

**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 SIERRA CLUB’S MOTION TO STRIKE OR IN THE ALTERNATIVE FOR LEAVE TO FILE A SUR-REPLY

I. INTRODUCTION

Sierra Club’s Motion to Strike Or In The Alternative For Leave To File A Sur-Reply (“Motion”) should be denied other than with regard to the Sierra Club Energy Resources Policy paper.

Sierra Club’s primary objection is Ohio State’s citation to a “Sierra Club Energy Resources Policy.” This report from Sierra Club’s own website was presented at public hearing. Sierra Club repeatedly requested, and was granted, multiple public hearings so that the public could provide input to the Board. For some reason Sierra Club now pretends the Board may not consider comments from a public hearing. This is incorrect. The Board can consider public comments in its decision, particularly in situations like this where the witness is merely quoting statements of a party opponent like Sierra Club.

Sierra Club’s additional motions to strike lack merit. This portion of the Motion was not developed in any significant way. It seeks to strike four completely different concepts in only two sentences by asserting those concepts are not supported by the record. That is simply not true, as

shown by the citations from Ohio State in its Reply Brief. As there is record support for each of these arguments there is no reason to strike them.

Other than the Sierra Club Energy Resources Policy, Sierra Club never justifies why a sur-reply should be permitted. Ohio State's Reply Brief responded to Sierra Club's arguments with specific record citations. Sierra Club seeks a sur-reply brief because it disagrees with the statements of those witnesses, but the briefing schedule does not permit sur-reply briefs in this circumstance. Sierra Club may not modify the briefing schedule established by the Administrative Law Judge solely because it would like another chance to make its arguments.

While there is no legal justification for a sur-reply brief regarding the Sierra Club Energy Resources Policy document, this document is different than the other four motions to strike. Due to issues associated with the pandemic, the August 4, 2020 public hearing took place after the evidentiary hearing. As this is a departure from normal Board practice, Ohio State does not object to making a reasonable allowance to accommodate Sierra Club during this extraordinary time. As such, Ohio State does not object to the Board's consideration of the portion of Sierra Club's sur-reply which addresses the Sierra Club Energy Resources Policy document on its website.

II. ARGUMENT

A. Public Hearings Are Part Of The Record

Public hearing testimony is part of the record considered by the Board. Indeed, the very purpose of public hearings is to permit the Board to consider testimony from members of the public. This is why the public hearing is specifically required by R.C. § 4906.07(A) and OAC 4906-2-13.¹ The Board's desire for public testimony is why witnesses are sworn, a record created

¹ OAC 4906-2-13 ("At the public hearing, the board or the administrative law judge shall accept written or oral testimony from any person regardless of that person's status.")

of that testimony, and why that testimony is subject to cross examination pursuant to OAC 4906-2-09.

During the August 4, 2020 public hearing the fact that these statements are record testimony was acknowledged by the ALJ: “The purpose of this evening's public hearing is to receive testimony. . .”² The parties had the opportunity to cross examine the witnesses providing that testimony.

Relevant here, a witness testified regarding the Sierra Club Energy Resources Policy paper. “Lastly, I have reviewed the Sierra Club's National Energy Resources Policy, and on page 14 it says that they speak favorably about CHP, that they agree with it completely, and I assume this was informed by experts.”³

The ALJ made the witness available for cross examination. Sierra Club did not question the witness or attempt to challenge the veracity of their statement. Sierra Club did not object on hearsay (or any other) grounds when the witness made the statement or submitted the document from Sierra Club’s website into the record. That witness was questioned only by Chairman Randazzo and specifically stated the document is from Sierra Club’s own website.

CHAIRMAN RANDAZZO: Your Honor, I have a question for the witness. Sir, you referenced a Sierra Club policy, and a page 14. Do you know the title of that document by any chance?

MR. CLARK: Yes, I'm looking at it. It just says Energy Resources Policy. I got it off of their website, and I can track down the link if you need it. And then it's page 14 under "Combined Heat and Power." Would you like me to read it?

² August 4, 2020 Hearing, Tr. 11.

³ August 4, 2020 Hearing, Tr. 44.

CHAIRMAN RANDAZZO: No, I just -- I'd be more interested in having some -- if you have a link to the document, if you could provide that to us, that would be great.

MR. CLARK: Sure.

ALJ PARROT: And Mr. Clark, you can send that by electronic mail or submit it as a comment to the Board's website.⁴

The document is still available on Sierra Club's website, and Sierra Club has not raised any dispute as to its accuracy.⁵

There is no reason to strike a comment that is from Sierra Club's own website, was testified to at the public hearing, and that the Chairman and Administrative Law Judge invited that member of the public to submit. That outcome is particularly true here, where Sierra Club has moved to strike the references to this document from Ohio State's brief but not from the record itself. By not objecting to this information when it was included in the record Sierra Club has waived any argument such evidence should be stricken.⁶ There is no justification to allow the testimony and document into the record but prohibit Ohio State from citing to that portion of the record in its brief.

Finally, Sierra Club claims that it is prejudiced because Ohio State did not discuss other statements in the document, most notably that Sierra Club opposes new natural gas generation.⁷ Besides being incorrect,⁸ there is no prejudice to Sierra Club because the entire document was

⁴ *Id.* p. 45.

⁵ <https://www.sierraclub.org/policy/energy> (under the "Energy Resources" hyperlink)

⁶ *Stores Realty Co. v. City of Cleveland, Bd. of Bldg. Standards & Bldg. Appeals*, 41 Ohio St. 2d 41, 43, 322 N.E.2d 629, 630 (1975) ("Ordinarily, errors which arise during the course of a trial, which are not brought to the attention of the court by objection or otherwise, are waived and may not be raised upon appeal."); *Office of Consumers' Counsel v. Pub. Utilities Comm'n*, 67 Ohio St. 2d 153, 159, 423 N.E.2d 820, 824 (1981).

⁷ Motion to Strike p. 3.

⁸ Ohio State references Sierra Club's opposition to natural gas throughout its brief, starting in the Introduction. See Ohio State Reply Brief, p. 4 ("Sierra Club's objections are targeted at national policy goals adverse to natural gas instead of issues with this facility specifically.")

submitted by the witness. As such, the Board has access to the complete text of the document, not just the portion quoted by Ohio State. Sierra Club was also given the opportunity to cross examine the witness and make these points during the public hearing and chose not to do so thereby waiving this argument. Accordingly, there is no prejudice to Sierra Club from Ohio State's citation to this public comment.

B. Sierra Club's remaining motions to strike should be denied.

In only two sentences Sierra Club claims that four different Ohio State claims are not supported by the record and should be stricken.⁹

Sierra Club first argues that Ohio State did not establish "extensive," "detailed" analysis of hourly thermal load or provide any citations supporting such analysis, citing Ohio State's Reply Brief page 18 generally rather than any allegedly incorrect statement to be stricken. This argument fails through a simple review of pages 17-18. In this section Ohio State provides extensive citation to the record and even quotes the specific witness testimony showing that Ohio State did this analysis.¹⁰ Ohio State also cited to Exhibit C, which shows that Ohio State has installed or is installing heat recovery chillers into 27 buildings, and for each of those projects a complete audit report is prepared. This record evidence is more than sufficient to support Ohio State's claim that it has done "extensive" and "detailed" work on these issues.

⁹ Sierra Club Motion to Strike, p. 3.

¹⁰ See Ohio State Reply Brief, FN 58 ("Tr. 83 ("Q. So OSEP did conduct an hourly analysis of thermal load on campus. A. Yes."); Tr. 83 ("A. I think I already answered in my previous answer that on a building-by-building basis, we do look at hourly consumption data, cooling and heating demands at the same time because that's the way heat recovery chillers can be considered and, if feasible, can be designed and implemented. Q. And those studies have been conducted at the building level, correct? A. That is correct."));

Tr. 166 ("We track thermal load on an hour-by-hour basis and to a certain degree on a building by-building basis as well. I'm saying to a certain degree because part of the concession agreement also includes implementing a smart meter program, over a thousand smart meters in a four-year -- four-year window that includes electricity, chilled water, steam, hot water. We had about 60 -- 75 percent complete in this implementation so those were things that where the smart meters are installed we do get an hourly data, in fact, minute level data.").

Sierra Club next seeks to strike any reference to the possible \$500 million cost to replace Ohio State's steam network. Once again, Ohio State's estimate is supported by record evidence, which was expressly cited in Ohio State's brief. At page 25 Ohio State points out that Sierra Club has presented no cost estimate for replacing the steam network. Ohio State then cites the testimony of Mr. Tufekci that it would cost a "few hundred million" dollars to complete that project and compares it by analogy to the \$400-\$500 million cost of the Stanford conversation relied on by Sierra Club.¹¹ Ohio State has been very clear that it has not prepared a specific project cost for replacing the steam network because that replacement is not feasible or affordable, and explained in detail where it obtained the \$400-\$500 million estimate cited in its brief. Accordingly, there is no reason to strike this sentence from Ohio State's Reply Brief. That conclusion is particularly true here when Sierra Club has offered no estimate of its own, and the Stanford analogy used by Ohio State was expressly suggested by Sierra Club.

It is unclear what exactly Sierra Club's next motion to strike involves. Sierra Club takes issue with the fact that Ohio State called its steam need "significant" in its introduction. The offending sentence appears to be "[e]ven if Ohio State could replace the entire steam network, doing so would not eliminate Ohio State's need for significant volumes of steam for several on campus hospital and medical research facilities." The steam need on campus, including at hospitals and medical research facilities, is specifically addressed in the record and later in Ohio State's brief. For example, in its Reply Brief Ohio State specifically cites to the steam and thermal volumes needed on campus with record citations.¹² Ohio State also specifically cites record

¹¹ Ohio State Reply Brief, p. 25 (citing Tr. 76-77 and expressly acknowledging the exact Stanford cost is not in the record but Mr. Tufekci testified it was more than \$400 million)

¹² Reply Brief, p. 26-27 ("Specifically, the volume of steam Ohio State needs to operate is 'over 100,000 pounds an hour in the summer,' and '500,000 pounds in the winter.'")

testimony regarding the two new hospitals.¹³ As such there is no reason to strike the reference to these volumes as “significant.”

Sierra Club’s final motion to strike is also unclear. Sierra Club seeks to strike an undefined portion of Ohio State’s brief not because Ohio State’s position is unsupported with record evidence, but rather because Ohio State “rests solely on a witness’s assertion that available land was considered and geothermal generation rejected.”¹⁴ As Ohio State is directly quoting witness testimony in this section, there are no grounds for striking it.

C. Sierra Club should not be permitted to file a sur-reply for any issue other than the Sierra Club Energy Resources Policy.

Sierra Club’s request for leave to file a sur-reply for the four “additional” issues should be denied. The Board does not permit sur-reply briefs to allow litigants another bite at the apple to better argue their position. Instead, the Board establishes a briefing schedule and the parties are expected to present their arguments in accordance with that schedule. Sierra Club has not provided any valid reason to depart from Ohio’s general briefing rules or to permit a sur-reply in this case for the four “additional” issues discussed in section (B) above and as such this portion of Sierra Club’s request should be denied.

While there is no legal justification for a sur-reply brief regarding the Sierra Club Energy Resources Policy document, Ohio State acknowledges this document is different than the other four motions to strike. Due to issues associated with the pandemic, the August 4, 2020 public hearing took place after the evidentiary hearing. As this is a departure from normal Board practice, Ohio State does not object to making a reasonable allowance to accommodate Sierra Club during

¹³ *Id.* p. 27.

¹⁴ Sierra Club Motion to Strike p. 4.

this extraordinary time. As such, Ohio State does not object to the Board's consideration of Section (1) of Sierra Club's proposed sur-reply (pp. 1-3), the section of its sur-reply regarding the Sierra Club Energy Resources Policy.

III. CONCLUSION

For the foregoing reasons, Ohio State respectfully requests that Sierra Club's Motion to Strike or For Leave to File A Sur-Reply be denied other than with regard to the Sierra Club Energy Resources Policy paper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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 September 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
University

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

Summary: Memorandum in Opposition to Sierra club's Motion to Strike electronically filed by Mr. Trevor Alexander on behalf of The Ohio State University