FILE

BEFORE
THE OHIO POWER SITING BOARD

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

PETITION FOR REHEARING OF INTERVENOR CITY OF MONROE

Pursuant to Revised Code § 4903.10 and Ohio Administrative Code § 4906-7-17(D), the City of Monroe, Ohio, respectfully petitions the Ohio Power Siting Board to grant a rehearing in this matter. For grounds, Monroe submits that the Board's January 26, 2009 Opinion, Order and Certificate is unlawful and erroneous for at least the following reasons:

1. Because the Coke Plant is a component of the major utility facility over which the Board has jurisdiction, the Board should have allowed discovery on, heard evidence about, and imposed requirements to address the adverse impacts of the Coke Plant on air quality and the historic and cultural resources of the site.

2. Without allowing discovery and introduction of detailed information on site alternatives, the Board has insufficient evidence to determine whether the facility represents the minimum adverse environmental impact or whether the public interest is served, and, in fact, should not have approved the certificated site due to its proximity to Monroe's neighborhoods and the presence of historic and cultural resources.

3. The Board erred in concluding that the historic and cultural resources identified in the Gray & Pape reports will not be adversely affected by the cogeneration facility, and by failing to require the applicant to protect these resources.

4. The Board erred in concluding that the Cogeneration Facility will have minimal noise effects on the surrounding community.

The basis for this petition, including additional information about the errors in the Board's opinion, is set forth in more detail in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

I. THE COKE PLANT IS A COMPONENT OF THE MAJOR UTILITY FACILITY OVER WHICH THE BOARD HAS JURISDICTION.

Monroe submits that the Board has erred in concluding that the Coke Plant is not part of the major utility facility that is the subject of these proceedings. It has further erred by failing to allow Monroe's discovery on, hear evidence about, and impose requirements on the applicant to address the environmental impacts of the Coke Plant, including its air emissions and the inadequacy of its air pollution controls.

The Board cites two prior certification proceedings in which the Board excluded coke plants from the scope of its review of cogeneration facilities. *In the Matter 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 (6/13/2005); *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 (10/28/2008). In neither case, however, was the issue of jurisdiction over the coke plant considered in any detail. Both matters were submitted to the Board almost entirely on the basis of stipulations between the Staff and applicants. In both cases, the Staff accepted the applicant's description of the scope of the project without further inquiry or analysis. No third-party intervenors were involved in either case. Because the Staff and Board accepted the applicants' descriptions of those facilities without further analysis, the issue of jurisdiction over the Coke Plant in this proceeding is an issue of first impression for the Board.

Nonetheless, the Board's proceedings in *Haverhill* are relevant for a different reason. In that case, both the applicant and the Staff clearly stated that heat recovery steam generators

(HRSGs) and flue gas desulfurization (FGD) equipment were part of the cogeneration facility. In its application, SunCoke Energy described the Haverhill Cogeneration Station as follows:

> The Cogeneration Station will include a single steam turbine building (administration, operation, and STG Hall), an administration area, flue gas desulfurization (FGD) area, outdoor HRSG area, exterior tankage, cooling towers, 69kV substation and general roadway access to the major equipment.

In the Matter 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, Company Ex. 1 at 02-3 through 02-4. SunCoke also included a detailed discussion of the HRSGs as components of the "major generating equipment" that comprised that Cogeneration Station. *Id.* at 04-11 through 04-12. Furthermore, in the Staff Report and Recommendations in that matter, the Staff stated:

> The proposed power station will consist of the following major pieces of equipment:
>
> 1) Steam Turbine Generation Unit (STG);
>
> 2) Five Heat Recovery Steam Generators (HRSGs);
>
> 3) An 18 kV-69 kV Generator Step-Up Transformer.

Id., Staff Exhibit 1 at 3 (Project Description). Monroe requests the Board to take judicial notice, pursuant to Rule 4906-7-90(E), of these facts set forth in SunCoke's amended application and the Staff Report and Recommendations, both of which were admitted into the record in Case No. 04-1254-EL-BGN as Company Exhibit 1 and Joint Exhibit 1, respectively.

The Haverhill Cogeneration Facility and the Middletown Coke Cogeneration facility are owned by a common parent company, SunCoke Energy, Inc. The Middletown Coke application contains facility descriptions identical to the description of the Haverhill Cogeneration Station:

> The Cogeneration Facility will include a single steam turbine building (administration, operation, and Steam Turbine Generator Hall), an administration building, flue gas desulphurization (FGD) area, outdoor Heat Recovery Steam Generating (HRSG) area, exterior tankage, cooling towers, 69kV substation and general roadway access to the major equipment.

Company Exhibit 1 at Appendix 07-2.

Notwithstanding all of the above statements to the contrary, the Company argues that the HRSG and FGD unit are not part of the Cogeneration Station for purposes of these proceedings. However, the Company's mere assertions do not make it so, and Monroe respectfully submits that the Board erred in accepting the Company's assertions where the record in *Haverhill* and the Company's own statements in its application show that such a distinction is wholly arbitrary. The Company's attempt to separate the HRSGs and FGD unit from this project is intended purely to avoid the Board's scrutiny of the siting and impacts of the Coke Plant. The Board should not accept this transparent attempt to circumvent its jurisdiction.

Furthermore, the design of the Middletown Coke facility provides no functional basis to distinguish between the Cogeneration Station and the Coke Plant. The coke plant and the electrical generating equipment are functionally inextricable. *See* Monroe's Post-Hearing Brief at 5-9. The Board acknowledges that the Cogeneration Facility is functionally dependent on the Coke Plant, but concludes that the Coke Plant is not functionally dependent on the Cogeneration Facility because "operation of the coke plant does not require that electricity be generated." Opinion, Order, and Certificate at 9. However, lawful operation of the coke plant is dependent on the HRSGs and FGD unit—both of which, as discussed above, are rightly considered components of the Cogeneration Station. Furthermore, as the Board acknowledges, the Company's own application admits that a primary purpose of the Cogeneration Station is to cool flue gas from the Coke Plant so that sulfur dioxide emissions in the flue gas can be removed in

the FGD unit. Company Exhibit 1 at 01-1. *See also Haverhill*, Company Ex. 1 at 01-1 (identical description of purpose of the Haverhill Cogeneration Station.) Had Monroe been permitted to offer evidence on this subject, Monroe's expert witness would have testified that such temperature reduction is necessary for operation of the FGD unit and associated baghouses, which equipment is necessary for compliance with applicable air pollution control regulations and permit requirements. Offer of Proof of Robert Basl, Monroe Exhibit B, at V. *See also* Company Exhibit 1 at 02-2. Monroe was also barred from establishing this fact on cross-examination of the Company's witness. Tr. at p. 28, l. 4.

The Board also acknowledges that the Cogeneration Station is functionally dependent on the Coke Plant for supply of steam, yet it concludes that the Coke Plant is not part of the Cogeneration Facility because it does not serve the same function as a coal-fired utility boiler. There is no functional reason to distinguish between a coal –fired utility boiler (over which the Board has jurisdiction) and the Coke Plant. The Coke Plant generates heat that is used to convert water to steam—just as a utility boiler generates heat for the same purpose. Both sources burn coal for heat. The heat from the Coke Plant is not, as the Board suggests, analogous to the coal used in a coal-fired plant. The coal burned in the Coke Plant is analogous to the coal burned in a coal-fired utility boiler, but Monroe does not claim that the Board should assert jurisdiction over coal mines in either case.

There also is no basis to distinguish between the Coke Plant and a coal-fired utility boiler as a matter of law. The fact that the Coke Plant or the HRSGs may serve multiple purposes is no reason to exclude those components from consideration as part of a major utility facility. As discussed in Monroe's Post-Hearing Brief, R.C. § 4906.01(B) does not exclude facilities from coverage merely because they create a second product, and exceptions to general, all-inclusive

statutory provisions may not be created where such exceptions are not expressly stated in the law. *Eggleston v. Harrison*, 61 Ohio St. 397 (1900). It avails nothing for the Company to argue that the Coke Plant or the HRSGs themselves are not designed for, or capable of operating at, 50 MW or greater. Such an argument has not prevented the Board from extending its jurisdiction over barging/docking facilities, boilers, cooling cells, fuel storage, fertilizer and urea storage, or solid waste disposal facilities, *In re American Municipal Power*, No. 06-1358-EL-BGN, none of which generate electricity themselves. The Company's argument misses the whole thrust of Monroe's argument—the Coke Plant and the HRSGs, being the source of steam without which electricity cannot be generated, are in fact a part of the "electrical generating plant and associated facilities" that comprise the major utility facility in these proceedings.

Monroe also notes that neither the Company's post-hearing briefs nor the Board's Opinion and Order respond to Monroe's assertion that the Coke Plant and HRSGs are "associated facilities" under the statutory definition of "major utility facility." Although the Staff argues that the Coke Plant has no "direct connection" to the generating equipment, Staff's Reply Brief at 3, that statement is clearly incorrect, since the coke ovens, HRSGs, and generating equipment are physically connected by piping and ductwork. Company Ex. 1 at 02-2 (Coke Plant flue gases are captured by HRSGs, which generate steam that is directed to STG); *id.* Figure 04-4A. The Coke Plant and HRSGs are "associated facilities" for purposes of R.C. § 4906.01(B)(1) given their direct physical and functional connection to the generating facility.

Although financial interdependence and the NEPA doctrine of segmentation are not stated in R.C. § 4906.01 as elements of the statutory definition of "major utility facility," those considerations are nonetheless relevant in assessing whether the Coke Plant and HRSGs should be considered either part of the "electric generating plant" or "associated facilities." Middletown

Coke's application establishes the financial interdependence of the Coke Plant and the Cogeneration Facility by declaring that neither can survive without the other. For example, page 01-5 of the application states that the "economic benefit of waste heat recovery and power generation to the overall MCC project is critical to the viability of the investment."

Furthermore, the statutory provisions under which the Board acts are indeed comparable to NEPA. NEPA requires federal projects (and state and private projects that rely on federal funding or permitting) to consider the environmental consequences of a proposed project with economic and technical considerations. *Calvert Cliffs Coord. Committee v. Atomic Energy Comm'n*, 449 F.2d 1109, 1113-14 (D.C. Cir. 1971). NEPA accomplishes this by requiring the project proponent to prepare a "detailed statement" that considers the impact of the project on the environment, the environmental costs that may be avoided, and alternative measures that may alter the cost-benefit equation. *Id.*; NEPA § 102(C), 42 U.S.C. § 4332(C). Similarly, Revised Code §4906.10(A)(2)-(3) directs the Ohio Power Siting Board to consider both the environmental impact of each proposed major utility facility and alternatives for minimizing such impact. Federal courts have developed the doctrine of segmentation under NEPA to prevent project proponents from using arbitrary definitions of project scope to avoid meaningful environmental review. Such principles are equally applicable in this case, where the Company seeks to avoid review of the siting and environmental impacts of the Coke Plant based on an arbitrary definition of the Cogeneration Facility.

In conclusion, the Board has improperly limited its review in this case based on an illusory and arbitrary distinction between the Coke Plant and the Cogeneration Station. Without considering issues of regulatory compliance and environmental and socioeconomic impact related to the coke plant, the Board cannot meet its statutory obligations to evaluate project

impacts and public interest under R.C. § 4906.10. As a consequence of excluding the coke plant from consideration in these proceedings, the Board does not have the necessary information concerning this major utility facility to satisfy its statutory obligations under R.C. § 4906.10. Specifically, the Board does not have sufficient information to determine--

- The nature of the probable environmental impact of the facility;
- Whether the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;
- Whether the facility will comply with Revised Code Chapter 3704. and all rules and standards adopted thereunder; and
- Whether the facility will serve the public interest, convenience, and necessity.

R.C. § 4906.10(A)(2), (3), (5), (7).

For the above reasons, as supported by Monroe's Post-Hearing Brief at 5-12 and Post-Hearing Reply Brief at 6-11, both of which are incorporated herein, Monroe petitions the Board for rehearing on (1) the question whether the Coke Plant, the HRSGs, and the FGD unit are part of the major utility facility that is the subject of these proceedings, and (2) the environmental impacts of the Coke Plant, including its air emissions and the inadequacy of its air pollution controls. In addition, because the Administrative Law Judge (ALJ) did not allow Monroe to conduct discovery on these topics below, Monroe petitions the Board to direct the ALJ to reopen discovery prior to the rehearing on these topics and to compel Middletown Coke to provided this information.

II. WITHOUT DETAILED INFORMATION ON SITE ALTERNATIVES, THE BOARD HAS INSUFFICIENT EVIDENCE TO DETERMINE WHETHER THE FACILITY REPRESENTS THE MINIMUM ADVERSE ENVIRONMENTAL IMPACT OR WHETHER THE PUBLIC INTEREST IS SERVED.

The Board's opinion notes that the Company was granted an exemption from the requirement to perform a site alternatives analysis. As pointed out in Monroe's Post-Hearing Brief, however, the site alternatives waiver merely excuses Middletown Coke from providing site alternative information in the application. Consequently, the Board has erred by failing to allow Monroe's discovery, and hear evidence, about the unsuitability of the Coke Plant site and the availability of suitable alternative sites for the Coke Plant. The Board further erred by approving Middletown Coke's preferred site due to its proximity to Monroe's neighborhoods and the presence of historic and cultural resources.

The site alternative waiver, which was granted in the early stages of this proceeding, does not exempt the Company from justifying its site selection at the hearing, nor does it excuse the Board from considering whether the facility represents the minimum adverse environmental impact or whether the facility serves the public interest. R.C. § 4906.10(A)(3) still requires the applicant to prove, and the Board to determine, whether "the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." R.C. § 4906.10(A)(6) still requires the applicant to prove, and the Board to determine, whether the facility will serve the public interest. The ALJ also did not waive the application of O.A.C. §§ 4906-13-01(A)(3) and –(4), which require the applicant to describe major site alternatives considered and the principal environmental and socioeconomic considerations of the preferred and alternative sites. Surely, there must be available alternative sites, such as the brownfield at AK Steel, that are not located on the edge of a municipal neighborhood and that do not destroy or impair historic and

cultural structures and relics. In the absence of such information, Middletown Coke has not met its burden of proof, and the Board has insufficient information on which to make the determinations required by statute.

The Board's opinion on this issue is based largely on its conclusion that there is only one practical location for the Cogeneration Station—next to the Coke Plant. That reasoning does not hold, however, if the Cogeneration Station and the Coke Plant are deemed the same facility. But even assuming, *ad arguendo,* that the Cogeneration Station and the Coke Plant are separate and distinct facilities, the alternatives analysis cannot be avoided simply because the Cogeneration Station must be situated near the Coke Plant. After all, the opposite holds true as well—the Coke Plant must be situated near the Cogeneration Station. The Company and the Board cannot excuse the requirement for an alternatives analysis on the basis of a nonexistent Coke Plant for which alternative sites are available. At the adjudication hearing, the ALJ barred counsel for Monroe from pursuing cross-examination, (Tr. at p. 37, line 17) that would have established that an alternative location for the project exists on brownfield property owned by AK Steel. Whether the Coke Plant is considered part of the Cogeneration Station or not, the Board cannot excuse consideration of alternative sites for a major utility facility because it must be near operations not yet in existence, and for which alternative sites are available.

In reality, there has been no consideration whether the placement of the Cogeneration Facility is ideal from an ecological, cultural, or socioeconomic standpoint. Without that information, the Board has insufficient basis to make its statutory determinations under R.C. 4906.10(2), (3), and (6). For the above reasons, as supported by Monroe's Post-Hearing Brief at 12-14 and Post-Hearing Reply Brief at 1-6, 14-16 (both of which are incorporated herein), Monroe petitions the Board for rehearing to consider and hear evidence about the suitability of

the Coke Plant site and the availability of suitable site alternatives. In addition, because the ALJ did not allow Monroe to conduct discovery on these topics, Monroe petitions the Board to direct the ALJ to reopen discovery prior to the rehearing on these topics and to compel Middletown Coke to provide this information. Finally, Monroe petitions the Board to disapprove Middletown Coke's preferred site due to its proximity to Monroe's neighborhoods and the presence of historic and cultural resources at that site.

III. THE BOARD ERRED IN CONCLUDING THAT THE HISTORIC AND CULTURAL RESOURCES IDENTIFIED IN THE GRAY & PAPE REPORTS ARE OUTSIDE THE AREA OF IMPACT OF THE COGENERATION FACILITY.

Monroe has asserted that an alternative site analysis is also warranted because important historic and cultural resources are located on the Company's preferred project site. The Board found this assertion to be "unwarranted" because, according to the Board, the historic and cultural resources identified in the Gray & Pape studies "were not within the site or the impact area of the cogeneration facility." Even accepting for sake of argument that the Coke Plant and Cogeneration Station are distinct facilities (which they are not), the record indicates that important cultural resources are within the area of potential effect of the Cogeneration Station.

The Company's own application to the Board included a recommendation from its consultant, URS, that the Company conduct a Phase I Archaeological Survey following Ohio Historic Preservation Office guidelines, since the project area "appears to have a high potential for encountering prehistoric and historic archaeological sites." Company Exhibit 1 at Appendix 07-2, p. 2. URS also recommended an Architectural History Survey to evaluate the indirect Area of Potential Effect of the project and to assess the potential effects of the project on historic structures within the Area of Potential Effect. *Id.* The Area of Potential Effect was to include

the actual viewshed from which the cogeneration facility would be visible, based on its proposed height. *Id.*

Thereafter, the Gray & Pape studies were performed "as a prelude to a proposed heat recovery coke-making facility *with an associated cogeneration facility.*" Monroe Exhibit H at 1. These studies were not, as suggested by the Board, limited to consideration of the location or impact of the Coke Plant. To the contrary, they addressed the entire Reed-Bake Farm parcel on which both the Coke Plant and the electrical generating equipment is proposed to be located. Tr. at p. 60, l. 12 (Osterholm). The area of potential effect for the Gray & Pape Archeological Survey was "delineated largely based on a consideration of potential visual effects." Monroe Ex. F at 1. In fact, the Archaeological Survey stated further that a 150' silo and a 200' stack "planned for the cogeneration facility" represented "the principal source of potential visual effects upon any existing historical properties." *Id.* at 3.

Furthermore, the letter from State Historic Preservation Office (SHPO) dated September 22, 2008, was not limited solely to impacts of the Coke Plant. The letter states that construction of the Coke Plant will require wetlands authorizations under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, "which necessitates consultation regarding the effects of the project on historic properties . . . ." Letter from SHPO to Denise Marmer, U.S. Army Corps of Engineers, September 22, 2008, at 1 (included in Monroe Exhibit E). The SHPO letter continues, "An application to construct and operate the cogeneration facility has also been made to the Ohio Power Siting Board." *Id.* The SHPO expressed concern about this visual impact of the "massive industrial facility" being proposed for the site:

> Demolition of buildings associated with a National Register-eligible property is an adverse effect pursuant to 36 C.F.R. Section 800.5(a)(2)(i), while surrounding the Bake Farm complex with a massive industrial facility such as that proposed by Middletown

> Coke Company would dramatically alter the feeling, association, and setting of the farm, thereby compromising its historic integrity.

Id. at 2.

Therefore, the Board erred in concluding that "the Gray & Pape study related to the location of the coke plant" and that the Reed/Bake Farm is "not within the site or the impact area of the cogeneration facility." In light of the important historic and cultural assets at stake, a site alternatives analysis is warranted in this case. Furthermore, even in the absence of a site alternative study, Middletown Coke has not met its obligation to estimate the impact of the proposed facility on these historic landmarks and to describe its plans to mitigate any adverse impact. O.A.C. § 4906-13-07(D)(2). By failing to disclose Gray and Pape's findings in its application, Middletown Coke deprived the public of the opportunity to review and comment on that information, and further deprived the staff of the ability to take this critical information into account in the course of its investigation.

Finally, the Board has utterly failed its responsibility to include requirements in the certification to protect these historic and cultural structures and relics. The Board has done no more than refer to the applicant's vague promise to discuss protective measures with the Ohio Historic Preservation Office and consult with "interested parties." The Board is required to issue a certification that provides protection for historic and cultural resources, not abdicate this task to others.

For the above reasons, as supported by Monroe's Post-Hearing Brief at 14-21 and Post-Hearing Reply Brief at 3-6, 14-15 (both of which are incorporated herein), Monroe petitions the Board for rehearing to consider a site alternatives analysis and a mitigation plan for any National Register-eligible sites that may be affected by the project.

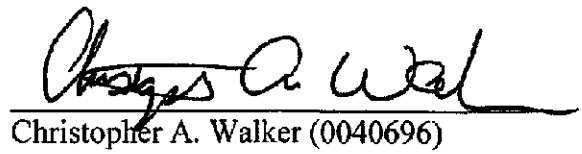
IV. THE BOARD ERRED IN CONCLUDING THAT THE COGENERATION FACILITY WILL HAVE MINIMAL NOISE EFFECTS ON THE SURROUNDING COMMUNITY.

The record is devoid of authoritative information on the environmental, health, or nuisance impacts of construction or operational noise from the proposed facility or the need for mitigation. Since the Company conducted no testing of daytime and nighttime background noises in the surrounding neighborhoods, Tr. pp. 51-52 (Osterholm), there is no factual basis upon which to conclude that "the construction and operation noise at the power plant will not introduce significant noise impacts." Staff Ex. 1 at 13. The Company's was unable to point to a specific noise standard that would indicate the predicted noise level of 55 dBA would be adequately protective of neighboring properties, as claimed in the Company's application. Tr. p. 51, l. 13 (Osterholm). The Staff witness, Mr. Timothy Burgener, stated that he did not personally have an opinion whether the above noise levels are protective of public health and welfare. Tr. p 129, l. 13 (Burgener). The Staff did not request a review of the noise levels by anyone with expertise in acoustics, community noise, or the health effects of noise, *id.* at 129-130, nor did Middletown Coke or the Staff produce any witness with such expertise to testify about these impacts. Although the Staff invited the Ohio Department of Health to review the application, ODH provided no comments to the Staff. *Id.* Mr. Burgener stated that the Staff does not have a rule of thumb for what level of noise is permissible from the cogeneration facility. *Id.* at p. 131, l. 1.

For the above reasons, as supported by Monroe's Post-Hearing Brief at 20-23 and Post-Hearing Reply Brief at 4 (both of which are incorporated herein), Monroe petitions the Board for rehearing on the nature of the probable noise impacts of the facility, whether noise from the

facility represents the minimum adverse environmental impact, and whether the facility will serve the public interest in light of its noise impacts.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing and Memorandum in Support was served upon the following parties of record by electronic and regular mail on February 24, 2009.

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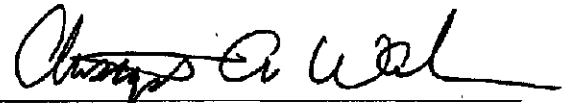

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