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

ENTRY ON REHEARING

The Board finds:

(1) On June 6, 2008, Middletown Coke Company, a subsidiary of SunCoke Energy, (MCC) filed an application for a certificate of environmental compatibility and public need (certificate) for the construction, operation, and maintenance of an electric cogeneration facility in Butler County. The cogeneration facility is designed to recover waste heart from an adjacent coke plant.

(2) On January 26, 2009, the Board issued an opinion, order, and certificate (order) in this case that approved a stipulation entered into by MCC and the Board staff and that ordered that a certificate be granted to MCC for the construction, operation, and maintenance of the cogeneration facility. The stipulation was opposed by the city of Monroe (Monroe) and Mr. Joseph Schiavone.

(3) Section 4906.12, Revised Code, provides that Sections 4903.02 to 4903.16, Revised Code, shall apply to any proceeding or order of the Board under Chapter 4906, Revised Code, in the same manner as if the Board were the Public Utilities Commission of Ohio (Commission) under such sections.

(4) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing in respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(5) On February 25, 2009, the city of Monroe filed an application for rehearing of the Board's order, asserting four assignments of error.

(6) In its first assignment of error, Monroe states that, "[t]he coke plant is a component of the major utility facility over which the board has jurisdiction." It claims that the coke plant and the heat recovery steam generators (HRSGs) should have been treated as components of the major utility facility over which the Board has jurisdiction, or as associated facilities, thus giving the Board jurisdiction to allow discovery on, hear evidence about, and impose requirements to address the adverse impacts of the coke plant on air quality and the historic and cultural resources of the site. Monroe raises several arguments to support this assignment of error.

(a) Monroe contends that the Board's two prior cogeneration certification proceedings, in which the Board did not include the associated coke plants in its review, involved stipulations between staff and applicants and that no substantive inquiry or analysis was conducted, nor were any third-party intervenors involved. Thus, Monroe concludes that this issue is one of first impression for the Board. (Application for rehearing at 3.)

(b) Monroe also claims that, in the application in this case, just as was the situation with the application in one of the Board's previous cogeneration cases, heat recovery steam generators (HRSGs) and flue gas desulfurization (FGD) equipment were included and discussed as components of the cogeneration facility. *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 (Haverhill). Monroe believes that this is significant because "lawful operation of the coke plant is dependent on the HRSGs and FGD unit – both of which . . . are rightly considered components of the Cogeneration Station." (Application for rehearing at 5.) Monroe

therefore concludes that the coke plant and the cogeneration facility are dependent on each other and are inextricably linked and must be considered as a single major utility facility. Monroe contends that it would have proved that mutual dependence if the evidence it proffered had been permitted. (Application for rehearing at 3-6.)

(c) Referencing the Board's distinction between the coke plant and a traditional coal-fired boiler, Monroe further argues that there is no functional or legal basis to distinguish between a coal-fired boiler over which the Board does have jurisdiction and the coke plant. It submits that the coke plant generates heat, just as does a coal-fired boiler, which heat is used to convert water to steam. Further, it argues that the fact that the coke plant may serve multiple purposes is also no reason to exclude those components from consideration as part of a major utility facility. Monroe also asserts that, in its post hearing brief, it noted that Section 4906.01(B), Revised Code, does not exclude facilities from coverage merely because they create a second product.

(d) Monroe alternatively advocates that the coke plant and HRSGs should be treated as associated facilities under the statutory definition of "major utility facility" and asserts that this was not addressed by the Board. It points to the fact that the coke ovens, HRSGs, and generating equipment are physically connected by piping and ductwork. Thus, it concludes, the coke plant and HRSGs are, in fact, facilities that are associated with the cogeneration facility. (Application for rehearing at 7.)

(e) Finally, Monroe contends that while financial interdependence and the National Environmental Policy Act (NEPA) doctrine of segmentation are not expressly included in Section 4906.01, Revised Code, as elements of the statutory definition of

> "major utility facility, those legal concepts are nonetheless relevant in the Board's assessment of whether the coke plant and HRSGs should be considered either as part of the electric generating plant or as associated facilities. Monroe believes that the Board should follow the federal courts' approach to NEPA, simply because the NEPA statute is similar to governing law in Ohio. (Application for rehearing at 7-8.)

(7) In its memorandum contra, MCC argues that the Board reasonably and lawfully determined that the coke plant did not constitute a component of a major utility facility. MCC states that Section 4906.01(B)(1), Revised Code, defines a major utility facility to mean an "electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more." According to MCC, this means that, to constitute a major utility facility, both the electric generating plant and the associated facility must be designed for or capable of operation at a capacity of 50 megawatts of electricity or more. MCC contends that the coke plant is neither designed for, nor capable of, operation at that capacity. In addition, argues MCC, neither of the concepts raised by Monroe, of having a direct physical connection or having a functional connection to the generating facility, is set forth as a statutory criterion. (Memorandum contra at 2-3.)

MCC also addresses Monroe's argument that the coke plant should be treated in an analogous manner as a coal-fired boiler, which is under the Board's jurisdiction. It dispute's Monroe's contention that the Board has taken jurisdiction over barging/docking facilities, boilers, cooling cells, fuel storage, fertilizer and urea storage, and solid waste disposal facilities, explaining that these items were mentioned by the Board but not treated as either major utility facilities or associated facilities. (Memorandum contra at 3.)

(8) MCC contends that the coke plant and the HRSGs are not "associated facilities" because they do not meet the statutory test. The HRSGs are neither designed for nor capable of generating electricity but are designed for the cooling of the flue gas from the coking plant. The flue gas desulphurization unit is not to be installed as part of the cogeneration facility but

as part of the coking unit and its purpose is not to generate electricity but to remove the sulphur from the flue gas coming from the coke plant. The baghouse is also designed to capture particulate matter that would other wise escape into the environment, not to generate 50 megawatts of electricity. (Memorandum contra at 4.)

As to Monroe's references to the NEPA, MCC points out that the Board is not governed by the NEPA and, therefore, the NEPA standard is not relevant or applicable to this proceeding. (Memorandum contra at 4.)

(9) Monroe has raised nothing new in its first assignment of error that wasn't previously addressed by the Board. We found that the Board has no jurisdiction over the coke plant and that the environmental impacts associated with the coke plant, as well as the adverse impacts of the coke plant on the historic and cultural resources are not part of this proceeding. The fact that applications in other Board proceedings, including Haverhill, involved similar processes where cogeneration facilities utilize waste heat from coke manufacturing processes, did not provide us with a basis to expand the Board's jurisdiction to include the coke plants. We also found, and Monroe has raised no basis to find otherwise, that, while the coke plant and the cogeneration facility may be financially interdependent, financial viability is not the concern of the Board and does not affect its jurisdiction, nor does common ownership of cogeneration facilities have a bearing on that jurisdiction.

(10) As to Monroe's claim that the coke plant and the HRSGs and FGD equipment are components of the electrical generating plant that comprises the major utility facility in this proceeding, we find no merit. As the evidence in this case shows, the existence of the cogeneration facility is not a prerequisite for coke production and the two facilities are not mutually interdependent. Although Monroe asserts that the coke plant cannot be operated without the HRSGs and the FGD equipment, it is clear that the steam produced from the coke production provides a source of power for the cogeneration facility, which could be merely dissipated as a waste product from the coke production. Thus, the coke plant is not dependent on the cogeneration facility. The physical connection of the two facilities is the means by which that

waste product provides a useful end product. That physical connection does not result in the coke plant being a part of a major utility facility.

We also disagree with Monroe's contention that the coke plant should be treated in an analogous manner as a coal-fired utility boiler on the ground that the statutory definition does not exclude facilities just because they create a second product, we disagree. We are not presented with a situation in which a facility over which our jurisdiction is in question is one that is primarily related to generation but also creates a "second product." Rather, the coke plant, or the HSRGs and FGD equipment, are primarily to be used in the coke manufacturing process. The waste from that process is proposed to be used to generate electricity. The coke manufacturing process is clearly not merely a second product. We find that it is appropriate to distinguish between the coke plant (or the HSRGs and FGD equipment) and a coal-fired boiler.

We also do not agree with Monroe's contention that the coke plant and the HRSGs are "associated facilities," although we do not base this conclusion on the responsive argument by MCC. Rather, we find that it would be inappropriate to read the term "associated facilities" so broadly that it would encompass either an entire coke plant or parts of that coke plant that would be constructed even without our approval of this application. To do so, we believe, would defeat the legislatively created regulatory scheme. If the legislature had intended this result, the statute would clearly have given such jurisdiction to the Board.

Finally, as to Monroe's arguments related to the definition of a "major utility facility" and standards under NEPA, it has raised no new arguments in its application for rehearing that were not raised in its post hearing briefs and, thereafter, considered in the opinion, order, and certificate. The statutory provisions under which the Board acts are not comparable to NEPA. Monroe cited to no precedent under which the Board has applied NEPA standards to certificate applications nor cited to the jurisdictional basis under which the Board could apply such standards in this case. Monroe's first assignment of error is denied.

(11) Monroe's second assignment of error is that, 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. In fact, Monroe believes that the Board should have allowed discovery relating to the issue of site alternatives, should have heard evidence on the issue, and should not have approved the certificated site due to its proximity to Monroe's neighborhoods and the presence of historic and cultural resources. Monroe notes that MCC was granted a waiver in the early stages of this proceeding from the requirement to perform a site alternative analysis. According to Monroe, that waiver does not exempt MCC from justifying its site selection at the hearing or describing the alternatives considered, 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. Monroe maintains that there must be available alternative sites that are not located on the edge of a municipal neighborhood and that do not destroy or impair historic and cultural structures and relics. Monroe suggests that the Board's opinion is based on its conclusion that there is only one practical location for the cogeneration facility which is next to the coke plant; however, Monroe claims that position does not hold because the cogeneration facility and the coke plant are deemed the same facility. Further, Monroe asserts that the Board cannot excuse consideration of alternative sites for a major utility facility on the basis it must be near operations that are not yet in existence and for which alternative sites are available. (Application for rehearing at 10-12.)

(12) With regard to this assignment of error, MCC asserts that the Board did consider alternatives and that there was ample evidence that the proposed cogeneration facility represents the minimum adverse environmental impact. MCC argues that it did justify the site selection at the hearing and no additional information was necessary for alternative sites. MCC points out that it considered locations outside of the primary location but, because of the consideration in locating the coke oven batteries, the preferred site was the logical place for the cogeneration facility. MCC states that its witness testified that the cogeneration facility was sited in an industrial area, next to

an existing industrial site, and the proposed location is from one-fourth to one-half mile away from the nearest residence or other institutions. It also notes that its witness Mr. Ryan Osterholm testified that alternate ways of locating the cogeneration facility were considered by MCC. However, because of where the coke ovens are located and the ancillary equipment necessary around the coke ovens, there is very little other space other than where the cogeneration facility is proposed to be sited. Further, MCC points out that the site selection was based, in part, on local setback requirements that it believed had not been eliminated. (Memorandum contra at 5-7.)

(13) While we find no merit to this assignment of error, it is helpful to recite the procedural events that relate to this aspect of the rehearing. On April 24, 2008, in advance of the filing of its application, MCC sought, in part, a waiver of the requirement for fully developed alternative site analysis, pursuant to Rules 4906-13, O.A.C. Staff indicated that it had no objection to this waiver request, but reserved the right to require information in areas covered by the waiver request. On May 28, 2008, the ALJ granted the waiver request but did not preclude the staff from requesting the waived information.

We would note that, throughout this proceeding, Monroe has sought to link the cogeneration facility with the coke plant and to try to incorporate the coke plant as a part of this application. In its motion to intervene, Monroe stressed the importance of the environmental impacts associated with the coke plant. However, in his September 25, 2008, entry granting Monroe's intervention, the ALJ stressed that, because the Board has no jurisdiction over any permits for construction of the coke plant, issues related to the coke plant, which had been raised by Monroe in its motion to intervene, would not be considered in this proceeding. Monroe next sought 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. However, by entry of October 9, 2008, the ALJ denied Monroe's motion to vacate. The ALJ also denied Monroe's motion to vacate the May 28, 2008, entry granting a waiver of the requirement to fully develop the analysis of the alternative site under Chapter 4906-13, O.A.C. In that motion, Monroe claimed that MCC had provided misleading information in its waiver

request; however, the ALJ found that there was no basis to make such a finding and it cited no references to any parts of the application where Monroe identified misleading information. In addition, at the hearing and in its rehearing application, Monroe has provided no evidence or references to evidence that MCC submitted any misleading information related to the site alternatives analysis in MCC's application. As we have noted throughout this proceeding, and in the denial of Monroe's first assignment of error, the Board does not have jurisdiction over the coke plant and, therefore, the suitability of and alternatives to the siting of the coke plant have not been the subject of this proceeding nor the subject of the certificate issued to MCC.

As we noted in the order, we did not agree with Monroe's contention that such a waiver of the requirement to perform alternatives analysis was based on an erroneous jurisdictional ruling. We have also addressed that assignment of error in finding 8 above. Further, we noted that MCC did consider alternative configurations in its application but, because the cogeneration facility had to be located next to the coke plant, there was only one practical location for the cogeneration facility. Further, the record is clear that staff also considered the site selection in its review of this application. Staff found that the location for the cogeneration facility is dependent upon the location of the coke plant, which is not required to undergo a formal site selection study. Further, staff found that the proposed site, represented the only practical location for the cogeneration facility, and that the cogeneration facility and its processes will be most efficient if located directly adjacent to the coke plant.

We would also note that, even at the hearing, Monroe attempted to inquire into issues related to the coke plant, It asked: "Is the coke plant to be built on one or two parcels of property?" (page 36) "Does AK Steel own sufficient property to site the cogeneration station and the coke plant on its own property?" (37). Both inquiries by Monroe sought information related to the coke plant and were denied by the ALJ. At that time, Monroe did not take an interlocutory appeal of those rulings, nor did it seek to admit expert testimony on this subject, nor proffer any evidence related to site alternatives, as it had done with its proffered evidence related to the

environmental impacts from the coke plant operations. We would also note that, at no time at the hearing did Monroe seek to introduce evidence related to site alternatives for the cogeneration facility. Monroe's second assignment of error is denied.

(14) In its third assignment of error, Monroe argues that "[t]he 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 maintains that the Gray & Pape studies addressed the parcel of property on which both the coke plant and the electrical generating equipment is proposed to be located and that the area of potential effect for the survey was delineated largely based on a consideration of potential visual effects. Further, Monroe claims that a letter from the state historic preservation office (SHPO) was not limited solely to the impact of the coke plant and that the SHPO specifically referenced the cogeneration facility before expressing concern about the visual impact of the "massive industrial facility" being proposed for the site. Monroe claims that, in light of the important historic and cultural assets at stake, and as referenced in its post hearing brief and reply brief, a site alternative analysis and mitigation plan for any National Register-eligible sites that may be affected by the project are warranted in this case. (Application for rehearing at 12-14.)

(15) In its memorandum contra, MCC points out that Monroe continues to leave out several key facts and attributes a false motivation to the applicant by innuendo. It points out that the Gray & Pape study was not required for nor conducted for the siting of the cogeneration facility but was done exclusively to support an Army Corps of Engineers nationwide permit for the coke plant. It notes that the cogeneration facility is to be built on a three-acre tract and that neither the historic buildings nor the archaeological sites are within the footprint of the proposed cogeneration facility. MCC also contends that it never sought to deprive the staff or the public of the Gray & Pape study. According to MCC, whether the coke plant poses a concern to the Reed-Blake Farm is a question for the Army Corps of Engineers and not the Board. (Memorandum contra at 8.)

(16) In this assignment of error, Monroe repeats the same arguments it raised in its post hearing briefs. First, it refers to the Gray & Pape study. However, as we noted in the order, while the Gray & Pape study identified important historic and cultural resources, the sites identified by Monroe as problematic were not within the site or the impact area of the cogeneration facility. Rather, as pointed out by MCC, the study was prepared in connection with an application for construction of the coke plant. Further, as we noted in the order, the one historic structure identified by staff was located within one mile of the project area and is neither directly nor indirectly impacted and is not within the visual area of potential effects of the cogeneration facility. In addition, the letter from the state historic preservation office, referencing the "massive industrial facility," includes the area of the coke plant, which again is not a part of this application. Monroe's third assignment of error is denied.

(17) Monroe's final assignment of error is that "the Board erred in concluding that the cogeneration facility will have minimal noise effects on the surrounding community." Monroe argues that the record is devoid of authoritative information on the environmental, health, or nuisance impacts of construction or operational noise from the proposed facility. According to Monroe, because MCC conduced no testing of daytime and nighttime background noise in the surrounding neighborhoods, there is no factual basis upon which to conclude the construction and operation noise at the plant will not introduce significant noise impacts. Monroe also claims that MCC 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. Further, Monroe assets that staff did not request a review of the noise levels by anyone with expertise in acoustics, community noise, or the health effects of noise, nor did MCC produce any witness with such expertise to testify about these impacts. (Application for rehearing at 15-16.)

(18) In its memorandum contra, MCC states that the issues raised by Monroe were all addressed in brief. According to MCC, Rule 4906-13-07(A)(3), O.A.C., requires that the applicant describe the construction noise levels expected at the nearest property boundary and that such a description is to address

dynamiting activities, operation of earth-moving equipment, driving of piles, erection of structures, truck traffic, and the installation of equipment. The rule also requires the applicant to submit a description of the operational noise levels expected at the nearest property boundary and to indicate the location of any noise-sensitive areas within one mile of the site According to MCC, its application addressed issues related to sound, including construction noise levels and operational noise levels. Further, MCC notes that, as part of its investigation, staff asked the applicant to provide an estimated maximum noise levels and comparison noise levels for the construction and operational phases of the project, and such a response was provided to staff. MCC also indicated that its witness testified at hearing on noise levels during construction and operation and that staff found that sound levels form anticipated construction would be less that the ambient noise level from nearby road traffic on State Route 4 and other roads. Finally, MCC points out that Monroe provided no evidence on the issue of sound levels nor sought any information in discovery related to sound levels. (Memorandum contra at 9-12.)

(19) Rule 4906-13-07, O.A.C., sets forth the application requirements related to noise impacts. The applicant must describe the construction noise levels expected at the nearest property boundary; must address dynamiting activities, operation of earth-moving equipment, driving of piles, erection of structures, truck traffic, and installation of equipment; must describe the operational noise levels expected at the nearest property boundary, including generating equipment, processing equipment, associated road traffic; must indicate the location of any noise-sensitive areas within one mile of the proposed facility; and must describe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation. All of this information was provided by the applicant. While Monroe argues that the record is "devoid of authoritative information on the environmental, health, or nuisance impacts of construction or operational noise from the proposed facility," MCC provided noise level estimates based on the Federal Highway Administration Roadway Construction Noise Model. Monroe presented no evidence to contradict those estimates and provided no evidence that this model was unreliable. We would also note that Monroe provided no evidence on the issue

of sound levels and did not contest the staff's findings that the sound levels would be less than the ambient noise from nearby road traffic on State Route 4 and other roads or that the construction and operation noise at the cogeneration facility will not introduce significant noise impacts. As to Monroe's claim that there was no evidence that no factual basis upon which to conclude the construction and operation noise at the plant will not introduce significant noise impacts, the staff report found that the sound levels expected by the applicant at the construction site would be less than the ambient noise form nearby road traffic on State Route 4 and other roads. Monroe failed to rebut this evidence. Lastly, Monroe argues that staff did not request a review of the noise levels by anyone with expertise in acoustics. However, Monroe cited to no board rule mandated such an expert review. Monroe's fourth assignment of error is denied.

It is, therefore,

ORDERED, That the city of Monroe's application for rehearing be denied. It is, further,

ORDERED, That copies of this entry on rehearing be served upon parties of record.

THE OHIO POWER SITING BOARD

Alan R. Schriber, Chairman of the
Public Utilities Commission of Ohio

Mark Barbash, Board Member and
Interim Director of the Ohio Department
of Development

Sean Logan, Board Member
and Director of the Ohio Department
of Natural Resources

Alvin Jackson M.D., Board Member
and Director of the Ohio Department
of Health

Christopher Korleski, Board Member and
Director of the Ohio
Environmental Protection Agency

Robert Boggs, Board Member and
Director of the Ohio Department
of Agriculture

Lorry Yale Wagner, Board Member and
Public Member

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MAR 23 2009

Reneé J. Jenkins
Secretary