

FILE

BEFORE THE
OHIO POWER SITING BOARD

In the Matter of Application of)
American Municipal Power-Ohio, Inc.,)
for a Certificate of Environmental)
Compatibility and Public Need for an)
Electric Generation Station and Related)
Facilities in Meigs County, Ohio)

Case No. 06-1358-EL-BGN

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AMERICAN MUNICIPAL POWER-OHIO, INC.'S
MEMORANDUM CONTRA APPLICATION FOR REHEARING OF
THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,
OHIO ENVIRONMENTAL COUNCIL AND SIERRA CLUB

On April 2, 2008, the Natural Resources Defense Council, Inc., Ohio Environmental Council, and Sierra Club ("Activist Groups") filed an Application for Rehearing of this matter before the Ohio Power Siting Board ("OPSB" or "Board") regarding the Board's March 3, 2008 issuance of a Certificate of Environmental Compatibility and Public Need ("Certificate") to American Municipal Power-Ohio, Inc. ("AMP-Ohio") for construction, operation, and maintenance of the American Municipal Power Generating Station ("AMPGS"). In so doing, Activist Groups offer nothing new and have simply restated earlier arguments thoroughly examined and rejected in the well-reasoned Opinion, Order, and Certificate ("Order") issued by the Board. As explained below, Activist Groups have failed to demonstrate that the Board's Order is in any way unreasonable or unlawful, and accordingly, the Application for Rehearing must be denied.

I. Legal Framework

By reference in O.A.C. 4906-07-17(D) to R.C. 4903.10, any party to a Board proceeding may file an application for rehearing of any final order of the Board. An application for rehearing must be in writing and set forth specifically the ground or grounds on which the applicant considers the order unreasonable and unlawful. R.C. 4903.10(B). The Board shall not

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take any additional evidence that, with reasonable diligence, could have been offered at the original hearing. Id. Any rehearing is limited to matters determined by the Board in the earlier proceeding and to matters which sufficient reason has been shown for rehearing. See Columbus & Southern Ohio Electric Co. v. Public Utilities Commission of Ohio (1984), 10 Ohio St.3d 12, 13, 460 N.E.2d 1108, 1109. A rehearing is not intended to be a *de novo* hearing. Id.

It is important to note that, where evidence has been presented that allows either of two conclusions, it is arbitrary and improper for an agency or board to enter one finding and then re-evaluate that same evidence and make an opposite finding, in the absence of additional evidence or new legal questions. See Doc Goodrich & Son v. Public Utilities Commission of Ohio (1978), 53 Ohio St.2d 70, 72, 372 N.E.2d 354, 356.

As explained below, Activist Groups have failed to demonstrate that the Board's Order was unreasonable or unlawful, thus the Application for Rehearing must be denied.

II. Argument

A. The Board's Order with Respect to Carbon Dioxide Emissions and Alternatives was Reasonable and Lawful.

Despite Activist Groups' repeated declarations that the nature of environmental impact was not "determined" in this proceeding, the record in this case clearly demonstrates the Board determined the nature of all probable environmental impacts, including consideration of carbon dioxide ("CO₂") emissions. In addition, Activist Groups make the bare declaration that AMPGS's CO₂ emissions will have significant environmental impacts, yet there is nothing in the record that supports this claim.

Activist Groups claim that the nature of probable environmental impact has not been determined because global warming/climate change and CO₂ emissions were not "evaluated." However, and as already stated by AMP-Ohio in its Post Hearing Reply Brief, Activist Groups

failed, both from a legal and technical standpoint, to connect climate change/global warming to the Board's proceeding. AMP-Ohio Post Hearing Reply Brief, pp. 4-7. Instead, Activist Groups attempted on the last day of the hearing to present additional evidence as rebuttal testimony. Activist Groups failed to articulate a single reason as to why such evidence was not presented in their direct case, and they similarly fail to do so in their Application for Rehearing. Activist Groups' repeated attempts to turn this proceeding into a debate about global climate change must be rejected and cannot form the basis for rehearing.

Activist Groups also fail to specifically address how the Board's Order with respect to CO₂ emissions was unreasonable or unlawful. The Board's well-reasoned Order notes that no parties dispute that the AMPGS's annual CO₂ emissions are estimated at 7.3 million tons. Opinion, Order, and Certificate, p. 12. In addition, the Certificate includes certain conditions that reflect the Board's consideration of CO₂ emissions. For example, AMP-Ohio is required to file an application with the Board if and when it seeks to conduct carbon capture and sequestration. Opinion, Order, and Certificate, p. 33, Condition 6. The Certificate also requires AMP-Ohio to use Powerspan air pollution control technology for control of sulfur dioxide. Opinion, Order, and Certificate, p. 34, Condition 9. Evidence was admitted showing that Powerspan holds promise for potential carbon capture in the future, and this one of the reasons AMP-Ohio selected Powerspan. Opinion, Order, and Certificate, p. 6.

Activist Groups also claim, as they repeatedly have, that the Board should have required AMP-Ohio to do the impossible, i.e., consider alternatives in light of a not-yet-commercially available technology to capture and sequester CO₂. No evidence was presented at the hearing demonstrating that carbon capture and sequestration is commercially available for electric generation facilities.

The Board lawfully and reasonably found that R.C. 4906.10(A)(3) requires the Board to determine the state of *available* technology in its alternatives analysis. Activist Groups ask this Board to speculate as to technologies that may or may not develop in the future. Such a task is contrary to the statute's explicit language requiring consideration of the state of *available* technology.

In further arguing that AMP-Ohio must reduce CO₂ emissions, Activist Groups request that the Board require AMP-Ohio to shut down the Richard H. Gorsuch Station ("Gorsuch Station"). Nothing in the Power Siting Board's statute or rules requires an entity to retire existing assets as a condition of constructing new power generation facilities, whether for CO₂ emission reductions or otherwise. Nonetheless, as the record reflects AMP-Ohio indicated it intended to retire the Gorsuch Station upon commercial operation of AMPGS. Tr. II, p. 113. AMP-Ohio's Board has now confirmed that decision by resolution number 08-02-2552, adopted February 12, 2008 (See Appendix A hereto). Evidence was presented at the hearing regarding the Gorsuch Station demonstrating that power from AMPGS will replace power that is generated by less efficient plants, like Gorsuch Station, and that some AMP-Ohio members, such as St. Mary's, have already retired older plants in anticipation of participation in AMPGS. Tr. II, p. 113-115. Activist Groups ignore this fact and fail to explain how shutting down of Gorsuch or any other plant is required by the Board's statutes, rules, or precedents. Nonetheless, the point is really moot.

Finally, Activist Groups argue that the Board must require AMP-Ohio to utilize a supercritical, as opposed to subcritical, boiler design for construction of AMPGS. AMP-Ohio presented evidence at the hearing regarding considerations for boiler design choice, including the need to obtain bids from Engineer, Procure, and Construct ("EPC") contractors. AMP-Ohio

Exhibit 3, Testimony of Scott Kiesewetter, Q/A 22. As the EPC contractor bidding process has progressed, AMP-Ohio's Board has now declared by resolution number 08-02-2551, adopted February 12, 2008, it intends to utilize a supercritical boiler design (See Appendix B). As such, Activist Groups' argument for supercritical design is irrelevant because a) Activist Groups failed to demonstrate how considerations of CO2 emissions are tied to this proceeding and b) AMP-Ohio has already selected supercritical boiler design for AMPGS.

The Board lawfully and reasonably held that the AMPGS represented the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives. Accordingly, the Board should deny Activist Groups' Application for Rehearing.

B. The Board Reasonably and Lawfully Found that Energy Efficiency and Renewable Energy Sources, Alone or in Combination with Other Sources, Could Not Serve the Critical Base Load Needs of AMP-Ohio.

Activist Groups mistakenly claim that the Board "found" that 454 megawatts ("MW") of energy could be obtained by AMP-Ohio through a combination of energy efficiency and renewable energy sources. No such finding occurred. Rather, the Board's Order discussed the potential megawatts available if AMP-Ohio pursued every possible renewable source and efficiency under ideal conditions, not taking into account issues of reliability, cost, and dispatchability.

Activist Groups therefore distort the Board's discussion of potential sources of renewable energy and efficiency to claim that these sources could serve as an alternative to some or all of the power to be supplied by AMPGS. The Board did not find that renewable sources and efficiency could serve as an alternative to a base load resource like AMPGS. Rather, the Board made clear that "the relevant comparison of alternatives would be a combination of alternatives

which produce 960 MW and is available as a base load resource,” not a combination of non-base load sources like wind and hydroelectric generation. Opinion, Order, and Certificate, p. 12.

Activist Groups also completely ignore the testimony and record demonstrating that AMP-Ohio is already implementing energy efficiency methods and is a state-wide leader in deploying and exploring renewable sources of energy. Tr. II, p. 170, AMP Ohio Reply Brief, p. 10. As the Board found, efficiency and renewable sources, however, cannot take the place a base load resource such as AMPGS. Opinion, Order, and Certificate, p. 13. AMP-Ohio continues to pursue efficiency and renewable sources *in addition to*, not in lieu of, AMPGS. As such, Activist Groups’ have failed to demonstrate how the Board’s alternatives determination with respect to the availability of efficiency and renewable sources was unreasonable or unlawful, and the Application for Rehearing must be denied.

C. The Board Reasonably and Lawfully Found that AMP-Ohio Properly Considered and Rejected Natural Gas Combined Cycle and Integrated Gasification Combined Cycle Based on Pertinent Considerations of Cost, Risk, Reliability, Dispatchability, Vendor Guarantees, and Environmental and Operational Performance.

AMP-Ohio properly considered all relevant factors in its evaluation of various alternative energy sources, including natural gas combined cycle (“NGCC”) and integrated gasification combined cycle (“IGCC”) electric generation. Both of these methods were rejected, as the Board found, for permissible reasons. NGCC was rejected as a non-base load source and due to costs and the risks of volatility in natural gas prices. Opinion, Order, and Certificate, p. 14. IGCC was rejected due to risk, cost, size, reliability, dispatchability, and environmental and operational considerations. Opinion, Order, and Certificate, p. 14. For purposes of judicial economy, AMP-Ohio will not rehash the extensive testimony that was presented at the hearing and explained in AMP-Ohio’s post hearing briefs addressing why base load power is so essential to AMP-Ohio

and its members. Suffice to say that the record clearly shows, as relied upon by the Board, that NGCC and IGCC are not feasible alternatives to fulfill AMP-Ohio's base load power generation needs.

Activist Groups point to statements made by their witness, Mr. Furman, to tout the benefits of IGCC, but the record in this case clearly demonstrates that Mr. Furman was not an expert with respect to IGCC, and existing IGCC plants are not achieving levels of environmental performance that are any greater than what is expected from AMPGS. Tr. II, p. 123. In addition, other factors, such as high operational costs, operational challenges, and the lack of load-following capability, make IGCC economically and technically infeasible for AMP-Ohio as its "flagship" base load resource.

Activist Groups resort to the same tired arguments articulated in their post hearing briefs to argue that NGCC and IGCC were not properly evaluated, yet point to no evidence in the record to support such statements. A rehearing will not change this reality. As such, the Board should deny Activist Groups' Application for Rehearing.

D. The Board Properly Upheld the Administrative Law Judges' Evidentiary Rulings, and Even if Those Rulings were Reversed, the Board Held that It Would Not Alter Its Decision.

Activist Groups argue, as they did before the Administrative Law Judges, that statements and documents must be admitted into evidence, even if such statements constitute classic hearsay, are outside the scope of witness expertise, and are completely unreliable. As Ohio courts have repeatedly held, however, the finder of fact has the power to make rulings as to the "competency, admissibility and scope of expert testimony and to determine the weight to be accorded that testimony." Chester Township v. Power Siting Commission (1977), 49 Ohio St.2d 231, 237, 361 N.E.2d 436, 440. The Administrative Law Judges, as initial finders of fact in this

proceeding, properly ruled as to the “competency, admissibility and scope of expert testimony.” Activist Groups ignore this principle to argue that the Administrative Law Judges had no discretion to exclude expert testimony by Mr. Furman that was clearly outside the scope of his expertise.

Activist Groups also argue the Administrative Law Judges erred by excluding Mr. Furman’s exhibits and statements as irrelevant and otherwise inadmissible, but fail to explain why the Board should depart from its practice of deference to the evidentiary rulings of its Administrative Law Judges. An expert’s qualifications are “a matter for determination by the trier of the facts and rulings with respect to such matters will ordinarily not be reversed unless there is a clear showing that the court abused its discretion.” City of Akron v. Public Utilities Commission (1966), 5 Ohio St.2d 237, 242, 215 N.E.2d 366, 370-71 (internal citation omitted). There is nothing in the record justifying a departure from deference to the Administrative Law Judges’ evidentiary rulings.

Finally, Activist Groups’ argument is moot since the Board noted in its Order that, even if it considered the evidence that was excluded by the Administrative Law Judges, it would not have altered its findings. Opinion, Order, and Certificate, p. 16. As such, potential inclusion of evidence that was excluded by the Administrative Law Judges cannot form the basis for rehearing, since it would not alter the outcome of this proceeding.

III. Conclusion

For the reasons set forth above, in AMP-Ohio's prior filed briefs, the Staff's briefs, and the Board's well-reasoned Order, AMP-Ohio urges the Board to deny Activist Groups' Application for Rehearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John W. Bentine', is written over a horizontal line. The signature is stylized with large, overlapping loops.

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Appendix A

AMERICAN MUNICIPAL POWER-OHIO, INC.

RESOLUTION NO. 08-02-2552

**TO DECLARE THE RETIREMENT OF THE RH GORSUCH PROJECT
CONTEMPORANEOUSLY WITH THE COMMERCIAL OPERATION OF THE
AMERICAN MUNICIPAL POWER GENERATING STATION**

WHEREAS, The RH Gorsuch Generating Station (RHGS) project primarily consists of the 1950's vintage 213 MW pulverized coal generating facility consisting of four boilers, four turbine generator sets and associated facilities;

WHEREAS, since the acquisition of the RHGS by AMP-Ohio in 1988, it has provided a significant, reliable and cost effective base load generation for AMP-Ohio's participating members;

WHEREAS, the respective capacity of the RHGS project participants has been included in the capacity planned for the American Municipal Power Generating Station (AMPGS) project;

WHEREAS, debt service for RHGS has been substantially reduced and will end on or about December 31, 2012;

WHEREAS, RHGS is approaching the end of its useful life as currently configured and AMP-Ohio has notified the adjacent steam customers of the termination of their steam contracts;

WHEREAS, AMP-Ohio is investigating re-powering RHGS after its retirement as a new project using innovative technology such as Integrated Gasification Combined Cycle (IGCC) with carbon capture;

WHEREAS, AMP-Ohio has estimated costs associated with retiring the RHGS Project including post retirement health and pension benefits, and has fully funded the same;

**NOW THEREFORE BE IT RESOLVED BY THE BOARD OF TRUSTEES OF
AMP-OHIO THAT:**

Section 1: AMP-Ohio shall take steps necessary to terminate the RHGS Project pursuant the current RHGS Power Sales Contracts more or less contemporaneously with the in service date of the second unit of AMPGS;

Section 2: AMP-Ohio staff shall continue to investigate the re-use of the RHGS site and other assets after its retirement, as a new project,

by repowering, utilizing different technology that produces less emissions or sale of the site and other assets;

Section 3: AMP-Ohio shall continue to work with the current steam customers, representing over 750 area jobs, with regard to replacement of the steam currently provided by RHGS to those entities;

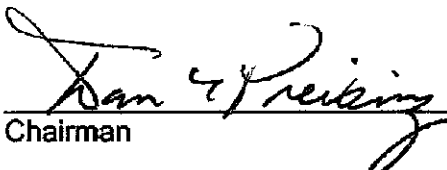
Section 4: AMP-Ohio shall apply any net funds or other assets, after accounting for all retirement or closure costs, to the benefit of the respective RHGS participants in accordance with their RHGS project entitlement;

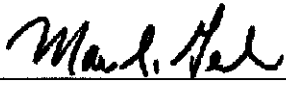
Section 5: The President, in consultation with the CFO and General Counsel, is authorized and directed to take the actions necessary to implement this Resolution.

Date: February 12, 2008

Approved
As to Form:


GENERAL COUNSEL
AND ASSISTANT SECRETARY


Chairman


PRESIDENT

Appendix B

AMERICAN MUNICIPAL POWER-OHIO, INC.

**TO CONFIRM THE USE OF POWERSPAN AND SUPERCRITICAL BOILER DESIGN
AT AMPGS**

RESOLUTION NO. 08-02-2551

WHEREAS, on October 23, 2006, the Board of Trustees of AMP-Ohio adopted Resolution 06-10-2384 declaring AMP-Ohio's intent to pursue utilization of Powerspan Air Emissions Control Technology on the AMPGS project with certain conditions and declaring it in the best interest of AMP-Ohio's members to consider the future costs and availability of carbon capture in the design of AMPGS;

WHEREAS, on May 16, 2007 the Board adopted Resolution 07-05-2437 and 06-10-2384 that among other things, confirmed AMP-Ohio's pursuit of Powerspan with certain conditions;

WHEREAS, after AMP-Ohio's due diligence and discussions with the potential EPC contractors, the conditions set forth in Resolution 07-05-2437 will be met;

WHEREAS, the Power Siting Board Staff recommended a condition of the Generation Certificate to be issued by the Power Siting Board that AMP-Ohio must apply for an amendment to such Certificate if it does not utilize Powerspan, and AMP-Ohio has concurred in such condition;

WHEREAS, while AMP-Ohio's air permit and Power Siting applications contemplated either sub-critical or supercritical boiler design;

WHEREAS, all EPC proposers have proposed supercritical boiler design and such design provides benefits in efficiency;

NOW THEREFORE BE IT RESOLVED by the AMP-Ohio Board of Trustees that AMPGS shall utilize Powerspan Eco-SO₂ technology and supercritical boiler design.

Date: February 12, 2008

Approved
As to Form.


GENERAL COUNSEL
AND ASSISTANT SECRETARY


Chairman


PRESIDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing American Municipal Power-Ohio, Inc.'s Memorandum Contra Application for Rehearing of the Natural Resources Defense Council, Inc., Ohio Environmental Council, and Sierra Club for Case No. 06-1358-EL-BGN was served upon the following persons via electronic mail and/or via postage prepaid U.S. Mail on April 14, 2008:

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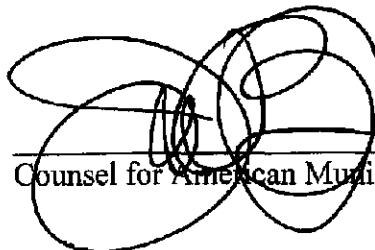
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