

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of The Ohio)
State University for a Certificate of Environmental)
Compatibility and Public Need for Combined Heat) Case No. 19-1641-EL-BGN
and Power Major Unit Facility in Franklin County,)
Ohio on the Campus of The Ohio State University.)

**THE OHIO STATE UNIVERSITY’S MEMORANDUM IN OPPOSITION TO
INTERVENOR SIERRA CLUB’S MOTION TO COMPEL**

I. INTRODUCTION

Sierra Club’s Motion to Compel must be denied because Sierra Club seeks irrelevant information from Ohio State concerning alternative generation sources (solar and wind) that have nothing to do with the proposed CHP facility at issue in this case. Sierra Club claims that the Board must consider alternative sources as part of its determination under R.C. 4906.10(A)(3) as to minimum adverse environmental impact. This position has no basis in Ohio law, and Sierra Club has been unable to find any case which supports its novel argument imposing an integrated resource planning process on anyone who wants to build generation in Ohio (traditional or renewable).

As there is no authority supporting Sierra Club’s legal position, the information which it seeks is not reasonably likely to lead to the discovery of admissible evidence. Ohio State’s solar and wind generation planning over the last five years simply has nothing to do with this case. Only the CHP facility in the application is at issue here. Accordingly, Sierra Club’s Motion to Compel must be denied.

II. ARGUMENT

A. Sierra Club's contention that R.C. 4906.10(A)(3) requires the Board to consider an entirely different fuel type as part of its analysis is incorrect and not supported by any Ohio law.

Sierra Club claims that the Board is required to make comparisons about alternative fuel source types—including fuel source types that are not included in an application—in order to determine whether a proposed facility represents the minimum adverse environmental impact under R.C. 4906.10(A)(3).¹ Essentially, Sierra Club is insisting that anyone seeking to build generation in Ohio, renewable or not, is required conduct a full integrated resource planning process before the Board approves an application. Sierra Club provides no actual support for this novel contention, and instead relies on *In Re Am. Mun. Power-Ohio, Inc.*, No. 06-1358-EL-BGN, Entry (Mar. 3, 2008) (“*AMP-Ohio*”) to argue that for R.C. 4906.10(A)(3) “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.”² But this position, and Sierra Club’s reliance on *AMP-Ohio*, is incorrect.

Despite all the generation which has been approved by the Board over the decades, there is no authority stating that wind and solar are a required part of the determination as to whether the proposed facility represents the minimum adverse environmental impact under R.C. 4906.10(A)(3). Instead, when determining whether a proposed facility in an application represents the minimum adverse environmental impact, the Board focuses on whether the *proposed facility* has been “sited and designed to minimize potential impacts” to demographics, land use, cultural resources, residences, surface waters, vegetation, threatened and endangered species, geology and

¹ Sierra Club Motion to Compel at 1, 3–4, 7, 9.

² Sierra Club Motion to Compel at 4–5 (emphasis added).

soils, public services and traffic, roads and bridges, and noise.³ Noticeably absent from this is any requirement or consideration of alternative fuel source types that are not a part of the application for the proposed facility. Accordingly, Sierra Club’s claim that R.C. 4906.10(A)(3) requires comparisons about other alternative fuel source types simply has no basis in Ohio law.

Likewise, Sierra Club’s reliance on *AMP-Ohio* also fails to support Sierra Club’s contention concerning R.C. 4906.10(A)(3).⁴ *AMP-Ohio* involved an application for a certificate of environmental compatibility and public need to construct a 960 MW coal fired electric generation facility, consisting of two 480 MW electric generating units in Meigs County, Ohio. Sierra Club intervened and argued, among other things, that it was AMP-Ohio’s burden to evaluate alternatives in combination, not just individually, and to justify any rejection of them as part of the analysis under R.C. 4906.10(A)(3). The Board rejected Sierra Club’s position, finding that “there is no feasible combination of energy efficiency measures and generation resources based upon renewable sources which could serve as an alternative to the proposed 960 MW AMPGS facility as a baseload generation resource,” and further rejected the citizen groups’ argument that AMP-Ohio improperly rejected alternatives to the proposed facility.⁵

³ See, e.g., *In the Matter of the Application of Clean Energy Future-Lordstown, LLC for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Lordstown, Ohio, Trumbull County*, Case No. 14-2322-EL-BGN, Opinion, Order, and Certificate (Jan. 1, 2015) (finding the project “is sited and designed to minimize potential impacts” and “represents the minimum adverse environmental impact because of its low potential to impact land use, cultural resources, streams, wetlands, and residences”); see *In the Matter of the Application of NTE Ohio, LLC for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Middletown, Ohio*, Case No. 14-534-EL-BGN, Opinion, Order, and Certificate (Nov. 24, 2014) (finding “that NTE has sited and designed the proposed facility to minimize potential impacts” and “due to the limited potential impacts to land use, cultural resources, streams, wetlands, and noise sensitive receptors . . . the project represents the minimal adverse environmental impact”); see *In the Matter of the Application of South Field Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Columbiana County*, Case No. 15-1716-EL-BGN, Opinion, Order, and Certificate (Sept. 22, 2016) (reviewing proposed facility’s impacts to land use, surface waters, vegetation, threatened and endangered species, traffic, and noise when finding that “the proposed facility represents the minimum adverse environmental impact and complies with R.C. 4906.10(A)(3)”).

⁴ See Sierra Club Motion to Compel at 8.

⁵ *In the Matter of the 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, Opinion, Order, and Certificate (Mar. 3, 2008).

The *AMP-Ohio* Board’s findings on rehearing are particularly relevant to Sierra Club’s arguments here.⁶ The *AMP-Ohio* Board rejected Sierra Club’s arguments regarding the failure to consider carbon dioxide impacts of the proposed facilities and strategies for minimizing same, that it was obligated to consider energy efficiency and renewable energy alternatives to the coal plant, or that it was obligated to consider a hypothetical gas plant. In pertinent part, the Rehearing Entry held “[t]he Citizen Groups have cited no legal precedent to support their contention that the Board should limit any certification for the proposed [coal plant] to the amount of needed generation that cannot be satisfied through alternatives based on the record of this case.”⁷ Based on that lack of legal support, the Board rejected all of Sierra Club’s assignments of error. Thus, contrary to Sierra Club’s contention, the Rehearing Entry directly cuts against any argument that the Board must consider alternative sources of renewable generation as part of its R.C. 4906.10(A)(3) analysis.

Finally, it is important to note that Ohio State is seeking approval for a combined heat and power facility because it requires both steam heat (for nearby buildings) and electricity. There is no practicable way for wind or solar resources to produce steam heat in anywhere near the quantities needed by Ohio State. Sierra Club ignores this problem by stating that Ohio State could achieve “some part of” of its generation goals from wind or solar resources. While there is no doubt that electrons could theoretically be obtained from rooftop solar panels and the like, Sierra Club misses the point. It is not Sierra Club’s decision as to how Ohio State will meet its heat and power needs, and Sierra Club may not insist that Ohio State spend untold millions in order to meet Sierra Club’s preferred policy outcome. Ohio State is the entity responsible for making its own needs determination, balancing both its climate goals and its mandate to provide an affordable

⁶ *In the Matter of the 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, Entry on Rehearing (Apr. 28, 2008).

⁷ *Id.* at ¶ 7.

education to students. Sierra Club’s request to ignore obvious cost considerations and mandate an integrated resource process for a facility to be utilized entirely on campus is simply not feasible.

Accordingly, Sierra Club’s claims that R.C. 4906.10(A)(3) “necessarily entails comparison” and requires “evidence as to the feasibility” of alternative fuel source types in order for the Board to render a decision as to whether the proposed facility represents the minimum adverse environmental impact under R.C. 4906.10(A)(3) is without merit.⁸

B. Sierra Club’s discovery requests are not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence.

As this proceeding is for a certificate for construction of a combined heat and power major utility facility on Ohio State’s Columbus campus, the proper scope of this matter is contained in R.C. 4906.10(A). Specifically, prior to issuing a certificate, the Board must find and determine, among other things, 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.”⁹ As explained above, the Board makes this determination about the proposed facility by reviewing the impacts of the proposed facility upon demographics, land use, surface waters, vegetation, threatened and endangered species, geology and soils, public services and traffic, roads and bridges, and noise.¹⁰ Absent from this determination is any requirement that the Board must consider entirely different “facilities” from what has been proposed. The Board is also not required to make determinations about alternative

⁸ Sierra Club Motion to Compel at 9.

⁹ R.C. 4906.10(A)(3) (emphasis added).

¹⁰ See, e.g., *In the Matter of the Application of Clean Energy Future-Lordstown, LLC for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Lordstown, Ohio, Trumbull County*, Case No. 14-2322-EL-BGN, Opinion, Order, and Certificate (Jan. 1, 2015); *In the Matter of the Application of NTE Ohio, LLC for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Middletown, Ohio*, Case No. 14-534-EL-BGN, Opinion, Order, and Certificate (Nov. 24, 2014); see *In the Matter of the Application of South Field Energy LLC for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Columbiana County*, Case No. 15-1716-EL-BGN, Opinion, Order, and Certificate (Sept. 22, 2016).

fuel source types for the proposed facility or generation sources that may have been considered, but not ultimately included, in the application. This issue has already been addressed in Ohio in the context of a discovery dispute.

In *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) (“*Buckeye Wind*”), an intervenor sought to compel information relating or referring to Buckeye’s consideration, evaluation, or selection of turbines for the proposed facility, claiming the information was relevant to potential facility impacts on the surrounding community. The ALJ rejected this argument and determined that because the Board only considers the application before it, any information regarding considerations made—but not ultimately included in the application—is simply irrelevant to the proceeding. Based on that determination the Entry denied the intervenor’s motion to compel.¹¹

Because the discovery dispute here mirrors *Buckeye Wind*, it warrants the same result. The information Sierra Club seeks and its reasons for seeking to compel discovery from Ohio State do not support Sierra Club’s claims of relevancy. The discovery requests are not tailored to elicit information that is reasonably calculated to lead to the discovery of admissible evidence concerning the proposed CHP facility actually at issue in this case. Accordingly, Sierra Club’s Motion to Compel must be denied.

1. Sierra Club’s Requests 1.10, 1.11, and 1.12 seek irrelevant information concerning solar and wind electricity generating facilities.

Sierra Club mischaracterizes its Requests 1.10 and 1.11 as simply seeking documents relating to feasibility studies of solar electricity and wind electricity generating facilities.¹² In

¹¹ *Buckeye Wind*, Case No. 08-666-EL-BGN, Entry at ¶ 11 (Oct. 30, 2009)

¹² Sierra Club Motion to Compel at 5–6.

reality, however, Sierra Club’s requests seek “all documents relating to possible construction or use of” solar electricity and wind electricity generating facilities “as a means of providing energy for the OSU campus . . . including but not limited to any proposals, studies, assessments, or reports regarding the feasibility, cost, or risks associated with such construction or generation.”¹³ Sierra Club claims this information is relevant to whether solar and 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.”¹⁴ In Request 1.12 Sierra Club seeks “all correspondence” between Ohio State and other entities “relating to the construction or use of solar or wind electricity generating facilities, including storage,”¹⁵ and claims this information is relevant “regarding wind and solar alternatives to the proposed gas generation.”¹⁶

These requests are incredibly broad. They would encompass every document in Ohio State’s possession regarding solar or wind generation. For example, they would include any analysis Ohio State has done to put a single solar panel on a roof of any building on campus, evaluations of the strength of that campus roof to hold such panel(s), possible battery storage products which could be connected to that rooftop system, and communications with current and prospective power purchase agreement partners for wind and solar projects.

Because Ohio State is not seeking a certificate for a solar or wind electric generation facility, “all documents” relating to an entirely different fuel source are not “directly relevant” as to whether the proposed CHP facility at issue satisfies the requirements of R.C. 4906.10(A)(3).¹⁷

¹³ Sierra Club Motion to Compel at 3–4; Exhibit C, p. 12–13.

¹⁴ Sierra Club Motion to Compel at 5–6.

¹⁵ Sierra Club Motion to Compel at 4; Ex. C, p. 14.

¹⁶ Sierra Club Motion to Compel at 6.

¹⁷ Sierra Club Motion to Compel at 5.

The Commission should evaluate the CHP facility rather than hypothetical facilities which are not at issue in this case.

2. Sierra Club’s Request 2.06 seeks information well beyond the CHP facility at issue in the application.

In Request 2.06, Sierra Club seeks to discover “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.”¹⁸ Once again, this is incredibly broad. This request expands to include any requests for proposals (“RFP”) for a generation resource on or to any OSU campus for a period of more than five years. Continuing the earlier hypothetical, this overbroad request would encompass any RFP issued by Ohio State to put solar panels on roofs, but this time compounding the problem by including panels installed on branch campuses as well as the Columbus campus.

Sierra Club first claims this information is relevant “regarding OSU’s consideration of generation alternatives with less adverse environmental impacts.”¹⁹ This is factually inaccurate because that is not what the request seeks. This 100 MW facility will provide heat and power to the Columbus campus today. Other requests for proposal, for other campuses, for only the production of energy instead of both heat and electricity, are not relevant to what Ohio State considered to solve its issues here. Moreover, Sierra Club’s request is not legally correct under Ohio law. There is no requirement under R.C. 4906.10(A)(3) that an applicant for a proposed major utility facility must consider generation alternatives as part of this process, nor does Sierra Club provide any support for such a position. Accordingly, whether or not Ohio State has

¹⁸ Sierra Club Motion to Compel at 4; Ex. D, p. 8.

¹⁹ Sierra Club Motion to Compel at 6.

considered a wind or solar project at any point over the past five years is not reasonably likely to lead to the discovery of admissible evidence about the generation unit at issue in this case.

Sierra Club's second reason that this request is relevant is just as baseless. Sierra Club claims that this information will lead to "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."²⁰ Again, this request has nothing to do with the proposed CHP facility at issue in this case. Whether or not Ohio State has considered renewable generation in the past has nothing to do with this case. And, as already explained above, because the Board is not required to consider alternative fuel source types when determining whether the proposed facility at issue represents the minimum adverse environmental impact under R.C. 4906.10(A)(3), Sierra Club's claimed relevancy reason is without merit.

Contrary to Sierra Club's arguments, Requests 1.10, 1.11, 1.12 and 2.06 are not "directly relevant" to the R.C. 4906.10(A)(3) analysis, nor are such requests limited to the proposed facility at issue in this case.²¹ As the above requests go well beyond the proposed CHP facility and whether it represents the minimum adverse environmental impact under R.C. 4906.10(A)(3), and instead encompass all energy which Ohio State would possibly use on any campus, any solar panel, or any wind contract, Sierra Club's requests are not relevant to the issue in this case, nor are they likely to lead to the discovery of admissible evidence.

Furthermore, because Sierra Club outright admits that its reasons for seeking such documents is to see what alternative forms of electricity generation and what efforts Ohio State *may* have made to solicit possible alternatives (but did not ultimately include in its application),

²⁰ Sierra Club Motion to Compel at 6.

²¹ Sierra Club Motion to Compel at 5–6.

these requests are in direct contravention of *Buckeye Wind*.²² As explained above, the Board is not asked to consider any alternative generation sources, such as solar or wind, when determining whether the proposed facility at issue represents the minimum adverse environmental impact under R.C. 4906.10(A)(3). And, as *Buckeye Wind* makes clear, because the Board only considers the application before it, any information regarding considerations made—but not ultimately included in the application—is simply irrelevant to the proceeding.²³

Sierra Club’s attempt to overcome this by claiming that the ALJ in *Buckeye Wind* “did conclude that Applicant’s analysis of the environmental impact of alternatives was relevant to the proceeding,”²⁴ is misleading. Sierra Club is mistaken because the ALJ authorized discovery regarding alternative site analysis—not alternative generation sources. This is a material distinction because site selection is governed by a specific rule which brings those questions about alternative sites squarely into play.²⁵ There is no similar rule requiring consideration of alternative generation sources.

As there is a specific rule regarding discussion of alternative site selection, and no rule regarding discussion of alternative generation sources, Sierra Club’s arguments clearly fail. Just as in *Buckeye Wind*, whether or not Ohio State has considered solar or wind generation over the past five years has no relationship to this proceeding. Accordingly, Ohio State has properly objected to these requests on relevancy grounds, and Sierra Club’s Motion to Compel must be denied.

²² Sierra Club Motion to Compel at 9; Ex. E (“Requests 1.10, 1.11, and 1.12 all relate directly to whether OSU considered alternative technologies for electricity generation prior to proposing the instant Application and to any findings OSU may have made with regard to the feasibility of those alternatives.”).

²³ See *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).

²⁴ Sierra Club Motion to Compel at 7.

²⁵ OAC 4906-4-04.

III. CONCLUSION

For the foregoing reasons, Ohio State respectfully requests that Sierra Club's Motion to Compel be denied.

Respectfully submitted,

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I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 1st day of July 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander
One of the Attorneys for The Ohio State
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Summary: Memorandum Memorandum in Opposition to Sierra Club's Motion to Compel electronically filed by Ms. Kari D Hehmeyer on behalf of THE OHIO STATE UNIVERSITY