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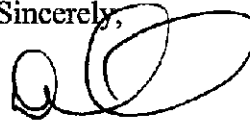
Re: In the Matter of: The Application of American Transmission Systems
Incorporated and the Cleveland Electric Illuminating Company
Case No: 07-0171-EL-BTX

To Whom It May Concern In the PUCO Docketing Division:

Enclosed for filing is the reply brief of the Village of Orwell. I have served the parties electronically and included 11 hard copies with this filing. Please time-stamp the extra copy of the pleading and return to me in the pre-paid pre-addressed envelope provided.

Thank you for your cooperation in this matter.

Sincerely,



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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)	

**REPLY BRIEF OF THE VILLAGE OF ORWELL IN SUPPORT OF
CERTIFICATION OF GEAUGA COUNTY 138 KV TRANSMISSION LINE
SUPPLY PROJECT**

Pursuant to the Directive of the Attorney Examiner, The Village of Orwell files its reply brief in the instant action.¹

I. INTRODUCTION

This is a case about providing reliable electric service to the citizens in Geauga and Ashtabula counties, including those 1,500 citizens residing in the Village of Orwell. The resolution of this matter and certification of the project is essential to provision of such service. The affected citizens have been given ample opportunity to critique the Application and voice concerns. No further delay is warranted as there is no legal basis for more procedure.²

¹ This brief is timely filed as additional time was granted pursuant to the teleconference between Administrative Law Judge Stoneking and the parties in this matter on 10/20/08.

² O.A.C. 4906 et. seq.; O.R.C. 4906 et seq.

The viable alternatives for the project have been thoroughly researched and the time has come to certify the project so as not to further delay reliable power for the citizens of Orwell. The record presents sufficient evidence and the Ohio Power Siting Board Staff supports the necessary findings for certification of this project.³ Indeed, expedient certification of this project is warranted.

II. ARGUMENT

A. OPPONENTS HAVE ADVANCED NO COMPELLING FACTUAL OR LEGAL ARGUMENTS THAT JUSTIFY FURTHER DELAY IN CERTIFICATION

1) CARE'S READING OF THE STATUTE IS FLAWED

The statute governing this stage of the proceedings provides the Board a clear directive. The Power Siting Board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the Board considers appropriate.⁴ The statute also provides an unambiguous analytical framework for evaluation of the record consisting of eight essential elements.⁵ Applicant

³ OPSB post-hearing brief at 6.

⁴ O.R.C. 4906.10(A).

⁵ The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:

(1) The basis of the need for the facility if the facility is an electric transmission line or gas or natural gas transmission line;

(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;

(4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;

(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

demonstrated that each element in the statute is satisfied. And OPSB staff agrees. Ohio Power Siting Board Staff has evaluated each statutorily required finding in the context of this case and has recommended certification of the project.⁶

Staff correctly points out that the Board is asked to apply its judgment and expertise to evaluate the merits of the application.⁷ Yet opponents to certification of the project take aim at details of the Application which are not essential to the findings necessary for certification.⁸ Opponents would have the Board give weight to minutiae without considering, as required by law, the merit of the application as a whole.⁹

2) CARE PRESENTS ARGUMENTS IRRELEVANT TO CERTIFICATION

Opponents have set forth a series of arguments based on the Ohio Administrative Code.¹⁰ These arguments focus on the contents of the application as they relate to the application instructions.¹¹ The Administrative Code provisions, as a matter of law, are not compelling with regard to the ultimate findings necessary for certification of this

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.

(6) That the facility will serve the public interest, convenience, and necessity;

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

⁶ OPSB Staff post-hearing brief at 20.

⁷ OPSB Staff post-hearing brief at 5.

⁸ O.R.C. 4906.10. See also OPSB Staff post-hearing brief at 4.

⁹ O.R.C. 4906.10; CARE initial post-hearing brief at 3.

¹⁰ Opponents cite O.A.C. 4906-15-03, O.A.C. 4906-15-06(C), O.A.C. 4906-15-03(A)(1)(g), O.A.C. 4906-15-07 to further their arguments.

¹¹ CARE initial post-hearing brief at 4-16.

project.¹² While the Village of Orwell is opposed to consideration of these factors to determine certification, for thoroughness, the brief will proceed.

Opponents¹³ take aim at the:

- a. route selection study;
- b. analysis of the socioeconomic and land use impacts of the project;
- c. qualitative factors considered;
- d. ecological analysis;
- e. evaluation of other routes;
- f. alleged obstructionist tactics of the applicants; and
- g. other distribution methods.

a. Route Selection Study

CARE asserts the land use was not properly evaluated.¹⁴ Even if CARE's assertion - that agricultural land use and recreational land use was not considered - is true, it is without basis to find that the objective study was somehow flawed in its entirety. The notion that a reasonable study could somehow be wholly flawed due to a single land use considerations is absurd. A given use may not be highlighted to the opponents' liking, but it certainly does not result in a meritless study. It seems that nothing short of a completely new route selection study

¹² OPSB Staff post-hearing brief at 4. *See also* O.R.C. 4906.10.

¹³ CARE has presented these arguments in their redacted version of the initial brief filed October 20, 2008. The final point addresses distributive generation and was presented by Intervenor George K. Davet. *See* CARE initial post-hearing brief at 4-26 and Davet initial post-hearing brief at 3-4.

¹⁴ CARE initial post-hearing brief at 4-8.

which highlights only those land use factors which will result in routes away from opponents' land will satisfy CARE.

Perhaps a reasonable approach would consider which elements of the route selection study serve as proxy for agricultural and recreational land use. Indeed, when CARE's concerns about agricultural and recreational land use gave rise to a potential alternative route, it was evaluated. The three alternative routes promoted by CARE were evaluated at least three separate times.¹⁵ Each evaluation confirmed the validity of the Applicant's initial route selection study.¹⁶

Ohio Power Siting Board Staff noted:

"the initial route screening and final scoring provided an objective evaluation tool for comparison of all practicable routes within a large study area. The subsequent visual investigations, route adjustments, detailed ecological evaluations, comments from the local community, and consideration of other qualitative factors contributed to the final selection of routes. In Staff's opinion, the Applicant's route selection process was reasonable."¹⁷

The Applicants have evaluated opponents' route proposed routes at presumably great cost and certainly further delay for the citizens of the Village of Orwell. There is no basis in the record to discount the validity of the route selection process.¹⁸

b. Analysis of the Socioeconomic and Land Use Impacts of the Project

¹⁵ CARE suggested Route 11, 322/Mayfield Road, and what has been called the modified Rachel Route as alternatives to the Preferred and Alternate routes identified in the Applicant's route selection study.

¹⁶ Geckle rebuttal testimony at 2-14. *See also* Geauga Park District post-hearing brief at 5.

¹⁷ OPSB Staff Report of Investigation at 4.

¹⁸ OPSB Staff Report of Investigation at 4.

CARE's belief that land use impacts were overlooked is simply unfounded.¹⁹ Each route in the study was evaluated numerically based on 27 quantifiable ecological, cultural, land use, and engineering attributes.²⁰ Even if CARE's definition of commercial use in the context of the agricultural and recreational land is accurate, there is no basis for finding that the quantifiable attributes did not incorporate such uses.

CARE's advocacy for consideration of recreational land uses and simultaneous advocacy for certification along the modified Rachel route are patently inconsistent. The modified Rachel route traverses the Maple Highlands Bike trail which is used for recreational purposes.²¹ If CARE's argument for further consideration of recreational land use prevails, their position that the modified Rachel route is an option becomes untenable.

It seems that only a heightened consideration of the private recreational land use of CARE members will satisfy this opponent. Even so, allowing disproportionate consideration for the private recreational land use of CARE members is not guaranteed to change the overall outcome of the route selection study. The Applicants presented their proposed and alternate routes based on the route selection study.²² CARE proposed three additional routes along the modified Rachel Route, 322/Mayfield, and State Route 11.²³ Consideration of the additional routes did not change the ranking order of the referred or alternate

¹⁹ CARE initial post-hearing brief at 8-12.

²⁰ OPSB Staff Report of Investigation at 3.

²¹ Geauga Park District post-hearing brief at 1.

²² Geckle rebuttal testimony at 1; Geckle initial testimony at 38-43; Geckle initial testimony appendix 03-1.

²³ See *supra* note 15 and accompanying text.

routes. Regardless, any further considerations will certainly result in further delay in providing reliable power to the Village of Orwell and its 1,500 citizens.

c. Qualitative factors considered

CARE presumes a “detailed description of each and every factor that was considered in selecting the Preferred and Alternate Routes”²⁴ is an essential prerequisite to disrupting the lives of the residents of Geauga County. CARE emphasizes the project will be disruptive to CARE members yet fails to recognize that the absence of reliable power is also disruptive to the lives of the citizens of the Village of Orwell. Continued delay of the project for the purposes of providing such a detailed report, as it is not required by law, is unjustified.

The Village of Orwell is satisfied with the Staff’s determination that qualitative factors were incorporated into the route selection process.²⁵ Applicant witness Geckle even detailed the steps further in rebuttal testimony and highlighted the undesirable nature of a CARE’s suggested route because it crossed the Chagrin State Scenic River.²⁶ Further, CARE was provided with explanation of the qualitative considerations in Geckle’s rebuttal testimony.²⁷

d. Ecological analysis

CARE alleges that the Applicants are required to provide a detailed list and description of each species of animal and piece of vegetation in existence in

²⁴ CARE initial post-hearing brief at 12.

²⁵ OPSB Staff Report of Investigation at 4.

²⁶ Geckle rebuttal testimony at 6.

²⁷ Geckle rebuttal testimony at 5-6 and 12-13.

the affected area.²⁸ It seems that only an omniscient report detailing the entirety of the flora and fauna to be affected by the project will satisfy CARE's concerns about the ecological analysis. OPSB Staff justifiably recognizes that it is impracticable to identify each and every plant and animal in the affected area and has therefore recommended that the Applicants have an environmental specialist on site at all times during construction in or near an ecologically sensitive area.²⁹ Additionally, OPSB Staff determined the Applicant took many steps when planning its Preferred Route that result in a reduction to potential plant and wildlife impacts.³⁰ Thus, delay of certification for lack of ecological analysis is not warranted.

e. Evaluation of other routes

CARE insists on arguing for routes that have been evaluated and dismissed, this time, under the veil of O.R.C. 4906.10(A)(3). The staff appropriately weighs the accepted proposed routes under this statute in terms of which presents the minimum adverse environmental impact.³¹ The statute requiring essential findings is not an invitation for CARE to reevaluate the route selection study in its entirety. As such, the Village of Orwell maintains that the Preferred and Alternate routes were selected according to a reasonable process and there is no justifiable reason to further delay the certification of Applicant's project.

²⁸ CARE initial post-hearing brief at 13-16.

²⁹ OPSB Staff initial post-hearing brief at 14, Staff condition #5.

³⁰ OPSB Staff Report of Investigation at 31.

³¹ OPSB Staff initial post-hearing brief at 9.

f. Alleged obstructionist tactics of the applicants

CARE alleges in their brief that Applicants used obstructionist tactics.³²

Such an allegation is wholly irrelevant to certification in this matter. However, as a result of CARE's recent inability to separate obstructionism from confidentiality, the filing of this brief and these proceedings have been further delayed.

The citizens of the Village of Orwell are still in need of reliable power. In fact, the CARE's insistence on impracticable route considerations have made it even more burdensome, not only on the applicants and presumably the resources they have dedicated to this project, but more burdensome than necessary on the 1,500 citizens of the Village of Orwell. In any event, CARE's allegations are not a basis to deny or delay certification of this project.

g. Other distribution methods

Intervenor George K. Davet asserts "with the preferred route Applicant has chosen, Applicant has failed to adequately address or mitigate the negative impact that the power lines will have on Davet's use of his farm, whether those impacts are to his aesthetic enjoyment, health, or agricultural use."³³ Surely mitigation cannot occur before the project has begun. Further, there is nothing in the record to support that the route selection study was less than adequate.³⁴

³² CARE initial post-hearing brief at 3.

³³ Davet initial post-hearing brief at 6.

³⁴ See *supra* note 17 and accompanying text.

Davet opines that further study might demonstrate that aesthetics, health concerns, environmental impacts, and distributed generation considerations might serve as sources for alternative considerations to the proposed and alternate routes. However, this testimony is of limited value to the Board because Mr. Davet has not conducted such studies.³⁵ The time has passed for such philosophical speculation and any argument based on a study that has yet to be conducted is misplaced.

OPSB Staff is satisfied that distributed generation, demand side management, and efficiency measures are not feasible alternatives to this project.³⁶ Despite the Applicant's explanation that distributed generation is not a viable solution³⁷ and an absence of any scientific study confirming health concerns, intervenor Davet continues to believe there must be some other solution.

It is not the responsibility of the applicant to perform a ubiquitous search for a solution that will have zero impact whatsoever on anyone or anything. OPSB Staff notes that it would be impossible for the Board to review all possible routes, there is no end to them.³⁸ Therefore, the Village of Orwell encourages the immediate certification of the project.

³⁵ See 06-1358-EL-BGN Opinion, Order and Certificate issued March 3, 3008 at 30. In this recent contentious Electric Generation Station Siting case, the speculative arguments made by opponents were not persuasive as the studies they suggested could be completed had not been performed. *See also* Davet initial post-hearing brief at 3.

³⁶ OPSB Staff post-hearing brief at 8.

³⁷ Sears rebuttal testimony at 12.

³⁸ OPSB Staff post-hearing brief at 2.

Davet's assertion – that the Applicants “failed to provide adequate explanation for why the lines need to go through the middle of Davet's property, rather than along one of its borders or through the tree lines”³⁹ – is false. Davet's farm is depicted on Figure 04-1D, which is attached as an appendix to the Krauss Direct Testimony and which is provided in the Application. Figure 04-1D depicts the line as entering Davet's land at point “OO” on Moseley Road, and running east from that point to point “PP”, and thence north through the northern boundary of Davet's land and on to point “QQ.” Comparison of the referenced part of Figure 04-1D against the map that is attached to Davet's Direct testimony⁴⁰ establishes that the depiction on Figure 04-1D matches the land that Davet identifies as his land. Figure 04-1D also provides additional information about Davet's land – namely, that there are Ohio Wetland Inventory-designated wetlands on Davet's land, generally on both sides of the proposed right-of-way. These wetlands are further described on page ten (10) of Appendix 06-1 of the Application, where the description of the route segment between points PP and QQ on the preferred route notes that there is “one wetland that is about 50 feet to the west of the route [and] a pond is located about 370 feet to the east of the route within the same agricultural field.” Comparison of this text against the Segment PP-QQ that is depicted on Figure 04-1D establishes that the references to the wetland to the west of the line and the pond to the east are references to wetlands on the Davet land. Thus, contrary to the assertions in Davet's testimony and

³⁹ Davet IB, p. 5. Other points in Davet's materials that suggest that the proposed routing over Davet's land are Davet IB, pp. 1, 6 and Davet Direct, pp. 2 (Q/A 10, 12).

⁴⁰ Davet Direct, Ex. Davet-1.

initial brief, the Applicants have provided an adequate explanation for why the lines need to go through the middle of Davet's property. Specifically, and as the cited Application materials establish, the explanation is that the line runs between wetland areas on the eastern and western sides of Davet's property.⁴¹

8) OPPONENTS MAKE CLASSIC NIMBY ARGUMENTS NOT BASED ON FACTS IN THE RECORD.

CARE has themed the case as one where the Applicants "always get what they need and a lot of what they want."⁴² Portraying themselves as a victim fuels a classic NIMBY argument: Misunderstanding of the proceedings. This case is not about Applicants or intervenors getting what they want or being victims, it's about providing reliable service to the citizens in Geauga and Ashtabula counties, specifically the citizens in the Village of Orwell.

NIMBY arguments are based in emotional generalizations and furthered as a result of unwillingness to accept the merit of fact-based arguments. Despite extensive route studies that resulted in the selection of the Proposed and Alternate routes, CARE clings to its unreasoned generalization that the project should be constructed along a route other than the Preferred or Alternative routes submitted in the Application. What CARE is really saying is that the project is needed but Not In My Back Yard.

⁴¹ Review of the maps suggests that it might be possible to run the lines north along the eastern edge of Davet's property. In light, that this routing (which would abut Sidley Road) would bring the lines much closer to Davet's house, Davet's concerns about potential health impacts from the line would disqualify this route.

⁴² CARE initial post-hearing brief at 1.

It seems no amount of research or explanation will satisfy the opponents to this project. Nothing short of further delay and construction along another route is acceptable to the opponents to certification. If the results of a diligent study, which incorporates the concerns of the opponents and is supported by industry professionals, fails to convince CARE and Davet of the appropriateness of certification, it is unlikely that they can be convinced. CARE and Davet's case boils down to the classic NIMBY approach of arguments fueled by emotion or personal belief and not based on the facts in the record. Therefore, it is for the Board to fashion a reasonable fact-based solution which will provide for the power needs for the citizens in the Village of Orwell. Here, the facts in the record supports certification without further delay.

B. THE VILLAGE OF ORWELL IS IN NEED OF THIS PROJECT

The Village of Orwell highlighted the need for the project with reference to the technical analysis presented by Applicant witness Sears in its initial post-hearing brief. Perhaps the most succinct statement of the Village's need is presented in Staff's post-hearing brief "the company analysis shows that there is a need for the company to build transmission and that no other alternative will address the problems. A CARE witness [Merat] seems to agree that the system needs to be strengthened."⁴³

There is no doubt that this project is needed. Orwell Mayor, Lawrence Bottoms, testified that he has partnered with the Applicants to do what was needed to provide the Village of Orwell with reliable power:

⁴³ OPSB Staff initial post-hearing brief at 8.

“It was a fight at the beginning. But over the last three to four years [The Cleveland Electric Illuminating Company and the Village of Orwell have] partnered up to ensure that the Village can continue to employ over 1,700 people. We fought, we looked at everything we could to get this done. ... but we can’t let this drag on any more. ... We need the quality of electrical power now.”⁴⁴

CARE has presented no compelling fact based opposition to the project. It is unjust and unreasonable to delay the benefits to the 1,500 Citizens of Orwell to give more time to CARE’s concerns. While CARE exhausted extensive efforts to oppose the Applicant’s project, the needs of 1,500 citizens in the Village of Orwell went unmet. It is time to resolve the need for reliable power for the 1,500 citizens of the Village of Orwell as all fact-based analysis supports immediate certification of the project.

III. CONCLUSION

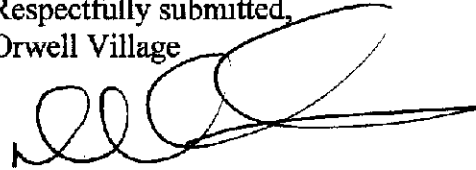
Development is necessary. Change is inevitable. While opposition to certification along the Preferred and Alternate routes based on NIMBY arguments is to be expected, the statutory guidelines support certification. To allow any of the opponents to certification’s arguments to advance is to ignore industry standard, the substantial amount of resources that have been dedicated to finding a lawful resolution to this issue, statutory mandates and the needs of 1,500 citizens in the Village of Orwell.

To confuse any of the infighting or minutiae with the real purpose of these proceedings would further delay a needed project and harm the citizens of the Village of Orwell. In fact, based on the present need for the project and the absence of compelling

⁴⁴ Public hearing held 8/27/08 at Ledgemont Elementary School, Testimony of Mayor Lawrence Bottoms, Tr. 39-40.

arguments against certification, the only thing certain to be gained by further delay is more injury to the citizens in the Village of Orwell.

Respectfully submitted,
Orwell Village

A handwritten signature in black ink, appearing to read 'David L. McCombs', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Brief of Orwell Village" has been served on each party to this proceeding in accordance with the requirements of Rule 4906-7-06 of the Board's Rules of Proceedings by mailing a copy, postage prepaid, on October 27, 2008 to the following addresses:

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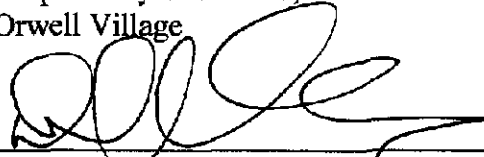
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Dated at Orwell, Ohio, this 27th day of October, 2008.

Respectfully Submitted,
Orwell Village

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