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**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of AEP :
Transmission Company for a Certificate : Case No. 11-1313-EL-BSB
of Environmental Compatibility and :
Public Need for 765/345/138 kV :
Vassell Station Project. :

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

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INTRODUCTION

Intervenors Alvin and Susan Barkeloo submit that they are the “epitome” of an American success story, living and operating a business in what they describe as a “quiet rural neighborhood.” It is just as important to recognize that they are consumers of electricity, and are dependent on reliable electric service as any other consumer in Central Ohio. Indeed, the Barkeloos’ property includes a large (3400 sq. ft., twice the size of the residence) outbuilding on their property from which they operate a business affixing decals to large vehicles. Furthermore, the area at issue in this case is hardly residential in nature. It is significantly rural.

The proposed Vassell Substation Project meets a public need, and can be constructed and operated with minimal impact if the Board Staff’s recommended conditions are adopted. The project is consistent with the character of that neighborhood,

and will disturb neither the quiet nor the rural character of the area where AEP Transco proposes to locate it.

ARGUMENT / STAFF CONDITIONS

A. The Law

The role of the Power Siting Board is to evaluate and decide whether the applicant's proposal in its application, with any supplemental information, meets the statutory criteria. The Board must render a decision based upon the record either granting or denying the application, as filed, or granting it upon such terms, conditions, and modifications as it deems appropriate.¹ The record in this case includes the application, supplemental information filed by AEP Transco, the Staff Report of Investigation, and testimony and exhibits accepted at both the local public and evidentiary hearings.

Based upon the evidentiary record, the Staff recommends that the Board find that each criterion enumerated in R.C. 4906.10 has been met.

B. Staff Report of Investigation

The Staff's Report of Investigation, contrary to suggestions made by the applicant is part of the evidentiary record in this case. The Staff's Report reflects its investigation of the application and its findings up to the date of its submittal, on topics specifically addressed in R.C. 4906.10.

¹ Ohio Rev. Code Ann. § 4906.10(A) (Anderson 2012).

The Staff carefully fulfilled its statutory and Board defined role in this case. It fully evaluated the application, analyzed it in light of the statutory criteria and it developed recommendations and conditions that it believes will ameliorate project impacts. The Staff performed its role in a fair and balanced manner.

1. R.C. 4906.10(A)(1) – Basis of Need²

The Applicant has adequately demonstrated that the Vassell Substation Project is needed to improve and maintain the quality of electric service and reliability to Central Ohio and the surrounding AEP load area. There is no evidence of record suggesting that this projected is not needed. The Board should find that the basis of need for the project has been demonstrated and therefore complies with the requirements specified in ORC Section 4906.10(A)(1), provided that any certificate issued by the Board for the proposed facility include the conditions specified in Staff's Recommended Conditions of Certificate.

2. R.C. 4906.10(A)(2) – Nature of Probable Environmental Impact³

Based upon its review, Staff made numerous findings regarding the nature of the probable environmental impacts in its report. Staff's comprehensive findings address such varied subjects as socioeconomic impacts, ecological impacts, and public services and facilities. Based upon its evaluation of information on these and other matters, and

² Staff Exhibit 1, Staff Report of Investigation, at 9-10.

³ Staff Exhibit 1, Staff Report of Investigation, at 11-16.

subject to the Staff's recommended conditions in Staff Exhibit 1, and any conditions modified herein, the Staff recommends a Board finding that this criterion has been met.

3. R.C. 4906.10(A)(3) – Minimum Adverse Environmental Impact⁴

Intervenors claim that AEP Transco did not perform a meaningful search for a substation site that would pose the least public harm. The Barkeloos claim that Board's rules require that utility facilities be placed where they pose the "least public harm"⁵ is simply erroneous. Minimum adverse impact does not mean "no" impact. Nor does it mean "less impact than any other possible site." The project must, to be certified, have a minimal adverse impact on the environment. Staff believes that, upon the adoption of its recommended conditions, any adverse environmental impact will be minimized.

The purpose of the review by the Ohio Power Siting Board is to weigh the preferred and alternative sites/routes proposed by the applicant against the criteria established by R.C. 4906.10 (A) and the applicable rules. That process, as outlined by the statute and the rules, is focused on the preferred and alternative sites/routes which are set forth by Applicants their application.

OPSB rules do require that applicants "include fully developed information on two sites/routes." O.A.C. 4906-5-04(A). The Barkeloos claim that AEP Transco did not "propose *any* alternate sites for the Board to consider."⁶ This is not merely hyperbole, it

⁴ Staff Exhibit 1, Staff Report of Investigation, at 17-18.

⁵ Opening Post-Hearing Brief of Intervenors Alvin and Susan Barkeloo, p. 5.

⁶ Barkeloo Brief, p. 7.

is untrue. The Applicant did, of course, propose both a preferred and an alternate site. What the intervenors effectively argue is that it was error for the ALJ to grant Applicant's requested waiver of the route commonality restrictions in O.A.C. 4906-5-04.

In the first instance, it is important to distinguish between alternate *routes* and alternate *sites*. Neither the Ohio Revised Code nor the Ohio Administrative Code defines "route" or "site." It is clear from a plain reading of both, however, that, as it respects this application, the "site" is the proposed substation, while the "route" refers to the associated electric transmission line interconnections.

On July 26, 2011 AEP Transco, filed a motion asking that the Board grant it a waiver from the twenty percent commonality restriction for an alternate *route* required by O.A.C. 4906-5-04(A). That rule provides that the two *routes* will be deemed alternatives only if not more than 20 percent of the *routes* are in common. The rule also provides that the restriction may be waived for good cause shown. No-one, including the Board Staff, objected to the Applicant's request. The ALJ found that the request was "reasonable and should be granted."⁷

AEP Transco did propose alternate sites for this project. The Barkeloos claim that these sites are not "truly" alternatives. But it is significant to note that the Ohio Administrative Code does not require the same lack of commonality for *sites* that it does for *routes*. Although the 20 percent rule is contained in the same paragraph as the requirement that the application include "fully developed information on two sites," there

⁷ Entry (Sept. 27, 2011) at 3.

is no requirement, either statutory or rule, that an alternate site cannot overlap – even significantly – a preferred site. Neither the statute, nor the Board’s rules, nor the ALJ’s Entry, required AEP Transco to propose what the Barkeloos claim would be a “truly alternate site.”

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 intervenors discuss in their Initial Brief. The application (App. Ex. 1) includes 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. The Barkeloos apparently expected the Applicant to consider every conceivable site to determine which would impose the “least” impact. This is clearly absurd. That is why the rules call for a preferred and an alternate site. This is a necessary cornerstone for the development of detailed information which allows for a focused review that 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 sites proposed in the application.

Staff concluded that AEP Transco had sited and designed the Vassell Substation Project to minimize potential impacts while meeting the need for the project. Staff further found that the project would not affect future growth in the region, and would support economic development by improving the supply and reliability of the regional electric

system. Staff concluded that AEP Transco has taken all practicable measures to mitigate aesthetic impacts to nearby residences. Staff further concluded that the Preferred Site represents the minimal adverse environmental impact. Staff recommends that the Board find that the proposed facility represents the minimum adverse environmental impact, and therefore complies with the requirements specified in ORC Section 4906.10(A)(3), provided that any certificate issued by the Board for the proposed facility include the conditions specified in the Recommended Conditions of Certificate contained in Staff Exhibit 1.

4. R.C. 4906.10(A)(4) – Electric Grid⁸

The Applicant has adequately demonstrated that the proposed Vassell Substation Project will improve voltage and thermal issues to AEP-recommended planning criteria levels. There is no evidence of record suggesting that the project would cause reliability or stability problems. The Board should find that the proposed 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 would serve the interests of electric system economy and reliability.

5. R.C. 4906.10(A)(5) – Air, Water, and Solid Waste, and Aviation⁹

⁸ Staff Exhibit 1, Staff Report of Investigation, at 19-21.

⁹ Staff Exhibit 1, Staff Report of Investigation, at 22-23.

The Applicant has adequately demonstrated the impacts of the Vassell Station Project on air, water, waste and aviation, and the ways in which the Application satisfies the requirements of Chapters 3704 (air pollution code), 3734 (hazardous and solid waste code), 6111 (water pollution code) and Sections 1501.33, 1501.34 and 4561.23 of the Revised Code. The Board should find that the project therefore complies with the requirements specified in ORC Section 4906.10(A)(5), provided that any certificate issued by the Board for the proposed facility include the conditions specified in Staff's Recommended Conditions of Certificate.

6. R.C. 4906.10(A)(6) – Public Interest, Convenience, and Necessity¹⁰

The Applicant has adequately demonstrated that the proposed Vassell Substation Project would serve the public interest by ensuring that Central Ohio's increased demands for reliable electricity continue to be met. The Board should find that the project therefore complies with the requirements specified in ORC Section 4906.10(A)(6), provided that any certificate issued by the Board for the proposed facility include the conditions specified in Staff's Recommended Conditions of Certificate.

7. R.C. 4906.10(A)(7) – Agricultural Districts¹¹

The Applicant has adequately demonstrated that the construction of the proposed Vassell Substation Project will have no impact on agricultural districts. The Board should

¹⁰ *Id.* at 24-25.

¹¹ Staff Exhibit 1, Staff Report of Investigation, at 26.

find that the project therefore complies with the requirements specified in ORC Section 4906.10(A)(7), provided that any certificate issued by the Board for the proposed facility include the conditions specified in Staff's Recommended Conditions of Certificate.

8. R.C. 4906.10(A)(8) – Water Conservation Practice¹²

The Applicant has adequately demonstrated that the proposed Vassell Substation Project will not utilize water for operation of the facility. Therefore, the Board should find that the water conservation practices specified under ORC 4906.10(A)(8) are not applicable to the substation project.

C. Staff Conditions

In addition to discussing each of the criteria enumerated in R. C. 4906.10, the Staff Report of Investigation contains a number of conditions recommended by the Staff. These recommended conditions, and any conditions modified herein, are supported by the record of evidence in this case. This is true despite the Applicant's claims that Staff "provided no evidence or justification in the record for the condition."¹³ The Staff's Report of Investigation, contrary to suggestions made by the Applicant is *part* of the evidentiary record in this case. Staff offered a witness to sponsor the Staff Report at the hearing, and counsel had ample opportunity to conduct examination regarding any assertion contained in the Report. The fact that counsel for the Applicant chose not to

¹² *Id.* at 27.

¹³ Post-Hearing Brief Of Applicant AEP Ohio Transmission Company, p. 20.

pursue inquiry of areas on which its witnesses testified does not mean that the Staff did not offer contrary evidence. Indeed, Staff repeatedly offered, even over the objections of counsel for the Applicant, to call any Staff evaluation team member for examination on any topic contained in the Report.

It is the Board's responsibility to weigh the evidence of record. It is incredulous that the Applicant would submit that the Staff Report of Investigation does not constitute evidence on issues raised in Staff's recommended conditions. Staff respectfully submits that the evidence of record supports adoption of its recommended conditions as previously and herein modified.

Conditions 4, 9 and 25

As Staff noted in its Initial Brief, these conditions all relate to actions that must be taken by the Applicant "prior to the commencement of construction" Condition 9 related to a maintenance and access plan to be developed by the Applicant. Conditions 4 and 25 relate to various permits and authorizations.

AEP Transco seeks to limit these requirements to the associated construction being performed. Staff agrees that such an amendment would better represent the construction process. Staff urges the Board to clarify that projects to be completed in discrete phases may proceed as long as the required permits and authorizations for each phase are obtained prior to the start of construction for that phase. Furthermore, the Board should specify that the Applicant should be required to specifically delineate each such phase prior to any construction, and to participate in a pre-construction conference with the Staff prior to each such phase of construction.

Condition 6

Staff agrees with the Applicant that the contemplated “complaint process” to be set up by the Applicant should be viewed as a process to deal with concerns, and not a legal proceeding. Staff disagrees, however, that the condition should only apply to “adjacent property owners.” Other citizens may have reasonable concerns about the construction and operation of the facility, and should not be precluded from having those concerns addressed.

Condition 8

As Staff noted in its Initial Brief, it agrees that AEP Transco should not minimize the impacts of landscaping and lighting at the cost of safety considerations. Staff finds that the Applicant’s suggested language that it “provide an opportunity for input by adjacent landowners” is an acceptable modification, provided that the input is sought in conjunction with the development of the landscape and lighting plan.

Conditions 10 & 11

Applicant asserts that proposed Conditions 10 and 11 appear to be redundant, in that they condition similar issues and requiring the same actions in both. AEP Transco asks that the conditions be combined to reduce confusion.

Staff submits that the two conditions are distinguishable. The Applicant proposes to clear more than just the 7 acres of high quality riparian corridor and woodlot adjacent to stream 1c. Condition 10 requires that the Applicant submit a vegetation management plan addressing “all areas of proposed vegetation clearing for the project.” It relates to activity involving the entire project area, and is intended to cover all vegetation that

would be removed in order to construct, operate, and maintain this project facility and the associated transmission lines. Information regarding vegetation removal would be covered in the vegetation management plan.

Condition 11 requires that the Applicant submit a “streamside vegetation restoration plan” specifically limited to the clearing of riparian vegetation. It is intended to specifically deal with the clearing of approximately 7 acres of an approximately 23 acre high riparian corridor and woodlot adjacent to stream 1c. All information regarding vegetation restoration activities in this area of the project would be covered in a streamside vegetation restoration plan. The sensitive nature of stream 1c justifies the adoption of this requirement as a separate condition.

Condition 12

The Applicant proposed clearing a 450 foot wide swath (approximately 7 acres) through a high quality riparian corridor and upland woodlot for the placement of the associated 765 kV and two 345 kV electric transmission interconnection lines.¹⁴ Staff recommended streamside vegetation restoration and conservation measures for unavoidable direct and indirect impacts to streams, high quality riparian corridor and woodlot.¹⁵

¹⁴ Staff Ex. 1, pgs. 13-15.

¹⁵ *Id.*, p. 17

The Applicant is opposed to the execution and filing of an R.C. 5301.68 conservation instrument, calling it a “penalty provision.”¹⁶ The condition is, as noted, intended to remediate unavoidable direct and indirect impacts described in the Staff Report of Investigation, and is not punitive in nature. Indeed, the Board has adopted such conditions as part of certificates for projects involving similar resources and impacts.¹⁷ This condition is reasonable and appropriate, and should be adopted by the Board.

Condition 17

Golden-winged warbler habitat is defined as shrub-dominated habitat such as successional fields, woodland edges, and clearings to forage.¹⁸ As the Barkeloos noted, the Applicant acknowledged that such habitat does exist in the project area, even if not to any significant extent.¹⁹ As such, Staff believes it is reasonable to retain this condition.

Condition 19

This condition relates to in-stream work during fish spawning restricted periods. The Applicant states that no in-water work is proposed. Because of the dynamic nature of such projects, the intent not to perform in-water work does not completely preclude such work from becoming necessary. Indeed, the application discusses the need for a permanent culvert to be placed in an unnamed tributary to Big Walnut Creek to access

¹⁶ AEP Transco Brief, p. 24.

¹⁷ See, e.g.: *In re: American Municipal Power-Ohio, Inc.*, Case No. 06-1358-EL-BGN (Opinion and Order) (March 3, 2008) at 37; *In re: American Transmission Systems, Inc. and The Cleveland Electric Illuminating Company*, Case No. 07-0171-EL-BTX (Opinion and Order) (November 24, 2008) at 45-6; *In re: City of Hamilton and American Municipal Power, Inc.*, Case Nos. 10-2439-EL-BSB, 10-2440-EL-BTX (Opinion and Order) (November 28, 2011) at 20.

¹⁸ Staff Ex. 1, p. 15.

¹⁹ Barkeloo Brief, p. 33.

and construct portions of the Alternate Site. The Application also discusses the need to cross an unnamed tributary to Big Walnut Creek to construct the associated transmission lines.

Staff is also not convinced that the proposed project would not have direct impact on streams, two state listed fish species, or associated indirect impacts to the unnamed tributary to Big Walnut Creek, Big Walnut Creek, or Hoover Reservoir. It is because of the possibility that in-water work may need to be done during sensitive periods that it is appropriate to retain this condition. Alternatively, the Board must affirmatively state that the Applicant may not, under any circumstances, perform any in-water work as part of this project.

Condition 24

Condition 24 relates to the issue of access restriction to the facility. As noted previously, Staff respectfully submits that its condition as worded is appropriate, but clarifies that, to the extent that “necessary measures” include fencing, only the equipment footprint is intended, and not the entire property.

Conditions 26-29

These conditions all related to restrictions on blasting, should it be necessary. Similar to the conditions relating to in-water work, the Applicant merely reasserts that “it does not intend to utilize blasting for this project.”²⁰ An “intent” not to blast does not completely preclude blasting from becoming necessary. It is because of the possibility

²⁰ AEP Transco Brief, p. 31.

that blasting *could* be required that it is appropriate to retain this condition. Alternatively, the Board must affirmatively state that the Applicant may not, under any circumstances, use blasting as part of this project.

Condition 30

This condition relates to testing for the impact of low-frequency noise. Staff believes that it is appropriate to insist that this testing be done for a number of reasons. But it is particularly appropriate since the Applicant committed to conducting such testing, and so informed the Staff, but then decided not to do so without supplementing its responses to Staff data requests.²¹ The Applicant offered no explanation or justification for refusing to provide requested and promised information that Staff deemed relevant to its investigation. The Board should find such conduct unacceptable and order the Applicant to perform the low-frequency noise test.

Post-Certificate Alterations, Information Submissions, and Other Changes

Intervenors mistakenly assert that certain conditions ordered by the Board are unlawful. While some conditions permit the Board Staff to perform certain functions after the certificate has issued, this neither “defers” consideration of issues until after the evidentiary hearing, nor allows the Board to circumvent its statutory responsibility under R.C. 4906.10. These conditions neither relieved AEP of its burden of proof, nor do they act to deny Intervenors either the right of participation or to due process of law.

²¹ Tr. at 114-116, 239-241.

The siting process is a dynamic one. It does not end with the Board's issuance of a certificate. The work of the Board's Staff continues at the project site where it monitors construction activity to ensure compliance with certificate conditions. The General Assembly recognized this and vested the Board with explicit authority to do exactly what Intervenor complain about. R.C. 4906.10(A) authorizes the Board to grant an application "upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate," and to issue a "conditional operating permit." The statute specifies that operation in compliance with a conditional operating certificate does not violate the certificate. *Id.* As long as an Applicant complies with the Board's conditions, Ohio law requires no further process.²² If an affected party believes that a developer has violated its certificate, Ohio law provides both a meaningful process and adequate remedies.

Furthermore, as Ohio Supreme Court recently observed:

R.C. Chapter 4906, the board's enabling statute, expressly allows the board to delegate many responsibilities to subordinates. * * * More generally, R.C. 4906.02(C) states, "The chairman of the public utilities commission may assign or transfer duties among the commission's staff." * * *

One responsibility, however, cannot be delegated: "the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself." R.C. 4906.02(C).

²²

The lone exception provided in Ohio's comprehensive statutory scheme is where the Board conditions a certificate modifying the location of all or a part of a facility. In that limited case, municipal corporations, counties, and residents affected by the modification must be given reasonable notice. Ohio Rev. Code § 4906.10(B).

In re Application of Am. Transm. Sys. Inc., 125 Ohio St. 3d 333, 336, 928 N.E.2d 427, 430 (2010). Delegations made by the Board to its Staff in the conditions that intervenors complain about are not prohibited delegations of certificate-granting authority. Only the Board has certificate-granting authority. Rather, these are delegations of *enforcement* authority. It can hardly be said that Board “consideration” has been deferred or that Intervenor were denied a right to participate. This is both practical and entirely proper as the Board’s Staff is responsible for compliance oversight in the field and initiating enforcement actions where needed. There is no improper delegation of authority or deferral of issues.

Intervenor object to 13 separate conditions. None of these conditions represents an improper delegation of authority by the Board, nor do they require decisions that the Board is statutorily required to make. All represent lawful and reasonable delegations of responsibility to the Board staff. The Barkeloos had ample opportunity at hearing to inquire about what the conditions mean and are intended to address and achieve. Intervenor received due process and a full and fair opportunity to be heard. That is all that is required.

CONCLUSION

Staff has concluded that the proposed project would introduce both temporary and permanent impacts on the surrounding community. After an exhaustive investigation, the Staff has developed a number of conditions that, if adopted by the Board would minimize environmental and other impacts to the project area. Additionally, AEP Transco’s

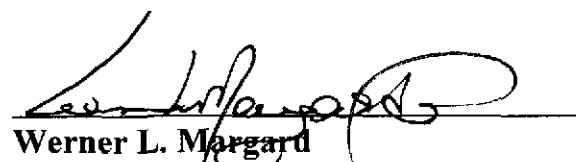
proposal faces close scrutiny in a host of related permitting cases before various federal and state agencies. It is expected that, if granted, these permits would result in additional conditions and requirements upon AEP Transco.

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. The Staff recommends that, if a certificate is issued to applicant for this project, the Board require applicant to comply with all of Staff's Recommended and modified conditions.

Respectfully submitted,

Mike DeWine
Ohio Attorney General

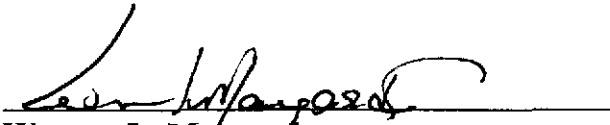
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing 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 5th day of March, 2012.



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