

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITIZENS ADVOCATING RESPONSIBLE ENERGY,)	Case No. 09-0481
)	
)	
Appellant,)	On Appeal from The Ohio Power Siting Board
)	
vs.)	
)	Case No. 07-0171-EL-BTX
THE OHIO POWER SITING BOARD,)	
)	
Appellee.)	

**REPLY BRIEF OF APPELLANT
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ARGUMENT IN REPLY

Proposition of Law No. 1.:

When The Ohio Power Siting Board Delegates Its Statutory Duties To A Public Utilities Commission Employee And Fails To Make An Independent Determination That A Certificate Of Environmental Compatibility And Public Need Should Be Issued, The Order Granting Such A Certificate Is Unlawful And Unreasonable.

This Court has repeatedly emphasized that an individual's private property rights are paramount and that any power granted by statute to condemn property must be strictly construed. See *Platt v. Pennsylvania* (1885), 43 Ohio St. 228, 244, 1 N.E. 420. The Order of the Ohio Power Siting Board (the "Board" or "OPSB") was not issued in accordance with the statutory obligations imposed upon it, and the Board failed to reach an independent determination that the Application for a Certificate of Environmental Compatibility and Public Need (the "Application") filed by Appellees American Transmission Systems Incorporated and the Cleveland Electric Illuminating Company (collectively "Applicants") should be granted. Because the Board failed to conduct an independent review of the evidence presented, and accepted the conclusions and rulings of the Administrative Law judge ("ALJ") without oversight or independent analysis, the Order approving the construction of the line along the preferred route in Geauga County is unlawful and unreasonable and should be vacated.

A. Appellees Do Not Dispute That Revised Code 4906.02 Prohibits The Board From Delegating Its Authority To Grant Certificates Of Environmental Compatibility And Public Need To A Public Utilities Commission Employee.

The Board's authority to grant Certificates of Environmental Compatibility and Public Need under Section 4906.10 "**shall not be exercised by any officer, employee, or body other than the Board itself.**" Revised Code 4906.02(C) (emphasis added.) This is not disputed by

Applicants or the Board (collectively, “Appellees”), who contend¹ that the Board followed this statutory mandate. However, Appellees cannot explain how the Board reached an independent decision and drafted a 50-page Order granting a Certificate when the Board never met to discuss the evidence or whether the requirements of R.C. 4906.10 were satisfied before that Order was prepared. Further, a review of the record reveals that the Board never communicated even once with the ALJ regarding the Application or the evidence presented, and the Board never met before signing the Order which mysteriously appeared at the November 24, 2008 meeting – the first meeting at which the Board considered the Application. This dearth of evidence of Board activity demonstrates that the Board delegated its decision-making authority to the ALJ, and prior to the Board’s November 24, 2008 meeting, the ALJ drafted the Order, and that the Board simply rubber-stamped that Order without discussion or debate.

Unlike the normal case where a board or commission delegates fact finding to a hearing officer, in the present case there is no hearing officer report or any report and recommendation from the ALJ to the Board. Here, the adjudicatory hearing ended and, months later, with no intervening meeting or communication, the Board adopted a detailed order evaluating evidence and deciding arguments made at the Adjudicatory Hearing - even though the Board heard none of that evidence and did not participate in any of those arguments. Consequently, there is no merit to Appellees’ contention that because no record of any communication between the Board and the ALJ regarding the Order exists, the Board complied with all statutes and regulations. To the contrary, this lack of communication proves that the Board fully accepted the ALJ’s pre-

¹ The instant Reply Brief responds to the Merit Brief of *Amicus Curiae* Industrial Energy Users-Ohio as well. Although not specifically addressed herein, IEU-Ohio’s arguments mirror those of Applicants.

drafted opinion, failed to conduct an independent review of the record, and thereby violated R.C. 4906.02.

Indeed, if the Board had met with the ALJ, or even by itself, to consider the Application, the evidence, and the findings set forth in the Order, there would be a record of such meeting, and no such record exists. More significantly, when CARE challenged the Board on this issue in its Application for Rehearing, the Board did not deny the accusation but instead simply stated

“Just because a proposed order is prepared by an ALJ does not mean it is not read and closely considered by each board member.”

(Supp. 168).

The Board’s “you can’t prove we didn’t do our job” answer to CARE’s direct accusation that the Order was a decision of the ALJ, not the Board, is further evidence that the Order was written by and expresses the opinion of the ALJ, and is tantamount to an admission by the Board that it simply rubber-stamped a decision already made by its delegate. Given that the Board’s determinations directly impact the constitutional rights of CARE’s members, the Board’s cavalier disregard of its duties should not be tolerated by this Court.

As set forth in its Merit Brief, CARE does not dispute that the Board has discretion to delegate certain tasks and responsibilities to its employees. See, e.g., R.C. 4906.02(A) (“All hearings, studies, and consideration of applications for certificates shall be conducted by the board or representatives of its members.”) and R.C. 4906.02(C) (permitting the chairman of the Board to “assign or transfer duties among the commission's staff”). But it is also clear from these statutory provisions that only the Board may issue a decision granting a Certificate. R.C. 4906.02(C) (“[T]he 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.**”)

(emphasis added). Therefore, when the Board delegates authority beyond the parameters of this statute, any decisions made pursuant that delegation are unlawful and should be reversed.

The Board's failure to follow the governing statutes and regulations in the proceeding below is further illustrated by its violation of Ohio Administrative Code 4906-7-16. Ohio Administrative Code 4906-7-16(A) requires that a report drafted by the ALJ be filed with the Board and served on all parties. After the filing of any such report, the parties are then permitted to submit objections in response to the ALJ's findings, conclusions, and recommendations. O.A.C. 4906-7-16(B).

Here, no written report of the ALJ's findings, conclusions, and recommendations was filed with the Board and served on all parties as required by the Board's regulations. Appellees' contention that there was no need to abide by this regulation because the Board never, of record, ordered the ALJ to prepare a written report, is spurious. (OPSB Brief at 6, Applicants' Brief at 18) It is obvious from a review of the record that the ALJ was directed to draft an order for the Board – there is simply no other explanation as to how the 50 page Order magically appeared at the Board's November 24, 2008 meeting, and the Board has offered none in this proceeding. That the directive to decide the case was not of record does not shield it from the Board's regulations on this issue. Simply put, just because the Board directed the ALJ to decide the case but communicated that directive outside of the record - and with no notice to the parties - does not mean that OAC 4906-7-16 is inapplicable or that this prohibited practice was rendered permissible.

Apparently, by issuing an unofficial order to the ALJ that was not part of the public record, the Board was seeking to eliminate the parties' right to object to the ALJ's report. Appellees argue that this Court should overlook these procedural violations, because the Court

should accord “deference to the Board in matters of procedure” (OPSB Brief at 7) and because the Board is given statutory “discretion” and that it may “chose not to exercise” that discretion. (Applicants’ Brief at 18) To the contrary, this Court should not allow the Board to flagrantly disregard the governing statutes and claim that it has discretion to violate its own regulations, especially when the property rights of the citizens of Ohio are being infringed in a proceeding through which a for-profit public company seeks to be granted the right to exercise eminent domain power to acquire private property against the wishes of the property owners.

B. Permitting The Board To Delegate Its Decision-Making Authority To A PUCO Employee Is Not Similar To A Judge Appointing A Magistrate Or Judicial Clerk To Assist In Making Decisions.

This Court should reject Appellees’ assertion that the Board’s delegation of authority to the ALJ is akin to a Court delegating matters to a magistrate or judicial clerk. (Applicants’ Brief at 13-14; OPSB Brief at 5) The Board’s delegation of its statutory duties is not the same as, or even similar to, a judge delegating certain matters to a magistrate or clerk, because, as the Applicants admit, a judge retains the ultimate authority to render a final judgment. (Applicants’ Brief at 14) Here, the Board did not render a final independent judgment and instead simply rubber-stamped the order prepared by the ALJ. Contrary to the Applicants’ assertions, the signature of the Board members on the final Order does not mean that each Board member reviewed the record and made a final determination that the Certificate should be issued - a statutory requirement - it simply means that they signed the lines above their names. (See Applicants’ Brief at 8 (arguing that because the Order “was signed by all sitting Board members”, it was issued by the Board)). What really occurred here is demonstrated by the record and by the Board’s own “we might have read it” response to CARE’s accusation that the Board delegated its duty to the ALJ. (Supp. 168)

The relationship between judges and their judicial clerks is unique and special. Unlike the relationship between a board and an administrative law judge, the judicial relationship is not subject to the Sunshine Law; in fact, unlike administrative bodies, judicial bodies require privacy to decide disputes and the deliberation of judicial bodies is not subject to the Open Meetings Act. See *TBC Westlake v. Hamilton County Bd. of Revision* (1998), 81 Ohio St.3d 58, 62, 1998-Ohio-445, ¶ 3, 689 N.E.2d 32. Thus, the “law clerk” analogy fails. Judges and their clerks are exempt from the Sunshine Laws. The OPSB is not.

Nor is there merit to Appellees’ argument that the ALJ’s authority here was akin to that of a magistrate judge. When magistrate judges prepare written reports of their findings, similar to the requirement set forth in Ohio Administrative Code 4906-7-16, they must serve all parties with a draft of their report. When objections to a magistrate’s report are submitted, the judge is then required to rule on any objections, and adopt, reject, or modify the magistrate's decision. See Civ. R. 53(D)(3). Here, CARE was deprived of its opportunity to raise any objections to the ALJ’s findings because it was never served with a draft of the ALJ’s report and/or draft order. Although CARE raised these concerns in its Application for Rehearing, and although the Board should have evaluated these concerns itself, the record indicates that, once again, the ALJ wrote the Entry on Rehearing rejecting these arguments. Thus, all of CARE’s objections to the ALJ’s decision rejecting the case were, in fact, rejected by the ALJ and were never given independent consideration by the Board. Other than the individual signatures of the Board members on the applicable documents, there is no evidence that any of the Board members truly considered any of the arguments or their disposition by the ALJ, and there is a plethora of record evidence demonstrating that this matter was determined by the ALJ and not the Board. This should not be allowed to stand.

C. CARE's Due Process Rights Were Violated Because Of The Statutory Violations Committed By The Board.

“The fundamental requirement of procedural due process is notice and hearing, that is, an opportunity to be heard.” *Korn v. Ohio State Med. Bd.* (1988), 61 Ohio App.3d 677, 684, 573 N.E.2d 1100, citing *Luff v. State* (1927), 117 Ohio St. 102, 157 N.E. 388. Applicants are wrong that CARE's due process rights were not violated simply because a hearing before the ALJ occurred. (Applicants' Brief at 6) CARE is asking this Court to enforce the statutory obligation imposed upon the Board to make an independent determination regarding whether the proposed Certificate should be granted. The Board members, highly-placed government officials with diverse points of view, should not be allowed to delegate their independent decision-making authority to a single employee of the Public Utilities Commission, thereby depriving private property owners such as CARE's members from receiving the multi-disciplinary evaluation of the Application guaranteed by the statute creating the OPSB. Because the Board did not independently evaluate the evidence, and instead accepted the ALJ's pre-drafted order without discussion or debate, the proceedings below were rendered meaningless.

The United States Supreme Court has explained that because “[r]egulatory commissions have been invested with broad powers within the sphere of the duty assigned to them by law” all “the more insistent is the need, when power has been bestowed so freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity.” *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937), 301 U.S. 292, 304, 57 S.Ct. 724. See also *State v. Carroll* (1977), 54 Ohio App.2d 160, syllabus, 376 N.E.2d 596 (holding that “the requirements of a fair hearing and due process are not met when the record affirmatively shows that . . . the transcript of the evidence of the hearing was not read and considered by all members of the [State Medical Board]”). As fully set forth in CARE's Merit Brief, the Board's statutory

violations are significant, because the Order allows Applicants to utilize the State's power of eminent domain to acquire private property for Applicants' own economic benefit and because the Order creates an irrebuttable presumption of the necessity for the appropriation of private property in any subsequent eminent domain proceeding.

These arguments were raised in CARE's Application for Rehearing, and therefore, are properly before this Court. Indeed, CARE requested in its Application for Rehearing that the Board reconsider its decision and vacate the Order, because the Order violates CARE's rights to due process. (CARE Appendix at 108-110, 124) Specifically, CARE set forth in its Application for Rehearing that the Board failed to give appropriate consideration to the evidence presented and deprived CARE of its right to a fair hearing. (CARE Appendix 108-110, 124) CARE reiterated this argument on page 25 of its Application for Rehearing, where it explained that Article I, Section 19 of the Ohio Constitution guarantees that private property ownership is inviolate and subject only to a demonstrated public need. (CARE Appendix at 124) Accordingly, CARE's argument that its due process rights were violated, as well as its specific reference to the constitutional guarantees of Article I, Section 19, is sufficient to preserve its argument on appeal to this Court that the Order deprives property owners of the constitutional right to possess private property without a full and fair hearing.

D. Public Policy Should Favor Burdening Public Lands As Opposed To Acquiring Private Property.

CARE has maintained throughout this action that the Applicants failed to consider possible alternatives for the location of the proposed transmission line - locations that would not have a significant burden on private property but that would instead utilize publicly-owned property. In response to this contention, the Applicants admitted that the "methodologies" employed during their route selection study "reflect a value judgment" that utility lines should

never run through lands that are dedicated to public use unless “there are compelling reasons to do so.” (Applicants’ Brief 22)

This preference for burdening private property with public utilities instead of attempting to use publicly owned land is not supported by any statute, regulation, or decision of this Court. It is the result of the Applicants’ arbitrary “value judgment” that Applicants would prefer to acquire private property instead of public property - most probably because of the greater ability of public entities to oppose Applicants’ well-financed land acquisition programs. For example, Applicants contend they rejected the all-but-unused State Route 11 as a viable route because it is “a longer route” that would “burden an ODOT right-of-way.” (Applicants’ Brief 30) They also argue that use of a publicly-owned former railroad corridor through the City of Chardon is not suitable as a siting alternative because the Geauga Park District and the City of Chardon indicated they would oppose a shared use of that land by the public and Applicants. (Applicants’ Brief at 26)

If the Applicants’ “value judgments” had been different, and if the route selection study had utilized the methodology that the line should burden private lands only if there is a compelling reason to do so, the results of all of Applicants’ studies would likely have been different. Instead, the Applicants’ methodologies were premised upon the conclusion that it is always preferable to seize private land rather than engage in a shared use of public land, thereby inevitably resulting in the need to use eminent domain to acquire private property that would not occur if public property were the first choice. This underlying choice, which is one of the lynchpins upon which Applicants’ selection process was premised, ignores that the entire legal basis for affording this for-profit company eminent domain rights is that the project for which eminent domain is to be employed will benefit the general public. Were that not so, Article I,

Section 19 of the Ohio Constitution would be violated. Applicants' methodology - premised upon the notion that public lands should not be used for a project that benefits the general public unless private property cannot be acquired to meet that need - turns these principles on their head. CARE submits that this Court should rule that it is incumbent upon Applicants and upon the Board, when evaluating a utility project that seeks to utilize eminent domain to acquire private property, to utilize a scoring methodology that prioritizes the use of public property to achieve this public benefit, and that utilities should resort to the acquisition of private property through eminent domain only where public property is unavailable.

Proposition of Law No. 2. :

When Critical Information And Evidence Is Shielded From A Party To A Board Proceeding And From The Public, And When That Party Is Thereby Denied An Opportunity To Prepare Fully And Adequately For The Hearing In That Proceeding, The Order Issued In Such A Proceeding Is Unlawful And Unreasonable.

A. The Board's Decision To Shield Key Documents And Key Witness Testimony From The Public Violates The Ohio Sunshine Law And Renders Any Decision Based Upon Such Evidence Unlawful And Unreasonable.

A review of the record below demonstrates that the ALJ improperly allowed Applicants to shield certain information from the public, first on the basis that the information constituted a trade secret, and then, on the basis that the information was considered "propriety" and "Critical Energy Infrastructure Information." A review of the record illustrates that the ALJ did not make reasoned decisions supported by the evidence when reaching these conclusions, but instead, willingly accepted Applicants' assertions without analysis.

A party wishing to seal a record in a proceeding bears the burden of proving that a statutory exception applies to disclosure. *Dream Fields, LLC v. Bogart*, 175 Ohio App.3d 165, 2008-Ohio-152, ¶ 1, ¶ 3, 885 N.E.2d 978. Further, the rules of the Board mandate that an applicant for an order sealing documents demonstrate a need for secrecy *with specificity*. O.A.C

4906-7-07(H). The Board's regulations also mandate that documents submitted for filing under seal should be submitted with only such information that is essential to prevent disclosure of the allegedly confidential information redacted. O.A.C 4906-7-07(H)(4)(a).

In their October 1, 2007, November 8, 2007, and November 26, 2007 Motions for Protective Orders, Applicants requested that the purported "raw power flow base case information" submitted under seal was "trade secret" and "proprietary" but contrary to the Board's regulations, Applicants provided no analysis explaining why the information should be so classified. (Supp. 182-183, 186, 190) Applicants made no effort to redact any information and sought sealing of all of the records wholesale, and the ALJ ignored the Board's regulations in simply approving those requests. A simple review of the information deemed confidential by the Board reveals that significant portions of these documents contain no purported "trade secret" or "proprietary" information. Significantly, the Applicants fail to provide any explanation in their Merit Brief as to why they sought wholesale shielding of the records instead of redacting only the purportedly "confidential" information in their submissions.

After CARE moved to unseal the shielded documents, the Applicants crafted an entirely new argument. This argument was that the documents contained "Critical Energy Infrastructure Information", or CEII, and was protected from disclosure by Federal Energy Regulatory Commission ("FERC") Order No. 630. (Supp. 389) When CARE objected to the sealing of exhibits and transcripts during the Adjudicatory Hearing, the Applicants made similar arguments. When the ALJ rejected CARE's arguments, the ALJ ignored the specific requirements of FERC Order No. 630 and instead, without authority, created her own definition as to what constitutes CEII.

The ALJ stated “anything that has detailed level engineering automatically is sealed here as CEII” because the information can “be used by anyone for whatever purpose.” (Supp. at 518-521) CEII is not defined as “anything that has detailed level engineering” information and quite frankly, the ALJ’s ad hoc definition makes no sense - a number of things contain “detailed level engineering” information and can “be used by anyone for whatever purpose.” (Supp. 518-521)

The definition of CEII is set forth in 18 U.S.C. 388.113(c) and includes “specific engineering, vulnerability, or detailed design information about a proposed or existing critical infrastructure that:

- (1) relates details about the production, generation, transportation, or distribution of energy;
- (2) could be useful to a person in planning an attack on critical infrastructure;
- (3) is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(2000); **and**
- (4) does not simply give the general location of the critical infrastructure.”

(emphasis added). Although Applicants’ cited FERC No. 630 in persuading the ALJ to seal these records as “CEII,” Applicants presented no evidence of any of the required elements. Because the Applicants failed to demonstrate that the sealed information constituted CEII, and because the ALJ failed to apply the correct definition when making a ruling that the sealed information met that standard, the sealed information was improperly shielded from the public.

B. CARE Was Not Required To File A Mandamus Action In Order To Challenge The Board’s Shielding Of Public Records.

There is no merit to Appellees’ assertion that CARE was required to file a mandamus action to challenge the Board’s violations of the Public Records Act. (Applicants’ Brief at 36; OPSB Brief at 25) It is undisputed that the Public Records Act provides that a person aggrieved as a result of a failure to make public records available “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 the records request. R.C. 149.43(C)(1). However, this provision assumes that the aggrieved party does not have access to the documents and has no other avenue for challenging the Public Records Act violation. More significantly, the provision assumes that the aggrieved party does not have an adequate remedy at law, the existence of which is an absolute bar to the issuance of the writ. R.C. 2731.05. Here, because CARE was in a contested proceeding with Applicants, mandamus was unavailable.

It is settled that the purpose of allowing a mandamus action is to provide “a complete remedy” to the aggrieved party in those situations where other available legal remedies are insufficient. *See State ex. rel. Gilmour Realty, Inc. v. Mayfield Heights* (2008), 119 Ohio St.3d 11, 2008-Ohio-3181, ¶ 14, 891 N.E. 2d 320. Here, in an attempt to avoid being penalized for improperly shielding record evidence from public view, Appellees urge this Court to hold that CARE should have employed mandamus – an ancillary proceeding which would not have been resolved in time to alter the outcome of this case. Indeed, it is the mandamus remedy which would have been inadequate - and Appellees’ argument that CARE should be precluded from raising the issue in this appeal is simply their attempt to avoid meaningful review of the issue.

CARE was entitled to an open and public proceeding, and to the voluntary assistance from the general public which might have occurred had so much of the underlying record not been shielded from public view. Appellees’ contention that CARE should have filed a mandamus action, compelling the disclosure of those documents only after the Board had ruled on the Application, underscores the fundamental procedural flaws that are at the heart of this case.

CARE was provided with copies of the Applicants' "confidential" documents, but only after months of fighting over the terms of a confidentiality agreement demanded by Applicants, and only after protracted delay. The fact is, many of these documents are evidence upon which Applicants relied to meet their burden of proof, and the reality is that much of this evidence was and continues to be shielded from the public. That much of this evidence was shielded even from the parties and their witnesses until just before the Adjudicatory Hearing is more than sufficient ground to reverse the decision below.

C. CARE Was Deprived of An Opportunity To Prepare Fully And Adequately For The Adjudicatory Hearing Because The Applicants Purposefully Delayed Producing Relevant And Essential Documents Under Claims Of Confidentiality.

This Court should reject Appellees' argument that because CARE received all of the documents and information filed under seal pursuant to a confidentiality agreement, CARE has not suffered any prejudice from the sealing of this information. Negotiating the terms of the confidentiality document upon which Applicants insisted took 14 weeks and hindered CARE's ability to prepare for the Adjudicatory Hearing and to allow its expert witnesses adequate time to thoroughly examine the confidential information. This information included maps of the 36kV system in the area that contains all of the transmission alternatives identified in the Application, an electronic copy of the Applicants' base case power flow model data as identified in the Application, and the documents Applicants submitted to the Board in connection with the Application. All of this information was critical to CARE and its experts to examine the need for the project and the accuracy of the Applicants' assertions that the proposed line could only be sited in certain locations. (Supp. 329-332, 347-348) If these documents had been produced earlier, CARE would have had the opportunity to explore additional arguments in response to the

Application. (Supp. 329-332, 347-348) Appellees' argument that CARE was not harmed by the sealing of this information is therefore without merit.

CONCLUSION

If this Court affirms the Board's Order, Applicants will use eminent domain to condemn dozens of parcels of private property, all against the will of their owners. Applicants attempt to downplay this massive acquisition of private property by a for-profit corporation, contending that all that is being acquired is an easement and compensation for that easement will be paid. (Applicants' Brief at 10-11) This attempt to minimize the intrusion that the power line will have on private citizens' property shows the Applicants' disdain for the private property ownership rights that Article I, Section 19 of the Constitution seeks to protect. Simply put, this Court should reject Applicants' assertion that because the line may be needed, private property owners must yield their private property, even when alternative public property is available to meet that need.

When the record in this matter is examined as a whole, it is evident that the proceedings below were fraught with error, and that the Board ignored CARE's objections to these errors. Even though the Board's decision triggers the ability of a for-profit corporation to utilize eminent domain to take private property from Ohio citizens, and even though the legislature determined that such decisions should be made by a diverse board comprised of high public officials with unique views on a variety of issues, each of these diverse Board members delegated their decision-making authority to the same employee of the Public Utilities Commission. In doing so, the Board failed to abide by its own regulations, improperly shielded information from the public and failed to reach an independent determination that a Certificate should be issued. As a result, the Board's Order is both unlawful and unreasonable. This Court should therefore

reverse.

Respectfully submitted,

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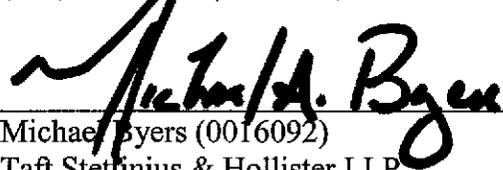
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A handwritten signature in black ink that reads "Michael A. Byers". The signature is written in a cursive style and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

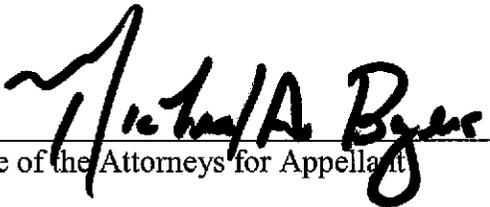
I hereby certify that on August 17, 2009, the foregoing Reply Brief of Appellant Citizens

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