

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.)	
)	OPSB Case No. 07-171-EL-BTX
)	
The Ohio Power Siting Board,)	
)	
Appellee.)	

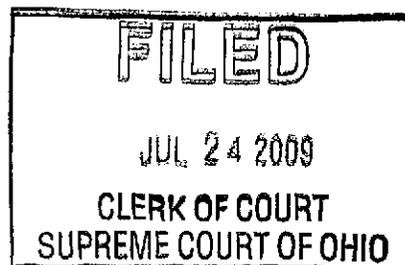
**MERIT BRIEF OF *AMICUS CURIAE* INDUSTRIAL ENERGY USERS-OHIO
 IN SUPPORT OF APPELLEE OHIO POWER SITING BOARD AND INTERVENING
 APPELLEES AMERICAN TRANSMISSION SYSTEMS, INC. AND THE CLEVELAND
 ELECTRIC ILLUMINATING COMPANY**

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STATEMENT OF FACTS

I. INTRODUCTION

IEU-Ohio's position is simple and urgent. The transmission line project approved by the Ohio Power Siting Board ("Board") in this case is needed and must be built as soon as possible in order for the industrial and manufacturing community in the affected area to remain in operation without suffering further economic harm. The improved quality of service this transmission line represents is of great importance inasmuch as service quality issues have significant impacts on the operations and profitability of the industrial community in the American Transmission Systems, Inc. and Cleveland Electric Illuminating Company (hereinafter referred to collectively as "Companies") service territories. The current economic downturn and the crippling affect it has had on industrial customers makes every improvement or advantage that much more critical to the continued operations of industrial customers. If the proposed transmission line is not built, the businesses located in the project area will suffer, and as those businesses suffer, so too does the local economy.

The existing distribution system has reached its limits in its ability to reliably serve the population to which it is dedicated, and the most effective way to adequately remedy the deficiency is to construct the 138 kilovolt ("kV") transmission system as approved by the Board.

As pointed out in the Staff Report, the Companies have explained that:

The existing 36-kV distribution system was constructed over 70 years ago and was designed to meet the area's electrical requirements in a predominately rural agricultural area. The population and electrical power requirements in this area have grown substantially and the existing distribution system is in need of additional power supply to keep the system reliable. The basis of need for the proposed project is the need to meet distribution level system requirements. Extending the existing 138-kV transmission system into the project area will supply the additional power required by the local distribution system to maintain reliable service to end use consumers.

*(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, OPSB Case No. 07-171-EL-BTX, Staff Exhibit 2 at 22 [CARE Supp. at 459]).*¹

The Companies' witnesses supported the conclusion of the Staff Report, explaining that "the existing 36-kV system ... is currently loaded beyond its design limits" and that as "electric load continues to grow, the 36-kV System will become unable to provide reliable service to CEI's customers in the local area." (Companies Exhibit 3 at 11 [Witness James Sears] [IEU-Ohio Supp. at 3]). As further explained in the Staff Report, when the normal conditions deviate for maintenance or repair, or experience peak load conditions, "the customers served by the 36-kV System experience unacceptable voltage fluctuations and other electric service issues." (*Id.* at 12 [IEU-Ohio Supp. at 4]). Witness Sears further indicated that the existing system faces unacceptable levels of operation, pointing out that the system is operating near its peak capacity under normal conditions, and is operating above its peak under N-1 conditions². (*Id.* at 19-25 [IEU-Ohio Supp. at 11-17])

The Staff Report acknowledged the Companies' data regarding the problems of low voltage at local distribution substations in the project area indicating that presently the voltages

¹ Citations to the record and the Board's Orders in the remainder of this brief have been shortened to only the document title for ease of reference and IEU-Ohio hereby incorporates in each cite the Board case caption, case number, and date of the document.

² Witness Sears explained later in his testimony that the two most normal conditions measured by the industry are "normal system conditions" and "N-1 conditions." Normal system conditions measure system performance when all system components and facilities are on-line and operating as they were designed to be operated. N-1 conditions measure system performance during periods when one component of the system is out of service, such as for planned maintenance or during a "forced" or unplanned outage. (Companies Exhibit 3 at 16 [IEU-Ohio Supp. at 8])

at three of the local distribution substations are below the normal operating and service reliability standard, (Staff Exhibit 2 at 23 [CARE Supp. at 460]). Moreover, the Companies' data also indicated that "... with the outage of one of the local distribution circuits the remaining circuits would not be able to pick up the load without causing low voltages for consumers on other distribution circuits" and that "these outages have exposed many facilities in the area to low voltage conditions." (*Id.*)

Those noted low voltage conditions result in serious negative economic consequences to the businesses in the affected area. During the local public hearings held in Thompson and Huntsburg, Ohio, a number of manufacturing industry representatives from Geauga County explained the hardships and economic risks that result from the unreliable electric service they have been experiencing on the Companies' system.³ For example, Mike Elly from Neff Perkins Company in Middlefield, Ohio testified that:

Power outages and power quality problems have created—or plagued us for more than ten years. We've incurred approximately a hundred thousand dollars in equipment damage resulting from power failures in the last 18 months alone. Equipment failures such as a burned out fire pump from a July outage, the need to replace a \$65,000 chiller system from a February outage.

In addition to these equipment failures, we're faced with dissatisfied customers because we can't meet deliveries. We're faced with increased production costs and we're faced with employees that are dissatisfied because they have to be sent home when the power goes out.

As a manufacturer in Geauga County, we must have every confidence that reliable power will be available in the near future. Without this confidence, we may be forced to consider alternative manufacturing locations outside of Geauga County.

³ As noted in the Staff Report, the Companies have received over ten complaints per year for low voltages or line outages on the distribution circuits serving the area. (Staff Exhibit 2 at 22 [CARE Supp. at 459])
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(Local Public Hearing Tr. at 25-26 [August 27, 2008] [IEU-Ohio Supp. at 26-27])

This view is not unique. Bill Ludwig from Sajar Plastics echoed Mr. Elly's points, stating that the electric reliability problems on the current system leads to costs that cannot be recovered, increases difficulties in competing in a global marketplace, and being able to justify growing the business in the Geauga County area. (*Id.* at 28-30 [IEU-Ohio Supp. at 29-31]) In addition, Lee James from Johnsonite testified that:

In the past few years Johnsonite has been impacted from the availability of a reliable power source. We have experienced an average of one to two power outages a month for the last two years. We experience continuous fluctuations in incoming voltage. We have had to shut down our facilities on multiple occasions because our voltage has fallen below 415 volts. We have shut down our facilities for extended periods at the request of First Energy to avoid a complete failure of the electrical grid. Low voltages and fluctuating voltages cause motors and their drives to fail prematurely, and as a result, we have had several instances where new electrical equipment that should have lasted for five years has failed in under one year.

(Local Public Hearing Tr. at 34-35 [September 19, 2008] [IEU-Ohio Supp. at 71-72])

Mr. James further explained that "a power outage of less than one second will stop the production process and results in the scrapping of all in-process materials." (*Id.* at 35 [IEU-Ohio Supp. at 72]) Not surprisingly, these issues have played an important role in companies' decisions to expand or relocate their businesses, as Mr. James also testified that power capability and reliability has become an important factor in Johnsonite's decision to build new facilities and expand its production processes in Middlefield, Ohio. (*Id.* at 36 [IEU-Ohio Supp. at 73]) Thus, it is clear through the testimony provided at the local public hearings that the negative power quality issues are real and have a severe negative impact on the already fragile economy in which these businesses are located.⁴

⁴ Several other manufacturing and industrial representatives from Geauga County provided testimony in support of the Geauga County Project, including Larry Lamphier from Welded Tubes, (Local Public Hearing Tr. at pp. 13-15 [August 27, 2008] [IEU-Ohio Supp. at 21-23]); Mike West from Saint Gobain {C28517:5 }

It is clear from both an analytical and practical perspective that the area is in need of the proposed transmission line. The approved transmission line can do nothing but help make the situation better. Citizens Advocating Responsible Energy (“CARE”) does not and cannot meet its burden of proof in this case and IEU-Ohio encourages the Court to affirm the Board’s lawful and reasonable ruling as quickly as possible. Doing so will remove any cloud of uncertainty over this badly needed reliability improvement and provide the Companies the freedom to move forward as expeditiously as possible.

II. PROCEDURAL HISTORY

On September 28, 2007, and as amended on January 2, 2008, the Companies filed an application with the Board for a certificate of environmental compatibility and public need to construct a 38-kV transmission line in Geauga County, Ohio. The Companies’ transmission line project involves the construction of a looped extension of an existing 138-kV electric transmission line to supply a new 138-kV to a 36-kV distribution substation located along Mayfield Road in the Huntsburg Township area of Geauga County. (Revised Application at 01-1 [January 2, 2008]).

Local public hearings were held in this proceeding in Thompson, Ohio on August 27, 2008, and in Huntsburg, Ohio on August 28, 2008 and September 10, 2008. The

Crystals, (Local Public Hearing Tr. at pp. 13-17 [August 28, 2008] [IEU-Ohio Supp. at 43-47]); Gary Petruska from Mar-Bal Inc., (*Id.* at pp. 22-26 [IEU-Ohio Supp. at 50-54]); Chris Winans from Masco Retail Cabinet Group, also known as KraftMaid Cabinetry, (*Id.* at pp. 58-62 [IEU-Ohio Supp. at 61-65]); Steve Metheny, formerly from Johnson Rubber, (Local Public Hearing Tr. at pp. 70-74 [September 19, 2008] [IEU-Ohio Supp. at 84-88]); and Mike Brakey, President of Brakey Consulting, who provided the ALJ with letters of support for the Geauga County Project from Duramax Marine, Dillen Products, Flambeau Products, Middlefield Cheese and Normandy Products, (*Id.* at pp. 61-70 [IEU-Ohio Supp. at 75-84]).

Several local leaders and economic growth advocates also provided support for the Geauga County Project, including Joseph Myernick, the executive director of the Growth Partnership for Ashtabula County, (Local Public Hearing Tr. at pp. 35-38 [August 27, 2008] [IEU-Ohio Supp. at 34-37]); Mayor Lawrence Bottoms, Mayor for the City of Orwell, (*Id.* at pp. 39-40 [IEU-Ohio Supp. at 38-39]); Geauga County Commissioner William Young, (Local Public Hearing Tr. at pp. 27-30 [August 28, 2008] [IEU-Ohio Supp. at 55-58]); and County Commissioner Joe Moroski, (Local Public Hearing Tr. at pp. 32-33 [September 19, 2008] [IEU-Ohio Supp. at 69-70]).

(C28517:5)

adjudicatory hearing was held from September 16, 2008 through September 18, 2008, with the rebuttal hearing held on October 1, 2008. At the conclusion of the rebuttal hearing on October 1, 2008, the Administrative Law Judge (“ALJ”) set the due dates for initial and reply briefs and after the completion of the briefing schedule the Board issued its Opinion, Order, and Certificate (“Order”) on November 24, 2008, approving the preferred route subject to certain conditions set forth in the Board’s Order. (Order at 46-47 [CARE App. at 70-73]). CARE filed an Application for Rehearing, which the Board denied through its Entry on Rehearing (“Entry on Rehearing”) issued on January 26, 2009. Entry on Rehearing at 16 (CARE App. at 22). CARE filed its Notice of Appeal on March 13, 2009 and its Merit Brief in this proceeding was submitted on June 12, 2009.

LAW AND ARGUMENT

Proposition of Law No. 1:

CARE has not Met the Requisite Burden of Proof for the Court to Reverse the Commission’s Opinion and Order Inasmuch as CARE has not Shown the Commission’s Order to be Unlawful or Unreasonable.

Appeals from decisions of the Board follow the same appellate procedures that apply to appeals from the Public Utilities Commission of Ohio (“Commission”). R.C. 4906.12 (IEU-Ohio App. at 21). Only this Court may review an order of the Board. R.C. 4903.12 (IEU-Ohio App. at 19); *State ex rel. Ohio Edison Co. v. Parrott* (1995), 73 Ohio St. 3d 705, 654 N.E.2d 106. As with the Commission, this Court will only reverse, vacate, or modify a final order of the Board if it is “unlawful or unreasonable.” R.C. 4903.13 (IEU-Ohio App. at 20).

With regard to the Board’s determination regarding questions of fact, this Court has held that it “will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show that the PUCO’s determination is not manifestly

against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Constellation NewEnergy v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, 2004-Ohio-6767, ¶50, citing *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St.3d 549, 555, 728 N.E.2d 371. The Court added that it “has consistently refused to substitute its judgment for that of the commission on evidentiary matters.” *Id.*, citing *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 765 N.E.2d 862. While the Court has complete and independent power to review questions of law, the Court defers to “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.’” *Ohio Consumers’ Counsel v. Pub Util. Comm.* (2009), 121 Ohio St.3d 362, 2009-Ohio-604, ¶13, quoting *Office of Consumers’ Counsel v. Pub. Util. Comm* (1979), 58 Ohio St. 2d 108, 110, 388 N.E.2d 1370.

As shown below, CARE failed to demonstrate that the Board’s resolution of the issues in this proceeding are unlawful, unreasonable, manifestly against the weight of the evidence, unsupported by the record or otherwise improper. As such, the Court should affirm the Board’s Opinion and Order.

Proposition of Law No. II:

Appellants from Ohio Power Siting Board Decisions Fail to Preserve Their Right to Appeal Claims when Those Claims are not Specifically Raised in the Assignments of Error in an Application for Rehearing.

CARE argues that the Board’s order “deprives property owners of their Constitutional rights without a full and fair hearing by the Board.” CARE Merit Brief at 8-10. CARE further relies on Section 19, Article I of the Ohio Constitution and Section 163.09(B), Revised Code, to support its argument that the Board’s Order “violates the Constitutional rights of the citizens of

Ohio.” CARE Merit Brief at 8. As demonstrated below, the Court should not consider the constitutional issues that CARE now raises inasmuch as CARE failed to properly raise these constitutional issues in its Application for Rehearing and therefore waived its right to raise them on appeal.

R.C. 4903.10(B) only permits a party to raise on appeal the “specific” grounds that the party raised on rehearing before the Board. R.C. 4903.10(B) (IEU-Ohio App. at 17) states:

Such application [for rehearing] shall be in writing and *shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. (emphasis added).*

This Court has consistently and strictly enforced the limitations contained in R.C. 4903.10(B). For example, in *Discount Cellular, Inc. v. Pub. Util. Comm.*, the Court declined to consider a Discount Cellular argument on appeal because it was not specifically raised in Discount Cellular’s Application for Rehearing, noting that Discount’s Cellular’s argument was not raised or discussed in its assignment of error on rehearing. *Discount Cellular, Inc. v. Pub. Util. Comm.* (2007), 112 Ohio St.3d 360, 2007-Ohio-53, ¶53-60. *See also Office of Consumers’ Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 247-48, 638 N.E.2d 550.

The only constitutional claim raised in CARE’s assignments of error in its Application for Rehearing was a broad claim that the Board’s reliance on the Staff Report somehow violated CARE’s right to due process. Application for Rehearing at 2, 9-11 (CARE App. at 101, 108-110.) CARE claimed that the Board’s adoption of all of Staff’s recommendations without consideration of its evidence and arguments deprived CARE of its right to a fair hearing. *Id.* at 9-11 (CARE App. at 108-110.) However, CARE does not make a constitutional claim related to the Board’s reliance on the Staff Report.

In its Merit Brief before this Court, CARE now attempts to string together R.C. 163.09(B) and Article I, Section 19 of the Ohio Constitution for the proposition that the Commission deprived property owners of their private property rights. CARE Merit Brief at 8-10. CARE did not make any arguments related to R.C. 163.09(B) and Article I, Section 19 of the Ohio Constitution in support of its actual assignments of error in its Application for Rehearing. CARE now abandons the claims it made in its actual assignment of error in its Application for Rehearing and hangs its hat on constitutional claims that CARE did not mention in its Application for Rehearing until the conclusion of its Application for Rehearing. Application for Rehearing at 25 (CARE App. at 124.)⁵

CARE waived its right to pursue this issue on rehearing when it failed to cite or explain this specific constitutional claim in an assignment of error in its Application for Rehearing. The Court should not now permit CARE to shoehorn a different constitutional argument into its appeal when it failed to raise such an argument in a meaningful way in its Application for Rehearing. The Court should hold that CARE failed to preserve its right to appeal this issue and therefore decline to consider CARE's argument.

⁵ CARE now cites three cases to support its eminent domain argument, yet only the *Norwood v. Horney* case was mentioned anywhere in CARE's Application for Rehearing and it was only mentioned in the conclusion of its Application for Rehearing. Application for Rehearing at 25 (CARE App. at 124.)
(C28517:5)

Proposition of Law No. III

Ohio Administrative Agencies have no Constitutional Obligation to Affirmatively Demonstrate an Independent Review that is Separate and Apart from an Administrative Law Judge's Findings or Draft Orders.

Even if the Court finds that CARE properly reserved this issue for appeal, CARE has failed to meet its burden to demonstrate that it was somehow deprived of its due process rights. CARE's due process claim revolves around the assertion that the Board must "carefully and independently" review the Companies' Application and that the Commission must conduct an independent review separate and apart from the conclusions of the ALJ. CARE Merit Brief at 9. CARE complains that the Board itself did not adequately consider its arguments, pointing to a perceived rubber stamp of the ALJ's draft Order. CARE Merit Brief at 10-13.

None of CARE's complaints constitute a due process violation. CARE points to no statutory authority, case law, or constitutional obligation that requires the Board itself to publicly discuss and consider applications in the manner that CARE wishes the Board had proceeded. Indeed, it is well-recognized by this Court that boards and commissions speak only through their final actions, *i.e.* their orders. *State ex rel. Yellow Freight v. Industrial Commission of Ohio* (1994), 71 Ohio St.3d 139, 142, 642 N.E.2d 378, *citing Industrial Comm. v. Hogle* (1923), 108 Ohio St. 363, 140 N.E. 612.

Further, the Board itself explained in its Entry on Rehearing that "Just because a proposed order is prepared by an ALJ does not mean it is not read and closely considered by each Board member, prior to the Board meeting at which action is to be taken. There is no reason to conclude that an order does not represent each Board member's opinion and decision, simply because no Board member chooses to comment on the proposed order or to raise an issue for discussion." Entry on Rehearing at 4-5 (CARE App. at 10-11.)

Due process does not require the Board to review every piece of evidence and conduct the independent review that CARE seeks. Agency decision-makers are not required to personally review all the evidence. Evidence “may be sifted and analyzed by competent subordinates,” and “deciding officers may ‘consider and appraise’ the evidence by reading a summary or analysis prepared by subordinates.” *State ex rel. Ormet Corp v. Industrial Comm.* (1990), 54 Ohio St.3d 102, 105-106, 561 N.E.2d 920. All that is required is that the decision-maker consider “in some meaningful manner” the evidence obtained at the hearing. *Id.* at 107.

The Board afforded, and CARE utilized, a full and fair opportunity to be heard and to raise any objections it had to the Application. CARE participated extensively, including conducting discovery, cross-examining witnesses and sponsoring its own witnesses, introducing exhibits, and presenting rebuttal evidence. CARE also filed two post-hearing briefs advocating for a specific resolution to this case. Once the Board considered the record evidence and issued its Order, CARE exercised its statutory right to file an Application for Rehearing, which was addressed and denied by the Board. Entry on Rehearing (CARE App. at 7-23.)

CARE failed to demonstrate that the Board’s Order is unlawful or unreasonable or that the Board violated CARE’s constitutional rights and therefore the Court should affirm in its entirety the Board’s Order.

Proposition of Law No. IV

The Adoption of a Draft Order Prepared by an Administrative Law Judge does not Violate R.C. 4906.02 or Constitute an Abrogation of the Board’s Statutory Authority.

CARE asserts that the Board exceeded its authority under R.C. 4906.02 to delegate duties to Board staff when it adopted an Order prepared by the ALJ. CARE claims that the Board “improperly delegated its full authority to the ALJ” and criticizes the Board for a perceived lack

of independent consideration of the Companies' Application and CARE's positions. Merit Brief at 10-14. CARE's arguments cannot be reconciled with R.C. 4906.02 or the record in this proceeding.

R.C. 4906.02(C) contains no prohibition on the Board tasking an ALJ with crafting a draft order, nor is there an inference that such a prohibition exists. R.C. 4906.02(C) provides, in its entirety:

The chairman of the public utilities commission may assign or transfer duties among the commission's staff. However, the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself.

R.C. 4906.02(C) plainly permits the Board to task an ALJ with preparing an Order for the Board to consider. An agency's orders and decisions carry the same force of law regardless of whether an ALJ or hearing examiner prepares a draft opinion. Ohio administrative agencies have long utilized administrative judges to conduct hearings and perform other tasks in the same manner that the Board relied on the ALJ. *See, e.g., Brown v. Ohio Bur. of Emp. Serv.* (1994), 70 Ohio St. 3d 1, 635 N.E.2d 1230; *see also* R.C. 119.09 (IEU-Ohio App. at 1).

The Board's delegation of authority is not improper. The Board retains the ultimate authority to accept, modify, or reject any or all of an ALJ's draft opinion. This court undertakes a similar delegation of authority when it requests a master commissioner to submit a proposed opinion to the Court or complete other tasks. *See* S.Ct. Prac.R. X, (11); S.Ct. Prac.R. IX, (7). (IEU-Ohio App. at 22-23). Such a delegation does not diminish the force and effect of the Court's decision or raise questions about the seriousness with which the Court considered the arguments raised in the case. Similar to a master commissioner's draft opinion, which parties cannot comment on or object to, an administrative agency like the Board may properly allow an ALJ to prepare a draft opinion or order without improperly delegating its authority.

As demonstrated by the Board's Order, it was considered and signed by all of the Board members at a regularly scheduled meeting of the Board. Order at 51 (CARE App. at 74.) The Order and the force of law behind the Order was authorized by the Board itself, not the ALJ. The Board alone issued the Opinion, Order and Certificate granting the Application during its ordinary public meeting on November 24, 2008.

CARE has failed to meet its burden of proof and the Court should affirm the Board's opinion in its entirety.

Proposition of Law No. V

The Board's Order Issuing a Certificate was not Unlawful or Unreasonable.

CARE claims that the Board erred when it ignored evidence that the Companies failed to conduct a study that evaluated all practical sites. CARE Merit Brief at 14. Specifically CARE objects to the Companies' alleged failure to evaluate the use of an abandoned railroad corridor (called the "Combination Route") as a potential route and/or the possibility of State Route 11 and U.S. Route 322 (Mayfield Road) as alternate routes for the transmission line. Each of these routes was considered by the Board and CARE has once again failed to meet its burden of proof to show that the Board's decision was unlawful or unreasonable.

The Board's Order acknowledges the arguments raised by CARE in support of the "Combination Route" and the other alternative routes proposed by CARE. (Order at pp. 29-31; CARE App. at 52-54.) However, the Board concluded its evaluation of the alternatives suggested by CARE and the evaluation of commercial, agricultural, and recreational land uses as follows:

We recognize that many of the impacts of building a new transmission line are problematic from the perspective of neighboring landowners. However, we also recognize that these impacts are balanced by the positive effects of such a line on residential and business needs for improved electric service. In this particular

situation, we note that the Applicants undertook a detailed and comprehensive effort to consider numerous factors related to site selection, in order to seek the route with the minimum adverse environmental impact. The Board's Staff evaluated the impacts of the proposed routes, including agricultural (which are further discussed below), environmental, aesthetic, recreational, and economic consequences. On the basis of the evidence presented, we do not believe that any of the alternatives raised by CARE would be more advantageous, overall, than the routes presented by the Applicants.

Order at 31 (CARE App. at 54.) The Board did not fail to consider CARE's arguments; it simply disagreed with CARE's analysis and recommendation.

Further, the record demonstrates that alternative routes suggested by CARE were evaluated and found to be inferior choices for a transmission line route. The rebuttal testimony of Aaron Geckle, as well as Theodore Krauss, explains why the alternative routes suggested by CARE were not viable options. Geckle Rebuttal Testimony (IEU-Ohio Supp. at 90-111); Krauss Rebuttal Testimony (IEU-Ohio Supp. at 112-142). CARE's real complaint is not that not that the Board failed to study the proposed routes suggested by CARE, but rather that its proposed routes were not selected by the Board.

The record contains ample evidence supporting the reasonableness of the Companies' and Board's choices in this regard. CARE failed to demonstrate that the Board's Order is unlawful or unreasonable and the Court should affirm in its entirety the Board's Order.

Proposition of Law No. VI

Trade Secrets and Critical Energy Infrastructure Information ("CEII") are Exempt from Public Disclosure under R.C. 149.43 because the Release of such Information is Prohibited under State and Federal Law.

The Companies submitted certain load flow information, load modeling diagrams, and other information to the Board and requested confidential treatment of such information inasmuch as it qualifies as confidential trade secret information under Ohio law and trade secret critical energy infrastructure information ("CEII") under federal law. The ALJ granted the

Companies' requests for a protective order by Entry on March 3, 2008. Entry at 2 (March 3, 2008) (CARE Supp. at 74). The ALJ also later denied a CARE motion to unseal the records on the first day of evidentiary hearings. Hearing Tr. at 9-10 (September 16, 2008) (CARE Supp. at 518-521).

The Board's decision to protect this confidential and sensitive information was lawful. R.C. §149.43(A)(1)(v) excludes from the definition of public record any documents the release of which is prohibited by state or federal law. R.C. 149.43 (IEU-Ohio App. at 5). This Court's precedent also supports the proposition that trade secrets are exempt from disclosure under R.C. 149.43, if the documents, data, or other information at issue meets the definition of "trade secret" under R.C. 1333.61(D). *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 540, 721 N.E.2d 1044. R.C. 1333.61(D) (IEU-Ohio App. at 16) defines "trade secret" as follows:

"Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The information exempted from public disclosure by the Board meets the definition of trade secrets and CEII and the Court should affirm the Board's decision in this regard.

The Companies demonstrated that these materials constitute trade secrets and CEII in each of the respective Motions for Protective Orders filed by the Companies. The ALJ evaluated the information and determined that it meets the definition of a trade secret and is therefore

exempt from public disclosure. Entry at 2 (March 3, 2008) (CARE Supp. at 74). CARE expresses great concern about these materials but yet was not so concerned during the pendency of this proceeding to file the proper interlocutory appeal to challenge the lawfulness of the ALJ's March 3, 2008 Entry. During the evidentiary hearing, the ALJ specifically identified the information at issue as CEII and denied CARE's request to unseal these materials. Hearing Tr., Vol. I, Sept. 16, 2008, pp. 9-10 (CARE Supp. at 518-521). The Board itself, after consideration of all the materials at issue, affirmed the ALJ's determinations that the materials are trade secrets and CEII. Entry on Rehearing at 15 (January 26, 2009) (CARE App. at 20).

Finally, CARE suffered no harm or prejudice from the Board's decision to grant the Companies' request for protective treatment. This Court "will not reverse an order of the Public Utilities Commission unless the party seeking reversal demonstrates the prejudicial effect of the order." *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 92, 706 N.E.2d 1255, *citing Holladay Corp. v. Pub. Util. Comm.* (1980), 61 Ohio St.2d 335, 402 N.E.2d 1175. CARE cannot demonstrate any harm or prejudice from the Board's Orders in this regard inasmuch as (subject to a confidentiality agreement) CARE had complete and unredacted access to the limited amount of information exempted from public disclosure by the Board. *See* Memorandum of Applicants American Transmission System, Incorporated and the Cleveland Electric Illuminating Company In Response to Application for Rehearing of Intervenor Citizens Advocating Responsible Energy at 27-33 (January 7, 2009). Even if the Court finds the information should not have been exempted from public disclosure, CARE cannot demonstrate any harm or prejudice, and for this reason alone the Court should not reverse the Board's decision.

CARE has failed to meet its burden of proof and the Court should affirm the Board's opinion in its entirety.

Proposition of Law No. VII

CARE was not Denied an Opportunity to Fully and Adequately Prepare for the Adjudicatory Hearing.

CARE's last argument alleges that the Companies' conduct deprived CARE of an opportunity to fully and adequately prepare for the adjudicatory hearing in this case. CARE Merit Brief at 26-30. CARE has not shown that it was denied an opportunity to fully and adequately prepare for the adjudicatory hearing in this case.

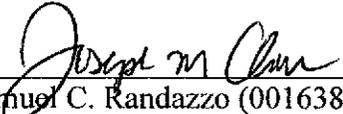
The Board's Entry on Rehearing directly addressed CARE's points and shows that CARE was afforded a full opportunity to prepare for the adjudicatory proceeding. First, the Board, after considering the arguments presented by CARE, concluded that the Companies undertook proper efforts to protect its trade secret information and that the Companies' efforts were not dilatory. Entry on Rehearing at 11-14 (CARE App. at 17-20). Further, the Board recognized that the Companies provided the confidential information when the proper confidentiality agreement was reached. *Id.* Indeed, CARE received all of the documents it requested more than five weeks prior to the start of the adjudicatory hearing. *See* Memorandum of Applicants American Transmission System, Incorporated and the Cleveland Electric Illuminating Company In Response to Application for Rehearing of Intervenor Citizens Advocating Responsible Energy at 33 (January 7, 2009). Finally, the ALJ also granted a continuation of the evidentiary hearing to allow CARE additional time to prepare despite the objections of other parties to the proceeding. Entry on Rehearing at 14 (CARE App. at 17-20).

The Board's conclusion that the Companies' conduct was proper is both lawful and reasonable. CARE has failed to meet its burden of proof and the Court should affirm the Board's opinion in its entirety

CONCLUSION

For the foregoing reasons, and those set forth in the Merit Brief of the Companies and the Board, this Court should affirm the Board's Opinion, Order and Certificate. CARE has failed to meet its burden of proof; the Board's Order was lawful and reasonable and well supported by the record evidence in this case.

Respectfully submitted,

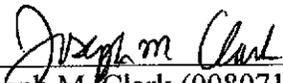


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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief of *Amicus Curiae* Industrial Energy Users-Ohio in Support of Appellee Ohio Power Siting Board and Intervening Appellees American Transmission Systems, Inc. and The Cleveland Electric Illuminating Company was sent by regular U.S. mail to all parties of record on July 24, 2009.



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119.09 Adjudication hearing.

This version is in effect until 07-01-2009

As used in this section "stenographic record" means a record provided by stenographic means or by the use of audio electronic recording devices, as the agency determines.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, and for that purpose the agency may, and upon the request of any party receiving notice of the hearing as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The fees and mileage of the sheriff and witnesses shall be the same as that allowed in the court of common pleas in criminal cases. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.

At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party; otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination.

The agency, or any one delegated by it to conduct an adjudication hearing, may administer oaths or affirmations.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct the hearing. The referee or examiner shall have the same powers and authority in conducting the hearing as is granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

Effective Date: 07-26-1991

This version is effective 07-01-2009

As used in this section "stenographic record" means a record provided by stenographic means or by the use of audio electronic recording devices, as the agency determines.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, and for that purpose the agency may, and upon the request of

any party receiving notice of the hearing as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The sheriff shall be paid the same fees for services as are allowed in the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 119.094 of the Revised Code. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which the witness may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.

At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party; otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

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written report setting forth the referee's or examiner's findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or the party's attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

Effective Date: 07-26-1991; 2008 HB525 07-01-2009

149.43 Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, other than the report prepared pursuant to section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent

that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT:

(a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and

paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public

records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6)

of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in this division, "journalist" means a person engaged in, connected with, or employed by any

news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C) (1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the

requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for

responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

Effective Date: 02-12-2004; 04-27-2005; 07-01-2005; 10-29-2005; 03-30-2007; 2006 HB9 09-29-2007; 2008 HB214 05-14-2008; 2008 SB248 04-07-2009

1333.61 Uniform trade secrets act definitions.

As used in sections 1333.61 to 1333.69 of the Revised Code, unless the context requires otherwise:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(C) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and includes governmental entities.

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Effective Date: 07-20-1994; 2008 HB562 (Vetoed) 06-24-2008

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is

in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

4903.12 Jurisdiction.

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

Effective Date: 10-01-1953

4903.13 Reversal of final order - notice of appeal.

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.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner; or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

4906.12 Procedures of public utilities commission to be followed.

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.

Effective Date: 11-15-1981

Section 5. Time and Procedures for Oral Argument.

(A) In cases involving affirmance or imposition of the death penalty, 30 minutes shall be allotted to each side for oral argument on the merits. In all other cases scheduled for oral argument, 15 minutes shall be allotted to each side for argument on the merits. In cases where there are multiple parties per side, the parties shall share the time allotted to each side.

(B) Either *sua sponte* or upon motion, the Supreme Court may vary the time for oral argument permitted by this section. Motions to vary the time for oral argument shall be filed at least seven days before the date scheduled for oral argument.

(C) The appellant shall open oral argument and may conclude oral argument by reserving time for rebuttal. In a case involving a cross-appeal, the appellee/cross-appellant may reserve time for rebuttal of the appellant/cross-appellee's argument in response to the cross-appeal.

Section 6. Oral Argument by *Amicus Curiae*.

(A) No time for oral argument shall be allotted to counsel who have filed *amicus curiae* briefs. However, with leave of the Supreme Court and the consent of counsel for the side whose position the *amicus curiae* supports, counsel for the *amicus curiae* may present oral argument within the time allotted to that side. If an *amicus curiae* wishes to participate in oral argument but either does not receive the consent of counsel for the side whose position the *amicus curiae* supports or does not expressly support the position of any parties to the case, the *amicus curiae* may seek leave from the Supreme Court to participate in oral argument, but such leave will be granted only in the most extraordinary circumstances.

(B) A motion of *amicus curiae* for leave to participate in oral argument shall be in writing and filed at least seven days before the date scheduled for the oral argument.

Section 7. Reference of Certain Cases to Master Commissioner for Oral Argument.

(A) Appeals from the Board of Tax Appeals shall be referred to a regular or special master commissioner for oral argument unless the parties waive the argument or the Supreme Court, *sua sponte* or upon motion, decides to hear the argument itself. A motion for the Supreme Court to hear oral argument shall be filed within 20 days after the filing of appellee's brief.

(B) The Supreme Court may refer any other matter scheduled for oral argument to a regular or special master commissioner for argument.

showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached.

Section 8. Merit Briefs.

All merit briefs shall conform to the requirements set forth in S.Ct.Prac.R. VI and VIII, to the extent those rules are applicable.

Section 9. Expedited Election Cases.

Because of the necessity of a prompt disposition of an original action relating to a pending election, and in order to give the Supreme Court adequate time for full consideration of the case, if the action is filed within 90 days prior to the election, the respondent shall file a response to the complaint within five days after service of the summons. Unless otherwise ordered by the Supreme Court, relator shall file any evidence and a merit brief in support of the complaint within three days after the filing of the response or, if no response is filed, within three days after the response was due. Respondent shall file any evidence and a merit brief within three days after the filing of relator's merit brief, and relator may file a reply brief within three days after the filing of respondent's merit brief. Motions to dismiss and for judgment on the pleadings may not be filed in expedited election cases. The parties shall serve the response, evidence, and merit briefs on the date of filing by personal service, facsimile transmission, or e-mail.

Section 10. Expedited Adoption/Termination of Parental Rights Cases.

If the original action involves termination of parental rights or adoption of a minor child, or both, the respondent shall file a response to the complaint within 15 days after service of the summons. After the time for filing a response to the complaint, the Supreme Court will decide on an expedited basis whether to dismiss the case or issue an alternative or a peremptory writ, if a writ has not already been issued. In order to invoke these expedited procedures, the relator shall designate on the cover page of the complaint that the original action involves termination of parental rights or adoption of a minor child, or both.

Section 11. Reference to a Master Commissioner.

The Supreme Court may refer original actions to a master commissioner for hearing and argument.

Section 12. Consequence of Failure to File Briefs.

If the relator fails to file a merit brief within the time provided by this rule or as ordered by the Supreme Court, an original action shall be dismissed for want of prosecution. Unless otherwise ordered by the Supreme Court, a dismissal under this section operates as an adjudication on the merits. If the respondent fails to file a merit brief within the time provided by this rule or as ordered by the Supreme Court, the Supreme Court may accept the