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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 Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Line Supply Project.	))))))	Case No. 07-171-EL-BTX

GEAUGA PARK DISTRICT'S MEMORANDUM CONTRA CITIZENS ADVOCATING RESPONSIBLE ENERGY'S MOTION TO STRIKE THE TESTIMONY OF ANTHONY J. COYNE

I. INTRODUCTION

Citizens Advocating Responsible Energy ("C.A.R.E.") filed a Motion to Strike ("Motion") that arose from the filing of the direct expert testimony of Anthony J. Coyne, Esq. ("Coyne's Testimony") on September 8, 2008 on behalf of the Geauga Park District. In its Motion, C.A.R.E. does not challenge Mr. Coyne's qualifications or expertise. Furthermore, there is no claim that Coyne's Testimony was incorrect factually or legally. Instead, C.A.R.E. simply challenges the appropriateness of such testimony on the grounds that it is both "irrelevant and improper" because it provides "improper legal opinions and conclusions." As explained in greater detail below, Coyne's Testimony is both relevant and proper expert testimony.

II. LAW AND ARGUMENT

A. Coyne's Testimony is relevant to (and necessitated by) the testimony of C.A.R.E. witnesses challenging the proposed and alternate routes for installation of a high-voltage overhead transmission line in Geauga County.

Coyne's Testimony is <u>only</u> relevant to this proceeding because of C.A.R.E.'s decision to intervene in this case and challenge the application of American Transmission Systems, Inc. and

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The Cleveland Electric Illuminating Company ("Applicants"). The heart of C.A.R.E.'s argument is that the Applicants' two proposed routes should be denied because the Geauga Park District's Maple Highlands Trail (or large portions of it) represents an allegedly better route. C.A.R.E.'s claim is legally and factually incorrect—and Coyne's Testimony is necessary to rebut C.A.R.E.'s contentions.

In his direct testimony, C.A.R.E.'s President, James Galm, identified the "advantages" of two additional alternate routes for the Applicants' transmission lines. First, Galm testified that the C.A.R.E.-proposed "Modified Rachel route," which involves miles of the Maple Highlands Trail, "fulfills the electrical needs" of the Applicants, and already has been "engineered, presented for application to the Board, approved by the Board."[1] Then, Galm testified that a "Ruth-Pinegrove Combination route," another route involving an even greater distance along the Maple Highlands Trail, is an even better alternative than the Modified Rachel route.[2] Galm, however, conveniently ignored the disadvantages of these routes, despite the fact that he even acknowledges that "ownership" of a large portion of the Modified Rachel route by the Geauga Park District is an "impediment" to its use.[3] Coyne's Testimony presents expert testimony on this point raised by C.A.R.E., not the Applicants. C.A.R.E. has posited no credible argument to show that Mr. Coyne has not properly presented testimony to rebut its unsubstantiated position.

Coyne's Testimony serves three distinct purposes, each of which is relevant to the testimony proffered by C.A.R.E. First, Coyne's Testimony explains the principles underlying the power of eminent domain and how this power differs when exercised by a public utility and political subdivision. Second, Coyne's Testimony identifies and explains the significant

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1 Initial Direct Testimony of James Galm, September 8, 2008 ("Galm Testimony"), pp. 13-14, lines 283-303.

2 Galm Testimony, pp. 15-16, lines 341-351 (describing his reasons for reaching such a conclusion).

3 Galm Testimony, p. 14, lines 305-311.

"impediment" identified in Galm's direct testimony—namely the legal standards that apply when one of two entities that holds powers of eminent domain (i.e., the Applicants as public utilities) would attempt to appropriate the property of another entity holding similar powers (i.e., the Geauga Park District). Finally, Coyne's Testimony proves that if the C.A.R.E.-proposed routes were properly analyzed, they would have to be rejected on the grounds that eminent domain would not be available to electric utility companies (i.e., the Applicants) with appropriating authority under Ohio Revised Code ("R.C.") Section 4933.15 for the purpose of acquiring significant portions of the Geauga Park District's Maple Highlands Trail from the Park District.

For the above-stated reasons, Coyne's Testimony is appropriate rebuttal to C.A.R.E.'s contentions. And, it must be noted that it was C.A.R.E.'s own testimony which made Coyne's Testimony both necessary and relevant.

B. Coyne's Testimony is proper expert testimony on an ancillary issue in this proceeding.

As the Administrative Law Judge will see from Coyne's Testimony filed on September 8, 2008, Mr. Coyne is an attorney with extensive background and expertise in the area of "eminent domain" law. In essence, Mr. Coyne opines in his direct testimony that eminent domain would not likely be an available remedy to an electric utility company with appropriating authority under R.C. Section 4933.15 for the purpose of acquiring significant portions of the Geauga Park District's Maple Highlands Trail from the Park District in order to install a high-voltage overhead transmission line on such trail.

Furthermore, even though Coyne's Testimony concerns a legal topic—the eminent domain powers of a utility under R.C. Section 4933.15 when applied to property owned by an Ohio statutory park district—Coyne's Testimony is entirely admissible in this case. That is because this particular legal topic is not the ultimate issue which this Board must decide. In

other words, if this Board were required to decide whether or not a utility company could indeed acquire Geauga Park District property by appropriation under R.C. Section 4933.15, one might properly argue that Coyne's Testimony is inadmissible because he is opining on the ultimate legal issue in that case. However, even in such an instance, Ohio Rules of Evidence Rule 704 permits such testimony addressing the ultimate issue under certain circumstances.

In this case Mr. Coyne is merely establishing a significant fact which is germane to a position espoused by C.A.R.E., not the Applicants. Mr. Coyne is opining that, under current Ohio law, the likelihood of a utility company being able to appropriate Geauga Park District property, which is being utilized and enjoyed by the public, is slim to none. This is a position which ought to be considered by the Board as a counter argument to C.A.R.E.'s urging the Board to refuse to approve the Applicants' proposed two routes because there are, allegedly, two other more attractive routes that C.A.R.E. claims were not sufficiently evaluated by the Applicants. Under these circumstances, Coyne's Testimony is admissible.

The sole case cited in support of C.A.R.E.'s contention is inapposite. In *Wagenheim v. Alexander Grant & Co.*, (1983), 19 Ohio App.3d 7, the 10th District Court of Appeals concluded that an accountant's expert testimony had been improperly admitted by the trial court because it was an "opinion relating to the law and was prejudicial to the rights of the defendant." In fact, the accountant testified about the legal duty owed by an accountant to his client to not disclose confidential information – the very question at issue in the lawsuit.

The *Wagenheim* case is distinguishable for three simple reasons. First, it involved an accountant rendering opinions outside the accountant's area of expertise. Here, Mr. Coyne is an attorney experienced in eminent domain law. And, as one Ohio appellate court noted, "when counsel needs to have an expert witness to testify as to a legal opinion, he must call upon a

fellow attorney."[4] Second, the testimony in the *Wagenheim* case was before a jury of laymen. Here, the testimony is before a well-versed administrative law judge who already has seen the testimony. Third, and finally, the expert testimony in *Wagenheim* involved the issue at the heart of the case. Here, Coyne's Testimony targets an ancillary issue requiring testimony solely because of C.A.R.E.'s prior testimony.

Furthermore, an analogy may be helpful to distinguish testimony that opines on factors to be considered in weighing the merits of a position of a party from an opinion that states an ultimate finding necessary to decide the case. For example, in a divorce case, where the court must determine how to divide the marital assets, one such asset might be an undeveloped parcel of land. The husband might claim the land is nearly valueless due to zoning considerations. The wife may claim the land is indeed valuable because a variance to the zoning regulations could likely be obtained. Under such circumstances, it would be helpful for the trial court to hear the expert testimony of a lawyer with zoning expertise to opine whether or not a variance could indeed be granted to make the asset more valuable. Such expert is not giving an opinion as to who should receive the property in the division of marital assets; the attorney is merely providing his expertise to assist the trial court in understanding how current zoning law might affect the ultimate utilization of the property.

Moreover case law supports this type of expert testimony. In *State v. Jackson*,[5] a defendant charged with securities violations objected to the introduction of expert testimony regarding the "state of securities law in Ohio" on the grounds that it involved an interpretation of the law. Rejecting this argument, the appellate court allowed the expert to testify about the "state

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[4] *State v. Decker* (1985), 11th App. No. 10-181, 1985 Ohio App. LEXIS 9998 (concluding that the trial court erred in failing to admit the expert testimony of an attorney regarding the accepted standard of care in pursuing an insanity defense).

[5] 9th App. No. CA 2754, 1994 Ohio App. LEXIS 1997.

of securities law in Ohio" before rendering his opinion whether certain agreements at issue in the case were in fact securities under Ohio law.

In reaching this conclusion, the appellate court first noted that, under Evidence Rules 702 and 704, the "trial court reasonably determined" that the expert's testimony "would assist the jury to understand the evidence and determine a fact in issue." The court also emphasized that the defendant did not argue that the expert testimony was "incorrect either factually or legally." Finally, the court cited to Evidence Rule 705 and concluded that, because the expert's "knowledge of the applicable securities law. . . provided the bases for rendering his expert opinion," it was admissible.

The rationale used in *State v. Jackson* is directly applicable to this proceeding before the Power Siting Board. Here, Mr. Coyne is testifying about the state of eminent domain law in Ohio. Like securities law, the law surrounding eminent domain is ever-changing and complex. As a result, Coyne's Testimony would assist the Board in understanding whether or not the Modified Rachel route or the Ruth-Pinegrove Combination route are indeed viable alternatives which would affect the approval of the Applicants' proposed route. Additionally, C.A.R.E. does not challenge Coyne's Testimony as either factually or legally incorrect. And, because Coyne's Testimony regarding the status of eminent domain law in Ohio serves as the basis for Mr. Coyne's opinion regarding the viability of the C.A.R.E.-proposed transmission line, it must be admissible.

C. The Commission is not confined by the Ohio Rules of Evidence.

C.A.R.E.'s rigid evidentiary arguments not only are misplaced, but ignore the fact that an administrative agency is "not stringently confined by the Rules of Evidence."[6]

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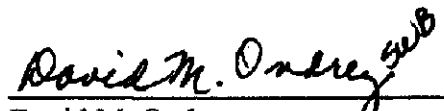
[6] *Greater Cleveland Welfare Rights Organization, Inc. v. PUCO* (1982), 2 Ohio St.3d 62, 67. *See also Ohio Bell Tel. Co. v. PUCO* (1984), 14 Ohio St.3d 49, 51.

Relying on this holding, the closely analagous Public Utilities Commission of Ohio ("Commission") recognized that, "[w]ithin the context of the discretionary powers vested in the Commission, the Supreme Court of Ohio has found consistently that the Commission, being an administrative body, **is not and should not be inhibited by the strict rules** as to the admissibility of evidence which prevail in courts." Emphasis added.[7] Based upon this principle alone, Coyne's Testimony should be admitted—and C.A.R.E.'s Motion to Strike should be denied.

III. CONCLUSION

For all the foregoing reasons, Intervenor Geauga Park District asks that C.A.R.E.'s Motion to Strike the testimony of Anthony J. Coyne, Esq. be dismissed.

Respectfully submitted on behalf of,
GEAUGA PARK DISTRICT



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[7] *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power & Light Company and Related Matters*, PUCO Case No. 86-07-EL-EFC (Opinion & Order dated February 18, 1987).

CERTIFICATE OF SERVICE

A copy of the foregoing was sent via ordinary U.S. mail and via electronic mail transmission on this 12th day of September 2008 to the following parties of record.

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