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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

**APPLICATION FOR REHEARING OF THE  
NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
OHIO ENVIRONMENTAL COUNCIL, AND  
SIERRA CLUB**

Pursuant to O.R.C. § 4903.10 and O.A.C. § 4906-07-17(D), the Natural Resources Defense Council, Ohio Environmental Council, and the Sierra Club (collectively, the "Citizen Groups") respectfully apply for rehearing of the Power Siting Board's March 3, 2008 Opinion, Order and Certificate certifying American Municipal Power-Ohio's ("AMP") proposed 960 megawatt coal-fired power plant in Meigs County, Ohio ("AMP Coal Plant"). Rehearing is necessary for the reasons set forth in the attached Memorandum in Support, which is incorporated herein by reference. Specifically, the Board's certification of the AMP Coal Plant is unreasonable and unlawful in the following respects:

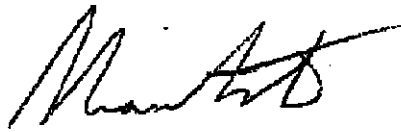
1. The Board failed to require the evaluation of the impacts of the AMP Coal Plant's CO2 emissions, and improperly concluded that such CO2 impacts need not be factored into the evaluation of alternatives for minimizing the impacts of AMP's proposal.
2. The Board improperly dismissed energy efficiency and renewable energy alternatives to the AMP Coal Plant.
3. The Board improperly upheld AMP's rejection of natural gas combined cycle and integrated gasification combined cycle alternatives to the AMP Coal Plant.

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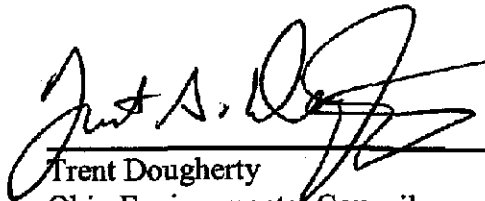
4. The Board improperly upheld evidentiary rulings that were contrary to the Board's regulations and the Ohio Rules of Evidence.

Therefore, the Citizen Groups respectfully request that the Board grant rehearing of the March 3, 2008 Order, Opinion, and Certificate so that the careful evaluation of environmental impacts and selection of alternatives that would minimize those impacts required by the Ohio Power Siting Statute can occur.

Respectfully Submitted,



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April 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

**MEMORANDUM IN SUPPORT OF THE  
APPLICATION FOR REHEARING OF THE  
NATURAL RESOURCES DEFENSE COUNCIL, INC.,  
OHIO ENVIRONMENTAL COUNCIL, AND  
SIERRA CLUB**

The Natural Resources Defense Council ("NRDC"), Ohio Environmental Council ("OEC"), and the Sierra Club (collectively, the "Citizen Groups") respectfully apply, pursuant to O.R.C. § 4903.10 and O.A.C. § 4906-07-17(D), for rehearing of the Power Siting Board's March 3, 2008 Opinion, Order and Certificate certifying American Municipal Power-Ohio's ("AMP") proposed 960 megawatt ("MW") coal-fired power plant in Meigs County, Ohio ("AMP Coal Plant"). The record shows that the AMP Coal Plant's carbon dioxide ("CO2") emissions would have significant adverse environmental impacts that have not been evaluated, and that there are numerous alternatives that AMP could pursue to minimize the CO2 and other environmental impacts of its proposal. Therefore, the Board erred in concluding that the "probable environmental impacts" of the proposed AMP Coal Plant had been "determined," or that the Plant represents "the minimum adverse environmental impact" given other alternatives. O.R.C. §4906.10(A)(2), (3). As such, rehearing must be granted.

The Board first failed to require that the impacts of the AMP Coal Plant's emission of 7.3 million tons of carbon dioxide ("CO2") per year were evaluated and minimized. In the face of

testimony by both AMP and the Staff that they did not evaluate the impacts of the Plant's CO2 emissions, the Board found that simple reference to those emissions was sufficient. The Statute, however, requires an evaluation of impacts, not just a blank statement that a pollutant will be emitted. The Board also held that CO2 emissions need not be factored into the evaluation of alternatives because there is no way to capture and sequester CO2 emissions. This holding is factually inaccurate and ignores numerous other steps that could be taken to reduce CO2 impacts from AMP's proposal.

Second, while the Board found that energy efficiency and renewable energy could supply up to 454 MW of power, those alternatives were rejected because the Citizen Groups purportedly had not demonstrated that such alternatives could replace the full 960 MW of power that the AMP Coal Plant would produce. AMP, however, bears the burden of showing that less damaging alternative do not exist, O.A.C. § 4906-7-09(F), and it has not met that burden here. In addition, to the extent that such alternatives are available, the size of the AMP Coal Plant should be reduced. Also, the record shows that the Board underestimated the availability of energy efficiency, and that energy efficiency and renewable energy were not evaluated in combination with other alternatives.

Third, the Board concluded that AMP properly rejected natural gas combined cycle ("NGCC") and Integrated Gasification Combined Cycle ("IGCC") as alternatives to the AMP Coal Plant. The Board, however, relied on cost data regarding NGCC that the Citizen Groups were never allowed to conduct discovery regarding, and that fails to take into consideration the lesser environmental impacts of NGCC versus the AMP Coal Plant. As for IGCC, no findings were made. Instead, the Board just adopted AMP's testimony, while clear evidence

demonstrating that IGCC is available, cost competitive, and less polluting than the proposed AMP Coal Plant was never addressed.

Finally, the Board improperly upheld a series of evidentiary rulings by the Administrative Law Judges excluding testimony and other evidence presented by the Citizen Groups. These rulings are inconsistent with the Board's rules, which require the ALJs to admit all relevant and material evidence. O.A.C. § 4906-7-09(A).<sup>1</sup>

**I. The Impacts of the AMP Coal Plant's CO2 Emissions Have Not Been Evaluated or Minimized.**

Rehearing is necessary because the Board's Order unlawfully and unreasonably fails to require the evaluation of the impacts of the AMP Coal Plant's CO2 emissions or any binding commitments to minimize those impacts. As the Citizen Groups previously explained (Citizen Groups Initial Br. at 5-13), the AMP Coal Plant's CO2 emissions would exacerbate global warming and its resulting environmental impacts, but AMP and the Staff did not evaluate those impacts or factor them into any consideration of alternatives. Therefore, the environmental impacts of the AMP Coal Plant have not been "determined," O.R.C. § 4906.10(A)(2), and there has not been a showing that the Plant represents the "minimum adverse environmental impact" in light of alternatives. O.R.C. § 4906.10(A)(3).

The Board's Order does not identify any evaluation of the impacts of CO2 in the record and overlooks numerous steps that could be taken to minimize those impacts. The Board first found that reference in the record to the AMP Coal Plant's emission of 7.3 million tons of CO2

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<sup>1</sup> The Board also found that O.R.C. § 4906.10(A)(5), which requires an applicant to obtain permits under various other state environmental laws, would be satisfied, in part because the Ohio Environmental Protection Agency issued an air permit-to-install for the plant on February 7, 2008. (Order at 27 and n. 1). The Citizen Groups have appealed the air permit-to-install to the Environmental Review Appeals Commission because the permit fails to comply with various provisions of the federal Clean Air Act and state law. See ERAC Case Nos. 996158, 256159, and 996160.

satisfies the requirement that the probable environmental impacts of the Plant be determined. (Order at 12). In order to "determine" the environmental impact of the AMP Coal Plant, however, there must be an actual evaluation of such impacts, O.R.C. § 4906.10(A)(2), not just a statement that the Plant will release a certain amount of a pollutant. With the exception of a brief statement by the Staff that CO2 emissions "have been associated with climate change" (Staff Ex. 1 at 30), AMP and the Staff have presented no analysis of the environmental impacts of the AMP Coal Plant's CO2 emissions. For example, there has been no evaluation of how CO2 emissions contribute to climate change, the impacts of climate change, or how construction of the AMP Coal Plant's emissions would affect efforts to address climate change. Instead, the record indisputably shows that neither AMP nor the Staff factored CO2 emissions or climate change into their assessment of the environmental impacts of the project. (Tr. Vol. II at 29-30, 94-95, 97, 161; Tr. Vol. V at 96). This violates the Power Siting Statute.

The Board also held that the AMP Coal Plant's CO2 emissions did not need to be factored into the evaluation of alternatives required by O.R.C. § 4906.10(A)(3) because there is currently no commercially available technology for capturing and sequestering such emissions. (Order at 15). This holding is unsupported by the record. As the Citizen Groups' expert, Mr. Furman, testified, carbon capture from an IGCC plant is commercially available because all of the necessary components of a capture system have been demonstrated. (Tr. Vol. 1 at p. 184 line 18 to p. 186 line 3; Citizen Group Ex. 1 at p. 5 line 19 to p. 6 line 7 and p. 30 lines 16 to 23). In addition, coal gasification plants at which CO2 is captured have also demonstrated the ability to inject such CO2 underground for enhanced oil recovery. (Citizen Group Ex. 1 at p. 5 lines 21 to 25, and p. 30 lines 22-23). It was erroneous not to require that the AMP Coal Plant minimize its global warming impacts by capturing and sequestering its CO2 emissions.

In addition, even if CO2 capture and sequestration were not currently available, there are numerous other steps to reduce or otherwise help address the CO2 impacts of the AMP Coal Plant, which must be evaluated and required under O.R.C. § 4906.10(A)(3). These include:

- **Requiring the pursuit of cleaner alternatives that could serve some or all of the identified need.** The AMP Coal Plant's CO2 impacts could be reduced or eliminated through the pursuit of less-CO2 intensive alternatives. The Board found that energy efficiency and renewable energy sources could satisfy as much as 454 MW of the identified need that the AMP Coal Plant would serve. (Order at 13). While this figure actually underestimates the availability of cleaner alternatives, as discussed in Sections II and III below, it does demonstrate that the full 960 MW of pulverized coal-fired generation sought by AMP could not be certified because at least part of that energy could be supplied through the use of sources that would have lower CO2 emissions and impacts. Therefore, in order to minimize adverse environmental impacts from AMP's proposal, as required by O.R.C. § 4906.10(A)(3), the Board must factor CO2 and other impacts into the evaluation of alternatives and limit any certification for the AMP Coal Plant to the amount of identified need that cannot be satisfied through less CO2 intensive alternatives.
- **Requiring the AMP Coal Plant to capture CO2 in the future.** While AMP has frequently trumpeted the possibility that its Powerspan control technology might someday be able to be retrofitted to capture CO2 (Tr. Vol. II at p. 188 line 9 to p. 189 line 16; AMP Ex. 1 at 15 Q; AMP Ex. 2 at 12 Q), AMP refuses to commit to actually doing so. If the Board upholds certification of the AMP Coal Plant, it must require AMP to follow through on its rhetoric by

mandating that AMP install and use CO2 capture equipment as soon as it becomes commercially available.<sup>2</sup>

- **Requiring the shut down of other coal fired facilities.** AMP contends that the AMP Coal Plant will lead to a reduction of emissions because it will allow AMP to move beyond existing, dirtier sources of power. (AMP Ex. 2 at Ex. RM-6; Tr. Vol. II at p. 77 line 20 to p. 83 line 22). Such reductions, however, are illusory because AMP refuses to legally commit to actually shutting down any of those existing sources, such as its R.H. Gorsuch Station. (Tr. Vol. II at p. 79 line 21 to p. 80 line 2). In fact, AMP is considering repowering Gorsuch as a bigger facility. (*Id.* at p. 114 line 4 to p. 115 line 1). In order to minimize the CO2 and other environmental impacts of AMP's proposal, the Board must mandate the shut down of Gorsuch and other coal-fired facilities as part of any certification for the AMP Coal Plant.
- **Requiring a more efficient plant.** There is no dispute in the record that a supercritical pulverized coal plant would be more efficient and, therefore, emit less CO2 and other pollutants than the proposed sub-critical AMP Coal Plant would. (Citizen Groups' Ex. 1, p. 37, lines 13-19; p. 37, lines 22-24 and p. 38 lines 1-13, Ex. RCF-30; AMP Ex. 2 at 29 Q; AMP Ex. 3 at 23 Q, AMP Ex. 4 at 35 Q and 37 Q). The Board, however, did not make any finding regarding the need to require a more efficient plant. In order to minimize the CO2 and other environmental impacts of AMP's proposal, the Board must require that the AMP Coal Plant be a supercritical facility with an efficiency of at least 38% as part of any certification.

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<sup>2</sup> AMP's witnesses testified that they expect Powerspan to be commercially available for CO2 capture in three to eight years, and noted that a commercial demonstration of the technology at an existing 125 MW plant is currently scheduled to begin in 2012. (Tr. Vol. II at p. 53 line 21 to p. 54 line 14). The Board should require AMP to provide annual updates regarding the status of the Powerspan and other CO2 capture technology so that an accurate assessment of its commercial availability can be made.



These options demonstrate that there are numerous steps that could be taken to minimize the CO2 and other adverse environmental impacts of the proposed AMP Coal Plant. The Power Siting Statute, therefore, requires that the impacts of CO2 emissions be factored into the alternatives analysis, and that the Board include binding commitments to minimize those impacts. O.R.C. § 4906.10(A)(3). The Board's contention to the contrary (Order at 15) is unlawful and unsupported by the record and, therefore, rehearing should be granted.

## **II. Energy Efficiency and Renewable Energy Alternatives to the AMP Coal Plant Have Been Improperly Rejected.**

Rehearing is also necessary because the Board improperly dismissed energy efficiency and renewable energy alternatives to the proposed AMP Coal Plant. As the Citizen Groups explained in their post-hearing briefs, energy efficiency and renewable energy sources are less polluting alternatives that can satisfy some or all of the energy need that AMP has identified. (Citizen Groups Initial Br. at 13-28; Citizen Groups Reply Br. at 15-16). AMP, however, either ignored these alternatives or rejected them on specious grounds, and the Staff did not even mention alternatives in the Staff Report. (*Id.*). As such, the record does not support a finding that the AMP Coal Plant represents the "minimum adverse environmental impact" in light of alternatives. O.R.C. § 4906.10(A)(3).

The Board found that energy efficiency and renewables could satisfy up to 454 MW of the identified need, but then rejected those alternatives because they purportedly could not satisfy the full 960 MW that the AMP Coal Plant would supply. (Order at 13). In so ruling, the Board deferred to the testimony of AMP's witnesses regarding the amount of renewables the company might pursue, and noted that the Citizen Groups' expert had not provided a specific estimate of the amount of energy the various alternatives could provide. (*Id.*).

The Board's ruling is unlawful and unreasonable for a number of reasons. First, reliance on the Citizen Groups' purported failure to demonstrate the existence of specific capacity of alternatives is contrary to the Board's regulations, which place the burden of demonstrating compliance with the Power Siting Statute on the applicant. O.A.C. § 4906-7-09(F). AMP is required to demonstrate that there are no less environmentally damaging alternatives in order for certification to be supported by the record, but has not done so. (Citizen Groups Initial Br. at 13-28; Citizen Groups Reply Br. at 15-16).

Second, as noted in Section I above, the finding that energy efficiency and renewables could satisfy up to 454 MW of need justifies reducing the amount of AMP's proposed coal-fired generation that the Board can certify, not rejecting those alternatives. The record is undisputed that energy efficiency and renewable energy would have fewer adverse environmental impacts than the proposed AMP Coal Plant. In order to ensure that the "minimum adverse environmental impact" is achieved O.R.C. § 4906.10(A)(3), the Board must limit any certification for the proposed AMP Coal Plant to the amount of need that cannot be satisfied through less polluting alternatives.

Third, the Board's conclusion that energy efficiency and renewables can satisfy only 454 MW of need is based on a significant underestimation of the amount of need that can be met through energy efficiency. The Board cites the Citizen Groups' expert, Mr. Schlissel, for the contention that energy efficiency could meet only one to two percent of total demand. (Order at 12). Mr. Schlissel actually testified at the hearing that energy efficiency could meet one to two percent of total demand per year, over a number of years. (Tr. Vol. III at p. 78 lines 2-7, p. 78 line 24 to p. 80 line 1). Similarly, his written testimony cited studies projecting that energy efficiency could satisfy 15 to 29 percent of total demand by 2020. (Citizen Group Ex. 6 at p.

71). Therefore, energy efficiency could satisfy significantly more energy demand than the one to two percent total that the Board credits it for.

Fourth, the Board improperly considered energy efficiency and renewable energy sources separately from other alternatives, such as natural gas combined cycle ("NGCC") and integrated gasification combined cycle ("IGCC"). In order for the thorough evaluation of alternatives required by the Power Siting Statute to occur, however, alternatives must be considered in combination. (Citizen Groups Initial Br. at 14). This is because even if an individual resource is not able to satisfy all of the identified energy need, a combination of such resources could do so with fewer adverse environmental impacts. The Board's Order and the record show that no such consideration of a combination of alternatives has occurred and, therefore, rehearing is required.

### **III. NGCC and IGCC Alternatives to the AMP Coal Plant Have Been Improperly Rejected.**

The Citizen Groups' motion for a rehearing should also be granted because the Board's decision upholding AMP's rejection of NGCC and IGCC is unsupported by the record and does not comply with the requirements of the Power Siting Statute. As the Citizen Groups explained in their post-hearing briefs, the record shows that NGCC and IGCC are both available and cost competitive energy sources that would have significantly lower emissions of sulfur dioxide, nitrogen oxides, mercury, particulate matter, and other harmful air pollutants. (Citizen Groups' Initial Br. at 22-28). In addition, an NGCC plant would have lower CO<sub>2</sub> emissions, while an IGCC plant provides commercially proven opportunities to control CO<sub>2</sub> emissions. (*Id.*) Given these less polluting alternatives, the AMP Coal Plant cannot be found to "represent the minimum adverse environmental impact." O.R.C. § 4906.10(A)(3).

The Board upheld AMP's rejection of NGCC on the basis of rebuttal testimony from AMP's witness Mr. Clark that an NGCC would have a higher levelized cost than the AMP Coal Plant even if CO2 costs are factored in. (Order at 14). This is inadequate under the Power Siting Statute, however, because an applicant cannot reject an environmentally preferable alternative simply because it might cost a little more. Instead, the Statute provides that the Board must determine whether there are less environmentally damaging alternatives, and to "consider" the economics of those alternatives in making this determination. O.R.C. § 4906.10(A)(3). This statutory language shows that the Board must balance the environmental impacts and economics of proposed alternatives, rather than prioritizing economics over the environment. No such balancing has occurred here.

Mr. Clark's rebuttal testimony also should not be relied on by the Board because the Citizen Groups were not allowed to conduct discovery regarding that testimony. Without discovery regarding the testimony, the Citizen Groups did not have a fair opportunity to evaluate and challenge the assumptions upon which Mr. Clark's cost estimate was based. (Citizen Groups Initial Br. at 24 & n. 7). Therefore, such evidence should not be given any weight.

The Board also relied on the purported volatility in natural gas prices as a basis for upholding AMP's rejection of NGCC. (Order at 14). There is no evidence in the record, however, supporting such a finding. To the contrary, the only evidence regarding future natural gas prices in the record show such prices remaining below today's prices through 2030. (AMP Ex. 4 at IC-4; Tr. Vol. II at p. 21 lines 17-24).

In upholding AMP's rejection of IGCC as an alternative, the Board did not present any analysis of IGCC but instead simply adopted by reference AMP's concerns about "risk, cost,

size, reliability, and environmental and operating conditions.” (Order at 14). These concerns, however, were fully discredited by Mr. Furman and even AMP’s own witness.

For example, with regards to reliability, AMP’s witness Mr. Kiesewetter acknowledged that with the use of a backup fuel (such as natural gas), the reliability of an IGCC plant is comparable to that of a pulverized coal plant. (Tr. Vol. II at p. 156 lines 17-21; see also Citizen Groups Ex. 1 at p. 32 line 14 to p. 33 line 23).

As for cost, any cost advantage of the AMP Coal Plant disappears once the cost of CO2 capture and sequestration is factored in. (Citizen Groups Ex. 1 at p. 11 line 19 to p. 12 line 6, p. 12 line 12 to p. 13 line 9, Ex. RCF-5, RCF-6; Citizen Groups Ex. 9 at p. 37). In addition, as with NGCC and other alternatives, AMP and the Board have not balanced any extra cost for an IGCC against the significant environmental advantages of an IGCC over the proposed AMP Coal Plant.

As for environmental performance, AMP compared the AMP Coal Plant to only two IGCC plants that were built in the late 1990s. (AMP Ex. 2 at 18 Q; Tr. Vol. II at 86-87). More weight should be given to recently proposed IGCC plants because they represent the capabilities of current IGCC technology, including the use of Selexol for SO2 control and SCRs for NOx control, which neither of the two existing IGCC plants in the U.S. use. (Citizen Groups’ Ex. 1 at p. 19 lines 4-6, 9-13, 24-25 and p. 20 lines 1-4).

In addition, while the AMP Coal Plant may have a slight advantage regarding dispatchability (Order at 14), an IGCC has advantages related to environmental performance, CO2 capture capability and cost, and fuel flexibility. (Tr. Vol. II at p. 157 lines 3-7, Citizen Groups Ex. 1 at p. 33 lines 1-4).

The Board failed to address this evidence or provide any basis for siding with AMP’s witness testimony over the evidence regarding the availability, cost, and environmental

performance of IGCC presented by the Citizen Groups. As such, the Order does not provide a supported basis for rejecting IGCC as an alternative to the AMP Coal Plant and, therefore, a rehearing is necessary.

**IV. The ALJs' Evidentiary Rulings Were Contrary to Board Rules Requiring Admission of All Relevant and Material Evidence.**

Finally, rehearing should be granted because the ALJs excluded Citizen Group evidence and testimony in violation of the rules of evidence set forth by the Board's regulations and the Ohio Rules of Evidence. The Board regulations are clear – "the administrative law judge *shall* admit all relevant and material evidence, except evidence that is unduly repetitious, *even though inadmissible under the rules of evidence* applicable to judicial proceedings." O.A.C. § 4906-7-09(A) (emphasis added). In other words, the only grounds for excluding evidence in this proceeding are if it is not relevant and material, or it is unduly repetitious. *Id.*

In contrast to these plain requirements, the ALJs struck exhibits RCF-4, RCF-7, RCF-8, RCF-11, RCF-12, and RCF-13 to Mr. Furman's testimony, plus portions of Mr. Furman's written testimony that relied on such exhibits. With the exception of RCF-8, none of the exhibits at issue here were stricken for being irrelevant, immaterial, or unduly repetitious. Nor could they be, as the exhibits address the cost and emissions of IGCC plants, and therefore are relevant to whether there is a less environmentally damaging alternative to the AMP Coal Plant for purposes of O.R.C. § 4906.10(A)(3). *See* RCF-4, RCF-7, RCF-11, RCF-12, RCF-13. Instead, the exhibits were stricken because they were purportedly based on hearsay or beyond the scope of Mr. Furman's expertise (Tr. Vol. 1 at pp. 45-49, 270-74). As noted above, these are not proper bases for excluding evidence from this proceeding under O.A.C. § 4906-7-09(A).

The ALJs struck RCF-8 on relevance grounds (Tr. I at p. 270 line 16 to p. 271 line 13), but a review of that exhibit shows that it is relevant. As defined by the Ohio Rules of Evidence, evidence is relevant if it has “*any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ohio R. Evid. 401 (emphasis added). RCF-8 demonstrates an advantage of an IGCC plant over a pulverized coal plant – namely that the IGCC plant can generate cheaper power than the pulverized coal plant by burning petcoke. As such, this exhibit is relevant to the evaluation of the “nature and economics of the various alternatives” required by O.R.C. § 4906.10(A)(3). While RCF-8 and the accompanying testimony examined costs in Florida, nothing in the record demonstrates that the ability of an IGCC plant to burn petcoke would not also provide an advantage for an IGCC facility in Ohio. At most, the fact that RCF-8 provides information for another state goes to the weight that should be given to that exhibit, not to its admissibility.

Even if O.A.C. § 4906-7-09(A) did not compel admission of all relevant and material evidence, RCF-7, RCF-11, RCF-12, and RCF-13 are also admissible under the Ohio Rules of Evidence. First, each one of these exhibits was authenticated by the witness, and each summarizes facts or data perceived by him for purposes of Ohio Rule of Evidence 703. Mr. Furman’s use of data originally collected by a third party, as in exhibits RCF-7, RCF-11, RCF-12, and RCF-13, does not render those exhibits inadmissible. *See Nilavar v. Osborn*, 137 Ohio App. 3d 469, 490 (2<sup>nd</sup> Dist. Clark County 2000).

The ALJs also improperly struck portions of Mr. Furman’s written testimony corresponding to the stricken exhibits. Even if the Furman exhibits were properly stricken, Mr. Furman’s expert opinions corresponding to those exhibits should be admitted because an expert

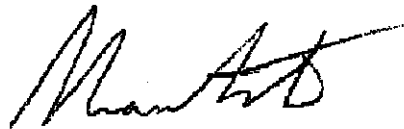
may testify to matters even without having first-hand knowledge and even based on facts not admitted into evidence. Ohio Rule of Evidence 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert *or* admitted in evidence at the hearing." The plain text of the rule permits admissibility of expert opinion even if not based on otherwise admissible evidence. *Nilavar*, 13 Ohio App. 3d at 490.

The Board's ruling upholding the ALJs exclusion of exhibits RCF-4, RCF-7, RCF-8, RCF-11, RCF-12, and RCF-13 and corresponding testimony is contrary to law and, therefore, rehearing should be granted.

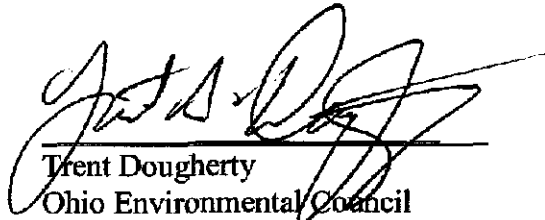
#### V. Conclusion

For the foregoing reasons, the Board's Opinion, Order and Certificate granting certification to the AMP Coal Plant is contrary to the requirements of the Power Siting Statute and unsupported by the record. Therefore, the Board should grant the Citizen Groups' motion for rehearing so that the careful evaluation of environmental impacts and selection of alternatives that would minimize those impacts can occur.

Respectfully Submitted,



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April 2, 2008

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and 10 copies of the foregoing Application for Rehearing of the Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club and supporting Memorandum have 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 2<sup>nd</sup> day of April, 2008.

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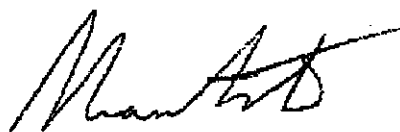
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