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FILE

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VIA HAND DELIVERY

Ms. Reneé Jenkins
Public Utilities Commission of Ohio
13th Floor
180 East Broad Street
Columbus, OH 43215

**Re: American Transmission Systems, Incorporated and The
Cleveland Electric Illuminating Company;
Case No. 08-287-TP-UNC**

07-171-ET-BTX

Dear Ms. Jenkins:

Enclosed is the original and requisite number of copies of the testimony of Anthony J. Coyne and Thomas G. Curtain on behalf of Geauga Park District for filing in the above-referenced proceeding.

If you have any questions, please call me at the number listed above.

Sincerely,

Sally W. Bloomfield

cc: Parties of Records (via regular U.S. Mail)

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of American)
Transmission systems, Incorporated and The)
Cleveland Electric Illuminating Company for a)
Certificate of Environmental Compatibility and)
Public Need for the Geauga County 138 kV)
Transmission Line Supply Project.)

Case No. 07-171-EL-BTX

DIRECT TESTIMONY OF

Anthony J. Coyne

on behalf of

Geauga Park District

September 8, 2008

1 1. **Q. PLEASE IDENTIFY YOURSELF FOR THE RECORD.**

2 **A.** Anthony J. Coyne.

3 2. **Q. WHAT IS YOUR PROFESSION?**

4 **A.** I am a practicing attorney in the State of Ohio. My practice is entirely civil. The
5 majority of my practice involves real estate, land use, development and eminent
6 domain. My firm's eminent domain practice is one of the most active in the State
7 of Ohio representing both property owners and taking authorities.

8 3. **Q. WHAT IS YOUR BUSINESS ADDRESS?**

9 **A.** 55 Public Square, 21st Floor, Cleveland, Ohio 44113. I am affiliated with
10 Mansour, Gavin, Gerlack & Manos Co., LPA., and I have been with the firm for
11 the better part of 20 years.

12 4. **Q. WHAT IS YOUR POSITION IN THE FIRM?**

13 **A.** I am a partner and President of the law firm.

14 5. **Q. HOW LONG HAVE YOU BEEN AN ATTORNEY?**

15 **A.** Approximately 20 years.

16 6. **Q. WHERE DID YOU RECEIVE YOUR J.D.?**

17 **A.** Cleveland-Marshall College of Law. I also received a Master's Degree in Urban
18 Studies and City Planning from Cleveland State University College of Urban
19 Affairs.

20 7. **Q. WHAT ARE YOUR AREAS OF LEGAL PRACTICE?**

21 **A.** I practice in areas of real estate, land use, development and eminent domain law.
22 I also have a general corporate practice involved in corporate litigation, real estate
23 litigation and the enforcement of contracts.

1 8. Q. WHAT ARE MEMBERSHIPS THAT YOU HAVE IN LEGAL OR
2 RELATED ORGANIZATIONS?

3 A. I am a member of the Cleveland Bar Association, the Ohio Bar Association and
4 the American Bar Association. I am a former member of the Board of Trustees of
5 the Ohio Planning Conference, a Chapter of the American Planning Association.

6 9. Q. ARE YOU A MEMBER OF ANY PUBLIC BODY OR BOARDS?

7 A. I currently serve as the Chairman of the Cleveland Planning Commission and
8 have been in that position for approximately nine years. I have been a member of
9 the Cleveland Planning Commission since 1991.

10 10. Q. HAVE YOU PRESENTED ANY LEGAL COURSES OR SEMINARS?

11 A. I have been a lecturer at Cleveland-Marshall College of Law and Cleveland State
12 University's College of Urban Affairs. I have also been a lecturer and have
13 conducted seminars for National Business Institute and Lorman Education
14 Services. When I have spoken at the law school or at any area colleges or
15 seminars, they have generally been in the area of eminent domain law, land use
16 law and development law.

17 11. Q. DESCRIBE YOUR SPECIFIC EXPERIENCE IN THE FIELD OF
18 EMINENT DOMAIN IN YOUR PROFESSIONAL CAREER?

19 A. As I previously indicated, I have a very active eminent domain practice and have
20 represented clients in over 20 counties in the State of Ohio in handling eminent
21 domain cases. I have tried to a jury somewhere in the vicinity of 50 eminent
22 domain cases. I have handled and resolved nearly 1,000 eminent domain cases in
23 my 20-year practice. I have also represented clients before various courts of
24 appeals concerning eminent domain cases. I also attend annually the American
25 Bar Association's Eminent Domain Seminar and Conference.

1 12. Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS
2 PROCEEDING?

3 A. My testimony, while it gives my legal opinion, is not a legal opinion upon any of
4 the questions that must be considered by the Ohio Power Siting Board with
5 respect to its consideration of the FirstEnergy application before it. Rather, my
6 opinion pertains to the legal issues that would have to be considered if the route
7 proposed by Citizens Advocating Responsible Energy ("C.A.R.E.") were to be
8 proposed by an applicant to the extent that it includes public park property owned
9 by the Geauga Park District if the Geauga Park District Commissioners did not
10 consent to the use. The legal issues presented in such a case require an
11 understanding of eminent domain and the legal standards that apply when one of
12 two entities that holds powers of eminent domain seeks to appropriate the
13 property of another entity holding similar powers.

14 13. Q. WHAT IS EMINENT DOMAIN?

15 A. Eminent domain is a legal process by which the government utilizes the power of
16 eminent domain to acquire real property and on rare occasional personal property
17 for a public use or purpose. Eminent domain must be conducted in conformance
18 with the procedures set forth in Chapter 163 of the Ohio Revised Code. The
19 whole practice of eminent domain must also comply with the Fifth Amendment of
20 the United States Constitution which mandates that the government cannot take
21 property without due process of law and the payment of just compensation. The
22 best examples of eminent domain being used is when the government acquires
23 property for a school, a police station, a city hall, a government building, a road, a
24 bridge or a park.

1 14. Q. DESCRIBE A PUBLIC UTILITY'S POWER OF EMINENT DOMAIN AS
2 DISTINGUISHED FROM A POLITICAL SUBDIVISION'S POWER OF
3 EMINENT DOMAIN.

4 A. A public utility has the power of eminent domain pursuant to Chapter 4933 of the
5 Ohio Revised Code. A public utility's use of the power of eminent domain must
6 be for that specific use granted to the public utility. For example, if the public
7 utility is a provider of natural gas, it can use the power for the provision of natural
8 gas. If the utility provides electricity, it could use the power for the provision of
9 electricity. A public utility cannot use the power of eminent domain for any
10 reason not related to its charter. The public utilities power of eminent domain is
11 equivalent to a political subdivision; however, it is much more limiting in that the
12 public purpose of a political subdivision can be determined by the legislative body
13 governing said subdivision. The public utility's power must comply with its
14 charter and the type of public utility it provides.

15 15. Q. WHAT DIFFERENCES EXIST BETWEEN THE TWO TYPES, IF ANY?

16 A. The public utility's power of eminent domain is not as broad or expansive as that
17 of a political subdivision. I should specify a political subdivision is likely the
18 State of Ohio, a county government, a municipality or village and on occasion, a
19 township. We know that school districts also have the power of eminent domain,
20 but again, it is somewhat more limited in that they have to be tied to the school
21 district's mandated use (i.e., acquire land to build schools and educational
22 facilities).

1 16. Q. WHAT ARE THE CONTROLLING STANDARDS IF ONE ENTITY WITH
2 EMINENT DOMAIN POWERS SEEKS TO APPROPRIATE PROPERTY
3 FROM ANOTHER ENTITY WITH EMINENT DOMAIN POWERS?

4 A. Ohio Revised Code Section 4933.15 provides that "any company transmitting or
5 distributing electricity in the State for public or private use may enter upon any
6 land held by any individual or corporation, whether acquired by purchase,
7 appropriation proceedings, or otherwise, unless such land is owned essential to
8 the purposes of another corporation possession the power of eminent domain."
9 This provision restricts a public utility, specifically an electric company, from
10 acquiring land that is already devoted to a public use and which is owned or
11 possessed by a corporation having the power of eminent domain. The Geauga
12 Park District, for example, has such a power of eminent domain; therefore, its
13 lands could not normally be appropriated by a public utility as a matter of
14 statutory law. This is specifically addressed in Section 1545.11 of the Ohio
15 Revised Code. There is also a series of cases that address what is essentially a
16 balancing test to determine whether eminent domain can be used against another
17 entity that has the power. In rare occasions, if the property is owned by another
18 entity having the power of eminent domain but is not being used, the court will
19 impose a balancing test. The cases of *Blue Ash v. Cincinnati*, *Northwood v. Wood*
20 *County Regional Water and Sewer District* and *Cincinnati v. Louisville and*
21 *Nashville Railroad Co.* (citations omitted), generally held that government and
22 corporate entities having the power of eminent domain cannot use it against other
23 entities also having said power in order to protect the State from unnecessary
24 interference or the destruction of a public use that has already been acquired. It
25 should also be noted that a trial court case known as *Cleveland Electric*

1 *Illuminating Co. v. Scapell* maintains a specific holding supporting a park
2 district's effort to prevent a public utility from acquiring land from a park. In that
3 case the court ruled that "the priceless health and welfare of the 3,000,000
4 Ohioans to whom the park is accessible defeat the right of the utility to
5 appropriate through eminent domain." *Cleveland Electric Illuminating Co. v.*
6 *Scapell* (1974), 41 Ohio Misc. 107 at 112.

7 17. **Q. UPON WHAT BASIS DO YOU MAKE YOUR PRECEDING ANSWER?**

8 A. Obviously, in my general practice but also some of the cases and statutes that are
9 cited in the answer.

10 18. **Q. WHAT HAVE YOU BEEN ASKED TO DO FOR THE GEAUGA COUNTY**
11 **PARK DISTRICT IN THIS MATTER?**

12 A. I was asked to opine whether or not if FirstEnergy were to apply for a certificate
13 to construct the route proposed by C.A.R.E and if it were given approval by the
14 Ohio Power Siting Board to install and maintain a 138 kV overhead transmission
15 line within all or a portion of the Maple Highlands Trail, and the Park District
16 refused to provide the utility company with easements to do so, could FirstEnergy
17 appropriate the necessary right-of-way from the Park District by eminent domain.

18 19. **Q. WHAT DID YOU DO IN ORDER TO ENTER SUCH AN OPINION?**

19 A. I examined the plans and location maps of the Geauga County Park District and
20 the Maple Highlands Trail. I also reviewed the locational considerations for the
21 utility company. I have also personally inspected the area that could be impacted
22 by these power lines. I was asked to determine whether the utility company could
23 in effect install such a transmission line on property owned by the Geauga Park
24 District if the latter did not agree.

1 I reviewed the applicable sections of the Ohio Revised Code. I also reviewed
2 some of the case law which I am familiar with and did some additional research
3 concerning the applicable sections of Chapter 1545 of the Ohio Revised Code as
4 well as Chapter 163 of the Ohio Revised Code. I also reviewed Nichols Treatise
5 on Eminent Domain and did some Lexis research to update some of the case law
6 that I have had some familiarity with over the years.

7 20. Q. WHAT DO YOU UNDERSTAND THE UNDERLYING FACTS TO BE
8 WITH REGARD TO FIRSTENERGY'S ABILITY TO APPROPRIATE
9 ANY OR ALL OF THE MAPLE HIGHLANDS TRAIL FROM THE PARK
10 DISTRICT IN ORDER TO INSTALL A 138kV OVERHEAD SINGLE
11 POLE TRANSMISSION LINE?

12 A. The underlying facts are as follows: The Maple Highlands Trail is a linear park,
13 100 feet in width. In the approximate center, running its full length of 8.2 miles is
14 an 8-foot-wide paved trail constructed on a former railroad embankment. This
15 park traverses rural countryside and few homes or other buildings are even visible
16 from the trail. Only in the City of Chardon itself does one see homes and other
17 buildings to any great extent. The park's paved trail is surrounded for most of its
18 length on either or both sides by forests, wetlands, or open meadows or fields.
19 The trail has a number of environmentally sensitive areas and species along it. It
20 is widely used by the general public for biking, hiking, and peaceful enjoyment of
21 nature.

22 If the C.A.R.E. proposal were to be adopted to place the line on the Maple
23 Highlands Trail, the 138 kV power line would be on 80-foot-tall wooden poles. It
24 is my understanding from the response to Interrogatory 16 to the Staff's First Set
25 of Interrogatories to the Applicants that there would be a total of about 98 poles
26 placed along the trail. Approximately 35 of these poles would be within several

1 feet of the trail pavement, and 20 more poles about 6 feet off the pavement. The
2 power line itself would occasionally traverse directly over the trail, as the poles
3 would switch from side to side in order to accommodate curves and other features
4 such as wetlands. The utility would require a 60-foot-wide clearing of vegetation
5 from the centerline, which means many trees or tree cover would need to be
6 removed or cut back substantially. I also understand that maintenance roads
7 would have to be constructed at various locations to accommodate future utility
8 maintenance needs.

9 Another important fact is that any route for this type of electrical transmission line
10 has to be approved by the Ohio Power Siting Board.

11 **21. Q. WHAT ARE THE KEY FACTORS WHICH WILL DETERMINE**
12 **WHETHER OR NOT AN APPLICANT, SUCH AS FIRSTENERGY**
13 **WOULD BE ABLE TO SUCCEED IN SUCH AN APPROPRIATION?**

14 **A.** FirstEnergy would have to demonstrate that it has authorization to acquire the
15 property either expressly or by necessary implication. Presumably, approval of
16 this route by the Ohio Power Siting Board would satisfy this requirement. The
17 next area of inquiry would be whether FirstEnergy's installation of the power
18 lines would interfere with the Park District's use of its property to such an extent
19 that it would be tantamount to destroying the park.

20 **22. Q. WHAT IS YOUR UNDERSTANDING OF HOW THIS TRAIL IS**
21 **CURRENTLY USED BY THE PUBLIC?**

22 **A.** The Geauga Park District has made extensive improvements to the trail and it is
23 my understanding that the trail is very actively used by the community for
24 walking, hiking and significant bicycling.

1 23. Q. **HOW DID YOU REACH THIS UNDERSTANDING?**

2 A. I reached this understanding by reviewing the testimony of Tom Curtin, Executive
3 Director of the Geauga Park District and by talking to other colleagues that live in
4 Geauga County and are familiar with the bike trail. I also personally inspected
5 the bike trail previously and recently. I am also well aware of the increased
6 interest in bicycling. More and more individuals prefer to ride bicycles on bicycle
7 trails rather than confront the inherent dangers of bicycling in the public right of
8 way. I also reviewed aerial maps and photos.

9 24. Q. **WHAT IS YOUR UNDERSTANDING OF WHAT THE PROBABLE
10 IMPACTS WOULD BE ON THE PUBLIC'S USE OF THIS PARK IF THE
11 PROPOSED C.A.R.E. TRANSMISSION LINE WERE INSTALLED
12 WITHIN THE BOUNDARIES OF THE MAPLES HIGHLANDS TRAIL?**

13 A. First and foremost, the bucolic and aesthetic quality of the Maple Highlands Trail
14 would be substantially diminished if such transmission lines were installed. In
15 addition, without a careful wetlands delineation and some historical analysis of
16 the forested areas, the environmental consequences to the Park District and the
17 surrounding environs could be very detrimental. The aesthetic impact is difficult
18 to quantify; however, it would also be substantial.

19 25. Q. **HOW DID YOU REACH THIS UNDERSTANDING?**

20 A. I reached this understanding in part by researching the area and inspecting the
21 property. I have also looked at Tom Curtin's testimony and his exhibits. I should
22 add that I have, as a member of the Cleveland Planning Commission, been active
23 in supporting improvements to the Cuyahoga Valley Towpath Trail. One of the
24 most difficult aspects of improving that bicycle trail is the preservation of natural
25 landscaped areas and the inclusion of landscaped areas that are located in

1 industrial and developed portions of the Cuyahoga Valley. I therefore conclude
2 the probable impacts to the Maple Highlands Trail I just described are true and
3 accurate.

4 26. Q. IN LIGHT OF THE NATURE OF THE USE AND CHARACTERISTICS
5 OF THIS PARK PROPERTY AND IN LIGHT OF THE PROBABLE
6 IMPACTS OF C.A.R.E.'S PROPOSED OVERHEAD TRANSMISSION
7 LINE ON THIS PARK PROPERTY, AS YOU HAVE JUST DESCRIBED
8 YOUR UNDERSTANDINGS, DO YOU HAVE AN OPINION, TO A
9 REASONABLE DEGREE OF LEGAL CERTAINTY, WHETHER OR NOT
10 FIRSTENERGY OR ANY APPLICANT WOULD BE ABLE TO
11 SUCCESSFULLY APPROPRIATE ANY OR ALL OF THIS
12 PARTICULAR PARK PROPERTY FOR AN OVERHEAD SINGLE POLE
13 TRANSMISSION LINE ON THE MAPLE HIGHLANDS TRAIL?

14 A. My opinion to a great degree of legal certainty is that the FirstEnergy
15 transmission lines could only be installed through negotiation with the Park
16 District. The land is already devoted to a well-recognized public use and
17 important recreational amenity. FirstEnergy could not use the power of eminent
18 domain to appropriate property already devoted to park use. I conclude the two
19 uses here are incompatible; the very presence of the power line would
20 fundamentally destroy the purpose and use of this park. While biking and hiking
21 could certainly continue, the experience would be so drastically different without
22 the existing scenery and unspoiled landscape, the public purpose would be ruined.
23 As such, eminent domain would be unavailable to the utility company. I believe
24 this opinion is supported not only by various sections of the Ohio Revised Code
25 but also case law including several cases at the Court of Appeals level as well as
26 the Ohio Supreme Court.

1 27. Q. HOW DID YOU REACH SUCH AN OPINION?

2 A. I did appropriate legal research and factual research concerning the Park District.
3 In addition, my background as a land use lawyer also gives me the benefit of
4 studying such matters in reaching the above opinion and conclusion.

5 28. Q. WHAT WOULD FIRSTENERGY OR ANY APPLICANT HAVE TO
6 DEMONSTRATE IN A COURT PROCEEDING IN ORDER TO
7 SUCCESSFULLY APPROPRIATE PROPERTY FROM THE MAPLE
8 HIGHLANDS TRAIL TO BUILD AND MAINTAIN THIS
9 TRANSMISSION LINE?

10 A. First, the electric utility applicant would have to have evidence that the property is
11 not used for a public purpose. The applicant could also fall back to a secondary
12 position that the trail is not used extensively by the public. As a consequence, if
13 the balancing tests were applied, then the electric utility applicant would have to
14 show that installation of the transmission line would outweigh the use of the
15 subject property as no longer being devoted to a public use. This latter argument
16 would normally be found on properties owned by the public but no longer used.
17 This is simply not the case with the Maple Highlands Trail; consequently, I don't
18 see how an electric utility applicant could logically or legally make such an
19 argument to be able to acquire the property by eminent domain.

20 29. Q. HAVE YOU HAD AN OPPORTUNITY TO REVIEW THE OPINION
21 MEMO CREATED BY THE LAW FIRM PORTER WRIGHT FOR ITS
22 CLIENT FIRSTENERGY WHICH WAS PROVIDED TO THE GEAUGA
23 PARK DISTRICT IN THIS MATTER?

24 A. Yes.

1 30. Q. DO YOU BELIEVE IT GIVES A REASONABLE ASSESSMENT OF THE
2 STATUS OF THE LAW ON EMINENT DOMAIN WITH REGARD TO
3 THE QUESTION OF APPROPRIATING SOME PORTION OF THE
4 MAPLE HIGHLANDS TRAIL?

5 A. I generally agree with the conclusions in the legal memorandum prepared by the
6 Porter Wright law firm and would conclude that the likelihood of FirstEnergy
7 being able to appropriate the land within the Highlands Trail would be difficult if
8 not legally impossible.

9 31. Q. HAS ANYTHING IN THE RECENTLY ADOPTED STATUTES IN OHIO
10 PERTAINING TO EMINENT DOMAIN LAW CHANGED, IN YOUR
11 OPINION, THE CASE LAW PRECEDENTS WHICH WOULD BE
12 APPLICABLE TO THIS PARTICULAR APPROPRIATION ISSUE?

13 A. While there have been significant changes in the eminent domain law, there is
14 nothing that would effectively change my opinion in this matter. I would also
15 state that the issue at hand would be presented to a judge -- not a jury. While
16 there has been a wholesale change in various sections of Chapter 163 of the Ohio
17 Revised Code, as well as some recent Supreme Court decisions in Ohio, none of
18 those changes would affect my opinion in this matter or would affect the
19 proceedings significantly.

20 32. Q. DOES THIS CONCLUDE YOUR TESTIMONY?

21 A. Yes it does.