

ORIGINAL

In the  
Supreme Court of Ohio

CITY OF MONROE,	:	Case No. 2009-0941
	:	
Appellant,	:	
	:	On Appeal from the
v.	:	Ohio Power Siting Board
	:	
OHIO POWER SITING BOARD.,	:	Case No. 08-281-EL-BGN
	:	
Appellees.	:	

**MERIT BRIEF OF APPELLEE OHIO POWER SITING BOARD**

JACK A. VAN KLEY (0016961)  
 Van Kley & Walker, LLC  
 132 Northwoods Blvd., Suite C-1  
 Columbus, OH 43235  
 614-431-8900  
 614-431-8905 fax  
 jvankley@vankleywalker.com  
 Counsel for Appellant  
 City of Monroe

RICHARD CORDRAY (0038034)  
 Ohio Attorney General

CHRISTOPHER WALKER (0040696)  
 Van Kley & Walker, LLC  
 137 North Main Street, Suite 316  
 Dayton, OH 45402-1772  
 937-226-9000  
 937-226-9002  
 cwalker@vankleywalker.com  
 Counsel for Appellant  
 City of Monroe

MARGARET A. MALONE (0021770)  
 SAMUEL PETERSON (0081432)\*  
*\* Counsel of Record*  
 Assistant Attorneys General  
 Environmental Enforcement Section  
 Columbus, OH 43215  
 614-466-2766  
 614-422-9187 fax  
 margaret.malone@ohioattorneygeneral.gov  
 samuel.peterson@ohioattorneygeneral.gov  
 Attorneys for Appellee  
 Ohio Power Siting Board

K. PHILIP CALLAHAN (0047324)  
 City of Monroe Law Director  
 101 North First Street  
 Miamisburg, OH 45342  
 937-866-9933  
 937-866-9022 fax  
 coolahanlaw@yahoo.com  
 Counsel for Appellant  
 City of Monroe

DUANE W. LUCKEY (0023557)  
 Section Chief  
 THOMAS G. LINDGREN (0039210)  
 Assistant Attorney General  
 Public Utilities Section  
 180 East Broad Street, 9th Floor  
 Columbus, OH 43215  
 614-466-4397  
 614-644-8764 fax  
 thomas.lindgren@puc.state.oh.us  
 Attorneys for Appellee  
 Ohio Power Siting Board

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M. HOWARD PETRICOFF (0008287)  
STEPHEN M. HOWARD (0022421)  
Vorys, Sater, Seymour & Pease, LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
614-464-5414  
614-464-6350 fax  
mhpetricoff@vorys.com  
Counsel for Intervening Appellee,  
Middletown Coke Company

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## INTRODUCTION

The Ohio Power Siting Board (“the Board”) is a statutorily created administrative entity. The Board therefore may exercise jurisdiction and authority only to the extent authorized by statute. The General Assembly created the Board for the limited purpose of reviewing proposed facilities related to power generation and transmission. The General Assembly did not grant the Board the authority to consider any questions beyond this limited scope.

In this case, Appellee Middletown Coke Company (“MCC”) proposes to construct a coke plant with an attached electric cogeneration facility. The cogeneration facility will utilize waste heat from the coke plant to generate 57 megawatts of electricity. Because the Board must approve all such proposed electric generating facilities prior to the commencement of construction, MCC filed an application for a certificate of environmental compatibility and public need for the cogeneration facility.

The Board properly concluded that it did not have jurisdiction to consider the coke plant, and limited the scope of its review to the cogeneration facility itself. The coke plant is not an electric generating plant nor is it an associated facility, and therefore does not fall under the Board’s purview. If the Board had held otherwise, it would have exceeded the narrow jurisdiction granted to it by statute and would have infringed on the exclusive authority of the Environmental Review Appeals Commission to review the actions of the Director of the Ohio Environmental Protection Agency.

Because the Board only had the authority to consider the cogeneration facility standing alone, it was not required to include the remainder of the overall facility in its review of MCC’s application for a certificate for the cogeneration facility. The Board was required to consider the

impact of the cogeneration facility on cultural and historic resources; it was not permitted to address the impact of the coke plant. Similarly, the Board was not permitted to allow discovery or other evidence related to any matters involving the coke plant, including but not limited to, potential alternative sites and the minimum adverse impact.

The City of Monroe (“Monroe”) repeatedly tries to blur the line between the cogeneration facility and the coke plant. By doing so, Monroe tries to cast doubt upon the reasonableness and lawfulness of the Board’s decision to grant MCC’s application for a certificate for the cogeneration facility. Contrary to Monroe’s claims, the Board followed the necessary procedures and considered all of the relevant factors when reviewing MCC’s application. Because the Board had no jurisdiction to consider the coke plant, it cannot be faulted for failing to include that portion of the facility during its review of MCC’s application.

### **STATEMENT OF THE FACTS AND CASE**

MCC filed a notice of a public informational meeting regarding a proposed cogeneration facility to be located on a site in the City of Middletown, Ohio. MCC also filed a motion for waiver of certain requirements for an application, including the submission of fully developed information on the alternative site. The Board granted the waiver requests.

MCC then filed its application with the Board. The application proposed construction of an electric cogeneration facility that will utilize otherwise wasted heat from an adjacent coke plant to generate an average of 57 megawatts (MW) of electricity, with a peak capacity of 67 MW. The proposed facility includes a single steam turbine generator fueled by steam produced at the coke plant by five heat recovery steam generators (HRSGs) that will recover waste heat

from the coke ovens. The cogeneration facility will be connected to the local transmission system.

The Board notified MCC that its application had been certified as complete. As required by the Board's rules, MCC served copies of the application upon local government officials. After receiving a copy of the application, Monroe filed a motion to intervene. In an entry dated September 25, 2008, the administrative law judge (ALJ) granted the motion to intervene filed by Monroe and one individual and denied another motion to intervene. This entry also clarified that the Board had no jurisdiction over any permits for construction of the coke plant and, therefore, any issues related to the coke plant were outside the scope of the proceeding.

The Board staff filed a report of its investigation. The report found that the proposed cogeneration facility complied with the statutory criteria and recommended that any certificate be subject to twelve conditions. A stipulation resolving all issues between MCC and the staff was filed on October 30, 2008.

A local public hearing was held in Middletown regarding the application. The adjudicatory hearing was held on November 7, 2008. One witness provided testimony for MCC and one staff witness provided testimony. Monroe proffered the testimony of two witnesses regarding the coke plant, but neither witness was permitted to testify. Following the hearing, the parties filed initial and reply briefs.

On January 26, 2009, the Board met in a public session and voted to issue an Opinion, Order, and Certificate for the construction, operation, and maintenance of the cogeneration facility, subject to twelve conditions. *In the Matter of the Application of Middletown Coke Company, a subsidiary of Sun Coke Energy, for a Certificate of Environmental Compatibility and Public Need to Build a Cogeneration Facility*, Case No. 08-281-EL-BGN (hereinafter *In re*

*MCC*) (Opinion, Order and Certificate) (January 26, 2009), Appellant’s App. at 7. Monroe filed an application for rehearing that was denied by the Board on March 23, 2009. *In re MCC*(Entry on Rehearing) (March 23, 2009), Appellant’s App. at 39. Monroe filed its notice of appeal to this Court on May 22, 2009.

## ARGUMENT

### Proposition of Law I:

*The Ohio Power Siting Board properly confined its review to the cogeneration facility because it did not have jurisdiction to consider the coke plant and the pollution control equipment required for that facility.*

**A. The Ohio Power Siting Board does not have jurisdiction over the coke plant because it is not an electric generating plant nor is it an associated facility.**

The Ohio Power Siting Board (“the Board”) is a statutorily created subdivision of the Public Utilities Commission. R.C. 4906.02(A). Before a major utility facility can be constructed, the Board must issue a certificate of environmental compatibility and public need for that facility. R.C. 4606.10; see also *State v. Columbia Gas Transmission Corp.* (1979), 60 Ohio St. 2d 21, 23-24. A major utility facility is defined by statute in relevant part as an “[e]lectric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more.” R.C. 4906.01.

Because the Board is an administrative entity created by statute, its authority is limited to the jurisdiction and powers conferred to it by the enabling statutes. *State ex rel. Clarke v. Cook* (1921), 103 Ohio St. 2d 465, 467. As a subdivision of the Public Utilities Commission, the Board has “special and limited jurisdiction and has no power to exercise any jurisdiction beyond that expressly conferred by statute.” *Washington v. Public Utilities Com.* (1918), 99 Ohio St. 2d 70, 72. Thus in accordance with the power granted to it by R.C. Chapter 4906, when reviewing

an application for a certificate, the Board may only consider the electric generating plant and associated facilities at issue in that application.

When reviewing decisions of the Board, the Court should apply the same standard of review as is applied to decisions of the Public Utilities Commission of Ohio. This Court “has consistently deferred to the commission’s judgment in matters that require the commission to apply its special expertise and discretion with regard to factual matters.” *Constellation New Energy, Inc. v. Pub. Util. Comm’n*, 104 Ohio St. 3d 530, 2004-Ohio-6767 ¶ 50; *Cincinnati Bell Tel. Co. v. Pub. Util. Comm’n*, 92 Ohio St. 3d 177, 180, 2001-Ohio-134. However, the court retains “complete and independent power of review as to all questions of law.” *Ohio Consumers’ Counsel v. Public Utilities Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 ¶82.

In this case, the proposed coke plant is not itself an “electric generating plant”, as defined by R.C. 4606.01(B)(1), nor is it an “associated facility”. After reviewing the relevant law and facts, the Board correctly determined that it was without jurisdiction to consider the coke plant when reviewing MCC’s application for a certificate for the cogeneration facility.

**i. The coke plant is not an electric generating plant**

Although the waste heat and steam generated by the coke plant will eventually be used to create electricity at the cogeneration facility, the coke plant is not itself an electric generating plant. Standing alone, the coke plant is not capable of operation at “fifty megawatts or more.” It is capable of creating coke and other byproducts, but absent the cogeneration facility, the coke plant is incapable of generating even a single usable nanowatt of electricity. It is clear from the plain language of R.C. 4906.01 that the coke plant does not qualify as an electric generating facility. Because the coke plant does not satisfy the definition of an electric generating plant,

there is no need to consider whether there is a statutory exception excluding it from the Board's jurisdiction: it was never subject to the Board's authority.

**ii. The coke plant is not an associated facility as defined by R.C. 4906.01**

Although the coke plant is not an electric generating facility, it may nevertheless fall under the Board's jurisdiction if it meets the definition of an associated facility. The term "associated facilities" is not specifically defined either by statute or administrative rule. However, the rules of statutory construction provide that "the coupling of words denotes an intention that they should be understood in the same general sense." *Wilson v. Stark County Dep't of Human Servs.* (1994), 70 Ohio St. 3d 450, 453 quoting 2A Sutherland Statutory Construction (5 Ed. Singer Rev.1992) 183, Section 47.16. Thus the term "associated facilities" must be understood in the same sense as the term "electric generating plant" with which it is joined. Both terms must be interpreted in light of R.C. 4906.01 (B)(1) as a whole. When read in this manner, it is clear that the term "associated facilities" as used in R.C. 4906.01(B)(1) does not include the coke plant.

As already stated, a major utility facility is defined in part as an "[e]lectric generating plant and associated facilities *designed for, or capable of, operation at a capacity of fifty megawatts or more.*" R.C. 4906.01(B)(1) (emphasis added). Because the term "associated facilities" is coupled with the term "electric generating plant", under the rules of statutory construction, the phrase "designed for, or capable of, operation at a capacity of fifty megawatts or more" must therefore modify both "associated facilities" as well as "electric generating plant." Because it is not capable of generating any electricity itself, the coke plant may qualify as an associated facility subject to the Board's jurisdiction only if it was designed for the primary purpose of generating electricity.

To design means “to have as a goal or purpose.” Webster’s II New College Dictionary (1995) 307. Thus a facility that is “designed for” a specific end has that end as its purpose. In this case the coke plant’s primary purpose is the creation of coke. The creation of waste heat and steam, and the electricity generated by the cogeneration plant from those waste products, is simply an ancillary byproduct of the coking process.

In determining whether the coke plant is “designed for” the creation of electricity, it is helpful to question what the most significant product of the plant is. If the coke plant were “designed for” the primary purpose of electricity generation then it would logically follow that the most significant product would be electricity. In this instance that is not the case. The coke plant’s primary purpose is to make coke and coke is its most significant product. As the Board correctly concluded, the coke plant would be able to accomplish this purpose without the presence of the cogeneration facility. *In re MCC* (Opinion, Order and Certificate at 9) Appellant’s App. at 15. Although it is true that the steam and waste heat generated by the coke plant must be cooled before being scrubbed of pollutants, it is not necessary that the cogeneration facility at issue in this case be used to accomplish that cooling. Instead, it is simply one method of cooling. The cogeneration process just happens to be a method of cooling that makes productive use of a byproduct of the coking process that would otherwise go to waste.

A definition of the term “associated facilities” that includes all facilities that in some way aid or advance the electricity generation process, even if doing so is not their primary purpose, would expand the limited jurisdiction that the General Assembly granted to the Board. For example, if appellant’s definition of “associated” were correct, a road or train track carrying coal to a power plant could be considered an “associated facility” and therefore be subject to the Board’s jurisdiction for its entire length. Such a definition would broaden the Board’s

jurisdiction well beyond the limited sphere that the General Assembly intended. Thus to further the General Assembly's intent, the term "associated facilities" must be interpreted in a restrictive manner.

In light of the Board's specific statutory authority and the logical application of the definition of "electric generating plant" and "associated facility," the Board correctly determined that the coke plant was not an associated facility as that term is used in R.C. 4906.01. "Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 384, 2006-Ohio-5853 ¶ 41; *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 2000-Ohio-5. The Board's determination that the coke plant did not qualify as an associated facility was a reasonable interpretation of R.C. 4906.01 in light of both the law and the facts of this case. This Court should therefore affirm the Board's decision.

**B. The Environmental Review Appeals Commission has exclusive jurisdiction to review actions of the Director of the Ohio Environmental Protection Agency regarding enforcement of air pollution laws.**

Simply because the coke plant is outside the scope of the Board's authority does not mean that decisions regarding its construction and permitting are unreviewable. The General Assembly granted the Director of Ohio Environmental Protection Agency ("Ohio EPA") the authority to administer all laws related to air and water pollution. R.C. 3745.01(A). Additionally, the Environmental Review Appeals Commission ("ERAC") has exclusive original jurisdiction over the appeal of any action by the Director of Ohio EPA. R.C. 3745.04(B); *Cincinnati ex rel. Crotty v. Cincinnati* (1977), 50 Ohio St. 2d 27, 30. Although some facilities and projects in Ohio may be subject to the jurisdiction of multiple permitting authorities, the

coke plant is not such a facility. The coke plant does not fall under the specifically defined jurisdiction of the Board. Therefore only the Director of Ohio EPA has the authority to make decisions regarding permitting of the coke plant and the air pollution controls that are required of that facility and only ERAC has the authority to review those permitting decisions.

In this case, Monroe argues that the Board must consider the coke plant because it alleges that the plant will emit “more than 2900 tons of air contaminants per year into the air,” Appellant’s Br. p. 1, and that it will threaten the region’s air quality by producing “harmful air emissions.” Appellant’s Br. pp. 2, 9. Monroe claims that in spite of these alleged threats, the Director of Ohio EPA required MCC to install “air pollution equipment inferior to the air pollution controls at competing coke production facilities.” Appellant’s Br. p. 2. Had the Board considered the coke plant as part of its review, Monroe states that it would have introduced evidence regarding what air pollution control equipment is needed to bring the coke oven battery into compliance with applicable air pollution control regulations and permit requirements. Appellant’s Br. p. 10.

Thus Monroe openly and freely acknowledges that its ultimate goal in seeking the Board to exercise jurisdiction over the coke plant is to obtain review of the Director of Ohio EPA’s decision regarding what pollution control equipment must be installed at the coke plant. Because ERAC has exclusive jurisdiction to review all actions by the Director, a review of the coke plant’s air pollution control equipment does not fall within the Board’s jurisdiction. Monroe’s claim that the coke plant will evade review if the Board does not consider it as part of the cogeneration facility is simply not true. Although no mention of ERAC is made anywhere in Monroe’s brief, the City has already sought relief from that body by appealing the permit that the Director of Ohio EPA issued to the coke plant. *City of Monroe, Ohio v. Korleski, et al.*, ERAC.

No. 096265. As of the date of this filing, that case remains pending before ERAC. Thus there has been no attempt on the part of MCC to insulate the coke plant from review; it is simply incorrect, if not disingenuous, to suggest that the Board's failure to consider the coke plant would "create a giant loophole for any facility wishing to evade meaningful environmental review." Appellant's Br. p. 20. If anything it is Monroe who is seeking to evade the established environmental review process by attempting to circumvent the exclusive authority of ERAC and attempting to expand the authority of the Board in this case. Interpreting R.C. 4906.01 in such a way as to make the coke plant, and its air pollution controls, reviewable by the Board would infringe on the statutory authority of the Director of the Ohio EPA to make permitting decisions and of ERAC to review those decisions.

**Proposition of Law II:**

*In accordance with the limited jurisdiction granted to it by statute, the Ohio Power Siting Board properly considered the cogeneration facility's impact on cultural resources.*

Prior to approving a certificate of environmental compatibility and public need, the Board must consider the cultural impact of a proposed facility. Specifically, the Board must identify "any registered landmarks of historic, religious, archaeological, scenic, natural, or other cultural significance within five miles of a proposed site." Ohio Adm.Code 4906-13-07(D)(1). The Board fully complied with this requirement and determined that the proposed cogeneration facility would not have a negative impact on any historic or archaeological landmarks.

There was testimony at the adjudicatory hearing regarding the cogeneration facility's potential impact, Tr. pp. 58; 63-64; Supp. pp. 34; 39-40, and the Board determined that there were no historic or cultural resources located on the site of the proposed facility. *In re MCC* (Opinion, Order & Certificate at 12) (January 26, 2009); Appellant's App. at 24. Although it

determined that there was one historic structure within a mile of the cogeneration facility, the Board ultimately concluded that the cogeneration facility itself would not negatively impact that structure. *Id.* And, contrary to Monroe's assertion, the Board had knowledge of the Reed-Bake farm. The Board found that "MCC plans to preserve, for nonresidential use, the Bake family farm house on the coke plant site." *Id.* at 14; Appellant's App. at 20. The Board affirmed its conclusion when it rejected Monroe's motion for rehearing. In its order denying a rehearing, the Board again found that the Reed-Bake farm was not within the site or impact area of the cogeneration facility and that "the one historic structure identified by staff was located within one mile of the project area and is neither directly nor indirectly impacted and is not within the visual area of the potential effects of the cogeneration facility." *In re MCC* (Entry on Rehearing at 11) (March 23, 2009); Appellant's App. at 49. Thus the Board fulfilled its statutory obligation and considered the potential impact of the cogeneration facility on cultural and historic landmarks. The decision granting the certificate for the cogeneration facility was therefore reasonable and lawful.

By attempting once again to conflate the coke plant and the cogeneration facility, Monroe seeks to improperly expand the Board's jurisdiction and shift the focus away from the cogeneration facility, the only facility subject to the Board's authority. As already discussed, the Board has jurisdiction only to consider electric generating plants and associated facilities. The coke plant was not subject to the Board's jurisdiction and could not be considered by the Board when it addressed the cogeneration facility's impact on cultural and historic landmarks. The Gray & Pape study that Monroe repeatedly references addressed the impact of only the coke plant. And, a close reading of Monroe's claim shows that even when it ostensibly considers the

impact of the cogeneration facility standing alone, it still links that portion of the project to the “massive industrial facility” which includes the coke plant. Appellant’s Br. pp. 28-29.

Contrary to Monroe’s assertions, there was more than sufficient evidence to support the Board’s conclusion that the cogeneration facility itself would not impact any historic sites. As Monroe ultimately acknowledges, the Board considered evidence and input from the Ohio Historical Society about the potential impact of the project. Appellant’s Br. p. 28. The Historical Society did not express concern about the cogeneration facility itself; instead it raised concerns about the coke plant and the project as a whole. Even if the worries about the coke plant were justified, the Board did not have the authority to consider them.

**Proposition of Law No. III:**

*The Ohio Power Siting Board lawfully and reasonably denied discovery regarding alternative sites for the coke plant.*

The limitation on discovery to exclude matters related to the coke plant was proper. The Board rule governing discovery provides that “any party to a board proceeding may obtain discovery of any mater, not privileged, which is *relevant to the subject matter of the proceeding.*” Ohio Adm.Code 4906-7-07 (A)(2) (emphasis added). The rule makes relevance a prerequisite to discovery. Discovery of matters related to the coke plant were not relevant to the Board proceeding because the Board did not have jurisdiction over the plant.

Monroe asserts that the Board erred in barring discovery concerning alternative sites. Monroe states that the purpose of the discovery would have been “to identify and compare alternative sites that could be used for MCC’s project to avoid the destruction of the proposed site’s historic landmarks and to move the Facility’s air emissions farther from Monroe’s residential neighborhoods.” Appellant’s Br. at pp. 30-31. Monroe further argues that, without

having evidence on alternative sites, the Board had insufficient information on which to base its grant of certificate. This argument lacks merit.

Neither preserving historic landmarks nor reducing air emissions is related to the cogeneration facility that was the sole subject of the Board proceeding. There are no historic structures within the site of the cogeneration facility itself. *In re MCC* (Entry on Rehearing at 11) (March 23, 2009), Appellant's App. at 49. Likewise, the Board Staff found that, standing alone, the cogeneration facility will not produce any emissions from the combustion of fuel and minimal emissions of particulate matter from the cooling tower. *In re MCC* (Opinion, Order & Certificate at 12) (January 26, 2009), Appellant's App. at 18; *In re MCC* (Staff Report of Investigation at 16) (September 26, 2008), Supp. at p. 105.

Both the historic sites that Monroe sought to protect and the air emissions with which it was concerned relate to the coke plant, not the cogeneration facility. As established above, the Board does not have jurisdiction over the coke plant. Therefore, Monroe was not seeking to conduct discovery on issues related to the Board proceeding, nor was the information Monroe sought reasonably calculated to lead to the discovery of admissible evidence.

The Board's ruling prohibiting discovery of information related to the coke plant was consistent with the proper scope of the proceeding before the Board. The ruling was also consistent with the Board's rules. The ruling was therefore lawful and reasonable and should be upheld.

**Proposition of Law IV:**

*The Ohio Power Siting Board properly determined that the proposed facility represents the minimum adverse environmental impact and properly limited the evidence that was introduced during the hearing.*

When reviewing an application for a proposed facility, the Board must determine that the facility represents the minimum adverse environmental impact. R.C. 4906.10(A)(3). That statute requires a finding 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.” *Id.* A review of the record demonstrates that the Board reasonably made this required finding.

Although the ALJ had granted MCC a waiver from including a fully developed alternative site evaluation in the application, the site selection process was nevertheless considered by the Staff and was addressed in the Staff Report. The Staff concluded that “[t]he only practical location for the cogeneration station is in close proximity to the coke ovens.” *In re MCC* (Staff Report of Investigation at 3) (September 26, 2008), Appellant’s Supp. at p. 92. At the hearing, MCC’s witness, Ryan Osterholm, testified that the MCC’s engineers had concluded that there is only one practical site for the cogeneration facility based on engineering constraints and the existing terrain. Tr. at pp. 29-30, Appellant’s Supp. at pp. 18-19. He further testified that different configurations were considered but that there was only one practical location for the cogeneration facility. Tr. at pp. 31-34, Appellant’s Supp. at pp. 20-22. Monroe failed to rebut this testimony.

As noted by the Board, “at no time at the hearing did Monroe seek to introduce evidence related to site alternatives for the cogeneration facility. *In re MCC* (Entry on Rehearing at 10) (March 23, 2009). Appellant’s App. at 48. Rather, Monroe sought to elicit testimony regarding the site of the coke plant. For example, the City’s counsel asked the applicant’s witness: “Is the coke plant to be built on one or two parcels of property?” Tr. at 36, Supp. at 24. The City’s counsel further asked, “Does AK Steel own sufficient property to site the cogeneration station

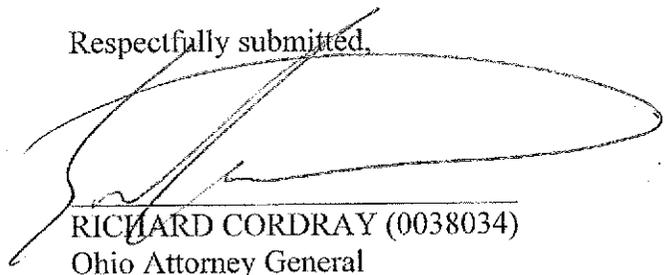
and the coke plant on its own property?" Tr. at p. 37, Supp. at p. 25. These questions related to the siting of the coke plant which, as established above, was not within the scope of the Board proceeding. Concerning the siting of the cogeneration facility, the Board had sufficient information to make its determination.

Once again, Monroe's argument turns on the erroneous premise that the Board should have considered alternative sites for the coke plant. With respect to the location of the cogeneration facility, the Board did consider whether there were practical alternatives. This Court has stated that it "will not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Chester Township v. Power Siting Comm'n* (1977), 49 Ohio St. 2d 231, 238. In this case, the Board had ample evidence on which to base its finding that the cogeneration facility satisfied the criteria in R.C. 4906.10(A)(3). The Court should uphold this determination.

### CONCLUSION

For these reasons, this Court should affirm the decision of the Ohio Power Siting Board granting Middletown Coke Company's application for a certificate of environmental compatibility and public need.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Richard Cordray', is written over a horizontal line. The signature is fluid and somewhat abstract, with a large loop at the end.

RICHARD CORDRAY (0038034)  
Ohio Attorney General

MARGARET A. MALONE (0021770)  
SAMUEL PETERSON (0081432)\*

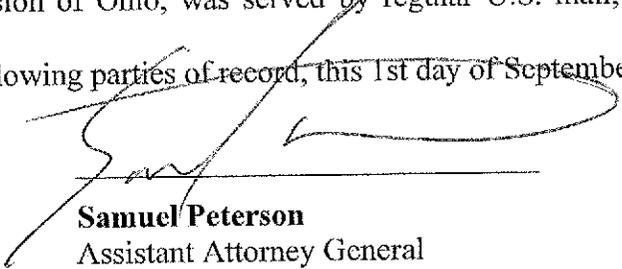
*\*Counsel of Record*

Assistant Attorneys General  
Environmental Enforcement Section  
Columbus, OH 43215  
614-466-2766  
614-422-9187 fax  
margaret.malone@ohioattorneygeneral.gov  
samuel.peterson@ohioattorneygeneral.gov  
Attorneys for Appellee  
Ohio Power Siting Board

DUANE W. LUCKEY (0023557)  
Section Chief  
THOMAS G. LINDGREN (0039210)  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street, 9th Floor  
Columbus, OH 43215  
614-466-4397  
614-644-8764 fax  
thomas.lindgren@puc.state.oh.us  
Attorney for Appellee  
Ohio Power Siting Board

## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief** submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 1st day of September, 2009.



**Samuel Peterson**  
Assistant Attorney General

### **PARTIES OF RECORD:**

**JACK A. VAN KLEY**  
Van Kley & Walker, LLC  
132 Northwoods Blvd., Suite C-1  
Columbus, OH 43235

**CHRISTOPHER WALKER**  
Van Kley & Walker, LLC  
137 North Main Street, Suite 316  
Dayton, OH 45402-1772

**K. PHILIP CALLAHAN**  
City of Monroe Law Director  
101 North First Street  
Miamisburg, OH 45342

**M. HOWARD PETRICOFF**  
**STEPHEN M. HOWARD**  
Vorys, Sater, Seymour & Pease, LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008