FILE

BEFORE THE
OHIO POWER SITING BOARD

Application of American Municipal Power, Ohio, Inc. (AMP-Ohio) for a Certificate of Environmental Compatibility and Public Need For the American Municipal Power Generating Station in Meigs County, Ohio	)))))	Case No. 06-1358-EL-BGN

POST-HEARING REPLY BRIEF OF THE NATURAL RESOURCES DEFENSE COUNCIL, INC., OHIO ENVIRONMENTAL COUNCIL, AND SIERRA CLUB

Unable to demonstrate compliance with the basic requirements of the Power Siting Statute, American Municipal Power ("AMP") tries to avoid those requirements. AMP spends much of its initial post-hearing brief arguing that core provisions of the Statute do not apply to AMP, but that argument is not supported by the law. AMP also tries to attack the qualifications and knowledge of the Citizen Groups' experts, but the record shows that such attacks are unfounded. AMP points to non-binding suggestions about controlling CO2 emissions and reducing reliance on dirtier existing plants, and offers post hoc rationalizations for rejecting alternatives in an unsuccessful effort to demonstrate compliance with the Statute. What AMP has not done is show that the Statute's required evaluation of "probable environmental impacts" and determination that the AMP Coal Plant "represents the minimum adverse environmental impact" in light of alternatives have occurred here. As such, the Board must deny certification to the AMP Coal Plant.

I. AMP Is Required to Satisfy the Minimum Adverse Environmental Impacts and Alternatives Requirements of the Power Siting Statute.

Before AMP can build an expensive and highly polluting coal plant that will operate for the next 50 years, the Power Siting Statute requires that environmental impacts be evaluated and minimized. In particular, the Statute provides that the Board may grant certification only if it finds that the "probable environmental impacts" of the AMP Coal Plant have been evaluated, and determines that the Coal Plant "represents the minimum adverse environmental impact" in light of alternatives. O.R.C. § 4906.10(A)(2), (3).

Realizing that it has not satisfied these standards, AMP tries to avoid them by claiming that it is entitled to municipal home rule authority to shield it from thorough Board review, that the Statute is satisfied if AMP demonstrates compliance with other Ohio statutes, and that a thorough evaluation of impacts and alternatives would be too onerous. These arguments contradict the law and do not excuse AMP's failure to demonstrate compliance with the applicable standards of the Power Siting Statute.

A. AMP's Status Does Not Exempt It From the Power Siting Statute's Minimum Adverse Environmental Impact Standard.

AMP's first attempt to avoid the requirements of the Statute is to claim that municipal home rule authority shields it from anything more than a cursory review by the Board. In particular, AMP contends that the Board cannot apply the Statute's "minimum adverse impact" standard, O.R.C. § 4906.10(A)(3), and, instead, is limited to balancing the environmental impact of the proposed AMP Coal Plant against AMP's claimed need for the Plant. (AMP Initial Br. at 10-11). The case law, however, demonstrates that the State does have the authority to subject AMP to the minimum adverse impacts standard of O.R.C. § 4906.10(A)(3) and the other requirements of the Power Siting Statute.

Most importantly, AMP has provided no support for its contention that it is entitled to municipal home rule authority. The cases cited by AMP (AMP Br. at 11-12) involve actual municipalities that were exercising their authority to operate a public utility. AMP, however, is a non-profit organization that has municipal members in Ohio and four other states. As such, there is no evidence that AMP has home rule authority that would shield it from any of the requirements of the Statute.

Even if AMP did have home rule authority, the Statute's required evaluation and minimization of impacts in light of alternatives fits squarely within the State's well-recognized authority to subject a municipal utility to regulations designed to protect the environment, public health and welfare. *Bd. of County Commissioners of Delaware County v. City of Columbus*, 26 Ohio St. 3d 179, 180-81 (1986); *City of Columbus v. Teater*, 53 Ohio St. 2d 253, 257-61 (1978). For example, in *Teater*, the Court held that despite municipal home rule authority, the State could subject the City of Columbus' proposal to build a water reservoir to the requirements of a state law designed to protect wild and scenic rivers. *Id.* at 261. The Court found that this authority arose from both the State's general police power and Article 36 of the Ohio Constitution, which authorizes the State to "provide for the conservation of the natural resources of the state." *Id.* at 261. Article 36 provides the state with "broad and comprehensive . . . blanket power" to take steps to protect the environment. *Snyder v. Bd. of Park Comm'r of Cleveland Metropolitan Park Dist.*, 125 Ohio St. 336, 340 (1932). This "blanket power" plainly authorizes the State to condition Board certification of the AMP Coal Plant on the evaluation of the "probable environmental impacts" of the Coal Plant, O.R.C. § 4906.10(A)(2) and a determination that the Plant "represents the minimum adverse environmental impact" in light of alternatives. O.R.C. § 4906.10(A)(3).

Similarly, the Court in *Columbus v. Power Siting Commission*, 58 Ohio St. 2d 435 (1979), upheld the Board's authority over environmental matters. AMP incorrectly claims that *Columbus* somehow limits the Board's authority under O.R.C. § 4906.10 with respect to the determination that the Plant "represents the minimum adverse environmental impact" in light of alternatives. The Court in *Columbus*, however, put a municipal utility's findings regarding need and public convenience beyond the reach of the Board, but upheld the Board's authority over environmental matters. *Id.* at 440-41. While the Court referred to the Board weighing environmental impacts against the identified need and public convenience, *id.* at 441, nothing in *Columbus* suggests that this weighing conflicts with or eliminates the need for an evaluation and minimization of impacts under O.R.C. § 4906.10(A)(2) &(3).

In fact, Ohio case law further supports this conclusion. In considering a municipality's proposed water reservoir in *Teater*, the Court noted that the Board's weighing of impacts against need should involve an evaluation of the "statewide environmental significance" of the proposal and a determination of whether there are "reasonably alternative potential sources of water" for the municipality. *Teater*, 53 Ohio St. 2d at 261 n. 6. That is exactly the sort of analysis that the Power Siting Statute requires and that AMP failed to do here.

B. That AMP Might Obtain Other Permits For the AMP Coal Plant Does Not Demonstrate that AMP Has Satisfied the Power Siting Statute's Impacts and Alternatives Requirements.

AMP and the Staff next attempt to avoid the Power Siting Statute's environmental impact and alternatives requirements by suggesting that the Statute is satisfied if the Plant can comply with Ohio's other environmental laws before other agencies. (AMP Br. at 11, 23, 35-37; Staff

Br. at 7, 9). This argument is critically flawed because it conflicts with statute, case law, and the evidence in the administrative record.

This argument conflicts with the plain language of the Statute. In particular, the Board can grant certification only if it finds that the proposed facility complies with certain designated Ohio statutes, **and** determines the facility's probable environmental impact, **and** finds that the facility represents the minimum adverse environmental impact in light of alternatives. O.R.C. § 4906.10(A)(2), (3), and (5). The Statute, therefore, requires an independent evaluation of impacts and alternatives, in addition to compliance with other statutes. *See Kungys v. United States,* 485 U.S. 759, 778 (1988) ("A cardinal rule of statutory construction [is] that no provision should be construed to be entirely redundant.")

AMP's claims notwithstanding (AMP Br. at 11), the Court's holding in *Columbus* does not lead to a contrary result here. In *Columbus*, the Court relied on the lack of evidence in that case that Ohio's air, water, and solid waste statutes would not adequately protect the state's environmental interests in finding that the City of Columbus' proposed facility need not undergo further review under the Power Siting Statute. *Columbus*, 58 Ohio St. 2d at 441-42. That result, however, was due to a failure of proof by the state, not a legal finding that the environmental impacts and alternatives requirements of the Statute can be readily ignored. *Id.* at 441. In fact, the Court specifically noted that its holding was:

> not to be understood as a recommendation for appellee to ignore the statutes in issue. Disregard of these provisions will not obviate the inevitable confrontation of state environmental interests and municipal needs, a conflict which could have severe attendant costs if not resolved in early planning stages. Appellee must proceed at its own peril.

Id. at 441 n. 3.

In contrast to the situation in *Columbus*, here there is a plethora of evidence that the environmental interests recognized in the Power Siting Statute are not being adequately protected by other statutes. In particular, while CO2 emissions from the AMP Coal Plant would exacerbate global warming, AMP has not been required to evaluate the environmental impacts of those emissions, or to make any binding commitments to reduce them.[1] (Citizen Groups Initial Br. at 8-13). In addition, while there are numerous alternatives that AMP could use to meet its identified need with less environmental impact (*id.* at 18-28), AMP has not been required to evaluate or pursue those alternatives. Therefore, AMP's purported compliance with other Ohio environmental statutes does not excuse AMP's failure to evaluate the "probable environmental impacts" of the AMP Coal Plant or to demonstrate that the Coal Plant "represents the minimum adverse environmental impact" in light of alternatives. O.R.C. § 4906.10(A)(2), (3). Moreover, the record does not reflect an analysis by the Board or any other agency that the proposed Coal Plant will comply with all other environmental laws. Thus, AMP's argument that it might obtain other permits for the Coal Plant fails to demonstrate that AMP has satisfied the Power Siting Statute's impacts and alternatives requirements.

C. Limits on the Clean Air Act's Best Available Control Technology Analysis Do Not Demonstrate that AMP Has Satisfied the Statute's Impacts and Alternatives Requirements.

AMP next attempts to weaken the impacts and alternatives analysis required by O.R.C. § 4906.10(A)(3), by citing *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007), a decision regarding the limits of the Best Available Control Technology ("BACT") analysis required by the federal

[1] While the Clean Air Act and Ohio's air pollution control statute require a binding limit on CO2 emissions from the AMP Coal Plant (Citizen Groups Initial Br. at p. 7 n. 1), the Ohio EPA has not imposed such a limit and AMP contends that CO2 emissions are not regulated. As such, even if the Board could avoid evaluating the impacts of a pollutant that is regulated under another statute, it cannot do so where the agency implementing that statute refuses to regulate the pollutant and the applicant contends that it is not regulated.

Clean Air Act. (AMP Br. at 12-13). In *Sierra Club*, the Court upheld the Illinois EPA's decision not to require a coal-fired power plant which was located next to a mine, to import lower sulfur coal from elsewhere. The Illinois EPA had concluded that its policy against using a BACT analysis to "redefine a source" foreclosed the agency from requiring the plant to seek out a different source of coal.

Sierra Club offers no defense for AMP's failure to evaluate alternatives here. First, the Court in *Sierra Club* specifically noted that the BACT and "redefining the source" issues presented in that case had nothing to do with the evaluation of alternatives allowed under a separate part of the Clean Air Act. *Sierra Club*, 499 F.3d at 655. A BACT analysis focuses on what sort of steps (such as add-on control technology, cleaner fuels, and innovative fuel combustion techniques) can be used to reduce emissions from a proposed facility. 42 U.S.C. § 7479(3). An alternatives analysis, meanwhile, examines whether there are better options to the proposed facility. As such, even if *Sierra Club* were binding on the Board, that case does not foreclose the consideration of alternatives required by the Statute here.

Second, AMP's fear that the thorough evaluation of alternatives required by the Statute could be a never-ending "Sisyphean labor," *Sierra Club*, 499 F.3d at 655, is unfounded. The Statute identifies certain factors that should be used in evaluating alternatives – namely, achieving minimal environmental impact, given the technological availability, nature, and economics of alternatives – and the Board can put reasonable limits on the number, type, and variety of alternatives that must be evaluated. What the Board cannot do, however, is to find that a proper analysis of alternatives has occurred where, as here, the evidence shows that various alternatives would have fewer environmental impacts and that AMP's post hoc justifications for

rejecting or ignoring such alternatives are unsupported by the record. (Citizen Groups Initial Br. at 18-28).

Finally, it is important to note that the Environmental Appeals Board decision upheld in *Sierra Club* specifically relied on Illinois EPA's policy of requiring the consideration of IGCC as BACT in concluding that the agency was not applying the redefining the source policy in an overly broad manner. *In re Prairie State Generating Co.*, PSD Appeal 05-05, 13 E.A.D. __ , at 33-37 (E.A.B. Sept. 24, 2006). IGCC is, of course, one of the alternatives with fewer environmental impacts that AMP has improperly rejected in this proceeding. (Citizen Groups Br. at 24-27). As such, nothing in *Sierra Club* forecloses or weakens the Citizen Groups' showing that AMP has failed to demonstrate that the AMP Coal Plant represents the minimum adverse environmental impact in light of alternatives.

II. The Citizen Groups' Witnesses Are Knowledgeable and Well Qualified, and Their Testimony is Entitled to Substantial Weight.

In another attempt to excuse its failure to comply with the environmental impacts and alternatives requirements of the Power Siting Statute, AMP unsuccessfully attacks the qualifications and knowledge of the Citizen Groups' witnesses. In particular, AMP contends that Mr. Schlissel and Mr. Furman's testimony should be given little to no weight because those experts are purportedly unqualified or lack knowledge regarding specific facts about AMP and its members. The record, however, shows that both experts are fully qualified and knowledgeable about the topics upon which they were testifying and that, therefore, their testimony should be given substantial weight.

Mr. Schlissel's testimony in this proceeding focused on AMP's failure to engage in resource planning that evaluated a full range of alternatives and properly factored in cost risks

related to CO2 emissions and construction cost increases. The record leaves no doubt as to Mr. Schlissel's qualifications to provide such testimony. Mr. Schlissel has reviewed and helped prepare resource plans for at least 25 years, and his recommendations have been accepted by a number of state public utility commissions, including in Indiana, Florida, New Mexico, and Texas. (Tr. Vol. IV at p. 215 line 14 to p. 216 line 15). He also has 30 years of experience as a consultant on management, engineering, and economic matters relating to a wide variety of energy issues. (Citizen Groups Ex. 6 at DAS-1 pp. 1-2). This work has been for a wide variety of clients, including the U.S. Department of Justice, the Governor and Attorney General of New York, the New Mexico Public Regulation Commission, environmental groups, consumer advocates, General Electric, and publicly owned utilities. (Tr. Vol. IV at p. 216 line 18 to p. 217 line 8). Mr. Schlissel has also filed testimony, affidavits or comments in approximately 130 proceedings before boards, commissions, and courts. (Citizen Groups Ex. 6 at DAS-1 pp. 3-16). AMP's suggestion (AMP Br. at 15-16) that Mr. Schlissel lacks the expertise to testify regarding resource planning, alternatives, and costs in this proceeding is unfounded.

AMP's claim that Mr. Schlissel "knew very little about AMP-Ohio" (AMP Br. at 16) is also unsupported by the record. In reality, Mr. Schlissel testified that he knew, *inter alia*, that AMP: (1) is a non-profit, (2) has two partners in developing the AMP Coal Plant project, (3) currently owns a coal plant, hydro facilities, a small wind farm, and some combustion turbines, (4) purchases a fairly high amount of its power from the market, (5) has members in five states, (6) operates in two Regional Transmission Organizations (PJM and MISO), and that (7) a number of AMP's members own small coal-fired power plants, and (8) AMP's member Cleveland Public Power competes with First Energy. (Tr. Vol. III at pp. 59-72, p. 140 lines 11-18). As such, AMP's claim that Mr. Schlissel had "no idea" of basic facts regarding AMP (AMP

Br. at 16) is simply false. The record is clear that Mr. Schlissel is qualified and knowledgeable, and that his testimony should be given substantial weight.

AMP's challenge to Mr. Furman's expertise is also unavailing. Mr. Furman testified in this proceeding about the feasibility and cost of Integrated Gasification Combined Cycle ("IGCC") technology, and how the comparative environmental performance of an IGCC plant versus the AMP Coal Plant demonstrates that the AMP Coal Plant does not represent the "minimum adverse environmental impact."[2] Mr. Furman's expertise to provide such testimony is evident from his educational and employment background. Mr. Furman has a master's degree in engineering from MIT, where he did his thesis on coal gasification. (Citizen Groups Ex. 1 at p. 2 lines 10-15). Over his 30 year engineering career, Mr. Furman worked on a wide range of energy issues, including new energy technologies, and alternative fuels and pollution controls for power plants. (*Id.* at p. 1 lines 16-18, p. 2 line 24 to p. 3 line 7). This career included work for three major utility companies and as a consulting engineer for government agencies, process developers, and research organizations. (*Id.* at p. 1 lines 18-21 and p. 3 lines 5-7). Such background gives Mr. Furman the expertise to evaluate the cost, feasibility, and environmental performance of various types of power plant pollution controls, such as IGCC technology.

The record shows that Mr. Furman based his opinions on a number of sources of information, including studies from government, industry, and MIT (Citizen Groups Ex. 1 at 11,

[2] AMP's spurious contention that it is "troubling" that the Sierra Club and NRDC would sponsor an IGCC witness should be ignored by the Board. (AMP Br. at 27 n. 3). Contrary to AMP's claim (*id.*), Mr. Furman did not testify that an IGCC plant should be constructed. Instead, Mr. Furman's testimony demonstrated that IGCC technology can achieve greater pollution control levels than the proposed AMP Coal Plant and that, therefore, the AMP Coal Plant does not satisfy the "minimum adverse environmental impact" standard in the Power Siting Statute. Whether a specific IGCC plant or any other specific alternative should be constructed is a hypothetical that is not before the Board in this proceeding. In addition, the attempts by AMP's counsel to elicit testimony from Mr. Furman about the Citizen Groups' positions on such a hypothetical are plainly improper because the answers are beyond the scope of Mr. Furman's knowledge. Mr. Furman is neither an employee of any of the Citizen Groups nor is he involved in any of those groups' internal policy making decisions and, therefore, he is not qualified to testify as to the positions that any of the Citizen Groups might take with regard to hypothetical proposals that are not at issue in this proceeding. (Tr. Vol. I at p. 216 lines 9-17, p. 233 lines 3-7).

12, 17, 18, 24, 35, 38), his own review of recently issued permits and permit applications (id. at 21, 22; Tr. Vol. I at p. 149 lines 8-21), and other compilations of information regarding the performance of IGCC technology. While AMP criticizes Mr. Furman for relying on the work of others (AMP Br. at 30), that is exactly what experts are supposed to do – use their knowledge and experience to evaluate available information and reach conclusions. *See Kane v. Ford Motor Co.*, 477 N.E.2d 662, 663 (Ohio App. 1984) (noting that "it is perfectly proper for an expert to . . . draw upon knowledge gained from other experts in the field"). In addition, AMP complains that Mr. Furman did not know the membership, corporate, and tax status of AMP (AMP Br. at 30-31), but that information is not relevant to the cost, feasibility, and comparative environmental performance of IGCC technology. As such, Mr. Furman is qualified to testify in this proceeding and his testimony should be provided substantial weight.

III. AMP Has Not Demonstrated That the Environmental Impact and Analysis of Alternatives Requirements of the Power Siting Statute Have Been Satisfied Here.

As the Citizen Groups explained in their initial post-hearing brief, AMP has not evaluated the "probable environmental impacts" of the AMP Coal Plant or demonstrated that the Coal Plant represents the "minimum adverse environmental impact" in light of alternatives. In particular, AMP ignored the impacts of the Coal Plant's CO2 emissions, failed to engage in a proper analysis of alternatives, and improperly rejected less environmentally damaging ways to meet its identified energy needs.

In its initial post-hearing brief, AMP contends that its selection of Powerspan for SO2 control constitutes adequate "consideration" of the AMP Coal Plant's CO2 emissions. In addition, AMP asserts that its Coal Plant represents the minimum adverse environmental impact

because it would replace older, dirtier generation sources and because other alternatives purportedly cannot "feasibly" or "cost-effectively" replace the AMP Coal Plant. These arguments, however, do not demonstrate compliance with the requirements of the Power Siting Statute.

A. AMP Has Not Evaluated the Impacts of the AMP Coal Plant's CO2 Emissions or Factored Those Impacts Into a Consideration of Alternatives.

Despite the significant environmental impacts posed by CO2 emissions and global warming, AMP and Staff witnesses acknowledged that they did not evaluate the impacts of the AMP Coal Plant's more than 7.3 million tons of CO2 emissions per year, or factor those impacts into any evaluation of alternatives. (Citizen Groups Initial Br. at 5-13). As such, the Board cannot conclude that AMP has evaluated the "probable environmental impacts" of the AMP Coal Plant or determine that the Coal Plant "represents the minimum adverse environmental impact" in light of alternatives. O.R.C. § 4906.10(A)(2), (3).

AMP and the Staff contend that the failure to evaluate and minimize CO2 impacts is excused because AMP "considered" CO2 emissions in deciding to use Powerspan control technology for sulfur dioxide ("SO2"). (AMP Br. at 23, 33; Staff Br. at 6, 8, 13). AMP's selection of Powerspan for SO2 control, however, is not a binding commitment to capture or otherwise reduce CO2 emissions from the AMP Coal Plant. (Tr. Vol. II at p. 150 lines 9-14, p. 151 line 22 to p. 152 line 2). Instead, AMP has simply left open the possibility that it might later install additional Powerspan controls for which CO2 capture pilot testing is not expected to begin until later this year. (Tr. Vol. II at p. 188 line 9 to p. 189 line 16; AMP Ex. 1 at 22 Q; AMP Application at Sec. OAC 4906-13-01 p. 11; Staff Ex. 1 at 31). The Statute, however, requires an evaluation and binding commitment to actually reduce the impacts of CO2 emissions, not just a

suggestion that CO2 controls might someday be installed and used. As such, the Board cannot rely on AMP's "consideration" as a substitute for the evaluation and minimization of CO2 impacts required by the Power Siting Statute. O.R.C. § 4906.10(A)(2), (3)

AMP also asserts that it can avoid the evaluation and minimization of CO2 emissions because the Citizen Groups did not present or elicit any testimony that CO2 must be controlled under Ohio's air pollution control statute, O.R.C. § 3704 *et seq.* (AMP Br. at 36). The question of whether CO2 must be controlled, however, is a matter of law, not testimony by expert witnesses. For example, AMP's counsel stipulated at the hearing that Mr. Meyer was not "testifying as to the legal standards" and is not a lawyer. (Tr. Vol. II at p. 89 lines 3-5). Similarly, Mr. Furman's testimony regarding regulatory requirements for CO2 is irrelevant to whether AMP had to evaluate and minimize CO2 emissions because Mr. Furman was also not presented as a legal expert. (Tr. Vol. I at p. 97 lines 16-19).

In addition, AMP and the Staff's incorrect assertions that CO2 emissions are not regulated under O.R.C. § 3704 *et seq.* or otherwise (AMP Br. at 24, 35-37; Staff Br. at 2, 8-9) are irrelevant to whether the impacts of CO2 emissions must be evaluated and minimized under O.R.C. § 4906.10(A)(2), (3). *(Citizen Groups Initial Br. at 7-8). As already explained in* Section I.B above, the Power Siting Statute requires not just compliance with Ohio's air pollution control statute, but also an evaluation of environmental impacts and a determination that alternatives that would minimize those impacts have been selected. These standards cannot be met where, as here, the impacts of the AMP Coal Plant's CO2 emissions have not been evaluated or factored into the alternatives analysis.

B. The Existence of Older, Dirtier Coal Plants Does Not Demonstrate that the AMP Coal Plant Represents the Minimum Adverse Environmental Impact.

AMP and the Staff's contention that the AMP Coal Plant would allow AMP to move away from even more polluting existing sources of power (AMP Br. at 32, Staff Br. at 6, 9) does not help AMP's case here. The relevant question under the Statute is whether the AMP Coal Plant is the least environmentally damaging alternative, not simply whether it is cleaner than power sources built decades ago. The evidence shows that there are less environmentally damaging alternatives than the AMP Coal Plant that can be built today. The fact that there are old plants that are dirtier than the AMP Coal Plant does nothing to change this; the mere existence of more-polluting alternatives does not demonstrate that the AMP Coal Plant is the least-damaging alternative, or vitiate the need for an analysis of the Plant's impacts.

Second, there is no evidence that any of those older plants would actually shut down as a result of the AMP Coal Plant. AMP's only support for the assertion that the building of the AMP Coal Plant would lead to emission reductions is a chart presented by Mr. Meyer that is unreliable and misleading. (AMP Ex. 2 at Ex. RM-6; Tr. Vol. II at p. 77 line 20 to p. 83 line 22). That chart purports to show the reductions of sulfur dioxide ("SO2"), nitrogen oxide ("NOx") and particulate matter ("PM") emissions that would be achieved if the AMP Coal Plant replaced AMP's existing power sources. (*Id.*). None of the sources on the chart, however, are guaranteed to shut down if the AMP Coal Plant were to be built. In fact, the St. Mary's Plant has already shut down (Tr. Vol. II at p. 80 lines 6-11), AMP is not legally committed to shutting down its existing R.H. Gorsuch Station (Id. at p. 79 line 21 to p. 80 line 2),[3] and there is no basis for concluding that any of the market-based power that AMP currently relies on would shut down. Instead, the AMP Coal Plant would just add another source of SO2, NOx, PM, CO2, and other pollutants.

[3] AMP is considering repowering the Gorsuch facility as a bigger, 350 MW IGCC plant. (Tr. Vol. II at p. 114 line 4 to p. 115 line 1).

Finally, Mr. Meyer's chart overestimates the emissions from the market-based power by ignoring legally required emission reductions that will result from the federal Clean Air Interstate Rule and the settlement of Clean Air Act lawsuits against American Electric Power and Ohio Edison. While CAIR and the settlements would lead to emission reductions at many of the plants that supply the market-based power represented in the chart, Mr. Meyer inexplicably did not factor those reductions in. (Tr. Vol. II at p. 81 line 11 to p. 83 line 2). As a result, Mr. Meyer's chart and testimony simply do not provide a credible basis for concluding that the AMP Coal Plant would reduce emissions.

C. AMP Has Improperly Rejected Less Environmentally Damaging Alternatives

In an effort to demonstrate compliance with O.R.C. § 4906.10(A)(3), AMP primarily copies portions of its witnesses' testimony seeking to justify the rejection of various alternatives to the AMP Coal Plant. (AMP Br. at 20-22, 26-29). The Citizen Groups have already addressed in their initial brief the inadequacies in this testimony and AMP's consideration of alternatives. (Citizen Groups Initial Br. at 13-28). As explained therein, AMP did not evaluate alternatives in combination, factor environmental considerations in the evaluation, or adequately assess the risk of higher CO2 and construction costs. (*Id.* at 13-18). In addition, AMP failed to justify its rejection of a number of less environmentally damaging alternatives – including energy efficiency, wind, natural gas combined cycle, IGCC, and a more efficient pulverized coal plant – that alone or in combination could satisfy the power need identified by AMP. (*Id.* at 18-28).

Only two additional points raised in AMP's initial brief regarding alternatives need be addressed here. First, contrary to AMP's assertion (AMP Br. at 13-14), the Citizen Groups are not challenging here AMP's identified power need. Instead, as the record makes clear, the

Citizen Groups contend that there are alternative ways to satisfy that identified need that would have fewer environmental impacts than the AMP Coal Plant.

Second, AMP has ignored its obligation to evaluate all alternatives. Instead, AMP misconstrues Mr. Schlissel's testimony regarding alternatives and presents an unsubstantiated argument that AMP can avoid considering an alternative because it could not individually satisfy all of the identified need. As Mr. Schlissel explained and the law requires, however, alternatives should be considered in combination, not just individually. (Citizen Groups Initial Br. at 14). In addition, it is AMP's – not the Citizen Groups' – burden to evaluate such alternatives and justify any rejection of them. O.A.C. § 4906-7-09(F). AMP has not met that burden. (Citizen Groups Initial Br. at 13-28).

IV. Conclusion

The record is clear that AMP has not evaluated all of the "probable environmental impacts" of the AMP Coal Plant or demonstrated that the Coal Plant "represents the minimum adverse environmental impact" in light of alternatives. As such, the Board must deny certification.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 10 copies of the foregoing Post-Hearing Relpy Brief of the Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club has been filed with the Ohio Power Siting Board via Federal Express overnight delivery and served on the following via electronic mail at the e-mail addresses listed below on this 8th day of February, 2008.

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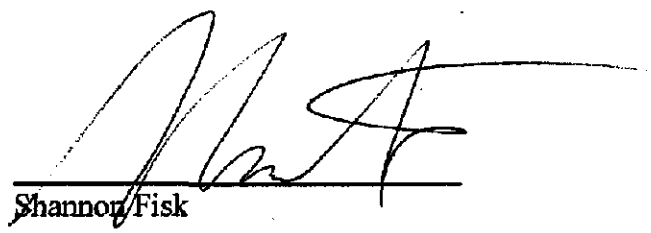

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