

FILE

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of an Application by :
American Transmission Systems, Inc. and : Case No. 07-171-EL-BTX
the Cleveland Electric Illuminating :
Company for a Certificate of :
Environmental Compatibility and Public :
Need for the Geauga County 138 kV :
Transmission Supply Project.

**REPLY POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE OHIO POWER SITING BOARD**

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INTRODUCTION

The purpose of the review by the Ohio Power Siting Board is to weigh the preferred and alternative routes proposed by the applicant, against the criteria established by R.C. 4096.10 (A) and the applicable rules. That process, as outlined by the statute and the rules, is focused on the preferred and alternative routes which are set forth by Applicants their application. While citing the OPSB rules at various locations throughout their Initial Brief, CARE has erroneously attempted to turn this process into one that focuses on the site/ route selection study rather than the actual alternatives proposed in the application.

Ohio Administrative Code 4906-15-03 does not require detailed evaluation of each of the routes evaluated in the site/route selection study nor does it require the detailed level of information that CARE discusses in their Initial Brief. The application (App. Ex. 1) includes in Appendix 1-03 Applicants' Route Selection Study. The only practical way to proceed, as was done in this case, is for the applicant to use an objective screening process to limit the alternatives. Apparently before ranking the hundreds of routes considered in the study, CARE

expected the Applicants to interview every landowner to determine whether they were using their land for recreation. This is clearly absurd. That is why the rules call for a preferred and an alternate route. This is a necessary cornerstone for the development of detailed information which allows for a focused review which is the pre-requisite for the determination of whether the statutory criteria are met and whether specific conditions are appropriate to reduce the impacts of the proposed project. The screening process is not the appropriate point to develop the full detailed evaluation required by rule for the preferred and alternate routes proposed in the application. Further, additional information about the details of the route selection process and evaluation of other potential routes were produced both in response to Staff Interrogatory 16 and in the testimony of Applicants' witnesses Ted Krauss, Aaron Geckle, and James Sears, and Applicants' Exhibits 14, 15, and 13.

More importantly, while citing to information that has not been admitted into evidence in this proceeding, CARE has ignored the recommended Staff Conditions (Staff Ex 3) and the Staff Report (Staff Ex 2) which analyze the impacts of the preferred and alternate routes in light of the applicable statutory criteria which the OPSB must use in acting on this matter. The arguments advanced by CARE ignore whether the imposition of the recommended conditions on the preferred route will reduce the adverse impacts of the proposed project so that the statutory criteria are met. Indeed, CARE's Initial Brief completely ignores the statutory criteria which are the basis for any OPSB ruling in this matter. Fundamentally, the OPSB will make its decision not on the application and its contents alone, but on the evidence admitted into the record in this adjudicatory proceeding measured against the statutory criteria set forth in R.C. 4906.10(A)

Ultimately the Board has to determine which alternative and associated conditions meet the applicable criteria set forth in 4904.10 (A). In this case Staff recommended the preferred

route combined with the conditions recommended by the Staff, which both clarify and reduce the overall impact of the project. The Recommended Conditions set forth in Exhibit A to Staff Exhibit 3, provide the means to do this. The Board should approve the preferred route with the Recommended Conditions.

ARGUMENT/STAFF CONDITIONS

A. The Socioeconomic and Land Use Impact of the Preferred and Alternate Routes Is Established By The Exhibits and Other Evidence Admitted In The Adjudicatory Hearing.

The position which CARE attempts to advocate with regard to agricultural land use is internally inconsistent. In essence the position advanced by CARE at pages 8-11 reflects the apparent view that farms need to be considered as both agricultural and commercial land uses. Clearly, they have to be treated as falling into one or the other. Further, the arguments advanced assume that the testimony of witnesses who appear to have little or no real understanding of the impact of having the proposed line cross their property will have little or no impact on their ability to operate their farms and derive income from those operations.

A concern has been raised that the proposed project does not adequately address agricultural impacts. Staff believes this concern is misplaced. The Staff Report identifies and quantifies the effect on agricultural land use in the Nature of Probable Environmental Impact section of the Staff Report of Investigation. Staff Exhibit 2 at 27, paragraphs 24 and 25. Indeed the Report identifies losses during construction and the problems associated with soil compaction both on productivity and drainage systems. Further the Report identifies problems associated

with access to the lines permanent loss of production from locations where the poles would actually be placed. Staff Exhibit 2 at 34.

The impact on agricultural use can be difficult to assess in advance. It cannot be known in advance, for example, whether installing the poles will damage drainage systems. Such damage is a possibility either during installation or later operation. If drainage systems are harmed, the Staff recommended that the applicant be required to repair the systems. Staff Exhibit 3 at paragraph 19. There is simply nothing more that can be done in this regard currently. As to the loss of production that might come with soil compaction the Board cannot determine how much damage, if any, will occur before the project is done. Whether soil compaction occurs is highly dependent on the equipment used and the soil conditions at the time. Tr. II at 29-30. The farmers themselves use equipment in the fields without apparent harm. Tr. II at 27-28. This assessment can only be done retrospectively. It would be a matter of assessing economic harm and is a matter to be addressed by a Court in a condemnation action. As to the harms associated with the company gaining access to the line, the Staff recommendations reduce the harm associated with the access to the extent possible. The Staff's recommended conditions include a bar on disposing of debris on agricultural land and the required removal of any temporary gravel and access road materials. Staff Exhibit 3 at paragraphs 20 and 21. The amount of productive land that will no longer be useable because of the poles themselves is, quite obviously, dependent on the final detail of the pole placement. Locating a pole a few feet in one direction or another may change this impact. Regardless of this however, the loss of economic value is not something that could be recompensed by this Board. This Board does not award damages. That would be a matter for a court in another proceeding.

In sum, the analysis in the case identifies agricultural impacts to the extent they are possible. The recommended conditions mitigate those potential impacts to the extent that they can be addressed in advance. In large measure, the economic impacts cannot be measured by this Board in advance, but even if they could, this Board does not award damages.

B. The Ecological Impact of the Preferred and Alternate Routes Is Established By The Exhibits and Other Evidence Admitted In The Adjudicatory Hearing.

The real issue presented is that the adjudication hearing is not limited to the four corners of the application. The issue to be determined is not simply whether the application failed to include some information that CARE has presented in testimony and exhibits which have been admitted into the record. Rather, the issue presented is whether the totality of the record evidence presented in the adjudication hearing is sufficient for the OPSB to make a decision on the criteria set forth in R.C. 4906.10(A) which are related to the issue of ecological impact. Those criteria are:

(2) The nature of the probable environmental impact;

(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;

(5) That the facility will comply with Chapters 3704, 3734, and 6111 of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

CARE's argument about compliance with OAC 4906-15-07 is fatally flawed. First, the argument is flawed because it is based on evidence which was not properly admitted into

evidence in the adjudicatory hearing. By way of example, much of the information and "lists" relied upon by CARE were generated by Dr. Bissell. However, CARE made a calculated decision not to present Dr. Bissell to provide expert testimony in the adjudication proceeding. It is clearly not appropriate for CARE to argue that the September 16, 2008 letter sent to the Public Utilities Commission by Jim Bissell rises to the level of evidence admitted in this adjudication hearing. The same is true of the animal report of Dr. Matson included with the same letter.

Second, CARE's argument is fatally flawed because it ignores all of the information generated and provided after the filing of the application. Just because an individual can testify at hearing and point to a small seedling of black walnut that was not explicitly referenced in the application does not mean that a route cannot be certificated. Indeed, the result of such an argument would be that nothing would ever be certificated because rather than considering the application together with all of the evidence admitted in the adjudication hearing the contents of the application would be the only thing that mattered. Obviously this would mean that applications would have to be constantly revised. If there is some naturally occurring vegetation that is not reflected in the application, CARE has had the opportunity to present information about that species and its claim about any impact. That was the purpose of this entire proceeding.

Third, CARE's argument ignores the analysis of impacts set out in the Staff Report. One example is the yellow-bellied sapsucker. The potential presence of yellow-bellied sapsucker along the route was not, as CARE appears to claim at page 13, newly raised by a resident at the public hearing. Rather, the potential presence of this species and the impact of the project were discussed in the Staff Report which was issued August 12, 2008. The nature of the

impacts to this state endangered species was discussed at page 27. Staff Ex. 2p27. The Staff Report specifically included recommended condition 13, at page 45 which required the Applicant to perform a habitat suitability assessing for nesting/breeding yellow-bellied sapsuckers and precluded clearing or construction in these areas before Staff review and approval of the assessment. Staff Ex 2 p45. The Staff's rebuttal testimony not only recommended a even more specific approach to protection of the yellow-bellied sapsuckers including habitat surveys and mitigation of the potential impact that may occur from tree removal. Staff Ex 3 at p2 L13-14 and Exhibit A, p2, Condition 13(B).

Another example where CARE has continued to ignore the Staff Report and the record evidence generated by the Staff appears in CARE's reference at page 13 to description of the naturally occurring plant species that may be impacted by the project, including the requirements for description of impacts from construction, operation and maintenance, and mitigation procedures.

The Staff Report has already discussed these requirements at length both in the portion of the Staff Report related to determination of the nature of the probable environmental impact, and the portion of the Staff Report related to determination of the minimum adverse environmental impact. Staff Ex 2 at pages 24-36. Indeed, the Staff Report initially recommended conditions that were specifically aimed at mitigation of the impact to plant species including *inter alia* Conditions 15, 16, 18, 28, 29, 30; mitigation of impacts to specific identified natural areas including Condition 31; proper control and disposal of all construction debris including Conditions 20, 21, 22, 29; reflection of the impact of operation and maintenance, Conditions 29, 30.

As previously discussed, the Staff's rebuttal testimony explained that these conditions were changed to clarify both some of the language and the Applicant's responsibilities under those conditions. As they appear in Staff Exhibit 3; Ex A, these Recommended Conditions continue to require that the Applicants implement the mitigative measures described in the application, supplemental filings and these conditions. Recommended Condition 3. Staff Ex 3, at Ex A p1. Recommended Condition 12 is related to the use of herbicides in proximity to surface waters, including wetlands, specifically outlines construction and right of way maintenance provisions while the OPSB has jurisdiction and requires full compliance with applicable law after jurisdiction ends. Staff Ex 3, at Ex A p2. Recommended Condition 15 continues to require flagging endangered plant species, generally prohibits use of herbicides in certain areas and requires the submission of a threatened and endangered species protection plan. Staff Ex 3, at Ex A p3. Condition 16 continues to require that when threatened or endangered species are confirmed not only must Staff and other regulatory agencies be informed but activities that could have an adverse impact must halt until there is agreement on an appropriate course of action. Staff Ex 3, at Ex A p3 Recommended Condition 18 expands and clarifies the snowshoe hare condition recommended in the Staff Report requiring both the identification of the area known to support snowshoe hare, requires a further plan, and prohibits certain types of impacts to the animal's habitat. Staff Ex. 3, at Ex. A p3.

Recommended Condition 28 continues to require the submission for Staff review and approval of a detailed tree clearing plan which protects compatible trees and shrubs from damage during construction, explains how clearing will minimize removal of woody vegetation and requires priority be given to protecting vegetation in wetlands. Staff Ex. 3, at Ex A p4. Condition 29 continues to limit clearing in riparian areas. Staff Ex. 3, at Ex A p.4.

Recommended Condition 30 continues require a long term plan applicable beyond construction to operation and maintenance for delineating certain sensitive areas by signage in the field and markings on plans so that they can continue to be protected from clearing as part of Applicant's long-term maintenance activities. Staff Ex 3, at Ex A p4. Further, Recommended Conditions 20, 21, 22 remain unchanged. Staff Ex 3, at Ex A p3-4. Finally, Recommended Condition 23 continues to require that Applicants obtain and comply with all applicable permits and authorizations prior to construction.

The decision-making criteria for the OPSB in terms of ecological impact is not based solely on what the Applicant provided in the application. Rather, the question is whether upon considering the entire record, the OPSB can determine that the applicable provisions of R.C. 4906.10(A) are met.

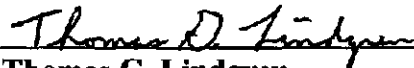
CONCLUSION


Applicants have identified a need for additional transmission capacity in the project area. That need is significant and not contested. After a thorough investigation, the Staff has developed a number of conditions that, if adopted by the Board will minimize environmental and other impacts to the project site and surrounding area. Based upon the foregoing, the Staff believes that the record in this case supports an affirmative Board finding on each of the criteria in R.C. 4906.10. Intervenor CARE has not shown otherwise. The Staff recommends that, if a certificate is issued to applicants for this project, the Board require applicants to comply with all conditions contained in Staff Exhibit 3.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Reply Post-Hearing Brief, submitted on behalf of the Staff of the Ohio Power Siting Board, was served by regular U.S. mail, postage prepaid, hand-delivered, or delivered via electronic mail, upon the following parties of record, this ~~23~~²⁴ day of October, 2008.


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