

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF MONROE,

Appellant,

v.

OHIO POWER SITING BOARD,

Appellees.

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: Case No. 09-0941
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: On Appeal from the Ohio Power Siting
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: Board
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: Ohio Power Siting Board
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: Case No. 08-281-EL-BGN
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BRIEF OF MIDDLETOWN COKE COMPANY
IN SUPPORT OF THE APPELLEE

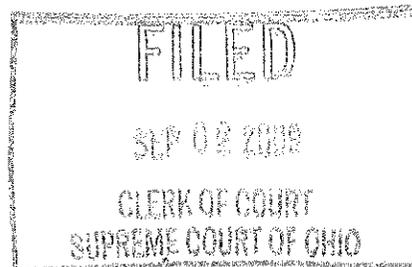
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STATEMENT OF FACTS

Middletown Coke Company, an affiliate of SunCoke Energy, Inc., which is a wholly owned subsidiary of Sunoco, Inc. (“Applicant” or “MCC” or “the Company”) proposes to build an electric cogeneration station in Middletown, Ohio, adjacent to a proposed 100 oven coke manufacturing plant. The cogeneration station will produce electricity at an average rate of 57 megawatts (MW) with a peak generation rate of 67 MW. The cogeneration station will include a single steam turbine generator fueled by steam that is produced at the coke plant by five heat recovery steam generators (HRSGs) which will recover waste heat from the coke ovens. The electric power will be transmitted to the local transmission system through an on-site 13.8 kV to 69 kV substation. The cogeneration station will tie into two existing 69 kV lines owned and operated by Duke Energy.

The proposed cogeneration station will occupy less than three acres within the 250 acre coke plant property. It will be located on the south side of the city of Middletown in Butler County and is situated between State Route 4 to the west, Yankee Road to the east, Oxford State Road to the north, and Todhunter Road to the south. The proposed cogeneration site is located just east of the center of the 250 acre property.

The Applicant requested a Certificate of Environmental Compatibility and Public Need from the Ohio Power Siting Board to build the proposed cogeneration facility consistent with the conditions contained in Joint Exhibit 1.

On April 9, 2008, MCC caused notice of an informal public meeting to be published in the *Middletown Journal*. The informal public meeting was held on April 16, 2008 at the Ramada Inn, 6147 W. State Route 127, Franklin, Ohio at 5 p.m.

On April 24, 2008, MCC filed a motion for a waiver of Rule 4906-13-03 of the OAC by requesting that it not be required to submit fully developed information on the alternative site. MCC also sought a waiver of the requirement to file an application one year prior to commencement of construction under Section 4906.06(A)(6) of Ohio Revised Code. By Entry of May 28, 2008, the Administrative Law Judge (ALJ) granted MCC's waiver request.

MCC formally submitted its Application for a certificate of environmental compatibility and public need in regard to the Middletown Coke Company Cogeneration Station on June 6, 2008. (Company Exhibit 1) Replacement inventory maps were filed on July 1, 2008. The Application was found to comply with OAC Chapter 4906 on July 26, 2008. On July 31, 2008, the Applicant filed proof of service in accordance with OAC Rule 4906-5-05. (Company Exhibit 2)

The ALJ issued an Entry on August 4, 2008, setting a local public hearing for October 14, 2008, an adjudicatory public hearing on October 16, 2008, and finding that the effective date of the filing of the application was August 4, 2008. Notice of the Application and the Hearings was published in the *Middletown Journal* in accordance with OAC Rule 4906-5-08(B)(1) on August 17, 2008. (Company Exhibit 3)

On September 12, 2008, a petition for leave to intervene and memorandum in support was filed on behalf of the City of Monroe, Ohio ("the City," "Monroe," or the "Appellant)."/> A letter explaining the details of the MCC cogeneration station to property owners and the details of when the public hearing would be held was filed on behalf of the Applicant on September 12, 2008. On September 18, 2008, separate petitions to intervene were filed on behalf of Robert Snook of Monroe, Ohio and F. Joseph Schiavone.

On September 25, 2008, the ALJ issued an Entry granting the motions to intervene of the City and Mr. Schiavone but denying the motion to intervene of Mr. Snook. However, in Finding (8), the ALJ pointed out that attached to Mr. Schiavone's motion to intervene were several comments that were included in a letter to be filed with the Hamilton County Department of Environmental Services. These comments related to an application filed by MCC for a permit to install a coke plant project, located in the vicinity of the cogeneration project at issue in Case No. 08-281-EL-BGN. The ALJ noted that similarly, Monroe's motion to intervene contained numerous references to the MCC coke plant project. The ALJ stated in his September 25, 2008 Entry of Finding (8) that "the Board had no jurisdiction over any permits for construction of the coke plant." (Appellant's Appx., 58) Therefore, the ALJ stated that "issues related to the coke plant would not be considered in this proceeding."

On September 30, 2008, the City filed a motion to vacate the September 25, 2008 Entry for closing testimony about environmental impacts of the proposed coke plant, or, in the alternative, an application for interlocutory appeal and memorandum in support. On October 6, 2008, the Applicant filed its memorandum contra to the September 30, 2008 Monroe motion. On October 9, 2008, the ALJ issued an Entry denying the motion to vacate and denying the motion to certify the interlocutory appeal. (Appellant's Appx., 60-65)

On September 12, 2008, September 17, 2008 and October 1, 2008, the Applicant filed responses to various Staff data requests. (Company Exhibit 4, Appellant's Supplement, 156 - 176) On October 9, 2008 and October 29, 2008, the Applicant filed responses to the City's first and second set of discovery. (Company Exhibit 5, Appellant's Supplement, 177 - 207) On October 15, 2008, the City filed its responses to the Applicant's first set of discovery.

The Staff Report was filed on September 26, 2008. (Staff Exhibit 1, Appellant's Supplement, 84 - 113) Notice of the October 14 and 16 hearings was published on September 28, 2008 in the *Middletown Journal*. (Company Exhibit 3)

A local public hearing was held on October 14, 2008 at 5:30 p.m. at the City Building, City Council Chambers, Lower Level, 1 Donham Plaza, Middletown, Ohio 45042. The only persons who testified at the October 14, 2008 public hearing were Mr. Snook¹, counsel for the City and Mr. Schiavone. The hearing originally scheduled for October 16 was converted into a pre-hearing conference which was held on October 16, 2008 at 10 AM. The adjudicatory hearing was rescheduled to November 7, 2008 at 9 AM. An adjudicatory hearing was held on November 7, 2008 at 9 AM at the offices of the Ohio Power Siting Board, 180 E. Broad Street, Columbus, Ohio and was concluded later that day.

A Joint Stipulation and Recommendation (Joint Exhibit 1, Appellant's Supplement, 214 - 222) signed by the Staff and by the Applicant was filed on October 30, 2008. The direct testimony of Ryan D. Osterholm on behalf of the Applicant was filed on October 31, 2008. (Company Exhibit 6, Appellant's Supplement, 209 - 212)

On November 3, 2008, the City of Monroe filed a motion to compel discovery responses from the Applicant related to the coke ovens. On November 4, 2008, the ALJ issued an Entry denying the City of Monroe's motion to compel. On November 6, 2008, the City of Monroe filed a document entitled "Stipulation of City of Monroe."

At the November 7, 2008 hearing, Mr. Ryan D. Osterholm testified on behalf of the Applicant and Mr. Timothy Burgener testified on behalf of the Staff. The City of Monroe proffered the testimony of two witnesses (Monroe Exhibits B and C) which had been excluded

¹ Mr. Snook's testimony at the public hearing on October 14, 2008 in Middletown focused on emissions from the coke plant – a subject that had been excluded from consideration at the hearing as a result of the September 25, 2008 Entry.

from evidence as a result of the ALJ's Entry of September 25, 2008. The Company's Exhibits 1-6, Monroe Exhibits A, B, C, and E-H, Staff Exhibit 1, and Joint Exhibit 1 were each moved and admitted into evidence. The matter was submitted on the record with initial briefs being filed on December 1, 2008 and reply briefs filed on December 12, 2008.

On January 26, 2009, the Board issued its Opinion, Order and Certificate granting MCC's Application. (Appellant's Appx., 7) On February 25, 2009, the City filed an application for rehearing. (Appellant's Appx., 69) The Board denied the application for rehearing on March 23, 2009, confirming its original Opinion, Order and Certificate. (Appellant's Appx., 39) The City filed its Notice of Appeal on May 22, 2009.

ARGUMENT

PROPOSITION OF LAW NO. 1

Pursuant to Section 4906.01(B)(1), Revised Code, the Board has jurisdiction over the proposed cogeneration station, not the coke ovens, and properly granted a Certificate of Environmental Compatibility and Public Need to build the cogeneration station.

Monroe maintains that the coke ovens as well as the cogeneration station should be subject to the Board's jurisdiction because the coke ovens produce the heat and steam and used at the proposed cogeneration station. (Appellant's Brief pp. 19-25). No one contests the Board's jurisdiction over the proposed cogeneration station of MCC. The proposed cogeneration station is a "major utility facility" pursuant to Section 4906.01, Revised Code, because it is an electric generating plant designed for operation at a capacity of 50 MW or more. An application was filed pursuant to Section 4906.06, Revised Code containing all of the information required by the Board's Rules (Company Exhibit 1). In compliance with Section 4906.06, Revised Code, the Applicant filed a proof of service that a copy of the application had been served on the chief

executive officer of each municipal corporation and county, the head of each public agency charged with the duty of protecting the environment or planning land use, and with the local public library in Middletown. (Company Exhibit 2). Notice of the informational meeting, the application, and the hearings were also published in compliance with the Board's rules. (Company Exhibit 3). The Board's Staff investigated the application and filed its Staff Report with the Board on September 30, 2008, not less than 15 days prior to the October 14, 2008 hearing. (Staff Exhibit 1, Appellant's Supplement, 84 - 113). A Joint Stipulation and Recommendation was signed between the Company and the Staff and was introduced into evidence. (Joint Exhibit 1, Appellant's Supplement, 214 - 222.) The Joint Stipulation and Recommendation was the product of serious bargaining between capable, knowledgeable parties, as a package benefits rate payers and the public interest, and violates no regulatory principle or practice. Tr. 123-124. It meets the criteria approved by the Ohio Supreme Court in Consumers' Counsel v. Pub. Util. Com. (1992), 64 Ohio St. 3d 123, at 126; 592 N.E. 2d 1370, 1373 (1992).

The Board has jurisdiction over the certification of major utility facilities which have commenced construction after October 23, 1974. A major utility facility is defined by Section 4906.01(B), Revised Code as either an electric generating plant designed for operation of a capacity of 50 MW or more, an electric transmission line of a design capacity of 125 kV or more, or a natural gas transmission line designed for or capable of transporting gas at pressures in excess of 125 psi.

The Board does not have jurisdiction over coke plants or, for that matter, over coal mines, gas wells, rivers, wind, or anything that might supply power for a generating station. Mr. Osterholm explained that the heat recovery steam generators (HRSGs), the flue gas desulfurization (FGD) units, and the bag house are not part of the proposed cogeneration station

and are not proposed to be located on the proposed three acre site. Tr. 19, 21-23, and 27 (Appellant's Supplement, 8, 10-12, and 16).

Although the issue was not specifically litigated, the Board approved a similar project in 2005 where a cogeneration facility was approved which was sited adjacent to a coke production facility. In its June 13, 2005 Opinion, Order and Certificate in Case No. 04-1254-EL-BGN, In Re: Application of Sun Coke for a Certificate to Build the Haverhill Cogeneration Station, the Board stated at pp. 5 - 6:

The facility will function by utilizing waste heat from the coke manufacturing process to generate electricity, energy that would otherwise be released into the environment...Staff supports the Applicant's efforts to fully utilize energy resources at its coke production facility. By using the by-product steam from the coke operation to generate electricity, the company not only is able to offer an additional product that will be made available to all PJM network customers, but also reduce the amount of wastewater generated by the coke production operation. Without the generating facility, additional wastewater would be discharged from the site. See Middleton Coke Company's Supplement, 5-6.

The Ohio Power Siting Board also issued an Opinion, Order, and Certificate, In Re: The Application of FDS Coke Plant, LLC, for a Certificate of Environmental Compatibility and Public Need to Build a Cogeneration Facility, Case No. 07-703-EL-BGN, on October 28, 2008. See Middletown Coke Company's Supplement, 26-45. The Application in Case No. 07-703-EL-BGN involved an application to build a cogeneration facility within the same 51 acre site where the applicant was building its new non-recovery coke oven plant. The Board did not assert jurisdiction over coke ovens in either case.

In his September 25, 2008 Entry in the case now before the Court, the ALJ properly noted that "(t)he Board has no jurisdiction over any permits for construction of the coke plant" and that "issues related to the coke plant will not be considered in this proceeding." (Appellant's

Appx., 58) Such a holding is consistent with Ohio law and makes good policy sense. The Court should affirm the Board's finding that it has jurisdiction over the proposed cogeneration station, not the coke plant.

Monroe makes much about the fact that the cogeneration station and the coke plant are operationally and economically interdependent. The City's argument is that because the electrical generating equipment cannot operate without steam, and because there are no other sources of steam other than from the coke plant, then the coke plant and the electrical generating equipment cannot be logically separated in function or effect and they must be parts of the same facility. The Appellant fails to grasp the nature of a cogeneration station.

Cogeneration has been defined as "the simultaneous production of power (either electrical or mechanical) and useful heat (e.g., process steam), with the reject heat of one process thus becoming an energy input to a subsequent process so that the same fuel is used twice. Cogeneration can be employed in any process where either steam or heat is needed."² In the case before the Court, the Application presented an opportunity for the efficient production of electricity using waste heat from a coke oven plant. Of course, the cogeneration station and the coke plant are operationally and economically interdependent—otherwise, there would likely be no cogeneration facility. No one disputes that the coke plant and the cogeneration station are operationally and economically interdependent. But that fact alone does not convert the coke plant into a "major utility facility".

The City of Monroe argues that the cogeneration facility and the coke plant constitute a single major utility facility. The City suggests that because the generation of heat and steam is

² Cogeneration, S. David Hu, Reston Publishing Company, Inc. 1985, at p. 2. Further, cogeneration presents "an efficient way of utilizing our limited energy resources because the same fuel source is used simultaneously to produce two forms of useful energy, including electricity and heat." Id., at xvii. See Middletown Coke Company's Supplement, 48 and 50.

an “essential part” of the electric generating process, the coke plant must be considered part of the “electric generating plant”. (Appellant’s Brief, p. 20) The City also suggests that even if the coke plant is not part of the electric generating plant, it most certainly is “associated” with the electric generating plant because the coke plant is “joined together, connected, or combined” with the cogeneration station. (Appellant’s Brief, p. 21) Finally, the City asserts that the Applicant is attempting to divide, segment, or piecemeal the cogeneration facility from the coke plant which is prohibited under the National Environmental Policy Act (NEPA). (Appellant’s Brief, pp. 22-23)

The Applicant submits that none of these arguments³ are relevant when the Board considers the statutory definition of “major utility facility”. Section 4906.01(B)(1), Revised Code defines a “major utility facility” to mean an: “Electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more;”. This means that to constitute a major utility facility, both the electric generating plant and the associated facilities must be designed for or capable of operation at a capacity of fifty megawatts of electricity or more. Neither concept of being an “essential part” nor being “connected together” are set forth as statutory criteria. The record in this case demonstrates that the coke oven plant does not meet the statutory criteria and therefore does not constitute a major utility facility.

No admissible testimony was provided by the City of Monroe or by Mr. Schiavone. However, Mr. Osterholm explained at the hearing why the coke oven plant is not a major utility facility. The heat recovery steam generators (HRSGs) are neither designed for nor capable of generating electricity; they are designed for the cooling of the flue gas from the coking plant and

³ The Administrative Law Judge rejected each of these arguments in his October 9, 2008 Entry, at Finding (8).

in the process produce steam which the cogeneration station then uses. Tr. 17 (Appellant's Supplement, 6). The flue gas desulphurization unit is not to be installed as part of the cogeneration facility but as part of the coking unit. Tr. 23 (Appellant's Supplement, 12). The purpose of the flue gas desulphurization (FGD) unit is not to generate electricity, but to remove the sulphur from the flue gas coming from the coke plant. Tr. 24 (Appellant's Supplement, 13). The baghouse is designed to capture particulate matter that would otherwise escape into the environment, not to generate fifty megawatts of electricity. Tr. 26 (Appellant's Supplement, 15).

A clear and concrete example illustrating the fallacy of the City's logic is the Haverhill Phase 1 coking facility operated by an affiliate of the Applicant in Haverhill, Ohio in Ohio Power Siting Board Case No. 04-1254-EL-BGN. This facility is nearly identical to the Applicant's proposed coke plant in Middletown. Haverhill Phase 1 includes coke ovens, HRSGs for cooling the flue gas and steam production, an FGD for scrubbing the coking flue gas, and a baghouse for capturing particulate matter. However, Haverhill Phase 1 does not generate electricity and does not include a cogeneration station. Instead, the steam is utilized by an adjacent chemical facility for process uses. Thus, while there are coke ovens, there is no generation of electricity. In light of this example, it is clear that the design and function of these components of the coke plant are to produce coke, not electricity. Obviously, the Board would not have and did not assert jurisdiction over the Haverhill Phase I project.

At page 20 of its Brief, the City attempts to compare the proposed Middletown coke plant to the boiler of a coal-fired power plant. That is not an accurate or meaningful comparison because the only purpose of the boiler is to create steam for electric power production. The example of Haverhill Phase I described above clearly demonstrates that the true purpose of the coke plant (including the HRSGs and FGD) is to make coke, not electricity. Accordingly, the

City's argument is flawed and these coke plant operations cannot be considered a major utility facility.

This contrasts with the Applicant's project in Middletown where a proposed cogeneration station will be composed of a steam turbine generator, a steam condensing system, a steam turbine operation and administration building, cooling towers, and a generator step up transformer. Tr. 14-15. The purpose of the cogeneration station is to accept the steam which is generated by the HRSGs and to subsequently produce electric power -- which is what triggers the Board's jurisdiction over the cogeneration station. Tr. 18 (Appellant's Supplement, 7). Thus, the proposed cogeneration station is designed for and will be capable of generating 50 megawatts of electricity. It, and it alone, constitutes a major utility facility.

The City's accusation that the Applicant was dividing, segmenting and piecemealing the facility is misdirected. In Finding (8) of his October 9, 2008 Entry, the ALJ found that the Board is not governed by the NEPA and the NEPA standard is not applicable. (Appellant's Appx., 58) The National Environmental Policy Act (NEPA) is a federal statute, not a state statute. The Applicant followed the applicable Ohio law and provided background information about the non-jurisdictional coke plant so that the Board could grasp the nature of the proposed cogeneration station.

Excluding the coke plant from consideration in these proceedings was both necessary, proper and lawful given the Board's jurisdiction over major utility facilities. Contrary to the City's argument at page 24 of its Brief, the Board does have sufficient information to determine the nature of the probable environmental impact of the cogeneration facility, whether the cogeneration 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, whether the cogeneration facility will comply with Revised Code Chapter 3704 and all rules and standards adopted thereunder, and whether the cogeneration facility will serve the public interest, convenience, and necessity. The Board had ample evidence on this issue in the Application, the Staff Report, Joint Exhibit 1 (the Stipulation and Recommendation), and the hearing transcript. The Applicant submits that both the law and the facts demonstrate that the coke plant is not part of a “major utility facility” subject to the Board’s jurisdiction in this case. The Court must affirm the Board’s finding that it has jurisdiction over the proposed cogeneration station, not the coke plant.

PROPOSITION OF LAW NO. 2

Pursuant to Section 4906.10, Revised Code, the Board found and determined that the proposed cogeneration station will have a minimal impact on historic cultural or archaeological resources.

At pages 25-30 of its Brief, the City erroneously claims that there is no record support for the Board’s opinion that the cogeneration plant has no effect on landmarks. (Appellant’s Brief, 29) The City also makes several serious but untrue allegations about the Applicant. The City argues that the application was submitted without finishing the cultural assessment. It argues that the Applicant withheld information from the Board Staff and allowed it conclude incorrectly that no archaeological or culturally significant sites were located within the proposed generation station area. It also alleges that the Applicant violated its obligation by failing to disclose significant and historic archaeological sites that the Gray & Pape study had identified. Unfortunately, the City has left out several key facts and attributed a false motivation to the Applicant by innuendo. Any reasonable reading of the evidence in this case supports the Board’s determination that the proposed cogeneration facility will not impact historic and cultural assets.

The Gray & Pape study was done to support a requested nationwide permit application for the coke plant (not the proposed cogeneration station) from the U.S. Army Corps. of Engineers. Tr. 35 and 107 (Appellant's Supplement, at 23 and 56). The proposed cogeneration station is to be built on a three acre tract; neither the Reed-Bake farm buildings nor the archaeological sites 33BU1110 and 33BU1122 are within the footprint of the proposed cogeneration station. Tr. 58 and 60 (Appellant's Supplement, at 34 and 36). There was no motivation to deprive the Staff or the public of the Gray & Pape study. Because the Gray & Pape study was done to secure a nationwide permit for the coke plant and because it identified historical and cultural assets that would not be impacted by the proposed cogeneration station, it was not essential that the Board Staff receive this information. Nevertheless, the Applicant's witness, Mr. Osterholm, explained that there is still an ongoing process with the Ohio Historic Preservation Office and that there will need to be consultation with interested parties and the Applicant to address the issues related to the historic sites and the proposed coke facility. Tr. 64-65 (Appellant's Supplement, at 40-41). The Staff Report at p. 22, and the Joint Stipulation and Recommendation at p. 6, which were adopted by the Board, both require as a condition, that prior to construction, that the Applicant obtain and comply with all applicable permits and authorizations as required by federal and state law and regulations for any activities where such permit or authorization is required. (Appellant's Supplement, 111 and 219) The one other historic structure noted by the Board Staff was located within one mile of the project area at a lower elevation than the cogeneration facility. In both its Opinion, Order and Certificate and its Entry on Rehearing, the Board found that this site was neither directly nor indirectly impacted and was not within the visual area of the potential effects of the cogeneration facility. Appellant's Appx., 24 and 49) Ample evidence exists to support the Board's finding that the

proposed cogeneration station will have a minimal impact on historic and cultural resources. Because that determination is both reasonable and lawful, the Court should not reverse the Board's determination. Chester Township v. Power Siting Commission (1977), 49 Ohio St. 2d 231, 3 Ohio Ops. 3d 367, 360 N.E.2d 743.

PROPOSITION OF LAW NO. 3

The Applicant complied with Section 4906.10(A)(3), Revised Code and Rules 4906-13-01(A)(3) and (4) of the Ohio Administrative Code; the Board properly denied discovery of information relating to subjects over which the Board does not have jurisdiction.

At pages 30-35 of its Brief, the Appellant launches a misguided attack on the Board and the Applicant alleging that the Applicant did not comply with Section 4906.10(A)(3), Revised Code or Rules 4906-13-01(A)(3) and (4) of the Ohio Administrative Code. The Appellant also mistakenly argues that it was denied discovery rights by the Board. Review of the law and the evidence will reveal that the Appellant is wrong on all counts.

Section 4906.10(A)(3), Revised Code provides that the Board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the Board, unless it finds and determines . . .

- (3) 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;

The Appellant has unilaterally and erroneously inserted the word "site" after the word "alternatives" in this portion of the statute; however the word "site" is not present. This subsection of the statute does not have anything to do with alternative sites -- it has to do with the minimum adverse environmental impact considering the state of available technology and the

nature and economics of the various alternatives. The Staff and the Applicant both recognize this. At page 12 of the Staff Report (Appellant's Supplement, 101), the Staff stated:

Pursuant to O.R.C. Section 4906.10(A)(3), the proposed facility must represent the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, along with pertinent considerations. Environmental impacts include ecological and social impacts. Staff evaluates the ecological impacts of the project by assessing the potential effects on plants and wildlife, wetlands, streams, soils, and other ecological features. Social impacts are measured by the project's potential effects on existing land use, cultural and archeological resources, and be at noise levels, aesthetics, economics, and other social concerns.

At pages 12-13 of the Staff Report (Staff Exhibit 1), the Staff analyzed the ecological impacts and social impacts including land use, cultural and archeological resources, ambient noise, aesthetics, and economics. The Staff recommended that the Board find that the proposed facility represented the minimum adverse environmental impact, and therefore complied with the requirements specified in O.R.C. Section 4906.10(A)(3).

The Applicant submitted "environmental data" and "social and ecological data" in its Application at pages 06-1 through 06 and 07-1 through 20 addressing the minimum adverse environmental impact considering the state of available technology and the nature and economics of the various alternatives. For example, an ecological survey of the site was conducted by MCC's consultant. (Appellant's Supplement, 133) A Phase I literature review was conducted to assess the cultural impact. (Appellant's Supplement, 137) Evidence exists to support the Board's finding that the proposed facility represents the minimum adverse environmental impact and therefore complies with the requirements specified in Section 4906.10(A)(3) of the Ohio Administrative Code. The Board did not waive this statute; the Applicant clearly complied with it. The Appellant's argument must be rejected.

The Appellant also argues that the Applicant never complied with Rules 4906-13-01(A)(3) and (4) of the Ohio Administrative Code. These rules require a description of the site selection process, including descriptions of the major alternatives considered and a discussion of the principal environmental and socioeconomic considerations of the preferred and alternate sites. The Applicant did not seek a waiver of these rules and did in fact provide information entitled "Site Selection Process" and "Principal Environmental and Socioeconomic Considerations" in its application. See pages 01-2 through 01-5 of the Application. (Appellant's Supplement, 119-122) The Applicant did in fact comply with Rules 4906-13-03(A)(3) and (4) of the Ohio Administrative Code. This argument should also be rejected.

Finally, the Appellant argues that the ALJ's Entry of October 9, 2008, prohibited Monroe from conducting discovery to identify and compare alternative sites. This argument must also be rejected. The Board is a creature of statute. Its jurisdiction is governed by Chapter 4906, Revised Code. Pursuant to Section 4906.01(B)(1), Revised Code, it has jurisdiction over a proposed cogeneration facility that is designed for or capable of operation at a capacity of 50 megawatts or more. It does not have jurisdiction over a coke plant. The Board is not governed by NEPA. Economic justifications are not relevant to the Board's consideration of whether the coke plant should be considered as associated facilities.

The Applicant responded to all discovery questions related to the cogeneration station; it did not respond to questions regarding the coke plant because it was outside the Board's jurisdiction. See Company Exhibit 5. (Appellant's Supplement, 177-207) The Appellant's discovery rights were not violated; it just asked for information on subjects over which the Board has no jurisdiction. The Board properly limited discovery to subject matters over which it had jurisdiction. This argument must also be rejected.

PROPOSITION OF LAW NO. 4

The Board properly found and determined that the Applicant did consider alternatives and that the proposed cogeneration station represents the minimum adverse environmental impact, and that the Applicant met its burden of proof.

At pages 35-38 of its Brief, the City argues that Middletown Coke Company presented no evidence defending its site selection process and that it attempted to circumvent the Ohio Power Siting Board review. It maintains that the Board did not require evidence about the unsuitability of the Facility site and the availability of suitable alternatives and that even if the cogeneration station and the coke ovens are separate facilities, the Board cannot excuse consideration of alternative sites.

The Applicant did address the site selection process. At pages 01-2 through 01-3 of the Application, the Middletown Coke Company states the following:

(3) Site Section Process

The Cogeneration Station is not typical of dedicated power generation applications, which have different siting criteria (electric transmission, water availability, natural gas/coal supply, etc.). The location of the Cogeneration Station is dependent upon the location of the coke manufacturing facility, which is not required to undergo a formal site selection study. Given the practicalities of the project, the only reasonable location for the cogeneration equipment is in close proximity to the coke ovens. Based on this information, MCC has submitted an application to waive the requirement for a fully developed site alternative analysis. The waiver request is included in Appendix 03-1.

Engineering considerations dictate the location of the power generation equipment in relation to the coke plant structures. It is desirable to minimize costs by reducing the lengths of duct-work, wiring, and piping to a minimum. Additional constraints include safety issues, access, and permitting factors. MCC has taken care to ensure that the locations considered ideal for placement of the generation equipment minimize impact to ecological, cultural and socioeconomic resources. The power facility has been located based on the engineering constraints, space constraints, and the existing terrain. Additional potential locations near the battery

were determined to be infeasible due to site or equipment constraints.

The preferred footprint selected by MCC for the generation equipment is located adjacent to the west of the coke oven facility. This area historically has been an actively farmed plot. (Application, p.01-4, Appellant's Supplement, pp. 120-121.)

The testimony of the Applicant's witness at the hearing confirmed that no further alternative site analysis was necessary. Mr. Ryan Osterholm testified that there were alternate ways that were considered, but ultimately the proposed cogeneration station site was the optimal and for the most part the only viable option. Tr. 34 (Appellant's Supplement, 22). He explained that when one looks at the site where the coke ovens are located and looks at all the ancillary equipment necessary around the coke ovens, there is very little other space besides where the cogeneration facility is proposed to be sited. Tr. 30 (Appellant's Supplement, 19). While different ways were considered, given all of the constraints where the coke ovens needed to sit and given the requirements that the coke plant needed to meet regarding zoning setbacks and other requirements, the cogeneration station needs to be where it is proposed to be sited. Tr. 31 (Appellant's Supplement, 20). While the Applicant considered locations outside of the "blue footprint" on Figure 04-4B, because of the considerations in locating the coke oven batteries, the preferred site was the logical place for the cogeneration station. Tr. 33 (Appellant's Supplement, 21). Mr. Osterholm stated that given the fact that the cogeneration station needs to be located in close proximity to the coke plant and given that the coke ovens are located where they are, the latitude for alternative sites for the cogeneration facility was very limited. Tr. 34-35 (Appellant's Supplement, 22-23).

The cogeneration station is proposed to be located in an existing industrial area next to an existing industrial site and is from $\frac{1}{4}$ to $\frac{1}{2}$ mile away from the nearest residences or institutions. Tr. 35 (Appellant's Supplement, 23). The cogeneration station needs to be constructed next to

the coke ovens and the coke ovens need to be located close to the A.K. Steel plant to allow for conveyor delivery of coke. Tr. 36-37 (Appellant's Supplement, 24-25). The site selected was based in part on setback requirements. Mr. Osterholm did not believe that the setback requirements had been eliminated. Tr. 70 (Appellant's Supplement, 44). The cogeneration site was and has been zoned for general industrial purposes. Tr. 71 (Appellant's Supplement, 45).

Section 4906.10(A)(3), Revised Code requires the Board to find and determine 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." The Application and testimony of Mr. Osterholm provided such information to the Board. The Staff recommended that the Board find that the proposed facility represented the minimum adverse environmental impact and therefore complied with the requirements of Section 4906.10(A)(3), Revised Code. Staff Exhibit 1, pp. 12-13. (Appellant's Supplement, 101-102).

There was no attempt to circumvent Ohio Power Siting Board review. The excerpt from the Application quoted above and Mr. Osterholm's testimony explained the site selection process and why the preferred site was the logical location for the proposed cogeneration station. The Board considered the admissible evidence and properly struck any information regarding the site selection of the coke oven over which it had no jurisdiction. The Court should affirm the Board's ruling.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Ohio Power Siting Board.

Respectfully submitted on behalf of,
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CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Middletown Coke Company was served via electronic mail and via U.S. first class mail, postage prepaid, upon the following persons this 2nd day of September, 2009:

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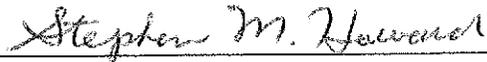
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