

FILE

**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

**NATURAL RESOURCES DEFENSE COUNCIL, INC.'S MOTION
TO PRESENT SUR-REBUTTAL TESTIMONY AND TO CONTINUE HEARING**

The Natural Resources Defense Council, Inc. hereby moves to present sur-rebuttal testimony in response to AMP-Ohio's three rebuttal witnesses, and to continue the January 4, 2008 hearing until January 18, 2008. The basis for this motion is provided in the attached Memorandum in Support.

Respectfully Submitted,



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January 2, 2008

**BEFORE THE
OHIO POWER SITING BOARD**

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

**NATURAL RESOURCES DEFENSE COUNCIL, INC.'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO PRESENT SUR-REBUTTAL TESTIMONY
AND TO CONTINUE THE HEARING**

Intervenor Natural Resources Defense Council, Inc. ("NRDC") moves to present sur-rebuttal testimony from David Schlissel in order to address the "new and updated information" regarding the carbon dioxide ("CO2") costs, construction costs, and alternatives that AMP-Ohio presented in its recently filed rebuttal testimony. Such sur-rebuttal is necessary to ensure that the Board is presented with a complete record, *In re Jackson County Power, LLC*, Case No. 00-839-EL-BGN, 2001 WL 1530174, at *5-*6 (O.P.S.B. Sept. 17, 2001), and is especially appropriate given that AMP-Ohio's rebuttal witness Ivan Clark purports to use Schlissel's own CO2 cost numbers to compare the proposed AMPGS to some alternatives. NRDC also moves to continue the January 4 hearing date to January 18, in order to provide NRDC with adequate time to review the 40 pages of rebuttal testimony presented by AMP-Ohio and to depose and prepare for cross examination of AMP-Ohio's three rebuttal witnesses. Given that NRDC is entitled to file sur-rebuttal testimony, such a continuance of the hearing date will not delay this proceeding.

On December 18, 2007, one day before the close of direct testimony in this proceeding, AMP-Ohio requested permission to present rebuttal testimony. On December 19, the ALJs granted AMP-Ohio's request, required such testimony to be filed by December 28, and

continued the hearing until January 4, 2008. On Friday, December 28, at around 5p.m., AMP-Ohio served 40 pages (including exhibits) of rebuttal testimony from three witnesses: Mr. Clark, Mr. Meier, and Mr. Marquis. This testimony presented a “new and updated” cost analysis of the AMPGS and three alternatives that purportedly factors in Mr. Schlissel’s mid-range CO2 costs (Clark Rebuttal at 3Q, 5Q-11Q, IC-10, IC-11), and provides additional information regarding the cost and alternatives issues raised by Mr. Schlissel.

On December 28, counsel for NRDC requested that AMP-Ohio provide all of the workpapers and calculations used in Mr. Clark’s “new and updated” cost analysis. AMP-Ohio’s counsel has stated he will provide workpapers and calculations the morning of Wednesday, January 2, but NRDC has not received them as of the time of this filing. AMP-Ohio’s counsel offered to make Clark, Meier, and Marquis available for “informal discussions” with NRDC counsel on January 2 or 3, but refuses to make these witnesses available for deposition.

NRDC is entitled to file sur-rebuttal testimony because, in its rebuttal testimony, AMP-Ohio purports to provide “new,” “updated,” and “additional” analysis and information regarding the cost and alternatives issues raised by Mr. Schlissel. (Clark Rebuttal at 3Q, Meier Rebuttal at 5Q, Marquis Rebuttal at 5Q). As the Board explained in *Jackson County Power*, 2001 WL 1530174, at * 6, it is proper for an intervenor to recall a witness in response to an applicant’s rebuttal testimony in order to make sure that the record is complete and not “skewed against” the intervenor. *Id.* Here, it is necessary to recall Mr. Schlissel in order to address AMP-Ohio’s challenges to his direct testimony.

Most significantly, AMP-Ohio claims to have used Mr. Schlissel’s own CO2 cost data to do a new cost comparison of the AMPGS, natural gas combined cycle (“NGCC”), and two other coal options that purportedly shows that the AMPGS remains the cheapest option. (Clark

Rebuttal at 5Q-11Q, IC-10, IC-11). Fundamental fairness requires that NRDC be permitted to present sur-rebuttal from Mr. Schlissel to respond to this purported use of his own CO2 data and AMP-Ohio's new cost analysis based on that data. In addition, in its rebuttal testimony, AMP-Ohio asserts that the NGCC alternative can be used only for intermediate power (Clark Rebuttal at 12Q-15Q), that rising construction cost risks have been adequately evaluated by AMP-Ohio (*id.* at 21Q), and that AMP-Ohio is fully pursuing renewable energy alternatives such as hydroelectric, wind, and landfill gas. (Marquis Rebuttal; Meier Rebuttal). In order to ensure that the record is complete and not skewed against it, NRDC is entitled to present sur-rebuttal from Mr. Schlissel to address these rebuttal points.

NRDC also moves to continue the January 4, 2008 hearing date until January 18 so that there is adequate time for the Intervenors to evaluate AMP-Ohio's rebuttal testimony and prepare for the hearing. As noted, AMP-Ohio filed 40 pages of rebuttal testimony from three witnesses at around 5pm on Friday, December 28 which, given the New Years Day holiday, is only three business days before the scheduled hearing.

A short continuance of the hearing date is appropriate to give the Intervenors adequate time to review and evaluate the rebuttal testimony. That testimony included, among other things, a new cost analysis that involves assumptions regarding numerous factors such as fuel prices, allowance prices, financing rates, operation and maintenance costs, etc. that make review of the analysis quite time consuming. While NRDC requested all of the supporting workpapers and calculations for that cost analysis on Friday, December 28, NRDC has not received them as of the time of this filing, which is less than 48 hours before the hearing is scheduled to begin. The Intervenors would be prejudiced if they have to review and evaluate AMP-Ohio's new cost

analysis and other new testimony, and prepare to cross-examine three witnesses, in such a short period of time.

The January 4 deadline should also be continued because it does not provide the Intervenor adequate time to depose AMP-Ohio's rebuttal witnesses. AMP-Ohio has presented two entirely new witnesses and new testimony from a third witness. The Intervenor is entitled to depose these witnesses as a necessary part of evaluating their testimony and preparing for cross-examination. Yet it would not be possible to depose these three witnesses and get the transcripts from such depositions before the currently scheduled hearing. While AMP-Ohio has offered to make these witnesses available for informal discussions, such discussions would not be transcribed or on the record and, therefore, cannot provide a basis for impeachment or other use at the hearing. In addition, it would be quite difficult to carry out even informal discussions with AMP-Ohio's three rebuttal witnesses in time to prepare for cross examination, given the short period of time between AMP-Ohio's filing of rebuttal testimony and the January 4 hearing.¹

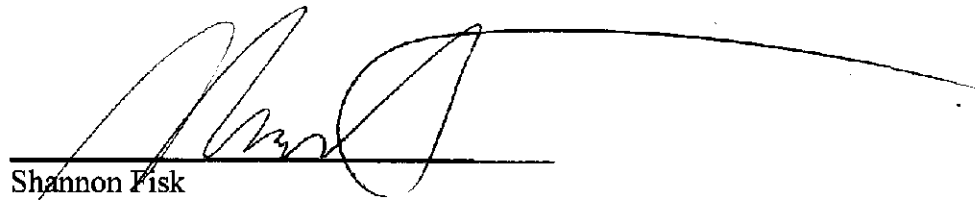
Finally, a continuance of the hearing date to January 18 would not unduly delay this proceeding. For one thing, it is important to keep in mind that any minor delay here was triggered by AMP-Ohio's decision to present 40 pages of rebuttal testimony from three rebuttal witnesses very late in this proceeding, and is more than offset by the Intervenor's right to have adequate time to review and prepare for cross-examination of such witnesses. In addition, given that NRDC is entitled to recall Mr. Schlissel as a sur-rebuttal witness, the hearing would not conclude on January 4 in any event. Instead, NRDC would need time to file that sur-rebuttal testimony, and AMP-Ohio would need time to review and prepare to cross examine Mr. Schlissel

¹ If AMP-Ohio continues to refuse to make these new witnesses available for deposition, NRDC may need to file a motion to compel.

on that sur-rebuttal. Therefore, NRDC proposes that it file sur-rebuttal testimony by January 11, and that AMP-Ohio's rebuttal witnesses and Mr. Schlissel be cross examined at a hearing on January 18.²

For the foregoing reasons, NRDC respectfully requests that the ALJs grant this motion, allow NRDC to present sur-rebuttal testimony from David Schlissel on January 11, and continue the January 4 hearing date to January 18.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Shannon Fisk', is written over a horizontal line.

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January 2, 2008

² On December 31, 2007, NRDC filed a motion to present rebuttal testimony on climate change impacts. NRDC will endeavor to file that testimony and present that witness for cross-examination on the same dates – January 11 and January 18 – depending on when the motion is ruled on.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 10 copies of the foregoing Motion to Present Sur-Rebuttal Testimony and to Continue the Hearing has been filed with the Ohio Power Siting Board via Federal Express and served on the following via electronic mail at the e-mail addresses listed below on this 2nd day of January, 2008.

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