

ORIGINAL

IN THE SUPREME COURT OF OHIO

Citizens Advocating Responsible Energy,)	Supreme Court Case No. 2009-0481
)	
Appellant,)	Appeal from the Ohio Power Siting Board
)	
v.)	
)	Siting Board Case No. 07-0171-EL-BTX
The Ohio Power Siting Board,)	
)	
Appellee.)	

MEMORANDUM OF INTERVENOR-APPELLEES AMERICAN TRANSMISSION SYSTEMS, INCORPORATED AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY IN OPPOSITION TO APPELLANT'S MOTION TO UNSEAL

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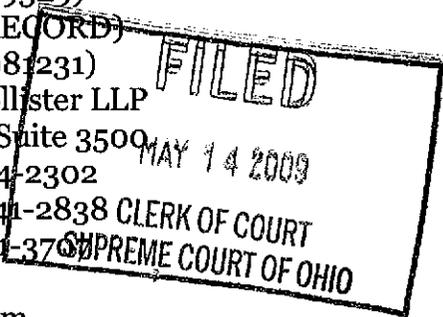
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I. INTRODUCTION

On May 4, 2009, Appellant Citizens Advocating Responsible Energy (hereinafter "CARE") filed a "Motion to Unseal Appellate Record," as well as a separate Motion seeking expedited consideration by the Court. Intervening Appellees American Transmission Systems, Inc. and the Cleveland Electric Illuminating Company ("Applicants") responded to CARE's request for expedited consideration on May 7, 2009, noting that CARE's request was not supported by the Court's Rules of Practice, was not timely made, and that it sought an end-run around the Court's regular merit briefing schedule about issues that CARE itself has brought before the Court in its Notice of Appeal. The Ohio Power Siting Board ("Siting Board") also opposed CARE's request for expedited treatment, noting that CARE's request was unfounded under the Court's procedural rules, and that this Court should not act hastily on CARE's Motion to Unseal, given that "[t]he bell cannot be unrung" if the sealed material is released.

Having opposed CARE's request for expedited consideration, Applicants now respectfully ask the Court to deny CARE's Motion to Unseal on the merits. As the following discussion will show, CARE's Motion is flawed in multiple and fatal respects.

As an initial matter, Applicants believe that motion practice of the type being pursued by CARE in this case interferes with this Court's ability to reach the merits of CARE's appeal. Although there is a general provision in the Rules of Practice allowing for motions to be filed with the Court before briefing is complete and oral arguments held, it is unlikely that the Rules anticipated, or were adopted to promote, "expedited"

motions such as CARE's whose sole intent is to circumvent this Court's ability to efficiently review complex matters arising from decisions of agencies such as the Siting Board. Procedural motions are at times necessary, as are motions for extraordinary relief. CARE's Motions are neither. By seeking an expedited ruling on the merits of the very issues raised in its Notice of Appeal, CARE is attempting to circumvent the detailed review of the Siting Board's Order that a full merit briefing schedule would allow. Accordingly, CARE's Motion to Unseal is procedurally improper and should be denied on that basis alone.

CARE's Motion to Unseal also fails for other compelling reasons. CARE negotiated and signed a Non-Disclosure and Confidentiality Agreement ("Confidentiality Agreement") with Applicants which expressly anticipated that certain information provided by Applicants during the proceedings before the Siting Board could contain Applicants' trade secrets and/or critical energy infrastructure information ("CEII"). The Agreement between CARE and Applicants regarding the treatment of such confidential information expressly provided that it would be enforced by the Siting Board's Administrative Law Judge ("ALJ"), and it was. Out of the many thousands of pages of information produced by Applicants to CARE and others in discovery, and out of the hundreds of pages of hearing testimony and exhibits, the ALJ properly sealed from *public* view only a limited quantity of information containing what she agreed were Applicants' trade secrets and CEII – *all of which CARE received in unredacted form and had the opportunity to review before the hearing from which it now appeals.*

The ALJ's determinations regarding the status of Applicants' trade secrets and CEII were proper under state and federal law and should be maintained by this Court on appeal. CARE's reliance on Ohio's Public Records Act in its Motion to Unseal is

misplaced, since neither CARE nor any other participant in the proceedings before the Siting Board invoked the remedies provided by the Public Records Act and submitted a public-records request to the Siting Board (much less filed an original action in mandamus against the Board, as specified by Section 149.43(C) of the Revised Code) seeking release of the documents that CARE now asks this Court to unseal. Further, CARE's reliance on this Court's forthcoming Amendments to the Rules of Superintendence for the Courts of Ohio is also baseless. CARE misstates the effective date of those Amendments in its Motion (they are not, in fact, effective yet), and the Rules of Superintendence by their own terms do not apply to the Siting Board or control the Siting Board's discretion to seal trade secrets or CEII.

For these and other reasons more fully discussed below, CARE's Motion to Unseal should be denied. In the alternative, this Court should defer any ruling on CARE's Motion until it rules on the merits of the identical issues raised in CARE's Notice of Appeal, after the parties have had the opportunity to fully brief those issues under the Court's rules for submission of briefs on the merits.

II. LAW AND ARGUMENT

A. CARE's Motion To Unseal Is Procedurally Improper.

1. CARE did not invoke the remedies specified in the Public Records Act.

CARE's argument in support of its Motion to Unseal opens by citing Ohio's Public Records Act ("Act"), R.C. 149.01 *et seq.* (Motion at 6.) But what CARE fails to note is that neither CARE nor any other party to the proceedings before the Siting Board made a request to the Board pursuant to Section 149.43(B)(1) of the Public Records Act – much less filed an original action in mandamus under Section 149.43(C)(1) – seeking

release of the information that CARE now asks this Court to unseal on the basis of the Act.¹ Both a request to the public office and (if that request is refused) an original action in mandamus to obtain the requested documents are express statutory remedies provided by the Act. R.C. 149.43(B)(1) (“Upon request...”); 149.43(C)(1) (“the person allegedly aggrieved may commence a mandamus action...”).

CARE cannot use an “expedited” Motion within the context of an appeal to avoid taking the steps that the General Assembly has decreed must be taken in order to compel a public office to release what the requester believes are public records. As this Court has noted time and time again, “[m]andamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act.” *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260, 788 N.E.2d 629, ¶10, quoting *State ex rel. Cincinnati Enquirer v. DuPuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶11. The statutory procedures for enforcement of the Public Records Act, as set forth in Sections 149.43(B) and (C), are the exclusive remedies provided for enforcement of the Act. As noted by this Court in *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 427, 639 N.E.2d 83:

The statute provides for the use of mandamus to enforce the public records law. That is the course that those seeking R.C. 149.43 relief should follow.

Indeed, that is why the decisions from this Court cited in CARE’s Motion were issued in original actions brought by relators seeking relief in mandamus – after their public-records requests had been rebuffed. (Motion at 6-7, citing *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St.3d 30, 485 N.E.2d 706, and *State ex rel.*

¹ It should also be noted that, to the best of Applicants’ knowledge, no other member of the public has made a request for these documents from the Siting Board under the Public Records Act.

Cincinnati Enquirer v. Jones-Kelly, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206.) CARE never filed a public-records request with the Siting Board and never filed an action in mandamus to seek release of the records it now asks this Court to unseal. Because CARE has not followed the procedures specified in the Public Records Act, it should not be allowed to pursue an “end-run” around them by filing a motion with this Court to unseal the materials which were deemed confidential by the Siting Board.

2. CARE lacks standing to invoke the Public Records Act.

CARE suffered no harm from the ALJ’s decision to seal Applicants’ trade secrets and CEII during the proceedings below. The parties entered into a Confidentiality Agreement during the proceedings before the Siting Board. Under the terms of that Agreement, CARE received from Applicants complete and unredacted versions of all of the information that CARE now seeks to unseal. CARE also was not excluded from the adjudicatory hearing before the Siting Board when testimony was heard regarding any confidential information or documents. As discussed in detail below, much of the confidential information that CARE received (and now complains has not been made public) consisted of two computer discs (“CDs”) containing raw electric load-flow data. The information was not used by CARE’s experts during the proceedings below, presumably because CARE made no effort to obtain the publicly available General Electric proprietary Positive Sequence Load Flow (“PSLF”) software, which is necessary to analyze the data.² Thus, CARE cries “foul” over the sealing of documents which: (1)

² CARE’s expert testified that the software is not publicly available. See Initial Direct Testimony of James M. Galm, Hearing Transcript, Vol. IV, Oct. 1, 2008, pages 27, 30 (ICN Trans.). Had CARE bothered to review the affidavit of Bradley Eberts, filed with the Siting Board on September 15, 2008, as Exhibit 4 to Applicants’ Response to Intervenor’s Motion To Unseal Public Records (ICN # 525) or conducted a simple internet search, it would have known that the software is available for sale to the general

were not sealed as to CARE; (2) many of which CARE did not make any effort to obtain the necessary software to use; and, (3) the sealing of which caused CARE no harm during the proceedings before the Siting Board. The lack of harm suffered by CARE or its members from the ALJ's decision to seal the limited quantity of information in question defeats CARE's standing to complain about it. See *Ohio Contractors Assn. v. Bicking*, 71 Ohio St. 3d 318, 320, 1994-Ohio-183, 643 N.E.2d 1088 ("to have standing, the association must establish that its members have suffered actual injury"); see also, R.C. 149.43(C)(1) (limiting mandamus remedy to a person "aggrieved" by a public office's failure to release a record).

To the extent CARE now advocates that the sealed status of the information will deprive *other members of the public* from access to this data (Motion at 10-11), CARE lacks standing to advocate on behalf of members of the public other than CARE's own membership. The "affected property owners," whom CARE complains "cannot even view critical evidence that ATSI and CEI have submitted to the Board" (Motion at 10-11), are free to invoke the procedures and remedies of the Public Records Act if they wish. None have done so, and CARE itself has already been provided (and continues to possess, pursuant to the Confidentiality Agreement entered into by the parties) unredacted copies of *all* the information at issue in its Motion to Unseal.

CARE's Motion is, in reality, a request for this Court to enter an advisory opinion on the rights of an unknown person's yet-to-be-filed public-records request. But this Court does not render advisory opinions in public-records cases. *State ex rel. Dispatch*

public. See http://www.gepower.com/prod_serv/products/utility_software/en/ge_pslf/index.htm. (For the Court's convenience, cited portions of the record below, transmitted to this Court from the Siting Board, will be referred to by the "ICN" number appearing on the Siting Board's April 13, 2009, Index and Docket Entries.)

Printing Co. v. Johnson, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶43. Nor does it do so in other matters. On the contrary, “[e]very court must ‘refrain from giving opinions on abstract propositions and *** avoid the imposition by judgment of premature declarations or advice upon potential controversies.’” *Arbino v. Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶84, quoting *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13, 14, 257 N.E. 2d 371.

3. CARE’s reliance on this Court’s Amendments to the Rules of Superintendence is misplaced.

CARE next invokes this Court’s Amendments to the Rules of Superintendence for the Courts of Ohio (“Amendments”). (Motion at 10-12.) There are multiple problems with this argument, not the least of which is that CARE misstates the effective date of the Amendments in its Motion. Although CARE asserts that the Amendments “went into effect on May 1, 2009,” (Motion at 10), this is simply not the case. On April 10, 2009, well before CARE filed its Motion invoking the Amendments, this Court announced that the effective date of the Amendments had been delayed to July 1, 2009. In its April 10 Announcement,³ the Court explained that the effective date of the Amendments had been delayed “[i]n order to allow more time for judges, court staff, members of the public, and the media to become more familiar with new rules on public access to court records *** [.]” See also Amended Sup. R. 99(JJ) (“The amendments to Sup. R. 44 through 47 adopted by the Supreme Court on December 15, 2008 shall take effect on July 1, 2009.”) (Emphasis added.)

There is no small irony in CARE’s request that this Court, *on an expedited basis*, apply new rule Amendments to the merits of its Motion to Unseal, when the effective

³ Available at: www.supremecourtsohio.gov/PIO/news/2009/publicAccess_041009.asp.

date of those very Amendments has just recently been postponed. This is particularly problematic given that the Amendments themselves state that “[a]ccess to case documents in actions commenced prior to the effective date of Sup. R. 44 through 47 shall be governed by federal and state law.” Amended Sup. R. 47(A)(1) (Emphasis added.) That, of course, is the very law that the ALJ already applied when she sealed the information in question in the first instance.

There are other fundamental problems with CARE’s invocation of the Amendments in this context. The Rules of Superintendence, by their own terms, “are applicable to all courts of appeal, courts of common pleas, municipal courts, and county courts in this state.” Sup. R. 1(A). The applicability of the Rules of Superintendence to courts is consistent with the provision in the Ohio Constitution under which the Rules are promulgated; that is, Article IV, Section 5(A)(1), which gives the Supreme Court “general superintendence over all courts in the state.” (Emphasis added.) Here, however, CARE is asking this Court to apply its Amendments to the Rules of Superintendence to overrule a decision to seal made not by a court, but rather by the Power Siting Board – a Board that is by statute “within the public utilities commission.” R.C. 4906.02. CARE’s invocation of the Rules of Superintendence is an invitation to this Court to utilize its Rules to contravene the operations of a state agency. This Court has long held that “[c]ourt rules must not contravene either the organic law or a valid statute, and they must be reasonable in their operation.” *Meyer v. Brinsky* (1935), 129 Ohio St. 371, 195 N.E. 2d 702, syllabus paragraph two. This Court should accord deference to the Board’s decision to seal, made pursuant to the Board’s own administrative regulations, rather than applying the Amendments as if the request to seal had been made here in the first instance. *State ex rel. Saunders v. Indus. Comm.*,

101 Ohio St. 3d 125, 2004-Ohio-339, 802 N.E.2d 650, ¶41 (regarding the “due deference” courts give to an administrative interpretation formulated by an agency that has accumulated substantial expertise in the subject area).

4. Even assuming, *arguendo*, that the Amendments to the Rules of Superintendence applied here, those Rules allow for hearings on a request to unseal case documents.

If, for whatever reason, this Court accepts CARE’s invitation to apply the not-yet-effective Amendments to the Rules of Superintendence to assess the merits of CARE’s Motion, it is worth noting that the Amendments expressly allow for hearings on requests to obtain access to case documents previously granted restricted public access, as well as hearings on requests by parties to restrict public access. See, *e.g.*, Amended Sup. R. 45(E)(1); (F)(1). Before this Court “rings the bell that cannot be unrung” and chooses to reverse the Siting Board’s sound decision to seal Applicants’ trade secrets and CEII, Applicants should be entitled to appear before the Court at a hearing, *in camera*, so that they may explain to the Court precisely why the information CARE seeks to unseal must not be released to the public, as the Siting Board has already determined.

B. Out Of Thousands Of Pages Of Information Produced To CARE In Discovery Below, As Well As Hundreds Of Pages Of Testimony And Exhibits Introduced At The Adjudicatory Hearing, The Siting Board Properly Sealed Only A Limited Quantity Of Information Containing Applicants’ Trade Secrets And Critical Energy Infrastructure Information.

1. CARE has mischaracterized the extraordinary efforts made by the ALJ and Applicants to limit the amount of sealed documents.

Throughout the proceedings below, the Applicants and the ALJ made extraordinary efforts to meet CARE’s exceptionally broad discovery requests and provide CARE with ample opportunity to develop and present its case. More than

69,000 pages of documents were produced in response to CARE's document requests. Applicants made a concerted and good-faith effort to limit the number and type of documents produced for which a claim was made that the documents contained either trade secrets or CEII pursuant to the parties' Confidentiality Agreement. In the end, two CDs of raw load-flow data were filed under seal with the Siting Board, and less than 300 additional pages of documents were identified as containing trade secrets or CEII. These documents were all produced in unredacted form to CARE before the close of discovery and weeks before the adjudicatory hearing.

CARE now seeks to characterize these documents as "public records," notwithstanding that CARE itself has had (and continues to have) complete and unfettered access to them. And CARE has failed to offer any evidence that the documents and information are not trade secrets or CEII, notwithstanding the fact that CARE had the opportunity to conduct cross-examination of Applicants' witnesses on this issue, and did not. CARE also conveniently ignores the evidence in the record, including a detailed affidavit from the Applicants and the *in camera* review of the documents and load-flow data conducted by the ALJ, which led to the sealing of these records.

Even more telling, since CARE did not obtain access to the PSLF software program necessary to "read" the data on the CDs that were filed under seal,⁴ CARE lacks any actual knowledge regarding the contents of the CDs. Consequently, CARE has no evidence to establish that the contents of the CDs are anything other than as represented by the Applications and accepted by the Board; namely, that the data is proprietary and

⁴ See Initial Direct Testimony of James M. Galm, Hearing Transcript, Vol. IV, Oct. 1, 2008, pages 27, 30 (ICN Trans.).

a trade secret and, moreover, falls within the FERC's CEII program and information-protection requirements. CARE nevertheless contends that the Applicants did not "prove" that the documents and information in question should be protected from disclosure and that the ALJ did not conduct a rigorous analysis of the Applicants' claims. Neither contention has merit.

2. The standard of review is deferential.

Before turning to the record of the proceedings below, it is important to properly characterize the standard of review applicable to the relief that CARE is requesting. CARE is asking this Court to set aside portions of an Order of the Siting Board. Under R.C. 4903.13, "[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶12. This same standard applies to decisions of the Siting Board. R.C. 4906.12 ("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.").

In reviewing PUCO decisions, this Court has stated: "[w]e will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Ohio Consumers' Counsel*, at ¶12, citing *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-

Ohio-6896, 820 N.E.2d 921, ¶29. This Court continued by stating that “[t]he appellant bears the burden of demonstrating that the PUCO’s decision is against the manifest weight of evidence or is clearly unsupported by the record.” *Id.* Although the Court has “complete and independent power of review as to all questions of law in appeals from the commission,” *Id.*, quoting *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St. 3d 466, 469, 1997-Ohio-196, 678 N.E.2d 922, the Court may “rely on the expertise of a state agency in interpreting a law where ‘highly specialized issues’ are involved and ‘where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.’” *Id.*, quoting *Consumers’ Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 388 N.E.2d 1370. Consequently, CARE bears the burden of showing that the decision of the Siting Board to adopt the ALJ’s Order sealing parts of the record was manifestly against the weight of the evidence. CARE cannot meet this burden because the only evidence in the record supports Applicants’ contention that the documents and information are both trade secrets and CEII.

3. **Applicants have made every effort to produce the least amount of information under seal while at the same time providing the ALJ and CARE with substantial evidence to support Applicants’ requests for sealing the information and documents. CARE has offered no evidence to support reversing the ALJ’s acceptance of Applicants’ contention that the documents and information are both trade secrets and CEII.**

CARE cannot meet this Court’s stringent standard of review because CARE cannot point to anything in the record that contradicts the conclusion of the ALJ, which was based both on evidence in the record and her own *in camera* review. CARE’s argument omits important details of the proceedings below and avoids any discussion of the actual standard of review applicable to its request.

It is important to consider the limited universe of documents and information placed under seal to understand why CARE's claims lack merit. After the initial submittal of the Application to the Siting Board, Applicants made three additional submittals for which Applicants requested that certain documents and information be maintained under seal. Applicants originally filed under seal three sets of two (2) CDs containing the load-flow information that is required by Ohio Admin. Code 4906-15-02(A)(4),⁵ namely raw power flow base case data.⁶ The data Applicants submitted was in the format required by the regulation in effect at the time of the filing of the Application and routinely used in the utility industry. The data was accessible through the use of a proprietary, but publicly available, software package from General Electric, known as "PSLF." In fact, the PSLF software was and remains available for purchase and can be acquired by contacting GE.⁷ As has been past practice, this information was determined to meet the definition of trade secrets by Entry dated March 3, 2008 and placed under seal.⁸ Similar transmission system information has previously been determined to be confidential by the PUCO. See, *e.g.*, Order, May 6, 2004, PUCO Case No. 04-504-EL-FOR (granting motion for protective order because of the security risk posed by information detailing the characteristics of the transmission owners' existing

⁵ It should be noted that the Siting Board has since amended Ohio Admin. Code 4906-15-02(A)(4) to remove the requirement for the submittal of this data in this format. Ohio Admin. Code 4906-15-02(A)(4) now provides: "(4) For electric power transmission facilities, load flow data shall be presented in the form of transcription diagrams depicting system performance with and without the proposed facility." Thus, the rules no longer require the submission of the raw PSLF data.

⁶ See Motion by [Applicants] for Protective Order for Certain Information Produced to Staff, Sept. 28, 2007 (ICN # 85), as amended Oct. 1, 2007 (ICN #86).

⁷ See http://www.gpower.com/prod_serv/products/utility_software/en/ge_pslf/index.htm.

⁸ See Entry, Mar. 3, 2008 (ICN # 198).

and proposed transmission lines and substations); Order, Jan. 30, 2008, PUCO Case No. 07-504-EL-FOR (granting motion for protective order to seal portions of the companies' electric long-term forecast report detailing the characteristics of the transmission owner's existing transmission lines and substations and showing the interrelationship of facilities).

In response to a subsequent request from the Staff of the Siting Board, Applicants provided additional single-page diagrams detailing the load modeling information contained on the CDs.⁹ These diagrams have detailed information on the design, structure and condition of the transmission system that was generated by the PSLF load-flow modeling software. In the past, when faced with exactly the same situation (namely, the production of diagrams based on outputs from the General Electric PSLF software package), such documents were determined by the PUCO to be trade secrets and placed under seal. See Entry, Apr. 24, 2000, PUCO Case Nos. 99-1658-EL-ETP; 99-1659-EL-ATA; 99-1660-EL-ATA; 99-1661-EL-AAM; 99-1662-EL-AAM; 99-1663-EL-UNC; 99-1687-EL-ETP; 99-1688-EL-AAM; 99-1689-EL-ATA; 00-02-EL-ETP (CG&E and DP&L Electric Transition Plan Cases). The data and diagrams sealed by the ALJ in this matter are of a type and nature that have been routinely treated as, and continue to be, trade secrets or CEII subject to protection from public disclosure.

In addition to the single-page diagrams provided to the Staff of the Siting Board and the load-flow data CDs, the Applicants also produced (in response to CARE's broad discovery requests) approximately 300 pages of other documents and one (1) additional data CD that contained Applicants' trade secrets and CEII. This represents about four

⁹ See Second Motion by [Applicants] for Protective Order for Certain Information Produced to Staff, Nov. 8, 2007 (ICN # 143).

tenths of one percent (0.4%) of the 69,581 pages of documents produced by Applicants to CARE during discovery. Of this small subset of documents and information produced to CARE, CARE introduced 14 documents at hearing, all but three of which were single-page engineering diagrams of the load-flow data – and all of which were admitted into evidence and relied upon by CARE’s witnesses.¹⁰ Applicants made no effort to restrict CARE’s access to this information, nor did Applicants attempt in any way to restrict the testimony of CARE’s witnesses based on the confidential nature of this information.

The only portions of the hearing transcript that were sealed by the ALJ relate directly to those documents introduced by CARE which were previously determined by the ALJ to be trade secrets or CEII, or both. Consequently, the only testimony before the Siting Board that was not open to the public was that portion directly related to these confidential documents.¹¹ Far from CARE’s contention that the ALJ and Applicants did not use the least restrictive method to protect information from disclosure, they made extraordinary efforts to limit the amount of information not subject to public disclosure.

4. The ALJ and Applicants made extensive efforts to ensure that only a minimal amount of information was sealed.

CARE’s contention that the Applicants failed to follow the requirements of Ohio Admin. Code 4906-7-07(h)(4)(a) and adopted an “all or nothing” approach to the information they sought to seal is disingenuous, at best. Of the 14 exhibits CARE now wishes to unseal, (Motion at Exh. A), all but three are single-page engineering diagrams of load-flow data, such that redacting them would effectively result in completely blank

¹⁰ See Hearing Transcript, Vol. II, Sept. 17, 2008, pages 6-8 (ICN Trans.).

¹¹ See, *e.g.*, Hearing Transcript, Vol. 1, Sept. 16, 2008, pages 48-58 (ICN Trans.).

pages.¹² The other three exhibits that CARE now seeks to unseal are two planning and engineering studies and a summary presentation of the planning and engineering studies. All three of these documents contain trade secrets and CEII interspersed throughout, making redaction impractical.¹³ Furthermore, the parts of the hearing transcript that are now sealed relate only to testimony based on these sealed exhibits.¹⁴

Finally, as discussed above, the CDs that CARE now wishes to unseal contain raw base case load-flow data that cannot be “redacted” in any meaningful way. The other documents filed under seal by the Applicants in October and November 2007 are the originals of the single-page engineering diagrams of the base case load-flow data that CARE had admitted as Adjudicatory Hearing Exhibits, CARE-Galm 27 – 30 and 32 – 38.¹⁵ To the extent there is any non-confidential information currently under seal, it is minimal. CARE’s suggestion that the ALJ and Applicants are preventing the public disclosure of a significant amount of non-confidential information is factually incorrect, and it does not constitute a basis for unsealing Applicants’ trade secrets and CEII.

5. The law and evidentiary record support the conclusion that the information at issue constitutes both trade secrets and CEII properly sealed in these proceedings.

CARE’s claims also fail because the documents in question constitute trade secrets and CEII, and are therefore protected by law from disclosure. Even if this were a public-records matter, which it is not, Ohio law recognizes an exception from public

¹² See Adjudicatory Hearing Exhibits, CARE-Galm 27-30 and 32-38 (ICN Trans.).

¹³ See Adjudicatory Hearing Exhibits, CARE-Galm 24-26 (ICN Trans.).

¹⁴ See Hearing Transcript, Vol. II, Sept. 17, 2008, pages 109-123, 136-140 (ICN Trans.); Vol. IV, Oct. 1, 2008, pages 9-47 (ICN Trans.).

¹⁵ The CDs are referenced at 02-15 of Volume I of the Application filed in this proceeding, (ICN # 78), and constitute the only information from the Application which was not made public.

disclosure of records submitted to a public body which contain trade secrets. Such materials containing trade secrets are exempt from disclosure as “records the release of which is prohibited by state or federal law.” R.C. 149.43(A)(1)(v). On more than one occasion, this Court has ruled that trade secrets are not entitled to disclosure to the public under Section 149.43 of the Revised Code. See, e.g., *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 2000-Ohio-282, 724 N.E.2d 411; *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 543, 2000-Ohio-475, 721 N.E.2d 1044. Thus, if a document or other material is properly classified as a trade secret, or otherwise protected from disclosure under federal and state law, it is exempt from the disclosure requirements of R.C. 149.43.

In addition to the protections afforded trade secrets under the R.C. 149.43, the data in question here is also protected from disclosure under federal law as CEII. It contains detailed engineering and transmission system data which specifically identifies load flows, modeling information and circuit designs – information which relates to “the production, generation, transportation, transmission, or distribution of energy” and which could “be useful to a person in planning an attack on critical infrastructure.” See 18 CFR § 388.113(c)(1)(i), (ii). As a consequence, this type of information has been designated as CEII by the FERC and is routinely shielded from mandatory public disclosure under the Freedom of Information Act. See *In re Hala Ballouz*, No. CE07-121-000, 119 F.E.R.C. P62,204, 2007 FERC LEXIS 1058 (June 8, 2007); *In re Baumgardner*, No. CE08-18-000, 122 F.E.R.C. P62,068, 2008 FERC LEXIS 158 (Jan. 25, 2008); *In re Kritikson*, No. CE08-26-000, 122 F.E.R.C. P62,020, 2008 FERC LEXIS 33 (Jan. 11, 2008). Consequently, the documents and information in question are both trade secrets and CEII and are protected from disclosure under both Ohio and federal

law. CARE has offered nothing to rebut this conclusion other than unsubstantiated speculation.

Following CARE's initial motion to unseal the documents and information, Applicants provided an affidavit from Bradley D. Eberts, the Director of Forecasting and Customer Load Evaluation for FirstEnergy Service Company.¹⁶ In this affidavit, Mr. Eberts explained why the CDs with the raw load-flow data and the one-page diagrams are both trade secrets and CEII. (Id.) In particular, Mr. Eberts explained that the load-flow data and the single-page engineering diagrams contain detailed information on Applicants' electrical transmission system, as well as the internal policies and planning criteria of the Applicants. Further, the load-flow data and single-page diagrams contain information on Applicants' customers that could be used to put the Applicants' customers at a competitive disadvantage. (Id.) CARE has provided no evidence to suggest that anything in Mr. Eberts' affidavit is incorrect.

These CDs are of a particular concern because they contain raw-power flow base-case information for the entire eastern interconnect (in other words, the CDs contain data regarding energy flows and flow patterns on specific electric facilities that are used to transport, transmit and distribute energy throughout most of the eastern half of the United States), not just the smaller geographic area directly implicated by the proposed Geauga 138 kV transmission line project. It is worth mentioning that, with respect to the CDs in particular, CARE's claims are particularly weak because CARE failed to obtain access to the PSLF software. CARE, therefore, has little or no idea what is actually on the CDs that it seeks to unseal and has no evidence in the record to support

¹⁶ See Affidavit of Bradley Eberts, attached as Exhibit 4 to Applicants' Response to Intervenor's Motion to Unseal Public Records (ICN # 525).

its contention that these materials are not proprietary and trade secrets or that they are not CEII. CARE cannot claim that Applicants did not “prove” that the PSLF data was trade secret and CEII when CARE made no effort to secure the PSLF software. CARE’s unsubstantiated speculation, particularly when accompanied by its conscious decision not to obtain the PSLF software, is not grounds for rejecting Applicants’ claims of trade secret and CEII status for the load-flow data. CARE has offered no reasoned basis to support its request to unseal these materials.

The confidential materials also include several single-page diagrams containing graphical depictions of the load modeling information contained on the CDs, as well as detailed information on the design, structure, and condition of the transmission system, which was generated through the use of the proprietary PSLF software.¹⁷ This information is useful to competitors in the unregulated wholesale electric generating market.¹⁸ Similar transmission system information previously has been determined to be confidential. See, *e.g.*, Order, May 6, 2004, PUCO Case No. 04-504-EL-FOR; Order, Jan. 30, 2008, PUCO Case No. 07-504-EL-FOR.

On at least two occasions, the ALJ personally reviewed the all the confidential data and the documents that CARE is now seeking to unseal, and properly concluded that the information and documents for which Applicants sought confidentiality are trade secrets and CEII entitled to confidential treatment. As the ALJ noted in her March 3, 2008 Entry at 3 (ICN # 198), she personally reviewed the CDs and the single-page engineering diagrams and concluded that they contain trade secrets as

¹⁷ See Applicants’ Response to Intervenor’s Motion To Unseal Public Records at 2 (ICN # 525).

¹⁸ See Affidavit of Bradley Eberts, attached as Exhibit 4 to Applicants’ Response to Intervenor’s Motion To Unseal Public Records (ICN # 525).

contemplated by R.C. §1333.61(D). She also personally reviewed CARE's exhibits that Applicants had asserted contain both trade secrets and CEII and correctly concluded that the proposed exhibits indeed constitute trade secrets and CEII. The ALJ reasoned:

The information on these documents has specific engineering detailed level information that were it to be in the public record would open it up to be used by anyone for whatever purpose, and for that reason the Federal Energy Commission and the Ohio Power Siting Board and the Public Utilities Commission follows their guidance. Anything that has detailed level engineering automatically is sealed here as CEII.¹⁹

Contrary to CARE's claims, there is considerable evidence in the record to support the conclusion that the documents and information in question are both trade secrets and CEII. CARE has offered nothing to rebut this conclusion or to show that the decision is against manifest weight of the evidence.

6. CARE misrepresents what the ALJ considered in making her determinations.

Finally, CARE complains that the ALJ "disregarded" a recent FERC amendment ("FERC Order No. 683") in her ruling on CARE's September 12, 2008 Motion to Unseal filed before the Siting Board. (Motion at 8.) As a threshold matter, CARE's description of FERC Order No. 683 is not accurate. CARE states that the ALJ "disregarded" the Order 683 "amendments" to the definition of CEII. It is important to note the implicit reasoning in CARE's argument is that the Order 683 "amendments" are of such scope that the information filed under seal by the Applicants no longer falls within the CEII program.

Order 683 is not a substantive change to the FERC's CEII program. Order 683-A, 119 FERC ¶ 61,029 at Paragraph 7 (2007). Rather, Order 683 is an interpretation of the

¹⁹ Hearing Transcript, Vol. I, Sept. 16, 2008, pages 9-10 (ICN Trans.).

FERC's definition of CEII. *Id.* The FERC clarified that CEII is defined to mean "specific engineering, vulnerability or detailed design information." Order 683, 116 FERC ¶ 61,263, at Paragraph 6 (2006). The clarification is that specificity and detail are required for information to fall within the CEII program. Thus, while it is true that, in Order 683, the FERC sought to "minimize the amount of information that qualifies as CEII," *Id.* at Paragraph 3, it is also true that there is no change in the FERC's underlying purpose of protecting information that – if freely available on an unprotected basis – would aid a terrorist attack. *Id.* at Paragraph 6. As discussed above, the information that was submitted under seal below consists of precisely the sort of specific and detailed information that falls well within the CEII definition – even under Order 683. As such, CARE's implicit argument – that Order 683's clarifications to the CEII program were of such scope as to exclude the information that the Applicants filed under seal from the definition of CEII – is fatally flawed, and CARE's attack on the ALJ's ruling should be disregarded.

III. CONCLUSION

For the foregoing reasons, Intervening Appellees American Transmission Systems, Inc. and The Cleveland Electric Illuminating Co. respectfully ask the Court to deny Appellant's Motion to Unseal the Appellate Record. In the alternative, this Court should defer any decision on the merits of CARE's Motion until its decision on the merits of the related issues raised in CARE's Notice of Appeal. In that way, the parties will have a full and fair opportunity to brief the issues raised by CARE in its appeal regarding the ALJ's treatment of Applicants' trade secrets and CEII.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Opposing Appellant's Motion to Unseal was sent by regular U.S. mail to all parties of record on May 14th, 2009.

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