BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Middletown Coke Company, a Subsidiary of SunCoke Energy, Inc., for a Certificate of Environmental Compatibility and Public Need to Build a Cogeneration Facility.	)))))	Case No. 08-281-EL-BGN

ENTRY

The administrative law judge finds:

(1) On June 6, 2008, Middletown Coke Company (MCC), a subsidiary of SunCoke Energy, Inc., filed an application for a certificate of environmental compatibility and public need to build a cogeneration facility to be located on the site of a coke plant. MCC had been granted a waiver of the requirement for a fully developed alternative site analysis on May 28, 2008.

(2) By entry of September 25, 2008, the administrative law judge (ALJ) granted motions to intervene filed by F. Joseph Shiavone and the city of Monroe (Monroe). In the September 25, 2008, entry, the ALJ noted that both motions to intervene contained references to a coke plant adjacent to the cogeneration project at issue in this case. The ALJ indicated that the Board has no jurisdiction over any permits for construction of the coke plant and, therefore, issues related to the coke plant would not be considered in this proceeding.

(3) Rule 4906-7-15, Ohio Administrative Code (O.A.C.), provides that no party may take an interlocutory appeal from any ruling issued under Rule 4906-7-14, O.A.C., unless the appeal is certified to the Board by the ALJ. Rule 4906-7-15, O.A.C., also provides that the ALJ shall not certify such an appeal unless he finds that the appeal presents a new or novel question of law or policy and an immediate determination by the Board is needed to prevent the likelihood of undue prejudice or expense.

(4) On September 30, 2008, Monroe filed a motion to vacate the portion of the September 25, 2008, entry that found that issues related to the coke plant would not be considered during this proceeding. Monroe also moves the ALJ to vacate the May 28, 2008, entry, which granted a waiver of the requirements to fully

develop the analysis of the alternative site under Chapter 4906-13, O.A.C. In the alternative, Monroe requests that the ALJ certify these issues for interlocutory appeal.

(5) In its motion, Monroe claims that MCC's waiver application inaccurately represented that the coke plant and the cogeneration station are two separate projects, whereas, according to Monroe, the two projects are inseparable, intertwined parts of the same project whose environmental impact should be evaluated in this proceeding. Monroe argues that ignoring the coke plant would insulate the environmental impacts of the coke plant, which include air emissions, from the Board's review.

Monroe contends that the two projects are two components of a single installation. It first refers to MCC's application, which describes the coke plant and cogeneration station as "components of a heat recovery coke oven project." It also notes that both projects are financially, physically, and functionally codependent. According to Monroe, the coke plant produces excess heat that is converted into steam and is then utilized by the cogeneration facility to make electricity. Without the cogeneration unit, Monroe argues that the coke plant would need to build a cooling facility to convert the steam into wastewater. Monroe further argues that, because the coke plant conducts the first step of electricity production, the generation of heat and steam, it is part of the electric generating plant. Monroe also claims that, because it is all a single project, the entire project falls under the definition of a major utility facility as defined by Section 4906.01(B), Revised Code, and should therefore be subject to Board review. Alternatively, Monroe suggests that, even if the coke plant is not part of the electric generating plant, it is a facility associated with the electric generating plant and, therefore, is a part of the major utility facility as contemplated by Section 4906.01(B), Revised Code.

Monroe further argues that MCC has divided its project into two parts in order to insulate a component of the operation from Board regulation. Monroe claims that this practice is similar to a practice known as segmentation under the National Environmental Policy Act (NEPA), that is objectionable, where an overall project may not be divided into component parts in

an attempt to avoid environmental review. 40 Code of Federal Regulations 1506.25(a). According to Monroe, two projects are "connected" under NEPA if they do not have independent utility. Applying this test, Monroe maintains that the cogeneration station cannot function without the coke plant since it depends on the coke plant for heat and steam, that the coke plant will not be economically viable without the income from producing electricity, and that the cogeneration project is a necessary component of the coke plant's air emission controls and waste recycling system.

(6) On October 6, 2008, MCC filed a memorandum contra Monroe's motion. MCC argues that Monroe's claim that the coke plant will have no limits on its air emissions unless the Board exercises jurisdiction is untrue. MCC states that the Ohio Environmental Protection Agency (OEPA) has jurisdiction over air emissions and that MCC must be issued an air permit for the coke plant by the OEPA prior to operation. In addition, MCC argues that Monroe's claims related to the definition of a major utility facility are without merit. MCC contends that the definition of major utility facility requires the ability to generate 50 megawatts (MW), which the coke plant on its own cannot do; whereas the cogeneration facility, which is the subject of the application, is capable of generating more than 50 MW, making it subject to the Board's jurisdiction. MCC also points out that the coke plant is not subject to NEPA and there is no legal basis upon which to argue that the Ohio General Assembly wanted the Board to oversee or negate the exclusive air permitting scheme created by Chapter 3745, Revised Code. According to MCC, the General Assembly has delegated to the OEPA the authority to evaluate all air environmental issues and there is no provision for air permits in Chapter 4906, Revised Code.

As to Monroe's claim related to misleading information in the waiver request, MCC argues that no information it provided to the Board was misleading and it points out that Monroe never identified any alleged misleading information. MCC also contends that it would be unreasonable, unlawful, and prejudicial for the Board to rescind the waivers at this time, when Monroe had an adequate remedy it could have exercised in early June 2008. Further, none of the information sought by

Monroe relates to alternative site information. Thus, MCC concludes that the waiver ruling should not be vacated.

With regard to Monroe's request for an interlocutory appeal, MCC contends that there is established precedent for the very ruling Monroe complains of and, therefore, the city is not entitled to an interlocutory appeal. MCC cites two Board cases which both involve certification of a cogeneration station where waste heat is supplied from a coke plant that is not the subject of the application in this case. In the first such case, the Board issued an opinion, order, and certificate on June 13, 2005, for a cogeneration facility. *In the Matter of the Application of Sun Coke Company for a Certificate of Environmental Compatibility and Public Need to Build the Haverhill Cogeneration Station*, Case No. 04-1254-EL-BGN (04-1254). The second such case involves the Board's consideration of an application for a cogeneration facility in *In the Matter of the Application of FDS Coke Plant, LLC for a Certificate of Environmental Compatibility and Public Need to Build a Cogeneration Facility*, Case No. 07-703-EL-BGN (07-703). MCC notes that, in both cases, adjacent coke facilities were involved and waivers of alternative sites were granted, and in neither case did the Board find that it must investigate and independently approve the air emissions from the adjacent coke plant. MCC also contends that, even if Monroe's interlocutory appeal were denied, no prejudice or expense would occur in this case, because Monroe could proffer its testimony on air emissions and submit it to the Board.

(7) On October 8, 2008, Monroe filed a reply to MCC's memorandum contra.

(8) The ALJ finds no merit to Monroe's motion to vacate the September 25, 2008, entry finding that the Board has no jurisdiction over the coke plant. The Board's jurisdiction is governed by Chapter 4906, Revised Code. Pursuant to Section 4906.01(B)(1), a major utility facility means an electric generating plant and associated facilities designed for, or capable of, operation at a capacity of 50 MW or more. In this case, the cogeneration facility is the operative facility that generates electricity and the coke plant serves as the fuel source (steam) to the cogeneration facility. Monroe has urged the Board to apply the NEPA standard regarding associated facilities. However, the Board is not governed by NEPA and,

therefore, such a standard is not applicable. Monroe has also posited that the coke plant is not economically viable without the income from the cogeneration facility and, therefore, the two projects are interdependent. The Board notes that the economic considerations related to whether the cogeneration facility should be built are ones that would be made by MCC, and not the Board. Therefore, such economic justifications are not relevant to the Board's consideration of whether the two projects should be considered associated facilities. In this case, the ALJ finds that the projects are not "associated" as that term is used in Chapter 4906, Revised Code. As to Monroe's concerns regarding air emissions, the Board has no jurisdiction under Chapter 4906, Revised Code, over air permitting that the General Assembly has delegated to the OEPA. Thus, such concerns are more properly addressed to the OEPA. With regard to Monroe's claims that misleading information was submitted to the Board, there was no basis to make such a finding and no references were made by Monroe to any parts of the application where it identified misleading information.

(9) With respect to Monroe's motion to certify an interlocutory appeal of the September 25, 2008, entry, the ALJ finds that no new or novel question is presented in this case. Therefore, the motion to certify should be denied. As pointed out by MCC, the Board recently considered an application in 04-1254, for a project which is almost identical to the instant project. In that case, the Board approved a certificate for a cogeneration facility which recovered heat from the flue gas system of an adjacent coke facility project, in order to generate electricity. In its order, the Board noted the staff's findings that the facility would utilize waste heat from the coke manufacturing process. However, this portion of the decision was only included because, at that time, the governing statute required an analysis of the need for the project. Since that time, that provision, Section 4906.10(A)(1), Revised Code, has been amended to require that the Board only consider the need for the project if the facility is an electric transmission line or a gas or natural gas transmission line. Further, in that case, there was no analysis by the Board of the environmental aspects of the associated coke facility as it related to the cogeneration project. The ALJ also notes that the Board is currently considering an application in 07-703 for a cogeneration project adjacent to a coke facility. As pointed out by MCC, in neither case did the

Board find that it must investigate and independently approve the air emissions from the associated coke plant.

(10) Lastly, Monroe seeks a ruling that, even if the waivers are not vacated, the information related to site alternatives would still be subject to discovery and hearing. The ALJ finds that, as the request to vacate the waiver rulings is denied, the information sought by Monroe related to site alternatives is not subject to discovery and hearing.

It is, therefore,

ORDERED, That the motion to vacate the May 28, 2008, entry granting waivers be denied. It is, further,

ORDERED, That the motion to vacate the September 25, 2008, entry be denied. It is, further,

ORDERED, That the motion to certify an interlocutory appeal be denied. It is, further,

ORDERED, That a copy of this entry be served on MCC and its counsel, the city of Monroe, F. Joseph Shiavone, those individuals served a copy of the certified application pursuant to Rule 4906-5-05, O.A.C., and all other interested persons of record.

THE OHIO POWER SITING BOARD

By: Scott Farkas
Administrative Law Judge

GRG
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Entered in the Journal
OCT 09 2008

Reneé J. Jenkins
Secretary