

**FILE**

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BEFORE THE  
OHIO POWER SITING BOARD

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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 )

PUCO

Case No. 07-0171-EL-BTX

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**APPLICANTS' MOTION TO EXCLUDE  
TESTIMONY OF KATHLEEN MCGEE**

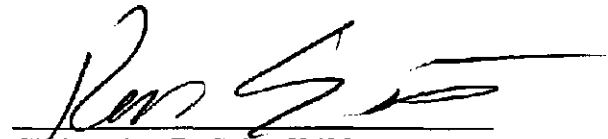
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**I. Introduction.**

Intervenor Citizens Advocating Responsible Energy ("CARE") has named Kathleen McGee as a witness for the adjudicatory hearing in the above-captioned matter. In accordance with the Administrative Law Judge's order, CARE filed Ms. McGee's prepared direct testimony. Based on a review of that testimony, Applicants American Transmission Systems, Inc. ("ATSI") and The Cleveland Electric Illuminating Company ("CEI") (collectively "Applicants") hereby move that McGee's testimony be excluded. As set forth more fully herein, there are multiple bases for the exclusion of McGee's testimony. CARE has proffered McGee as an "expert" witness; however her testimony lacks the requisite reliability for the admission of expert testimony under Ohio law. Further, the subject of McGee's testimony, which focuses solely on the alleged impact of the project on property value, is not relevant to the certification of environmental compatibility and public need for the project. Therefore, for the reasons set forth in the attached memorandum in support, Applicants respectfully request McGee be excluded as a witness and that her testimony be stricken from the record of this proceeding.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Schraff", written over a horizontal line.

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## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

On September 8, 2008, CARE filed the initial direct testimony of Kathleen McGee. The contents of this filing demonstrate that McGee's methodology fails to satisfy the standards required for expert testimony. Additionally, the subject matter of McGee's testimony has no relevance to the present issue of whether a certificate of environmental compatibility and public need should be granted for the project.

### II. LAW AND ARGUMENT

#### A. McGee's testimony does not exhibit sufficient reliability to qualify as expert testimony.

CARE has proffered Kathleen McGee as an expert witness on effect of the project on the property value of parcels adjacent to the Preferred and Alternate routes. Under Ohio law, proposed expert testimony must be deemed sufficiently *reliable* before it will be admitted. *See, e.g., Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 611. The United States Supreme Court addressed the issue of expert testimony reliability in the leading cases of *Daubert v. Merrell Dow Pharmaceuticals* (1993), 509 U.S. 579, and *Kumho Tire Company, Ltd. v. Carmichael* (1999), 526 U.S. 137. The Ohio Supreme Court has incorporated this reliability principle into state law. *See, e.g., Miller*, 80 Ohio St.3d at 611; *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶118. The key question in determining reliability is whether the reasoning or methodology underlying the expert's testimony is valid. *Miller*, 80 Ohio St.3d at 611.

McGee's prepared testimony, as filed, demonstrates none of the indicia of reliability required of expert testimony. McGee admits that she performed "no specific quantitative studies" of the financial impact of the proposed routes on specific properties along those routes.

(McGee Testimony, at 4). She has conducted no specific analysis of the properties along either the Preferred or Alternate routes and has indicated that the only basis for her speculative opinion is her experience, a vaguely defined “paired sale analysis” and her training (McGee Testimony, at 4 and 8). Ms. McGee has not even conducted a review of relevant and readily available peer-reviewed studies on the specific topic of the impact of transmission lines on property values.

Her assessment is purportedly based on a “paired sale analysis” that she has conducted in the past on unrelated *undeveloped* residential lots. (McGee Testimony, at 6.) Although McGee’s testimony contains a self-serving declaration that this is a “typical methodology” used for appraisals, there is no evidence offered to support this assertion nor is there any indication that a paired sale analysis of undeveloped residential lots is applicable to farm land, wetlands, homes, ponds and golf courses. Moreover, the description of this methodology is too vague to permit the Administrative Law Judge to determine the reliability of her analysis or its applicability to the properties along the preferred and alternative routes. McGee is not even sure how many paired-properties were in her study, referring generally to “ten to twelve” pairs. (McGee Testimony, at 7).

McGee describes the method as relying on a review of pairs of “similar” properties, one bearing an easement and one without an easement, sold within a “similar” time frame. (McGee Testimony, at 7.) There is no indication in the testimony, and indeed likely cannot be because of the lack of specific analysis of the properties along with the Preferred or Alternate routes, that her analysis is applicable to the properties along the Preferred or Alternate routes. This study purportedly found that the undeveloped residential lots with easements sold for 40 to 60 percent less than the other “similar” undeveloped residential lots. (Id., at 8.) The use of the term “similar,” however, does not provide sufficient detail to demonstrate reliability of the

methodology of this study nor is it sufficiently reliable to be applicable in this case. For instance, there is nothing in the testimony or the vague description of the undeveloped residential lots used in her analysis to suggest that her analysis is even remotely applicable to a 100 acre farm. Beyond noting that the pairs of undeveloped residential lots were generally located across the street from each other, she does not provide any other evidence of the relative similarity of the properties to each other or to the properties along the Preferred and Alternate routes. There is no description of any other factors that could have affected the value of the encumbered properties – for example the size of the lots, zoning classification, the quality of the land, or the characteristics of other neighboring properties. Likewise, there is no clarification of what was deemed to constitute a “similar” time frame for sale, particularly based on the recent volatility in the real estate market. While McGee’s methodology *might* be sufficiently rigorous and precise to meet the reliability requirements for expert testimony in some instances, it is not sufficiently reliable to be applicable in this case.

It bears repeating that McGee admitted that she has not done any specific analysis of the properties along the Preferred and Alternate routes. (McGee Testimony, at 4). Thus, even if her vaguely described paired sales analysis was done correctly and consistently with industry standards, a doubtful proposition due to the lack of specifics included in the testimony and her inability to even accurately indicate how many paired sales were in her analysis, she has not done any analysis that would allow her to extrapolate her results from a remarkably limited sample set to the properties along the Preferred and Alternate routes. Rank speculation is not reliable expert testimony. Thus, McGee cannot be qualified as an expert witness, and because she offers no testimony as a fact witness, her testimony should be completely excluded. This testimony is merely speculative, and testimony that is “too speculative to be of value” should be

rejected. *See, e.g., In re Estate of Love* (Franklin 1965), 1 Ohio App.2d 571, 577.

**B. McGee's testimony is not relevant to an assessment of the environmental compatibility and public need for the project.**

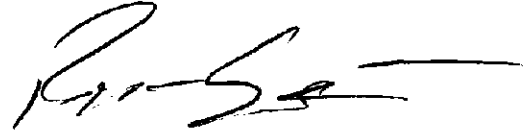
In addition to its lack of reliability, McGee's testimony, as set forth in the prefiled testimony, lacks any *relevance* to the current proceeding. The OPSB's rules provide that "relevant and material" evidence should be admitted. Ohio Adm. Code 4906-7-09(A). The sole focus of McGee's testimony is the impact of the proposed line on the value of the properties adjacent to the route. This testimony has no bearing on whether the application demonstrates a sufficient need for the project or complies with the environmental requirements for this type of facility.

McGee admits that her method of assessment is appropriate "to determine property values for the just compensation of property being taken through use of eminent domain." (McGee Testimony, at 5.) The testimony goes solely to the value of the property if the transmission line is approved. Thus, this evidence is neither "relevant" nor "material" to the subject matter of this proceeding. This type of evidence is appropriate, if at all, in a proceeding to determine the value that property owners should receive for the easements in question. The Administrative Law Judge should, therefore, exclude McGee's testimony and remove the prefiled testimony from the record.

**III. Conclusion**

For all of the foregoing reasons, Applicants respectfully request McGee be excluded as a witness in this proceeding and that her testimony be stricken from the official record.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Schraff", with a long horizontal flourish extending to the right.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Applicants' Motion to Exclude Testimony of Kathleen McGee" has been served upon the following persons by mailing a copy, postage prepaid, on September 10<sup>th</sup>, 2008, addressed to:

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