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 A COMBINED HEAT AND POWER MAJOR UNIT FACILITY IN FRANKLIN COUNTY, OHIO ON THE CAMPUS OF THE OHIO STATE UNIVERSITY	**)**	**CASE NO. 19-1641-EL-BGN**

SIERRA CLUB MOTION TO STRIKE
OR IN THE ALTERNATIVE FOR LEAVE TO FILE A SURREPLY

Sierra Club respectfully moves to strike portions of Applicant The Ohio State University (OSU)'s Post-Hearing Reply Brief that cite as evidence materials outside the record or rely on claims unsupported by any evidence in the record.[1] Having entirely ignored its statutory obligation to demonstrate the proposed facility "represents the minimum adverse environmental impacts, considering the state of available technology and nature of the various alternatives" in its opening brief, OSU has now belatedly introduced numerous factual claims and selective quotations from a Sierra Club document never entered into the record of the adjudicatory proceeding in this matter. These references and assertions should be struck as improper. OSU's misleading reference to a document outside the record and assertion of new, unsupported claims for the first time in its Reply Brief are prejudicial to Sierra Club; the improper portions of OSU's Reply Brief must be struck or Sierra Club should be provided with an opportunity to correct

[1] Sierra Club respectfully moves to strike the following portions of OSU's Reply Brief: (1) From the phrase "or spend $500 million…" to the end of the first full paragraph on page 2; (2) the final paragraph (beginning "In fact,…") on page 3 through the sentence beginning "In light of…" on page 4; (3) from the sentence beginning "As preliminary matter…" at p. 17 through the conclusion of the paragraph (ending "…it exists and was considered") on p. 18; (4) the first sentence of the subsection entitled "(i) Geothermal" (beginning "There is simply not sufficient…") on page 28; and (5) the paragraph spanning pages 42 and 43.

OSU's mischaracterization and outside-the-record assertions in a brief surreply. Sierra Club's proposed surreply is attached as Exhibit A.

1. OSU's Reliance on a Sierra Club Policy Document Outside the Record in this Proceeding is Improper and All References to the Document Should be Struck.

OSU's Post-Hearing Reply Brief relies in significant part on a document outside of the record of this proceeding, the "Sierra Club Energy Resources Policy."[2] This document was not introduced into the record before or at a hearing, never authenticated, and never subject to examination by a witness who could testify to its content or context. OSU does not even attach a copy or provide a citation to the document, relying instead on a comment submitted by a member of the public after the conclusion of the adjudicatory proceeding.[3] The document was never admitted into evidence and so cannot be relied on by the Board as part of its decision; OSU's references to the document should accordingly be stricken.[4] To identify the document, OSU relies solely on the hearsay testimony of a member of the public without authority to authenticate or answer questions regarding its content.[5] OSU presents no argument for its (doubtful) relevance to the instant proceeding, which is limited to whether the proposed facility meets the statutory requirements set forth at Rev. Code §4906.10, as OSU would have been required to do if the document had been properly introduced at the adjudicatory hearing. OSU's citation to the document is clearly improper.

Not only does OSU refer to and quote from a document outside the record, it does so selectively and inaccurately, thereby misrepresenting the document itself. OSU declines to acknowledge that the same document proclaims Sierra Club's opposition to "new electric

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[2] *See* OSU Reply Brief at pp. 3-4, 42-43.
[3] *See* OSU Reply Brief at p. 3.
[4] *See* R.C. 4906.09 ("A record shall be made of the hearing and of all testimony taken."); OAC 4906-2-30 ("the board shall issue a final decision based only on the record").
[5] *See* R.C. 4906.09 ("Rules of evidence…shall apply to the proceeding.")

generating units powered by natural gas," and asserts that "it is critical that the US avoid further high-capital investments in new natural gas plants and related infrastructure." OSU also declines to mention that "low-temperature geothermal" generation facilities—precisely the alternative Sierra Club has advanced here—are listed as a preferred resource. Finally, OSU wrongly attributes advantages the document ascribes to distributed generation and the dual use of industrial processes to its own *gas-fired* proposed CHP facility.

Sierra Club is prejudiced by OSU's reliance on outside-the-record information, introduced only by an email *after* the conclusion of formal hearings (both adjudicatory and public), to advance new arguments regarding the relative merits of its proposed CHP facility. That in doing so OSU has misrepresented the contents of that document, selectively ignoring statements in favor of geothermal heating and against the construction of new gas-fired generating units provides further reason for disallowing this eleventh-hour effort by OSU to shore up its case. If the Board nevertheless allows OSU to rely on this document, Sierra Club respectfully requests the opportunity to introduce it into evidence in its entirety and explain why OSU has misrepresented its contents.[6]

2. OSU's Reply Brief Improperly Advances Factual Claims Unsupported by Any Record Evidence.

In its Reply Brief OSU belatedly introduces—for the first time—several novel factual claims that have no basis in the record evidence. Specifically, OSU asserts—without citation—that there was "extensive," "detailed" analysis of hourly thermal load that is nowhere documented;[7] that the cost of replacing OSU's steam network would be $500 million;[8] and that Ohio State has a need for "significant"—but unspecified or quantified—volumes of steam at

[6] *See* Evid. R. 106.
[7] *See* OSU Reply Brief at p. 18.
[8] *See id.* at p. 2.

campus hospital and medical research facilities.[9] OSU also asserts that insufficient land exists on the OSU campus to construct geothermal generation to "fill the thermal need;" this assertion rests solely on a witness's assertion that available land was considered and geothermal generation rejected.[10] OSU cannot, in a putative reply brief, buttress its case by introducing claims with no support in the record about the comparative benefits and costs of the proposed facility and less environmentally damaging alternatives and what analysis OSU performed to reach these supposed conclusions.

The Board should therefore strike each of the above-described claims by OSU as unsupported by the record. In the alternative, the Board should grant leave to Sierra Club to file a short surreply explaining why OSU lacks an evidentiary basis for these claims.

Dated: August 25, 2020

Respectfully Submitted,

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[9] *See id.* at p. 2.
[10] *See id.* at p. 28.

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Exhibit A

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 A COMBINED HEAT AND POWER MAJOR UNIT FACILITY IN FRANKLIN COUNTY, OHIO ON THE CAMPUS OF THE OHIO STATE UNIVERSITY	**)**	**CASE NO. 19-1641-EL-BGN**

SIERRA CLUB'S SURREPLY

The proposed CHP facility does not "represent the minimum adverse environmental impacts, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations."[1] Nothing in The Ohio State University's ("OSU") Reply Brief establishes that the proposed facility meets this standard. In an attempt to avoid this conclusion, however, OSU introduces and mischaracterizes a Sierra Club document outside the record and makes numerous claims about the nature and extent of its consideration of alternative technologies and the cost and feasibility of those alternatives which have no basis in the record. The Board should disregard these improperly raised and unsupported arguments

1. **OSU Misrepresents an Out-of-Record Document Stating Sierra Club's Categorical Opposition to New Gas Construction as Supporting its Proposed Facility.**

OSU's Post-Hearing Reply Brief relies in significant part on a document outside of the record of this proceeding, the "Sierra Club Energy Resources Policy."[2] This document is not part of the record, and OSU neither provides a citation to the document nor attaches it as an exhibit. OSU instead refers to an email sent to OPSB Legal Department Assistant Mary Fischer,

[1] *See* Rev. Code §4906.10(A)(3).
[2] *See* OSU Reply Brief at pp. 3-4, 42-43.

submitted *after* both the adjudicatory and public hearings had concluded, referencing a website where numerous Sierra Club policies are linked, including an Energy Resource Policy, and attaching a document from that website.[3] OSU's reliance on this Policy document, which was never introduced or admitted during the adjudicatory hearing, is improper. Even *if* OSU had properly introduced the document and explained its (doubtful) relevance to the instant proceedings, OSU's description of the Policy is inaccurate and misleading.

OSU claims in its Reply Brief that "Sierra Club's own prior statements specifically support CHP technology *akin to the technology at issue in this case.*"[4] This is a blatant misrepresentation. The Policy unequivocally states that, "The Sierra Club opposes new electric generating units powered by natural gas, including peaking and combined cycle units. Consistent with the Board's goal of eliminating all fossil fuels from the electric sector no later than 2030, it is critical that the US avoid further high-capital investments in new natural gas plants and related infrastructure."[5] The proposed facility is a high-capital investment and gas-fired electrical generation facility with an anticipated life extending well past 2030. The Policy also states that Sierra Club endorses "promoting energy conservation, tapping the enormous resource of energy efficiency, directly reducing dependence on non-renewable fuels and maximizing the benefits of renewable energy"—all goals served by the use of geothermal wells and heat exchangers, which have no carbon emission, facilitate energy storage and thus maximize the benefits of waste heat.[6]

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[3] The link provided in the email is https://www.sierraclub.org/policy/energy. The Policy can be found here: https://www.sierraclub.org/sites/www.sierraclub.org/files/Energy-Resources-policy_0.pdf.
[4] Reply Brief at p. 3 (emphasis added).
[5] Policy at p. 22; *see* Evid. R. 106.
[6] *Id*.

OSU also misleadingly cites statements made about *distributed generation*, and more specifically rooftop solar and "the efficient use of *waste* heat from fuel uses" to suggest these argue in favor of a CHP facility.[7] Sierra Club *is* advocating distributed generation here, but distributed generation utilizing non-emitting sources such as geothermal, heat capture from cooling systems, and rooftop solar; not new-built gas-fired generation (which it categorically opposes). Indeed, immediately below the statement about CHP facilities OSU quotes, the Policy states "Low-Temperature Geothermal" is a preferred resource.[8]

Given OSU's selective and misleading characterization of the Policy, it is not surprising that OSU made no effort in its Reply Brief to put the full document before the Board, either via direct citation or attachment. The Policy has not been admitted, is outside the record, and should not be relied upon by the Board.[9] At a minimum, however, the Board should disregard OSU's mischaracterization of Sierra Club's Energy Resources Policy which is, consistent with Sierra Club's position in this proceeding, opposed to the construction of new gas-fired generation resources as incompatible with the Club's *and OSU's* carbon emission elimination goals. As Sierra Club explained in its Initial Post-Hearing Brief, construction of such new generation locks in carbon emissions for decades and invests capital in continued climate-altering technology rather than alternatives (such as low-temperature geothermal) that do not share these adverse impacts.

2. OSU's Claims Regarding its Consideration of Heated Hot Water Systems Have No Basis in the Record.

As Sierra Club explained in its Initial Post-Hearing Brief, OSU's own Feasibility Study identifies a "more advanced, more environmentally protective technology"—heated hot water—

[7] *Cf.* Policy at pp. 9, 12 (emphasis added) *and* OSU Reply Brief at p. 4.
[8] *See* Policy at p. 14.
[9] *See* R.C. 4906.09; OAC 4906-2-30.

which is currently available to serve OSU's thermal needs.[10] OSU nevertheless rejected this alternative in favor of a gas-burning CHP plant OSU has been seeking to build for more than ten years—*i.e.*, since before the intervening technological development facilitating the installation of "Fourth Generation" heated hot water systems at other university campuses as described in Appendix N of the Feasibility Study. OSU, having ignored its statutory obligation to show its proposed facility minimizes adverse environmental impacts in its Application and Initial Post-Hearing Brief advocating for the proposed CHP facility, attempts in its Reply to introduce new claims relying on facts outside the record for its choice of gas-fired generation. OSU now claims that a heated hot water system using geothermal wells and heat exchangers was rejected as too costly and infeasible. But there is no evidence in the record to support this conclusion, or that OSU reached it on anything more than a superficial guess.

First, OSU asserts that there was "extensive," "detailed" analysis of hourly thermal load (an analysis necessary to determine what the net heating requirement on campus is, and thus the actual number of wells required).[11] OSU's witness admitted that this analysis was not included as part of the Feasibility Study, but OSU now blithely asserts that this analysis (entirely undocumented in the record) "was considered." *Id.* What the record actually provides evidence for is that OSU had hourly data assessing simultaneous heating and cooling needs *at the building level* for 60-75% of buildings at the time of the hearing.[12] There is no evidence that OSU had

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[10] *State of W.Va. v. Ohio Hazardous Waste Facility Approval Bd.*, 28 Ohio St. 3d 83, 84 (1986).("Appellants first argue that the applicant for a hazardous waste facility permit is required by R.C. 3734.05(C)(6)(c) to produce evidence of alternative technologies in order to prove that its facility represents the minimum adverse environmental impact….[T]his this proposition is certainly correct….[T]he statute normally would require the board to evaluate the nature and economics of alternative technologies to determine whether a more advanced, more environmentally protective technology can and should be utilized. We agree.").

[11] *See* OSU Reply Brief at p. 18.

[12] *See* Tufekci Cross-Exam at 83, 166; Reply Brief fn. 58.

completed a "system" or "campus" analysis (as OSU claims in its Reply Brief at page 17) or evidence as to what percentage of *buildings* OSU had so analyzed at the time the Application was submitted. Absent analysis identifying the *net* thermal generation required across the entire system, it is impossible to evaluate alternative technologies, because OSU does not know what capacity is sufficient to meet its actual needs as opposed to the steam requirements *under the current system*.[13]

Second, OSU asserts, again without citation, that the cost of replacing the steam network would be $500 million.[14] Later in its Reply Brief, OSU provides a different estimate—$400-500 million.[15] As a basis for this latter estimate, OSU cites the testimony of its witness, Mr. Tufekci, who offered a vague recollection as to the price of *Stanford University*'s conversion being more than $400 million based on a paper he had read but could not identify.[16] There is no evidence in the record to support OSU's $500 million number, or even that the cost of OSU's conversion would equal or exceed Stanford's.

Third, OSU announces for the first time in its Reply Brief that the campus has a need for "significant" volumes of steam at campus hospital and medical research facilities.[17] OSU has not introduced any evidence into the record to quantify or specify this "significant" need, which is mentioned nowhere in its Application.[18]

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[13] *Cf.* OSU Reply Brief at pp. 26-27 (characterizing thermal demand in terms of steam).
[14] Reply Brief at p. 2.
[15] Reply Brief at p. 25.
[16] *See* Tufekci Cross-Exam at 77:20-78:1.
[17] Reply Brief at p. 2.
[18] Nor has OSU shown why the proposed facility is required to meet these steam needs. OSU's witness Mr. Tufekci testified that localized boilers could generate steam for, e.g. sterilization purposes, *see* Tufekci Cross-Exam at 54:19-22, and OSU will—even if it builds the proposed facility—maintain McCracken, which has steam generation capacity.

Fourth, OSU claims that insufficient land exists on the OSU campus to construct geothermal generation to "fill the thermal need."[19] OSU's only support for this claim is a statement by its witness, "based on University available land on the University, or lack thereof, and based on the scale of heating required on campus and based on the scale of non-heating-related steam required on campus, we've considered that geothermal is not an alternative to a CHP facility."[20] As an initial matter, the "scale of *non*-heating-related steam required" (emphasis added) is irrelevant to the ability of geothermal wells to fulfill OSU's *heating* needs. Moreover, as discussed above, OSU has not actually identified its *net* thermal need on a campus- or system-wide basis and thus "the scale of heating required on campus"; at most, OSU *now* (i.e., not at the time it selected a gas-fired CHP facility or submitted its Application) has data from 60-75% of campus buildings. There is no document in the record quantifying the land required to fill OSU's thermal need—however determined. And, as Dr. Sahu testified, use of geothermal wells does not restrict surface use.[21] OSU's witness's vague assurances that OSEP "considered" geothermal alternatives simply cannot support OSU's categorical assertion that insufficient land exists to construct geothermal wells to meet OSU's net heating needs in a manner similar to, e.g., Ball State University.

Having failed to articulate an affirmative case for the environmental compatibility of its own facility as compared to alternatives OSU itself identified, OSU has belatedly attempted to justify the new facility by claiming it considered, and rejected, Sierra Club's alternative. But the record shows (as Sierra Club demonstrated in its Initial Post-Hearing Brief) that OSU did not

[19] Reply Brief at p. 28.
[20] Tufekci Cross-Exam at 70:15-20.
[21] Sahu Re-Direct at 357:8-17.

actually consider heated hot water conversion. OSU's newly discovered reasons for favoring a gas-fired CHP find no support in the record.

3. Conclusion

To be clear, Sierra Club does not concede that OSU's remaining arguments in its Post-Hearing Brief have merit, and stands on its Initial Post-Hearing Brief's arguments and explanation of the evidentiary record. This surreply is intended only to address OSU's belated and unsupported claims regarding the putative inadequacy of heated hot water as an alternative technology and to rebut OSU's improper and inaccurate invocation of Sierra Club's Energy Resources Policy. OSU's outside-the-record criticisms of a technology it acknowledges is preferred, for the reasons described above, should be rejected as without foundation, and OSU's mischaracterization of Sierra Club's Energy Resources Policy should be disregarded.

Dated: August 25, 2020

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Summary: Motion Sierra Club's Motion to Strike or, in the Alternative, for Leave to File a Surreply electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club