

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 ON REHEARING

Entered in the Journal on January 21, 2021

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the application for rehearing of the September 17, 2020 Opinion, Order, and Certificate filed by Sierra Club.

II. DISCUSSION

A. *Procedural Background*

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

{¶ 3} Pursuant to R.C. 4906.04, no person shall construct a major utility facility without first having obtained a certificate from the Ohio Power Siting Board (Board). In seeking a certificate for an electric generation facility, applicants must comply with the filing requirements outlined in R.C. 4906.06, as well as Ohio Adm.Code Chapters 4906-3 and 4906-4.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} By Entry dated January 29, 2020, a procedural schedule was established for this case, including a local public hearing to occur on April 9, 2020, and an adjudicatory hearing to commence on April 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} On March 12, 2020, the administrative law judge (ALJ) issued an Entry to suspend the procedural schedule in this matter, in light of the guidance issued by the Executive Order and the Department of Health. Among other things, the ALJ postponed the local public and adjudicatory hearings.

{¶ 10} On May 12, 2020, a prehearing teleconference occurred during which the parties discussed a new procedural schedule for this matter, including potential dates for the local public and adjudicatory hearings, and options for proceeding with the hearings through video conferencing or other means.

{¶ 11} By Entry dated May 22, 2020, the ALJ reestablished the procedural schedule in this matter. In the Entry, the ALJ scheduled a public hearing for June 30, 2020, and an adjudicatory hearing to commence on July 14, 2020. Due to the continued state of emergency, and given the passage of Am. Sub. H.B. 197, the ALJ indicated that the 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 15, 2020, the Staff Report of Investigation was filed.

{¶ 13} On June 23, 2020, the ALJ granted Sierra Club's timely petition to intervene in this case.

{¶ 14} A second prehearing conference and technology test session were held through remote access technology (specifically, Webex) on June 26, 2020.

{¶ 15} A public hearing in this matter was held through Webex on June 30, 2020.

{¶ 16} The adjudicatory hearing, which was held through Webex, commenced on July 14, 2020, and concluded on July 15, 2020.

{¶ 17} Pursuant to Entry dated July 15, 2020, a second public hearing was held on August 4, 2020, through Webex.

{¶ 18} By Opinion, Order, and Certificate dated September 17, 2020, the Board issued a certificate of environmental compatibility and public need to Ohio State for the construction, operation, and maintenance of the CHP facility, subject to ten conditions set forth by the Board.

{¶ 19} R.C. 4906.12 provides that R.C. 4903.02 to 4903.16 and R.C. 4903.20 to 4903.23 apply to any proceeding or order of the Board, as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 20} Ohio Adm.Code 4906-2-32(A) states, in relevant part, that any party or affected person may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner, form, and circumstances set forth in R.C. 4903.10. R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

{¶ 21} Ohio Adm.Code 4906-2-32(E) provides that the ALJ may issue an order granting rehearing for the purpose of affording the Board more time to consider the issues raised in an application for rehearing.

{¶ 22} On October 16, 2020, Sierra Club filed an application for rehearing of the September 17, 2020 Opinion, Order, and Certificate. Ohio State filed a memorandum contra the application for rehearing on October 26, 2020.

{¶ 23} By Entry dated November 13, 2020, the ALJ, pursuant to Ohio Adm.Code 4906-2-32(E), granted Sierra Club's application for rehearing for the limited purpose of affording the Board additional time to consider the issues raised in the application for rehearing. The ALJ specifically reserved for the Board's determination the matter of whether the application for rehearing was filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32(A).

{¶ 24} The Board has reviewed and considered all of the arguments raised in the application for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Board and should be denied.

B. *Consideration of the Application for Rehearing*

{¶ 25} In its application for rehearing, Sierra Club asserts that the Board's conclusion that the CHP facility represents the minimum adverse environmental impact is unreasonable, because it is based on numerous findings that are unsupported or contradicted by the record. In its memorandum in support of the application for rehearing, Sierra Club contends that there is no reliable evidence in the record to support the Board's finding that a heated hot water system utilizing geothermal wells and heat exchangers is not an alternative to the CHP facility. According to Sierra Club, the Board's finding is based on unsupported or contradicted inferences that Ohio State lacks sufficient land to construct the necessary geothermal wells; certain buildings on the University's campus are incompatible with heat recovery; the CHP facility is in some way a precursor to a heated hot water conversion; a conversion to a heated hot water system would exceed the University's budget constraints; and renewable electricity generation cannot meet the University's heating needs. Noting that Ohio State failed to analyze the possibility of balancing heating and cooling loads at different buildings within a single system, Sierra Club emphasizes that neither the University nor Ohio State Energy Partners (OSEP) conducted a system-wide net thermal needs study, while Ohio State witness Tufekci instead offered impromptu estimates of both land use and cost that were contradicted by OSEP's CHP Feasibility Study and which failed to distinguish between building-by-building and system-wide conversions. In the absence of an hour-by-hour analysis of Ohio State's heating and cooling needs, Sierra Club contends that there is no evidence in the record that the University or OSEP actually knows how much geothermal heating energy and associated land is needed by the University. Additionally, Sierra Club disputes the Board's finding that Ohio State reasonably considered and rejected various alternatives to the proposed CHP facility. Sierra Club asserts that Ohio State's witnesses admitted that neither the University nor OSEP formally considered a heated hot water system utilizing geothermal wells and heat exchangers, despite the fact that the CHP Feasibility Study described the implementation of such a system at other universities and characterized it as preferable to CHP technology in almost all respects.

{¶ 26} In its memorandum contra the application for rehearing, Ohio State responds that Sierra Club has failed to present any new argument that the Board has not already considered, addressed, and properly rejected and that Sierra Club, in essence, questions the Board's exercise of its discretion under R.C. 4906.03 to weigh the evidence in this matter. Ohio State notes that the testimony of its witnesses, Mr. Tufekci and Mr. Potter, indicates that the University has considered and even used the technologies proposed by Sierra Club, but determined that those technologies cannot meet the University's current needs. Ohio State asserts that the record evidence supports the Board's findings that the University considered all commercially available technology; geothermal heating is not a viable alternative due to the lack of available land on campus and the scale of heating required; heat recovery chillers are not a feasible or cost-effective option for every building; a steam to hot water conversion is essentially dependent upon the construction and operation of the CHP facility; cost considerations preclude the use of heated hot water as a viable alternative; and renewable energy cannot fulfill the University's electrical needs. Noting that its witnesses are qualified and have personal knowledge of the University's system, Ohio State emphasizes that Mr. Tufekci and Mr. Potter explained, in detail, why Sierra Club's hypothetical system is not a viable alternative. Ohio State adds that Sierra Club's own witness, Dr. Sahu, did not analyze whether his proposals were feasible in light of the University's geographic location and other physical constraints; did not provide cost estimates for his proposals; and offered an opinion based upon articles addressing projects at other universities, while ignoring differences in those systems.

{¶ 27} As an initial matter, the Board finds that Sierra Club's application for rehearing is procedurally deficient. As required by R.C. 4903.10, which is applicable to the Board's proceedings pursuant to R.C. 4906.12 and Ohio Adm.Code 4906-2-32(A), an application for rehearing must set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. The Ohio Supreme Court has found that an application for rehearing must specifically allege in what respect the order was unreasonable or unlawful, in order to satisfy the requirements in R.C. 4903.10. *Discount*

Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957; *see also* *Conneaut Telephone Co. v. Pub. Util. Comm.*, 10 Ohio St.2d 269, 227 N.E.2d 409 (1967); *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 638 N.E.2d 550 (1994); *City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949). In its application for rehearing, Sierra Club has failed to state specifically the ground or grounds on which it considers the Opinion, Order, and Certificate to be unreasonable or unlawful. Thus, the Board finds that Sierra Club's application for rehearing does not comply with R.C. 4903.10(B) and should, therefore, be denied on that basis. Nonetheless, the Board will proceed to address the arguments raised in Sierra Club's memorandum in support of its application for rehearing.

{¶ 28} Upon review, the Board finds that Sierra Club's arguments have already been fully considered and denied in the Opinion, Order, and Certificate. The Board found that the record supports Staff's conclusion that the proposed CHP facility represents the minimum adverse environmental impact, in accordance with R.C. 4906.10(A)(3). We thoroughly explained and provided evidentiary support for our conclusion. Opinion, Order, and Certificate at ¶ 67 (citing Staff Ex. A at 21-22; Staff Ex. B at 2-3; OSU Ex. A at 5, 14, Ex. 1 at 3-4, 87-126, Ex. P, Ex. Q, Ex. R, Ex. S, Ex. U; OSU Ex. D at 7, 8-11). The Board also fully addressed Sierra Club's contentions with respect to whether the proposed CHP facility represents the minimum adverse environmental impact. In reaching our conclusion that the standard set forth in R.C. 4906.10(A)(3) has been satisfied in this case, the Board was persuaded by the expert testimony of Ohio State witnesses Tufekci and Potter, among other evidence offered by the University, which was referenced and cited in the Opinion, Order, and Certificate. Opinion, Order, and Certificate at ¶¶ 69-71 (citing OSU Ex. A at 5-6, Ex. 1 at 26, Ex. 4; OSU Ex. D at 4, 5-6; Tr. I at 70). We, therefore, decline to reweigh the evidence of record, as Sierra Club essentially requests in its application for rehearing.

{¶ 29} In particular, Sierra Club questions the Board's finding that a heated hot water system that uses heat exchangers and geothermal wells for heating and renewable generation resources for electricity is not a viable solution to meet Ohio State's needs for

both electricity and thermal energy. Sierra Club emphasizes that this conclusion was not based on any study conducted by Ohio State or other documentary evidence. Again, as the Opinion, Order, and Certificate reflects, the Board's decision rests on the testimony offered by Mr. Tufekci and Mr. Potter, who, as Chief Executive Officer for OSEP and Senior Director of Comprehensive Energy Management for Ohio State, respectively, have personal and expert knowledge of the University's system, land use requirements, and cost considerations, among other things. Although Sierra Club presses its preferred alternative based on projects undertaken by other universities around the country, Sierra Club offered no evidence as to how its proposal is currently feasible for Ohio State, while the University's witnesses sufficiently explained why it is not a viable alternative. Sierra Club also claims that several of the Board's factual findings are erroneous. However, each of the findings questioned by Sierra Club is supported by record evidence. Opinion, Order, and Certificate at ¶ 71 (citing OSU Ex. A at Ex. 4 at 3-19, App. N at A-24; OSU Ex. C; OSU Ex. D at 5-6; Sierra Club Ex. C at 11; Tr. I at 50, 70-72, 76, 88, 92-93, 102-105, 176-180, 190-192, 199). For these reasons, the Board finds that Sierra Club's request for rehearing should be denied.

{¶ 30} In its memorandum in support of the application for rehearing, Sierra Club also argues that the Board is required under R.C. 4906.10(A)(3) to consider evidence relating to carbon emissions and to evaluate whether a proposed facility's fuel selection will impact these emissions. Sierra Club maintains that, despite extensive evidence relating to the magnitude of carbon emissions associated with the proposed CHP facility and with the production of fuel for the facility, the Board ignored these adverse environmental consequences in concluding that the proposed facility represents the minimum adverse environmental impact and that the impact from emissions will be negligible. Sierra Club adds that the Board's decision to decline to address the environmental impact associated with the production of the fuel to be used by the CHP facility is contrary to the Board's order compelling the production of documents in this case, as well as an order denying a motion in limine in a prior case, which concluded that fuel selection is relevant under R.C. 4906.10(A)(3). *In re American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN (AMP-

Ohio Case), Entry (Dec. 4, 2007) at 4-5. Sierra Club asserts that it offered undisputed evidence regarding the adverse environmental impacts associated with the extraction of natural gas, which are neither incidental nor unforeseeable as related to the operation of the CHP facility.

{¶ 31} Ohio State counters that the Board properly considered the full extent of the adverse environmental impacts associated with the CHP facility, including the negligible impact associated with emissions. Additionally, Ohio State contends that the Board's determination that nothing in R.C. 4906.10(A)(3) or the Board's rules requires an analysis of the environmental impact associated with the production of the fuel to be used by the CHP facility was proper and consistent with Ohio law. Ohio State notes that Sierra Club's position conflates different legal standards and is based on ALJ rulings pertaining to the relevancy of evidence that could potentially be considered by the Board when making its determination under R.C. 4906.10(A)(3). According to Ohio State, an applicant is not required under Ohio law to address the environmental impacts of fuel sources as part of the Board's review process, while the imposition of such a standard at this point would unduly prejudice the University.

{¶ 32} The Board finds that Sierra Club's arguments on this issue have already been considered and addressed in the Opinion, Order, and Certificate. Opinion, Order, and Certificate at ¶ 72 (citing Sierra Club Ex. E at 1-4; OSU Ex. A at Ex. 1 at 50-53, 70-71; Tr. I at 294; Staff Ex. A at 25-27). The Board was persuaded by the independent environmental assessment prepared by TRC Environmental Corporation, which concluded that the "CHP project will have negligible impact on the existing air quality in Franklin County and will not affect its attainment status for any pollutant." We also noted that the Ohio Environmental Protection Agency had also considered the environmental impact associated with the CHP facility's air emissions and granted the necessary permit, without any limit on the capacity factor at which the facility must operate. We, therefore, find no merit in Sierra Club's assertion that the Board failed to consider the environmental impacts from emissions in reaching a determination as to R.C. 4906.10(A)(3). We also find that nothing in the Opinion, Order, and Certificate is contrary to the ALJ rulings compelling the production

of documents in this case and denying the motion in limine in the *AMP-Ohio Case*. Both of those rulings related to the scope of the Board's consideration of alternatives in the context of environmental impact under R.C. 4906.10(A)(3). As Sierra Club notes, the ALJ in the *AMP-Ohio Case* concluded that evidence related to emissions and fuel selection, among other matters, was relevant to the Board's determination of whether the proposed facility represented the minimum adverse environmental impact under R.C. 4906.10(A)(3). *AMP-Ohio Case*, Entry (Dec. 4, 2007) at 4-5. However, as we stated in the Opinion, Order, and Certificate, nothing in R.C. 4906.10(A)(3) or the Board's rules requires an analysis of the environmental impact associated with the production of the fuel or other materials to be used in the construction or operation of a major utility facility under review. Opinion, Order, and Certificate at ¶ 72. The Board is tasked with assessing the environmental impact of the proposed generating facility, not the impacts associated with the extraction of the fuel that would power it. Sierra Club has offered no support for its position that the scope of the Board's review should extend well beyond the emissions generated by the proposed CHP facility. We, therefore, find that Sierra Club's request for rehearing on this issue should be denied.

{¶ 33} Finally, Sierra Club contends that the concurring opinion to the Opinion, Order, and Certificate mischaracterizes the procedural history of this case, is hostile to intervention in a manner that is contrary to Ohio law, and exhibits bias by a member of a purportedly impartial administrative body. Sierra Club requests that the Board strike the concurring opinion, as it casts doubt on the Board's decision-making process and gives the impression to the public that a member of the Board is a partisan of CHP technology rather than an impartial adjudicator applying Ohio law.

{¶ 34} Noting that Ohio's Sunshine Laws encourage an open and deliberative process, Ohio State responds that Sierra Club has cited nothing in support of its contention that the concurring opinion is improper or suggests inappropriate bias. Ohio State adds that the concurring opinion does not change the outcome of this case.

{¶ 35} As is clear from its position following the Board's Opinion, Order, and Certificate, and by the fact that it was signed by a single Board member, the concurring opinion is separate from the Board's decision in this matter and, as such, has no relation to the Board's resolution of this case and does not represent the factual determinations or legal conclusions of the Board as a whole. There is no basis for Sierra Club's contention that the concurring opinion has in any way influenced the Board's consideration of the application and evidence under R.C. 4906.10(A) or any other aspect of the Board's decision-making process in this case. Accordingly, the Board finds that Sierra Club's request to strike the concurring opinion should be denied.

III. ORDER

{¶ 36} It is, therefore,

{¶ 37} ORDERED, That Sierra Club's application for rehearing be denied. It is, further,

{¶ 38} ORDERED, That Sierra Club's request to strike the concurring opinion be denied. It is, further,

{¶ 39} ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:

Approving:

M. Beth Trombold, Acting Chair
Public Utilities Commission of Ohio

Matt McClellan, Designee for Lydia Mihalik, Director
Ohio Development Services Agency

Brittney Colvin, Designee for Mary Mertz, Director
Ohio Department of Natural Resources

W. Gene Phillips, Designee for Stephanie McCloud, Director
Ohio Department of Health

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

Sarah Huffman, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

Greg Murphy, Public Member

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

Summary: Entry denying the application for rehearing of the September 17, 2020 Opinion, Order and Certificate filed by Sierra Club. electronically filed by Ms. Mary E Fischer on behalf of Ohio Power Siting Board