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IN THE SUPREME COURT OF OHIO

CITY OF MONROE,	)	
	)	Case No. 09-0941
Appellant,	)	
	)	On Appeal from the Ohio Power Siting
v.	)	Board, Case No. 08-281-EL-BGN
	)	
OHIO POWER SITING BOARD, et al.,	)	
	)	
Appellees.	)	
	)	

NOTICE OF APPEAL OF APPELLANT CITY OF MONROE

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Appellant City of Monroe ("Monroe") hereby gives notice of its appeal pursuant to R.C. 4903.11, 4903.13, and R.C. 4906.12 to the Ohio Supreme Court from the following attached orders of the Ohio Power Siting Board in Case No. 08-281-EL-BGN (hereinafter referred to as the "Orders"): (1) Opinion, Order and Certificate entered on January 26, 2009; (2) Entry on Rehearing entered on March 23, 2009; (3) Entry of May 28, 2008; (4) Entry of September 25, 2008; (5) Entry of October 9, 2008; and (6) Entry of November 4, 2008. Monroe is and was a party of record in Case No. 08-281-EL-BGN and timely filed its Application for Rehearing of the Board's Opinion, Order and Certificate of January 26, 2009 pursuant to R.C. 4903.10. The Orders are unlawful and unreasonable in the following respects:

I. Because the Coke Plant is a component of the major utility facility over which the Board has jurisdiction, the Board erred by failing to allow discovery on, hear evidence about, and impose requirements in the certificate to address the adverse impacts of the Coke Plant on air quality and the historic and cultural resources of the site.

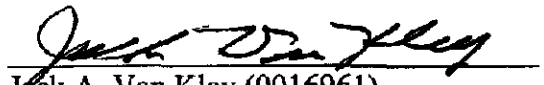
II. The Board erred by finding that the historic and cultural resources identified in the Gray & Pape reports will not be adversely affected by the cogeneration facility, and by failing to require the applicant to protect these resources.

III. The Board erred by refusing to allow Monroe to conduct discovery about other sites that may have been considered or available as alternatives to the certificated site.

IV. The Board erred by failing to require the applicant to sustain its burden of proving under R.C. § 4906.10(A)(3) that its major utility facility represents the minimum adverse environmental impact considering the nature and economics of the various alternatives, and by refusing to admit evidence about alternative sites that may allow construction and operation of the facility at a distance further from Monroe's neighborhoods and without impairing the historic and cultural resources on the applicant's certificated site.

Accordingly, Monroe requests that the Court remand the Orders to the Ohio Power Siting Board with instructions to correct the errors identified herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2009, a copy of the foregoing Notice of Appeal was served upon the Chairman of the Public Utilities Commission and the Ohio Power Siting Board, Alan R. Schriber, by leaving a copy at his office at 180 East Broad Street, Columbus, OH 43215, and upon the following counsel and parties of record by regular U.S. mail:

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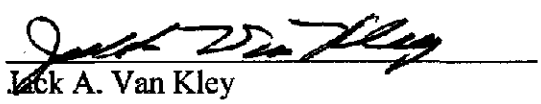

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CERTIFICATE OF FILING

I hereby certify that, on May 22, 2009, a copy of the foregoing Notice of Appeal was filed with the Docketing Division of the Public Utilities Commission and the Power Siting Board at 180 East Broad Street, Columbus, Ohio 43215 pursuant to R.C. 4903.13, OAC 4901-1-02(A), OAC 4901-1-36, and OAC 4906-7-18.

Jack A. Van Kley
Counsel for Appellant City of Monroe

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

OPINION, ORDER, AND CERTIFICATE

The Ohio Power Siting Board, coming now to consider the above-entitled matter, having appointed its administrative law judge to conduct a public hearing, having reviewed the exhibits introduced into evidence at the public hearing held in this matter, including the stipulations of the parties, and being otherwise fully advised, hereby waives the necessity for an administrative law judge report and issues its opinion, order, and certificate in this case, as required by Section 4906.10, Revised Code.

APPEARANCES:

Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, on behalf of Middletown Coke Company, a subsidiary of SunCoke Energy, Inc.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Thomas G. Lindgren, Assistant Attorney General, Public Utilities Section, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, and by Margaret A. Malone, Assistant Attorney General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, on behalf of the staff of the Ohio Power Siting Board.

Van Kley & Walker, LLC, by Christopher A. Walker and Jack A. Van Kley, 137 North Main Street, Suite 316, Dayton, Ohio 45402, on behalf of the city of Monroe, Ohio.

F. Joseph Schiavone, Co., LPA, by Frank Schiavone, Suite 520, Key Bank Building, Second and High Street, Hamilton, Ohio 45011, on his own behalf.

OPINION:

I. SUMMARY OF THE PROCEEDINGS

All proceedings before the Ohio Power Siting Board (Board) are conducted according to the provisions of Chapter 4906, Revised Code, and Division 4906, Ohio Administrative Code (O.A.C.).

On April 18, 2008, Middletown Coke Company (applicant or MCC), a subsidiary of SunCoke Energy, Inc., (SunCoke) which is a wholly owned business unit of Sunoco, Inc., filed proof of publication, in accordance with Rule 4906-5-08, O.A.C., of a public informational meeting regarding an application for a certificate of environmental compatibility and public need (certificate) that it intended to file for a cogeneration facility proposed to be located on a site located south of the city of Middletown, in Butler County, Ohio. On April 24, 2008, MCC filed a motion for a waiver of Rule 4906-13-03, O.A.C., asking that it not be required to submit fully developed information on the alternative site for the project. MCC also sought a waiver of the requirement to file the application one year prior to commencement of construction, under Section 4906.06(A)(6), Revised Code. By entry of May 28, 2008, MCC's waiver requests were granted. On June 6, 2008, MCC filed its application for a certificate for the project.

By letter dated July 22, 2008, the Board notified MCC that its application had been certified as complete pursuant to Rule 4906-1, *et seq.*, O.A.C. On July 31, 2008, MCC served copies of the application upon local government officials and filed proof of service of the application, pursuant to Rule 4906-5-06, O.A.C. By entry of August 4, 2008, a local public hearing was scheduled for October 14, 2008, in Middletown, Ohio, and the adjudicatory hearing was scheduled for October 16, 2008. The August 4, 2008, entry also directed MCC to publish one hearing notice within seven days of the effective date of the application, August 4, 2008, and a second hearing notice at least at least seven days but no more than 21 days before the local public hearing, in accordance with Rule 4906-5-08, O.A.C. Notice of the application was published in *The Middletown Journal*, a newspaper of general circulation in Butler County, and proof of publication of the first notice was filed on August 21, 2008, and proof of publication of the second notice was filed on October 6, 2008.

On September 12, 2008, the city of Monroe (Monroe) filed a motion to intervene in this proceeding. Monroe noted that its interest in this proceeding was based, in part, on its concerns related to an adjoining heat recovery coke facility (coke plant) and it claimed that the Board should evaluate the cogeneration facility in conjunction with the coke plant. On September 18, 2008, Robert Snook and F. Joseph Schiavone also filed motions to intervene. Attached to Mr. Schiavone's motion were comments that he had filed with the Hamilton County Department of Environmental Services, related to the coke plant. Mr. Schiavone similarly argued that the Board should consider the environmental effects associated with the coke plant in its evaluation of the cogeneration facility. By entry of September 25, 2008, the administrative law judge granted the motions to intervene filed by Monroe and Mr. Schiavone and denied the motion to intervene filed by Robert Snook. The September 25, 2008, entry also clarified that the Board has no jurisdiction over any permits for construction of the coke plant and found that issues related to the coke plant would not be considered in this proceeding. By entry of October 9, 2008, the administrative law judge denied Monroe's motion to vacate the May 28, 2008, entry granting waivers, denied Monroe's motion to vacate the September 25, 2008, entry regarding the jurisdiction of the

Board and the issues to be considered in this proceeding, and denied Monroe's motion to certify an interlocutory appeal of the September 25, 2008, entry.

On September 26, 2008, pursuant to Section 4906.07(C), Revised Code, staff of the Board filed a report of its investigation of MCC's application (staff report). The scheduled October 16, 2008, evidentiary hearing was converted to a prehearing conference and, by entry of October 17, 2008, the evidentiary hearing was rescheduled to November 7, 2008. On October 30, 2008, a stipulation resolving all of the matters between MCC and staff was filed. By entry of November 4, 2008, the administrative law judge denied Monroe's motion to compel MCC to produce information related to discovery of issues concerning the coke plant. On November 6, 2008, Monroe filed a stipulation indicating that it did not object to certain of the findings of fact and conclusions of law set forth in the stipulation between MCC and staff.

At the October 14, 2009, Middletown public hearing, three witnesses provided testimony. One witness, Mr. Snook, testified as to his concerns related to the environmental impacts associated with air emissions from the coke plant. The other two witnesses were Mr. Schiavone, a party to this proceeding, who identified the location of his residence in relation to the project site, and the legal counsel for Monroe, another party to the proceeding, who noted his appearance in this case. At the November 7, 2008, evidentiary hearing, the only two witnesses providing testimony were Ryan D. Osterholm, on behalf of MCC, and Timothy Burgener, on behalf of staff. Also at the evidentiary hearing, Mr. Schiavone stated that he was in agreement with the Monroe stipulation. On December 1, 2008, MCC, Monroe, and staff filed initial briefs and, on December 12, 2009, MCC, Monroe, and staff filed reply briefs. Mr. Schiavone filed a statement that he was not filing a brief in this proceeding.

II. PROPOSED FACILITY

In its application, MCC seeks certification for construction of an electric cogeneration facility that will utilize otherwise-wasted heat from an adjacent, coke plant, in order to generate an average of 57 megawatts (MW) of electricity. The cogeneration facility, according to MCC, will include a single steam turbine generator fueled by steam that is produced, at the coke plant, by five heat-recovery steam generators (HRSGs) that will recover waste heat from the coke ovens. MCC says that the project will be located in Butler County, in the city of Middletown, on about three acres of an approximately 250-acre tract of land that has been optioned by SunCoke for the construction of the coke plant. MCC notes that its application in this case is limited to the cogeneration facility and does not include the coke plant, the coke ovens or their associated facilities such as rail, road, or other site infrastructure. (MCC Ex. 1, at 01-1 to 01-2 .)

According to the application, the cogeneration facility will include the steam turbine building, administration area, exterior tankage, cooling towers, 69 kilovolt (kV) substation, and general roadway access to the major equipment. MCC proposes that the

electric power will be transmitted to the local transmission system through an onsite substation and will tie into two existing 69 kV lines owned and operated by Duke Energy Ohio (Duke), with a portion of the electricity utilized for onsite services. The cogeneration facility will also require several auxiliary systems to support power generation, including condensate, feedwater, blowdown, station water treatment, station compressed air, station process cooling water, station circulating cooling water, station monitoring and control, station electric supply, and utility interconnections. (*Id.* at 01-2.)

In its application, MCC indicates that there are two general purposes for the cogeneration facility: First, MCC explains that the hot flue gas from the coking process must be cooled so that it can be processed in a flue gas desulfurization unit to remove sulfur dioxide and in a fabric filter baghouse to remove particulate matter and mercury. According to MCC's application, the most cost-effective means to lower the temperature of the flue gas is by routing it through waste heat exchangers (that is, the HRSGs). Second, MCC points out that there will be a significant amount of steam produced from those waste heat exchangers, which steam can be used to generate electricity by means of a steam turbine generator. (*Id.* at 01-1.)

III. CERTIFICATION CRITERIA

Pursuant to Section 4906.10(A), Revised Code, the Board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the Board, unless it finds and determines all of the following:

(1) The basis of the need for the facility if the facility is an electric transmission line or gas or natural gas transmission line.

(2) The nature of the probable environmental impact.

(3) That 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.

(4) In case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability.

(5) That the facility will comply with Chapters 3704, 3734, and 6111, Revised Code, and all rules and standards adopted under

those chapters and under Sections 1501.33, 1501.34, and 4561.32, Revised Code.

(6) That the facility will serve the public interest, convenience, and necessity.

(7) The impact of the facility on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929, Revised Code, that is located within the site and alternative site of the proposed major utility facility.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the Board, considering available technology and the nature and economics of various alternatives.

MCC Exhibit 1 and Staff Exhibit 1 both address all of the above criteria.

IV. JURISDICTIONAL ISSUE

Monroe raises a threshold issue concerning the Board's certification of the application. Monroe argues that the coke plant must be considered by the Board in its review of MCC's cogeneration facility application.

A. Monroe's Position

According to Monroe, the cogeneration facility and the coke plant constitute a single "major utility facility," as that term is defined in Section 4906.01, Revised Code. Monroe reaches this conclusion based on its arguments that the coke plant is an integral part of the electric generation process and that the coke plant and the cogeneration facility are interdependent, both operationally and economically.

Monroe insists that the coke plant is an essential component of the cogeneration process. Monroe believes that the Board's consideration should not exclude the source of the steam (the coke plant) just because it also creates a second product (the coke). Monroe analogizes this situation to an application for a coal-fired power plant, in which the boilers (which provide the steam to create power) are included in the Board's consideration. In that situation, Monroe asserts, the source of steam is considered, just as it should be here. (Monroe Initial Brief at 8-9.) Monroe's position is that the coke plant and the cogeneration facility are operationally and economically interdependent. The cogeneration facility, Monroe argues, is operationally dependent on the coke plant, since the coke plant generates the flue gas that provides the heat for the HSRGs' creation of steam for the electric generation process. Conversely, Monroe stresses that the coke plant is operationally dependent on the cogeneration facility since the HRSGs cool the flue gas to a

temperature at which it can be processed in pollution control equipment. Thus, it concludes that the two plants are operationally interdependent. (Monroe Initial Brief at 5-9.)

Monroe also points out a discrepancy, relevant to these arguments, as to whether the HRSGs are part of the cogeneration facility application before the Board or whether, on the contrary, they are part of the coke plant. Monroe asserts that the role of the HRSGs is included in the application in various places, even though Mr. Ryan Osterholm, a witness for MCC, denied that they are a part of this application. (Monroe Initial Brief at 6-7.)

From an economic interdependency standpoint, Monroe points out that the application blurs any distinction between the two parts of the project by discussing the global market for coke, the supply needs of the AK Steel plant, and the role of the cogeneration facility in the coke plant's pollution control system. Thus, Monroe concludes that the segmentation of the coke plant from the cogeneration facility is illusory and that the coke plant, being an integral part of the electric generating plant, must be included within the electric generating plant that is reviewed by the Board. (Monroe Initial Brief at 7-8.)

Monroe also provides a fallback position, stating that, if it is not found to be a part of the generating plant, it should at least be treated as "associated" with that plant. Monroe points to the statutory definition of the term "major utility facility," over which facilities the Board has jurisdiction, pointing out that the definition covers an "[e]lectric generating plant and *associated facilities* designed for, or capable of, operation at a capacity of fifty megawatts or more." Section 4906.01(B), Revised Code (emphasis added). On this point, Monroe begins with a dictionary definition of the term "associated" and then points out that the coke plant and electric generating equipment are inextricably linked and that the application actually describes the generation equipment as being associated with the coke facility. Further, Monroe identifies an administrative rule that requires an applicant for a certificate to describe the proposed generation and associated facility, including fuel. (Monroe Initial Brief at 9-10.)

Finally, Monroe claims that MCC's attempt to divide its project into two parts is similar to a practice known as "segmentation" that is prohibited under the National Environmental Policy Act (NEPA). According to Monroe, under NEPA, one project may not be divided into component segments that have less significant effects, in an attempt to avoid environmental review. It explains that, under NEPA, courts have developed a test for "independent utility," inquiring into whether each project would have taken place without the other. According to Monroe, an analogous application of the NEPA test for independence would reinforce the conclusion that the coke plant is associated with the cogeneration facility because the cogeneration facility depends on the coke plant for heat and steam, the cogeneration facility will cool the coke plant's flue gases for pollution

control purposes, and the coke plant will not be economically viable without the income from generation of electricity. (Monroe Initial Brief at 10-11; Monroe Reply Brief at 9-10.)

B MCC's Position

MCC agrees that the cogeneration facility and the coke plant are operationally and economically interdependent. (MCC Reply Brief at 2.) However, it argues that Monroe's arguments have no merit. With regard to Monroe's argument that the coke plant is either part of the electric generating plant or associated with it, MCC also looks to the statutory language. It emphasizes the portion of Section 4906.01(B)(1), Revised Code, that states that the facilities over which the Board has jurisdiction must be "designed for, or capable of, operation at a capacity of fifty megawatts or more." MCC stresses that the coke plant's HRSGs are not designed for or capable of generating electricity. Rather, they are designed for cooling flue gasses. Similarly, it says that the flue gas desulphurization unit does not generate electricity but removes sulphur from flue gas. Further, it argues, the baghouse captures particulate matter and does not generate electricity.

MCC also addresses Monroe's argument that the coke plant should be analogized to a coal-fired boiler or a nuclear reactor. MCC rejects this proposed comparison, pointing out that the only purpose of the boiler or the reactor is to create steam for generation of electricity. In contrast, the HRSGs' main purpose, according to MCC, relates to the production of coke. Thus, MCC concludes that the record in this case demonstrates that the coke plant meets neither of the statutory criteria and therefore does not constitute a major utility facility. MCC also notes that its application only indicated the economic impacts of the coke plant in order to provide informational background. (MCC Reply Brief at 2-4; MCC Ex. 1 at 01-4; Tr. at 39.)

MCC also challenges Monroe's argument that the federal NEPA standard is relevant. MCC contends that NEPA does not govern the Board and that its standards are inapplicable. (MCC Reply Brief at 5.)

C. Staff's Position

Addressing Monroe's belief that the coke plant and the cogeneration comprise a single, integrated unit, over which the Board has jurisdiction, Staff points out that the primary purpose of the coke plant is to produce coke, which it could do without having a generation facility nearby. Staff also notes that the economic advantages of building the cogeneration facility do not cause the coke plant to be a part of the cogeneration facility, just as the choice to site a generating plant near a coal mine does not make the coal mine part of the generating facility. (Staff Reply Brief at 1-2.)

Staff similarly discounts Monroe's suggestion that the coke plant should be considered as an associated facility, noting that the coke plant has no direct connection to

the generation process as the cogeneration process merely uses a waste product from the coke production. (Staff Reply Brief at 3.) Staff witness Burgener testified, on this point, that staff has always taken the approach of distinguishing the electric generating equipment from the source of the steam (Tr. at 126).

Like MCC, Staff also argues that NEPA standards are inapposite. Staff points out that the test described by Monroe arose out of the specific provisions of NEPA and is not relevant to the statute governing the Board's jurisdiction. (Staff Reply Brief at 3.)

Staff also points out that, even though the Board does not have jurisdiction over the coke plant, its environmental impacts are subject to separate permitting review by the Ohio Environmental Protection Agency (OEPA) and to federal government review. (Staff Reply Brief at 3-4.)

D. Board Analysis and Determination

The Board has jurisdiction only to the extent granted by statute. Section 4906.01(B)(1), Revised Code, defines a major utility facility as an "electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more . . .." There is no question that the cogeneration facility satisfies the definition as a major utility facility. It is an electric generating plant designed for or capable of operation at a capacity of 50MW or greater. The issue before the Board relates to jurisdiction over the coke plant.

Initially, we note that, in two recent cases, the Board issued certificates for similar applications that involved cogeneration facilities that would use heat from the flue gas systems of adjacent coke facilities in order to generate electricity. *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 (Opinion and Order June 13, 2005) (04-1254) and *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 (Opinion and Order October 28, 2008) (07-703). In both of those cases, the applicants proposed to build cogeneration facilities adjacent to coke plants. In neither case did the Board take jurisdiction over the coke plants. While it is true that, in 04-1254, the Board discussed the staff's findings that the cogeneration facility would utilize waste heat from the coke manufacturing process, this issue was only relevant because, at that time, the governing statute required an analysis of the need for the project. Since that time, Section 4906.10(A)(1), Revised Code, has been amended to require consideration of the need for a project only if it relates to an electric transmission line or a gas or natural gas transmission line. Thus, no such analysis is statutorily required in the present case. Further, in 04-1254, we noted that there was no analysis by the Board of the environmental aspects of the coke facility. Thus, the question before us is whether Monroe has raised arguments that would necessitate our deviating from the existing precedent.

The first issue we must consider is whether the HRSGs are a part of the coke plant or the cogeneration facility. Although Monroe points to the application's description of the purpose of the cogeneration facility, we find that the more relevant information is in its description of the facility covered by the application. There, MCC specifically limited the application to "those facilities that are directly constructed for the purposes of generating power." It subsequently explained that "[t]he proposed power facility will include a single extraction/condensing steam turbine generator unit (STG) fueled by superheated steam from the coke plant. The coke plant will generate steam via 5 heat recovery steam generators . . . which will recover heat from the flue gas system of the coke ovens." (Company Ex. 1, at 01-1 and 01-2.) We find that the application clearly limited its coverage to the STG and related systems (listed in the application) and itemized the HRSGs as being part of the coke plant.

Analogizing this situation to a coal-fired power plant, Monroe contends that the coke plant, being an essential component of cogeneration, is part of the cogeneration facility. We disagree. In the case of a coal-fired power plant, the Board has jurisdiction over the boilers that are included within that plant, but not over the coal mine that produces the fuel. Here, the coke plant provides the heat that creates the steam. That heat is analogous to the coal used in a coal-fired plant to create steam. It is true that the coke plant also, through its HRSGs, provides the steam itself. In this way, the cogeneration situation cannot appropriately be analogized to a coal-fired power plant, where the boilers are included within Board jurisdiction. As MCC correctly notes, the boilers in this example have no other purpose but to create steam for power generation while the HRSGs serve the primary function of cooling the flue gas to ready it for pollution control. We therefore conclude that we should not treat the HRSGs in a comparable fashion as coal-fired boilers.

With regard to operational interdependence, we believe that Monroe's position fails to address the situation correctly. Monroe argues that the coke plant is dependent on the cogeneration facility and that the cogeneration facility is dependent on the coke plant. We agree with the latter statement but disagree with the former. Operation of the coke plant does not require that electricity be generated. After the HRSGs cool the flue gas, the resultant steam could be merely dissipated. It is not necessary that it be used. As pointed out by staff, this is merely a waste product from the coke production. Therefore, while not addressing whether interdependence would necessarily result in a conclusion that the Board has jurisdiction over the coke plant, we find that the coke plant and the cogeneration facility are not mutually interdependent.

Monroe also asserts that the Board has jurisdiction over the coke plant because it and the cogeneration facility are financially interdependent. Financial viability is not the concern of the Board and does not affect its jurisdiction.

Finally, as to Monroe's request that the Board adopt NEPA's test for inappropriate segmentation of projects, we decline to take this step. The statutory provisions under which the Board acts are not comparable to NEPA.

Accordingly, we find that the Board has no jurisdiction over the coke plant. As such our review of the application will be limited to the cogeneration facility. In addition, we note that Monroe made offers of proof associated with the coke plant. As our review excludes the coke plant, we therefore give no weight to the offers of proof made by Monroe in this proceeding.

V. SUMMARY OF THE EVIDENCE

A. Basis of Need - Section 4906.10(A)(1), Revised Code

1. Staff Report

Staff submits and recommends that the Board find that the criterion related to the basis of need for the project, specified under Section 4906.10(A)(1), Revised Code, is not applicable to this electric generating project (Staff Ex. 1 at 11).

2. Board Analysis and Determination

No issues were raised by any party related to the basis of need for the project. The Board recognizes that Section 4906.10(A)(1), Revised Code, specifies that is applies to the Commission determination process only if the facility in question is an electric transmission line or a gas or natural gas transmission line. As the application in this case does not relate to the enumerated categories, the Board finds that Section 4906.10(A)(1), Revised Code, is not applicable.

B. Nature of Probable Environmental Impact - Section 4906.10(A)(2), Revised Code

1. Staff Report

Staff reviewed MCC's environmental information contained in the application. In addition, staff made site visits to the project area and had discussions with employees and representatives of the applicant (*Id.* at 10). The staff report notes the following, regarding the nature of the probable environmental impact:

1. The project will require approximately 2.5 acres of agricultural land and will be located adjacent to the coke ovens within the 250-acre, MCC property. The site is presently zoned for industrial use in the city of Middletown. No additional right of way, outside of the MCC coke plant property, will be needed for the project.

2. There are no inhabited residences in the immediate proximity of the project. Residential areas in the city of Monroe are approximately one-half mile west of the project and, in the city of Middletown, are approximately one-third mile to the northeast. No structures or inhabited dwellings will be removed as a result of the construction of the project.

3. MCC estimates that noise levels from construction activities are not expected to exceed 70 decibels (dBA) at the nearest residence. Operational noise levels of the cogeneration facility are not expected to exceed 50 dBA at the nearest residence.

4. State Route 4, to the west of the site, will be the primary access point for construction traffic for this project, along with Yankee Road to the east.

5. Aesthetic impacts of the cogeneration facility are expected to be minimal due to the adjacent coke plant and the industrial character of the surrounding area.

6. No archaeological or culturally significant sites were identified on the generation facility site. One historic structure was identified within one mile of the project area and is located along the east bank of the Great Miami River at a lower elevation than the cogeneration station. Consequently the historic site is not within the visual area of potential effects.

7. No recreational uses will be impacted by the project. Nearby institutions include a school and nursing home, approximately 1,200 and 3,500 feet from the project site, respectively.

8. No wetland areas or streams will be directly impacted during the construction or operation of the project.

9. The project area consists primarily of grassland plants. One large, mature pasture tree, along with a grassy, fence right of way, will be cleared for the construction of the cogeneration project. Impacts associated with this vegetation clearing include displacement of wildlife species that might be utilizing the vegetation for habitat at the time of construction and permanent habitat loss after clearing activities are completed. There is no evidence of threatened or endangered plant species within the project area.

10. Wildlife species historically in or near the project site include:

(a) Birds: No threatened or endangered birds are known to inhabit the area. Other common birds such as the American crow, blue jay, and mourning dove are expected to be present. Vegetation on the site provides habitat and food for bird species, however other suitable habitat is available nearby. The mobility of these species, with the exception of hatchlings, should limit the potential for direct impacts.

(b) Reptiles and Amphibians: There is no record that any species of reptile or amphibian that is either threatened or endangered is found within the project area. Common species such as snakes, toads, and turtles are expected to inhabit the project site and surrounding area. These species are expected to leave the site during construction and move to other suitable habitat in the surrounding area.

(c) Mammals: The Indiana bat, a state and federal endangered species, is a tree-roosting species during non-winter months and has a summer range that historically includes the project area. No Indiana bats were identified in the project area; however ten potential bat roost trees were identified on the coke plant site.

Other common mammal species including white-tailed deer, squirrel, raccoon, coyote, and cottontail rabbit are expected to be found on the project site and in the surrounding area. If present during construction, the mobility of these species should limit the potential for direct impacts as a result of the construction and operation of the project. The vegetation on the site does not provide critical habitat for mammal species.

11. Discharge water will be routed to either a concrete-lined settling basin, the storm water basin, or the quench pond at the coke plant. No storm water will be discharged to off-site waterways during operation.

12. The facility will obtain its water from the city of Middletown public water system and an existing off-site well. MCC does not anticipate any adverse impacts to residential wells or other water supplies in the area.

13. Air emissions from the cogeneration facility will consist of less than 1,000 pounds per year of particulate matter emitted from the cooling tower. The facility will not produce any emissions from the combustion of fuel.

14. MCC estimates that capital and intangible costs for this project will total $47,560,000 and annual operation and maintenance costs will total $3,207,340.

(*Id.* at 10-11). In its report, staff recommends that the Board find that the nature of the probable environmental impact has been determined for the proposed site and that any certificate issued by the Board for the proposed facility include the conditions specified in the staff report.

2. Board Analysis and Determination

In the stipulation, staff and MCC agree that the record establishes the nature of the probable environmental impact from construction, operation, and maintenance of the facility under Section 4906.10(A)(2), Revised Code. With the exception of the social issues raised by Monroe on noise and archaeological or culturally significant impacts of the project, which are discussed below, we find that the record establishes the nature of the probable environmental impact from construction, operation, and maintenance of the facility under Section 4906.10(A)(2), Revised Code.

C. Minimum Adverse Environmental Impact - Section 4906.10(A)(3), Revised Code

Pursuant to Section 4906.10(A)(3), Revised Code, the proposed facility must represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives along with other pertinent considerations.

1. Staff Report

Staff evaluated the ecological impacts of the project by assessing the potential effects on plants and wildlife, wetlands, streams, soils, and other ecological features. Staff also evaluated social impacts by measuring the project's potential effects on existing land use, cultural and archaeological resources, ambient noise levels, aesthetics, economics, and other social concerns. (*Id.* at 12.) Staff found the following:

(a) Ecological Impacts

Staff determined that one large pasture tree and a grassy fence right of way will be cleared for the project and that the tree and grasses on the project site do not provide critical habitat to wildlife species, although wildlife may use the vegetation for stop-over habitat. Staff explained that wildlife that might be using this vegetation for habitat would be displaced during construction, but could possibly relocate to the nearby forested and grassland communities. Staff also identified no threatened or endangered species habitat on the project site; however, ten potential bat roost trees were identified on the coke plant site. It noted that MCC plans to mitigate for riparian tree clearing impacts by permanently preserving 16.2 acres of forested habitat in a riparian corridor on the coke plant site, which forest would provide continued habitat and food resources. Staff anticipated that there

would be no impacts to wetlands or streams as a result of this project, though it noted there would be a limited amount of riparian area clearing for the installation of a new railroad line across an unnamed tributary to Dick's Creek, as part of the coke plant. (*Id.* at 12.)

Staff concluded that the project will have minimal impact on the surrounding area, due to its location on the coke plant property in an industrial zone and the benefit of capturing a waste product that can be used to generate electricity. (*Id.*)

In its report, staff recommends that the Board find that the project represents the minimum adverse environmental impact and therefore complies with the requirements specified in Section 4906.10(A)(3), Revised Code. Staff also recommends that any certificate issued by the Board include the conditions listed in the staff report.

Pursuant to the stipulation, the staff and MCC agree that the record establishes that the project 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 under Section 4906.10(A)(3), Revised Code. Neither Monroe nor Mr. Schiavone raised any issues related to the ecological impacts associated with the cogeneration facility. We would note that, although Monroe did raise an issue related to the economic relationship between the coke plant and the cogeneration facility as it was discussed in the application, we have previously addressed that issue. Therefore, we find that the record establishes that the project 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 under Section 4906.10(A)(3), Revised Code.

(b) Social Impacts

Staff reviewed the land uses in the project area and explained that the site will be located on property recently rezoned to industrial use and that land use on the site will change from commercial farming to electric generation. Staff indicated that no land uses outside the boundary of the site, including those areas within one mile of the project, would change as a direct result of the project and that no structures will need to be removed for the project. Thus, staff found that the facility is not expected to have a significant impact on residential, institutional, agricultural, or recreation land uses. (*Id.* at 12.)

Through its review of the cultural and archaeological resources, staff found that no historic cultural or archaeological resources were identified on the project site or within the direct area of potential effects. Staff noted that MCC plans to preserve, for nonresidential use, the Bake family farm house on the coke plant site and that it will consult with the Ohio Historic Preservation Office to determine the need for additional cultural resource studies. (*Id.* at 12-13.)

Staff also reviewed the social impacts of the project. It concluded that the project is not expected to have a significant impact on residential, institutional, agricultural, or recreational land uses. Staff also found that no historic cultural or archaeological resources have been identified on the site or within the direct area of potential effects. Regarding noise, staff determined that there will be temporary, intermittent noise impacts during construction and that expected maximum sound levels, during operation of the facility, at the nearest residence will not exceed 50 dBA, which is less than the ambient noise from nearby road traffic, neither of which noise levels are expected to be a significant impact. The aesthetic impact, according to staff, will be minimized through vegetative screening.

Staff stated that the construction of the project will have positive economic benefits on the local economy and the region. Staff indicated that employment due to construction of the project will vary on a monthly basis and that total employment during construction of the entire coke facility is expected to peak at over 500 workers. According to staff, operation and maintenance activities for the project will require approximately eight full-time employees and the project will generate property tax revenue for the city of Middletown.

2. Monroe's Objections

Monroe contends that MCC has failed to meet its burden of proof with regard to this criterion, as it believes that the lack of evidence regarding site alternatives has left the Board with insufficient information to analyze whether the proposal represents the minimum adverse environmental impact. In addition, Monroe raises issues regarding historic and cultural resources and regarding noise impacts. Monroe's arguments concerning each one of these issues will be discussed in this section, together with the responses from MCC and staff and the Board's resolution.

(a) Site Alternatives

(1) Monroe's Position

Monroe begins its argument with its contention that the Board cannot determine, as required by the governing statute, whether the proposed facility "represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives," due to the fact that there is no evidence regarding possible alternative sites. Monroe notes that the administrative law judge granted MCC's motion for a waiver of a fully developed site alternative analysis, but believes that, in granting that motion, the judge's granting of that motion was made in reliance on MCC's statement that it had taken care to ensure that the locations it considered would minimize the impacts. Monroe insists that MCC actually considered only one such location, contrary to that statement. Monroe also argues that the specific

rules waived, as a result of that motion, did not include paragraphs (3) and (4) of Rule 4906-13-01(A), O.A.C., which, Monroe says, require the applicant to describe major site alternatives considered and the principal environmental socioeconomic considerations of the preferred and alternative sites. Monroe also points out that the waiver only excuses MCC from providing site alternative information in the application and does not exempt MCC from justifying its site selection at the hearing. Finally, Monroe submits that, even if the cogeneration facility must be in close proximity to the coke ovens, an alternative location for the coke plant should have been considered. (Monroe Initial Brief at 12-14.)

(2) MCC's Position

MCC insists that it has met its burden of proof, as the evidence shows that no further alternative site analysis was necessary. It points to the testimony of its witness Osterholm, stating that the cogeneration facility had to be collocated with the coke ovens based on engineering constraints, base constraints, and existing terrain. According to MCC, he also testified that other locations for the cogeneration facility were considered, but, given the constraints of where the coke ovens needed to be placed and that the coke ovens need to meet zoning setbacks and other requirements, the proposed site was optimal. MCC also points out that the selected site is zoned for general industrial purposes and is in an existing industrial area, next to an existing industrial site. In addition, it notes that the coke ovens need to be located close to the ultimate user of the coke, in order to allow for conveyor delivery of that product. (Tr. at 30-37; MCC Initial Brief at 9; MCC Reply Brief at 5-7.)

(3) Staff's Position

Staff argues that, although the administrative law judge granted the applicant a waiver from the requirement for a fully developed alternate site evaluation in the application, the site selection process was nevertheless consider by staff and addressed in the staff report. Staff concluded, in its report, that the cogeneration facility and its processes will be most efficient if located directly adjacent to the coke facility. Staff also notes that, at the hearing, MCC witness Osterholm presented unrebutted testimony that MCC's engineers concluded that there is only one practical site for the cogeneration facility, based on engineering constraints and the existing terrain. (Tr. at 29-34; Staff Ex. 1 at 3; Staff Reply Brief at 5.)

(4) Board Analysis and Determination

We find no merit to Monroe's claims regarding site alternatives analysis. First, MCC was granted an exemption from the requirement to perform such analysis by the administrative law judge on May 28, 2008. Secondly, we do not agree with Monroe's contention that such a waiver was based on an erroneous jurisdictional ruling. As we have previously noted, our jurisdiction extends to the cogeneration facility and not to the coke plant. We further agree that the record shows that MCC did consider alternative

configurations but there was only one practical location for the cogeneration facility and, also, that staff did consider the site selection and find that the proposed site was the only practical location for the cogeneration facility. Monroe failed to provide any evidence to rebut that testimony. Rather, Monroe's attempt to present evidence on this issue addressed the anticipated location for the coke plant, over which we have no jurisdiction. The location selection over which we have jurisdiction relates only to the cogeneration facility. This was appropriately considered and presented. Therefore, we conclude that MCC has met its burden of proof on this issue.

(b) Historic Cultural and Archaeological Resources

(1) Monroe's Position

Monroe indicates that SunCoke hired Gray & Pape, Inc., (Gray & Pape) to prepare architectural and archaeological studies of the proposed location of the facility, to document and asses the eligibility of any sites in the area for registration on the National Register of Historic Places (National Register). According to Monroe, Gray & Pape identified numerous resources in the study area, of which three (a farm and two archaeological sites) appear to be eligible for listing on the National Register and are within the proposed site. Monroe points out that the Gray & Pape study was not provided to staff, leading staff to conclude, in its report, that no archaeological or culturally significant sites were located in the proposed site or in the area of its potential effects. Monroe contends that the record should be reopened to require MCC to provide a site alternatives analysis and a mitigation plan for any sites eligible for listing on the National Register. (Monroe Ex. E, F, H; Tr. at 131-135; Monroe Initial Brief at 14-21.)

(2) MCC's Position

MCC claims that the Gray & Pape study was undertaken to support a requested nationwide permit application to the Army Corps of Engineers regarding potential deposits of fill in waters of the United States and that application related to the coke plant, not the cogeneration facility (Tr. at 35, 107). According to Mr. Osterholm, the report found that neither the Reed-Bake Farm buildings nor the two archaeological sites are within the footprint of the cogeneration facility (*Id.* at 54-58, 60). Nevertheless, MCC points out Mr. Osterholm's testimony that there is an ongoing process with the Ohio Historic Preservation Office and that there will need to be a consultation with interested parties and the applicant to address the issued related to the historic sites and the proposed coke plant. (Tr. at 64-65.) MCC also notes that the stipulation would require, as a condition of a certificate granted by the Board, that it obtain and comply with all applicable permits and authorizations required by federal and state law. MCC concludes that there is ample evidence to support a finding that the proposed location will have a minimal impact on historic cultural or archaeological resources. (MCC Initial Brief at 8-11; MCC Reply Brief at 7-8.).

(3) Staff's Position

Staff points out that the Gray & Pape survey chiefly references the site of the coke plant and not the site of the cogeneration facility. Thus, staff asserts, its arguments are inapplicable. In addition, staff notes that it specifically addresses the facts that no archaeological or culturally significant sites exist on the cogeneration facility site and that the one historic structure within one mile is not impacted. As a result, there is no need for further site analysis on this issue. (Staff Reply Brief at 6.)

(4) Board's Analysis and Determination

Upon review, we agree with MCC and staff that Monroe's claims are unwarranted. While the Gray & Pape study did identify important historic and cultural resources, the sites identified by Monroe as problematic may have been within the footprint of the coke plant but were not within the site or the impact area of the cogeneration facility (Monroe Ex. H at i). We also note that, in its report of investigation, staff did identify one historic structure within one mile of the project area at a lower elevation that the cogeneration facility; however, that historic site is neither directly nor indirectly impacted and is not within the visual area of potential effects. We also find no merit to Monroe's argument that MCC denied staff any relevant information and thus deprived the public of the opportunity to review and comment on that information. As we noted, the Gray & Pape study related to the location of the coke plant, over which we have no jurisdiction.

(c) Noise Impacts

(1) Monroe's Position

Monroe also argues that MCC has not met its burden of proof with regard to noise impacts from the project. MCC points out that the application stated that noise from plant operations is expected to be below 55 dBA, based on specified plant design assumptions, and concluded that no additional noise impact mitigation should be required. However, Monroe contends that MCC's witness Osterholm was unable to point to a specific noise standard that would indicate that the predicted noise level of 55 dBA would be adequately protective of neighboring properties. Monroe also notes that Mr. Osterholm was unaware of average daytime and nighttime background noise levels in residential areas surrounding the project. (Tr. at 51-52.) Monroe also indicates that MCC conducted no measurements of noise levels in the surrounding areas and performed no analysis to determine whether noise from the project would be predominantly in the low- or high-frequency ranges. Monroe further argues that MCC made no comparative study of available cogeneration equipment to determine whether noise levels from the proposed facility represent the minimum adverse environmental impact. (Monroe Initial Brief at 21-22.)

In addition, Monroe claims that the record is totally devoid of information regarding construction noise levels at neighboring properties. Further, according to Monroe, even when construction noise information was provided, MCC did not include information regarding background noise levels. (Monroe Initial Brief at 21-22.)

Monroe faults staff's report, claiming that staff underestimated operational and construction noise levels, as compared with information provided by MCC. Monroe also disagrees with staff's failure to recommend mitigation and notes that staff has no opinion regarding permissible noise levels. (Tr. at 129-131; Monroe Initial Brief at 22-23.)

Monroe concludes that the record provides no evidence regarding whether the facility represents the minimum adverse noise impact on the neighboring area and that MCC has failed to meet its burden of proof on this issue. Monroe also criticizes MCC for failing to compare sound measurements at the Haverhill plant which has a cogeneration facility. (Monroe Initial Brief at 23.)

(2) MCC's Position

MCC admits that the Board's rules require an applicant to describe the construction and operational noise levels expected at the nearest property boundary. Further, MCC agrees that the rules require it to indicate the location of any noise sensitive areas within one mile of the propose facility and to describe equipment and procedures to mitigate the effects of noise emissions from the project during construction and operation. Rule 4906-13-07(A)(3), O.A.C. MCC contends that it addressed those issues, pointing to portions of the application and to its response to staff's investigation. It also asserts that evidence on this issue was introduced at the adjudicatory hearing in the proceeding. The information provided to the Board thus covered both construction and operational noise levels, the assumptions on which those predictions were made, and comparison noise levels. Testimony indicated that construction noise would generally be limited in time and nature. Operational noise, according to the testimony at hearing, would primarily result from rotating equipment in the turbine building and would be mitigated by various described techniques. (Tr. at 49-53, 82-83, 91, 101, 130; Company Ex. 1, at 07-1 through 07-5; Company Ex. 4; MCC Reply Brief at 8-11.)

(3) Staff's Position

Staff contends that the differences between staff's noise-level estimates and MCC's noise-level ranges, which are highlighted by Monroe, are not material, given that the reported noise level estimates suggest that the project would not introduce any significant noise impacts. As to the reference to the contractor's information, staff notes that those estimates did not give rise to concerns over any significant noise impacts in the area surrounding the project and that staff had no need for additional information from the applicant regarding noise levels. Staff witness Burgener testified that the noise estimates

provided by MCC were adequate to inform staff of the noise impacts of the cogeneration facility and for the Board to conclude that MCC has met its burden on this issue. Staff also noted that no noise analysis from the Haverhill plant was requested because it was not in operation at the time the staff during its investigation (Tr. at 138). Finally, staff witness Burgener notes that, in its review of sound levels, the Ohio Department of Health was asked to file comments on the application, but that no comments were received. (Tr. at 130; Staff Reply Brief at 7.)

(4) Board's Analysis and Determination

Upon review of the evidence, we find that there is sufficient information to determine that the cogeneration facility represents the minimum impact on noise levels. Rule 4906-13-07, O.A.C., requires the applicant to describe the construction noise levels expected at the nearest property boundary and to address dynamiting activities, operation of earth moving equipment, driving of piles, erection of structures, truck traffic, and installation of equipment. This information was set forth on pages 07-1 through 07-5 of the application. In addition, staff determined the noise levels at the site during construction (Staff Ex. 1 at 13). The referenced Board rules also require the applicant to describe the operational noise levels expected at the nearest property boundary, including generating equipment, processing equipment, associated road traffic, and to indicate the location of any noise-sensitive areas within one mile of the proposed facility. Again, this information was set forth in the application and in the staff report. (MCC Ex. 1 at 07-1 through 07-5; Staff Ex. 1 at 13.) Finally, these Board rules require the applicant to describe equipment and procedures to mitigate the effects of noise emissions from the proposed facility during construction and operation, which information was similarly described in the application and in the staff report. (MCC Ex. 1 at 07-1 through 07-5; Staff Ex. 1 at 13.)

As to MCC's argument that the expected noise levels from plant operations were "sketchy predictions," we find no merit. According to the application, the noise levels were estimates to be used as guides due to the number of potential variables involved and were based on the Federal Highway Administration Roadway Construction Noise Model. Neither Monroe nor Mr. Schiavone contradicted or provided any evidence that this model was unreliable. We also find no merit to Monroe's claim that MCC did not perform any analysis to determine whether noise from the project would be predominantly in the low- or high-frequency ranges. There is no requirement that such measurements be made. As to Monroe's claim that staff failed to recommend any noise mitigation measures, we note that there is no specific requirement that staff make such recommendations; however, we note that, in the staff report, staff notes that mufflers will be utilized by MCC during construction. Staff concluded that sound levels from the construction will not increase significantly over the noise levels from the coke plant construction and that noise levels during construction would be less than the ambient noise from nearby road traffic on State Route 4 and other roads (Staff Ex. 1 at 13). There is also no requirement that MCC conduct a comparative study of available cogeneration equipment to determine whether noise levels from the proposed facility represent the minimum adverse environmental impact.

Finally, we would note that neither Monroe nor Mr. Schiavone provided any evidence on the issue of sound levels or contested 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.

3. Board Analysis and Determination

As discussed above, we find that the proposed facility represents the minimum adverse environmental impact, and therefore complies with the requirements specified in Section 4906.10(A)(3), Revised Code. Further, with regard to the issues disputed by Monroe, following our analysis and consideration of all of the arguments, we also find that the record establishes the nature of the probable environmental impact from construction, operation, and maintenance of the facility under Section 4906.10(A)(2), Revised Code.

D. Electric Grid - Section 4906.10(A)(4), Revised Code

1. Staff Report

During its investigation, staff evaluated the impact of interconnecting the proposed MCC cogeneration station into the existing regional electric transmission system. According to the staff report, MCC plans to interconnect the generating facility near the 69kV Todhunter Substation, located in the Duke's control area. The Midwest Independent Transmission System Operator (MISO) operates the bulk power transmission system across much of the midwestern U.S. Staff explains that MCC submitted its large-generator interconnection request to MISO and that MISO has completed a feasibility study and a system impact study, which are prerequisites to interconnect to the regional transmission grid (Staff Ex. 1, at 14). The staff noted that MISO found that MCC's proposed project did not cause any system constraints and will be capable of delivering the full nameplate rating of 67 megawatts (MW) to the grid.

Staff indicated that it believes that the proposed facility is consistent with regional plans for expansion of the electric power grid of the state and other interconnect utility systems an that the facility will serve the interest of electric system economy and reliability (Id. at 15). Staff recommended that the Board find that the proposed facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability. Further, staff recommended that any certificate issued by the Board for the proposed facility include the conditions specified in the staff report. (*Id.* at 14-15.)

2. Board Analysis and Determination

Staff and MCC stipulated that adequate data on the project has been provided to determine that the interconnection of the cogeneration facility to the existing transmission system is consistent with the regional plans for expansion of the electric power grid of the electric systems serving this state and the interconnected utility systems and that the facility will serve the interests of electric system economy and reliability, as required by Section 4906.10(A)(4), Revised Code. Neither Monroe nor Mr. Schiavone objected to this finding of the stipulation. We find that the evidence demonstrates that this criterion has been met.

E. Air, Water, and Solid Waste - Section 4906.10(A)(5), Revised Code

1. Staff Report

(a) Air

In its report, staff found that, although there will be no combustion-related emissions directly associated with operation of the cogeneration facility, there will be emissions of particulate matter from the facility's two-cell cooling tower. Staff also noted that, as of the date of publication of this staff report, a final determination had not yet been issued by OEPA regarding the requirement for an air quality permit issued pursuant to Chapter 3704, Revised Code, for particulate emissions associated with the operation of the facility's cooling tower. (*Id.* at 16.)

According to the staff report, construction activities associated with the cogeneration facility will result in the emission of minor amounts of air pollutants, such as volatile organic compounds, sulfur dioxide, carbon monoxide, nitrogen oxides, particulate matter, and fugitive dust. Because of the relatively low emission levels and the temporary nature of the construction activities, staff stated that it does not expect that the air pollutant emissions will have any significant adverse impacts. Staff further notes that fugitive dust rules adopted pursuant to the requirements Chapter 3704, Revised Code, will be applicable to construction of the cogeneration facility. MCC intends to control fugitive dust emissions during construction through vehicle speed restrictions, water spray suppression, and truck coverings. Staff explains that MCC has indicated that the facility parking lot and roadways will be paved and that there will be no other potential sources of fugitive dust during operation of the facility. (*Id.* at 16.)

(b) Water

The staff report states that, although operation of the proposed facility will require the use of significant amounts of water, the water will be sourced from the city of Middletown's water system. Because the facility's consumption of water will be less than two million gallons per day, the requirements under Sections 1501.33 and 1501.34, Revised

Code, are not applicable to this project. Staff also explains that the cogeneration facility is designed to be a zero discharge facility. All wastewaters generated from facility's operations will be routed to concrete-lined settling basins, the storm water basin, or the quench pond at the coke facility. Because the facility is designed to make use of all non-sanitary wastewater, including storm water runoff, in its operations, no storm water will be discharged to off-site waterways during operation. The coke facility's storm water system is designed to discharge water only through natural evaporation. Sanitary wastewater will be discharged to the Butler County's sanitary sewer system. (*Id.* at 16.)

As noted in the staff report, although construction of the coke facility, as proposed by the applicant, will not directly impact wetlands or water bodies, there will be a potential for temporary impacts to surface waters through storm water runoff which necessitates compliance with requirements of Chapter 6111, Revised Code. The applicant indicated that it will obtain a non-pollutant discharge elimination system (NPDES) Construction Storm Water General Permit from OEPA, prior to commencement of construction. The staff also noted that, during construction, the applicant intends to manage potential siltation impacts to water bodies through compliance with the NPDES Construction Storm Water General permit, its associated Storm Water Pollution Prevention Plan, the use of best-management practices, and an erosion and sediment control plan that is to be developed prior to construction. (*Id.* at 16-17.)

(c) Solid Waste

Staff notes in its report that construction of the cogeneration facility will result in the creation of solid waste. Nonhazardous solid waste will include items such as pallets, packing materials, scrap construction materials, and miscellaneous rubber, wood, plastics and metals. Staff also indicated that, because the cogeneration facility is in an existing agricultural area, vegetation removal will be minimal. Staff anticipates that construction of the power block and related facilities will also result in the creation of small quantities of hazardous waste materials. Hazardous wastes are expected to include paint remnants, solvents, cleaners, and waste fluids from vehicles and equipment. Staff notes that MCC will collect and recycle fluids that can be recycled and that other hazardous wastes that cannot be recycled will be reused or disposed of in compliance with applicable requirements. (*Id.* at 17.)

(d) Airports

In its report, staff states that it contacted the Ohio Office of Aviation during review of this application, in order to coordinate review of potential impacts the facility might have on local airports. According to staff, the airports nearest to the proposed facility include Hook Field, located on the northwest side of Middletown, about 3.5 miles north of the proposed facility and the Warren County airport, about eight miles east of the proposed facility. At the time of the publication of the staff report, no aviation-related concerns associated with Ohio airports had been identified. (*Id.* at 20.)

Staff recommends that the Board find that the proposed cogeneration facility complies with the requirements in Section 4906.10(A)(5), Revised Code, and that any certificate issued by the Board include the conditions set forth in the staff report.

2. Board Analysis and Determination

Under the stipulation, MCC and the staff agree that the record establishes as required by Section 4906.10(A)(5), Revised Code, that construction of the cogeneration facility on the preferred site will comply with Chapters 3704, 3734, and 6111 and Sections 1501.33 and 1501.34, Revised Code and all rules and standards adopted under these chapters and under Section 4561.32, Revised Code. No issues related to Section 4906.10(A)(5), Revised Code, were raised by the Monroe or Mr. Schiavone. The Board finds that this criterion has been met.

F. Public Interest, Convenience, and Necessity - Section 4906.10(A)(6), Revised Code

1. Staff Report

Staff believes that this project will serve the public interest, convenience, and necessity by providing electrical generation from what otherwise would be a waste product of the coke production process. According to the staff report, the project will help ensure that adequate electric capacity is available in the region. The cogeneration facility will also reduce the overall waste heat released from the coke facility and, therefore, will help to minimize the environmental impact of the coke plant.

According to staff, any elevated electric and magnetic fields (EMF) will be confined to the coke plant site and will be attenuated to background levels at the property line of the plant site. Further, staff noted that the 60 kV transmission lines transporting the power from the step-up transformer to the Duke substation will generate moderate levels of EMF. However, the circuit, in the vicinity of the project, is not located close to any residential buildings. Staff indicated that MCC will comply with safety standards set by the Occupational Safety and Health Administration, the National Electrical Safety Code, and the Commission. (*Id.* at 19.)

Staff recommends that the Board find that the cogeneration facility will serve the public interest, convenience, and necessity and therefore complies with the requirements specified in Section 4906.10(A)(6), Revised Code. Further, staff recommends that any certificate issued by the Board include the conditions specified in the staff report.

2. Board Analysis and Determination

MCC and staff stipulated that the record establishes that the cogeneration facility will serve the public interest, convenience and necessity under Section 4906.10(A)(6), Revised Code. Neither Monroe nor Mr. Schiavone raised any issue related to this criterion. Based on the evidence of record, the Board finds that the cogeneration facility will serve the public interest, convenience and necessity under Section 4906.10(A)(6), Revised Code.

G. Agricultural Districts - Section 4906.10(A)(7), Revised Code

1. Staff Report

Staff points out that land is classified as agricultural district land through an application and approval process that is administered through local county auditor's office. As stated in the application, MCC has determined that there are no agricultural districts located within the proposed site. Therefore, staff states that there will be no impact on agricultural districts. Staff notes that the site was previously used for agricultural production of soybeans, corn, and winter wheat and that construction of the project will remove approximately 2.5 acres of farmland from potential agricultural use.

Staff recommended that the Board find that the impact of the proposed facility on the viability of existing agricultural land in an agricultural district has been determined and therefore complies with the requirements in Section 4906.10(A)(7), Revised Code. Further, it recommended that any certificate issued by the Board include the conditions set forth in the staff report. (*Id.* at 20)

2. Board Analysis and Determination

Staff and MCC stipulated that adequate data has been provided to determine what the project's impact will be on the viability, as agricultural land, of any land in an existing agricultural district established under Chapter 929, Revised Code, that is located within the proposed site, as required by Section 4906.10(A)(7), Revised Code. Mr. Schiavone and Monroe indicated that they did not object to the finding of fact in the stipulation related to this criterion. Based on the record evidence, the Board finds that this criterion has been met.

H. Water Conservation Practice - Section 4906.10(A)(8), Revised Code

1. Staff Report

In its report, staff concluded that the coke and cogeneration facilities will require process and cooling water, which will be supplied from the city of Middletown and an existing off-site well. Staff noted that the greatest amount of water consumption will be associated with the cooling tower and the coke quenching processes. Staff found that the applicant will incorporate water conservation practices into its operation of the facility

including the use of cooling tower water recycling, use of waste water from the cogeneration facility in other facility operations, and making the facility zero-discharge in terms of wastewater.

Staff recommended that the Board find that the proposed facility will incorporate maximum feasible water conservation practices and that it therefore complies with the requirements set forth in Section 4906.10(A)(6). It further recommended that any certificate issued for the facility include the conditions specified in the staff report. (*Id.* at 21.)

2. Board Analysis and Determination

Under conclusion of law paragraph (10) of the stipulation, staff and MCC agree that the record establishes that the facility will comply with water conservation practices under Section 4906.10(A)(8), Revised Code (Jt. Ex. 1 at 5). In its stipulation, Monroe indicated that it did not object to conclusion of law paragraph (10). Mr. Schiavone agreed with Monroe's stipulation. The Board finds that, based on the evidence, the record establishes that the facility will comply with water conservation practice under Section 4906.10(A)(8), Revised Code.

VI. STIPULATION

In the stipulation, MCC and staff recommend that the Board issue the certificate requested by MCC and subject to the following conditions:

(1) That MCC shall utilize the equipment and construction practices as described in the application, any supplemental filings, replies to date requests, and all conditions of certificate.

(2) That MCC shall implement the mitigative measures described in the application, any supplemental flings, replies to data requests, and all conditions of certificate.

(3) That MCC shall coordinate with the appropriate authority regarding any vehicular lane closures dues to construction.

(4) That MCC shall promptly remove and properly dispose of gravel or any other construction material during or following construction of the facility in accordance with the OEPA regulations.

(5) That MCC shall properly install and maintain erosion and sedimentation control measures at the project site in accordance with the following requirements:

(a) During construction of the facility, seed all disturbed soil, except within cultivated agricultural fields, within seven days of final grading with a seed mixture acceptable to the appropriate County Cooperative Extension Service. Denuded areas, including spoils piles, shall be seeded and stabilized within seven days, if they will be undisturbed for more than 21 days. Reseeding shall be done within seven days of emergence of seedlings as necessary until sufficient vegetation in all areas has been established.

(b) Inspect and repair all erosion control measures after each rainfall event of one-half of inch or greater over a 24-hour period, and maintain controls until permanent vegetative cover has been established on disturbed areas.

(c) Obtain NPDES permits for storm water discharges during construction of the facility. A copy of each permit or authorization, including terms and conditions, shall be provided to staff within seven days of receipt.

(6) That, prior to the commencement of construction, MCC shall obtain and comply with all applicable permits and authorizations as required by federal and state laws and regulations for any activities where such permit or authorizations required. Copies of permits and authorization, including all supporting documentation, shall be provided to staff within seven days of issuance or receipt by MCC.

(7) That MCC shall not commence construction of the facility until it has a signed interconnection agreement with the MISO, which includes construction, operation, and maintenance of system upgrades necessary to reliably and safely integrate the proposed generating facility into the regional transmission system.

(8) That MCC shall conduct a preconstruction conference prior to the start of any project work, which the staff shall attend, to discuss how environmental concerns will be satisfactorily addressed.

(9) That, at least 30 days before the preconstruction conference, MCC shall submit to the staff, for review and approval, one set of detailed drawings for the certificated electric generating

facility, including all lay down areas and access points, so that the staff can determine that the final project design is in compliance with the terms of the certificate.

(10) That at least seven days before the preconstruction conference MCC shall submit to the staff a copy of its storm water pollution prevention plan and its erosion and sediment control plan for review and approval.

(11) That the certificate shall become invalid if MCC has not commenced a continuous course of construction of the proposed facility with in five years of the date of journalization of the certificate.

(12) That MCC shall provide to the staff the following information as it becomes known:

(a) The date on which construction will begin;

(b) The date on which construction was completed; and

(c) The date on which the facility began commercial operation.

(Jt. Ex. 1, at 5-6)

In its stipulation, Monroe stated that it did not join in, but did not object to, all recommended conditions set forth above, but that such recommended conditions may be appropriate but are not sufficient, given the exclusion of the proposed MCC coke plant from the stipulation.

VII. CONCLUSION

According to the stipulation, the parties recommend that, based upon the record, and the information and data contained therein, the Board should issue a certificate for construction, operation, and maintenance of the project on the preferred site, as described in the application filed with the Board on June 6, 2008, and as clarified by supplemental filings (Joint Ex. 1, at 1-2). Although not binding upon the Board, stipulations are given careful scrutiny and consideration. Based upon the record in this proceeding, the Board finds that all the criteria established in Section 4906.10(A), Revised Code, are satisfied for the construction, operation, and maintenance of the project using the preferred site as described in the application filed with the Board on June 6, 2008, as supplemented, and subject to the conditions set forth in the stipulation. Accordingly, based upon all of the above, the Board approves and adopts the stipulation between MCC and staff and hereby issues a certificate to MCC for the construction, operation, and maintenance of the project

at the preferred site, as proposed in its application, and subject to the conditions set forth in Section V of this opinion, order and certificate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) MCC is a corporation and a person under Section 4906.01(A), Revised Code.

(2) The proposed MCC cogeneration facility is a major utility facility, as defined in Section 4906.01(B)(1), Revised Code.

(3) On April 18, 2008, MCC filed proof of publication of the public informational meeting in accordance with Rule 4906-5-08, O.A.C.

(4) On April 24, 2008, MCC filed a motion for a waiver of Rule 4906-13-3, O.A.C., and a waiver of Section 4906.06, Revised Code.

(5) On May 28, 2008, the ALJ granted MCC's requested waivers.

(6) On June 6, 2008, MCC filed its application for a certificate to build a cogeneration facility.

(7) On July 23, 2008, the Board notified MCC that its application had been found to comply with Chapters 4906-01, *et seq.*, O.A.C.

(8) MCC served copies of the application upon local government officials and filed proof of service of the application, pursuant to Rule 4906-5-06, O.A.C., on July 31, 2008.

(9) By entry of August 4, 2008, a local public hearing was scheduled for October 14, 2008, in Middletown, Ohio and the adjudicatory shearing was scheduled for October 16, 2008, and finding the effective date of the application was August 4, 2008.

(10) By entry of September 25, 2008, the administrative law judge granted the motions to intervene filed by Monroe and Mr. Schiavone and denied the motion to intervene filed by Mr. Snook.

(11) On September 26, 2008, staff filed its staff report on the MCC application.

(12) Notice of the hearings was published on September 28, 2008, and proof of publication was filed on October 6, 2008.

(13) By entry of October 9, 2008, the administrative law judge denied Monroe's motion to vacate the May 28, 2008, entry granting waivers, denied Monroe's motion to vacate the September 25, 2008, entry, and denied Monroe's motion to certify an interlocutory appeal of the September 25, 2008, entry.

(14) A local public hearing was held on October 14, 2008, at 5:30 p.m., at the City Building, City Council Chambers in Middletown, Ohio.

(15) On October 30, 2008, MCC and staff filed a stipulation and recommendation.

(16) By entry of November 4, 2008, the administrative law judge denied Monroe's motion to compel MCC to produce information subject to discovery of issues related to the coke plant.

(17) On November 6, 2008, a stipulation was filed by Monroe.

(18) An adjudicatory hearing was held on November 7, 2008, at the offices of the Ohio Power Siting Board, in Columbus, Ohio.

(19) Adequate data on the MCC cogeneration facility has been provided to make the applicable determinations required by Section 4906.10(A), Revised Code.

(20) The record evidence in this matter provides sufficient factual data to enable the Board to make an informed decision.

(21) MCC's application complies with the requirements of Chapter 4906-13, O.A.C.

(22) The record establishes that the basis of need, under Section 4906.01(A)(1), Revised Code, is not applicable.

(23) The record establishes the nature of the probable environmental impact from construction, operation, and maintenance of the facility under Section 4906.10(A)(2), Revised Code.

(24) The record establishes that the preferred site of the MCC cogeneration facility, subject to the conditions set forth in the

stipulation, 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 under Section 4906.10(A)(3), Revised Code.

(25) The record establishes that, subject to the conditions set forth in the stipulation, the cogeneration facility is sited to be consistent with regional plans for expansion of the electric power grid and will serve the interests of electric system economy and reliability, under Section 4906.10(A)(4), Revised Code.

(26) The record establishes, as required by Section 4906.10(A)(5), Revised Code, that the cogeneration facility will comply with Chapters 3704, 3734, and 6111, Revised Code, and Sections 1501.33 and 1501.34, Revised Code, and all rules and standards adopted under these chapters and under Section 4561.32, Revised Code.

(27) The record establishes that the cogeneration facility will serve the public interest, convenience, and necessity, as required under Section 4906.10(A)(6), Revised Code.

(28) The record establishes that the cogeneration facility will not impact the viability as agricultural land of any land in an existing agricultural district, under Section 4906.10(A)(7), Revised Code.

(29) The record establishes that the cogeneration facility will comply with water conservation practices under Section 4906.10(A)(8), Revised Code.

(30) Based on the record, the Board shall issue a certificate for construction, operation, and maintenance of the MCC cogeneration facility at the preferred site and subject to the conditions set forth in the stipulation.

ORDER:

It is, therefore,

ORDERED, That the stipulation be approved and adopted. It is, further,

ORDERED, That a certificate be issued to MCC for the construction, operation, and maintenance of the cogeneration facility, as proposed, at the preferred site. It is, further,

ORDERED, That the certificate contain the 12 conditions set forth above in Section VI of this opinion, order, and certificate. It is, further,

ORDERED, That a copy of this opinion, order, and certificate be served upon each party of record and any other interested person.

THE OHIO POWER SITING BOARD

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

Lee Fisher, Board Member
and 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

SEF:ct

Entered in the Journal
JAN 26 2009

Reneé J. Jenkins
Secretary

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

SEF:ct

Entered in the Journal
MAR 23 2009

Reneé J. Jenkins
Secretary

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 Station in Butler County.	))))))	Case No. 08-281-EL-BGN

ENTRY

The administrative law judge finds:

(1) On April 24, 2008, Middletown Coke Company (MCC), a subsidiary of SunCoke Energy, filed a motion for waivers of Ohio Power Siting Board (Board) rules, in advance of an application for a certificate of public convenience and necessity for a cogenerating facility that it intends to file with the Board. The cogeneration facility will be located on the site of a coke facility that is currently under construction and the cogeneration facility will use the waste heat and steam from the new coke plant to generate electricity.

(2) On May 20, 2008, staff filed a memorandum in response to the waiver request.

(3) In its motion, MCC seeks two waivers. First, MCC seeks a waiver of Section 4906.06(A)(6), Revised Code, which requires that an application to the Board must be filed not less than one-year nor more than five years prior to the planned date of commencement of construction. MCC states that it needs to begin construction of the project as soon as it is authorized by the Board during late summer under optimum construction conditions. MCC contends that, without the waiver of the one-year notice provision, it will not be permitted to commence construction this year.

(4) In its memorandum, staff indicated that with respect to the waiver of Section 4906.06(A)(6), Revised Code, it had no objection.

(5) Section 4906.06(A)(6), Revised Code, provides that this period may be waived by the Board for good cause shown. Upon review, the administrative law judge finds good cause to grant MCC's motion to waive Section 4906.06(A)(6), Revised Code.

(6) MCC also seeks a waiver of the requirements for a fully developed alternative site analysis and the provision of information as required under Rules 4906-13-02(B)(1), 4906-13-03, 4606-13-04, 4606-13-05(A) and (B)(3), and 4606-13-06(B)(1)(a) and (C)(1)(e), Ohio Administrative Code (O.A.C.). MCC indicates that the location of the cogeneration station is dependent upon the location of the coke manufacturing facility, which was not required to undergo a formal site election study. Further, MCC states that engineering considerations dictated the location of the power generation equipment in relation to the coke plant structures and that the preferred footprint selected by MCC for the generation equipment is located adjacent to the southeast corner of the coke oven facility. In addition, MCC contends that, because of the need to locate the electric generating station near the coke plant property, there is not the need for an alternative site as there would be if this project were a transmission line. Therefore, MCC claims that there is no reason to require a fully developed site alternative analyses. Nevertheless, MCC states that it has taken care to ensure that the location considered ideal for placement of the generation equipment minimized the impact to ecological, cultural, and socioeconomic resources.

(7) In its memorandum, staff indicated that it has no objections to MCC's second waiver request provided the request for waiver from Rules 4906-13-02(B)(1), 4906-13-03, 4606-13-04, 4606-13-05(A) and (B)(3), and 4606-13-06(B)(1)(a) and (C)(1)(e), O.A.C., applies to only the alternative site and not the planned site. Staff indicated that it reserves the right to require information from the applicant in areas covered by the waiver request, if it deems such information essential to its investigation. In addition, staff noted that it reserves the right to investigate and contest all other issues presented by the application.

(8) Rule 4906-1-03, O.A.C., provides that, where good cause is shown, the administrative law judge may permit departure from Chapters 4906-1 to 4606-15, O.A.C. Upon review, the

administrative law judge concludes that MCC has shown good cause for its second requested waiver and that the request is reasonable. Accordingly, MCC's motion for a waiver of the requirements to fully develop the analysis of the alternative site under Rules 4906-13-02(B)(1), 4906-13-03, 4606-13-04, 4606-13-05(A) and (B)(3), and 4606-13-06(B)(1)(a) and (C)(1)(e), O.A.C., should be granted.

(9) The administrative law judge wishes to clarify that, although he is willing to grant the waiver from the filing requirements to fully develop the analysis of the alternative site under Rules 4906-13-02(B)(1), 4906-13-03, 4606-13-04, 4606-13-05(A) and (B)(3), and 4606-13-06(B)(1)(a) and (C)(1)(e), O.A.C., this waiver ruling does not preclude the staff from requesting the waived information and the applicant must provide staff with any and all waived information it may request during the completeness review or through discovery in this proceeding.

It is, therefore,

ORDERED, That MCC's motion for a waiver of Section 4906.06(A)(6), Revised Code, and a waiver of the requirements to fully develop the analysis of the alternative site under Rules 4906-13-02(B)(1), 4906-13-03, 4606-13-04, 4606-13-05(A) and (B)(3), and 4606-13-06(B)(1)(a) and (C)(1)(e), O.A.C., is granted. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

OHIO POWER SITING BOARD

Scott Farkas

By: Scott Farkas
Administrative Law Judge

JRJ
/ct

Entered in the Journal
MAY 28 2008

Renee J. Jenkins

Reneé J. Jenkins
Secretary

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

The administrative law judge finds:

(1) On June 6, 2008, Middletown Coke Company (MCC), a subsidiary of SunCoke Energy, 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 facility that is currently under construction. This site is located in Middletown, Ohio, Butler County.

(2) By entry of August 4, 2008, a local public hearing in this matter was scheduled for October 14, 2008, in Middletown, Ohio, and an adjudicatory hearing was scheduled for October 16, 2008, in Columbus, Ohio. The August 4, 2008, entry directed that MCC publish notice of the hearings and that the notice indicate that any person interested in intervening in this proceeding must file a motion to intervene within 30 days following publication of the newspaper notice.

(3) Rule 4906-7-04, Ohio Administrative Code (O.A.C.), provides that, in deciding whether to permit intervention, the administrative law judge (ALJ) may consider: the nature and extent of the person's interest, the extent to which the person's interest is represented by existing parties, the person's contribution to a just and expeditious resolution of the issues, and whether granting intervention would unduly delay the proceeding or unjustly prejudice an existing party.

(4) On September 12, 2008, the city of Monroe, Ohio (Monroe) filed a motion to intervene in this proceeding. According to Monroe, the project would be located less than 2,000 feet from the Monroe city limits and coal storage piles for the project would be situated approximately 2,000 feet from residential neighborhoods in Monroe. Also, Monroe asserts that the

cogeneration facility itself would be situated less than three quarters of a mile from these neighborhoods. Monroe also claims that the project is a part of a proposed heat recovery coke facility that would include 100 coke ovens and that steam generated for the coke facility will be utilized to generate electricity on-site and would emit over 2,700 tons of air pollutants each year. Monroe argues that the Board should evaluate the entire cogeneration facility, including steam generation, to determine the probable environmental impact of the project. Monroe notes that it is involved in the environmental permitting of the MCC coke facility and that its knowledge of the environmental and other aspects of the project will contribute to the just and expeditious resolution of this matter. In addition, Monroe states that its interest in the proceeding is not represented by any existing party and that granting its motion to intervene will not unduly delay this proceeding or unjustly prejudice any existing party. No pleadings were filed in opposition to Monroe's request to intervene.

(5) Upon review, the ALJ finds that Monroe has shown that the nature and extent of its interest is sufficient to warrant intervention. Therefore, Monroe's motion to intervene should be granted.

(6) On September 18, 2008, Robert Snook and F. Joseph Shiavone also filed motions to intervene in this proceeding. Mr. Snook claims that he has a real and substantial interest in the proceeding because he is an AK Steel retiree and he is a stakeholder with a substantial interest due to his monthly pension check. Mr. Snook's motion to intervene should be denied. Mr. Snook's only stated basis for intervention is a personal financial interest related to AK Steel, which is not a party in this proceeding. Such an interest is insufficient to warrant intervention in this proceeding.

(7) As to Mr. Shiavone's motion to intervene, the nature and extent of his interest is based on the claim that he is an adjoining property owner. The ALJ finds that such an interest is sufficient to warrant intervention. Therefore, Mr. Shiavone's motion to intervene should be granted.

(8) The ALJ points out that, attached to Mr. Shiavone's motion to intervene, are several comment letters that were included in a letter he filed with the Hamilton County Department of Environmental Services. These comment letters relate to an application, filed by MCC, for a permit to install a coke plant project, located in the vicinity of the cogeneration project at issue in this case. Similarly, Monroe's motion to intervene contained numerous references to the MCC coke plant project. The Board has no jurisdiction over any permits for construction of the coke plant. Therefore, issues related to the coke plant will not be considered in this proceeding.

(9) Rule 4906-7-10, O.A.C., provides in part that the ALJ may hold one or more prehearing conferences for the purpose of resolving discovery matters, ruling on pending procedural motions, clarifying issues in the proceeding, and identifying witnesses and the subject matter of their testimony.

(10) As Monroe's and Mr. Shiavone's motions to intervene have been granted, and as the case docket indicates that there are outstanding discovery requests by at least one of the parties, the ALJ finds that it would be appropriate to convert the evidentiary hearing, now scheduled for October 16, 2008, at 10:00 a.m., at the offices of the Commission, to a prehearing conference. The evidentiary hearing in this proceeding will be rescheduled by subsequent entry.

It is, therefore,

ORDERED, That the motions to intervene filed by the city of Monroe and F. Joseph Shiavone be granted. It is, further,

ORDERED, That the motion to intervene filed by Robert Snook be denied. It is, further,

ORDERED, That the October 16, 2008, evidentiary hearing be converted to a prehearing conference. It is, further,

ORDERED, That a copy of this entry be served on MCC and its counsel, the city of Monroe, F. Joseph Shiavone, Robert Snook, 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

Scott Farkas

By: Scott Farkas
Administrative Law Judge

JRJ/ct

Entered in the Journal
SEP 25 2008

Renee J. Jenkins

Reneé J. Jenkins
Secretary

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
/ct

Entered in the Journal
OCT 09 2008

Reneé J. Jenkins
Secretary

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 the 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) 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 moved 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 requested that the ALJ certify these issues for interlocutory appeal. Lastly, Monroe sought a ruling that, even if the waivers are not vacated, the information related to site alternatives would still be subject to discovery and hearing.

(4) By entry of October 9, 2008, the administrative law judge denied Monroe's motion to vacate the May 28, 2008, entry granting waivers; denied Monroe's motion to vacate the September 25, 2008, entry; and denied Monroe's motion to certify an interlocutory appeal. The ALJ also found that the information sought by Monroe related to site alternatives was not subject to discovery and hearing.

(5) On November 3, 2008, Monroe filed a motion to compel document production and interrogatory answers by MCC to interrogatories 2, 3, 4, 5, 7, and 8 of Monroe's first set of interrogatories and to produce the documents requested by requests 5 through 16 of Monroe's first set of requests for production of documents. Monroe claims that, while the ALJ has ruled that the coke plant issues will not be considered at the hearing, no order prohibits discovery about the coke plant. Monroe asks that the ALJ either clarify that discovery on the coke plant is prohibited or, in the alternative, compel MCC to produce the requested information.

(6) As noted previously, by entries dated September 25, 2008, and October 9, 2008, the Board's jurisdiction is governed by Chapter 4906, Revised Code, and the Board has no jurisdiction over the coke facility. The ALJ has previously found that issues related to the coke plant would therefore not be considered in this proceeding. As issues relating to the coke plant are not relevant to the Board's determination in this proceeding, discovery on such issues is not appropriate in this forum. Accordingly, Monroe's motion to compel MCC to produce the requested information should be denied to the extent that such interrogatories or requests for production of documents are related to the coke plant.

It is, therefore,

ORDERED, That MCC's motion to compel 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

VLK/ct

Entered in the Journal

NOV 04 2008

Reneé J. Jenkins
Secretary