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BEFORE
THE OHIO POWER SITING BOARD

In the Matter of an Application by American Municipal Power-Ohio, Inc. for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Station in Meigs County, Ohio.	:	Case No. 06-1358-EL-BGN

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE OHIO POWER SITING BOARD

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INTRODUCTION

This reply brief is submitted on behalf of the Staff of the Ohio Power Siting Board (Staff). The Staff will narrowly address certain matters raised in the initial post-hearing briefs and will not reargue its entire case here. The Staff reaffirms the arguments and recommendations made in its initial post-hearing brief.

ARGUMENT

The governing law is R.C. 4906.10. The Board must evaluate the evidence of record, that includes AMP-O's application, the Staff Report of Investigation, and all evidence adduced during the hearing process to determine if each statutory criterion is met. As indicated in its initial brief, Staff believes that there is sufficient evidence to enable the Board to make each required factual finding.

At the heart of this case is R.C 4906.10 (A)(2) which requires that the Board find the nature of the probable environmental impact of the proposed facility and R.C.

4906.10(A)(3) which requires the Board to find that the proposed facility represents the minimum adverse environmental impact given available technology and the nature and economics of alternatives. Does the record, including the Staff Report, identify probable environmental impacts of the project? Yes, it does. Did AMP-O consider other generating technologies for its base-load needs? The record shows it did and why it settled upon Powerspan ECO-SO_2. Did AMP-O explain why its technology choice was superior to others to meet *its members' needs*? Yes. Does the record reflect that AMP-O's existing energy portfolio is diversified and includes environmentally-friendly wind, hydroelectric, and biomass-powered generation, as well as aggressive conservation and energy efficiency programs? It does. Finally, will adoption of numerous Staff conditions help minimize environmental and other impacts reasonably expected to occur from this project? The Staff certainly believes that the conditions will accomplish this end.

As it deliberates the merits of this case, the Board should keep these questions in mind as it applies R.C. 4906.10 in the context of existing law and regulations. As time passes and technology evolves, as it will, there will always be something "better" tomorrow, but the Staff submits that R.C. 4906.10 contemplates no such "wait and see" approach.

I. Board Jurisdiction

AMP-Ohio (AMP-O) devotes several pages of its brief to the issue of jurisdiction. There is no issue on this point. AMP-O has proposed to construct a "major utility facility" under R.C. 4906.01 and it submitted, and properly so, an application to the Board

under R.C. 4906.10 for authority to do so. Although "need" is amply demonstrated in the record, AMP-O is correct that the Board must make no finding under R.C. 4906.10(A)(1) in this case. With the enactment of S.B. 3 in 1999, applicants are no longer required to establish "need" as part of an application for authority to construct and operate a generating facility. The case law cited by AMP-O at pages 10-11 of its brief is, however, inapposite here because AMP-O is not itself a municipality. AMP-O is a nonprofit corporation and does not have any home rule rights or authority under Article XVIII of the Ohio constitution. Both cases cited by AMP-O involve an Ohio city that was directly exercising its home rule powers to operate a utility. Thus, the question of direct and substantial interference with home rule authority does not arise. The Board has the authority to review and decide all environmental, ecological, regional (grid), and social impacts associated with this project as outlined in R.C. 4906.10(A).

II. The Record Contains Sufficient Evidence to Enable the Board to Determine Whether the Criteria Set Forth in R.C. 4906.10(A)(2) and (3) Have Been Met.

A. The Citizen Groups ignore the evidence and misstate the applicable law.

This inquiry by the Board must be made in the context of existing law. Current law does not require the evaluation and determination of the specific impact of the proposed facility on climate change and global warming. Indeed, to do so would require a level of scientific precision that does not currently exist. There is no direct evidence in the record that the impacts of the proposed facility would "significantly exacerbate" cli-

mate change. The record includes evidence that both supports the fact that there will be CO_2 emissions as a result of this project, if certificated and built, and that also addresses the amount of those emissions if uncontrolled. It is patently absurd to argue that the Staff and AMP-O have ignored and not evaluated CO_2 emissions. The Staff Report of Investigation not only states that the facility will emit carbon dioxide but acknowledges that as proposed the CO_2 emissions will not be controlled, captured, and sequestered.[1] AMP-O has selected Powerspan ECO-SO_2 as its control technology to comply with current air emissions requirements. AMP-O has indicated that this technology can be easily retrofitted to meet future CO_2 emission requirements when, and if, they are adopted. Indeed, the Staff has specifically recommended that if the Board issues a certificate that it require AMP-O to file a separate application before the Board in the event that AMP-O decides to pursue carbon capture and storage for the facility.[2] AMP-O bears the risk of any such change in the law and, to state the obvious, any authorization by the Board to construct the project in no way relieves AMP-O from complying with future emissions standards. The record in this case amply establishes the nature of the probable environmental impact of the proposed facility, including the uncontrolled CO_2 emissions.

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1 See Staff Ex 1 at 30-31.

2 *Id.* at 59; Staff Ex. 2.

B. The Citizen Groups have misstated the law; CO_2 is not currently regulated by Ohio EPA.

While framing their argument about the claimed lack of consideration of environmental impacts around criteria 2 and 3, the Citizen Groups[3] largely ignore the requirement of R.C. 4906.10(A)(5), that specifically requires that in order to issue a certificate the Board must find that the proposed facility will comply with Ohio's air pollution statute R.C. Chapter 3704 and the rules adopted thereunder. Even worse, at pages 7-8 and footnote 2 of their brief, the Citizen Groups misstate Ohio law on the issue of whether CO_2 emissions are otherwise regulated. The Staff's statement at page 30 of the Staff Report, that CO_2 emissions are currently unregulated by Ohio EPA, remains a correct statement of Ohio law.

The Citizen Groups' reliance upon the U.S. Supreme Court's decision in *Massachusetts v Environmental Protection Agency*, 127 S. Ct. 1438 (2007) is misplaced. That case is readily distinguishable for a number of reasons and it involved the interpretation of federal EPA requirements for rulemaking for mobile sources, specifically motor vehicles, and not stationary sources such as AMP-O's proposed generating station. Unless and until federal EPA makes a finding of endangerment under 42 U.S.C. § 7521(a)(1), there is no basis upon which to regulate an air pollutant. In deference to the role of the EPA, the U.S. Supreme Court in *Massachusetts* specifically declined to reach the question of whether, on remand, U.S. EPA must make an endangerment finding.

[3] The "Citizen Groups" refer to the collaboration of the National Resources Reference Council, Sierra Club, and Ohio Environmental Council.

Turning to the issue of Ohio law, the Citizen Groups' footnote 2 misstates the law and refers to the wrong definitional rule. The definition of "regulated NSR pollutant" is critical to understanding what is currently regulated under Ohio law. Consistent with the Clean Air Act, Ohio's rules require that the owner or operator of a new major stationary source "shall apply BACT to the major stationary source *for each regulated NSR pollutant* that the major source would have the potential to emit in significant amounts."[4] The term "regulated NSR [New Source Review] pollutant" is defined, in turn, as:

> (2) For stationary sources located in an attainment area for a given regulated air pollutant:
>
> (a) Any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the administrator (e.g., VOCs are precursors for ozone);
>
> (b) Any pollutant that is subject to any standard promulgated under Section 111 of the Clean Air Act;
>
> (c) Any Class I or II substance subject to a standard promulgated under or established by Title VI of the Clean Air Act; or
>
> (d) Any pollutant that otherwise is subject to regulation under the Clean Air Act. . . .
>
> Ohio Admin. Code § 3745-31-01(FFFFF).

Thus, the pollutant has to have already *been subjected to regulation* by U.S. EPA under the Clean Air Act in one of four specific ways set out in the definition. The pollutants in the first three categories – subparagraphs (a), (b), and (c) – are a specifically identified group of pollutants that are regulated under the Clean Air Act, and this group does

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[4] Ohio Admin. Code § 3745-31-15(C) (emphasis added).

not include CO_2. Ohio EPA has consistently interpreted "subject to regulation under the Clean Air Act" to mean that the pollutant *is actually regulated* under the federal Act, and not simply that the pollutant *could* be regulated under the Act[5]. Carbon dioxide has not been subjected to regulation and the Citizen Groups presented no evidence to support any claim that CO_2 has been subjected to regulation by U.S. EPA under the Act in any of the enumerated ways. Carbon dioxide is not a regulated NSR pollutant. Thus, there is no obligation under the OEPA Permit to Install rules, cited in footnote 2, to specifically consider CO_2 because they apply to a "regulated NSR pollutant."

C. R.C. 4906.10(A)(3) does not require choice of an alternative that has no significant environmental impacts.

The Citizen Groups' brief misinterprets the criteria of R.C. 4906.10(A)(2) and (3). The Board's statute is not the National Environmental Policy Act (NEPA). The term "significant" is of no import in considering what must be found and determined by the Board because it does not appear in either criterion 2 or 3 of R.C. 4906.10(A). The Citizen Groups simply attempt to engraft both "significant" environmental impacts language and consideration of "all reasonable alternatives in depth" language from NEPA and its interpretative case law into an Ohio statute that contains no such requirements[6].

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[5] This is consistent with an interpretation of the United States Court of Appeals for the District of Columbia. *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 n.60 (D.C. Cir. 1979).

[6] In *Center for Biological Diversity v Nation Highway Traffic Safety Administration*, 508 F.3d 508 (9th Cir. 2007) the failure to adequately consider greenhouse gas emissions and monetize the value of the carbon emissions in setting the final rule was not overturned because of NEPA. *Id.* at 514. Further, a review of *Stop the Pipeline v White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002), makes it clear that even under NEPA the construction of a 149-mile-long pipeline can be properly found to have no significant environmental impact that even need be studied.

The Citizen Groups, in essence, urge the Board to replace R.C. 4906.10(A) with NEPA requirements.

Under 4906.10 (A)(3) the determination that the proposed facility represents the minimum adverse environmental impact is required to be made "considering the state of available technology and the nature and economics of the various alternatives". The Board should reject the approach advocated by the Citizen Groups and consider the evidence in the record in light of the plain language of the Ohio statute. The arguments advanced by the Citizen Groups improperly attempt to force an analytical framework that ignores the limitations imposed by R.C. 4906.10(A)(3). The mere fact that there is an alternative source of energy that might be less polluting than the one chosen by an applicant does not mean that is required to be evaluated or chosen. Nor does it mean that a technology is necessarily "available" either. AMP-O presented extensive evidence regarding its already diversified energy portfolio, and it explained why those alterative technologies, including IGCC, were inadequate to meet its members' significant *base-load* needs. The record further shows that IGCC is itself not yet a commercially proven control technology. The record reflects that alternative energy sources and measures that AMP-O presently participates in (*i.e.* hydroelectric, wind, biomass, energy efficiency measures and demand side management measures) neither individually or in the aggregate serve as adequate substitutes for the 1000 megawatts of base-load capacity that consulting firm R.W. Beck has identified AMP-O members will need in the next five years.[7]

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[7] *See, e.g.* Tr. II at 168-172, 201; Tr. V at 17-20.

For a host of reasons, including the highly capital intensive nature of such projects, low capacity factors, and lack of dispatchability, these alternative generation resources cannot be counted on as base-load supply, and are intended to supplement, not replace, the coal-fired generation proposed in this case.[8]

Consideration by AMP-O of the relative cost of alternative technologies and the track record of specific technologies to perform to meet the base-load need identified by AMP-O is consistent with the analytical methodology established by R.C. 4906.10(A)(3). AMP-O's witnesses explained the process used to weigh the ultimate alternative chosen. AMP-O's brief discusses at length its reasons for not choosing IGCC control technology. The record includes such explanations for each of the various technology alternatives touted by the Citizen Groups. The record also includes AMP-O's consideration of the cost of future CO_2 control as related to its choice of alternatives.[9] A number of "non-cost" considerations, such as reliability and dispatchability, were also evaluated by AMP-O.[10] Looking ahead, AMP-O considered that, although Powerspan ECO control technology does not presently have commercial carbon capture capability, it holds future promise to do so.[11] AMP-O witness Clark explained that AMP-O members' need for base load generation exists regardless of carbon dioxide economic costs and that delay will

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8 *See, e.g.* Rebuttal Test. (Non-confidential) of P. Meier at 5-6, 9; Rebuttal Test. of L. Marquis at 2-6.

9 Rebuttal Test. (Non-confidential) of I. Clark. More specific cost data is delineated in Mr. Clark's confidential rebuttal testimony and is not discussed in this brief.

10 *Id.*

11 *See, e.g.* Tr. V at 22. AMP-O has been monitoring carbon capture and sequestration technology developments. AMP-O is a member of the Midwest Regional Carbon Sequestration Partnership and the Chicago Climate Exchange. Tr. II at 154.

only serve to increase those costs as well as price risks to AMP-O members associated with a regional power market that will have to absorb these costs as well.[12]

[12] Rebuttal Test. of L. Marquis at 5-6.

CONCLUSION

The Staff respectfully requests that the Ohio Power Siting Board adopt the arguments and recommendations raised by the Staff both here and in the Staff's initial brief. The Staff further requests that the Board adopt all recommendations in Staff Exhibit 2 as part of any certificate.

Respectfully submitted,

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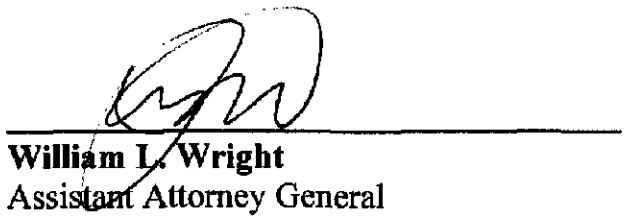
PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief, submitted on behalf of the Staff of the Ohio Power Siting Board, was served by regular U.S. mail, postage prepaid, hand-delivered, or delivered via electronic mail, upon the following parties of record, this 8th day of February, 2008.



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