

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of the )  
City of Hamilton and American )  
Municipal Power, Inc., for a Certificate )  
of Environmental Compatibility and ) Case No. 10-2439-EL-BSB  
Public Need for the Construction of a )  
Substation in Franklin and Washington )  
Townships. )

In the Matter of the Application of the )  
City of Hamilton and American )  
Municipal Power, Inc., for a Certificate )  
of Environmental Compatibility and ) Case No. 10-2440-EL-BTX  
Public Need for the Construction of a )  
Transmission Line in Franklin and )  
Washington Townships. )

ENTRY ON REHEARING

The Ohio Power Siting Board finds:

- (1) On May 4, 2011, the city of Hamilton, Ohio, and American Municipal Power, Inc. (AMP) (collectively Applicants) filed applications for certificates of environmental compatibility and public need (certificate) to construct a 138-kilovolt transmission line in Case No. 10-2440-EL-BTX (10-2440) and a substation in Case No. 10-2439-EL-BSB (10-2439).
- (2) On November 28, 2011, the Board issued its opinion, order, and certificates (Order), in 10-2439 and 10-2440 that approved a stipulation and granted the applications for authority to construct the transmission line and substation projects, subject to 50 conditions.
- (3) Section 4906.12, Revised Code, states, in relevant part, that Sections 4903.02 to 4903.16 and 4903.20 to 4903.23, Revised Code, apply to a proceeding or order of the Board as if the

Board were the Public Utilities Commission of Ohio (Commission).

- (4) Section 4903.10, Revised Code, provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission. Further, Section 4903.10, Revised Code, provides that leave to file an application for rehearing shall not be granted to any person who did not enter an appearance in the proceeding, unless the Commission finds that: (1) the applicant's failure to enter an appearance prior to the Commission's order complained of was due to just cause; and (2) the interests of the applicant were not adequately considered in the proceeding.
- (5) Rule 4906-7-17(D), Ohio Administrative Code (O.A.C.), states, in relevant part, that any party or affected person may file an application for rehearing within 30 days after the issuance of a Board order in the manner and form and circumstances set forth in Section 4903.10, Revised Code.
- (6) On December 21, 2011, through their attorney, Duane R. Brown and Bethany L. Brown (the Browns) filed a "Petition for Leave to Intervene" as well as a "Notice of Appeal and Request for Re-Hearing" in both 10-2440 and 10-2439, asserting seven assignments of error. Thereafter, on December 23, 2011, through their attorney, Gabrae L. Hack, Stephen E. Hack, and Michael E. Hack (the Hacks), and Easter A. Adkins each similarly filed petitions for leave to intervene and notices of appeal and requests for rehearing in 10-2440 and 10-2439. The Hacks' and Ms. Adkins' requests for rehearing contain the same seven assignments of error contained in the request for rehearing filed by the Browns.
- (7) On January 3, 2011, Applicants filed memoranda contras the petitions for leave to intervene and notices of appeal and applications for rehearing filed by the Browns, the Hacks, and Ms. Adkins. In their memoranda contras, the Applicants assert that the petitions to intervene fail to satisfy the statutory prerequisites for intervention under Section 4906.08(A)(3),

Revised Code, and that the applications for rehearing fail to satisfy the requirements set forth in Rule 4906-7-17(D), O.A.C. or Section 4903.10, Revised Code. Consequently, Applicants argue that the petitions to intervene and applications for rehearing should be denied.

- (8) By entry issued January 5, 2012, pursuant to Rule 4906-7-17(I), O.A.C., the administrative law judge (ALJ) granted rehearing for the limited purpose of affording the Board more time to consider the issues raised in the applications for rehearing. The ALJ stated that the limited grant of rehearing of the "Requests for Re-Hearing" did not constitute a finding regarding the merits of any arguments raised in the applications for rehearing, or a finding that there are any grounds for rehearing, or that the filings satisfy the legal requirements set forth in Section 4903.10, Revised Code, for filing an application for rehearing.
- (9) Initially, the Board will address the applications for rehearing filed by the Browns, the Hacks, and Ms. Adkins. In their applications for rehearing, the following assignments of error are raised: AMP failed to meet the legal conditions and requirements for the project; AMP failed and refused to address landowner concerns and to compensate landowners for known and expected diminution in value of adjoining properties; the project does not serve the best interest of the local public population; the project has not properly notified adjoining landowners and has disseminated false and misleading information about hearings, landowner rights, and appeals; adjoining landowners have not been provided legal notice, due process, or a fair opportunity to make claims and obtain a hearing; Applicants have failed to properly conduct the required studies and due diligence and do not meet the recommended conditions because the dictates in the Staff Report were not followed; and, there are other errors apparent in the record.
- (10) Prior to addressing the merits of the applications for rehearing, the Board will address whether the applications comply with the applicable rules and statutory provisions.

- (11) As stated above, Section 4903.10, Revised Code, provides that leave to file an application for rehearing shall not be granted to any person who did not enter an appearance in the proceeding, unless the Board finds that the movant satisfies both prongs of the following two-prong test: (1) the applicant's failure to enter an appearance prior to the order complained of was due to just cause; and (2) the interests of the applicant were not adequately considered in the proceeding.
- (12) With regard to the first prong of the test in Section 4903.10, Revised Code, the Browns, the Hacks, and Ms. Adkins never sought intervention in these cases prior to their December 2011, filings, and, thus, were never parties to these cases. Consequently, they could not enter an appearance at the adjudicatory hearing, as parties. Further, the applications filed by the Browns, the Hacks, and Ms. Adkins set forth no reasons why their failure to enter an appearance prior to the Order was due to just cause, and none is apparent to the Board. Here, Applicants filed their proofs of service pursuant to Rule 4906-5-08, O.A.C, on August 12, 2011, reflecting that the appropriate legal notices of the local public and adjudicatory hearings were published in newspapers of general circulation on August 4, 2011. The Board notes that, as ordered by the ALJ on July 27, 2011, the notices discussed the deadline for intervention by any interested person and provided the Board's address to which such interested persons could send petitions to intervene. Furthermore, Lee Eubanks, another landowner residing in the area, with concerns about the project similar to those of the Browns, Hacks, and Ms. Adkins, filed a motion to intervene and was granted intervention in these cases. In addition, as reflected in the transcript for the local hearing held on October 13, 2011, and conceded in the recent filings, the movants were aware of these proceedings and had an opportunity to file timely motions to intervene, as evidenced by the fact that both Mr. Brown and Mr. Hack testified at the local hearing. Consequently, the Board finds that the Browns, the Hacks, and Ms. Adkins have failed to demonstrate, in accordance with the first prong of the requirements set forth in Section 4903.10, Revised Code, that their failure to enter an appearance prior to the Order was due to just cause.

- (13) With regard to the second prong of the test in Section 4903.10, Revised Code, even had the Browns, the Hacks, and Ms. Adkins demonstrated that their failure to enter an appearance was due to just cause, the Board also cannot find that their interests were not adequately considered in these proceedings. As set forth in the November 28, 2011, Order, the Board considered the concerns raised by the five individuals, including Mr. Brown and Mr. Hack, who testified in opposition to the projects at the local public hearing. The concerns of these individuals were listed as including ecological studies, health risks associated with EMFs, depreciation in property value and marketability, loss of aesthetic value, loss of trees, noise from construction, and effects on telephone, television, and internet service. In its Order, the Board found that these issues were investigated during the course of the proceedings and were adequately addressed. Consequently, the Board cannot find that the movants satisfied the second prong of the statutory test and that their interests were not adequately considered in the proceedings.
- (14) Because the Board has found that the interests of the Browns, the Hacks, and Ms. Adkins were adequately considered in these proceedings, and that the movants failed to demonstrate that their failure to enter an appearance prior to the Board's order complained of was due to just cause, the Board finds that the Browns, the Hacks, and Ms. Adkins have failed to demonstrate grounds to file an application for rehearing pursuant to Section 4903.10, Revised Code. Consequently, the Board declines to grant the Browns, the Hacks, and Ms. Adkins leave to file applications for rehearing, and the applications will not be considered on their substantive merits.
- (15) With regard to the petitions for leave to intervene, the Browns, the Hacks, and Ms. Adkins all state that they own real property located in Felicity, Ohio, and that the proposed transmission line is planned to come within 100 feet of their property. The Browns, the Hacks, and Ms. Adkins all state that their property has been subdivided and developed, that three homes and a business were planned, and that the presence of the transmission line will interfere with their use of their property

and reduce their property value. In addition, the Hacks state that Mr. Hack appeared at the October 13, 2011, local public hearing in Felicity and the November 3, 2011, adjudicatory hearing in Columbus. The Browns, the Hacks, and Ms. Adkins also state that they seek rehearing and that they were not represented by any party to the proceedings.

- (16) Rule 4906-7-04, O.A.C., provides, in pertinent part, that a person desiring to intervene in a Board proceeding should prepare a motion for leave to intervene setting forth the grounds for proposed intervention and the petitioner's interest in the proceedings and file the petition within 30 days after the date of publication of the notice required in accordance with Rule 4906-5-08(C)(1), O.A.C. Further, Rule 4906-7-04(C), O.A.C., provides that an ALJ may, in extraordinary circumstances and for good cause shown, grant an untimely petition for leave to intervene. In such circumstances, the petition must contain a statement of good cause for failing to timely file and shall be granted only upon a finding that extraordinary circumstances justify granting the petition and that the intervenor agrees to be bound by agreements previously made in the proceeding.
- (17) As stated previously, Applicants filed their proofs of service reflecting that the appropriate legal notices of the local public and adjudicatory hearings were published in newspapers of general circulation, and the notices discussed the deadline for intervention and provided the Board's address. Given the date of publication of the notices, under Rule 4906-7-04, O.A.C., petitions to intervene were due by September 6, 2011. Here, petitions to intervene filed by the Browns, the Hacks, and Ms. Adkins are untimely as they were filed 106 days and 108 days, respectively, after the filing deadline for petitions to intervene, and after the Board issued the Order in these cases. Further, the petitions contain no statements of good cause for failing to timely file such petitions and there has been no showing that extraordinary circumstances justify granting the petitions or that the Browns, the Hacks, or Ms. Adkins agree to be bound by agreements previously made in the proceedings. Consequently, the Board finds that the petitions for leave to

intervene filed by the Browns, the Hacks, and Ms. Adkins fail to comply with Rule 4906-7-04, O.A.C., and should be denied. Moreover, given that the Board has also declined to grant the Browns, the Hacks, and Ms. Adkins leave to file applications for rehearing as set forth in Finding (14), the Board finds that the petitions for leave to intervene should be denied on the additional basis that they are unnecessary.

- (18) Finally, the Board notes that, on January 20, 2012, the Browns, the Hacks, and Ms. Adkins, though their attorney, filed a "Memorandum in Support of Application for Rehearing." The memorandum appears to be a supplement to the December 21, 2011, and December 23, 2011, applications for rehearing filed by the Browns, the Hacks, and Ms. Adkins. Initially, the Board notes that Section 4903.10, Revised Code, requires that all applications for rehearing be filed within 30 days of the order and the January 20, 2012, filing is well beyond this timeframe. The Board emphasizes that Rule 4906-7-17(D), O.A.C., requires that "[a]n application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing." Additionally, nothing in the applicable rules or Section 4903.10, Revised Code, governing applications for rehearing, allows the submission of supplemental memoranda following the filing of an application for rehearing. Consequently, the Board finds that it is without jurisdiction to consider the January 20, 2012, "Memorandum in Support of Application for Rehearing."

It is, therefore,

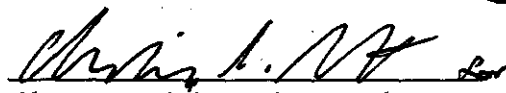
ORDERED, That the Browns, the Hacks, and Ms. Adkins are denied leave to file applications for rehearing. It is, further,


ORDERED, That the petitions for leave to intervene filed by Browns, the Hacks, and Ms. Adkins are denied. It is, further,

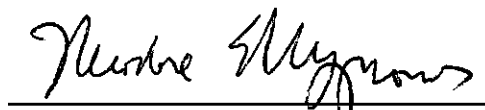
ORDERED, That a copy of this entry on rehearing be served upon each party of record and any other interested persons of record.


THE OHIO POWER SITING BOARD


  
Todd A. Snitchler, Chairman  
Public Utilities Commission of Ohio

  
Christiane Schmenk, Board  
Member and Director of the Ohio  
Department of Development

  
James Zehringer, Board Member  
and Director of the Ohio  
Department of Natural Resources

  
Theodore Wymyslo, Board  
Member and Director of the  
Ohio Department of Health

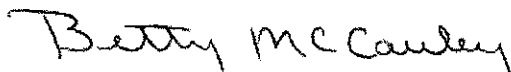
  
Scott Nally, Board Member  
and Director of the Ohio  
Environmental Protection Agency

  
Tony Forshey, DVM, Board  
Member and Interim Director of the  
Ohio Department of Agriculture

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Board Member  
and Public Member

MLW/sc

Entered in the Journal  
**JAN 23 2012**

  
Betty McCauley  
Secretary