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**BEFORE THE
OHIO POWER SITING BOARD**

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Application of American Municipal Power,)
Ohio, Inc. (AMP-Ohio) for a Certificate of)
Environmental Compatibility and Public)
Need For the American Municipal Power)
Generating Station in Meigs County, Ohio)

Case No. 06-1358-EL-BGN

**CITIZEN GROUPS' MEMORANDUM CONTRA
TO AMP-OHIO'S MOTION IN LIMINE AND MOTION TO STRIKE**

The Natural Resources Defense Council, Inc., Ohio Environmental Council, and Sierra Club (collectively, "Citizen Groups") oppose American Municipal Power-Ohio's ("AMP") motion in *limine* and motion to strike relevant documents submitted to the Ohio Power Siting Board ("OPSB" or "Board").¹ AMP's motions are a duplicative attempt to chill the Citizen Groups' intervention and participation at the December 10, 2007 adjudicatory hearing. AMP seeks to broadly limit the Citizen Groups' statutory rights to introduce at the hearing "any exhibits, lay witnesses, expert witnesses, or any other evidence or testimony related to global warming, carbon dioxide ("CO₂") emissions, potential costs for control and regulation of CO₂ emissions, fuel selection, and the basic design" of AMP's proposed plant. (AMP Mot. at 1). Ohio law grants citizens the right to participate in Board hearings and affords intervenors full evidentiary rights. AMP's unsubstantiated attempt to curtail these rights is inconsistent with Ohio law and, thus, should be denied.

AMP ignores that financial cost, the impacts and cost of CO₂ emissions, and alternatives are directly relevant to the statutory standards for certification that the Board must evaluate.

O.R.C. § 4906.10(A)(2), (3), and (6). Moreover, AMP impermissibly seeks to strike all

¹ The Citizens Groups objected to AMP's request for an expedited ruling for the sole purpose of preserving our right to submit this memorandum contra in accordance with the Ohio Administrative Code § 4906-7-12(C).

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documents submitted by the Citizen Groups in support of their motion to intervene. AMP's arguments are misplaced because the Citizen Groups properly submitted these documents to the Board to further demonstrate their direct and substantial interests in the proceeding in support of their motion to intervene. Because the Citizen Groups are statutorily entitled to present relevant evidence at the December 10, 2007 hearing and all documents have been properly submitted, AMP's motions should be denied.²

I. The Citizen Groups Timely Filed Their Motion to Intervene Consistent with the October 26, 2007 Deadline Established by the Administrative Law Judge

AMP, once again, incorrectly asserts that the Citizen Groups did not timely file their motion to intervene. (*See* AMP Mot. at 3). The relevant statutory provisions and the Board's docket belie AMP's assertion. As the Citizen Groups explained in their reply brief in support of intervention, pursuant to O.A.C. § 4906-7-04(A)(2)(b), a person may file a petition for leave to intervene "within the time established by the board or administrative law judge." *See also* O.R.C. §§ 4906.12, 4903.221. On August 2, 2007, the Honorable Gregory A. Price, the administrative law judge ("ALJ"), established an October 26, 2007 deadline for motions to intervene: "The Board will accept petitions to intervene . . . up to five days prior to the scheduled date for the [November 1, 2007] non-adjudicatory hearing." In accordance with the order, the Citizen Groups filed their motion to intervene on October 25, 2007—within the time set by the ALJ. As such, the Citizen Groups timely moved to intervene.

² Until the Board rules on the motion to intervene, the Citizen Groups will continue to exercise their rights as a "party" in accordance with the Board's rules and ALJ's instructions. Ohio Admin. Code §§ 4906-7-06(D); 4906-7-07(A)(8); 4906-7-12(E).

II. The Board Should Deny AMP's Motion in *Limine* Because the Citizen Groups Seek to Present Evidence on Issues that Are Central to the Governing Statute

A. The Governing Statute Requires An Evaluation of CO₂ Emissions and Project Costs

In its motion in *limine*, AMP once again asserts that the issues that the Citizen Groups seek to raise are irrelevant to this proceeding because they are broad in scope, rather than focused on "impacts to the immediate surrounding community." (*Compare* AMP Mot. at 7 with AMP Resp. to Motion to Intervene at 7). In support, AMP again cites to the Board's *Columbus Southern Power* case,³ in which the ALJ denied intervention to industrial and commercial energy users seeking to raise issues regarding the need for a proposed new coal gasification plant, in part because such issues were not relevant to the impacts of the plant "on the immediately surrounding community."⁴ According to AMP, cost and global warming issues do not fit within this limited mandate. (AMP Mot. at 7).

The *Columbus Southern Power* case is distinguishable because the issues the proposed intervenors were seeking to raise in that proceeding are excluded by the Power Siting Statute, O.R.C. § 4906.10(A)(1), and had already been "more than adequately addressed" by the Ohio Public Utilities Commission.⁵ By contrast, as discussed more fully below, the cost, impacts, and alternatives issues that the Citizen Groups are raising here are directly relevant to the requirements of O.R.C. § 4906.10(A)(2), (3), and (6), and have not been addressed by another state regulatory agency.

In addition, nothing in the governing statute limits the Board's review to only the "impacts to the immediate surrounding community." Rather, the relevancy of the issues

³ *In the Matter of Columbus Southern Power and Ohio Power Company for a Certificate of Environmental Compatibility and Public Need*, OPSB Case No. 06-0030-EL-BGN (June 14, 2006).

⁴ *Id.* at ¶7.

⁵ *Id.* at ¶7.

presented by the Citizen Groups is demonstrated by the statutory language. The statute commands that the Board cannot grant the application unless it “finds and determines” *inter alia* factors that are central to assessing and minimizing environmental impacts:

- “The nature of the probable environmental impact”
- “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”
- “That the facility will serve the public interest, convenience, and necessity”

O.R.C. § 4906.10(A)(2), (3), and (6). The Board cannot accurately make these findings and determinations if it evaluates only impacts to the immediately surrounding community. Thus, AMP’s effort to circumvent the scope of the Board’s authority is contrary to the requirements of the statute.

In addition, global warming will have impacts on the immediately surrounding community. While AMP labels global warming an “international issue,” there is no reason to believe that the increases in average temperature, increased incidences of extreme heat, drought, and heavy rain events, and the resulting impacts, will somehow spare Meigs County and Ohio while impacting the rest of the world. In fact, at least one local member of both NRDC and the Sierra Club is concerned that she is already witnessing local impacts from global warming. (Citizen Group Reply in Support of Intervention, Ex. 4 at ¶6). Therefore, even under AMP’s erroneously narrow reading of the statute, CO₂ emissions and global warming must be evaluated as part of this proceeding.

B. The Issues Raised by the Citizen Groups Are Properly Before the Board

It is true that issues relating to climate change, global warming, CO₂ emissions, and energy alternatives are of legislative importance, as are issues relating to coal use. (See AMP Mot. at 9). However, AMP cites to nothing in legislative policies that relieves the Board from its statutory obligations in deciding the proposed application. As discussed above in section II.A, the governing statute, O.R.C. § 4906.10(A)(2), (3), and (6) requires consideration of the issues that the Citizen Groups raise—the environmental impact of the proposed project, and the relative impacts and costs of the proposal and alternatives.

It is undisputed that CO₂ emissions from the Meigs Plant will contribute to the significant public health and environmental impacts caused by global warming (Citizen Groups Intervention Br. at § III.A). Therefore, such impacts must be evaluated in order for the Board to determine the “nature of the probable environmental impact of the Meigs Plant.” O.R.C. § 4906.10(A)(2). The cost of the Meigs Plant and its CO₂ emissions, and the costs and impacts of alternatives, are also relevant to the determination of whether the Meigs Plant “represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives,” and whether the “facility will serve the public interest, convenience and necessity.” (Citizen Groups Intervention Br. at §§ II, III.A, & IV). The fact that the legislature might evaluate energy issues from a statewide perspective does not excuse the Board from its legal duty to do so with respect to the proposed plant.

C. Air Pollution Control Laws Do Not Alter the Requirement that the Board Evaluate Costs, CO₂ Emissions, and Alternatives.

AMP also contends that the Board need not evaluate issues related to CO₂ emissions from the proposed Meigs Plant because “all issues related to air pollution control” are regulated under Ohio’s air pollution control statute, O.R.C. Chapter 3704. (AMP Mot. at 11). In support, AMP

cites to O.R.C. § 4906.10(A)(5) of the Power Siting Statute, which provides that a proposed facility may be certified by the Board only if it complies with the requirements of the air pollution control statute. AMP contends that CO₂ emissions are not regulated by the air pollution control statute and, therefore, are not relevant here.

This argument is flawed for three reasons. First, CO₂ emissions are subject to regulation under the air pollution control statute. The federal Clean Air Act and Ohio's regulations prohibit the construction of a new major stationary source of air pollutants unless, among other things, the plant applies "best available control technology for each regulated NSR pollutant that it would have the potential to emit in significant amounts." 42 U.S.C. § 7475(a); 40 C.F.R. § 52.21(j)(1); O.A.C. §§ 3745-31-02(A)(1); 3745-31-15(C); 3745-31-13(A). "Regulated NSR pollutant" is defined as including "any pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. 52.21(b)(50); O.A.C. 3745-31-01(DDDD)(2). The U.S. Supreme Court recently confirmed that CO₂ is an air pollutant, *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007),⁶ and CO₂ is subject to and/or actually regulated under various provisions of the Clean Air Act. 42 U.S.C. §§ 7411, 7521; 40 C.F.R. Part 75. As such, CO₂ emissions must be regulated under Ohio's air pollution control statute and cannot be ignored as an "unregulated" pollutant here.

Second, whether or not CO₂ emissions are regulated under the air pollution control statute, the Board must consider those emissions in its evaluation of the environmental impacts of the proposed Meigs Plant. The Power Siting Statute does not provide that once a proposed facility is found to comply with the air pollution control statute, air pollution emissions become irrelevant to other findings under the Statute. Instead, the Board must find that the proposed facility complies with O.R.C. Chapter 3704, and determine the facility's probable environmental

⁶ For the same reasons that the U.S. Supreme Court found CO₂ to qualify as an air pollutant under federal law, it is clear that CO₂ satisfies the definitions of "air contaminant" and "air pollution" found in the Ohio air pollution control statute. O.R.C. §§ 3704.01(B), 3704.01(D).

impact, and find that the facility represents the minimum adverse environmental impact in light of alternatives. O.R.C. § 4906.10(A)(2), (3), and (5). As such, the question of whether CO₂ emissions are regulated under the air pollution control statute is irrelevant to whether the impacts of those emissions must be evaluated as part of the environmental impacts and alternatives analyses required by the Statute.

Third, even if the environmental impacts of CO₂ emissions did not have to be evaluated in this proceeding, the costs of such emissions remain relevant to the alternatives and public interest standards for certification. O.R.C. § 4906.10(A)(3), (6). Therefore, AMP's effort to exclude evidence regarding the cost of CO₂ emissions from the Meigs Plant must be rejected.

D. Limits on the Clean Air Act's Best Available Control Technology Analysis Do Not Eliminate the Alternatives Analysis Required Under the Power Siting Statute.

In an effort to avoid the alternatives analysis required by O.R.C. § 4906.10(A)(3), AMP cites to *Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007), a decision regarding the limits of the Best Available Control Technology ("BACT") analysis required by the federal Clean Air Act. (AMP Mot. at 8-9). In *Sierra Club*, the Court upheld the Illinois EPA's decision not to require a coal-fired power plant that was proposed next to a mine to instead use lower sulfur coal from elsewhere. The Illinois EPA had concluded that its policy against using a BACT analysis to "redefine a source" foreclosed the agency from requiring the plant to seek out a different source of coal.

AMP's attempt to use *Sierra Club* to avoid an evaluation of alternatives here fails for a few reasons. First, the Court in *Sierra Club* specifically noted that the BACT and "redefining the source" issues presented in that case had nothing to do with the evaluation of alternatives allowed under a separate part of the Clean Air Act. *Sierra Club*, 499 F.3d at 655. A BACT

analysis focuses on what sort of steps (such as add-on control technology, cleaner fuels, and innovative fuel combustion techniques) can be used to reduce emissions from a proposed facility. 42 U.S.C. § 7479(3). An alternatives analysis, meanwhile, examines whether there are better options to the proposed facility. As such, even if the Board were required to follow *Sierra Club*, that case does not foreclose the consideration of alternatives to the proposed Meigs Plant.

Second, AMP's purported concern that the evaluation of alternatives could be a "Sisyphean labor," *Sierra Club*, 499 F.3d at 655, is unfounded and cannot justify reading the alternatives requirement out of the Power Siting Statute. The Statute identifies certain factors that should be used in evaluating alternatives, and the Board can certainly put reasonable limits on the number, type, and variety of alternatives that must be evaluated. What the Board cannot do, however, is ignore the alternatives requirement by, for example, allowing AMP to state only that it "is not proposing any other alternatives" to the Meigs Plant. (AMP App., Section OAC 4906-13-05 at 2, 3). Instead, the Citizen Groups should be permitted to present evidence regarding the evaluation of alternatives required by O.R.C. § 4906.10(A)(3).

Finally, it is important to note that the Environmental Appeals Board decision upheld in *Sierra Club* specifically relied on Illinois EPA's policy of requiring the consideration of IGCC as BACT in concluding that the agency was not applying the redefining the source policy in an overly broad manner. *In re Prairie State Generating Co.*, PSD Appeal 05-05, 13 E.A.D. ___, slip op. at 33-37 (E.A.B. Sept. 24, 2006). IGCC is one of the alternatives that the Citizen Groups are raising in this proceeding. As such, even if the Board were to improperly limit the alternatives analysis required by the Power Siting Statute to reflect what is required as part of a BACT analysis, the Citizen Groups have raised at least one alternative that would fit within that limit.

E. The Citizen Groups' Presentation of this Evidence Would Contribute to a Just and Expeditious Resolution of the Issues Involved in this Proceeding

AMP asserts—without any support—that the issues raised by the Citizen Groups would not contribute to a just and expeditious resolution of the issues involved in the proceeding. (AMP Mot. at 8). AMP ignores that the Citizen Groups seek to raise issues that are directly relevant to the statutory standards for certification, and are endeavoring to prepare their case within the time limits set by the ALJ. Addressing all relevant issues to the plant application, including the Citizen Groups' issues, during a single proceeding furthers the statutory purpose of “just and expeditious resolution,” as compared to adopting a piecemeal approach to addressing the issues. O.A.C. § 4906-7-04(B)(1)(c). In fact, in many cases, including the present one, denial of certification may be the just resolution, and participation by parties who are opposed or skeptical will help achieve that resolution expeditiously. Since the governing statute requires the Board to consider the issues raised by the Citizen Groups, AMP's motion in *limine* should be denied.

III. AMP's Motion to Strike Should Be Denied Because the Citizen Groups Properly Submitted Relevant Exhibits to the Board

In another attempt to limit the Citizen Groups' participation in the proceeding, AMP presents an illogical argument that the Board should “strike” all exhibits to the Citizen Groups' motion to intervene until the “Groups are permitted to intervene.” (AMP Mot. at 13). However, AMP fails to demonstrate that these exhibits were not properly submitted with the Citizen Groups' motion to intervene.

Instead, AMP attempts to exclude these exhibits through misapplication of administrative rules for the adjudicatory hearing. Specifically, AMP moves to strike the “Direct Testimony of

Richard C. Furman,” submitted as exhibit 9 with the Citizen Groups’ intervention motion. AMP argues that “[t]his is inappropriate and should not be considered by the Board unless and until” intervention is permitted. (*Id.*) However, AMP ignores that this document, along with all the documents, was properly submitted with the motion to intervene. Supporting evidence, including declarations, to a motion to intervene are needed to satisfy the requirements for intervention, and nothing in the administrative rules bars submittal of supporting evidence for a motion to intervene. *See* O.A.C. §§ 4906-7-04, 4906-7-12.

In addition, AMP’s assertion that all testimony must be presented orally, O.A.C. § 4906-7-09, applies only to evidence presented at the hearing, and has been obviated by the fact that the ALJ ordered at the October 31, 2007 pre-hearing conference that the parties pre-file written testimony by December 3. Further, as discussed above in section II, these exhibits are relevant to the proceeding. Finally, AMP itself similarly attached exhibits to its memorandum contra to the Citizen Groups’ motion to intervene. (*See, e.g.,* AMP Memoranda Contra to Mot. to Intervene at 7-8). Therefore, AMP’s motion to strike should be denied. Moreover, if the Board grants AMP’s motion to strike, the Board should likewise strike all exhibits attached to AMP’s memoranda contra to the motions to intervene.

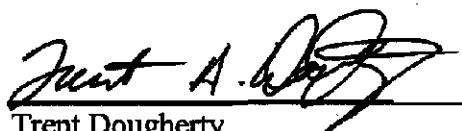
IV. Conclusion

Based on the above, AMP’s motion in *limine* and motion to strike should be denied. Instead, the Citizen Groups should be permitted to participate as full parties in this proceeding.

Respectfully Submitted,

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November 26, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 10 copies of the foregoing Citizen Groups' Memorandum Contra to AMP-Ohio's Motion *in Limine* and Motion to Strike has been filed with the Ohio Power Siting Board and served on the following via electronic mail at the e-mail addresses listed below on this 26th day of November, 2007.

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