying the value in the study by the facility's nameplate capacity. *Id*. Any renewable generating facility not in Ohio or a contiguous state having a significant impact under the Commission's deliverability test would satisfy the statutory criteria showing that the electricity is physically deliverable into Ohio.

It is "impossible to physically track energy from a specific generating facility to a specific load location." *Id*. at ¶ 7. But physical deliverability can be demonstrated "with a power flow study, performed by a RTO, offering evidence of a significant impact on power flows over transmission lines located in the state of Ohio." *Id.* at ¶ 7. An applicant can demonstrate a significant impact on power flows over transmission lines in Ohio with a DFAX study showing "an impact on a transmission line in Ohio that is greater than five percent and greater than one megawatt." *Id.* at ¶ 8. A DFAX study is "a computer model of the transmission systems that measures the change in power flows across a flowgate due to a change in generation (i.e., the addition of a renewable generating facility)." (Applicants' Ex. 7 at 8:3-6.)

Carbon Solutions has acknowledged that "power flow studies, including DFAX reports, may be used to figure out whether energy is physically deliverable from one area to another." (Carbon Solutions' Initial Brief at 14.)

B. Factual & Procedural Background

On various dates, the Applicants filed separate applications for the certification of certain named facilities ("Facilities") as eligible Ohio renewable energy resource generating facilities. (Order ¶ 5.) The Facilities are located in Minnesota, North Dakota, South Dakota, and Iowa (i.e., non-contiguous states with Ohio). (Applicants' Exs. 1-6.) These states are located in the region of the United States where electricity transmission is administered by the RTO Midcontinent Independent System Operator, Inc. ("MISO"). (Staff Ex. 2 at 5.)

Staff filed a review and recommendation in each of these cases, determining that each Facility satisfies the Commission's requirements for certification as a renewable energy facility. (Order ¶ 8.) Each review and recommendation relied on DFAX studies performed by the RTO charged with administering transmission in Ohio, PJM Interconnection, LLC ("PJM"). (Staff Exs. 3-8.) Each review and recommendation explained that the DFAX studies "evaluated the impacts of power flows from the Facility's injection of energy on approximately 3,000 electric system transmission facilities in Ohio and the surrounding areas." (*Id.*) Each review and recommendation found that the Facilities had the greatest impact along a transmission line that runs between Sorenson, Indiana and Marysville, Ohio. (*Id.*) This transmission line begins in Indiana, which is in MISO, and ends in Ohio, which is in PJM. And each review and recommendation concluded that the Facilities exceeded the five percent and one megawatt DFAX values established in *Koda*. (*Id.*) Carbon Solutions has not contested the DFAX values set forth in Staff's review and recommendations. (Order ¶ 50.)

By entries dated April 5, 2022, and June 28, 2022, the attorney examiner consolidated each of these cases and granted motions to intervene filed by Carbon Solutions and Intervening Appellees Blue Delta Energy, LLC ("Blue Delta"), 3Degrees Group, Inc., and Northern Indiana Public Service Company, LLC. (Order ¶ 17.)

On November 21, 2022, Carbon Solutions filed a motion for subpoena duces tecum, which requested the Commission direct an agent of PJM to appear at hearing to testify about PJM's DFAX studies. (Order ¶ 25.) PJM filed a memorandum in opposition to the motion for subpoena duces tecum, arguing that (1) Carbon Solutions' motion "failed to comply with the Commission's procedural requirements" and (2) the testimony sought by the motion is "either irrelevant or cumulative." (PJM's Memorandum in Opposition to Carbon Solutions' Motion for Subpoena Duces Tecum at 2.)

On December 5, 2022, an evidentiary hearing was held. (*Id.* ¶ 27.) During the hearing, the attorney examiners denied Carbon Solutions' motion for subpoena duces tecum for several reasons, including (1) Carbon Solutions' failure to provide a memorandum in support of the motion, (2) Carbon Solutions' failure to provide an explanation of the grounds in support of the motion, (3) Carbon Solutions' failure to demonstrate why the non-party witness was necessary to the proceedings, and (4) Carbon Solutions' failure to demonstrate that the Commission has the power to issue an enforceable subpoena to compel attendance of out-of-state, non-party witnesses. (Tr. Vol. I at 10:21-12:15.) The attorney examiners also noted that the Commission denied a similar motion for subpoena duces tecum in *In re Verde Energy USA Ohio, LLC*, Case No. 19-958-GE-COI. (*Id.*)

The hearing continued on December 6, 2022. (Order ¶ 27.) During the hearing, the parties identified a copying error in the DFAX studies that the Applicants had filed on the docket and moved to admit into evidence. (Order ¶ 54; Tr. Vol. II at 327:10-20.) As soon as this error was discovered, corrected versions of the DFAX studies were provided to counsel for Carbon Solutions. (Tr. Vol. II at 331:4-10.) And when the hearing resumed on December 8, 2022, Carbon

Solutions did not object to the admission of the corrected DFAX studies. (Tr. Vol. III at 481; Applicants' Ex. 7A.)

On September 20, 2023, the Commission granted the Applicants' applications for certification of the Facilities as eligible Ohio renewable energy resource generating facilities. The Commission found that the deliverability criterion was met for each of the Facilities because "Applicants provided power flow studies, performed by PJM, that show the facilities have met the thresholds established in *Koda*" and "[t]hese 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." (Order ¶ 50.) The Commission also rejected Carbon Solutions' challenge to the admission of the DFAX studies because Carbon Solutions "did not object to the admission of those exhibits at the conclusion of Staff's testimony" and, in any event, "[the] Commission is not strictly bound by the Ohio Rules of Evidence and routinely relies on publications and reports generated by PJM." (Order ¶ 57.) In addition, the Commission held that the denial of Carbon Solutions' motion for subpoena duces tecum was proper because Carbon Solutions "failed to either provide any demonstration warranting the presence of an out-of-state non-party witness or attempt to show that the Commission has the authority to issue an enforceable subpoena to compel an out-of-state non-party witness to appear in person at hearing before the Commission." (Order ¶ 58.)

On October 20, 2023, Carbon Solutions filed its Application for Rehearing, rehashing the same arguments that the Commission had already rejected. After Carbon Solutions' Application for Rehearing was denied by operation of law, this appeal followed.

STANDARD OF REVIEW

The Ohio Supreme Court "will not reverse or modify a PUCO decision as to questions of fact when the record contains sufficient probative evidence to show that the PUCO's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Harris Design Servs. v. Columbia Gas of Ohio, Inc.*, 2018-Ohio-2395, ¶ 12. The Court will not reweigh evidence or substitute its judgment for that of the Commission on factual questions when there is sufficient probative evidence in the record to support the Commission's decision. *Luntz Corp. v. Pub. Util. Comm*., 79 Ohio St.3d 509, 511 (1997). The Commission's factual determinations are "entitled to deference." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm*., 76 Ohio St.3d 163, 165 (1996). Moreover, "[t]he appellant bears the burden of demonstrating that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record." *Buckeye Energy Brokers, Inc, v. Palmer Energy Co.*, 2014-Ohio-1532, ¶ 15.

On the other hand, the Court has "complete and independent power of review as to all questions of law." *Luntz* at 512. However, the Court has customarily relied on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110 (1979). In *TWISM Ents., L.L.C. v. State Bd. Of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, the Court held that "the judicial branch is never required to defer to an agency's interpretation of the law," explaining that "any judicial deference to administrative agencies is permissive rather than mandatory and may occur only when a statutory term is ambiguous." *Id.* at ¶¶ 3, 40 (Emphasis in original.) If a statute is ambiguous, a Court may defer to agency interpretation–but the weight, if any, given to it "should depend on the persuasive power of the

agency's interpretation and not the mere fact that it is being offered by an administrative agency." *Id.* at ¶ 45. Here, the Commission determined there was no ambiguity on the face of the statute, R.C. 4928.64(B)(3). (Order ¶ 45).

ARGUMENT

Proposition of Law No. 1: The Commission's finding that the Applicants' resources are "deliverable into this state" is supported by sufficient probative evidence in the record to show that the Commission's decision was not manifestly against the weight of the evidence.

Carbon Solutions' first proposition of law insists that the Commission's finding that the Applicants' wind resources are deliverable into Ohio is improper. On the contrary, there is sufficient probative evidence in the record to support the Commission's finding that the Facilities' resources are "deliverable into this state," including the DFAX studies themselves, testimony explaining that the DFAX studies demonstrate deliverability from the Facilities to Ohio, a third-party report that concludes that the DFAX studies demonstrate deliverability for each of the Facilities, and the testimony of Carbon Solutions' own witness. The Court should reject Carbon Solutions' first proposition of law.

A. Carbon Solutions' first proposition of law does not contest the Commission's legal conclusions regarding the meaning of "deliverable into this state."

Carbon Solutions acknowledges that this Court "does not need to address whether 'the *Koda* test continues to be reasonable' or 'additional modifications to the test are necessary.'" (Appellant Brief at 12, citing Order ¶ 48.) Moreover, Carbon Solutions admits that the Commission correctly concluded that "deliverable into this state" means "capable of being physically delivered." (Appellant Brief at 12; Order ¶ 45.) And Carbon Solutions has acknowledged that "power flow studies, including DFAX reports, may be used to figure out

whether energy is physically deliverable from one area to another." (Carbon Solutions' Initial Brief at 14.)

In fact, Carbon Solutions concedes that the deliverability analysis merely presents factual questions, and thus a highly deferential standard of review applies. (*See* Appellant's App. at 047, Application for Rehearing at 3 ("The Application for Rehearing does not challenge the Commission's legal conclusions regarding the meaning of the term 'deliverable,' or the type of evidence needed to demonstrate deliverability. . . The dispute in this case centers around questions of fact: whether the power flow studies submitted *in this case* satisfy the deliverability standard explained in *Koda* and adopted in the Order.").) (Emphasis in original.) *Id*.

B. The Commission's factual finding that the Facilities' resources are "deliverable into this state" comports with *Koda* and the record.

There is sufficient probative evidence in the record to demonstrate that the Facilities' resources are "deliverable into this state" consistent with *Koda*. Under *Koda*, the Applicants can demonstrate physical deliverability with a DFAX study conducted by an RTO showing "an impact on a transmission line in Ohio that is greater than five percent and greater than one megawatt." *In re Koda Energy LLC*, Case No. 09-0555-EL-REN, Finding and Order at 3-4 (Mar. 23, 2011).

The Applicants provided DFAX studies performed by PJM, the RTO charged with administering transmission in Ohio. (Applicants' Ex. 7A.) Staff concluded that these DFAX studies satisfy the deliverability criterion and evaluate the "Facility's injection of energy on approximately 3,000 electric system transmission facilities in Ohio and the surrounding areas." (Staff Exs. 3-8.) Multiple expert witnesses confirmed that the DFAX studies demonstrate deliverability from the Facilities into Ohio:

- Applicants' witness Pete Landoni testified that "[t]he DFAX study for each of the Applicants['] Facilities . . .demonstrate[es] that each facility satisfies the physical deliverability requirement." (Applicants' Ex. 7 at 9:3-13.)
- Blue Delta witness Ken Nelson testified that "the results of the DFAX studies demonstrate that each of the facilities at issue in this proceeding passes the *Koda* test, and therefore, satisfies the deliverability criterion." (Blue Delta Ex. 1 at 5:14-16.)
- Staff witness Jason Cross testified that "the facilities applying for certificates in these cases meet the Commission approved deliverability standard." (Staff Ex. 1 at 3:16-18.)

What's more, a report prepared GDS Associates, Inc., an energy engineering and management consulting firm, concludes that "the six Avangrid facilities seeking certification satisfy the *Koda* test and the requirements embedded in Ohio law, and thus, should be certified in Ohio as qualifying renewable energy resource[] generating facilities." (Joint Ex. 1A at 20.)

Moreover, it is undisputed that the DFAX studies show that each of the Facilities met the five percent and one megawatt thresholds established in *Koda*. (Order ¶ 50.) The Commission cited the following DFAX values in the Appealed Order, and Carbon Solutions did not challenge these DFAX values in its Application for Rehearing or on appeal:

Facility Name	Impact on Transmission Line	Energy Delivery Value	*Koda* Criteria Met?
Moraine Wind, LLC	16.37 %	8.35 MWs	Yes
Rugby Wind, LLC	16.44 %	24.5 MWs	Yes
Elm Creek II Wind, LLC	16.50 %	24.5 MWs	Yes
Buffalo Ridge II Wind, LLC	16.38 %	34.4 MWs	Yes
Barton Windpower 1	17.00 %	13.6 MWs	Yes
Barton Windpower 2	17.00 %	13.26 MWs	Yes

(Order ¶ 49.) Relying on the above DFAX studies, the Commission found that "the facilities have met the thresholds established in *Koda*" and that "the applications satisfy the statutory requirement that generation produced by the facilities be physically deliverable to Ohio." (Order ¶ 50.)

Even though Carbon Solutions does not contest the above DFAX values, Carbon Solutions nevertheless insists that the DFAX studies do not demonstrate deliverability. Carbon Solutions claims that the DFAX studies "assume" delivery of the Facilities resources into PJM based on hypothetical delivery paths. To support this contention, Carbon Solutions relies almost exclusively on the following paragraph found in the cover letters to the DFAX studies:

> The information below provides some background information on the analysis.
>
> PJM confirmed the required information about the renewable resources from MISO to identify these facilities in the 2025 RTEP PSS/E case with the information for these facilities contained in the list below. A DFAX analysis on approximately 3,000 BES transmission facilities in Ohio and surrounding areas was performed using the TARA program. The buses at which the Wind generators are located provided the source for the DFAX analysis, and the generation with the PJM footprint provided the sink for the DFAX analysis. Finally, 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. Details of the analysis are in the table attached to this report.

(Applicants' Ex. 7A at 1.) Carbon Solutions claims that "would be expected to flow if they were to deliver their energy into PJM" means that the DFAX studies presume deliverability from MISO to PJM. Carbon Solutions' reliance on this language fails for at least three reasons.

First, the Commission rejected this argument because the deliverability criterion merely requires a showing that power is "capable of being physically delivered." (Order ¶ 48.) And there is no question that facilities located in MISO are capable of physically delivering power to PJM, which is then capable of physically delivering power into Ohio. Pursuant to a Joint Operating Agreement, MISO and PJM "agreed to the coordination and exchange of data and information . . . to enhance system reliability and efficient market operations as systems exist and are

contemplated as of the Effective Dates." (Joint Ex. 1A at Appendix D.) Attached to the Joint Operating Agreement is the Interregional Coordination Process between MISO and PJM, which "set[s] up procedures" related to the "interregional transmission" of power between the RTOs, including procedures for determining pricing for the transmission of power across the RTOs. (Joint Ex. 1A at Appendix D, Attachment 3 at 1.) The Interregional Coordination Process thus contemplates the transmission of power between MISO and PJM and confirms that power is "capable of being physically delivered" from MISO to PJM (and vice versa).

Relatedly, joint witness John Chiles testified that MISO is capable of delivering power to PJM, and that the DFAX studies identify real transmission paths between MISO and PJM. He explained that the transmission of electricity "is not impacted by state boundaries or regional transmission organization (RTO) boundaries." (Joint Ex. 2 at 4:8-10.) Certain transmission system facilities known as "tie lines" connect MISO and PJM and "facilitate the flow of electricity between the RTOs." (*Id.* at 4:20-23.) Indeed, "[t]he PJM DFAX studies identify several tie lines between Ohio and the rest of the Eastern Interconnection, including MISO." (*Id.* at 5:3-4.) For this reason, Mr. Chiles concluded that "[t]he data produced by these DFAX studies reflects that each of the Avangrid Facilities passes the *Koda* test, and therefore generates electricity that is deliverable into Ohio." (*Id.* at 13:19-21.) In fact, Carbon Solutions concedes that the "'physical' delivery of electricity cannot be observed in real time." (Appellant Brief at 6.) By Carbon Solutions' own admission, electricity travels along the "path of least resistance" and the path of least resistance is "indifferent to state borders," except in Hawaii, Alaska, and Texas. (*Id.*)

Second, the Commission "relied heavily on the persuasive testimony of Staff witnesses" to conclude that the DFAX studies do not presume deliverability, and the Commission's

credibility determination is entitled to deference. (Second Entry on Rehearing at ¶ 27.) Staff witness Jason Cross testified that the DFAX studies in this case "display[] the percentage of impact the facility would have on transmission lines on the electric grid" and that "the facilities applying for certificates in these cases meet the Commission approved deliverability standard." (Staff Ex. 1 at 2:20-3:2, 3:16-18.) On the other hand, Staff witness Kristin Clingan explained that Carbon Solutions "objects to Staff's recommendation(s) in the current case(s) because the facilities are located in the area of regional transmission operator (RTO) MISO" and "CSG alleges that MISO contributed no information in the current case(s) and that PJM's study is based purely on hypothetical power flows into PJM." (Staff Ex. 2 at 6:1-7.) When asked whether Staff agreed with this objection, Ms. Clingan said "[n]o." (*Id.* at 6:8-9.) To be sure, in *Koda*, both MISO and PJM provided DFAX studies because "[b]oth RTOs manag[ed] transmission in Ohio at that time." (*Id.* at 6:15-16.) However, "[s]ince 2012, all transmission in Ohio has been operated by PJM." (*Id.* at 6:18.) Moreover, Staff "underst[ood] that PJM has, or is able to obtain, all requisite information it needs to run power flow studies across RTOs (e.g., a source in MISO and a sink in PJM)."[5] (*Id.* at 7:1-3.)

The Commission found the testimony of Ms. Clingan and Mr. Cross to be persuasive. (Second Entry on Rehearing at ¶ 27.) Staff's testimony on this matter is particularly persuasive because Staff has applied the *Koda* methodology to twenty-eight applications for certification of facilities located in states noncontiguous to Ohio. (Staff Ex. 2 at 5:9-12.) Staff recommended the approval of sixteen of these applications and the denial of the remaining twelve. (*Id.*) This Court should defer to the Commission on the credibility of Ms. Clingan's and Mr. Cross' testimony.

[5] A "sink" is a "a place where energy from several sources is collected or drained away." *IEEE Standard Dictionary of Electrical and Electronics Terms* (3d Ed. 1984).

Harris Design Servs., 2018-Ohio-2395, at ¶ 13 (the Ohio Supreme Court "defer[s] to the PUCO's credibility determinations in its role as finder of fact").

Third, Carbon Solutions' own witness acknowledged that the DFAX studies do not presume delivery of energy from the Facilities to Ohio, and the Commission relied on this testimony to conclude that the DFAX studies do not presume deliverability:

> Q: Is it your testimony that the DFAX studies presuppose a certain distribution factor impact on Ohio transmission lines?
>
> A: No.

(Tr. Vol. II at 228:4-7; Second Entry on Rehearing at ¶ 27.) It is undisputed that the DFAX studies demonstrate a transmission path from the Facilities (i.e., "the source of the generation") to "the end point of Ohio." (Tr. Vol. II at 227:9-19.) In other words, the DFAX studies demonstrate deliverability.

All said, the record contains abundant evidence demonstrating that each of the Facilities meets the physical deliverability criterion. Staff concluded that each of the Facilities met the physical deliverability standard, multiple witnesses testified that the DFAX studies demonstrate the deliverability of energy from the Facilities to Ohio, and the Applicants and Blue Delta provided a third-party report that concludes that the DFAX studies demonstrate that each of the Facilities meets the deliverability standard. And importantly, the DFAX values in this case are uncontested and the Commission relied on these values to conclude that the Facilities met the deliverability criterion.

Carbon Solutions' reliance on one sentence from the cover letters to the DFAX studies fails because R.C. 4928.64 merely requires a showing that the qualifying renewable energy resources "can be shown to be deliverable into this state" and there is no question that MISO is

capable of delivering power from the Applicants' facilities to PJM.[6] The Commission relied on persuasive testimony from Staff witnesses regarding the use of the DFAX studies in the deliverability analysis. And finally, Carbon Solutions' own witness admitted that the DFAX studies do not presume deliverability from the Facilities to Ohio.

The Commission appropriately concluded that each Facility meets the deliverability criterion under R.C. 4928.64 and *Koda*. Accordingly, this Court should overrule Carbon Solutions' first proposition of law.

Proposition of Law No. 2: The statute and rules governing the proceeding were followed and Carbon Solutions did not suffer undue prejudice.

For its second proposition of law, Carbon Solutions insists that the Commission committed an array of evidentiary and procedural errors. Carbon Solutions waived many of these challenges by either failing to raise it in its Application for Rehearing or failing to object to the purported error during hearing. In any event, as discussed in detail below, Carbon Solutions' challenges fail on the merits and the Commission should overrule Carbon Solutions' second proposition of law.

A. Carbon Solutions' failure to raise the burden of proof challenge in its Application for Rehearing and Notice of Appeal deprives the Court of jurisdiction to consider this issue in the first instance; Notwithstanding this waiver, the Commission did not shift the burden of proof to Carbon Solutions.

Carbon Solutions begins by suggesting that the Commission shifted the burden of proof from the Applicants to Carbon Solutions. As a threshold matter, Carbon Solutions failed to raise this argument in its Application for Rehearing or its Notice of Appeal. For this reason alone,

[6] Ohio Adm.Code 4901:1-40-01(F) defines "deliverable into this state" to include electricity originating from other locations, pending a demonstration that the electricity is physically deliverable to the state.

Carbon Solutions has waived this argument on appeal and this Court should not consider this claim. *Ohio Partners. for Affordable Energy v. Pub. Util. Comm.*, 2007-Ohio-4790, ¶ 17 ("The failure to raise the argument at rehearing and in its notice of appeal precludes this court from considering the argument.").

Carbon Solutions' contention that the Commission improperly shifted the burden of proof also fails on the merits. In support of this contention, Carbon Solutions claims that the Appealed Order "rationalizes ALJ procedural rulings in a way that clearly indicates that so far as the Commission is concerned, Staff's recommendations created a presumption of deliverability, and the burden was on CSG to rebut this presumption." (Citations omitted.) (Appellant Brief at 18.) Importantly, however, the Commission correctly noted that the burden of proof was on the Applicants, not Carbon Solutions, explaining that "[u]ltimately, the burden lies on an applicant to demonstrate satisfaction of the statutory criteria, including deliverability, and in these proceedings, Applicants produced the information necessary for Staff to determine deliverability." (Order ¶ 48.) And Carbon Solutions cites nothing in the Appealed Order that demonstrates that the Commission improperly shifted the burden of proof. Carbon Solutions merely contends that the Appealed Order "clearly indicates" that the Commission shifted the burden of proof to Carbon Solutions. This conclusory statement is insufficient to establish that the Commission erred.

The Court should reject Carbon Solutions' claim that the Commission improperly shifted the burden of proof because (1) Carbon Solutions waived this argument, (2) the Commission correctly stated that the burden of proof was on the Applicants, and (3) Carbon Solutions points to nothing in the Appealed Order that indicates that the Commission improperly shifted the burden of proof.

B. Carbon Solutions failed to demonstrate prejudice by the Applicants' production of corrected DFAX studies, which were used and not objected to by Carbon Solutions, at the hearing.

Next, Carbon Solutions maintains that the Applicants' production of incorrect DFAX constitutes reversible error.

On the contrary, the initial production of incorrect DFAX studies and later production of corrected DFAX studies did not prejudice Carbon Solutions, and therefore does not constitute reversible error. *See Buckeye Energy Brokers, Inc, v. Palmer Energy Co.*, 2014-Ohio-1532, ¶ 22 ("Case law is clear that an allegedly aggrieved party must show that it suffered prejudice from a commission order to warrant reversal."). As the Commission explained, "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." (Order ¶ 56.) And when the Applicants moved to admit the corrected versions of the DFAX studies, Carbon Solutions did not object. (Tr. Vol. III at 481.) Additionally, the copying error that caused the production of the incomplete DFAX studies "did not impact the arguments made by Carbon Solutions during the hearing or in its briefs" and "Staff had access to the correct studies in its review of the applications." (Order ¶ 56.) Finally, Carbon Solutions' Appellant Brief makes no attempt to demonstrate prejudice from the production of the incomplete DFAX studies, particularly when Carbon Solutions did not object to the admission of the corrected DFAX studies.

For all these reasons, the Commission correctly concluded that Carbon Solutions did not suffer prejudice due to the Applicants' initial production of incorrect DFAX studies and later production of corrected DFAX studies, which were used and admitted into the record without objection by Carbon Solutions.

C. The denial of Carbon Solutions' motion for subpoena duces tecum with no memorandum providing any grounds or basis was proper and did not violate Carbon Solutions' statutory rights.

Carbon Solutions also asserts that the Commission committed reversible error by denying its motion for subpoena duces tecum compelling the attendance of a representative of PJM. Carbon Solutions ostensibly contends that the denial of the motion for subpoena deprived it of the right "to be heard" and "to have process to enforce the attendance of witnesses" under R.C. 4905.26. (Appellee's App. at 5.) To the contrary, the Commission acted within its authority by denying the motion for subpoena for failure to comply with the Commission's rules.

The Commission denied the motion for subpoena duces tecum, and declined to sign the subpoena, because it "agree[d] completely with the attorney examiner's rationale provide[d] at the hearing," including the attorney examiners' finding that "Carbon Solutions failed to either provide any demonstration warranting the presence of an out-of-state non-party witness or attempt to show that the Commission has the authority to issue an enforceable subpoena to compel an out-of-state non-party witness to appear in person at hearing before the Commission." (Order ¶ 58.) The attorney examiners also found that Carbon Solutions failed to provide a memorandum in support of the motion for subpoena. (Tr. Vol. I at 10.)

The Commission did not err by finding that Carbon Solutions' motion for subpoena was improper pursuant to Ohio Adm.Code 4901-1-12(A), which provides that "all motions . . . shall be in writing and shall be accompanied by a memorandum in support" and "[t]he memorandum in support shall contain a brief statement of the grounds for the motion and citations of any authorities relied upon." (Appellee's App. at 6.) Carbon Solutions' motion for subpoena was not accompanied by a memorandum in support. Nor did the motion for subpoena contain a "brief statement of the grounds for the motion." The only basis Carbon Solutions identified for compelling a nonparty, out-of-state witness to appear at hearing was the unsupported contention

that the witness was "believed to be knowledgeable of the DFAX studies cited in Staff testimony and filed in this proceeding." (Motion For Subpoena Duces Tecum at 2.) And Carbon Solutions cited no authorities in support of the notion that the Commission could issue the subpoena to compel attendance of a nonparty, out-of-state witness. On appeal, Carbon Solutions claims for the first time that the motion for subpoena may have been enforceable pursuant to R.C. 2319.09, but this argument was not raised in the motion itself or Carbon Solutions' Application for Rehearing and should not be considered by this Court.

The Commission certainly had the discretion to deny Carbon Solutions' motion for subpoena for violating Ohio Adm.Code 4901-1-12(A). Indeed, "R.C. 4901.13 provides that the 'commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all . . . hearings relating to parties before it.'" *Weiss v. Pub. Util. Comm.*, 90 Ohio St. 3d 15, 19 (2000). R.C. 4901.13 gives the Commission broad discretion in the conduct of its hearings. *Duff v. Pub. Util. Comm*., 56 Ohio St. 2d 367, 379 (1978). "It is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." (Footnote omitted.) *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 560 (1982). The Commission simply exercised its considerable discretion under R.C. 4901.13 to deny Carbon Solutions' motion for subpoena duces tecum. (Appellee's App. at 11.)

Rather than addressing the attorney examiners' stated rationale for denying its motion for subpoena, Carbon Solutions focuses on the fact that the Commission deemed PJM's testimony unnecessary because "Staff has routinely and consistently relied upon DFAX studies performed by PJM as part of the process in assessing deliverability." (Order ¶ 57). And because "the

Commission note[d] that it would have been permissible to take administrative notice of the DFAX studies utilized by Staff in its deliverability analysis." (Order ¶ 59.)

Again, the Commission had the discretion under R.C. 4901.13 to decide how to "manage and expedite the orderly flow of its business" and "avoid undue delay and eliminate unnecessary duplication of effort." *Toledo Coalition for Safe Energy* at 560. The Commission merely exercised this discretion to determine that the testimony of a representative of PJM was unnecessary and duplicative, particularly when Carbon Solutions' motion for subpoena made no attempt to demonstrate that this testimony was necessary.

Regardless, Carbon Solutions' statutory rights were not violated here. The Commission simply denied its motion for subpoena for failure to comply with Ohio Adm.Code 4901-1-12(A). The mere fact that R.C. 4905.26 provides a right "to be heard" and "to have process to enforce the attendance of witnesses" does not excuse a party from adhering to Ohio Adm.Code 4901-1-12(A) or deprive the Commission of its broad discretion to deny a motion for violating Ohio Adm.Code 4901-1-12(A). Carbon Solutions' challenge to the denial of its motion for subpoena duces tecum is without merit and should be rejected.

D. The unobjected to DFAX studies do not constitute inadmissible hearsay.

Finally, Carbon Solutions contends that the admission of the DFAX studies was erroneous because the DFAX studies purportedly constitute inadmissible hearsay.

Although Carbon Solutions argued that the DFAX studies constitute hearsay when the studies were first identified, Carbon Solutions ultimately did not object to the admission of the DFAX studies when the Applicants' moved to admit them into evidence. (Tr. Vol. III at 481.) In fact, when the attorney examiners asked Carbon Solutions whether it was "objecting to the admission of [the DFAX studies]," Carbon Solutions said "[n]o." (*Id.* at 481:18-20.) Thus, the

Commission correctly found that Carbon Solutions waived its hearsay challenge by failing to object to the admission of the DFAX studies. *See Plain Local Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 2011-Ohio-3362, ¶ 20 (the failure to advance a hearsay objection disposed of a hearsay challenge on appeal from administrative decision, absent a showing of plain error). Nor does the admission of the DFAX studies constitute plain error because the DFAX studies arguably constitute business records excepted from the hearsay prohibition under Ohio Evid.R. 803(6). (Appellee's App. at 12.)

Even if Carbon Solutions had preserved its hearsay challenge, its hearsay challenge would fail on the merits because the Commission has broad discretion over the admission of evidence and "is not stringently confined by the Rules of Evidence." *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Utilities Comm.*, 2 Ohio St. 3d 62, 68 (1982). And this Court "has consistently refused to substitute its judgment for that of the PUCO on evidentiary matters." *Payphone Assn. v. Pub. Util. Comm.*, 2006-Ohio-2988, ¶ 1.

In sum, Carbon Solutions failed to preserve its hearsay challenge, and, in any event, its hearsay challenge fails on the merits.

CONCLUSION

The record contains sufficient probative evidence to support the Commission's factual finding that each of the Facilities meet the deliverability criterion, including (1) the DFAX studies, (2) Staff's finding that the DFAX studies demonstrate deliverability from the Facilities to Ohio, (3) a third-party report concluding that the DFAX studies demonstrate deliverability from the Facilities to Ohio, (4) expert testimony explaining that the DFAX studies demonstrate deliverability from the Facilities to Ohio, (5) the Joint Operating Agreement between MISO and PJM, (6) the testimony of joint witness John Chiles confirming that MISO is capable of

delivering power to PJM, (7) the testimony of Staff witnesses Kristin Clingan and Jason Cross regarding Staff's use of the DFAX studies, and (8) the testimony of Carbon Solutions' own witness conceding that the DFAX studies do not presume deliverability from the Facilities to Ohio. And each of Carbon Solutions' evidentiary and procedural challenges fail because Carbon Solutions failed to comply with a procedural rule in motion practice and made no objection as to the admission of certain evidence, and the Commission acted within its broad discretion in resolving these matters. The judgment of the Commission should be affirmed in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Amended Merit Brief,** submitted on Behalf of Appellee, Public Utilities Commission of Ohio, was served by electronic mail this 26th day of November 2024, to the following:

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APPENDIX

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Section 4928.64 | Electric distribution utility to provide electricity from qualifying renewable energy resources.
Ohio Revised Code/Title 49 Public Utilities/Chapter 4928 Competitive Retail Electric Service

Effective: October 22, 2019Latest Legislation:House Bill 6 - 133rd General Assembly

(A)(1) As used in this section, "qualifying renewable energy resource" means a renewable energy resource, as defined in section 4928.01 of the Revised Code that:

(a) Has a placed-in-service date on or after January 1, 1998;

(b) Is any run-of-the-river hydroelectric facility that has an in-service date on or after January 1, 1980;

(c) Is a small hydroelectric facility;

(d) Is created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or

(e) Is a mercantile customer-sited renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division (A)(2)(c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(i) A resource that has the effect of improving the relationship between real and reactive power;

(ii) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(iii) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(iv) Electric generation equipment owned or controlled by a mercantile customer that uses a renewable energy resource.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such a qualifying renewable energy resource.

(B)(1) By the end of 2026, an electric distribution utility shall have provided from qualifying renewable energy resources, including, at its discretion, qualifying renewable energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall have provided a portion of its electricity supply for retail consumers in this state from qualifying renewable energy resources, including, at its discretion, qualifying renewable

energy resources obtained pursuant to an electricity supply contract. That portion shall equal eight and one-half per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage.

(2) Subject to section 4928.642 of the Revised Code, the portion required under division (B)(1) of this section shall be generated from renewable energy resources in accordance with the following benchmarks:

By end of year	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.010%
2011	1%	0.030%
2012	1.5%	0.060%
2013	2%	0.090%
2014	2.5%	0.12%
2015	2.5%	0.12%
2016	2.5%	0.12%
2017	3.5%	0.15%
2018	4.5%	0.18%
2019	5.5%	0.22%
2020	5.5%	0%
2021	6%	0%
2022	6.5%	0%
2023	7%	0%
2024	7.5%	0%
2025	8%	0%
2026	8.5%	0%

(3) The qualifying renewable energy resources implemented by the utility or company shall be met either:

(a) Through facilities located in this state; or

(b) With resources that can be shown to be deliverable into this state.

(C)(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for qualifying renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review

regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, as follows:

(i) Three hundred dollars for 2014, 2015, and 2016;

(ii) Two hundred fifty dollars for 2017 and 2018;

(iii) Two hundred dollars for 2019.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more. The cost of compliance shall be calculated as though any exemption from taxes and assessments had not been granted under section 5727.75 of the Revised Code.

(4)(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) Within ninety days after the filing of a request by an electric distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if

qualifying renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient qualifying renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of qualifying renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization, L.L.C., or its successor and the midcontinent independent system operator or its successor.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that qualifying renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the renewable energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from qualifying renewable energy resources. However, if the commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing all of the following:

(1) The compliance of electric distribution utilities and electric services companies with division (B) of this section;

(2) The average annual cost of renewable energy credits purchased by utilities and companies for the year covered in the report;

(3) Any strategy for utility and company compliance or for encouraging the use of qualifying renewable energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts.

The commission shall begin providing the information described in division (D)(2) of this section in each report submitted after September 10, 2012. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

Last updated May 26, 2022 at 5:46 PM

Section 4905.26 | Complaints as to service.
Ohio Revised Code/Title 49 Public Utilities/Chapter 4905 Public Utilities Commission - General Powers

Effective:March 23, 2015Latest Legislation:Senate Bill 378 - 130th General AssemblyPDF:Download Authenticated PDF
Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

This section does not apply to matters governed by Chapter 4913. of the Revised Code.

Chapter 4901:1-12 | Ohio Coal Research and Development Rate
Ohio Administrative Code/4901:1

Rule 4901:1-12-01 | Definitions.

Effective:June 15, 2023Promulgated Under:111.15PDF:Download Authenticated PDF
(A) "Commission" means the public utilities commission.

(B) "Gas company" and "natural gas company" have the meanings set forth in section 4905.03 of the Revised Code.

(C) "Ohio coal research and development cost adjustment" means a provision in a schedule of a gas or natural gas company that requires or allows the company to, without adherence to section 4909.18 or 4909.19 of the Revised Code, recover on a uniform basis per unit of sales Ohio coal research and development costs, determined to be reasonable by the commission.

(D) "Ohio coal research and development costs" has the same meaning as in section 4905.01 of the Revised Code.

(E) "Ohio coal research and development project" means any coal research and development, or any coal research and development facility with all or a part of the cost thereof being paid from a loan or grant from the Ohio coal development office or a loan guaranteed by the office under division (C) of section 1555.01 of the Revised Code.

(F) "Ohio coal research and development rate" means the updated semiannual research and development cost adjustment determined in accordance with rule 4901:1-12-06 of the Administrative Code.

(G) "Mcf" means a unit of gas equal to one thousand cubic feet.

(H) "Ccf" means a unit of gas equal to one hundred cubic feet.

(I) "Customer" means each billing account of a gas or natural gas company.

(J) "Total sales" means all sales of includable gas supplies to retail customers. "Total sales" does not include volumes transported to consumers under self-help arrangements.

(K) "Jurisdictional sales" means total sales, less sales to customers under municipal ordinances rates, except sales under municipal ordinances which have adopted, by reference or otherwise, rates established by the commission.

(L) "Reconciliation adjustment" means a positive or negative adjustment to future Ohio coal research and development recovery rates ordered by the commission pursuant to rule 4901:1-12-06 of the Administrative Code.

Last updated June 16, 2023 at 9:08 AM

Supplemental Information
Authorized By: 4905.304

Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 11/17/2016

Rule 4901:1-12-02 | Purpose.

Effective:November 17, 2016Promulgated Under:111.15PDF:Download Authenticated PDF
(A) The purpose of this chapter is to:

(1) Establish a uniform Ohio coal research and development cost recovery clause to be included in the schedules of gas and natural gas companies subject to the jurisdiction of the commission.

(2) Establish an Ohio coal research and development cost recovery process, which is designed to separate the cost of Ohio coal research and development projects from all other costs incurred by gas or natural gas companies.

(3) Provide for each gas or natural gas company's recovery of the cost of its includable Ohio coal research and development expenditures from its customers by means of the semiannual updated Ohio coal research and development rate and other provisions of this chapter.

(B) The provisions of this chapter also:

(1) Establish investigative procedures and proceedings, including periodic reports, audits, and hearings to examine the reasonableness and the arithmetic and accounting accuracies of the Ohio coal research and development costs reflected in each gas or natural gas company's cost recovery rate; and

(2) Review each gas or natural gas company's policies to the extent that those policies affect the Ohio coal research and development projects and the recovery of costs associated therewith.

Last updated November 10, 2022 at 11:59 AM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 5/5/1988

Rule 4901:1-12-03 | Scope.

Effective:June 15, 2023Promulgated Under:111.15PDF:Download Authenticated PDF
(A) Once the Ohio coal development office approves a coal research and development project for the purpose of section 4905.304 of the Revised Code, the director of the coal development office is to submit to the commission a report recommending that the commission allow the recovery of costs associated with the facility or project including the reasons for the recommendation. Such a

report shall include the total cost of the project and the part of the costs thereof being paid from a loan, loan guarantee, or grant.

(B) Once the report has been received by the commission and the recommendation by the director has been accepted by the commission, the gas or natural gas company may apply for the recovery of reasonable costs associated with the project and incurred since the approval by the coal development office less any expenditures of grant moneys, to be recovered under section 4905.304 of the Revised Code.

Last updated June 16, 2023 at 9:08 AM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 11/17/2016

Rule 4901:1-12-04 | Applicability.

Effective:June 15, 2023Promulgated Under:111.15PDF:Download Authenticated PDF
(A) The provisions of this chapter shall apply to any gas or natural gas company subject to the jurisdiction of the commission, with respect to the establishment or approval by the commission of a uniform rate or provision pursuant to section 4905.304 of the Revised Code, and as provided under paragraph (A) of rule 4901:1-12-06 of the Administrative Code.

(B) The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

Last updated June 16, 2023 at 9:09 AM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 10/10/2011

Rule 4901:1-12-05 | Semiannual reports.

Effective:June 15, 2023Promulgated Under:111.15PDF:Download Authenticated PDF
(A) Semiannual reports.

Each gas or natural gas company subject to the provisions of this chapter shall submit semiannual Ohio coal research and development reports. The semiannual report shall include the data required by the Ohio coal research and development cost form to calculate the Ohio coal research and development rate as specified in paragraphs (B), (C), and (D) of rule 4901:1-12-06 of the Administrative Code.

Last updated June 16, 2023 at 9:09 AM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 10/10/2011

Rule 4901:1-12-06 | Ohio coal research and development rate.

Effective:November 17, 2016Promulgated Under:111.15PDF:Download Authenticated PDF
(A) The Ohio coal research and development component equals the costs to be recovered less the costs to be refunded.

(1) Costs to be recovered: Each gas or natural gas company for which Ohio coal research and development projects or facilities are recommended to and accepted by the commission pursuant to division (B)(7) of section 1551.33 of the Revised Code shall recover those reasonable incurred costs associated with projects for the reporting period, less any expenditures of grant moneys. The coal research and development costs to be included shall equal the reasonable coal research and development costs incurred. These costs include all reasonable costs incurred through the most recent month for which actual data is available at the time of filing the initial application allowed by paragraph (B) of rule 4901:1-12-03 of the Administrative Code and each subsequent semiannual report required by paragraph (B) of rule 4901:1-12-05 of the Administrative Code, which costs have not been included previously in the gas or natural gas company's Ohio coal research and development component as a cost to be recovered.

(2) Costs to be refunded: Each gas or natural gas company shall refund all rents, royalties, income or other profits received by the company as a result of the developments, discoveries, or inventions, including patents or copyrights, which result in whole or in part from coal research and development projects and/or facilities in proportion to the share of ratepayer financing to the project.

(B) Each gas or natural gas company shall calculate and apply to the Ohio coal research and development rate reconciliations to correct for under-or-over-recoveries of the Ohio coal research and development component due to differences in sales volumes expected and delivered during the billing period, as well as any adjustments ordered by the commission.

(C) The Ohio coal research and development rate equals the Ohio coal research and development component plus or minus any adjustments or reconciliations, divided by the total sales of the gas or natural gas company for the six monthly billing periods commencing on or after the date one year prior to the effective date of the filing.

(D) The Ohio coal research and development rate shall be calculated on a companywide basis, and shall be expressed on a dollars and cents per Mcf basis.

Last updated November 10, 2022 at 11:59 AM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 5/5/1988

Rule 4901:1-12-07 | Customer billing.

Effective:October 10, 2011Promulgated Under:111.15PDF:Download Authenticated PDF
(A) Unless otherwise ordered by the commission, the semiannual updated Ohio coal research and development rate filed in accordance with rule 4901:1-12-05 of the Administrative Code shall become effective and shall be applied to customer bills for service rendered on or after the thirtieth day following the filing date established by the commission, or, at the option of the gas or natural gas company, on or after the first day of the month following the thirtieth day after the filing date established by the commission. The commission may at any time order a reconciliation adjustment as a result of errors or erroneous reporting.

(B) Each gas or natural gas company shall indicate on each customer bill:

(1) The Ohio coal research and development rate expressed in dollars and cents per Mcf or Ccf.

(2) The total charge attributable to the Ohio coal research and development rate expressed in dollars and cents.

Last updated November 10, 2022 at 12:00 PM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 5/5/1988

Rule 4901:1-12-08 | Audits and hearings.

Effective:June 15, 2023Promulgated Under:111.15PDF:Download Authenticated PDF
(A) The commission shall examine the Ohio coal research and development costs incurred by the gas or natural gas company once every six months in proceedings limited to that purpose. The company must file with the commission all of the information filed with the coal development office, including the semiannual project progress reports. All costs incurred on the project during the period to be considered are to be itemized in accordance with the uniform system of accounts. These costs shall delineate total costs, costs/expenditures of grant moneys, and costs requested to be recovered. This information shall be submitted concurrently with the semiannual report required by paragraph (B) of rule 4901:1-12-05 of the Administrative Code.

(B) The commission may hold a hearing to examine the report and recommendations submitted by the director of the Ohio coal development office, all facts, data, and other information pertinent to the coal research and development costs.

(C) The commission shall conduct or cause to be conducted periodic audits of each gas or natural gas company subject to the provisions of this chapter.

Last updated June 16, 2023 at 9:09 AM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 11/17/2016

Rule 4901:1-12-09 | Tariffs.

Effective:November 17, 2016Promulgated Under:111.15PDF:Download Authenticated PDF
Each gas or natural gas company desiring to avail itself of the provisions of this chapter shall file tariffs with the commission, which incorporate this rule in its entirety.

Last updated November 10, 2022 at 12:00 PM

Supplemental Information
Authorized By: 4905.304
Amplifies: 1551.33, 1555.01, 4905.01, 4905.304
Five Year Review Date: 9/16/2026
Prior Effective Dates: 5/5/1988

Section 4901.13 | Publication of rules governing proceedings.

Ohio Revised Code/Title 49 Public Utilities/Chapter 4901 Public Utilities Commission - Organization

Effective:October 1, 1953Latest Legislation:House Bill 1 - 100th General Assembly
The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public.

Available Versions of this Section
October 1, 1953 – House Bill 1 - 100th General Assembly [View October 1, 1953 Version]

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6)

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly

made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record

Testimony—or a certification under Evid.R. 901(B)(10)—that a diligent search failed to disclose a public record or statement if:

(a) The testimony or certification is admitted to prove that:

(i) The record or statement does not exist; or

(ii) A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(b) In a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

(11) Records of religious organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property

A statement contained in a document purporting to establish or affect an interest in

property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents

Statements in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) Market reports, commercial publications

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or otherscience or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history

Reputation among members of the declarant’s family by blood, adoption, or marriage or among the declarant’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant’s personal or family history.

(20) Reputation concerning boundaries or general history

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character

Reputation of a person's character among the person’s associates or in the community.

(22) Judgment of previous conviction

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Effective Date: July 1, 1980

Amended: July 1, 2006; July 1, 2007; July 1, 2016; July 1, 2022