

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**MERIT BRIEF OF INTERVENING APPELLEES
 AMERICAN TRANSMISSION SYSTEMS, INCORPORATED
 AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY**

Christopher R. Schraff (0023030)
 (COUNSEL OF RECORD)
 Robert J. Schmidt (0062261)
 L. Bradfield Hughes (0070997)
 PORTER, WRIGHT, MORRIS & ARTHUR LLP
 41 South High Street
 Columbus, OH 43215
 Telephone: (614) 227-2097
 Facsimile: (614) 227-2100
 cschraff@porterwright.com
 rschmidt@porterwright.com
 bhughes@porterwright.com

Richard A. Cordray (0038034)
 Attorney General of Ohio
 Duane W. Luckey (0023557)
 Thomas G. Lindgren (0039210)
 (COUNSEL OF RECORD)
 Thomas W. McNamee (0017352)
 Assistant Attorneys General
 Office of the Attorney General of Ohio
 180 East Broad Street
 Columbus, OH 43215-3793
 Telephone: (614) 466-4395
 Facsimile: (614) 644-8764

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

*Counsel for Appellee the Ohio Power
 Siting Board*

Morgan E. Parke (0083005)
 FIRST ENERGY SERVICE CORP.
 76 South Main Street
 Akron, OH 44308
 Telephone: (330) 384-4595
 Facsimile: (330) 384-4539
 mparke@firstenergycorp.com

Thomas J. Lee (0009529)
 (COUNSEL OF RECORD)
 Julie A. Crocker (0081231)
 TAFT STETTINIUS & HOLLISTER LLP
 200 Public Square, Suite 3500
 Cleveland, OH 44114-2302
 Telephone: (216) 241-2838
 Facsimile: (216) 241-3707

Of Counsel for Intervening Appellees

*Counsel for Appellant Citizens Advocating
 Responsible Energy*

FILED
 JUL 27 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

Samuel C. Randazzo (0016386)
Lisa G. McAlister (0075043)
Joseph M. Clark (0080711)
(COUNSEL OF RECORD)
McNees Wallace & Nurick, LLC
21 East State Street, Suite 1700
Columbus, OH 43215
Telephone: (614) 469-8000
Facsimile: (614) 469-4653
sam@mwncmh.com
lmcAlister@mwncmh.com
jclark@mwncmh.com

Counsel for Amicus Curiae Industrial Energy Users-Ohio

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I. STATEMENT OF THE CASE AND FACTS

This case is about regulatory authorization to construct a new electric transmission line. The regulatory agency in question – The Ohio Power Siting Board – and the affected electric utility companies – American Transmission Systems, Inc. (“ATSI”) and The Cleveland Electric Illuminating Company (“CEI”) (jointly referred to as “Applicants”) – submit that all legal requirements for issuance of the regulatory authorization have been satisfied. Appellant Citizens Advocating Responsible Energy (“CARE”), whose members generally are landowners along the selected route, disagree and point to alleged procedural and substantive legal errors in the Board’s handling of the regulatory proceeding.

The core questions in this case all go to the question of whether the Power Siting Board committed legal error when it authorized the utility companies to construct the new electric transmission line. As explained below, no legal error was committed, and the Board’s authorization of the route was lawful, reasonable, and supported by the manifest weight of the evidence.

On September 28, 2007, Applicants filed an Application with the Ohio Power Siting Board (“Board”) for a Certificate of Environmental Compatibility and Public Need (“Certificate”) to authorize construction of a new 138 kilovolt (kV) electric transmission line located primarily in Geauga County, Ohio. The proposed line will supply a new distribution substation. The project is needed to assure the continued provision of safe and reliable electrical service in response to growing electrical demand to customers in southern and eastern Geauga County, southern Ashtabula County, and small parts of

Cuyahoga and Trumbull counties. (Application, Vol. I, p. 02-2; Applicants Supp. at 12.)
The Application was submitted pursuant to R.C. 4906.04 and 4906.06.

Applicants were required to prepare and submit, as part of the Application, a Route Selection Study (“RSS”) that evaluated the project area and identified Preferred and Alternate Routes for the proposed transmission line. Ohio Adm.Code 4906-15-03. The RSS identified those routes that would meet the statutory requirement to design and construct the transmission line to cause the “... minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” R.C. 4906.10(A)(3). To meet this requirement, the Board’s rules require a RSS to identify all qualitative and quantitative siting criteria used to identify and propose Preferred and Alternate Routes. Ohio Adm.Code 4906-15-03(A)(1)(c). The RSS is required to take into consideration both quantitative and qualitative factors to determine which route has the least impacts.

As described in the RSS submitted for this project, Applicants considered and evaluated nearly 900 alternative routes, utilizing a consistent set of land-use criteria to develop a scoring system that allowed for the quantitative comparison of the routes. (Application, Route Selection Study, Appx. 03-1; Applicants Supp. at 29-37.) After evaluating the various alternatives quantitatively, Applicants identified other qualitative factors, such as the desire to avoid taking any homes along the right-of-way of the proposed line, to identify and propose the Preferred and Alternate Routes for the transmission line. (Krauss Rebuttal, pp. 28-29; Applicants Supp. at 239-240.)

The Preferred Route – the route ultimately approved by the Board – is approximately 14.7 miles long and begins in Lake County, Ohio, at a connection to an existing transmission line, and moves south into Geauga County, following an alignment

east of State Route 528, shifting east or west to minimize impacts, until it reaches a new substation that will be built approximately 1,500 feet east of the intersection of State Route 528 and U.S. Route 322. The Alternate Route that Applicants proposed is approximately 12 miles long and would be constructed adjacent to Clay Street in a north-south direction, connecting to an existing transmission line, then traveling for its entire length in Geauga County to a substation that would be built near the intersection of Clay Street and U.S. Route 322. (Application, Vol. I, pp. 01-4 and 01-5; Applicants Supp. at 8, 9.)

In proposing a Preferred Route and an Alternate Route, Applicants indicated their willingness to build the project on either route. (Krauss Direct, pp. 63; Applicants Supp. at 225.) Notably, the Alternate Route, a route following local roads, had the best total and ecological scores in the RSS. (Application Vol. I, Appx. 03-1, Route Selection Study, p. 29; Applicants Supp. at 35.) However, given the nature of the project area and the relative closeness of the top-scoring routes, rather than proposing two alternatives with almost identical impacts, the Applicants' preference was to present the Board with a choice between a route with comparatively greater land use impacts (a road route) and a route with comparatively fewer land use impacts (a cross-country route). (Krauss Rebuttal, pp. 28-29; Applicants Supp at 239-240.) Consequently, the most favorable cross- country route – the 15th best scoring route – was selected as an alternative to the best-scoring route. (Application Vol. I, Appx. 03-1, Route Selection Study, p. 30; Applicants Supp. at 36.) Of these two routes, the decision to designate the best-scoring cross-country route as the Preferred Route was influenced by public comments on the two routes, and the Applicants' desire to avoid the need to remove six residences. (Krauss Rebuttal, pp. 29-30; Applicants Supp at 240-241.)

After Applicants filed the Application, served the Application on governmental officials, and published the requisite public notices in local newspapers, several parties sought, and were granted, intervention in the proceedings before the Board, including Appellant Citizens Advocating Responsible Energy (“CARE”), the Huntsburg Township Board of Trustees, the Geauga Park District, Industrial Energy Users–Ohio (IEU-Ohio), the City of Chardon, the Village of Orwell, and a property owner, George K. Davet. Three public hearings were held in Geauga County in August and September 2008 to take public comments on the proposed routes. Four days of evidentiary hearings on the merits of the Application were then held in September and October 2008 before an Administrative Law Judge (“ALJ”) appointed by the Board. After the hearings, the ALJ directed the parties to submit post-hearing briefs.

On November 24, 2008, the Board issued its Opinion, Order and Certificate (“Order”) (CARE Appx. at 24) granting Applicants a Certificate for construction of the transmission line along the Preferred Route, subject to 43 conditions. The Board concluded that the Application met the criteria specified in R.C. 4906.10. CARE’s Application for Rehearing (CARE Appx. at 99) was denied by the Board in January 2009. (Entry; CARE Appx. at 7.) This appeal by CARE followed.

On May 4, 2009, CARE filed in this Court a Motion to Unseal certain information that had been sealed by the Board, as well as a separate motion seeking expedited consideration of its Motion to Unseal. The limited quantity of information that CARE sought to unseal had been protected from public disclosure because the Board’s ALJ agreed with Applicants that the information included trade secret and critical energy infrastructure information (“CEII”) that should not be released into the public domain. Both the Board and Applicants opposed CARE’s expedited request to unseal this

material, and this Court unanimously denied CARE's motions on May 20, 2009. Accordingly, on June 12, 2009, CARE filed Volume III of its Supplement under seal.

II. LAW AND ARGUMENT

A. THE STANDARD OF REVIEW

Appeals from decisions of the Board follow the same procedures that apply to appeals from the Public Utilities Commission ("Commission"). R.C. 4906.12. The statutes applicable to appeals from the Commission – and, hence, the Board – provide that only this Court may review the Board's orders. R.C. 4903.12; *State ex rel. Ohio Edison Co. v. Parrott* (1995), 73 Ohio St.3d 705, 654 N.E.2d 106. A final order of the Board shall be reversed, vacated, or modified by this Court only if, "upon consideration of the record, such court is of the opinion that such order was *unlawful or unreasonable.*" R.C. 4903.13 (emphasis added).

Under the 'unlawful or unreasonable' standard of R.C. 4903.13, this court will not reverse or modify a determination [of the Siting Board] unless it is *manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.*

Chester Twp. v. Power Siting Comm. (1977), 49 Ohio St.2d 231, 238, 361 N.E.2d 436 (emphasis added); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, ¶12 (same). Where questions of legal interpretation arise, this Court relies "on the expertise of a state agency in interpreting a law where 'highly specialized issues' are involved and 'where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.'" *Ohio Consumers' Counsel*, 2009-Ohio-604, at ¶13, quoting *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 388 N.E.2d 1370. Finally, CARE bears the burden of demonstrating that the Board's Order is against the manifest weight of the evidence or

clearly unsupported by the record. *Ohio Consumers' Counsel*, 2009-Ohio-604, at ¶12.

As shown below, CARE cannot meet this burden, and neither of CARE's propositions of law supports reversal of the Board's Order.

B. RESPONSE TO CARE'S PROPOSITION OF LAW NO. I: THE BOARD LAWFULLY AND REASONABLY DELEGATED AUTHORITY TO AN ADMINISTRATIVE LAW JUDGE TO PRESIDE OVER THE HEARING.

1. The Board's Order Does Not Deprive CARE Of Due Process.

The first argument CARE makes in support of its First Proposition of Law is that the Board's order "deprives property owners of their constitutional rights without a full and fair hearing by the Board." (CARE Brief at 8-10.) Not only did CARE waive this argument by failing to raise it in its Application for Rehearing, the argument lacks merit.

i. CARE failed to preserve its argument in its Application for Rehearing.

CARE asserts that the Board's Order "violates the Constitutional rights of the citizens of Ohio," relying upon Section 19, Article I of the Ohio Constitution and R.C. 163.09(B), Ohio's eminent domain statute, in support of its argument. (CARE Brief at 8.) However, the only constitutional claim specifically mentioned in CARE's assignments of error in its Application for Rehearing was that the Board's reliance on the Staff Report somehow violated CARE's right to due process. (Application for Rehearing, pp. 2, 9-11; CARE Appx. at 101, 108-110.) CARE made a passing reference to Section 19, Article I of the Ohio Constitution in the "Conclusion" of its Application for Rehearing, but nowhere did CARE argue that R.C. 163.09(B), coupled with Section 19, Article I, confers upon CARE any elevated due-process rights in hearings conducted before the Board. (Application for Rehearing, p. 25; CARE Appx. at 124.)

The General Assembly has limited what a party may assert in this Court in an appeal from the Board. Simply put, a party cannot assert any claim on appeal that it failed to specifically preserve in an Application for Rehearing filed with the Board. The applicable statute 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.*

R.C. 4903.10(B) (emphasis added).

This Court has repeatedly upheld this limitation. See, e.g., *Office of Consumers' Counsel*, 70 Ohio St.3d at 247-48, (declining to address issues not raised by appellant in application for rehearing); *City of Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353, 376-78, 86 N.E.2d 10 (same).

This Court, therefore, should decline to consider the arguments contained in Subsection A to CARE's First Proposition of Law. Consideration of these waived arguments, after CARE failed to develop them in its Application for Rehearing,¹ "would destroy the very purpose of an application for rehearing and make it an entirely meaningless procedural step." *City of Cincinnati*, 151 Ohio St.3d at 377.

ii. CARE has not been deprived of due process.

Even if CARE did not waive its "due process" argument, the argument lacks merit. CARE's "due process" argument, simply stated, is that the Board's Order was not issued in accordance with R.C. 4906.02 because that statute prohibits the Board from

¹ Of the three cases that CARE now cites in support of its "eminent domain" argument, only the *Norwood* case was mentioned anywhere in CARE's Application for Rehearing, in the Conclusion of CARE's Application. (Application for Rehearing, p. 25; CARE Appx. at 124.)

delegating to a “single employee,” (i.e., an ALJ), the authority to prepare a draft Order which the Board may then issue. (CARE Brief at 9.) CARE fails to provide any support for this argument, which cannot be squared with the language of R.C. 4906.02, controlling case law, or the record.

R.C. 4906.02(C) does not prohibit the use of an ALJ to prepare an Order of the Board. It 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.

The Order here was adopted by unanimous vote of all Board members at its November 24, 2008 meeting, and was signed by all sitting Board members. There is nothing in the Board’s Order, or anywhere else in the record, to suggest that the Order was issued by someone other than the Board itself.

CARE’s argument is that, because the Board adopted an Order that CARE theorizes was drafted by an ALJ before the Board’s November 2008 meeting, the Board somehow violated R.C. 4906.02(C). (CARE Brief at 11.) However, R.C. 4906.02(C) contains no language prohibiting an ALJ, or anyone else, from preparing an Order which the Board then may choose to adopt; nor does the statute create such an inference. In fact, other provisions of Section 4906.02 suggest that the Board indeed was authorized to employ a hearing examiner, ALJ, or some other person to conduct hearings and, if directed, prepare an Order for review and action by the Board. For example, R.C. 4906.02(A) provides:

All hearings, studies, and consideration of applications for certificates shall be conducted by the board *or representatives of its members*.

(Emphasis added.) Section 4906.02(D) further underscores this point by authorizing the chairman of the Board to “call to his assistance, temporarily any employee” of Ohio EPA, the Department of Natural Resources, Department of Agriculture, Department of Health, or Department of Development for the purpose of “conducting hearings, investigating applications, or preparing any report required or authorized under this chapter.” When read *in pari materia* with R.C. 4906.02(C), it is apparent that the Board has authority to delegate to an ALJ the tasks of conducting hearings on applications and preparing draft orders for the Board’s consideration.

CARE complains that the Board “never met to discuss the Application or any of the evidence or arguments” (CARE Brief at 10-11), that it “did not meet to discuss the issues raised in CARE’s Application for Rehearing” (Id. at 11), and that it “drafted the Order without discussion, and without any communication from the ALJ regarding the evidence, the arguments of the parties, the testimony of witnesses, the conflicting expert testimony, or the language and conditions of the Order.” (Id.) None of these complaints rises to the level of a due-process violation. This Court has repeatedly held that there is no constitutional right to notice and hearing in utility-related matters if no statutory right to a hearing exists. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶38; *Office of Consumers’ Counsel*, 70 Ohio St.3d at 248; *MCI Telecomm. Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 310, 513 N.E.2d 337; *City of Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 446, 453, 424 N.E.2d 561. No statute imposes upon the Board an obligation to first hold an adjudicatory hearing before an ALJ, and then a second hearing, to discuss what the ALJ heard and evaluated during the adjudicatory hearing.

CARE's members have received and will continue to receive *multiple* opportunities for notice and hearing – both before the Board, and again in common pleas court as part of any eminent-domain proceedings, if property owners are unwilling to grant easements for the transmission line. CARE's contention that the Board's Order “creates an irrebuttable presumption of the necessity for the appropriation' of private property during any subsequent eminent domain proceeding” (CARE Brief at 9), even if true, is of no moment here, because as CARE itself concedes in its Merit Brief, “CARE did not contest that the Project was needed ...[.]” (CARE Brief at 3) (emphasis added). Having already conceded the necessity for the project, CARE cannot now complain about any “presumption of necessity” caused by the Board's Order in a subsequent eminent-domain proceeding that is not before the Court.

iii. CARE's members are not being “deprived” of their residences or farms. The only property right sought to be acquired for this project is an easement for the placement of an overhead electric transmission line.

In reading CARE's Merit Brief, this Court may be left with the mistaken impression that the Board's Order will result in the taking of individual residences and entire farms owned by CARE's members. The following statements from CARE's Brief may create such an impression:

“Many of the impacted property owners live on farms that have been in their families for generations and *construction of the line will forever impact not only their property, but their connection to the land and the memories it holds.*” (CARE Brief at 9) (emphasis added).

“For the individual property owner, *the appropriation is not simply the seizure of a house. It is the taking of a home – the place where ancestors toiled, where families were raised, where memories were made.*” (CARE Brief at 9) (emphasis added) (quoting *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶34.)

“... the Order ... equates to a judicial determination that *these properties should be appropriated* for the public good.” (CARE Brief at 9) (emphasis added).

However, Applicants’ proposed transmission line will be designed as a double-circuit 138 kV electric transmission line primarily constructed on single wood poles. (See Application Vol. I, p. 01-1; Applicants Supp. at 7.) The right-of-way for the proposed transmission line is approximately 30 feet from the center of the line, and is generally 60 feet wide. The property owners will be compensated for the value of the easement, either by agreement or after eminent-domain proceedings. For the most part, the proposed transmission line will cross open land and agricultural fields at some distance from residences and other structures. (Application, Vol. I, pp. 01-6, 01-7; Applicants Supp. at 10, 11.) No residences are located in the proposed right-of-way, and therefore it will not be necessary to remove *any* residential structures on the approved route. (Application, Vol. I, pp. 06-5, 06-11, and 06-12; Applicants Supp. at 15, 21, 22.)

The three cases that CARE cites in support of its claim that the Board somehow violated CARE members’ due-process rights involved far more significant intrusions into the condemnees’ property rights and bear no resemblance to the certification proceedings before the Board. *Parkside Cemetery Assn. v. Cleveland, Bedford & Geauga Lake Traction Co.* (1915), 93 Ohio St. 161, 112 N.E. 596 (cited at page 8 of CARE’s Brief), for example, involved a “dummy” corporation that tried to appropriate cemetery land for use by another company’s railroad. This Court held that “[t]here is no authority for a railroad company to appropriate land in which it does not intend to have any real or beneficial interest or use, but which it is attempting as a ‘dummy’ corporation to appropriate for the sole use and benefit of another company.” *Id.* at paragraph four of the syllabus.

In *Platt v. Pennsylvania Co.* (1885), 43 Ohio St. 228, 1 N.E. 420 (cited at page 8 of CARE's Brief), a railroad appropriated a 100-foot wide, 1200-foot long, strip of land without paying any compensation to the landowner, and this Court was called upon to determine whether the landowner could recover damages against another railroad company that later purchased a portion of the appropriated land that never had been used by the appropriating railroad company. *Id.* at paragraph three of the syllabus.

Finally, in the more recent *Norwood* decision cited by CARE, this Court determined that economic or financial benefit alone is insufficient to satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution, and that "any taking based solely on financial gain is void as a matter of law ...[.]" *City of Norwood v. Haney*, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶80. *Norwood* concerned a plan to take and raze numerous inhabited homes to make way for an economic redevelopment project proposed by a private limited-liability company, when there had been "no showing that the taking was for public use." *Id.* at ¶105. Here, in contrast, construction of the Preferred Route will not require the taking or removal of any private residences or commercial structures. (Order, p. 11; CARE Appx. at 34.)

The facts in *Parkside*, *Platt*, and *Norwood* bear no resemblance to this matter. The Board did not adjudicate any property rights as between CARE, its members, and Applicants. Indeed, the Board lacks jurisdiction to "judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to ... property rights." *Gallo Displays, Inc. v. Cleveland Pub. Power* (1992), 84 Ohio App.3d 688, 690, 618 N.E.2d 190, quoting *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St.2d 9, 412 N.E.2d 395. Those eminent-domain issues will be adjudicated in a separate proceeding if a property owner refuses to grant Applicants an easement to construct the

transmission line. This is not an eminent-domain case, and CARE has expressly conceded the necessity for the transmission line. (CARE Brief at 3.) CARE's complaints about the outcome of any eminent-domain proceedings in the future are not ripe and not properly before the Court.

2. The Board Did Not Delegate Its Authority To Issue The Certificate.

CARE asserts that R.C. 4906.02 prohibits the Board from delegating its authority to grant a Certificate to an employee of the Board. (CARE Brief at 10-11.) It bears repeating that there is nothing in the record to support CARE's unfounded speculation that the Board delegated its authority. CARE also errs in asserting that the Board somehow violated R.C. 4906.02 when it utilized an ALJ to conduct hearings or draft an Order for consideration by the Board before the Board ultimately exercised its authority to grant or deny the Application in an open meeting. The Board's actions do not amount to an unlawful delegation, and nothing in the record suggests otherwise.

i. The Board did not improperly delegate its authority to make a final determination by assigning an ALJ to preside over hearings and prepare a report or draft opinion for the agency's review and action.

The delegation of authority to a hearing officer or ALJ to preside over an evidentiary proceeding and/or prepare an agency order or decision has long been a hallmark of administrative law. See, generally, Pierce, Administrative Law (4th Ed. 2002), 553 ("An agency head need not obtain personal mastery of evidence and facts in order for the agency to render a just and sound decision. She can, and often must, defer to trusted subordinates."). The practice of internal delegation is not limited to agencies. Courts, including this Court, have long delegated certain matters to agents, such as

magistrates and special commissioners, while retaining the ultimate authority to render a final judgment. See, e.g., Sup. Ct. Prac. R. IX, §7; Sup. Ct. Prac. R. X, §11.

An agency's orders and decisions are no less legitimate or binding when an ALJ or hearing examiner prepares a draft opinion. To the contrary, agencies have long relied on ALJs to make findings, issue reports, and recommend decisions. See, e.g., *Brown v. Ohio Bur. of Emp. Serv.* (1994), 70 Ohio St.3d 1, 1994-Ohio-156 (holding that State Personnel Board of Review, which reviewed findings and recommendations of its referee without independently examining the record, should have accorded greater deference to the referee's recommendation); accord *Bell v. Bd. of Trustees of Lawrence Cty. Gen. Hosp.* (1973), 34 Ohio St.2d 70, 74, 296 N.E.2d 276. In fact, relying on precedent from this Court approving the use of ALJs in administrative proceedings, Ohio courts have permitted so-called "successor ALJs" to issue final conclusions and recommendations where the ALJ who originally heard the matter left the agency before issuing a decision. *Aircraft Braking Sys. Corp. v. Civ. Rights Comm.*, 9th Dist. No. 22841, 2006-Ohio-1304 (citing *State ex rel. Ormet Corp v. Industrial Comm.* (1990), 54 Ohio St.3d 102, 561 N.E.2d 920); see, also, *Laughlin v. Pub. Util. Comm.* (1966), 6 Ohio St.2d 110, 216 N.E.2d 60.

It is particularly appropriate for an ALJ to prepare a recommendation if she has – as here – conducted the hearing, reviewed the evidence, and heard the testimony. In those circumstances, the ALJ's recommendation is entitled to substantial deference, "because it is the referee who is best able to observe the demeanor of the witnesses and weigh their credibility." *Brown*, 70 Ohio St.3d at 3 (citing *Jones v. Franklin Cty. Sheriff* (1990), 52 Ohio St.3d 40, 43, 555 N.E.2d 940. This practice does not constitute an improper delegation of authority, because the agency ultimately has the power to accept,

modify, or reject the recommendation or draft opinion. Just as this Court may allow a master commissioner to submit a proposed opinion to the Court without improperly delegating the Court's authority to adjudicate the case, an administrative agency like the Board may properly delegate these functions to an ALJ.

ii. The Board lawfully and reasonably issued its Order granting a Certificate to Applicants.

CARE would have this Court believe that the Board itself did not issue Applicants' Certificate, but instead "improperly delegated its authority to issue a certificate ... to the ALJ." (CARE Brief at 10.) But the Board alone issued the Opinion, Order and Certificate granting the Application. The Board considered the Application during an open meeting in November 2008. And it was the Board, not the ALJ, that decided unanimously during that session to issue the Order granting the Certificate. The Order bears the signature of each sitting member of the Board, not the ALJ. Thus, the authority to grant the Certificate was exercised by the Board, as R.C. 4906.02 requires. That statute imposes no other requirements.

CARE further asserts that the Board issued its Order without "any communication from the ALJ regarding the evidence, the arguments of the parties, the testimony of witnesses, the conflicting expert testimony, or the language and conditions of the Order." (CARE Brief at 11.) CARE thus infers that, because there is no record of extensive discussions by the Board, the Board must not have considered the Application or the proceedings before the ALJ. CARE does not cite to anything in the record to substantiate this. Rather, CARE takes a single sentence of the Board's Entry on Rehearing out of context to claim support for CARE's assertions:

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.

(CARE Brief at 12) (quoting the Board's Entry on Rehearing). According to CARE, this statement is an admission by the Board that it did not itself consider the Application, and that the Board should have "state[d] affirmatively that, in accordance with its statutory obligations, each member of the Board independently reviewed and analyzed the record and evidence." (CARE Brief at 12.) But, in its Entry on Rehearing, just before the quote CARE relies upon, the Board did affirmatively state:

With regard to the actual decision-making process, each Board member is responsible for his or her own review of the record and determination of an appropriate outcome.

(Entry on Rehearing; CARE Appx. at 10.) Thus, the Board's statements in denying CARE's Application acknowledge that the Board was indeed aware of – and met – its statutory obligations to review the record and determine an appropriate outcome.

CARE has failed to demonstrate that the Board's actions were unlawful or unreasonable.

iii. The Board was not required to serve a draft Order upon the parties.

Assuming that the ALJ did prepare a draft Order for the Board to review, neither the ALJ nor the Board was required to serve the draft Order on the parties. In some instances, there is a statutory requirement that hearing examiners' reports and recommendations be served upon parties in order to allow them an opportunity to object before the agency makes a final determination. See, e.g., R.C. 119.09. But the General Assembly has expressly excluded the Public Utilities Commission, and, hence, the Board, from these requirements, unequivocally stating that "sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission." R.C.

119.01(A)(1) (emphasis added). As this Court has recently recognized, the General Assembly intended that different, and potentially more “streamlined,” procedures apply to the Commission. *Discount Cellular*, 2007-Ohio-53, at ¶18 (noting that the Commission was not required to follow “traditional” rulemaking processes, and that “only a streamlined process” was required).

In a similar case, this Court has expressly recognized that agencies exempt from R.C. Chapter 119 do not need to distribute hearing examiners’ reports to the parties before reaching a final decision. In *TBC Westlake v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58, 689 N.E.2d 31, a statute allowed the Board of Tax Appeals to use examiners to conduct hearings and “report to [the Board] their finding for affirmation or rejection.” R.C. 5717.01. The appellants in *TBC Westlake* argued, much like CARE does here, that the Board of Tax Appeals’ refusal to distribute the attorney examiner’s report to the parties before the board ultimately decided the matter violated Ohio’s Sunshine and Public Records Acts. This Court rejected these arguments. First, the Court held that the agency did not need to distribute the report under Ohio’s Sunshine Law, R.C. 121.22, because that law does not apply in quasi-judicial proceedings where privacy is needed in the deliberation process. *TBC Westlake*, 81 Ohio St.3d at 62.² Furthermore, this Court concluded that the agency did not need to distribute the report under the Public Records Act, R.C. 149.43, because the common law’s “judicial mental-process privilege” applies to administrative agencies, and the Public Records Act contains an exemption for records whose release is prohibited by

² This Court defined quasi-judicial proceedings as those that include requirements like providing notice, a hearing, and an opportunity to introduce testimony and evidence. *Id.* at 61.

state or federal law. *Id.* at 62-64. These same principles apply to proceedings before the Board, which, like the Board of Tax Appeals, is exempt from R.C. 119.09.

Regulations promulgated under the Board's implementing statute also give the Board the discretion to decide whether to serve an ALJ's report upon the parties and provide them an opportunity to file objections:

If ordered by the board the administrative law judge shall prepare a written report of his or her findings, conclusions, and recommendations following the conclusion of the hearing. Such report shall be filed with the board and served upon all parties.

Ohio Adm. Code 4906-7-16(A) (emphasis added). The phrase "if ordered by the board" expressly leaves to the Board's discretion the option to require service of an ALJ's report. Accord *Discount Cellular*, 2007-Ohio-53, ¶17 (where the statute at issue permitted the Public Utilities Commission to hold a hearing "if it considers one necessary."). The Board chose not to exercise that discretion here.

CARE relies upon a "Statute Process Flowchart" from the Commission's website to argue that the ALJ must draft a report for the Board. (CARE Brief at 12.) The Flowchart has no authoritative force, and is described on its face as a "working draft." In any event, it contains no requirement that an ALJ's report must be served on the parties for review and comment before the Board's decision. The Flowchart simply anticipates that an ALJ report may be made, which is consistent with the regulation giving the Board the discretion to order one if it wishes.³

³ Available at www.puco.ohio.gov/emplibrary/files/OPSB/flowchart.pdf. Moreover, the Board's Guidance Document summarizing procedures before the Board does not provide for the filing of a draft report by the ALJ, or for comments by the parties on such a report. See Siting Board Guidance Document (Feb. 2005), at 4; available at www.puco.ohio.gov/emplibrary/files/OPSB/OhioSitingManual2005.pdf.

The only case that CARE cites in support of its argument, *Laurel Baye Healthcare of Lake Lanier, Inc. v. National Labor Relations Bd.* (C.A.D.C. 2009), 564 F. 3d 469, is equally unresponsive. In *Laurel Baye*, the National Labor Relations Board (“NLRB”) violated its organic statute by making a final decision absent the statutorily required quorum of members. Knowing that term expirations would temporarily leave the NLRB without a quorum, the NLRB attempted to circumvent the statutory requirement for a three-member quorum by delegating its authority to a smaller group. The smaller group tried to act on behalf of the NLRB. The U.S. Court of Appeals for the D.C. Circuit held that the NLRB acted beyond its lawful authority because the NLRB’s organic statute required a quorum of at least three members, and that the quorum must be satisfied at all times. *Id.* at 472-473. This appeal does not present a situation similar to the *Laurel Baye* case. CARE has provided no legal or factual support suggesting that the Board acted improperly by having an ALJ preside over the hearing or otherwise assist the Board in preparing its final Order. To the contrary, the record reflects that the Board carried out its statutory duties and issued a lawful and reasonable Order.

iv. CARE’s objections were fully heard before the ALJ in an adversarial, evidentiary proceeding.

CARE asserts that the “public, and the parties, are left to believe that each member of the Board individually synthesized thousands of pages of hearing transcripts and exhibits.” (CARE Brief at 11.) CARE suggests that this would be preposterous and that the Board, therefore, must not have performed its statutory duties. Practically speaking, however, if R.C. 4906.02 were read to require that each member of the Board hear and consider every shred of testimony and other evidence adduced at the hearing, there would be no need for an ALJ – the ALJ would be redundant and unnecessary.

This Court does not interpret statutes in a manner that would lead to such an absurd result. *State ex rel. Todd v. Felger*, 116 Ohio St.3d 207, 2007-Ohio-6053, ¶10.

Due process requires only notice and an opportunity to be heard – once. *Luff v. State* (1927), 117 Ohio St. 102, 111-12, 157 N.E. 388 (noting that appeals, even from criminal convictions, are not a necessary element of due process, and that “[d]ue process of law involves only the essential rights of notice and hearing, or opportunity to be heard before a competent tribunal.”). In administrative proceedings, the requirements of due process are more relaxed. *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46, 51, 554 N.E.2d 97. As one court explained:

Due process or the concept of a fair hearing does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. Where an agency expressly or impliedly has authority to delegate the taking of evidence to less than the whole number of its members or to an examiner or investigator, a hearing by such delegate does not deny due process and is not unfair, provided the evidence so taken is considered by the agency in making the ultimate decision.

State v. Carroll (1977), 54 Ohio App.2d 160, 171, 376 N.E.2d 596 (quoting 1 Oh. Jur. 2d, (1953), Administrative Law and Procedure, Section 114; *In re 138 Mazal Health Care, Ltd.* (1997), 117 Ohio App.3d 679, 691 N.E.2d 338 (quoting *Carroll*). This Court, too, has noted that due process does not even require the same ALJ who hears a case to be the one who prepares findings and recommendations. *Ormet*, 54 Ohio St.3d at 111; *Laughlin*, 6 Ohio St.2d at 112.

Neither does due process require the agency decision-makers to personally review all the evidence. Instead, 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.” *Id.* at 105-106 (citations

omitted). All that is required is that the decision maker consider “in some meaningful manner” the evidence obtained at the hearing. *Id.* at 107.

CARE had a full and fair opportunity to be heard and to raise any objections that it had to the Application. CARE participated in the hearings, cross-examined witnesses, put on its own witnesses, introduced exhibits, and presented rebuttal evidence. CARE also filed post-hearing briefs. After hearing all the testimony and reviewing the post-hearing briefs, the ALJ apparently prepared a draft Order for the Board’s review. The Board, in turn, after conducting its own review, exercised its authority to grant the Certificate. CARE’s argument that it should somehow be afforded a *second* hearing before the Board far exceeds any recognized requirement of due process.

3. The Board Lawfully And Reasonably Issued A Certificate For The Proposed Transmission Line After Considering The Evidence And Arguments Presented By CARE.

CARE claims that the Board’s Order failed to “evaluate” evidence presented by CARE that: (1) routes along “transportation corridors” can serve as alternative routes for Applicants’ proposed transmission line; and (2) Applicants “failed to consider commercial, agricultural, and recreational land uses in their route selection process.” (CARE Brief at 14.) These claims are not factually accurate, nor do they provide any basis to conclude that the Board’s Order was unlawful or unreasonable.

i. The Board lawfully and reasonably rejected alternative transmission line routes proposed by CARE.

CARE argues that several routes were not evaluated by Applicants. Specifically, CARE claims that “[u]se of an abandoned railroad corridor ... was not properly evaluated as a potential route” and that Applicants also failed to fully evaluate State Route 11 and U.S. Route 322 (Mayfield Road) as alternate routes for the new line.

(Id. at 15.) However, the record shows that each of these routes *was* fully considered by Applicants during their evaluation of literally hundreds of other potential routes, and was considered by the Board.

Before addressing the merits of CARE's contentions about the abandoned railroad corridor route, it is critical to understand one key fact: a significant portion of CARE's "abandoned railroad corridor" route is a public park and part of the Geauga Park District's Maple Highlands Trail (or "Bike Trail"). (Curtin Testimony, pp. 3-4; Applicants' Supp. at 197-198.) In fact, the record reflects that the Bike Trail is heavily used - and loved - by the local community. (Id. at 14; Applicants' Supp. at 202.) While much of Applicants' RSS methodology and analysis involves descriptions of complex processes that are used in route selection, CARE is advocating the use of a route that would burden public park lands that are dedicated to recreational and conservation purposes *in lieu* of burdening private lands owned by some CARE members.

By so doing, CARE suggests that public policy should favor siting utility facilities on lands that have been developed with tax dollars and dedicated to public use for recreation and conservation in order to avoid impacts to private landowners. Applicants' RSS methodologies reflect a value judgment that utility lines should run through public lands that are used or dedicated to public recreation or conservation only if there are compelling reasons to so. And, as reflected in the following discussion of the record evidence regarding the RSS methodologies and results, this case does not present any such compelling reasons. Accordingly, the Court should sustain the Board's decision to certify the line to run on the selected route - and reject CARE's efforts to shift the burden onto public lands that are heavily used by the local community.

a. The Board lawfully and reasonably rejected CARE's "abandoned railroad corridor" route.

CARE faults the Board and Applicants for failing to evaluate a "Combination Route" that would have involved constructing the proposed transmission line along the Geauga Park District's Maple Highlands Trail (or "Bike Trail"), then routing the line along what CARE refers to as an "abandoned railroad corridor" through the heart of downtown Chardon, Ohio. (CARE Brief at 15.) However, the Board fully considered CARE's advocacy of the "Combination Route" and rejected this route.

It is important to clarify the routes that CARE is referring to in its Brief. At various times, CARE has argued that Applicants did not consider using certain alternative routes for the transmission line. As noted earlier, CARE argues that Applicants did not properly evaluate an "abandoned railroad corridor" as a route for the line. CARE's argument, however, glosses over the fact that significant portions of the railroad corridor were, in fact, considered *both* in Applicants' RSS *and* in response to a request from the Board's Staff. (See Response to Interrogatory 16 of Staff's First Set of Interrogatories, as initially filed Apr. 15, 2008; Applicants Supp. at 70.) Initially, Applicants' RSS evaluated a route that the Board had approved previously in the "*Rachel* proceeding,"⁴ and which included portions of the then-unimproved railroad corridor. (Application Vol. I, Appx. 03-1, p. 8; Applicants Supp. at 33.) This route was scored in the RSS and ranked far below the Preferred and Alternate Routes. (*Id.*, p. 31; Applicants Supp. at 37.) A second route that used the railroad corridor was a route that the Board's Staff asked Applicants to consider along the existing Maple Highlands Trail

⁴ See PUCO Case No. 95-600-EL-BTX, *In the Matter of the Short-Form Application Of the Cleveland Electric Illuminating Co. for Certification of the Rachel 138 kV Transmission Line Project, Located in Geauga County, Ohio.*

and then traveling along additional portions of a former railroad right-of-way within the City of Chardon. This route was referred to in the proceeding below as the “Combination Route.” (See Response to Interrogatory 16 of Staff’s First Set of Interrogatories, as filed May 19, 2008; Applicants Supp. at 72.) This route was evaluated, as were all of CARE’s alternatives, using the same methodology as the RSS, and all scored poorly compared to the Preferred and Alternate Routes. (Application Vol. I, Appx. 03-1, Route Selection Study, p. 31; Applicants Supp. at 37.)

Although CARE argues that the Board did not consider the “abandoned railroad corridor,” the Board’s Order contains a detailed discussion of the evidence offered by CARE in support of the “Combination Route.” (Order at 29-31; CARE Appx. at 52-54.) The Board concluded its evaluation of the various routes offered by CARE 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 Appx. at 54.) It can hardly be said, therefore, that the Board failed to consider the merits of the “Combination Route” proposed by CARE. Rather, the Board specifically considered and rejected the “Combination Route” because that route did not represent the “minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations” required by R.C. 4906.10(A)(3).

The record contains ample evidence upon which the Board relied establishing that the so-called “Combination Route” was evaluated and found to be a poor choice for a transmission line. The “Combination Route” was evaluated in response to a Staff request that Applicants evaluate that particular route. Applicants provided a response to Staff’s Interrogatory (Response to Interrogatory 16 of Staff’s First Set of Interrogatories, May 19, 2008; Applicants Supp. at 72) which provided an extended evaluation of the “Combination Route.” Applicants applied the same route selection methodology to the “Combination Route” as was used in the RSS. (Krauss Direct, pp. 108-109; Applicants Supp. at 226-227.) When compared to the other routes in the RSS, the “Combination Route” ranked 209th out of 894 alternatives – i.e., far from an ideal route. (Id.; see, also, Staff Report, p. 4; Applicants Supp. at 143.) The “Combination Route” scored poorly, as compared with Applicants’ proposed routes, because it crossed highly developed areas, multiple streams and wetlands, and impacted the recreational uses of the Maple Highlands Trail. (Krauss Direct, pp. 110-111; Applicants Supp. at 228-229.)

Use of the “Combination Route” also would have conflicted with the positions of the Geauga Park District and the City of Chardon, both of which intervened and opposed this route. (See Curtin Testimony, pp. 11-19; Applicants Supp. at 199-207.) Moreover, there was uncertainty about whether Applicants could exercise the power of eminent domain to acquire title to a portion of the Maple Highlands Trail in the face of opposition from the Park District. (See Coyne Testimony, pp. 5-12; Applicants Supp. at 187.) CARE also argues that Applicants never seriously considered use of the “Combination Route” because they contacted the Park District and shared their concerns and opposition to using this route. (CARE Brief at 15-16.) However, it should

have been apparent to CARE that Applicants would contact the Park District about the “Combination Route,” as any proposed use of the Bike Trail would involve the Park District. The Park District was not yet a party to the proceedings, and, as stated in the Application, Park District officials had already indicated that they would strenuously oppose a transmission line along the Maple Highlands Trail. (Application Vol. I, Appx. 03-1, Route Selection Study, p. 31; Applicants Supp. at 37.)

The City of Chardon also vigorously opposed construction of the proposed transmission line along the “abandoned railroad corridor” through downtown Chardon. The City noted that it would be difficult to route the transmission line through high-density residential, commercial, and industrial development downtown, and questioned whether there would be sufficient space to avoid structures located in the proposed right-of-way. (Hartt Testimony, pp. 7-8, 12-15; Applicants Supp. at 244-245, 247-250.) Other portions of the “abandoned railroad corridor” have been redeveloped by private owners, and no longer constitute an “existing civil corridor” or an “abandoned railroad right-of-way.” (Krauss Rebuttal, pp. 16-17; Applicants Supp. at 234-235.)

CARE finally argues that a “significant portion” of the Combination Route “already is used for a 36 kV electric distribution line,” and that Applicants never discussed with the Park District the feasibility of placing electric poles adjacent to the Bike Trail. In fact, however, less than 20 percent of the “Combination Route” is paralleled by 36 kV lines or other electrical structures. (Id., p. 18; Applicants Supp. at 236.) Further, the Board’s Staff Report in the earlier *Rachel* proceeding concluded that following an alignment that parallels the abandoned Baltimore and Ohio Railroad (now the Maple Highlands Trail) will not result in minimal environmental impacts. (Staff Report, PUCO Case No. 95-600-EL-BTX, p. 30; Applicants Appx. at 36.) As a result, the

Board's Order in the *Rachel* proceeding included a condition that the structures be placed atop the railroad embankment, not adjacent to it, which would require placement of the transmission line directly on top of the Bike Trail which was constructed on the embankment.⁵ (Opinion, Order and Certificate, PUCO Case No. 95-600-EL-BTX, p. 28, Applicants Appx. at 42.)

The Board's Order explicitly considered CARE's arguments in favor of the Bike Trail and the "abandoned railroad corridor" through the City of Chardon. The Board's rejection of this "Combination Route" was rooted in ample evidence in the record, which demonstrated that this route was not feasible, and that it did not represent the "minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations." R.C. 4906.10(A)(3). The Board's decision to reject routes utilizing the "abandoned railroad corridor" was lawful and reasonable.

b. The Board's Order lawfully and reasonably concluded that neither a route along U.S. Route 322 (Mayfield Road) nor State Route 11 represents the minimum adverse environmental impact, as required by R.C. 4906.10(A)(3).

CARE also argues that the Board "ignored" evidence that U.S. Route 322 and State Route 11 are viable alternative options for the transmission line. (CARE Brief at 18.) Ultimately, CARE's argument is not premised upon any failure by the Board or Applicants to study the U.S. Route 322 or State Route 11 options. CARE's real complaint is that these routes were not ultimately *selected* by either Applicants or the Board as the route that the proposed line should follow. However, the record contains ample

⁵ In fact, placement of the line atop the embankment was considered and not recommended by Staff as an option in the earlier *Rachel* proceeding before the Board. (Krauss Rebuttal, p. 22; Applicants Supp. at 237.)

evidence supporting the reasonableness of Applicants' and the Board's choices in this regard.

As was the case with the "Combination Route," the Board discussed CARE's arguments in favor of both U.S. Route 322 and State Route 11. (See Order, pp. 29-31; CARE Appx. at 52-54.) The Board determined that neither of these routes was "more advantageous, overall, than the routes presented by Applicants." (Order, p. 31; CARE Appx. at 54.)

The Board's decision to reject the U.S. Route 322 and State Route 11 routes was amply supported by the record. CARE claims that "[n]o consideration was given to the possibility of constructing the proposed line along Route 322 prior to submittal of the Application." (CARE Brief at 18.) However, Aaron Geckle, an experienced land-use planner, testified that U.S. Route 322 (Mayfield Road) *was* considered early in the planning process as part of a pre-Application "screening study" in January 2006. (Geckle Rebuttal, p. 2; Applicants Supp. at 213.) U.S. Route 322 scored 43rd out of 61 corridors initially evaluated. (Id.) This route was also discussed with elected officials in May 2007 and was rejected because of the presence of sensitive land uses, including a large number of historic residences and dense residential and commercial development. (Id., p. 3; Applicants Supp. at 214.)

Mr. Geckle also compared U.S. Route 322 with the other potential routes utilizing the same scoring system used in the RSS. Mr. Geckle testified that U.S. Route 322 scored 894th out of 894 routes studied overall (including the 893rd route evaluated – the "Combination Route"). (Id., p. 5; Applicants Supp. at 216.) Mr. Geckle noted that, if U.S. Route 322 were utilized, 14 residences and 16 other commercial structures within the proposed right-of-way for the transmission line would need to be removed. (Id.)

Placing the transmission line along U.S. Route 322 also would require the line to cross two heavily congested intersections. (Id.) The U.S. Route 322 route also would extend the transmission line across the Chagrin River – a State Scenic River. No other route considered crosses a State Scenic River. (Id., p. 6; Applicants Supp. at 216.) Also, in contrast to U.S. Route 322, the Preferred Route does not require the removal of any residential, commercial, or other structures. (Application, Vol. I, pp. 06-5 to 06-13; Applicants Supp. at 15-23.)

Theodore Krauss, a registered professional engineer with decades of experience in power siting and public utility engineering, testified that the U.S. Route 322 (Mayfield Road) route was impractical for several other reasons, including:

- (1) It would be necessary to site two sets of transmission poles along U.S. Route 322 – one set for an existing 36kV electrical distribution line currently running along U.S. Route 322, and a second set for the proposed 138 kV transmission line.
- (2) The right-of-way that would be necessary to accommodate both sets of electrical lines, which must be offset from each other for safety reasons, would require approximately 25 additional feet of right-of-way on each landowner's property, in addition to the 60 feet of right-of-way necessary for placement of the 138kV transmission line.
- (3) The right-of-way necessary to accommodate two sets of electrical lines along U.S. Route 322 would exacerbate impacts to vegetation, sensitive areas, residences and other structures.

(Krauss Rebuttal, pp. 9-10; Applicants Supp. at 232-233.) In short, both Applicants and the Board fully considered and evaluated the viability of U.S. Route 322 as an alternate route, and concluded that this route did not represent the “minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations.” R.C.

4906.10(A)(3). The Board's conclusion was supported by the manifest weight of the evidence in the record.

Applicants also evaluated State Route 11, and the Board concurred that this route offered no advantages over the routes Applicants proposed. CARE claims that State Route 11 was "not fully studied by Applicants and there is no discussion in the Application regarding whether this would be a suitable option." (CARE Brief at 18.) However, routes utilizing Route 11 were evaluated as part of a screening study performed by URS in April, 2006. (Geckle Rebuttal, p. 7; Applicants Supp. at 218.) State Route 11 ranked 9th out of 11 options screened in this study. URS again evaluated this option in May, 2007, in response to inquiries from elected officials. (Id., p. 8; Applicants Supp. at 219.) Again, this route fared poorly as compared with other routes. (Id., p. 9; Applicants Supp. at 220-21.)

CARE suggests that State Route 11 was rejected primarily, if not exclusively, due to Applicants' past experience with the Ohio Department of Transportation ("ODOT"), indicating that ODOT did not favor placing high-voltage electric transmission lines within ODOT rights-of-way and parallel to limited-access highways. (CARE Brief at 19.) Before addressing the merits of CARE's contentions about the State Route 11 route, the Applicants note that CARE, by advocating a route along State Route 11, is advocating for a longer route with more impacts that would also burden an ODOT right-of-way dedicated for a limited-access public highway. In addition to Applicants' serious concerns about the ability to safely operate and maintain a transmission line located within a limited-access highway, it is Applicants' past experience that ODOT is extremely reluctant to allow a transmission line to be installed within and parallel to a limited-access highway. Applicants are not aware of any such installation in Ohio.

(Krauss Rebuttal, p. 25; Applicants Supp. at 238.) It also should be noted that CARE provided few specific details about this route, but vaguely indicated that it must extend from State Route 11 to the proposed Stacy substation. (Geckle Rebuttal, p. 10; Applicants Supp. at 221.) Applicants defined this route as connecting with the existing transmission line just north of the Interstate 90 and State Route 11 interchange, following State Route 11 south before turning west along U.S. 322, following U.S. 322 through the Village of Orwell, and ending at the proposed substation site – a route that is 39.4 miles long. (Id.) Other factors that contributed to State Route 11’s poor rating included: (1) the estimated number of residences in close proximity; (2) significant areas of woodlots and wetlands that would be impacted; and (3) the longer length of this route (30+ miles), as compared with the Preferred Route (14.7 miles). (Id., p. 9; Applicants Supp. at 220.) Finally, Mr. Geckle performed a quantitative evaluation of the State Route 11 option, using the same methodology used to evaluate the other routes considered in the RSS. State Route 11 ranked as 855th out of the 894 routes studied. (Id., p. 11; Applicants Supp. at 221-22) (see, also, Hearing Tr. Vol. II, pp. 128-130; Applicants Supp. at 264-265.)

ii. The Board fully considered commercial, agricultural, and recreational land uses.

CARE next claims that the Board’s Order failed to consider commercial, agricultural, and recreational uses in Applicants’ route selection process. (CARE Brief at 19-21.) This contention is not supported by the Board’s Order or the record.

First, the Board fully considered CARE’s claims that Applicants did not take into account various commercial, agricultural, and recreational uses when they proposed the Preferred Route for the location of the transmission line. The Board concluded:

CARE believes that additional emphasis should have been placed, by the Applicants, on agricultural and recreational land uses and on the social and economic impacts of the Project on those uses. 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.

(Order, p. 31; CARE Appx. at 54.)

With respect to agricultural uses, the Board found that Applicants' Preferred Route would result in "no significant, permanent impacts ... on Agricultural Districts and that construction and maintenance of the proposed electric transmission line would not impact the viability, as agricultural land, of any Agricultural District land." (Id., p. 37; CARE Appx. at 60.) The Board further noted that impacts to any existing farmlands would be minimal. (Id.) The Board's conclusions were supported by the evidence.

Typically, placing a transmission line along, or within, an agricultural field does not materially affect or change the agricultural use of a property. (Nicholas Testimony, Hearing Tr. Vol. I, pp. 72-73; Applicants Supp. at 259.) Dr. Lynn Forster, Ph.D., a retired member of the faculty of the Ohio State University's Department of Agriculture, and himself the owner of farmland crossed by transmission lines, concluded that, in a worst-case scenario, the Preferred Route's impacts on agriculture would reduce net annual farm income no more than 4.2 percent on agricultural fields *actually crossed* by the transmission line. (Forster Testimony, p. 30; Applicants Supp. at 210.) Further, he concluded that these impacts were expected to be short-term, on the order of "up to three years." (Hearing Tr. Vol. I, pp. 107-108; Applicants Supp. at 260.) In short, impacts to agricultural uses would be minimal, as the Board concluded.

CARE also claims that recreational uses of property along the Preferred Route were not considered. However, both the RSS and the Application demonstrate that

Applicants did, in fact, consider impacts to recreational uses in the vicinity of the Preferred Route. (Application Vol. I, p. 06-7; Applicants Supp. at 17; Application Vol. I, Appx. 03-1, p. 14 (“The following land use attributes were considered in the siting process ... [o]ther sensitive land uses (including parks, wildlife refuges, conservation areas, and golf courses)”); Applicants Supp. at 34.) See, also, Application, Vol. I, pp. 06-3 to 06-18; Applicants Supp. at 13-28.) What CARE is really contending is that a property owner’s choice of uses on private land should be given equal or greater weight than dedicated public recreational resources.

Finally, although CARE points to no particular commercial uses which would be significantly impacted by the Preferred Route, this issue was specifically addressed in the Application. (See *id.*)

In conclusion, both Applicants and the Board considered the potential impacts of the Preferred Route on commercial, agricultural, and recreational uses. The Board reasonably and lawfully concluded that these impacts were minor, at best, and did not present a valid reason for rejecting the Preferred Route.

C. RESPONSE TO CARE’S PROPOSITION OF LAW NO. II: THE ALJ LAWFULLY AND REASONABLY CONCLUDED THAT CERTAIN INFORMATION PRODUCED BY APPLICANTS CONTAINED TRADE SECRETS AND CRITICAL ENERGY INFRASTRUCTURE INFORMATION AND WAS PROPERLY SEALED.

In support of its Second Proposition of Law, CARE challenges the ALJ’s decision to seal a limited quantity of documents and information produced by Applicants.

(CARE Brief at 21-26.) CARE continues to assert, wrongly, that the sealing of Applicants’ trade secrets and critical energy infrastructure information (“CEII”) was incorrect and somehow prejudiced CARE. (*Id.*) However, the ALJ’s decision in no way prejudiced CARE’s ability to present its case or participate in the proceedings below.

After filing the Application, Applicants made three additional submittals that they requested be maintained under seal because they contained trade secrets and CEII. First, Applicants filed under seal three sets of two (2) CDs containing the load-flow information that was required by then-effective Ohio Adm.Code 4906-15-02(A)(4):⁶ namely, raw power-flow base-case data.⁷ The data that Applicants submitted was in the format required by the regulation in effect at the time and routinely used in the utility industry. The data was accessible through the use of a proprietary software from General Electric, known as Positive Sequence Load-Flow, or “PSLF.” The PSLF software required to review the data was, and remains, available for purchase.⁸ The ALJ determined that this data met the definition of a trade secret by Entry dated March 3, 2008, and placed it under seal. (Entry, Mar. 3, 2008; Applicants Supp. at 50.) CARE did not object to the ruling at that time. Similar transmission-system information previously has been determined to be confidential and sealed by the PUCO. See, e.g., Order, May 6, 2004, PUCO Case No. 04-504-EL-FOR, *In the Matter of the 2004 Electric Long-Term Forecast Report of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company and Related Matters*; Order,

⁶ It should be noted that the Board has since amended Ohio Adm.Code 4906-15-02(A)(4) to remove the requirement for the submittal of this data in this format. Ohio Adm.Code 4906-15-02(A)(4) now provides: “For electric power transmission facilities, load-flow data shall be presented in the form of transcription diagrams depicting system performance with and without the proposed facility.”

⁷ See Motion by [Applicants] for Protective Order for Certain Information Produced to Staff, Sept. 28, 2007 (Applicants Supp. at 38), as amended Oct. 1, 2007 (Applicants Supp. at 42.)

⁸ Available at: http://www.gpower.com/prod_serv/products/utility_software/en/ge_pslf/index.htm.

Jan. 30, 2008, PUCO Case No. 07-504-EL-FOR, *In the Matter of the 2007 Electric Long-Term Forecast Report of FirstEnergy Corporation*.⁹

Second, in response to a subsequent request from the Board's Staff, Applicants provided additional single-page diagrams detailing load-modeling information for the project area that was contained on the originally submitted CDs. (Second Motion by Applicants for Protective Order, Nov. 8, 2007; Applicants Supp. at 46.) These diagrams contain detailed information on the design, structure, and condition of Applicants' transmission system, and were generated by the proprietary PSLF software. In the past, when faced with the same scenario, the Public Utilities Commission has agreed that the documents were trade secrets and placed it under seal.¹⁰ Therefore, the data and diagrams sealed by the ALJ here are of a type that has been and continues to be routinely treated as trade secrets or CEII subject to protection from public disclosure.

Third, in addition to providing Staff the original load-flow data CDs and single-page diagrams, Applicants also produced (in response to CARE's broad discovery requests) approximately 300 pages of other documents and one (1) additional data CD that contained Applicants' trade secrets and CEII. These 300 pages represent only about four tenths of one percent (0.4%) of the 69,581 pages of documents produced by Applicants to CARE. From this third category of documents, 14 were admitted into evidence, and the documents – along with testimony related to them – remained sealed. (Hearing Tr. Vol. III, Sept. 18, 2008, pp. 57-61; Applicants Supp. at 269-270.)

⁹ These PUCO Orders are included in Applicants' Appx. at pp. 50 and 52, respectively.

¹⁰ See Entry, Apr. 24, 2000, PUCO Case Nos. 99-1658-EL-ETP; 99-1659-EL-ATA; 99-1660-EL-ATA; 99-1661-EL-AAM; 99-1662-EL-AAM; 99-1663-EL-UNC; 99-1687-EL-ETP; 99-1688-EL-AAM; 99-1689-EL-ATA; 00-02-EL-ETP (CG&E, DP&L, and Allegheny Power Electric Transition Plan Cases). (Applicants Appx. at [REDACTED].)

1. CARE Failed To Pursue The Exclusive Remedies Available Under R.C. 149.43 For Securing A Ruling That The Documents In Question Were “Public Records.”

CARE invokes the Public Records Act in its Brief (CARE Brief at 22-23), yet fails to note that it has not pursued the mandatory, exclusive remedies for requesting access to the Board’s records under that Act. Both a request to the public office and, if that request is refused, an original action in mandamus to obtain the requested records are required under the Act. R.C. 149.43(B)(1); 149.43(C)(1). R.C. 149.43(C)(1) provides:

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 ...[.]

R.C. 149.43(C)(1). As this Court has stated, where the General Assembly by statute creates a right and at the same time prescribes remedies or penalties for its violation, courts may not create additional remedies. *Trader v. People Working Coop.* (1996), 74 Ohio St.3d 1286, 1287, 1996-Ohio-255 (citations omitted). As this Court also has noted, “[m]andamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act.” *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 99 Ohio St.3d 6, 2003-Ohio-2260, ¶10, quoting *State ex rel. Cincinnati Enquirer v. DuPuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶11.

CARE never invoked the procedures for requesting public records under R.C. 149.43, and CARE never filed a mandamus action to challenge the denial of requested

records.¹¹ CARE, however, improperly invokes the Public Records Act as a basis for this Court to reverse and vacate the Board's Order. (CARE Brief at 22.) The only remedies provided by the General Assembly for violations of the Public Records Act are found in R.C. 149.43, and they do not include overturning reasonable and lawful decisions of the Board. CARE is seeking the wrong remedy in the wrong proceeding.

2. The Documents Sealed Below Are Trade Secrets Protected By Ohio Law From Public Disclosure.

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. As this Court has concluded, if documents, data, or other information meet the definition of "trade secret" found in R.C. 1333.61(D), that information is not a "public record" under R.C. 149.43(A)(1)(v). *State ex rel. Besser v. Ohio State Univ.* (2000), 87 Ohio St.3d 535, 540, 2000-Ohio-475; *State ex rel. Carr v. City of Akron* (2006), 112 Ohio St.3d 351, 358, 2006-Ohio-6714. Even if CARE had made a public-records request to the Board, the Board could not under R.C. 149.43 release Applicants' trade secrets.

Trade secrets must meet the following definition in R.C. 1333.61(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

¹¹ It would have been difficult for CARE to demonstrate the requisite standing to invoke these remedies in the first place, since CARE obtained *unredacted* copies of all the sealed records which it claims are public records well before the hearing, pursuant to a protective order. R.C. 149.43(C)(1), for example, makes writs of mandamus available to only those "aggrieved" by a public office's failure to release a record.

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.

Notwithstanding the ALJ's original determination in March 2008 that the documents and data Applicants originally filed were trade secrets, CARE filed a belated motion in September 2008 to unseal these records. (See Motion by Intervenor [CARE] to Unseal Public Records, Sept. 12, 2008; Applicants Supp. at 149.) In response, Applicants provided an affidavit from Bradley D. Eberts, the Director of Forecasting and Customer Load Evaluation for FirstEnergy Service Company, in further support of Applicants' position that the "trade secret" definition had been met. (Applicants' Response to Intervenor's Motion to Unseal Public Records, Sept. 15, 2008, Exh. 4, Eberts Aff.; Applicants Supp. at 173-76.)

Mr. Eberts explained why the raw load-flow data and the diagrams detailing that data are trade secrets. (Id., ¶11; Applicants Supp. at 174.) Mr. Eberts established the economic value of the sealed information by explaining that the load-flow data and the single-page engineering diagrams contain detailed information on Applicants' electrical transmission system, as well as Applicants' internal policies and planning criteria. (Id., ¶¶13-14; Applicants Supp. at 175.) Further, the load-flow data and diagrams contain information on Applicants' industrial customers that could be used to place them at a competitive disadvantage. (Id., ¶15; Applicants Supp. at 175.) CARE has provided no evidence to suggest that anything in Mr. Eberts' affidavit is incorrect. Indeed, CARE's Brief does not mention Mr. Eberts' affidavit. (See, generally, CARE Brief.)

The information at issue also meets the second prong of the definition of "trade secrets." Applicants have carefully controlled access to the type of data and diagrams

sealed in this case. The load-flow data and diagrams detailing that data are not shared with other departments within FirstEnergy, Applicants' parent company. The data is used by a dedicated staff of Applicants' transmission and distribution system engineers, and is not generally available to other FirstEnergy employees, much less to the public. (Id., ¶7; Applicants Supp. at 174.) After considering CARE's belated motion to unseal, as well as Applicants' response, the ALJ denied CARE's motion on September 16, 2008. (Hearing Tr. Vol. I, Sept. 16, 2008, pp. 9-10 ; Applicants Supp. at 255-256.)

Applicants met their burden under Ohio Adm.Code 4906-7-07(H) to establish that the data and diagrams are trade secrets. CARE also disregards the fact that the ALJ, far from simply accepting Applicants' contentions at face value, conducted a thorough *in camera* review of the data and diagrams before ruling that they should remain sealed. (Entry, Aug. 18, 2008; Applicants Supp. at 144) Because this type of information is regularly submitted to the Public Utilities Commission and the Board, ALJs have previously ruled that it is protected from public disclosure.¹² Administrative agencies are afforded great deference in the interpretation and implementation of their own rules. *Migden-Ostrander v. Pub. Util. Comm.* (2004), 102 Ohio St.3d 451, 456, 2004-Ohio-3924, 812 N.E.2d 955.

CARE now contends that none of this information is properly characterized as trade secrets because Applicants are a "public utility and have no direct competition." (CARE Brief at 23, n. 2.) CARE never raised this argument in its Application for Rehearing, and thus waived it for purposes of appeal. In any event, CARE's suggestion that Applicants are not in a competitive market highlights CARE's misunderstanding of the electric utility industry. Applicants participate in the regional wholesale electric

¹² See n. 10, *supra*.

markets, and the data filed with the Board under seal could provide Applicants' competitors in that market with information on the capabilities of Applicants' transmission system. (Eberts Aff., ¶13; Applicants Supp. at 175.) The load-flow data and diagrams also contain information related to Applicants' internal policies and procedures concerning their transmission and distribution system. Moreover, industrial customers' load data is contained within the data and diagrams sealed by the ALJ. If this information were to become publicly available, it could be used by competitors of those customers to determine, among other things, aspects of their production capabilities and their production costs. (Id., ¶15; Applicants Supp. at 175.) Accordingly, there is considerable importance to Applicants and their customers in limiting the dissemination of this type of data and diagrams.

Finally, CARE cites *Dream Fields v. Bogart* (2008), 175 Ohio App.3d 165, 2008-Ohio-152, 885 N.E.2d 978, in support of the general proposition that public records must be kept open to the public. (CARE Brief at 22.) But the *Dream Fields* Court also acknowledged that trade secrets are not public records. *Dream Fields*, 2008-Ohio-152, at ¶2. The *Dream Fields* Court – unlike the ALJ here – did not find anything in the record that fit into one of the exclusions from the definition of “public record” in R.C. 149.43, and none of the parties had claimed that any exclusions were applicable.

3. The Documents Sealed Below Are CEII Protected By Federal Law From Public Disclosure.

CEII is shielded from mandatory disclosure under federal law. See 5 U.S.C. §552 (The Freedom of Information Act, or “FOIA”); Section 388.113, Title 18, C.F.R. Thus, it is also properly exempt from disclosure under the Ohio Public Records Act. R.C. 149.43(A)(1)(v). After the terrorist attacks of September 11, 2001, the Federal Energy

Regulatory Commission (“FERC”) conducted a detailed review and reassessment of the public availability of energy infrastructure information. After this formal review and rulemaking, in February 2003, FERC issued Order No. 630, adopting regulations for protecting CEII from unrestricted disclosure. FERC Order No. 630 (Board Appx. at 32.)

FERC defined CEII as information about proposed or existing infrastructure that “relates to the production, generation, transportation, transmission or distribution of energy” that could be useful to a person in planning an attack on critical infrastructure. FERC declared such information exempt from disclosure under FOIA. Section 388.113(c)(1), Title 18, C.F.R. In discussing the information that would constitute CEII, FERC specifically noted that transmission-system maps and diagrams used by utilities for transmission planning, which are submitted to FERC on Form No. 715, Annual Transmission Planning and Evaluation Report, are CEII. FERC Order No. 630, ¶134 (Board Appx. at 32.) The transmission system maps and diagrams typically found in FERC Form No. 715 are the same as those filed under seal in this matter. (See Eberts Aff.; Applicants Supp. at 174.)

Raw load-flow data, transmission maps and diagrams, and system-performance data are and have been routinely considered CEII by FERC because they could be used to execute a terrorist attack. Section 388.113(c), Title 18, C.F.R.; see, also, *In re Hala Ballouz* (June 8, 2007), No. CE07-121-000, 119 F.E.R.C. P62,204, 2007 FERC LEXIS 1058; *In re Baumgardner* (Jan. 25, 2008), No. CE08-18-000, 122 F.E.R.C. P62,068, 2008 FERC LEXIS 158; *In re Kritikson* (Jan. 11, 2008), No. CE08-26-000, 122 F.E.R.C. P62,020, 2008 FERC LEXIS 33 (Applicants Appx. at pp. 1, 4, and 8.) Therefore, information that is CEII is exempt from mandatory disclosure under FOIA and exempt from disclosure under the Public Records Act. R.C. 149.43(A)(1)(v).

4. The ALJ Lawfully And Reasonably Sealed The Records Containing Trade Secrets And CEII.

The ALJ took pains to personally review the documents in question on two separate occasions and concluded that they contained both trade secrets and CEII. (See Entry, Aug. 18, 2008, p. 2; Applicants Supp. at 145. See, also, Hearing Tr. Vol. I, Sept. 16, 2008, pp. 9-10; Applicants Supp. at 255-256.) As this Court has previously held, “an in camera inspection is the ‘best procedure’ to determine whether information is exempt from disclosure.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 370, 2009-Ohio-604. As the ALJ noted in her March 3, 2008 Entry, she personally reviewed Applicants’ CDs and the single-page engineering diagrams and concluded that they contain trade secrets as contemplated by R.C. 1333.61(D). (Entry, Aug. 18, 2008, p. 2; Applicants Supp. at 145.) Again, in September 2008, she also personally reviewed CARE’s exhibits that Applicants asserted contain trade secrets and CEII, and correctly concluded that the documents should be protected from public disclosure. (Hearing Tr. Vol. I, pp. 9-10; Applicants Supp. at 255-256.) Contrary to CARE’s claims, there is considerable evidence in the record supporting the ALJ’s conclusion that the information contains both trade secrets and CEII. CARE has offered nothing to rebut this conclusion or to show that it is against the manifest weight of the evidence.

CARE contends that the ALJ did not properly consider the factors FERC has used to define CEII. (CARE Brief at 24.) In fact, however, the ALJ specifically found:

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

(Hearing Tr., Vol. I, pp. 9-10; Applicants Supp. at 255-256) (emphasis added). The transcript demonstrates that the ALJ correctly applied the standards to protect CEII in this case.

The ALJ's CEII determination is particularly significant (and critical) with respect to the raw load-flow data on the CDs. The CDs contain power-flow information for the entire eastern interconnect – i.e., the CDs contain data regarding energy flows and flow patterns on specific electric facilities used to transport, transmit and distribute energy throughout most of the eastern half of the United States – not just the smaller geographic area directly implicated by the proposed transmission line at issue in this appeal. (Memorandum of Applicants [ATSI and CEI] in Response to Application for Rehearing of Intervenor [CARE], Jan. 7, 2009, pp. 31, 36-37; Applicants Supp. at 272, 274-275.) The determinations made by the ALJ, and subsequently affirmed by the Board, were both reasonable and lawful. The information in question clearly meets the definitions of trade secret and CEII.

5. CARE Suffered No Prejudice From The Board's Decision To Seal The Records In Question.

Ohio courts have long recognized that errors are harmless unless they are inconsistent with substantial justice or affect a party's substantial rights. App.R. 12(B); Civ.R. 61; *Abrams v. Siegel*, 166 Ohio App.3d 230, 246, 2006-Ohio-1728, 850 N.E.2d 99. Even if the Board erred in sealing the materials, CARE has failed to show how these rulings caused any prejudice whatsoever to CARE.

Before the adjudicatory hearing, and after extensive negotiations, the parties entered into a Confidentiality Agreement. (See Hearing Tr. Vol I, Sept. 16, 2008, pp. 31-34; Applicants Supp. at 257-258.) Subject to that Agreement, CARE received from

Applicants complete and unredacted versions of all the information that CARE claims should be unsealed. CARE and its “experts” had complete, un-redacted access to all the data and documents well in advance of the evidentiary hearing. Moreover, CARE did not make any effort to obtain the PSLF software that is necessary to interpret much of the data that it now claims should not have been sealed. (Galm Testimony, p. 27; CARE Supp. at 329; Eberts Aff., ¶9; Applicants Supp. at 174.) Finally, CARE itself has conceded that the proposed transmission line was *needed* (CARE Brief at 3), and the information sealed by the ALJ is relevant to the *necessity* of a new transmission line in the project area. (Galm Testimony, p. 27; CARE Supp. at 329.)

Put simply, CARE’s ability to present its case to the Board was not impacted at all by the ALJ’s decision to maintain a limited quantity of documents, data, and testimony under seal. Thus, any error in sealing the records is harmless and does not support a holding that the Board’s Order was unlawful or unreasonable. The lack of harm suffered by CARE or its members from the ALJ’s decision to seal the information in question also defeats CARE’s standing to complain about it. *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183, 643 N.E.2d 1088 (“to have standing, the association must establish that its members have suffered actual injury”); see, also, R.C. 149.43(C)(1) (limiting mandamus remedy to persons “aggrieved” by a public office’s failure to release a record). Without harm, there is no controversy.

CARE contends that by shielding the documents, data, and testimony from public disclosure, the ALJ changed these public proceedings to a proceeding where “most” of the key evidence was seen by only those who had signed a Confidentiality Agreement. (CARE Brief at 25.) CARE contends that the testimony of a community member unaffiliated with any party to this appeal – Robert Takacs, who testified at one of the

public hearings which preceded the adjudicatory hearing, “might have been more in-depth” had Applicants’ load-flow data not been sealed from public review. (CARE Brief at 26.) This rank speculation was contradicted by Mr. Takacs himself, who, on cross-examination by CARE’s attorney, stated:

Mr. Lee: In the proceeding that’s pending currently, there’s a large amount of technical data relating to loads and voltages at each of the substations that’s filed under seal and not available to the general public. Would that have been helpful to you in framing your testimony today?

Mr. Takacs: It could have possibly enhanced it, **but I doubt it would change it that much because what I presented was more of an abstract conceptual argument.**

(Public Hearing Tr. Part 1, Sept. 10, 2008, p. 60; Applicants Supp. at 183) (emphasis added).

CARE appears to assert an undefined, general “right” for members of the public, not parties to this appeal, to have unfettered access to documents classified as trade secrets and CEII. No such right exists. The public-records argument that CARE advances in its Brief is, in reality, a request for this Court to enter an advisory opinion on the rights of an unidentified party’s entitlement under the Public Records Act to certain records sealed by an ALJ. But this Court does not render advisory opinions in public-records cases. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶43. On the contrary, “[e]very court must ‘refrain from giving opinions on abstract propositions and ... avoid the imposition by judgment of premature declarations or advice upon potential controversies.’” *Arbino v. Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶84, quoting *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 257 N.E.2d 371.

6. CARE had adequate time to fully prepare for the adjudicatory hearing.

CARE finally argues that Applicants' alleged delay in the production of confidential documents was undertaken to interfere with CARE's ability to prepare for the evidentiary hearing. (CARE Brief at 26-30.) However, as noted above, CARE obtained all the information in question *in unredacted form* weeks before the hearing, and any alleged lack of time to review the materials, including the load-flow data, was principally, if not exclusively, the result of CARE's own inaction.

At CARE's request, the ALJ postponed the hearing to accommodate CARE's desire for more time – over the objection of most of the parties. (Entry, Aug. 18, 2008, p. 4; Applicants Supp. at 147.) In granting the continuance requested by CARE, the ALJ balanced CARE's request against the interests of the other parties, and reached a reasonable accommodation by granting part of CARE's request for a postponement. It was CARE's obligation to commit the resources necessary to review and digest the information and documents produced by Applicants, and to prepare for the hearing. “[T]he responsibility for making an intervenor’s participation ‘meaningful’ lies with the intervenor.” *In the Matter of the Investigation into the Perry Nuclear Power Station*, Entry, Apr. 21, 1987, PUCO Case No. 85-521-EL-COI, at 2 (Applicants Appx. at 44.) CARE had sufficient time to prepare its case, if it had committed the necessary resources. CARE's failure in this respect is not the fault of the Board, nor is it in any way attributable to Applicants. The schedule established by the ALJ, as subsequently amended to provide CARE with additional time, was not unlawful or unreasonable.

CARE argues that Applicants delayed production of the confidential documents, thereby hindering CARE's ability to "examine, in consultation with its experts, the current need for the Project and to analyze the accuracy of the Applicants' assertions that the proposed line could be sited only in certain locations." (CARE Brief at 26-27.) CARE further argues that, if the confidential documents had been produced sooner, CARE could have

explored the possibility of a more regional solution to the problems identified by the Applicants, and specifically, the possibility of connecting the Applicants' electrical system with the adjacent Ohio Edison 69 kV system, which apparently, is in need of strengthening. CARE's expert witnesses mentioned this possibility to CARE during the discovery phase, but this option could not be explored in detail because the option was prompted only by the confidential documents and insufficient time was provided to analyze and digest this information.

(CARE Brief at 28-29.) But CARE's inability to evaluate the confidential documents produced to CARE in unredacted form was thwarted by its own failure or refusal to acquire the PSLF software necessary to evaluate the data. (Galm Testimony, p. 27; CARE Supp. at 329.)

Contrary to CARE's Brief, its witnesses did not conclude that CARE's exploration of a "regional" tie-in to the Ohio Edison 69 kV system was thwarted by untimely production of the confidential documents. CARE's witness, Dr. Francis Merat, cited by CARE in support of this statement, made no such claim. He testified that:

Based upon the information provided, it appears that the 69 kV system in Trumbull County is in need of strengthening, although few details are supplied. Several of the options discussed in the referenced exhibits make this fact clear and also involve the utilization of the 69 kV system. However, ***I do not have enough information to determine whether a viable option, from an electrical standpoint, exists utilizing the 69 kV system or in conjunction with the strengthening of that system as may otherwise be necessary,*** but the possibility that a more regional solution, addressing both the

Trumbull County and Geauga County problems might be viable, and this is at least suggested by these documents.

(Merat Testimony, p. 17; Applicants Supp. at 252) (emphasis added). Dr. Merat thus did not claim that he had inadequate *time* to evaluate the confidential documents produced by Applicants. Instead, he testified that there was inadequate information available to him from those documents to draw any conclusions about the viability of an alternative, “regional” solution to meet electric needs in Geauga County. This resulted, in part, from CARE’s own refusal to obtain the PSLF program required to analyze the load-flow data.

CARE argues that Applicants’ “tactics” resulted in a 14-week delay in producing the confidential materials to CARE. (CARE Brief at 28.) However, Applicants produced more than 69,000 pages of non-privileged documents to CARE during this period. The only documents not made available to CARE by the end of May 2008 – more than four months before the evidentiary hearing – were the three circumscribed categories of information described above: two CDs of power-flow model data; six diagrams showing the results of the modeling with General Electric’s proprietary PSLF software; and approximately 300 pages of other documents containing trade secrets and CEII. Most of this confidential information was produced to CARE on July 24, 2008 (and received by CARE on July 25, 2008), including the load-flow data. (Memorandum of Applicants [ATSI and CEI] in Response to Application for Rehearing, p. 33; Applicants Supp. at 273.) All of the requested information was provided to CARE by August 8, 2008. (Application for Rehearing, p. 19; CARE Appx. at 118.) Thus, CARE received all documents that it had requested, including all documents designated as confidential, and sealed by the ALJ, well before the August 29, 2008 discovery cutoff – and more than five weeks prior to the commencement of the adjudicatory hearing. (Id.) The

timeline for the load-flow data is even longer, with CARE having received the requested data more than seven weeks before the hearing. (Memorandum of Applicants [ATSI and CEI] in Response to Application for Rehearing, p. 33; Applicants Supp. at 273.)

Finally, CARE waited to file its initial discovery requests until March 27, 2008, three months after it had sought intervention, and more than three weeks after being granted intervention. ([CARE's] First Set of Interrogatories and Document Requests to [ATSI] and [CEI], Mar. 27, 2008; Applicants Supp. at 254.) While CARE seeks to characterize the delay in receiving a limited number of confidential documents as an intentional tactic by Applicants to disadvantage CARE, CARE's own delay in seeking discovery is also the cause of any disadvantage that CARE may have suffered. Having delayed its efforts to obtain these records, CARE should not be heard to complain that Applicants' efforts to protect the confidentiality of their documents was the exclusive, or even primary, cause of any claimed disadvantage to CARE in preparing for hearing.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Merit Brief of the Ohio Power Siting Board, this Court should affirm the Board's Opinion, Order and Certificate. The Board's Order was lawful and reasonable and well supported by the manifest weight of the evidence.

Respectfully submitted,

Christopher Schraff by L. B. Hughes
Christopher R. Schraff (0023030) 0070997
(COUNSEL OF RECORD)
Robert J. Schmidt (0062261)
L. Bradfield Hughes (0070997)

PORTER, WRIGHT, MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215
Telephone: (614) 227-2097
Facsimile: (614) 227-2100
cschraff@porterwright.com
rschmidt @porterwright.com
bhughes@porterwright.com

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

Morgan E. Parke (0083005)
First Energy Service Corp.
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-4595
Facsimile: (330) 384-4539
mparke@firstenergycorp.com

Of Counsel for Intervening Appellees.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief of Intervening Appellees was sent by regular U.S. mail to all parties of record on July 27, 2009.

Christopher Schraff by L.B. Hughes
Christopher R. Schraff (0023030) 0070997
(COUNSEL OF RECORD)

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

Service List:

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

Samuel C. Randazzo
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick, LLC
21 East State Street, Suite 1700
Columbus, OH 43215

*Counsel for Appellant Citizens Advocating
Responsible Energy*

*Counsel for Amicus Curiae Industrial
Energy Users-Ohio*

Richard A. Cordray
Attorney General of Ohio
Duane W. Luckey
Thomas G. Lindgren
Thomas W. McNamee
Assistant Attorneys General
Office of the Attorney General of Ohio
180 East Broad Street
Columbus, OH 43215-3793

*Counsel for Appellee the Ohio Power
Siting Board*

APPENDIX

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LEXSEE 2008 FERC LEXIS 158

Dean Baumgardner

Docket No. CE08-18-000

FEDERAL ENERGY REGULATORY COMMISSION - OFFICE DIRECTOR

122 F.E.R.C. P62,068; 2008 FERC LEXIS 158

January 25, 2008

ACTION:

[**1] ORDER GRANTING REQUEST FOR CRITICAL ENERGY INFRASTRUCTURE INFORMATION

OPINION:

[*64,127]

1. On November 13, 2007, Mr. Dean Baumgardner, on behalf of Dr. Juan S. Santos and Wind Capital Group, submitted a request under the Federal Energy Regulatory Commission's (Commission or FERC) Critical Energy Infrastructure Information (CEII) regulations at *18 C.F.R. § 388.113(d)(3) (2007)*. Specifically, Mr. Baumgardner seeks transmission topology maps, load flow base cases for the 2007 and 2012 "on and off peak" load flow cases, and detailed breaker diagrams for both the distribution and transmission systems in Ohio, northeast of Dayton. The requested information is contained in the FERC Form No. 715 submitted in 2007 by member companies of the Reliability First Corporation region of the North American Reliability Corporation. n1

n1 Because we do not segregate the components of the FERC Form No. 715 data, we will consider Mr. Baumgardner's submittal as a request for the entire FERC Form No. 715.

2. By letter dated December 12, 2007, Ann [*2] E. Gorton, Attorney-Advisor for General and Administrative Law, notified the submitters of the request and provided five (5) business days in which to submit comments. This letter also notified the submitters that, in accordance with *18 C.F.R. § 388.112(e)*, it served as notice of release if timely comments opposing release were not received. Two entities provided responses to Mr. Baumgardner's request.

3. Vectren Corporation (Vectren) expressed concern regarding the release of information to Mr. Baumgardner because this information could be used by unfriendly parties to determine the configuration and the critical locations of its electrical transmission system. Vectren adds that it has no knowledge that the requesting party is unfriendly, or associated with unfriendly parties.

4. FirstEnergy Corporation (FirstEnergy) asserted that the information in its FERC Form No. 715 should be exempt from disclosure under the Freedom of Information Act (FOIA) *Exemption 4* as it contains "confidential commercial information" and CEII. n2 It further argued that the requesters fail to articulate a sufficient need and description of the intended use of the information as required prior to [*3] the disclosure under *18 C.F.R. § 388.113(d)(3)(i)*.

n2 See *5 U.S.C. § 552(b)(4) (2000 & Supp. IV 2004)*.

5. CEII is defined in *18 C.F.R. § 388.113(c)* as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) Relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, *5 U.S.C. 552*; and (iv) Does not simply give the general location of the critical infrastructure." FERC Form No. 715, Annual Transmission Plan and Evaluation Report, contains information about the electric transmission system that constitutes CEII. Part 2 requires power flow data; Part 3 requires system maps and diagrams; Parts 4 and 5 require transmission planning data; and Part 6 requires system performance data. [**4] This type of information could be used to plan an attack on the electric grid. Parts 2, 3, and 6 are exempt from mandatory disclosure under FOIA *Exemption 7(F)*. n3 In addition, Parts 4 and 5 of some companies' FERC Form No. 715 are also exempt from mandatory disclosure under FOIA *Exemption 7(F)*. This particular FOIA provision exempts [*64,128] "records or information compiled for law enforcement purposes" to the extent that release of such information "could reasonably be expected to endanger the life or physical safety of any individual." n4 This information could be used to harm the electric grid, which would endanger life and safety. For the foregoing reasons, I conclude that the information requested qualifies as CEII.

n3 *5 U.S.C. § 552(b)(7)(F)*.

n4 *5 U.S.C. § 552(b)(7)(F)*.

6. With regard to FOIA *Exemption 4*, FirstEnergy does not provide adequate evidence in support of its argument that FERC Form No. 715 data qualify for FOIA *Exemption 4* protection. To qualify [**5] for FOIA *Exemption 4* protection, the information must be (1) commercial or financial, (2) obtained from a person, and (3) be privileged and confidential. While the FERC Form No. 715 reports arguably might qualify as commercial information from a person, I do not believe that FirstEnergy has demonstrated that the information is privileged or confidential. Generally, to be "confidential" for purposes of FOIA *Exemption 4*, disclosure of the information must either impair the government's ability to obtain similar information in the future, or cause substantial harm to the competitive position of the submitter of the information. See *National Parks & Conservation Ass'n v. Morton*, *162 U.S. App. D.C. 223, 498 F.2d 765, 770 (D.C. Cir. 1974)*. FirstEnergy has not shown that release of this information would impair the Commission's ability to obtain it in the future, and it has not articulated substantial competitive harm from such a release.

7. Although the information requested is CEII, it may be released to requesters with a legitimate need for the information. The Commission must balance a requester's need for the information against the sensitivity of the information. While the Commission's [**6] regulation at *18 C.F.R. § 388.113(d)(3)(i)* requires that a requester assert the particular need for and intended use of the information, the primary purpose of the rule is to ensure that information deemed CEII stays out of the possession of terrorists. Accordingly, assessing a requester's legitimacy and securing an executed non-disclosure agreement are paramount factors in determining whether to grant a request for CEII.

8. In this case, Commission staff has verified that Mr. Baumgardner is Senior Vice President of Wind Capital Group. On behalf of Wind Capital Group and Mr. Santos, Mr. Baumgardner plans to use the information for transmission studies to measure the impact and viability of new wind generation facilities in this area. Mr. Baumgardner has agreed to adhere to the terms of the attached non-disclosure agreement.

9. I conclude that Mr. Baumgardner is a legitimate requester with a demonstrated need for the information requested. Notwithstanding the fact that this information is CEII and could be harmful in the wrong hands, I conclude that release to Mr. Baumgardner, in accordance with the terms of the attached non-disclosure agreement, is appropriate. Pursuant [**7] to the non-disclosure agreement, the requester is prohibited from either disclosing or sharing the CEII with any person not otherwise covered by a Commission non-disclosure agreement covering this same information. Authority to act on this matter is delegated to the CEII Coordinator pursuant to *18 C.F.R. § 375.313*.

The CEII Coordinator orders:

Mr. Baumgardner's request for access to CEII is granted. This order is subject to rehearing pursuant to *18 C.F.R. § 385.713*.

122 F.E.R.C. P62,068, *; 2008 FERC LEXIS 158, **

Andrew J. Black
Director
Office of External Affairs

APPENDIX:
[*64,129]

[SEE CRITICAL ENERGY INFRASTRUCTURE INFORMATION CONSULTANT NON-DISCLOSURE
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Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative Law Governmental Information Freedom of Information General Overview Energy & Utilities Law Ad-
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LEXSEE 2007 FERC LEXIS 1058

Hala Ballouz

Docket No. CE07-121-000

FEDERAL ENERGY REGULATORY COMMISSION - OFFICE DIRECTOR

119 F.E.R.C. P62,204; 2007 FERC LEXIS 1058

Issued June 8, 2007

ACTION:

[**1] ORDER GRANTING REQUEST FOR CRITICAL ENERGY INFRASTRUCTURE INFORMATION

OPINION:

[*64,534]

1. On May 8, 2007, Hala Ballouz, on behalf of Electric Power Engineers, Inc. (EPE), submitted a request under the Federal Energy Regulatory Commission's (Commission or FERC) Critical Energy Infrastructure Information (CEII) regulations at 18 C.F.R. § 388.113(d)(3) (2006) for copies of the most recent FERC Form No. 715 data regarding the latest load flow base case models for all of the NERC regions' transmission systems.

2. By letter dated May 15, 2007, Megan Sperling, Attorney-Advisor, General and Administrative Law, notified the submitters of Form No. 715 of the request and provided five (5) business days in which the submitters could comment on the request. Georgia Transmission Corporation telephoned that it has no objection to the release of the information requested. Nine entities filed responses to the request.

3. CenterPoint Energy Houston Electric, LLC (CenterPoint Energy) states that the information in Form No. 715 is CEII and could be used to plan an attack on the electric grid of CenterPoint Energy. CenterPoint Energy also states that the information is [**2] exempt from disclosure under the Freedom of Information Act (FOIA) Exemption 7(F) (relating to records or information compiled for law enforcement purposes to the extent that disclosure could endanger the life or physical safety of any individual) because the information "could be used by anyone with ill motives to sabotage and harm the provision of electricity in the Houston area." See 5 U.S.C. § 552(b)(7)(F) (2006). CenterPoint Energy also states that the requester appears to have a legitimate business need for the information and that if the information is released, it should be subject to a confidentiality agreement.

4. Oncor Electric Delivery Company (Oncor) states that the information is CEII and should not be made public. Oncor states that Parts 2, 3, and 6 of the information contained in Form No. 715 include sensitive information about electric transmission facilities and confidential and privileged [*64,535] treatment of the information remains appropriate. Oncor requests that its information not be disclosed. However, it recognizes that the Commission has determined that energy market consultants should be allowed access to certain CEII information. [**3] Oncor requests that if the information is disclosed to the requesting entity, that it be subject to a non-disclosure agreement.

5. MidAmerican Energy Company (MidAmerican) states that the information requested is CEII and should not be disclosed to third parties and that the information is exempt from disclosure under FOIA Exemption 7(F). 5 U.S.C. § 552(b)(7)(F) (2006). MidAmerican also states that the Commission should continue to ensure that each requester demonstrates a legitimate need for the information and executes a non-disclosure agreement.

6. Alliant Energy Company (Alliant) states that while it does not object to the release of Part 1 of its Form No. 715 to the requester, it believes Parts 2, 3, 4, 5, and 6 of Form No. 715 should be withheld from disclosure because the infor-

119 F.E.R.C. P62,204, *; 2007 FERC LEXIS 1058, **

mation is exempt from disclosure under FOIA Exemption 7(F) and because it is CEII *See 5 U.S.C. § 552(b)(7)(F)* (2006). Alliant also argues that while consultants may have to identify potential clients, the request goes well beyond that which a reasonable, legitimate consultant would need to know to provide services in the industry.

7. SERC [**4] Reliability Corporation (SERC) states that the information in Form No. 715 is CEII and is eligible for protection from public disclosure under FOIA Exemptions 2 (relating to the internal personnel rules and practices of an agency) and 4 (relating to trade secrets and commercial or financial information obtained from a person that is privileged or confidential). *5 U.S.C. § 552(b)(2)* and *(b)(4)* (2006). SERC states that the request is insufficiently justified, inappropriate, and the proposed usage of the data is vague. SERC alleges that there is insufficient information provided to indicate that the data will not be used in a manner that is commercially harmful to the owners of the data or to the security of the electric grid in the Southeast. SERC also requests that if the data are released, the data should be deemed CEII and accompanied by an appropriate non-disclosure agreement.

8. FirstEnergy Corp. (FirstEnergy) states that the information requested in its Form No. 715 should be exempt from disclosure under FOIA Exemption 4 because it contains confidential commercial information and CEII *See 5 U.S.C. § 552(b)(4)* (2006). FirstEnergy [**5] also argues that the requesters' statement of need and intended use fails to meet the standards set forth in the Commission's regulations because it fails to provide the required detail, or to articulate a particular need for or intended use of the CEII as required by 18 C.F.R. § 388.113(d)(3)(i).

9. Vectren expresses concern regarding the release of the CEII in Part 3 of its Form No. 715 filing. Vectren states that the information could be used by unfriendly parties to locate and target key facilities within the Vectren electric system. Vectren also raises concerns related to the release of the drawings in Part 3 and the power flow base cases in Part 2 of the filing as this information could be used by unfriendly parties to target key facilities and to determine the configuration and the critical locations of its electrical transmission system. Vectren adds that it has no knowledge that the requesting party is unfriendly or associated with unfriendly parties.

10. American Transmission Company (ATC) states that the Form No. 715 contains electric power flow information for ATC's territory that is CEII and should not be disclosed. ATC offered to [**6] work with EPE directly to provide the information. ATC states that by contacting ATC directly and specifying the exact business need for the information, ATC and the requester can agree on the terms and conditions under which the information shall be provided under an appropriate confidentiality agreement. ATC also states it has provided similar information under similar arrangements with other parties.

11. Southern California Edison (SCE) states that the information in SCE's Form No. 715 is CEII and the Commission should reject the request. SCE also states that the information in Form No. 715 is exempt from disclosure under FOIA Exemption 7(F) *See 5 U.S.C. § 552(b)(7)(F)* (2006). SCE states the sensitive information regarding SCE's transmission system provided in Form No. 715 creates a risk that the information may be used to plan and carry out a terrorist attack. SCE also argues that the requester has not demonstrated a need for the information as required by 18 C.F.R. § 388.113(d)(3)(i). Additionally, SCE states that the requester has not demonstrated that the information will be kept confidential and that every person [**7] at EPE who intends to use the data should be included on the CEII request form.

12. CEII is defined in 18 C.F.R. § 388.113(c)(1) as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) Relates to the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act [FOIA], *5 U.S.C. 552*; and (iv) Does not simply give the location of the critical infrastructure." FERC Form No. 715, Annual Transmission Plan and Evaluation Report, contains information about the electric transmission system that constitutes CEII. Part 2 requires power flow data, Part 3 requires system maps and diagrams, Parts 4 and 5 require transmission planning data, and Part 6 requires system performance data. This type of information could be used to plan an attack on the electric grid. Parts 2, 3, and 6 are exempt from mandatory disclosure under FOIA Exemption 7(F). In addition, [**64,536] Parts 4 and 5 of some companies' [**8] Form No. 715 are also exempt from mandatory disclosure under Exemption 7(F). This particular FOIA provision exempts "records or information compiled for law enforcement purposes" to the extent that release of such information "could reasonably be expected to endanger the life or physical safety of any individual." *5 U.S.C. § 552(b)(7)(F)*. This information could be used to harm the electric grid, which would endanger life and safety. For the foregoing reasons, I conclude that the information requested qualifies as CEII. n1

n1 Although SERC and FirstEnergy reference Exemption 4, they do not provide adequate evidence in support of the argument that Form No. 715 data qualify for Exemption 4 protection. To qualify for Exemption 4 protection, the information must be (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. While the Form No. 715 reports arguably might qualify as commercial information obtained from a person, I do not believe that the companies that referenced Exemption 4 have demonstrated that the information is privileged or confidential. Generally, to be "confidential" for purposes of Exemption 4, disclosure of the information must either impair the government's ability to obtain similar information in the future, or cause substantial harm to the competitive position of the submitter of the information *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). SERC and FirstEnergy have not shown that release of this information would impair the Commission's ability to obtain it in the future, and they have not articulated substantial competitive harm from such a release.

[**9]

13. Although the information requested is CEII, it may be released to requesters with a legitimate need for the information. As CEII Coordinator, I must balance the requesters' need for the information against the sensitivity of the information. While the Commission's regulation at 18 C.F.R. § 388.113(d)(3)(i) requires that requesters assert a particular need for an intended use of the information, the primary purpose of the rule is to ensure that information deemed CEII stays out of the possession of terrorists. Accordingly, assessing the requesters' legitimacy and securing executed non-disclosure agreements are paramount factors in determining whether to grant requests for CEII. In this case, Commission staff has verified that the requester, Ms. Ballouz, is the Vice President and part owner of EPE, an engineering and consulting firm based in Waco, Texas. The requester states a need for the data to undertake load flow analysis for the purpose of evaluating interconnection of wind generation farms for EPE clients. The Commission has recognized that researchers and consultants provide valuable services to the energy industry and that substantial benefits [**10] are derived from their work. n2 Accordingly, where Commission staff has verified that the individual requester or firm is a researcher or consultant, the Commission is unwilling to deny access to information necessary to conduct valuable research or to provide legitimate services. In addition, Ms. Ballouz has agreed to adhere to the terms of the attached non-disclosure agreement. n3

n2 FERC Stats. & Regs. P31,189 at 31,642.

n3 With respect to SCE's concern that the requester has not demonstrated that the information will be kept confidential and that every person at EPE who intends to use the data should be included on the CEII request forms, Ms. Ballouz signed the non-disclosure agreement and Teresa Ives and Kristen Rodriguez, also employees of EPE, signed non-disclosure agreements for the same information in Docket Nos. CE07-111-000 and CE07-112-000.

14. I conclude that Ms. Ballouz is a legitimate requester with a demonstrated need for the information requested. Notwithstanding the fact that [**11] this information is CEII and could be harmful in the wrong hands, I conclude that release to this requester, in accordance with the terms of the attached non-disclosure agreement, is appropriate. Pursuant to the non-disclosure agreement, Ms. Ballouz is prohibited from either disclosing or sharing the CEII with any person not otherwise covered by a Commission non-disclosure agreement covering this same information.

15. This order provides notice to the submitters of the requested FERC Form No. 715 data that the requested material will be released no sooner than five calendar days after the date this order is issued. n4 Authority to act on this matter is delegated to the Critical Energy Infrastructure Information Coordinator pursuant to 18 C.F.R. § 375.313.

n4 *See* 18 C.F.R. § 388.112(e). ATC was notified that notwithstanding ATC's offer to work directly with EPE directly to provide the information, the CEII would be provided by the Commission.

[**12]

119 F.E.R.C. P62,204, *; 2007 FERC LEXIS 1058, **

The Critical Energy Infrastructure Information Coordinator orders:

The request for access to CEII is granted. This order is subject to rehearing pursuant to 18 C.F.R. § 385.713

Andrew J. Black

Director

Office of External Affairs

APPENDIX:

[*64,537]

[SEE CRITICAL ENERGY INFRASTRUCTURE INFORMATION GENERAL NON-DISCLOSURE AGREEMENT IN ORIGINAL]

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Governmental Information Freedom of Information Defenses & Exemptions Law Enforcement Records Endangerment Energy & Utilities Law Administrative Proceedings U.S. Federal Energy Regulatory Commission- General Overview Energy & Utilities Law Transportation & Pipelines Electricity Transmission



LEXSEE 2008 FERC LEXIS 33

James Kritikson

Docket No. CE08-26-000

FEDERAL ENERGY REGULATORY COMMISSION - OFFICE DIRECTOR

122 F.E.R.C. P62,020; 2008 FERC LEXIS 33

January 11, 2008

ACTION:

[**1] ORDER GRANTING REQUEST FOR CRITICAL ENERGY INFRASTRUCTURE INFORMATION

OPINION:

[*64,049]

1. On November 27, 2007, Mr. James Kritikson, on behalf of Shell Energy North America (Shell Trading), submitted a request under the Federal Energy Regulatory Commission's (Commission or FERC) Critical Energy Infrastructure Information (CEII) regulations at *18 C.F.R. § 388.113(d)(3) (2007)*. Specifically, Mr. Kritikson seeks load flow and production modeling data of the Western Electricity Coordinating Council (WECC) corresponding to the April 2007 FERC Form No. 715 filings submitted to the Commission.
2. By letter dated December 12, 2007, Michael Watson, Attorney Advisor, notified the submitters of FERC Form No. 715 of the request and provided five (5) business days in which to submit comments. This letter also notified the submitters that in accordance with *18 C.F.R. § 388.112(e)*, it served as notice of release if timely comments opposing release were not received. Neither the WECC or any of its member companies filed a response to Mr. Kritikson's request.
3. CEII is defined in *18 C.F.R. § 388.113(c)* as "specific engineering, vulnerability, or detailed design information about proposed or existing [**2] critical infrastructure that: (i) Relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, *5 U.S.C. 552*; and (iv) Does not simply give the general location of the critical infrastructure." FERC Form No. 715 contains information about the electric transmission system that constitutes CEII. Part 2 requires power flow data; Part 3 requires system maps and diagrams; Parts 4 and 5 require transmission planning data; and Part 6 requires system performance data. This type of information could be used to plan an attack on the electric grid. Parts 2, 3, and 6 are exempt from mandatory disclosure under FOIA Exemption 7(F). In addition, Parts 4 and 5 of some companies' FERC Form No. 715 are also exempt from mandatory disclosure under FOIA Exemption [*64,050] 7(F). This information could be used to harm the electric grid, which would endanger life and safety. For the foregoing reasons, I conclude that the information requested qualifies as CEII.
4. Although the information [**3] requested is CEII, it may be released to requesters with a legitimate need for the information. The Commission must balance a requester's need for the information against the sensitivity of the information. While the Commission's regulation at *18 C.F.R. § 388.113(d)(3)(i)* requires that a requester assert the particular need for and intended use of the information, the primary purpose of the rule is to ensure that information deemed CEII stays out of the possession of terrorists. Accordingly, assessing a requester's legitimacy and securing an executed non-disclosure agreement are paramount factors in determining whether to grant a request for CEII.
5. In this case, Commission staff has verified that Mr. Kritikson owns the energy consulting firm of Kritikson and Associates, Inc (Kritikson). Kritikson provides a variety of services to its energy industry clientele, including performing a

market analysis of current electric generation. The Commission has recognized that consultants provide valuable services to the energy industry and that substantial benefits are derived from their work. Accordingly, where Commission staff has verified that an individual requester and his firm provide [**4] legitimate consulting services, the Commission is unwilling to restrict access to information necessary to advise clients. n1 In addition, Mr. Kritikson has agreed to adhere to the terms of the attached non-disclosure agreement.

n1 *Critical Energy Infrastructure Information, Order No. 649, 69 Fed. Reg. 48,386 at P 12 (Aug. 10, 2004), FERC Stats. & Regs. P31,167 (2004).*

6. I conclude that Mr. Kritikson has demonstrated a legitimate need for the information requested. Notwithstanding the fact that this information is CEII and could be harmful in the wrong hands, I conclude that release to Mr. Kritikson, in accordance with the terms of the attached non-disclosure agreement, is appropriate. Pursuant to the non-disclosure agreement, Mr. Kritikson is prohibited from either disclosing or sharing the CEII with any person not otherwise covered by an agency non-disclosure agreement covering this same information.

7. This order provides notice to the submitters of the requested FERC [**5] Form No. 715 data that this material will be released no sooner than five (5) business days after the date this order is issued. n2 Authority to act on this matter is delegated to the CEII Coordinator pursuant to 18 C.F.R. § 375.313.

n2 *See 18 C.F.R. § 388.112(e).*

The CEII Coordinator orders:

Mr. James Kritikson's request for access to CEII is granted as discussed above. This order is subject to rehearing pursuant to 18 C.F.R. § 385.713.

Andrew J. Black
Director
Office of External Affairs

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative Law Governmental Information Freedom of Information Defenses & Exemptions Law Enforcement Records General Overview Energy & Utilities Law Administrative Proceedings U.S. Federal Energy Regulatory Commission General Overview Energy & Utilities Law Transportation & Pipelines Electricity Transmission



LEXSTAT 5 USC 552

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH PL 111-40, APPROVED 07/01/2009 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

Go to the United States Code Service Archive Directory

5 USCS § 552

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 3 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

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unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)

(A) (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

5 USCS § 552

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$ 250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo; *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed]

(E) (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

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(F) (i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

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(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D) (i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

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(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are--

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)

(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

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(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)

(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

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(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title [5 USCS § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44 [44 USCS §§ 3501 et seq.], and under this section.

(h) (1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

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(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

HISTORY:

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 383; June 5, 1967, P.L. 90-23 § 1, 81 Stat. 54; Nov. 21, 1974, P.L. 93-502, §§ 1-3, 88 Stat. 1561, 1563, 1564; Sept. 13, 1976, P.L. 94-409, § 5(b), 90 Stat. 1247; Oct. 13, 1978, P.L. 95-454, Title IX, § 906(a)(10), 92 Stat. 1225; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(2), 98 Stat. 3357; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle N, §§ 1802, 1803, 100 Stat. 3207-48, 3207-49; Oct. 2, 1996, P.L. 104-231, §§ 3-11, 110 Stat. 3049; Nov. 27, 2002, P.L. 107-306, Title III, Subtitle B, § 312, 116 Stat. 2390.)

(As amended Dec. 31, 2007, P.L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8-10(a), 12, 121 Stat. 2525, 2526, 2527, 2530.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Prior law and revision:****1966 Act**

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 USC Sec. 1002	June 11, 1946, ch 324, Sec. 3, 60 Stat. 238.

In subsection (b)(3), the words "formulated and" are omitted as surplusage. In the last sentence of subsection (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 Act

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Section 1 [of Pub. L. 90-23] amends *section 552 of title 5, United States Code*, to reflect Public Law 89-487.

In subsection (a)(1)(A), the words "employees (and in the case of a uniformed service, the member)" are substituted for "officer" to retain the coverage of Public Law 89-487 and to conform to the definitions in *5 U.S.C. 2101, 2104, and 2105*.

In the last sentence of subsection (a)(2), the words "A final order. . . may be relied on. . . only if" are substituted for "No final order. . . may be relied upon. . . unless"; and the words "a party other than an agency" and "the party" are substituted for "a private party" and "the private party", respectively, on authority of the definition of "private party" in *5 App. U.S.C. 1002(g)*.

In subsection (a)(3), the words "the responsible employee, and in the case of a uniformed service, the responsible member" are substituted for "the responsible officers" to retain the coverage of Public Law 89-487 and to conform to the definitions in *5 U.S.C. 2101, 2104, and 2105*.

In subsection (a)(4), the words "shall maintain and make available for public inspection a record" are substituted for "shall keep a record. . . and that record shall be available for public inspection".

In subsection (b)(5) and (7), the words "a party other than an agency" are substituted for "a private party" on authority of the definition of "private party" in *5 App. U.S.C. 1002(g)*.

In subsection (c), the words "This section does not authorize" and "This section is not authority" are substituted for "Nothing in this section authorizes" and "nor shall this section be authority", respectively.

5 App. U.S.C. 1002(g), defining "private party" to mean a party other than an agency, is omitted since the words "party other than an agency" are substituted for the words "private party" wherever they appear in revised *5 U.S.C. 552*.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

Explanatory notes:

A former *5 USC § 552* was transferred by Act Sept. 6, 1966, which enacted *5 USCS §§ 101 et seq.*, and now appears as *7 USCS § 2243*.

Amendments:

1967. Act June 5, 1967 (effective 7/4/67, as provided by § 3 of such Act, which appears as a note to this section) substituted this section for one which read:

"§ 552. Publication of information, rules, opinions, orders, and public records

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

"(1) a function of the United States requiring secrecy in the public interest; or

"(2) a matter relating solely to the internal management of an agency.

"(b) Each agency shall separately state and currently publish in the Federal Register--

"(1) descriptions of its central and field organizations, including delegations of final authority by the agency, and the established places at which, and methods whereby, the public may obtain information or make submittals or requests;

"(2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of the formal or informal procedures available and forms and instructions as to the scope and contents of all papers, reports, or examinations; and

"(3) substantive rules adopted as authorized by law and statements of general policy or interpretations adopted by the agency for public guidance, except rules addressed to and served on named persons in accordance with law.

A person may not be required to resort to organization or procedure not so published.

"(c) Each agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

"(d) Except as otherwise required by statute, matters of official record shall be made available, in accordance with published rule, to persons properly and directly concerned, except information held confidential for good cause found."



LEXSTAT 18 CFR 388.113

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TITLE 18 -- CONSERVATION OF POWER AND WATER RESOURCES
CHAPTER I -- FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY
SUBCHAPTER X -- PROCEDURAL RULES
PART 388 -- INFORMATION AND REQUESTS

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18 CFR 388.113

§ 388.113 Accessing critical energy infrastructure information.

(a) Scope. This section governs access to critical energy infrastructure information (CEII). The rules governing submission of CEII are contained in *18 CFR 388.112(b)*. The Commission reserves the right to restrict access to previously filed documents as well as Commission-generated documents containing CEII.

(b) Purpose. The procedures in this section are available at the requester's option as an alternative to the FOIA procedures in § 388.108 where the information requested is exempted from disclosure under the FOIA and contains CEII.

(c) Definitions. For purposes of this section:

(1) Critical energy infrastructure information means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- (i) Relates details about the production, generation, transportation, transmission, or distribution of energy;
- (ii) Could be useful to a person in planning an attack on critical infrastructure;
- (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, *5 U.S.C. 552*; and
- (iv) Does not simply give the general location of the critical infrastructure.

(2) Critical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

(d) Accessing critical energy infrastructure information.

(1) An Owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility directly from Commission staff without going through the procedures outlined in paragraph (d)(3) of this section. Non-employee agents of an owner/operator of such facility may obtain CEII relating to the owner/operator's facility in the same manner as owner/operators as long as they present written authorization from the owner/operator to obtain such information.

(2) An employee of a federal agency acting within the scope of his or her federal employment may obtain CEII directly from Commission staff without following the procedures outlined in paragraph (d)(3) of this section. Any Com-

mission employee at or above the level of division director or its equivalent may rule on federal agency representatives' requests for access to CEII.

(3) A landowner whose property is crossed by or in the vicinity of a project may receive detailed alignment sheets containing CEII directly from Commission staff without submitting a non-disclosure agreement as outlined in paragraph (d)(4) of this section. A landowner must provide Commission staff with proof of his or her property interest in the vicinity of a project.

(4) If any other requester has a particular need for information designated as CEII, the requester may request the information using the following procedures:

(i) File a signed, written request with the Commission's CEII Coordinator. The request must contain the following: Requester's name (including any other name(s) which the requester has used and the dates the requester used such name(s)), title, address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. A requester shall provide his or her date and place of birth upon request, if it is determined by the CEII Coordinator that this information is necessary to process the request. Unless otherwise provided in Section 113(d)(3), a requester must also file an executed non-disclosure agreement.

(ii) A requester who seeks the information on behalf of all employees of an organization should clearly state that the information is sought for the organization, that the requester is authorized to seek the information on behalf of the organization, and that all the requesters agree to be bound by a non-disclosure agreement that must be executed by and will be applied to all individuals who have access to the CEII.

(iii) After the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information.

(iv) If the CEII Coordinator determines that the CEII requester has not demonstrated a valid or legitimate need for the CEII or that access to the CEII should be denied for other reasons, this determination may be appealed to the General Counsel pursuant to § 388.110 of this Chapter. The General Counsel will decide whether the information is properly classified as CEII, which by definition is exempt from release under FOIA, and whether the Commission should in its discretion make such CEII available to the CEII requester in view of the requester's asserted legitimacy and need.

(v) Once a CEII requester has been verified by Commission staff as a legitimate requester who does not pose a security risk, his or her verification will be valid for the remainder of that calendar year. Such a requester is not required to provide detailed information about him or herself with subsequent requests during the calendar year. He or she is also not required to file a non-disclosure agreement with subsequent requests during the calendar year because the original non-disclosure agreement will apply to all subsequent releases of CEII.

(vi) If an organization is granted access to CEII as provided by paragraph (d)(4)(iii) of this section, and later seeks to add additional individuals to the non-disclosure agreement, the names of these individuals must be sent to the CEII Coordinator with certification that notice has been given to the submitter. Any newly added individuals must execute a supplement to the original non-disclosure agreement indicating their acceptance of its terms. If there is no written opposition within five (5) days of notifying the CEII Coordinator and the submitter concerning the addition of any newly-named individuals, the CEII Coordinator will issue a standard notice accepting the addition of names to the non-disclosure agreement. If the submitter files a timely opposition with the CEII Coordinator, the CEII Coordinator will issue a formal determination addressing the merits of such opposition.

(e) Fees for processing CEII requests will be determined in accordance with *18 CFR 388.109*.

HISTORY: [68 FR 9857, 9870, Mar. 3, 2003; 68 FR 46456, 46460, Aug. 6, 2003; 69 FR 48386, 48391, Aug. 10, 2004; 70 FR 37031, 37036, June 28, 2005; 71 FR 58273, 58276, Oct. 3, 2006; 72 FR 63980, 63985, Nov. 14, 2007]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
5 U.S.C. 301-305, 551, 552 (as amended), 553-557; 42 U.S.C. 7101-7352.

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NOTES: [EFFECTIVE DATE NOTE: *71 FR 58273, 58276*, Oct. 3, 2006, revised paragraphs (c)(1), (d)(3)(i), and (d)(3)(ii), effective Nov. 2, 2006; *72 FR 63980, 63985*, Nov. 14, 2007, amended paragraph (d), and added paragraph (e), effective Dec. 14, 2007.]

NOTES APPLICABLE TO ENTIRE TITLE:

CROSS REFERENCES: Applications and entries conflicting with lands reserved or classified as power sites, or covered by power applications: See Public Lands, Interior, 43 CFR subpart 2320.

Interstate Commerce Commission: See Transportation, 49 CFR chapter X.

Irrigation projects; electrification, Bureau of Indian Affairs, Department of the Interior: See Indians, 25 CFR part 175

Regulations of the Bureau of Land Management relating to rights-of-way for power, telephone, and telegraph purposes: See Public Lands, Interior, 43 CFR Group 2800.

Rights-of-way over Indian lands: See Indians, 25 CFR parts 169, 170, and 265.

Securities and Exchange Commission: See Commodity and Securities Exchanges, 17 CFR chapter II.

Withdrawal of public lands: See Public Lands, Interior, 43 CFR Group 2300.

NOTES APPLICABLE TO ENTIRE CHAPTER:

ABBREVIATIONS: The following abbreviations are used in this chapter: M.c.f.=Thousand cubic feet. B.t.u.=British thermal units. ICC=Interstate Commerce Commission.

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Notice terminating proceedings, see: *73 FR 79316*, Dec. 29, 2008.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 388 Denial of petition for rehearing, see: *72 FR 18572*, Apr. 13, 2007.]

1167 words

119.01 Administrative procedure definitions.

As used in sections 119.01 to 119.13 of the Revised Code:

(A)(1) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the civil service commission, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

Except as otherwise provided in division (I) of this section, sections 119.01 to 119.13 of the Revised Code do not apply to the public utilities commission. Sections 119.01 to 119.13 of the Revised Code do not apply to the utility radiological safety board; to the controlling board; to actions of the superintendent of financial institutions and the superintendent of insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, savings and loan associations, savings banks, credit unions, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies; to any action taken by the division of securities under section 1707.201 of the Revised Code; or to any action that may be taken by the superintendent of financial institutions under section 1113.03, 1121.06, 1121.10, 1125.09, 1125.12, 1125.18, 1157.01, 1157.02, 1157.10, 1165.01, 1165.02, 1165.10, 1349.33, 1733.35, 1733.361, 1733.37, or 1761.03 of the Revised Code.

Sections 119.01 to 119.13 of the Revised Code do not apply to actions of the industrial commission or the bureau of workers' compensation under sections 4123.01 to 4123.94 of the Revised Code with respect to all matters of adjudication, or to the actions of the industrial commission, bureau of workers' compensation board of directors, and bureau of workers' compensation under division (D) of section 4121.32, sections 4123.29, 4123.34, 4123.341, 4123.342, 4123.40, 4123.411, 4123.44, 4123.442, 4127.07, divisions (B), (C), and (E) of section 4131.04, and divisions (B), (C), and (E) of section 4131.14 of the Revised Code with respect to all matters concerning the establishment of premium, contribution, and assessment rates.

(2) "Agency" also means any official or work unit having authority to promulgate rules or make adjudications in the department of job and family services, but only with respect to both of the following:

(a) The adoption, amendment, or rescission of rules that section 5101.09 of the Revised Code requires be adopted in accordance with this chapter;

(b) The issuance, suspension, revocation, or cancellation of licenses.

(B) "License" means any license, permit, certificate, commission, or charter issued by any agency. "License" does not include any arrangement whereby a person, institution, or entity furnishes medicaid services under a provider agreement with the department of job and family services pursuant to Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended.

(C) "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing

such agency, and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code.

(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

(E) "Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by sections 119.01 to 119.13 of the Revised Code.

(F) "Person" means a person, firm, corporation, association, or partnership.

(G) "Party" means the person whose interests are the subject of an adjudication by an agency.

(H) "Appeal" means the procedure by which a person, aggrieved by a finding, decision, order, or adjudication of any agency, invokes the jurisdiction of a court.

(I) "Rule-making agency" means any board, commission, department, division, or bureau of the government of the state that is required to file proposed rules, amendments, or rescissions under division (D) of section 111.15 of the Revised Code and any agency that is required to file proposed rules, amendments, or rescissions under divisions (B) and (H) of section 119.03 of the Revised Code. "Rule-making agency" includes the public utilities commission. "Rule-making agency" does not include any state-supported college or university.

(J) "Substantive revision" means any addition to, elimination from, or other change in a rule, an amendment of a rule, or a rescission of a rule, whether of a substantive or procedural nature, that changes any of the following:

(1) That which the rule, amendment, or rescission permits, authorizes, regulates, requires, prohibits, penalizes, rewards, or otherwise affects;

(2) The scope or application of the rule, amendment, or rescission.

(K) "Internal management rule" means any rule, regulation, or standard governing the day-to-day staff procedures and operations within an agency.

Effective Date: 06-18-2002; 04-14-2006; 2007 HB100 09-10-2007

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.

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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

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

4906.04 Certificate required for construction of major utility.

No person shall commence to construct a major utility facility in this state without first having obtained a certificate for the facility. The replacement of an existing facility with a like facility, as determined by the power siting board, shall not constitute construction of a major utility facility. Such replacement of a like facility is not exempt from any other requirements of state or local laws or regulations. Any facility, with respect to which such a certificate is required, shall thereafter be constructed, operated, and maintained in conformity with such certificate and any terms, conditions, and modifications contained therein. A certificate may only be issued pursuant to Chapter 4906. of the Revised Code.

A certificate may be transferred, subject to the approval of the board, to a person who agrees to comply with the terms, conditions, and modifications contained therein.

Effective Date: 11-15-1981

4906.06 Certificate application.

(A) An applicant for a certificate shall file with the office of the chairperson of the power siting board an application, in such form as the board prescribes, containing the following information:

- (1) A description of the location and of the major utility facility ;
- (2) A summary of any studies that have been made by or for the applicant of the environmental impact of the facility;
- (3) A statement explaining the need for the facility;
- (4) A statement of the reasons why the proposed location is best suited for the facility;
- (5) A statement of how the facility fits into the applicant's forecast contained in the report submitted under section 4935.04 of the Revised Code;
- (6) Such other information as the applicant may consider relevant or as the board by rule or order may require. Copies of the studies referred to in division (A)(2) of this section shall be filed with the office of the chairperson, if ordered, and shall be available for public inspection.

The application shall be filed not less than one year nor more than five years prior to the planned date of commencement of construction. Either period may be waived by the board for good cause shown.

(B) Each application shall be accompanied by proof of service of a copy of such application on the chief executive officer of each municipal corporation and county, and the head of each public agency charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located.

(C) Each applicant within fifteen days after the date of the filing of the application shall give public notice to persons residing in the municipal corporations and counties entitled to receive notice under division (B) of this section, by the publication of a summary of the application in newspapers of general circulation in such area. Proof of such publication shall be filed with the office of the chairperson.

(D) Inadvertent failure of service on, or notice to, any of the persons identified in divisions (B) and (C) of this section may be cured pursuant to orders of the board designed to afford them adequate notice to enable them to participate effectively in the proceeding. In addition, the board , after filing, may require the applicant to serve notice of the application or copies thereof or both upon such other persons, and file proof thereof, as the board considers appropriate.

(E) An application for an amendment of a certificate shall be in such form and contain such information as the board prescribes. Notice of such an application shall be given as required in divisions (B) and (C) of this section.

(F) Each application for certificate or an amendment shall be accompanied by the application fee prescribed by board rule. All application fees, supplemental application fees, and other fees collected by the board shall be deposited in the state treasury to the credit of the power siting board fund, which is hereby created. The chairperson shall administer and authorize expenditures from the fund for any of the purposes of this chapter. If the chairperson determines that moneys credited to the fund from an applicant's fee are not sufficient to pay the board's

expenses associated with its review of the application, the chairperson shall request the approval of the controlling board to assess a supplemental application fee upon an applicant to pay anticipated additional expenses associated with the board's review of the application or an amendment to an application. If the chairperson finds that an application fee exceeds the amount needed to pay the board's expenses for review of the application, the chairperson shall cause a refund of the excess amount to be issued to the applicant from the fund.

Effective Date: 04-07-2004

5717.01 Appeal from county board of revision to board of tax appeals - procedure - hearing.

An appeal from a decision of a county board of revision may be taken to the board of tax appeals within thirty days after notice of the decision of the county board of revision is mailed as provided in division (A) of section 5715.20 of the Revised Code. Such an appeal may be taken by the county auditor, the tax commissioner, or any board, legislative authority, public official, or taxpayer authorized by section 5715.19 of the Revised Code to file complaints against valuations or assessments with the auditor. Such appeal shall be taken by the filing of a notice of appeal, in person or by certified mail, express mail, or authorized delivery service, with the board of tax appeals and with the county board of revision. If notice of appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. Upon receipt of such notice of appeal such county board of revision shall by certified mail notify all persons thereof who were parties to the proceeding before such county board of revision, and shall file proof of such notice with the board of tax appeals. The county board of revision shall thereupon certify to the board of tax appeals a transcript of the record of the proceedings of the county board of revision pertaining to the original complaint, and all evidence offered in connection therewith. Such appeal may be heard by the board of tax appeals at its offices in Columbus or in the county where the property is listed for taxation, or the board of tax appeals may cause its examiners to conduct such hearing and to report to it their findings for affirmation or rejection.

The board of tax appeals may order the appeal to be heard on the record and the evidence certified to it by the county board of revision, or it may order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper.

Effective Date: 03-14-2003



LEXSTAT OAC 4906-15-02

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APRIL 3, 2009 *

4906 Ohio Power Siting Board
Chapter 4906-15 Applications for Certificates for Electric, Gas, or Natural Gas Transmission Facilities

OAC Ann. 4906-15-02 (2009)

4906-15-02. Review of need for proposed project.

(A) The applicant shall provide a statement explaining the need for the proposed facility, including a listing of the factors upon which it relied to reach that conclusion and references to the most recent long-term forecast report (if applicable). The statement shall also include but not be limited to, the following:

- (1) A statement of the purpose of the proposed facility.
- (2) Specific projections of system conditions, local requirements or any other pertinent factors that impacted the applicant's opinion on the need for the proposed facility.
- (3) Relevant load flow studies and contingency analyses, if appropriate, identifying the need for system improvement.
- (4) For electric power transmission facilities, load flow data shall be presented in the form of transcription diagrams depicting system performance with and without the proposed facility.
- (5) For gas or natural gas transmission projects, one copy in electronic format of the relevant base case system data on diskette, in a format acceptable to the board staff, with a description of the analysis program and the data format.

(B) **Expansion plans.** (1) For the electric power transmission lines and associated facilities, the applicant shall provide a brief statement of how the proposed facility and site/route alternatives fit into the applicant's most recent long-term power forecast report and the regional plans for expansion, including, but not limited to, the following:

(a) Reference to any description of the proposed facility and site/route alternatives in the most recent long-term electric forecast report of the applicant.

(b) If no description was contained in the most recent long-term electric forecast report, an explanation as to why none was filed in the most recent long-term electric forecast report.

(c) Reference to regional expansion plans, including East Central Area Reliability Coordination Agreement bulk power plans, when applicable (if the transmission project will not affect regional plans, the applicant shall so state).

(2) For gas transmission lines and associated facilities, the applicant shall provide a brief statement of how the proposed facility and site/route alternatives fit into the applicant's most recent long-term gas forecast report, including the following:

(a) Reference to any description of the proposed facility and site/route alternatives in the most recent long-term gas forecast report of the applicant.

(b) If no description was contained in the most recent long-term gas forecast report, an explanation as to why none was filed in the most recent long-term gas forecast report.

(C) For electric power transmission facilities, the applicant shall provide an analysis of the impact of the proposed facility on the electric power system economy and reliability. The impact of the proposed facility on all interconnected utility systems shall be evaluated, and all conclusions shall be supported by relevant load flow studies.

(D) For electric power transmission lines, the applicant shall provide an analysis and evaluation of the options considered which would eliminate the need for construction of an electric power transmission line, including electric power generation options and options involving changes to existing and planned electric power transmission substations.

(E) The applicant shall describe why the proposed facility was selected to meet the projected need.

(F) Facility schedule. (1) Schedule. The applicant shall provide a proposed schedule in bar chart format covering all applicable major activities and milestones, including:

- (a) Preparation of the application.
- (b) Submittal of the application for certificate.
- (c) Issuance of the certificate.
- (d) Acquisition of rights-of-way and land rights for the certified facility.
- (e) Preparation of the final design.
- (f) Construction of the facility.
- (g) Placement of the facility in service.

(2) Delays. The applicant shall describe the impact of critical delays on the eventual in-service date.

History:Effective: 01/25/2009.

R.C. 119.032 review dates: 11/10/2008 and 11/30/2013.

Promulgated Under: 111.15.

Statutory Authority: 4906.03.

Rule Amplifies: 4906.03, 4906.06.

Prior Effective Dates: 12/27/76, 11/6/78, 7/7/80, 7/7/88, 8/28/98, 12/15/03.

48



STAFF REPORT OF INVESTIGATION

RECEIVED

OCT 23 1996

DOCKETING DIVISION
Public Utilities Commission of Ohio

In the Matter of the Short-Form Application of)
The Cleveland Electric Illuminating Company)
for Certification of the Rachel 138 kV)
Transmission Line Project, Located in Geauga)
County, Ohio.)

Case No. 95-600-EL-BTX

0078

THE OHIO POWER SITING BOARD

EQUAL OPPORTUNITY EMPLOYER

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In the Matter of the Short-Form Application of)
The Cleveland Electric Illuminating Company)
for Certification of the Rachel 138 kV)
Transmission Line Project, Located in Geauga)
County, Ohio.)

Case No. 95-600-EL-BTX

Staff's Report of Investigation
and Recommended Findings

Submitted to the
Ohio Power Siting Board

BEFORE
THE POWER SITING BOARD
OF
THE STATE OF OHIO

In the Matter of the Short-Form Application of)
The Cleveland Electric Illuminating Company) Case No. 95-600-EL-BTX
for Certification of the Rachel 138 kV)
Transmission Line Project, Located in Geauga)
County, Ohio.)

Members of the Board:

Craig A. Glazer, Chairman, PUCO	Samuel T. Bateman, State Representative
Donald E. Jakeway, Director, ODD	Barbara C. Pringle, State Representative
Peter Somani, M.D., Director, ODH	Roy L. Ray, State Senator
Donald D. Glower, P.E., Public Member	Anthony Latell, Jr., State Senator
Fred L. Dailey, Director, ODA	
Donald Schregardus, Director, OEPA	
Donald C. Anderson, Director, ODNR	

To The Honorable Power Siting Board:

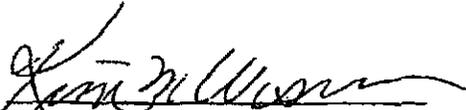
In accordance with provisions of Ohio Revised Code (ORC) Section 4906.07(C), and pursuant to Rule 4906-1-14(E) of the Ohio Administrative Code (OAC), the staff has completed its investigation in the above matter and submits its Findings and Recommendations in this Staff Report.

The Staff Report of Investigation and Recommended Findings has been prepared by the staff of the Public Utilities Commission of Ohio. The staff Findings and Recommendations are the result of staff coordination with the Ohio Environmental Protection Agency, the Ohio Department of Health, the Ohio Department of Development, the Ohio Department of Natural Resources and the Ohio Department of Agriculture. In addition, the staff coordinated with the Ohio Department of Transportation, the Ohio Historical Society, and the U.S. Fish and Wildlife Service.

In accordance with ORC Sections 4906.07 and 4906.12, copies of this Staff Report have been filed with the Docketing Division of the Public Utilities Commission on behalf of the Ohio Power Siting Board and served upon the applicant or its authorized representative, the parties of record and the main public libraries of the political subdivisions in the project area.

The Staff Report presents the result of the staff's investigation conducted in accordance with ORC Chapter 4906 and the Rules of the Ohio Power Siting Board, along with the staff's Findings and Recommendations for consideration by the Board. This Staff Report does not purport to reflect the views of the Board nor should any party to the instant proceeding consider the Board in any manner constrained by the Findings and Recommendations set forth.

Respectfully submitted,



Kim Wissman
Siting Officer

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Impacts to surface waters will be concentrated in the headwaters of several drainage basins along each proposed route resulting in long term, cumulative effects. Not only will significant impacts occur in the proposed project area but adverse effects can be expected downstream beyond the project area boundaries. These stream resources, which include rare coldwater and exceptional warmwater habitat, will be degraded due to the elimination of riparian areas, increased sedimentation, and the physical alterations caused by permanent access roads and culverts. Wetlands, particularly forested wetlands, will be permanently altered as well, and partially filled due to the installation of transmission line structures and associated permanent access roads.

Considering the nature and extent of sensitive ecological resources within the preferred r-o-w and 2,000 foot corridor, an alignment that parallels the abandoned Baltimore and Ohio Railroad clearly will not result in minimal environmental impacts. In fact, the applicant's proposal to construct a transmission line along this railroad corridor indicates to staff that ecological resources were not given proper consideration in the route selection process. In addition, it is evident that the additional information collected on ecological resources during the October and November 1995 field surveys was not used to re-evaluate either of the two alignments.

Staff strongly disagrees with the statements made on page 9 of the supplemental information in Appendix 11-1 of the application that the intermittent streams and ditches of the study area can be characterized as having minimal roles in the overall hydrologic system because of their small, noncontinuous flows and near absence of aquatic habitat. The applicant has concluded that minimal impacts would be expected on the streams in the project area, in part, because of the lack of aquatic habitat.

The upper reaches of streams, or the headwaters, are very important to the overall stream system. The Ohio Environmental Protection Agency's 1994 Ohio Water Resource Inventory Report indicates that the high level of disturbance of headwater streams contributes to the decline of populations of sensitive forms of aquatic life (i.e. species that are intolerant of human-induced environmental changes). Additionally, the report identifies on page 12 of the Executive Summary that the emerging problems of degradation of headwater streams could "undo" some of the gains made recently in the restoration of point source associated impairments given the ultimate dependence of mainstem reaches of streams on the network of headwater streams.

Further, sampling conducted by staff during July and September, 1996, identified uninterrupted flows in streams and the presence of coldwater, exceptional warmwater, or high quality warmwater aquatic habitat within the proposed alignments for both the preferred and alternative routes. It should be noted that this sampling provides a minimum measure of the aquatic resources that will be crossed by the transmission line since a more standardized sampling program

BEFORE

0240

THE OHIO POWER SITING BOARD

In the Matter of the Application of The)
 Cleveland Electric Illuminating Company) Case No. 95-600-EL-BTX
 for Certification of the Rachel 138 kV)
 Transmission Line Project.)

OPINION, ORDER, AND CERTIFICATE

The Ohio Power Siting Board (Board), coming now to consider the above-entitled matter, having appointed its administrative law judge to conduct a public hearing, having reviewed the record evidence, and the staff report of investigation, and being otherwise fully advised, hereby waives the necessity for an administrative law judge's report and issues its Opinion, Order, and Certificate in this case as required by Section 4906.10, Revised Code.

APPEARANCES:

Terence G. Linnert, Mark R. Kempic, and Donna M. Andrew, 6200 Oak Tree Boulevard, Independence, Ohio 44131, on behalf of The Cleveland Electric Illuminating Company.

Betty D. Montgomery, Attorney General of the State of Ohio, Duane W. Luckey, Section Chief, William L. Wright, and Gerald A. Rocco, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215-3793, and Margaret A. Malone and Ann Wood, Assistant Attorneys General, Environmental Enforcement Section, 30 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Ohio Power Siting Board.

Hahn, Loeser & Parks, by Janine L. Migden, One Columbus, Suite 1800, 10 West Broad Street Columbus, Ohio 43215-3420, on behalf of Citizens for a Better Way.

Hahn, Loeser & Parks, by Maureen R. Grady, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3420, on behalf of Sustainable Energy for Economic Development.

Arter and Hadden, by William A. Adams and Dane Stinson, One Columbus, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215-3422, on behalf of the Geauga County Industrial Group.

Brian and Cynthia Housour, Lori Bieber, Paul Gigliotti, Susanne Sobie, Robert and Ruth Wheeler, Joseph Turk, Raymond and Barbara Ianiro, Jeanne and Craig Hall, David and Evelyn Hewlett, James and Laura Marsic, Martha Christian, Marianna Hrynko, Robert Waller, James and Ingeborg Dilgren, Marian and Alfred Williams, Raymond and Nancy Pengel, Julia Zakany, Lawrence and Geraldine Chapman, Barb and

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and rivers, and backfilling for the transmission line would be contained in PVC conduits encased in concrete and would require an open excavation through stream beds, ditches, and wetlands. This could disrupt water flow and drainage basins. This would cause more environmental impacts than an overhead transmission line. CEI estimated the costs of placing the transmission line underground of approximately \$24 million along the preferred route. While pole costs of \$2.8 million and overhead conductor costs of \$856,000 would be eliminated by placing the line underground, the necessary underground conduit and conductors are projected to cost approximately \$16 million. Costs to site the line underground along the alternate route would be even greater since the alternate route is longer than the preferred route.

Board Analysis

Based on these factors, the evidence does not support the placement of the transmission lines underground. The evidence shows that the costs for this option are excessive, and that the environmental effects would be excessive. Accordingly, we cannot find that this alternative represents the minimum adverse environmental impact.

F. Proposed Modifications to the Preferred Route

During the hearing, CEI witness Krauss agreed that CEI would be willing to make modifications to the preferred route (CEI Ex. TDK-5) in order to satisfy the Board, although CEI believes that the preferred route should be certified by the Board (CEI Ex. 18). In addition, CEI witness Krauss indicated that the company would agree that the 19 conditions presented by Staff witness Yerian should be attached to the certificate. These modifications include:

- (1) That the facility be installed following the modified preferred route as depicted on CEI Ex. TRK-5. The portion of the route that follows the abandoned Baltimore and Ohio Railroad will utilize only the top of the railroad embankment for structure location and construction access. An adjustment to the centerline of the facility will be made in the vicinity of the residence at 14765 Stillwell Road to remove the necessity of acquiring the residence, unless the property owner desires otherwise.
- (2) That the applicant shall utilize the preferred structures and equipment described in the application on pages 08-12 through 08-14.
- (3) That, prior to construction, the applicant shall obtain all applicable permits and authorizations as required by Federal and

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigation)
into the Perry Nuclear Power) Case No. 85-521-EL-COI
Station.)

ENTRY

The Commission finds:

- 1) The public hearing in this case will commence on June 1, 1987. On April 6, 1987, the Greater Cleveland Welfare Rights Organization, et al. (GCWRO) filed a motion requesting that the Commission appoint as the Commission's own expert witnesses in this proceeding, two experts who testified before the Pennsylvania Public Utility Commission on the prudence of costs incurred in constructing the Perry Nuclear Generating Unit No. 1 (Perry). The experts are Mr. Dale G. Bridenbaugh and Mr. Richard B. Hubbard of MHB Technical Associates (MHB). In the alternative, GCWRO requests that the Commission take administrative notice of the direct testimony of these two persons including the attachments to that testimony which was submitted to the Pennsylvania Public Utility Commission on behalf of the Pennsylvania Office of Consumer Advocate, and accept these as part of the record in this proceeding. GCWRO also requested an expediting ruling on its motion but did not certify whether or not any other party objected to an expedited ruling. Under these circumstances, Rule 4901-1-12, Ohio Administrative Code, provides that any party may file a memorandum contra within seven days after the service of the motion.
- 2) On April 9, 1987, Ohio Edison Company and The Cleveland Electric Illuminating Company filed memoranda opposing GCWRO's motion. Also on April 9, 1987, the Office of the Consumers' Counsel (OCC) filed a memorandum supporting GCWRO's motion.
- 3) In support of its motion, GCWRO states that it would call these two individuals as its own expert witnesses except that it lacks the necessary funds, and that the appointment of these experts as witnesses on behalf of the Commission is needed to insure that there has

been a thorough, complete, and credible investigation of Perry.

- 4) In its motion, GCWRO argues that due process of law under the United States Constitution requires that it have the opportunity to be heard at a meaningful time and in a meaningful manner and that it have the right to present its evidence and summon the witnesses of its choice. GCWRO suggests that if the Commission, or the utilities, do not pay for its witnesses then it has been denied due process. This argument must be rejected. It is widely held that the consumer has no constitutionally protected right in the rate paid for utility service. Consolidated Aluminum Corp. v. T.V.A., 462 F. Supp. 464 (M.D. Tenn. 1978). The right of a ratepayer to participate in proceedings affecting rates is a statutory and not a constitutional right. Committee Against MRT v. Pub. Util. Comm., 52 Ohio St. 2d 231 (1977) (dissenting opinion); Pub. Util. Comm. of California v. United States, 356 F. 2d 236 (9th Cir. 1966), cert. denied, 385 U.S. 816 (1966). GCWRO has presented no constitutional due process question for the Commission's consideration. GCWRO's intervention in this proceeding is subject to the discretion of the Commission. Section 4903.221, Revised Code; Rule 4901-1-11, Ohio Administrative Code. Further, GCWRO does have the opportunity to be heard at a meaningful time and in a meaningful manner. It also has the opportunity to present its evidence and summon its witnesses. However, the responsibility for making an intervenor's participation "meaningful" lies with the intervenor, not with the Commission.

- 5) GCWRO's contention, that the Commission must retain these individuals to insure a thorough, complete, and credible investigation, is also without merit and must be rejected. The Commission has already performed, through the firms of Touche Ross and Co., Nielson-Wurster Group, Chapman & Associates, as well as its Staff, a comprehensive assessment of the Perry project. Any suggestion that the record in this case will be insufficient to protect the customers of the utilities is,

therefore, not supported by the facts. Further, the witnesses whom GCWRO wants the Commission to adopt as its own are consultants already retained by OCC and may be called to testify on OCC's behalf. (OCC's March 6, 1987 List of Issues and OCC's April 2, 1987 Amended List of Issues).

- 6) In the alternative to the Commission appointing these witnesses, GCWRO requests that the Commission take administrative notice of the prefiled direct testimony and exhibits of MHB Associates in the Pennsylvania cases. Under the circumstances presented, the MHB direct testimony is not a proper subject for administrative notice. See, Rule 201 of the Ohio Rules of Evidence. GCWRO's alternative request should also be rejected.
- 7) OCC suggests that in the event the Commission is unwilling to appoint Mr. Hubbard and Mr. Bridenbaugh as Commission witnesses, the Commission could sponsor and supervise a prehearing deposition of these individuals. The record of the deposition would then be available to be introduced at hearing. OCC indicates, however, that because the intervenors lack the financial resources to sponsor the deposition, a minimal commitment of resources by the Commission would be required. Any suggestion by OCC that the Commission sponsor these witnesses, even by deposition, has already been addressed above. Further, there is nothing to prevent the parties on their own from taking the depositions of Mr. Hubbard and Mr. Bridenbaugh. Questions related to the admissibility of these depositions will, however, be subject to rulings at the hearing. Accordingly, OCC's alternative request should also be rejected.

It is, therefore,

ORDERED, That the April 6, 1987 motion filed by the Greater Cleveland Welfare Rights Organization, et al., requesting that the Commission appoint additional expert witnesses is denied. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas V. Chema
Thomas V. Chema, Chairman

William H. Brooks
William H. Brooks

Gloria L. Gaylord
Gloria L. Gaylord

Ashley C. Brown
Ashley C. Brown

Alan R. Schriber
Alan R. Schriber

AKR/ksb

Entered in the Journal

21 APR 1987
A True Copy

Nancy L. Wolpe
Nancy L. Wolpe
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, Approval of Tariff Changes and New Tariffs, Authority to Modify Current Accounting Procedures, and Approval to Transfer its Generating Assets to an Exempt Wholesale Generator.	)	Case No. 99-1658-EL-ETP
	)	Case No. 99-1659-EL-ATA
	)	Case No. 99-1660-EL-ATA
	)	Case No. 99-1661-EL-AAM
	)	Case No. 99-1662-EL-AAM
	)	Case No. 99-1663-EL-UNC
In the Matter of the Application of the Dayton Power and Light Company for Approval of its Transition Plan, for the Opportunity to Receive Transition Revenues, for Approval to Change Accounting Methods, and Approval to Amend its Tariff.	)	Case No. 99-1687-EL-ETP
	)	Case No. 99-1688-EL-AAM
	)	Case No. 99-1689-EL-ATA
In the Matter of the Application of Monongahela Power Company dba Allegheny Power for Approval of an Electric Transition Plan.	)	Case No. 00-02-EL-ETP

ENTRY

The attorney examiner finds:

- (1) On April 21, 2000, Cincinnati Gas and Electric Company, Dayton Power and Light Company, and Monongahela Power Company (Companies) filed a motion for a protective order and a request for an expedited ruling. The Companies state that during the course of discovery, Industrial Energy User-Ohio (IEU-Ohio), a member of Citizens for Choice in Electricity (CCE), requested certain information regarding inputs used in a General Electric (GE) maps model used by the Companies. The Companies, IEU-Ohio, and CCE have agreed that the Companies will pay and provide to CCE's consultant, R W Beck, a newly created load flow data GE maps model. IEU-Ohio, CCE and R W Beck have agreed to maintain the confidentiality of the model that GE will license to R W Beck. However, in the event that such information is used at hearing, GE has requested that the Commission issue a protective order. The Companies have attached to their motion the terms of a proposed protective order to be followed regarding

the information provided to CCE. As part of the proposed protective order, information from the model provided under the protective agreement may be filed under seal, exchanged with other intervenor members of CCE, subject to the nondisclosure obligations of the protective order, or used at hearings *in camera*.

- (2) The motion for a protective order is reasonable and should be granted. The examiner will approve the proposed protective order attached to the motion.

It is, therefore,

ORDERED, That the motion for a protective order is granted. The protective order attached to the motion is approved. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in the above-captioned cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

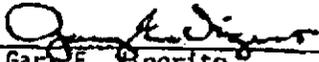

By: R. Russell Gooden
Attorney Examiner

geb

Entered in the Journal

APR 24 2000

A True Copy


Gary E. Vigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 2004 Long-Term)
 Forecast Report of Ohio Edison)
 Company, The Cleveland Electric) Case No. 04-504-EL-FOR
 Illuminating Company, and The Toledo)
 Edison Company and Related Matters.)

ENTRY

The attorney examiner finds:

- (1) On April 15, 2004, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the parties) jointly filed a 2004 electric long-term forecast report (LTFR).
- (2) Also on April 15, 2004, the parties filed a motion for a protective order and accompanying memorandum in support. In the motion, the parties request a Commission order protecting the confidentiality of certain documents filed under seal in this docket on April 15, 2004. The motion states that the documents contain sensitive and highly proprietary detailed operational information about the distribution and transmission systems of the parties, including Critical Energy Infrastructure Information. The parties add that these documents were filed under seal and separate from the remainder of the materials comprising the LTFR.

In the memorandum of support, the parties comment that after September 11, 2001, there is an increased awareness concerning the type and quantity of information made publicly available regarding certain facilities. The parties add that the information submitted under seal provides details about the characteristics of the transmission owner's existing and proposed transmission lines and substations and is considered Critical Energy Infrastructure Information under federal law. Further, state the parties, the destruction of such property would negatively affect national and economic security, as well as public health and safety. The parties also observe that similar information has been filed under seal as Critical Energy Infrastructure Information at the Federal Energy Regulatory Commission (FERC) and has been granted confidentiality in Case No. 03-504-EL-FOR by the Commission. Further, the parties assert that the information in question comprises a trade secret under Section 1333.61(D), Revised Code, and that as a

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trade secret any requests for disclosure under open records law should be rejected under Section 149.43(A)(1)(v), Revised Code. Finally, the parties note that because the information submitted under seal is available to Commission Staff, any Staff review may take place without the need to publicly disclose such information.

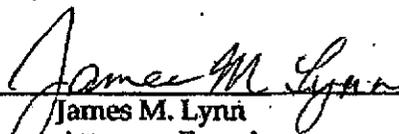
- (3) The parties' request for confidentiality of the information filed under seal is granted because of the security risk discussed by the parties. The attorney examiner adds, however, that Staff and parties granted intervention shall be afforded the opportunity to examine such information and to request additional similar information from the parties if necessary.

It is, therefore,

ORDERED, That the motion for a protective order regarding the confidentiality of information described in Finding (2) is granted. It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

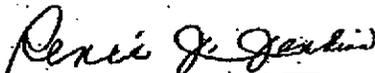
THE PUBLIC UTILITIES COMMISSION OF OHIO


By: James M. Lynn
Attorney Examiner

JML:ct 

Entered in the Journal

MAY 6 2004


Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 2007 Electric Long-Term)
 Forecast Report of FirstEnergy Corporation) Case No. 07-504-EL-FOR
 and Related Matters.)

ENTRY

The attorney examiner finds:

- (1) On April 16, 2007, the Ohio Edison Company, Cleveland Electric Illuminating Company, Toledo Edison Company and American Transmission Systems, Inc. (Companies) filed a motion for a protective order regarding their 2007 electric long-term forecast report (LTFR). In support of their motion, the Companies state that certain portions of Chapters 3 and 4 relating to their transmission and distribution systems contain operationally sensitive and propriety information and locations of electrical facilities. The Companies assert that the information submitted under seal details the characteristics of transmission owner's existing transmission lines and substations and also shows the interrelationship of facilities by listing the interconnecting lines and substations as well as line-loading limits. The Companies believe that this information should be considered critical energy infrastructure information and kept confidential.
- (2) Upon review of the Companies' motion, the attorney examiner finds that, pursuant to Rule 4901-1-24(D), Ohio Administrative Code, the Companies' motion for a protective order should be granted and directs that the portions of the Companies' 2007 LTFR filed under seal remain under seal until otherwise ordered by the Commission.

It is, therefore,

ORDERED, That the Companies' motion for a protective order be granted and that the portions of the Companies' 2007 LTFR filed under seal remain under seal until otherwise ordered by the Commission. It is, further,

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ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

R. Russell Gooden
By: R. Russell Gooden
Attorney Examiner

4th ct

Entered in the Journal

JAN 30 2008

Renee J. Jenkins
Renee J. Jenkins
Secretary