

**In The  
Supreme Court of Ohio**

<b>Citizens Advocating Responsible Energy,</b>	:	Case No. 09-0481
	:	
Appellant,	:	On appeal from the Ohio Power Siting Board, Case No. 07-171-EL-BTX, <i>In the Matter of the Application of American Transmission Systems, Incorporated and The Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Line Supply Project.</i>
v.	:	
<b>The Public Utilities Commission of Ohio,</b>	:	
Appellee.	:	

**MEMORANDUM CONTRA  
APPELLANT'S MOTION TO UNSEAL RECORD  
SUBMITTED ON BEHALF OF APPELLEE,  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**Thomas J. Lee** (0009529)

Counsel of Record

**Julie A. Crocker** (0081231)

Taft Stettinius & Hollister

200 Public Square, Suite 3500

Cleveland, OH 44114-2302

216.241.2838 (telephone)

216.241.3707 (fax)

[tlee@taftlaw.com](mailto:tlee@taftlaw.com)

[jcrocker@taftlaw.com](mailto:jcrocker@taftlaw.com)

**Counsel for Appellant,**

**Citizens Advocating Responsible**

**Energy**

**Richard Cordray** (0038034)

Ohio Attorney General

**Duane W. Luckey** (0023557)

Section Chief

**Thomas G. Lindgren** (0039210)

Counsel of Record

**Thomas W. McNamee** (0017352)

Assistant Attorneys General

Public Utilities Section

180 East Broad Street, 9<sup>th</sup> Fl

Columbus, OH 43215-3793

614.466.4397 (telephone)

614.644.8764 (fax)

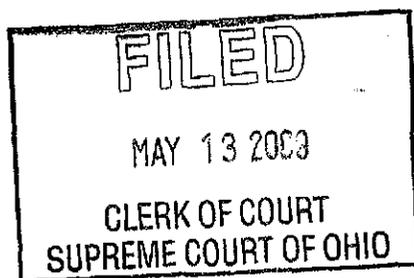
[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)

[thomas.lindgren@puc.state.oh.us](mailto:thomas.lindgren@puc.state.oh.us)

[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

**Counsel for Appellee,**

**The Ohio Power Siting Board**



**Christopher R. Schraff (0023030)**

Counsel of Record

**Robert J. Schmidt (0062261)**

**L. Bradfield Hughes (0070997)**

Porter, Wright, Morris & Arthur

41 South High Street

Columbus, OH 43215

614.227.2097 (telephone)

614.227.2100 (fax)

[cschraff@porterwright.com](mailto:cschraff@porterwright.com)

[rschmidt@porterwright.com](mailto:rschmidt@porterwright.com)

[bhughes@porterwright.com](mailto:bhughes@porterwright.com)

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

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## MEMORANDUM CONTRA

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### INTRODUCTION

The Motion to Unseal the Record in this case is a novel departure from the procedure established for appeals of Ohio Power Siting Board (Board) decisions. It is an effort to subvert the appeal process and substitute a truncated system that is fair to no one. The motion should be denied.

In the case below, the Board was presented with an application by American Transmission Systems, Inc. (ATSI) and the Cleveland Electric Illuminating Company (Applicants) for a certificate to construct a single line of wooden electric poles and conductors in a rural area of Geauga County, Ohio. A group of individuals calling itself Citizens Advocating Responsible Energy (CARE) intervened in that proceeding to oppose the application.

Prior to the hearing in the case below, Applicants filed several sets of additional information under seal, primarily load flow studies, circuit designs, and other engineering information relating to the system in the area where the line was proposed. Each set of confidential data was accompanied by a motion by Applicants to protect that data from disclosure. The Administrative Law Judge assigned to the case granted each motion as the data were confidential trade secrets and federally privileged Confidential Energy Infrastructure Information. CARE obtained all of this confidential information subject to a protective agreement under which CARE was obligated not to disclose the information

outside the Board proceedings. No public records request has ever been made regarding this information. The Administrative Law Judge's action was simply a decision about information handling by parties in the context of an ongoing proceeding.

After the hearing was finished, CARE argued in its Brief and Reply Brief to the Board that the Administrative Law Judge's confidentiality determination should be reversed. The Board disagreed with CARE, endorsed the Administrative Law Judge's findings and adopted the confidentiality ruling as its own, properly maintaining the confidentiality of the trade secret and Critical Energy Infrastructure Information. In addition, the Board approved the application and granted a certificate to Applicants subject to 43 conditions to assure that the project would meet the statutory requirements.

CARE objects to both determinations made by the Board, both the grant of the Certificate and the confidentiality finding. It has initiated this appeal to challenge both findings. CARE has chosen to file a motion with this Court asking that the confidentiality decision made by the Board should be overturned by this Court, not after the normal rounds of briefing and oral argument but, rather, up front based on motion. Proceeding on such a basis is extraordinarily bad policy and is supported by neither law nor logic.

## ARGUMENT

### Proposition of Law I

**The merits of appeals from the Ohio Power Siting Board are to be decided after the Court has received an Appellant's Brief, an Appellee's Brief, an Appellant's Reply Brief, and Supplements, and has heard an oral argument. Sup. Ct. Prac. Rules VI Section 2, 3, 4; Sup. Ct. Prac. Rule VII Sections 1, 3; Sup. Ct. Prac. Rule IX Section 1(B).**

As this Court is all too aware, administrative appeals are complex and technical. To aid the Court in the difficult task of reviewing these matters, rules have been developed. Appellant would have this Court ignore the Court's own processes. Ignoring the usual process for developing a case for the Court's review would only hamper the Court's already difficult duties. This Court should decline the offer.

Per statute, appeals from the Ohio Power Siting Board are to proceed under the same process as that used for the Public Utilities Commission of Ohio (PUCO). R.C. 4906.12. The Court's Rules reflect this approach. Sup. Ct. Rule II Section 3(C) provides that a notice of appeal from a decision of the Board shall be filed in accordance with the process provided for a notice of appeal from the PUCO. A unique naming convention applies to both the Board and the PUCO. Sup. Ct. Prac. R. II § 5. In all cases, the filing of an Appellant's Brief and an Appellee's Brief is mandatory. Sup. Ct. Prac. R. VI §§ 2(A), 3(A). Appellant may, but is not obligated to, file a Reply Brief as well. Sup. Ct. Prac. R. VI § 4. These briefs are sufficiently important to the Court's decision-making process that the failure to file can result in dismissal (of the Appellant) or reversal (of the Appellee), as appropriate. Sup. Ct. Prac. R. VI § 7. To aid the Court in analyzing the complicated matters that it faces, supplements containing relevant portions of the record

are required. Sup. Ct. Prac. R. VII § 1. This Court will have an oral argument in all Board cases, but only after the case is fully briefed. Sup. Ct. Prac. R. IX § 1(B). Appeals are thus very structured.

The ultimate purpose of all of this structure is, quite obviously, to present the cases to the Court in a clear, complete, and consistent way so that the Court can efficiently and effectively review each case and reach a thoroughly considered and correct decision. The structure is necessary so that the Court can manage the massive demands placed upon it.

CARE would have this Court ignore all this. CARE seeks a decision on one of the issues in the appeal up front without the benefit of full briefing or oral argument. This is unreasonable and unfair. It is harmful to the Court's interest because the approach simply throws out all of the procedural process which the Court has established to help itself in managing its case load. It is harmful to the administration of justice because it does not allow the full development of the issues in the case as would occur through proper briefing and oral argument. Additionally, CARE's request is akin to the piecemeal litigation of which the Court has expressed disfavor. *Cincinnati v. Pub. Util. Comm'n*, 63 Ohio St. 3d 366, 369, 588 N.E. 2d 775, 777 (1992); *Toledo Edison Co. v. Pub. Util. Comm'n*, 5 Ohio St. 3d 95, 449 N.E. 2d 428 (1983). In short, CARE's motion is a particularly bad idea and the motion should be denied.

## PROPOSITION OF LAW II

**A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained. R.C. 4903.16**

Appeals of Board decisions are purely statutory matters. As a part of the statutory mechanism the General Assembly created, there is a mechanism to provide some relief for an appellant *pendente lite*. The means provided is the stay under R.C. 4903.16. It applies to Board appeals by virtue of R.C. 4906.12 which provides:

Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.

Ohio Rev. Code Ann. §4906.12 (West 2009). Although CARE appears to want relief prior to the merit decision in the case, it has failed to recognize the only legal mechanism under which pre-merit decision relief might be sought. This is perhaps a recognition that the specific relief sought by CARE is not available and lacks any legal basis.

As noted, it is possible, in an appropriate situation, for an appellant to obtain a stay of a Board order. The statute is quite clear that a “stay” is a “...delay in the enforcement of the order complained of...” Ohio Rev. Code § 4903.16 (West 2009). A stay is not appropriate in this context.

CARE wants this Court to make certain trade secret and Confidential Energy Infrastructure Information publicly available. Doing so would not be “delaying the enforcement of the order complained of”, it would be reversing it. This reversal would also be, itself, irreversible. Once the information is made public, it can not be made private again. There is simply no means to do this. Even if the sort of relief that CARE wants were available under the statute, CARE has failed to invoke the correct section and has failed to offer the bond required<sup>1</sup>.

In sum, CARE wants relief from a Board order before the Supreme Court has an opportunity to fully hear the case. The statute, which allows relief from Board orders in some circumstances, does not allow the sort of relief CARE seeks and, even if it did, CARE has not taken the necessary steps to try to invoke that authority. CARE is not entitled to the relief it seeks under the controlling law and its motion should be denied.

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<sup>1</sup> Even if CARE had (1) asked for a sort of relief that the Court could grant under the statute, (2) invoked the correct law, and (3) offered necessary bond, it should still lose. A significant aspect of the test that is frequently suggested to the Court for application in R.C. 4903.16 situations is likelihood of success on the merits and there is essentially no likelihood that CARE will succeed on the merits. This will be shown, as it should be, in Appellee’s Merit Brief.

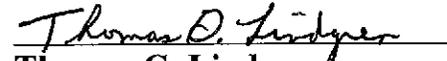
## CONCLUSION

CARE's attempt to resolve a single issue through a motion is an improper effort to circumvent the appellate process. The motion to unseal the record lacks any legal support and should be denied.

Respectfully submitted,

**Richard Cordray**  
Ohio Attorney General

**Duane W. Luckey**  
Section Chief

  
Thomas G. Lindgren

Counsel of Record

**Thomas W. McNamee**  
Assistant Attorneys General  
Public Utilities Section

180 East Broad Street, 9<sup>th</sup> Fl  
Columbus, OH 43215-3793

614.466.4397 (telephone)

614.644.8764 (fax)

[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)

[thomas.lindgren@puc.state.oh.us](mailto:thomas.lindgren@puc.state.oh.us)

[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum Contra Appellant's Motion to Unseal Record** submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, on the following parties of record, this 13~~th~~ day of May, 2009.

  
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**Thomas G. Lindgren**  
Assistant Attorney General

### **PARTIES OF RECORD:**

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

**Christopher R. Schraff**  
Counsel of Record  
**Robert J. Schmidt**  
**L. Bradfield Hughes**  
Porter, Wright, Morris & Arthur  
41 South High Street  
Columbus, OH 43215