

**OHIO POWER SITING BOARD**

<b>IN THE MATTER OF THE )</b> <b>APPLICATION OF THE OHIO STATE )</b> <b>UNIVERSITY FOR A CERTIFICATE OF )</b> <b>ENVIRONMENTAL COMPATIBILITY )</b> <b>AND PUBLIC NEED FOR A COMBINED )</b> <b>HEAT AND POWER MAJOR UNIT )</b> <b>FACILITY IN FRANKLIN COUNTY, )</b> <b>OHIO ON THE CAMPUS OF THE OHIO )</b> <b>STATE UNIVERSITY )</b>	<b>CASE NO. 19-1641-EL-BGN</b>
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**INTERVENOR SIERRA CLUB’S MOTION TO COMPEL DISCOVERY FROM**  
**APPLICANT THE OHIO STATE UNIVERSITY**

Pursuant to OAC §4906-2-22, Intervenor Sierra Club respectfully moves the Administrative Law Judge for an order compelling the Applicant, The Ohio State University (“OSU”), to produce documents in response to Sierra Club’s request for documents relating to any feasibility studies of solar or wind generation alternatives conducted by OSU or its contractors (that is, Requests for Production 1.10, 1.11, 1.12), and any requests for proposals for generation construction in the past five years (Request for Production 2.06), which were served on Applicant on April 9 and April 27, 2020, respectively. As described in the attached Memorandum of Support and affidavit of counsel, the information at issue goes to the heart of a key legal issue before the Siting Board in this proceeding: Whether the proposed facility represents the minimum adverse environmental impact, considering the alternatives. *See* Rev. Code §4906.10(A)(3).

Sierra Club has exhausted all other reasonable means of resolving its differences with OSU with respect to these requests. Intervenor Sierra Club therefore requests that the Administrative Law Judge issue an order directing OSU to respond fully to Requests for Production 1.10, 1.11, 1.12, and 2.06. In accordance with Ohio Admin. Code §4906-2-22(C), an

affidavit of counsel is attached, as are copies of Intervenor's requests which are the subject of this Motion to Compel and of Applicant's responses to those requests, as Exhibits A through D.

Respectfully Submitted,

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### **Memorandum in Support of Motion to Compel**

Under Ohio law, the Power Siting Board “shall not grant a certificate for the construction, operation, and maintenance of a major utility facility...unless it finds and determines...[t]hat 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.” Rev. Code §4906.10(A)(3). In this proceeding, The Ohio State University (“OSU”) is proposing the construction of a 105.5 megawatt gas-fired combined heat and power facility to serve its campus energy needs. The availability, nature, economics, and environmental impacts of alternative forms of generation that could provide the same generation capacity are directly relevant to whether this proposed gas facility represents the “minimum adverse environmental impact.” *See* R.C. §4906.10(A)(3). The Board cannot determine whether OSU’s choice of gas generation represents “the minimum adverse environmental impact, considering the state of available technology” without evidence about these “various alternatives” and their relative cost, capacity, and environmental impacts. Accordingly, Sierra Club has requested documents relating to OSU’s consideration of alternatives, namely, solar and wind generation, that could tend to show (or lead to evidence tending to show) that the nature and economics of available technology could allow OSU to construct a facility with less adverse environmental impact.

Specifically, Requests 1.10, 1.11, and 1.12, included among Sierra Club’s First Set of Document Requests, sought documents relating to the any studies OSU or its contractors have conducted regarding the feasibility, economics, and capacity of solar, wind, and storage resources to meet OSU’s energy needs:

- 1.10 Please produce all documents relating to possible construction or use of solar electricity generating facilities (including storage) as a means of providing energy for the OSU campus prepared by or at the direction of OSU, OSEP, or EBO,

including but not limited to any proposals, studies, assessments, or reports regarding the feasibility, cost, or risks associated with such construction or generation.

- 1.11 Please produce all documents relating to possible construction or use of wind electricity generating facilities (including storage) as a means of providing energy for the OSU campus prepared by or at the direction of OSU, OSEP, or EBO, including but not limited to any proposals, studies, assessments, or reports regarding the feasibility, cost, or risks associated with such construction or generation.
- 1.12 Please produce all correspondence between OSU, on the one hand, and OSEP, ENGIE North America, Axium Infrastructure, or EBO, on the other, relating to the construction or use of solar or wind electricity generating facilities, including storage.

OSU did not produce documents in response to these requests and instead objected to each in its entirety on the grounds that the requested documents “are not reasonably likely to lead to the discovery of admissible evidence.” *See* Exhibit C.

Request 2.06, included in Sierra Club’s Second Set of Document Requests, sought documents as follows:

- 2.06 Please produce any all requests for proposals relating to the construction of new energy generation resources to provide energy to any OSU campus issued between January 1, 2015 and March 31, 2020, inclusive.

OSU did not produce documents in response to this request and instead objected to this request in its entirety on the grounds that the requested documents “are not reasonably likely to lead to the discovery of admissible evidence.” *See* Exhibit D.

OSU’s objections are improper and should be overruled. Whether and what “alternatives” OSU considered, and any information OSU obtained regarding these alternatives, their economics, and environmental impacts, are directly relevant to whether the proposed gas facility represents the “minimum adverse environmental impact.” *See* R.C. §4906.10(A)(3). For this statutory standard to have meaning, the Board must be able to consider, as part of the record, evidence tending to show whether OSU could achieve the same generation goals or some part of

them with less environmental harm. If OSU is in possession of such evidence, it must be produced pursuant to Ohio Admin. Code §4906-2-14.

**1. The Requested Documents are Directly Relevant to the Subject Matter of this Proceeding**

OSU objects to each of these requests solely on the grounds that they are not relevant and not likely to lead to admissible evidence. This objection is meritless. Ohio Admin. Code §4906-2-14 provides that “any party to a board proceeding may obtain discovery of any matter...which is relevant to the subject matter of that proceeding. It is not grounds for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Ohio Admin. Code 4906-2-14. The text of this rule is similar to that of Civil Rule 26(B),<sup>1</sup> which “has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 856 N.E.2d 213, 234 (Ohio 2006). The subject matter of the pending proceeding is OSU’s request for a certificate for construction of a major utility facility; before it can grant such a certificate, the Board must “find[] and determine[],” as pertinent here, that OSU’s proposed “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.” Rev. Code Ann. § 4906.10(A)(3). Each of the disputed requests is directly relevant to this issue:

- **Request 1.10 (Solar Studies).** This request seeks documents relating to feasibility studies of solar electricity generating facilities. This request is relevant to and will

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<sup>1</sup> Effective July 1, 2020 the text of Civil Rule 26(B) has been revised by enacted legislation; these changes, however, are not relevant to the discovery standard before the Power Siting Board or to the case law cited, which relies on and construes language from the current version of Civil Rule 26(B) that is nearly identical to that of §4906-2-14.

likely lead to admissible evidence regarding whether solar generation facilities can provide equivalent energy and/or heating capacity to the proposed facility with a smaller adverse environmental impact meeting at least some of OSU's needs.

- **Request 1.11 (Wind Studies).** This request seeks documents relating to feasibility studies of wind electricity generating facilities. This request is relevant to and will likely lead to admissible evidence regarding whether wind generation facilities can provide equivalent energy and/or heating capacity to the proposed facility with a smaller adverse environmental impact meeting at least some of OSU's needs.
- **Request 1.12 (Correspondence about wind and solar generation).** This request seeks correspondence between OSU and the contractors responsible for the design and construction of the proposed facility regarding solar and wind generation. This request is relevant to and will likely lead to admissible evidence regarding wind and solar alternatives to the proposed gas generation.
- **Request 2.06 (Requests for proposals).** This request seeks any requests for proposals issued by OSU in the past five years relating to the construction of new generation resources for the OSU campus. This request is likely to lead to admissible evidence regarding OSU's consideration of generation alternatives with less adverse environmental impacts as well as evidence as to OSU's constraints and requirements for generation against which available technology can be compared for purposes of assessing the relative environmental impact of OSU's proposed facility.

OSU's arguments for the irrelevance of these documents are unavailing. Initially, OSU took the position that the Board's consideration is limited to the "application before it," and so "any information regarding considerations made [] but not ultimately included in the application"

is not discoverable. *See* May 13, 2020 Letter to Sierra Club (Exhibit F), at p. 2. But this position is inconsistent with the Board’s obligation to make certain statutory findings—even if the Applicant chooses not to include those considerations in its application. Moreover, the order on which OSU purports to rely in fact undermines its position. In that order, the Administrative Law Judge (“ALJ”) found that “information relating to any alternative site analysis performed by” the Applicant and any “documents relating or referring to the environmental and socioeconomic considerations of the preferred and alternative sites” to be relevant and ordered the Applicant to produce any responsive documents.<sup>2</sup> The ALJ *did* conclude that Applicant’s analysis of the environmental impact of alternatives was relevant to the proceeding.

In contrast, the request the ALJ rejected as “overbroad” did not concern environmental impacts at all. Rather, an intervenor sought all documents “relating or referring” to the Applicant’s selection of turbines—in addition to manuals for the three turbines the Applicant included in its Application, which had already been produced. *See* Exhibit G at p. 6. Intervenor Sierra Club does not seek—as did the Intervenor in *Application of Buckeye Wind*—drafts of OSU’s application or information about every piece of equipment considered and rejected for the proposal. To the contrary, Sierra Club’s request is narrowly tailored to a core question before this Board, namely, whether the choice of gas generation in fact presents the “the minimum environmental impact,” and seeks those documents in OSU’s possession that provide evidence as to the alternatives that must be considered in making this assessment. An ALJ order denying discovery as to equipment choices is therefore inapposite.

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<sup>2</sup> *In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities*, Case No. 08-666-EL-BGN, Entry (Oct. 30, 2009) (attached as Exhibit G).

In response to OSU's objections, Sierra Club referred OSU to *In Re Am. Mun. Power-Ohio, Inc.*, No. 06-1358-EL-BGN, Entry (Mar. 3, 2008) ("*AMP-Ohio*"). There, the Board explicitly considered, and entered into the record, evidence relating to the "nature and economics" of alternative coal combustion technologies, the availability of carbon capture technology, and whether "any feasible combination of energy efficiency measures and generation resources based upon renewable resources could serve as an alternative to the proposed...facility as a base load generation resource," although ultimately concluding that the proposed facility *did* meet the standard set forth in §4906.10(A)(3).<sup>3</sup>

OSU, in its response to Sierra Club, conflated the Commission's ultimate *determination* as to the feasibility of alternatives in *AMP-Ohio* with the *relevance* of those alternatives to that determination. As OSU correctly points out, the Commission found on the evidentiary record before it that the Applicant's selection of pulverized coal generation was reasonable given the limitations and economics of the alternative technologies available at the time. (Limitations and economics that have, as Sierra Club intends to show, changed significantly in the 12 years since *AMP-Ohio*.) But the Commission reached this conclusion on the basis of extensive evidence as to what alternatives AMP-Ohio considered *and* as to what alternatives intervenors argued it *should* have considered—including wind and hydroelectricity. The extent of the record regarding the economics and nature of these alternatives before the Commission, and its explicit and detailed consideration of alternatives not included in the original Application are entirely inconsistent with OSU's position that such alternatives are not *relevant*.<sup>4</sup> To the contrary, the

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<sup>3</sup> *In Re Am. Mun. Power-Ohio, Inc.*, No. 06-1358-EL-BGN (F.E.D.A.P.J.P. Mar. 3, 2008)

<sup>4</sup> OSU also cites the decision by the Power Siting Board denying rehearing. But the Board just reached the same *factual* determination—"there is no feasible combination of energy efficiency measures and generation resources based upon renewable resources which could serve as an



holding cited by OSU could only have been reached on the basis of precisely the type of evidence OSU is now refusing to produce.

OSU's position would render §4906.10(A)(3) meaningless. Whether a facility represents the *minimum* environmental impact necessarily entails comparison. The Board cannot "consider[] the state of available technology and the nature and economics of the various alternatives" without evidence as to the feasibility of those alternatives. Requests 1.10, 1.11, and 1.12 seek documents from OSU describing what—if any—information they have obtained regarding alternative forms of electricity generation to serve the OSU campus, the stated purpose of the proposed facility. Request 2.06 seek documents from OSU describing the economic and other constraints relevant to making this comparison, as well as any efforts OSU may have made to solicit possible alternatives. These documents are "relevant to the subject matter of the proceeding" and must be produced.

## **2. Sierra Club has Exhausted All Other Reasonable Means of Resolving its Differences with The Ohio State University With Respect to this Request**

On April 9, 2020, Sierra Club served OSU with Sierra Club's First Set of Document Requests (attached as Exhibit A). On April 29, 2020, OSU served responses and objections to Sierra Club's First Set of Document Requests (attached as Exhibit C).

On April 27, 2020, Sierra Club served OSU with Sierra Club's Second Set of Document Requests (attached as Exhibit B). On May 18, 2020, OSU served responses and objections to Sierra Club's Second Set of Document Requests (attached as Exhibit D).

On May 7, counsel for Sierra Club sent electronic mail to counsel for OSU stating Intervenor's position that OSU's objection to Requests 1.10, 1.11, and 1.12 on relevancy grounds

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alternative to the proposed AMPGS facility"—that depends on precisely the evidentiary record of the feasibility of alternative resources OSU is refusing to produce.

was inconsistent with the Board's obligation, under Rev. Code §4906.10(A)(3), to determine whether a proposed 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." *See* Exhibit E. On May 13, counsel for OSU responded via letter to Sierra Club, wherein OSU took the position that the Board "only considers the application before it," and thus any alternatives "that may have been considered by OSU, but ultimately not included in its Application" were not relevant to the instant proceeding. *See* Exhibit F.

Counsel for Sierra Club and OSU then met and conferred via telephone, on May 20, 2020, to discuss the dispute regarding Requests 1.10, 1.11, and 1.12. Following the conference, via letter dated May 28, 2020, Sierra Club offered, without concession and in an attempt to resolve the dispute, revised versions of Requests 1.10, 1.11, and 1.12. *See* Exhibit H. On June 3, 2020, OSU responded via letter, maintaining its position that the requested documents "are not likely to lead to the discovery of admissible evidence." *See* Exhibit I. On June 11, 2020 counsel for Sierra Club sought confirmation, via electronic mail, that OSU considered further efforts to resolve the parties' dispute with respect to Request 2.06 futile; counsel for OSU confirmed that the meet and confer process had been exhausted on June 15, 2020. *See* Exhibit J.

Ohio Administrative Code §4906-2-22(C) requires that before filing a motion to compel, the party seeking discovery must "have exhausted all other reasonable means of resolving any differences with the party...from who discovery is sought." Sierra Club has clarified its position, met and conferred with counsel for OSU, and offered narrower requests in an attempt to avoid litigation. OSU continues to stand on its comprehensive objection. Given the short time period before the evidentiary hearing in this matter, Sierra Club would be prejudiced by further delay

and discussion, and therefore seeks an order so that it can obtain the evidence to which it is entitled.

### **3. Conclusion**

For the foregoing reasons, Intervenor Sierra Club respectfully requests that the Administrative Law Judge enter an order directing OSU to respond fully to Sierra Club's Requests for Production of Documents 1.10, 1.11, 1.12, and 2.06 by producing all responsive documents in OSU's possession, custody, or control.

Respectfully Submitted,

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OHIO POWER SITING BOARD

IN THE MATTER OF THE )  
APPLICATION OF THE OHIO STATE )  
UNIVERSITY FOR A CERTIFICATE OF )  
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HEAT AND POWER MAJOR UNIT )  
FACILITY IN FRANKLIN COUNTY, ) CASE NO. 19-1641-EL-BGN  
OHIO ON THE CAMPUS OF THE OHIO )  
STATE UNIVERSITY )

**AFFIDAVIT OF MEGAN WACHSPRESS IN SUPPORT OF MOTION OF  
INTERVENOR SIERRA CLUB TO COMPEL DISCOVERY FROM APPLICANT THE  
OHIO STATE UNIVERSITY**

I, Megan Wachspress, hereby affirm as follows:

1. I am counsel of record for Intervenor Sierra Club, in the case captioned In the Matter of the Application of the Ohio State University, Ohio Power Siting Board Case No. 19-1641-EL-BGN.
2. I offer this affidavit in support of Intervenor Sierra Club's Motion to Compel Discovery from Applicant The Ohio State University ("OSU"), pursuant to Ohio Admin. Code §4906-2-22(C)(3).
3. To my knowledge, Section 2 of the Memorandum in Support of Intervenor Sierra Club's Motion to Compel is a true and accurate statement of the efforts which have been made to resolve differences between Sierra Club and OSU concerning the discovery sought in said Motion to Compel, and the Exhibits attached to the Motion are true and correct copies of the correspondence described therein.

Affiant states nothing further.

Megan Wachspress 6/13/20  
Megan Wachspress

Please See attached  
Notary Certificate  
MANDEEP KAUR, NOTARY PUBLIC / 06/13/2020

## ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of Alameda

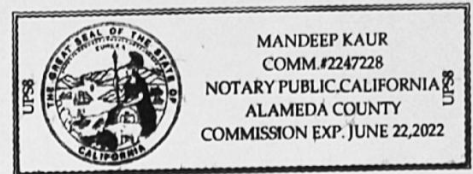
On JUNE, 13, 2020 before me, MANDEEP KAUR, NOTARY PUBLIC  
(insert name and title of the officer)

personally appeared MEGAN WACHSPRESS,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same in  
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the  
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mandeep Kaur (Seal)



*Affidavit*

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served by electronic mail this  
15<sup>th</sup> day of June, 2020, to the following:

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