

IN THE SUPREME COURT OF OHIO

Citizens Advocating Responsible Energy, Appellant, v. The Ohio Power Siting Board, Appellee.

Supreme Court Case No. 2009-0481 Appeal from the Ohio Power Siting Board Siting Board Case No. 07-0171-EL-BTX

MEMORANDUM IN OPPOSITION OF INTERVENING APPELLEES AMERICAN TRANSMISSION SYSTEMS, INCORPORATED AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY TO APPELLANT'S MOTION FOR EXPEDITED CONSIDERATION OF MOTION TO UNSEAL APPELLATE RECORD

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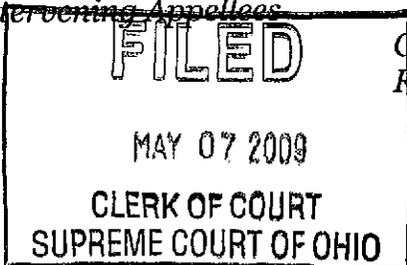
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I. INTRODUCTION

On May 4, 2009, Appellant Citizens Advocating Responsible Energy (“CARE”) filed with this Court a Motion for Expedited Consideration of its Motion to Unseal Appellate Record. Because the request for expedited consideration lacks merit, Intervening Appellees American Transmission Systems, Inc. (“ATSI”) and The Cleveland Electric Illuminating Co. (“CEI”) (collectively referred to as “Applicants”) request that this Court deny it.

On May 6, 2009, the Power Siting Board filed its Memorandum Contra to CARE’s Motion for Expedited Consideration. In that memorandum, the Board provided multiple legal and factual reasons why the Court should not grant CARE’s request for expedited consideration of its Motion to Unseal. The Applicants incorporate the Power Siting Board’s Memorandum Contra as if fully rewritten herein and submit the following additional reasons to deny CARE’s request for expedited consideration.

II. LAW AND ARGUMENT

CARE’s request for expedited consideration lacks justification under the Court’s Rules of Practice and asks this Court to rule prematurely on the merits of the case.

1. CARE’s Motion Should Be Denied Because There Is No Legal Justification For Expediting Consideration Of A Motion For A Party’s Convenience.

CARE cites S. Ct. Prac. R. XIV, Section (4)(A) as the basis for its request for an expedited ruling. Section 4(A), however, does not provide for expedited consideration of motions. In fact, no rule provides for the type of expedited consideration that CARE requests. Although Rule XIV, Section 4(C) provides that the Court may grant “emergency relief” upon a motion, the rule expressly states that such relief is appropriate only when “the interests of justice warrant immediate consideration by the

Supreme Court.” Rule XIV, Section 4(C) also allows for expedited consideration of a motion for a procedural order, but CARE’s Motion for Expedited Consideration is not procedural in nature; substantively, it seeks a ruling on the merits of one of its alleged grounds for appeal. Furthermore, CARE does not even mention or attempt to satisfy the “interests of justice” standard for emergency relief found in Section 4(C). CARE has not shown any need to expedite consideration of its Motion to Unseal, and it cannot show that “the interests of justice warrant immediate consideration.”

CARE argues that expedited consideration of its Motion to Unseal is warranted because of the “imminent” May 26 deadline for CARE to file its Merit Brief. CARE does not allege that the records must be unsealed immediately so that it has an opportunity to consider the contents of the records in preparing its brief. In fact, CARE cannot make such a claim because it has long been provided access to every single one of the documents and testimony that were sealed. Indeed, some of the redacted testimony was cross-examination conducted by CARE. See Sept. 16, 2008 Hearing Transcript, Vol. I, pp. 49 – 55 (filed under seal); Sept. 16, 2008 Hearing Transcript, Vol. IV, pp. 136 – 37 (filed under seal). Instead, CARE complains that “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.” Expedited consideration of a motion for a party’s convenience does not meet the high “interests of justice” threshold mandated by S. Ct. Prac. R. XIV, Section 4(C).

Parties before this Court have customarily submitted briefs and evidentiary materials under seal or with portions redacted where a lower court or administrative agency has determined that the materials should remain confidential. See, e.g., *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, Slip Opinion No. 2009-Ohio-604 (Feb. 19,

2009). In that case, the Ohio Consumers' Counsel prepared and submitted a redacted version of its merit brief, even though it disagreed with the Public Utility Commission's trade-secret determination. This Court reviewed, and ultimately upheld, the Commission's determination that the information in question constituted trade secrets. *Id.* at ¶31. Decreasing a party's workload is not a sufficient justification for unsealing a record or denying an opposing party the opportunity to respond fully to a motion to unseal a record.

Furthermore, CARE's Motion for Expedited Consideration should not be granted where the only "emergency" is due to CARE's own delay and inaction. When CARE brought this appeal on March 13, 2009, it knew that portions of the Power Siting Board's record would be transmitted to this Court under seal because those portions had been sealed by the Board. Yet CARE did not file a motion in this Court to unseal the record at that time. On April 13, 2009, the Power Siting Board did, in fact, transmit portions of the record under seal, pursuant to its prior determination that the sealed items were protected from disclosure because they either were trade secrets or constituted critical energy infrastructure information. Instead of filing a motion in this Court to unseal those portions of the record at that time, CARE chose to delay until May 4, 2009, just a few weeks before its Merit Brief is due, before filing its Motion to Unseal and the accompanying Motion for Expedited Consideration. This Court should not reward CARE's needless delay by granting its request for expedited consideration.

2. CARE's Motion For Expedited Consideration Should Be Denied Because It Asks The Court To Rule On The Merits Of The Case Prematurely.

Finally, expedited consideration of CARE's Motion to Unseal should be denied because it asks this Court to rule prematurely on the merits of one of the issues on

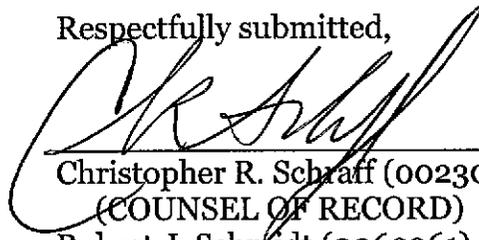
appeal and without full briefing and argument. In its Notice of Appeal, CARE asked this Court to review the Power Siting Board's Order, alleging that it was unlawful or unreasonable because the Power Siting Board "ignored the Administrative Law Judge's decision to shield key documents and key witness testimony from the public ...[.]" Notice of Appeal, Mar. 13, 2009, at 2. CARE has also alleged that the "obstructionist tactics" of the Applicants related to the sealing of such documents and testimony prevented CARE from fully and adequately preparing for the adjudicatory hearing below. Notice of Appeal, at 2. Thus, whether the documents were properly sealed is an enumerated issue in CARE's appeal – one that deserves full briefing, not expedited determination on a motion.

The Applicants seek the opportunity to respond to CARE's contentions, in merit briefs submitted in accordance with S. Ct. Prac. R. VI. It would be prejudicial to the Applicants for this Court to consider CARE's Motion to Unseal before the Applicants have the opportunity to respond or to require the Applicants to respond on an "expedited" basis. Since the Motion to Unseal is a transparent attempt to change the typical briefing schedule, the Court should allow the Applicants a full and fair opportunity to respond to CARE's allegations. Therefore, the Court should deny CARE's attempt to use its Motion to Unseal and Motion for Expedited Consideration as an "end-run" around the Court's typical briefing schedule. The Applicants also intend to respond to CARE's Motion to Unseal within the ten-day period prescribed by the Rules of Practice.

III. CONCLUSION

Because CARE's Motion for Expedited Consideration lacks legal justification and asks this Court to rule on the merits of the case prematurely, it should be denied.

Respectfully submitted,



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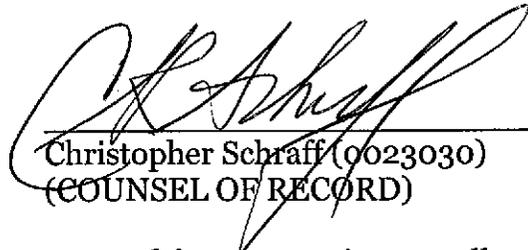
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum In Opposition of Intervening Appellees was sent by regular U.S. mail to all parties of record on May 7, 2009.



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