

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 TO
CONSTRUCT A COMBINED HEAT AND
POWER FACILITY IN FRANKLIN COUNTY,
OHIO.

CASE NO. 19-1641-EL-BGN

ENTRY

Entered in the Journal on July 7, 2020

{¶ 1} The Ohio State University (Ohio State or University) is a person as defined in R.C. 4906.01.

{¶ 2} R.C. 4906.04 provides that no person shall construct a major utility facility in the state without obtaining a certificate for the facility from the Ohio Power Siting Board (Board).

{¶ 3} On September 11, 2019, Ohio State filed a preapplication notification letter with the Board regarding its proposal to construct a combined heat and power (CHP) major utility facility on the University's campus in Clinton Township in Franklin County, Ohio. According to Ohio State, the CHP facility would serve as a primary source of heating and electricity to its Columbus campus.

{¶ 4} On November 6, 2019, Ohio State filed with the Board an application for a certificate of environmental compatibility and public need to construct the new CHP facility. Ohio State supplemented its application on November 27, 2019.

{¶ 5} By Entry dated January 29, 2020, the administrative law judge (ALJ) established a procedural schedule for this matter, including a local public hearing to be held on April 9, 2020, and an adjudicatory hearing to commence on April 23, 2020.

{¶ 6} On March 6, 2020, Sierra Club filed a timely petition to intervene in this case, which was granted by the ALJ on June 23, 2020.

{¶ 7} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding this public health emergency in order to protect their health and safety. The Executive Order was effective immediately and will remain in effect until the COVID-19 emergency no longer exists. The Department of Health is making COVID-19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

{¶ 8} Pursuant to R.C. 3701.13, the Ohio Department of Health has supervision of “all matters relating to the preservation of the life and health of the people” and the “ultimate authority in matters of quarantine and isolation.” On March 12, 2020, the Director of the Ohio Department of Health issued an Order indicating that “all persons are urged to maintain social distancing (approximately six feet away from other people) whenever possible.”

{¶ 9} By Entry dated March 12, 2020, the ALJ suspended the procedural schedule in this matter, in light of the guidance issued by the Executive Order and the Ohio Department of Health. Among other things, the ALJ postponed the local public and adjudicatory hearings and directed that notice of the postponement be issued by Ohio State.

{¶ 10} On May 12, 2020, a prehearing teleconference occurred during which the parties discussed a new procedural schedule for this matter.

{¶ 11} By Entry dated May 22, 2020, the ALJ reestablished the procedural schedule. In the Entry, the ALJ scheduled a local public hearing for Tuesday, June 30, 2020, at 6:00 p.m., and an adjudicatory hearing to commence on Tuesday, July 14, 2020, at 10:00 a.m. Due to the continued state of emergency, and given the passage of Am. Sub. H.B. 197, the ALJ

indicated that the local public and adjudicatory hearings would both be held using remote access technology that facilitates participation by telephone and/or live video on the internet.

{¶ 12} On June 16, 2020, Sierra Club filed a motion to compel discovery pursuant to Ohio Adm.Code 4906-2-22. Specifically, Sierra Club requests that Ohio State be required to produce documents relating to any feasibility studies of solar or wind generation alternatives conducted by the University or its contractors and correspondence about such generation (Requests for Production 1.10, 1.11, 1.12), as well as any requests for proposals for generation construction in the past five years (Request for Production 2.06), which were served by Sierra Club on Ohio State on April 9, 2020, and April 27, 2020, respectively. In support of its motion, Sierra Club asserts that the information sought in these discovery requests is relevant to the key legal question of whether the proposed facility represents the minimum adverse environmental impact, considering the alternatives, which the Board is required to evaluate under R.C. 4906.10(A)(3). *In re American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN (*AMP-Ohio Case*), Opinion, Order, and Certificate (Mar. 3, 2008). Sierra Club further asserts that it has requested documents relating to Ohio State's consideration of alternatives (namely, solar and wind generation) that could tend to show, or lead to evidence tending to show, that the nature and economics of available technology could allow the University to construct a facility with less adverse environmental impact. Sierra Club emphasizes that the Board cannot consider the state of available technology and the nature and economics of the various alternatives, as required by R.C. 4906.10(A)(3), without evidence as to the feasibility of those alternatives. Sierra Club argues that Requests 1.10, 1.11, and 1.12 seek documents from Ohio State describing what, if any, information it has obtained regarding alternative forms of electricity generation to serve its campus, which is the stated purpose of the proposed facility, while Request 2.06 seeks documents describing the economic and other constraints relevant to making this comparison, as well as any efforts that the University may have made to solicit possible alternatives. Sierra Club

concludes that these documents are relevant to the subject matter of the proceeding and must be produced.

{¶ 13} On July 1, 2020, Ohio State filed a memorandum contra Sierra Club's motion to compel discovery. First, Ohio State argues that 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 Ohio law. As its second argument, Ohio State contends that Sierra Club's discovery requests are not relevant to this proceeding and are not reasonably calculated to lead to the discovery of admissible evidence. According to Ohio State, the Board, when determining whether a proposed facility represents the minimum adverse environmental impact, 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 soils, public services and traffic, roads and bridges, and noise. Ohio State adds that none of these considerations encompasses alternative fuel source types that are not a part of the application for the proposed facility. Ohio State also asserts that the *AMP-Ohio Case* negates any argument that the Board must consider alternative sources of renewable generation as part of its analysis under R.C. 4906.10(A)(3). Ohio State notes that, in the *AMP-Ohio Case*, the Board, on rehearing, concluded that Sierra Club and other intervenors had "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." *AMP-Ohio Case*, Entry on Rehearing (Apr. 28, 2008). Further, Ohio State claims that Sierra Club's requests are incredibly broad, as they encompass every document in the University's possession regarding solar or wind generation. Noting that the Board only considers the application before it, Ohio State claims that Sierra Club's discovery requests are not reasonably calculated to lead to the discovery of admissible evidence concerning the proposed facility that is actually at issue in this case. *In re Buckeye Wind LLC*, Case No. 08-666-EL-BGN, Entry (Oct. 30, 2009). Finally, Ohio State emphasizes that it seeks approval for a CHP facility

because the University requires both electricity and steam heat for nearby buildings, the latter of which cannot be produced by wind or solar resources in the quantities needed by the University.

{¶ 14} Upon review, the ALJ finds that the *AMP-Ohio Case* is instructive as to the scope of the Board's consideration of alternatives in the context of environmental impact. As both Ohio State and Sierra Club recognize, the Board must consider, pursuant to R.C. 4906.10(A)(3), whether a proposed major utility 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." Ohio State asserts that the Board's consideration of alternatives should not extend to alternative fuel source types. The Board, however, rejected that position in the *AMP-Ohio Case*. Through a motion in limine, American Municipal Power-Ohio, Inc. (AMP-Ohio) sought to preclude the intervenors "from introducing any evidence at hearing related to global warming, carbon dioxide emissions, potential costs for control and regulation of carbon dioxide emissions, the potential regulation of carbon dioxide emissions, fuel selection and the basic design of AMP-Ohio's proposed generation facility," all of which AMP-Ohio argued was beyond the scope of the proceeding. The ALJ rejected the argument and found that such evidence was relevant to the Board's determination of the nature of the probable environmental impact and whether AMP-Ohio's proposed facility represented the minimum environmental impact under R.C. 4906.10(A)(2) and (A)(3), respectively. *AMP-Ohio Case*, Entry (Dec. 4, 2007) at 4-5. Following the hearing, the Board fully considered evidence of alternatives to the proposed pulverized coal facility, including renewable energy resources, as part of its analysis under R.C. 4906.10(A)(2) and (A)(3), in granting a certificate to AMP-Ohio for the proposed facility. *AMP-Ohio Case*, Opinion, Order, and Certificate (Mar. 3, 2008) at 5-15. The Board affirmed its findings on rehearing. *AMP-Ohio Case*, Entry on Rehearing (Apr. 28, 2008) at 4-6.

{¶ 15} It is clear from this precedent and R.C. 4906.10(A)(2) and (A)(3) that the Board's review is not limited to the application before it, contrary to Ohio State's contention. However, at the same time, the ALJ recognizes that Ohio State has proposed to construct a CHP facility to meet both its heating and electricity needs for the Columbus campus. Although Sierra Club fails to acknowledge this dual objective in claiming that the purpose of the proposed CHP facility is electricity generation, the ALJ finds that Sierra Club's motion to compel discovery should be granted, in part, as Requests for Production 1.10, 1.11, 1.12, and 2.06, as modified below, seek information that appears reasonably calculated to lead to the discovery of admissible evidence, as required by Ohio Adm.Code 4906-2-14(B). Regarding Requests for Production 1.10, 1.11, and 1.12, the ALJ finds that the requests should be limited in scope to the possible construction or use of wind or solar generating facilities as a means of providing energy for the Columbus campus as a functional alternative to the proposed CHP facility. With respect to Request for Production 2.06, the ALJ finds that the request should be limited to requests for proposals relating to the construction of new, functionally equivalent generation resources to provide energy to the Columbus campus between January 1, 2015, and March 31, 2020. The ALJ directs Ohio State to provide its discovery responses by July 8, 2020.

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That Sierra Club's motion to compel discovery be granted, in part, and that Ohio State provide all responsive information by July 8, 2020. It is, further,

{¶ 18} ORDERED, That a copy of this Entry be served upon all parties of record.

THE OHIO POWER SITING BOARD

/s/ Sarah J. Parrot

By: Sarah J. Parrot
Administrative Law Judge

GAP/mef

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Case No(s). 19-1641-EL-BGN

Summary: Administrative Law Judge Entry granting Sierra Club's motion to compel discovery, in part, and ordering Ohio State provide all responsive information by July 8, 2020. electronically filed by Ms. Mary E Fischer on behalf of Sarah J. Parrot, Administrative Law Judge, Ohio Power Siting Board