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BEFORE THE
OHIO POWER SITING BOARD

In the Matter of:	)	
The Application of American Transmission	)	
Systems, Incorporated and The Cleveland Electric	)	
Illuminating Company for a Certificate of	)	Case No. 07-0171-EL-BTX
Environmental Compatibility and Public Need	)	
for the Geauga County 138 kV Transmission Line	)	
Supply Project	)	

APPLICANTS AMERICAN TRANSMISSION SYSTEMS, INCORPORATED AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY RESPONSE TO CITIZENS ADVOCATING RESPONSIBLE ENERGY'S MOTION TO CONDUCT TELEPHONIC STATUS CONFERENCE

American Transmission Systems, Incorporated and The Cleveland Electric Illuminating Company ("Applicants") have no objection to CARE's request for a status conference; although the Applicants' preference is that any such conference should be in-person and on the record. Applicants note that a status conference is scheduled for June 23, 2008, and that it may be productive to address CARE's concerns at that conference.

Applicants are concerned that CARE's pattern of claiming lack of resources as justification for requesting procedural delay should be addressed as soon as possible. Although the Board and the Administrative Law Judge enjoy significant discretion with respect to conduct of Ohio Power Siting Board proceedings,[1] CARE's ongoing claims for special treatment so that CARE's members can save on legal fees could result in unfair and unjust delay in this proceeding. It has long been recognized by the Ohio Public Utilities Commission that "the

[1] *See* Ohio Admin Code § 4906-1-02.

responsibility for making an intervenor's participation 'meaningful' lies with the intervenor..."[2] The decision to intervene in these proceedings rested with CARE, and CARE's unwillingness to marshal the necessary resources to present its case is not grounds for giving CARE special treatment at the expense of the other Parties.

With respect to CARE's alleged surprise over Applicants' concerns with CARE's discovery responses, Applicants note that an uncharitable reading of CARE's pleading is that CARE's "primary counsel" decided that their client's interest was better served by sending another attorney who apparently was not prepared to represent CARE's interests at the May 21st hearing. A more charitable reading would be that even though CARE has now appeared by four separate attorneys from one of Ohio's premier law firms CARE somehow believes that it lacks the resources necessary to meaningfully participate in these proceedings and therefore it should receive extraordinary dispensation. In any event, the Administrative Law Judge would be justified to place CARE on notice that if she, the Applicants and OPSB Staff can prepare for and attend a hearing in this matter, then all parties including CARE and its attorneys are expected to do likewise.

The balance of this pleading provides further detail regarding these matters.

CARE's Request For Additional Time To Review Documents Produced By FirstEnergy Is Without Merit And Should Be Rejected.

At its core, CARE's suggestion of the need for additional time rests on two points: (i) that the volume of documents produced by FirstEnergy is such that CARE needs more time to complete its review (in order to prepare for potential depositions and for the yet to be scheduled Adjudicatory Hearing); and (ii) that Applicants' having taken longer than CARE expected to

[2] *In the Matter of the Investigation into the Perry Nuclear Power Station*, Case No. 85-521-EL-COI (entry dated April 21, 1987.

produce the documents justifies additional time for CARE. Both points lack merit, and CARE's request for additional time therefore should be denied.

CARE's concerns regarding the volume of documents that Applicants have produced – as well as CARE's complaints about the delay in production of documents – lack credibility. Any "delay" is the direct result of CARE's vague, overly broad, and largely irrelevant requests for document production by the Applicants.

By way of example, CARE requested, and Applicants have produced, "[a]ny and all documents that refer, relate or otherwise pertain to the Rachel Line."[3] This document request is staggeringly broad in scope and required the Applicants to expend significant resources to locate and identify archived documents to complete the request. Applicants finally located over 19,000 pages of responsive documents which: (i) were not stored electronically; (ii) were located in several locations; and (iii) are more than a decade old.

A key point is that CARE has not demonstrated that the "Rachel Case," and any of Applicants' non-public records related to that case,[4] are relevant to this proceeding, which concerns different electric needs and a different electric transmission project. Notwithstanding these points, Applicants cooperated by attempting to satisfy CARE's request; even to the point of agreeing simply to produce the documents *in toto* rather than asking counsel for CARE to review the documents in Applicants' attorneys' Columbus offices prior to production.

Several of CARE's other requests for production are similarly broad in scope and require Applicants to compile, review and produce thousands of pages of additional documents.

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[3] *Citizens Advocating Responsible Energy's First Section of Interrogatories and Document Requests to American Transmission Systems, Incorporated and The Cleveland Electric Illuminating Company,* Document Request No. 7. The "Rachel Project" was the subject of OPSB Case No. 95-0600-EL-BTX.

[4] The public record for the "Rachel" case can be found in the OPSB's archives, and parts are available on the OPSB's website.

The point here is that CARE should not be permitted to make broad requests that lack specificity and then, when they get what they ask for, complain that they need more time to review the documents. If they failed to understand that their broad and vague requests amounted to requests for tens of thousands of pages of documents, that is a problem of their own causing. If they knowingly asked for tens of thousands of pages of documents, then they should have been prepared to work with the documents upon production of the same. If they knowing asked for tens of thousands of pages of documents, and now want to complain about time and resources, Applicants would be justified in demanding that CARE explain why such document requests are anything other than harassment and intentional running-up of Applicants' litigation costs and an effort to further delay this proceeding. In any event, any "problem" is of CARE's own making, and equitable considerations compel a ruling that prevents CARE from benefitting from its own poor planning or intentional harassment of the Applicants.

CARE's Ongoing Pattern Of Alleging Insufficient Resources Does Not Merit Further Procedural And Substantive Relief In This Case.

CARE has sought on several occasions special considerations due to its status as a non-profit organization with limited resources. Initially, on April 17, 2008, CARE requested that the adjudicatory hearing be moved to Geauga County. In CARE's memorandum in support of this extraordinary request, CARE posited that "[b]ecause CARE is a non-profit organization with limited resources, composed primarily of farmers and other property owners of limited means, CARE is having difficulty finding experts who can travel to Columbus to testify at the hearing. CARE is also having difficulty locating fact witnesses who can travel to Columbus to testify regarding the adverse effects of the proposed project."[5] CARE further claimed that relocating the adjudicatory hearing would ease the burden on CARE for locating witnesses. CARE made

[5] *Memorandum in Support of Intervenor CARE's Motion to Relocate Adjudicatory Hearing*, pgs. 1-2, April 17, 2008.

no mention of the increased burden such a request would have on the Administrative Law Judge, OPSB staff and Applicants.

In its motion requesting a status conference, CARE also claims that an additional status conference is warranted because it elected to try and save costs by not having Cleveland counsel attend the May 21, 2008 hearing.[6] Again, CARE makes no reference to the additional costs of this request for another status conference on the other Parties to this proceeding. In sum, CARE has claimed lack of resources as an excuse for: (1) not preparing for the May 21, 2008 hearing; (2) requesting an additional status conference; (3) not identifying a single witness or expert; (4) proposing to move the adjudicatory hearing to Geauga County; and, (5) requesting additional time to review documents responsive to vague and overly broad document requests.

As discussed previously, "the responsibility for making an intervenor's participation 'meaningful' lies with the intervenor..."[7] Building on this clear holding, the Commission has also concluded that Intervenors, regardless of resources, are required to meet their obligations in discovery. In the *Perry Nuclear Power Station Investigation*, the Commission was faced with a request from Greater Cleveland Welfare Rights Organization ("GCWRO") for pre-approval of their request to have The Cleveland Electric Illuminating Company pay expert fees incurred by GCWRO in responding to CEI's discovery requests. GCWRO claimed this relief was needed because of its limited resources in order to effectively and fairly answer CEI's discovery requests. The Commission soundly rejected this proposal and, instead, concluded that Intervenors, no matter their resources, must properly respond to discovery.[8] The Commission explained that the "policy of discovery is to allow the parties to prepare cases and to encourage

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[6] *Memorandum in Support of Motion to Conduct Telephonic Status Conference*, pg.2, May 23, 2008.
[7] *In the Matter of the Investigation into the Perry Nuclear Power Station*, Case No. 85-521-EL-COI (entry dated April 21, 1987, pg. 2).
[8] *In the Matter of the Investigation into the Perry Nuclear Power Station*, Case No. 85-521-EL-COI (entry dated March 17, 1987,pg.9).

them to prepare thoroughly *without taking undue advantage of the other side's industry or efforts*."[9] Each of CARE's requests for special treatment imposes additional costs on the Applicants (and OPSB Staff) who have to review and respond to the requests and many, if not all of these requests, would cause still more delay in this proceeding.

As noted, *supra*, CARE now has appeared by four separate attorneys. What CARE has not told the Administrative Law Judge is that CARE has sent its attorneys to local town meetings and other events that concern the project, and that CARE's attorneys have been made available to the media. Reasonable observers might conclude that CARE appears willing to expend its resources on building local political opposition to the Project instead of actively participating in these proceedings. CARE is free to make this choice, but it can not use its conscious decision to apply its resources elsewhere as a justification to burden everyone else in this case.

Even assuming, *arguendo*, that CARE truly has constrained resources and that CARE has deployed its constrained resources in an effective manner, the fact that resources are constrained does not and cannot justify grant of further special dispensation to CARE in this proceeding. Ohio's legislature has created and provided resources to numerous administrative agencies to represent the "public interest" in this proceeding; including the interests of landowners and residents along the proposed "preferred" and "alternate" routes. CARE can not, therefore, argue that it should receive special dispensation in order to represent the "public" interest; regulatory agency staff (including OPSB Staff) represent the public interest and require no assistance from CARE to perform their regulatory duties.

Thus, CARE represents only its own members' interests in this proceeding. Consequently, CARE's members are responsible for providing resources sufficient to represent

[9] *In the Matter of the Investigation into the Perry Nuclear Power Station*, Case No. 85-521-EL-COI (entry dated March 17, 1987, pg. 10)(emphasis added).

their interests – their conscious decision about whether and how much to provide in the way of resources is and should remain their responsibility. As such, it is and would be unjust and unreasonable to adopt a course of action that causes Applicant and other parties to compensate for (indeed, subsidize) CARE's decisions about resources.

Significantly, CARE has presented no facts to justify any other course. In contrast, in the Application the Applicants demonstrated that immediate action is required to address the reliability needs that are to be served by the project. Thus, CARE's indifference to the time and expense of parties other than itself, and its apparent intent to indefinitely delay these proceedings is not supported in this proceeding, and the Administrative Law Judge would be justified in ruling that CARE's unilateral decisions about resources and resource allocation are not grounds for further substantive or procedural relief in this case.

CARE's Course Of Conduct To Date In This Proceeding Is Equitable Grounds To Deny CARE's Requests For Relief.

CARE asserts shock and surprise that Applicants took the opportunity to discuss procedural and substantive matters at the May 21st hearing. Applicants respectfully submit, however that there are a number of procedural and discovery matters yet to be resolved in this proceeding, including: the scheduling of public and adjudicatory hearings, the dates for filing expert witness testimony, the extent of discovery, depositions of proposed expert and factual witnesses, and other matters. Little progress on these matters has occurred to date. The Applicants believed that the May 21st hearing afforded an opportunity to discuss such matters at a time when the parties and the Administrative Law Judge were able to talk face to face. CARE's apparent decisions about how to staff that hearing were matters within CARE's sole control, and CARE's admission that it was not prepared to participate in these discussions still does not reflect assumption of responsibilities for CARE's decision making. As noted above, if

the Administrative Law Judge, the Applicants and OPSB Staff can prepare for and attend a hearing, then CARE should be expected to do likewise.

CARE's course of conduct to date in this case merits some additional discussion. CARE asserts that Applicants' delay in responding to CARE's document production requests is grounds for CARE's suggestion of a request for more time. What CARE fails to tell the Administrative Law Judge is that the Applicants submitted much more narrow requests for document production to CARE and that CARE, while indicating that it has the documents, still has not produced a single responsive document. CARE's alleged shock at the Applicants' concerns with CARE's inadequate and non-responsive discovery is disingenuous; Applicants would be pleased to sit down at any time with CARE and the Administrative Law Judge and go through each and every one of CARE's non-responses to Applicants' discovery.

For example Applicants' Interrogatory No. 3 asked:

> Identify each requirement of Administrative Code Chapter 4906-15 that the Project application allegedly fails to satisfy, as alleged in [CARE's] Memorandum in Support of the Petition to Intervene.

CARE responded:

> Objection. CARE objects to Interrogatory No. 3 to the extent it calls for the disclosure of information protected by the attorney-client and/or work product privileges. Subject to and without waiving these objections, CARE states that the application fails to satisfy the requirements set forth in Ohio Administrative Code Rules 4906-15-06 and 4906-15-07.

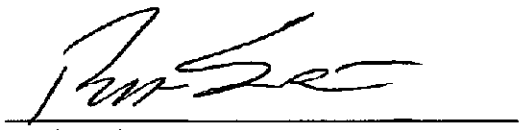
CARE's response is at best inadequate, and at worst, designed to prejudice Applicants' ability to defend the Application at hearing. In fact, it could be argued that an adjudicator would be justified in finding that the response was not in good faith.

Prior to raising the inadequacy of these responses, however, and in the spirit of averting further burden on the Administrative Law Judge's schedule, on May 29, 2008, Applicants served

a second round of highly specific requests for admissions and interrogatories on CARE. The purpose of this second round of discovery is to define the issues for hearing prior to petitioning the Administrative Law Judge for relief. Applicants expect, moreover, that as these discovery requests were served with sufficient time to allow CARE to respond before the June 23, 2008 hearing, Applicants will be in a position to discuss further CARE's response, or lack thereof, at that time.

In any event, application of equitable considerations would merit a finding that CARE should not be permitted to avoid document production and provide non-responsive answers to reasonable interrogatories only to then lay claim to procedural or substantive relief based on unfounded allegations about Applicants' delay in producing documents. Those that through poor planning or intent avoid their obligations in discovery cannot be heard to complain about other parties' performance of their discovery obligations.

Respectfully submitted,



Christopher R. Schraff (#0023030)
Robert J. Schmidt (#0062261)
PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-2097
Facsimile: (614) 227-2100

Attorneys for Applicants
American Transmission Systems, Inc.
The Cleveland Electric Illuminating Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicants American Transmission Systems, Incorporated and The Cleveland Electric Illuminating Company Response to Citizens Advocating Responsible Energy's Motion to Conduct Telephonic Status Conference was served upon the following persons by mailing a copy, postage prepaid, on June 3, 2008, addressed to:

Janet Stoneking, Esq.
Administrative Law Judge
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793

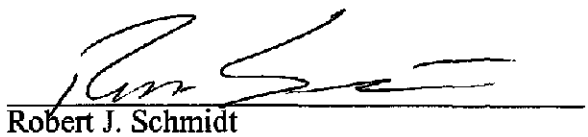
Thomas Lindgren, Esq.
Thomas McNamee, Esq.
Office of the Attorney General of Ohio
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793

Klaus Lambeck, Chief
Facilities, Siting & Environmental Analysis Division
Ohio Power Siting Board
180 East Broad Street
Columbus, Ohio 43215-3793

Jim O'Dell
Ohio Power Siting Board
180 East Broad Street
Columbus, Ohio 43215-3793

David M. Ondrey
Todd C. Hicks
Thrasher, Dinsmore & Dolan
Attorneys for Intervener Geauga Park District
100 Seventh Avenue, Suite 150
Chardon, OH 44024-1079

Thomas J. Lee
Julie Crocker
Taft, Stettinius & Hollister LLP
Attorneys for Intervener C.A.R.E.
200 Public Square, Suite 3500
Cleveland, Ohio 44114-2302



Robert J. Schmidt