

**In The
Supreme Court Of Ohio**

ORIGINAL

**Citizens Advocating Responsible
Energy,**

Appellant,

v.

The Ohio Power Siting Board,

Appellee.

Case No. 09-0481

Appeal from the Ohio Power Siting
Board, Case No. 07-0171-EL-BTX

**MEMORANDUM CONTRA APPELLANT'S MOTION
FOR EXPEDITED CONSIDERATION
SUBMITTED ON BEHALF OF APPELLEE
THE OHIO POWER SITING BOARD**

Thomas J. Lee (Counsel of Record)

(Reg. No. 0009529)

Julie A. Crocker

(Reg. No. 0081231)

Taft, Stettinius & Hollister, LLP

200 Public Square, Suite 3500

Cleveland, Ohio 44114-2302

216.241.2838 (telephone)

216.241.3707 (fax)

Counsel for Appellant,

Citizens Advocating Responsible Energy

Richard Cordray

(Reg. No. 0038034)

Attorney General of Ohio

Duane W. Luckey

(Reg. No. 0023557)

Section Chief

Thomas Lindgren

(Reg. No. 0039210)

Counsel of Record

Thomas W. McNamee

(Reg. No. 0017352)

Assistant Attorneys General

Public Utilities Section

180 East Broad Street, 9th Floor

Columbus, Ohio 43215-3793

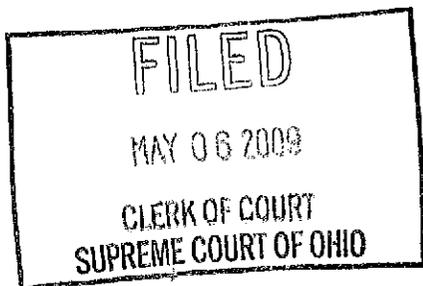
614.466.4397 (telephone)

614.644.8764 (fax)

duane.luckey@puc.state.oh.us

thomas.lindgren@puc.state.oh.us

thomas.mcnamee@puc.state.oh.us



**Counsel for Appellee,
The Ohio Power Siting Board**

Christopher J. Schraff

(Reg. No. 0023030)

Robert J. Schmidt

(Reg. No. 0062261)

L. Bradfield Hughes

(Reg. No. 0070997)

Porter, Wright, Morris & Arthur

41 South High Street

Columbus, Ohio 43215

614.227.2097 (telephone)

614.227.2100 (fax)

cschraff@porterwright.com

rschmidt@porterwright.com

bhughes@porterwright.com

**Counsel for Intervening Appellees,
American Transmission Systems,
Inc. and The Cleveland Electric
Illuminating Company**

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**MEMORANDUM CONTRA APPELLANT’S MOTION
FOR EXPEDITED CONSIDERATION
SUBMITTED ON BEHALF OF APPELLEE
THE OHIO POWER SITING BOARD**

INTRODUCTION

In the case below, the Ohio Power Siting Board (Board) Appellee, did two things. First it granted a certificate, pursuant to R.C. 4906.10, to intervening appellees American Transmission Systems, Inc., and The Cleveland Electric Illuminating Company (ATSI) to construct a single power line to be strung on wooden poles in a rural area in Geauga County, Ohio. Second, it determined that certain proprietary and security-related information in the docket should be kept confidential and only be made available to parties to the case who agreed not to make that information public. Appellant, Citizens Advocating Responsible Energy (CARE), had access to this information during the proceedings below. CARE

objects to both of these determinations and has brought this appeal challenging both actions.

Curiously, rather than follow the statutory appeals process which allows for briefs and oral arguments, CARE has submitted two motions, one asking the Court to peremptorily decide one of the issues in the case (confidential treatment) in its favor, and the second asking this Court to give CARE the extraordinary, unprecedented relief it seeks on an expedited basis, which itself is also extraordinary and unprecedented. This Memorandum Contra addresses only the Motion for Expedited Consideration. A later Memorandum Contra will address CARE's Motion to Unseal Appellate Record.

There is, quite simply, no basis in law or fact to support the request for expedited treatment. The Board must be given the opportunity to present its arguments. There is no emergency that would warrant this Court to step in and act immediately. CARE has known that portions of the record in the case were sealed since that decision was made months ago and has waited until now to submit its request. The "harm" CARE suggests it will suffer if it does not obtain its relief, that portions of its brief will have to be redacted, is no harm at all. This Court's procedural rules provide for just such an eventuality and the Court has experience in handling confidential documents. CARE will have every opportunity to present its arguments in the usual course of appeal. If redacting its brief is time-consuming, the Court's procedural rules provide for that as well, with the ability to obtain an extension of time to file a brief. In short, there is nothing in this

situation which would warrant hasty action and the Motion for Expedited Consideration should be denied.

ARGUMENT

Proposition of Law No. 1:

The Supreme Court may act upon a motion before the deadline for filing a memorandum opposing the motion if the motion is for a procedural order, including an extension of time to file a merit brief, or if the motion requests emergency relief and the interests of justice warrant immediate consideration by the Supreme Court. S. Ct. Prac. R. XIV Section 4(C).

CARE's Motion for Expedited Consideration fails to meet the standard provided in Supreme Court Practice Rule XIV Section 4(C). The motion is not for a procedural order, fails to identify any emergency, and the interests of justice require a fair opportunity be provided to the Board to respond.

It is clear that this motion does not deal with a procedural issue. The determination of confidentiality is a finding made by the Board. Appellee would have this Court reverse that decision on the merits.

Far from identifying any emergency, the timing of the motion shows that there is no emergency at all. That a portion of the record was to be sealed was known to CARE from the time that the Board's initial decision was made in November, 2008. Rather than acting immediately, CARE has chosen to wait until now. Clearly there is no emergency.

The interests of justice could require hasty action by the Court where there would be some harm that might result from allowing the Board to respond to the

motion but quite the opposite situation exists here. Harm, indeed irreparable harm, would flow from expedited consideration. The topic is confidential information. Once information is made public, it is public and it cannot be brought back under seal. The bell cannot be unrung. This is not a step to be taken lightly and certainly not without providing the Board the opportunity to state its position.

The only reason that CARE provides for its unique request is that, “This Court’s ruling on CARE’s Motion to Unseal will significantly impact the preparation of CARE’s Merit Brief and Supplement because, if the motion is not granted, CARE will be obligated to redact and/or file under seal significant portions of CARE’s Merit Brief and Supplement.” CARE’s Motion for Expedited Consideration at 2. Essentially, CARE argues that the Board should be denied its opportunity to present its arguments because redacting is hard for CARE to do. This must be rejected. The interests of justice require that both sides have an opportunity to present their positions.

The Court’s rules provide the mechanism to deal with confidential information. Supreme Court Practice Rule XIV Section 1 (B) provides that parties can file motions to seal information and that the information covered by the motion will be deemed confidential pending this Court’s action. Nothing whatever prevents CARE from following this requirement.

The Court regularly deals with confidential records in administrative appeals from decisions of the Public Utilities Commission of Ohio which process

appeals from the Board are to follow and has considered cases with redacted briefs. R.C. 4906.12. That CARE would need to redact its pleadings to protect the confidentiality of the protected information, until this Court has the opportunity to pass on the Board's decision in the normal course of hearing this case, is no problem at all. Indeed the Board and ATSI are in exactly the same situation.

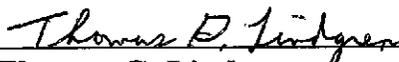
If CARE's concern is that redacting is too time-consuming and will eat up the time allotted to it to prepare its pleadings, the Court's rules address this as well. Supreme Court Practice Rule XIV Section 3(B) provides for an extension of time. This cannot be a basis for this Court to act precipitously.

CONCLUSION

The Board must be given the opportunity to present its arguments. CARE has presented no reason at all for this Court to act without hearing the Board's position. The Court's rules provide the means to protect the confidentiality of information *pendente lite* while still permitting CARE (and the Board and ATSI) to present their arguments. The Court is experienced in handling confidential information. If CARE needs additional time to redact, time is available. In short, there is no basis to grant expedited consideration in this matter and the motion should be denied.

Richard Cordray
(Reg. No. 0038034)
Attorney General of Ohio

Duane W. Luckey
(Reg. No. 0023557)
Section Chief

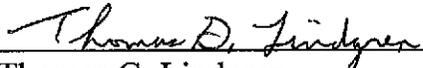


Thomas G. Lindgren
(Reg. No. 0039210)
Counsel of Record
Thomas W. McNamee
(Reg. No. 0017352)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
duane.luckey@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

**Counsel for Appellee,
The Ohio Power Siting Board**

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum Contra Appellant's Motion For Expedited Consideration Submitted On Behalf Of Appellee The Ohio Power Siting Board**, submitted on behalf of Appellee, The Ohio Power Siting Board, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 6th day of May, 2009.


Thomas G. Lindgren
Assistant Attorney General

PARTIES OF RECORD:

Thomas J. Lee (Counsel of Record)
Julie A. Crocker
Taft, Stettinius & Hollister, LLP
200 Public Square, Suite 3500
Cleveland, Ohio 44114-2302

Christopher J. Schraff
Robert J. Schmidt
L. Bradfield Hughes
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215