

RECEIVED-DOCKETING DIV

2008 AUG -7 AM 9:39

PUCO

BEFORE THE OHIO POWER SITING BOARD OF THE STATE OF OHIO

In the Matter of:)	CASE NO. 07-0171-EL-BTX
)	
The Certificate Application of American Transmission Systems, Inc. and The Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Construction of the Geauga County 138KV Transmission Line Supply Project)	MOTION BY INTERVENOR CITIZENS ADVOCATING RESPONSIBLE ENERGY TO CONTINUE SEPTEMBER 2, 2008 <u>ADJUDICATORY HEARING DATE</u> [IMMEDIATE RULING REQUESTED]

Intervenor Citizens Advocating Responsible Energy ("CARE") respectfully moves under O.A.C. §§ 4906-7-12 and 4906-7-13 to continue the adjudicatory hearing currently set for September 2, 2008 until October 1, 2008 or later. As explained in the attached Memorandum in Support, it is not logistically possible for CARE to complete necessary discovery in time to prepare for and participate meaningfully in the adjudicatory hearing as scheduled, and justice therefore requires that the adjudicatory hearing be delayed at least one month.

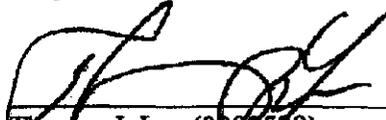
This Motion is made in good faith and not for purposes of delay and will not impact the local public hearings scheduled for August 27 and 28 and September 10, 2008.

In light of the strict time deadlines at issue, and the need for Applicants to provide timely notice of any such change, CARE respectfully requests an immediate ruling on this Motion.

{K0439395.1}

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
 Technician _____ Date Processed 8/7/08

Respectfully submitted,



Thomas J. Lee (0099529)

tle@taftlaw.com

Julie A. Crocker (0081231)

jcrocker@taftlaw.com

Taft, Stettinius & Hollister LLP

200 Public Square, Suite 3500

Cleveland, OH 44114-2302

(216) 241-2838

(216) 241-3707 (facsimile)



Benjamin J. Parsons (0076813)

parsons@taftlaw.com

Taft Stettinius & Hollister LLP

21 East State Street, Suite 1200

Columbus, Ohio 43215

(614) 221-2838

(614) 221-2007 (facsimile)

Counsel for Citizens Advocating
Responsible Energy

**BEFORE THE OHIO POWER SITING BOARD OF
THE STATE OF OHIO**

In the Matter of:)	CASE NO. 07-0171-EL-BTX
)	
The Certificate Application of American Transmission Systems, Inc. and The Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Construction of the Geauga County 138KV Transmission Line Supply Project)	Judge Janet K. Stoneking
)	
)	MEMORANDUM IN SUPPORT OF
)	CITIZENS ADVOCATING
)	RESPONSIBLE ENERGY'S MOTION TO
)	CONTINUE SEPTEMBER 2, 2008
)	<u>ADJUDICATORY HEARING DATE</u>

BACKGROUND

The Ohio Power Siting Board set the following procedural schedule in its July 11, 2008

Entry:

Witness Identification	August 1, 2008
File Staff Report	August 12, 2008
Discovery Completion	August 15, 2008
Case Status Conference	August 18, 2008
File Direct Testimony	August 25, 2008
Local Public Hearings	August 27 & 28, 2008
Adjudicatory Hearing	September 2, 2008

(7/11/08 Entry, at p. 2.) New developments make it logistically impossible to comply with this schedule and necessitate a continuance of the adjudicatory hearing until at least October 2008.

These developments include Applicants' tactic of filing, under seal, thousands of documents (claimed to be confidential) as part of the record of this proceeding and Applicants' subsequent refusal to disclose this relevant evidence until less than one month before the September 2

hearing; Applicants' delay in producing tens of thousands of "non-confidential" documents; and the August 1, 2008 identification, by multiple parties, of multiple new witnesses, (including two expert witnesses) who will need to be deposed before the adjudicatory hearing.

1. Document Production.

Beginning on September 28, 2007, as part of their application, Applicants filed under seal six DVDs containing thousands of documents, claiming that all of these documents were confidential. Applicants subsequently filed multiple additional documents under seal on November 8 and November 26, 2007, and Applicants' motion for a protective order was granted March 3, 2008.¹ As of the filing of this motion, CARE still does not know what the precise nature of this evidence is, but believes that this massive amount of information is likely to contain documents relevant to CARE's presentation at the adjudicatory hearing. Further, CARE has confirmed that this evidence is unavailable to the parties, even though it has been deemed necessary by and made available to Staff for more than nine months. Depriving CARE and its expert witnesses of this evidence (even if produced at this late date) has prejudiced CARE's ability to present its case adequately and fairly.

In addition, on July 25, 2008, CARE received five CDs from Applicants that were designated "confidential." One of the "confidential" CDs was readable only using GE proprietary software, and it is not possible for CARE's counsel or CARE's experts to view these documents. Although Applicants recently agreed to produce these documents in a readable format, to date, only a few of these documents have been produced, and the remainder remain a mystery to CARE, even though expert depositions are already underway.

¹ CARE suggests that, notwithstanding the March 3, 2008 protective order, this purported "filing under seal" of a massive amount of evidence necessary to support Applicants' application in this public proceeding is not justified either by applicable OAC regulations or by Chapter 121 of the Revised Code.

Finally, over the course of several weeks beginning at the end of May, 2008, Applicants produced more than 50,000 documents. CARE's counsel has been diligent in its review of these documents, but as CARE's counsel previously informed the ALJ, it has not been possible to review these documents, fight for production of the "confidential" documents, and participate in substantial discovery and at the same time prepare to present CARE's case at the September 2 adjudicatory hearing.

2. Identification of New Witnesses.

Less than two weeks before the August 15, 2008 close of discovery CARE received notice that at least five additional witnesses may testify at the September 2, 2008 adjudicatory hearing. By letter received on August 4, 2008, Intervenor Geauga Park District identified a new fact witness and a new expert witness, both of whom will need to be deposed. Similarly, on that same date, CARE received notice from Intervenor the City of Chardon of two new fact witnesses, plus a purported expert witness, thereby requiring even more depositions.

3. Discovery Already in Progress.

To date, by agreement, Applicants and CARE have already deposed four witnesses, and have confirmed scheduling for an additional eight witnesses. In addition, the parties are discussing the scheduling of three additional witnesses, and anticipate confirming those deposition dates shortly. However, discovery cutoff is August 15, 2008, and Applicants have steadfastly refused to even consider an extension of that date. Moreover, because it is necessary to prepare witnesses for the public hearings that will go forward in Geauga County on August 27 and 28, the Labor Day holiday that intervenes between the public hearings and the adjudicatory hearing, and the requirement that the parties prepare and file all of their direct testimony by

August 25, 2008, there is insufficient time for CARE to complete necessary discovery and adequately prepare its case if the adjudicatory hearing goes forward on September 2, 2008.

Consequently, CARE requests that the adjudicatory hearing be continued until October, 2008, and that the deadlines for discovery completion and the filing of direct testimony be similarly continued. CARE has no objection if the public hearings currently scheduled for August 27 and 28, 2008 go forward.

ARGUMENT

O.A.C. §4906-7-13(A) provides in part that “continuances of hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown.” It is also “a basic tenet of Ohio jurisprudence that cases should be decided on their merit.” *Autovest, L.L.C. v. Swanson*, 8 Dist. No. No. 88803, 2007 -Ohio- 3921, at ¶ 18.

Good cause exists, and justice requires, that the September 2, 2008 adjudicatory hearing be continued until at least October 2008 to enable CARE to prepare for trial.

- 1. A continuance is necessary to permit CARE to prepare for the adjudicatory hearing because of the volume of the documents produced and the associated problems with the document production.**

To properly prepare for the adjudicatory hearing and to cross-examine the fact and expert witnesses, CARE must be able to review the in excess of 50,000 pages of documents produced by Applicants, plus all the information in the five CDs that were designated “confidential” by Applicants, plus all of the evidence Applicants filed under seal – some or all of which may not be included in the recently produced “confidential” documents. Further, CARE did not receive the five CDs that were designated “confidential” by Applicants until July 25, 2008, and one of the CDs was not readable. As of the filing of this motion, and notwithstanding the impending close

of discovery, CARE still has not been provided with replacement documents in a readable format.

With such a volume of documents and information, much of which is still not within the possession of CARE, it is not logistically possible for CARE to be ready for the adjudicatory hearing by September 2, 2008. The discovery cut-off is August 15, 2008, and the parties' schedule is loaded with depositions between now and then.

The same is true with respect to CARE's experts. To properly prepare for their depositions and to be able to testify accurately at the adjudicatory hearing, CARE's experts must be provided with an opportunity to review all the information, including much of the purportedly "confidential" evidence which Applicants have filed under seal. It is not possible to have these experts complete all these tasks before the September 2, 2008 adjudicatory hearing.

2. A continuance is necessary to permit CARE to depose the additional witnesses that were just identified.

CARE received no notice until August 4, 2008, about at least five new witnesses who may testify at the adjudicatory hearing. With the discovery cutoff being August 15, 2008, and with eleven depositions already being crammed between the filing of this motion and that date, CARE's attorneys do not have the ability to depose five new and additional witnesses prior to the September 2, 2008 adjudicatory hearing, much less prior to the August 15 discovery cutoff. Justice requires that discovery be extended and that the adjudicatory hearing be continued to provide CARE with the opportunity to prepare for and depose these additional witnesses, so that CARE can adequately prepare its case.

3. A Continuance is necessary to provide CARE with an opportunity to prepare its Direct Testimony.

Under the current procedural schedule, the parties must submit their direct testimony by August 25, 2008. This deadline, only 10 days from the August 15, 2008 discovery cut-off, severely prejudices CARE. Applicants experts have had access to all documents for more than one year. By contrast, CARE's experts *still* do not have access to all of the documents, by virtue of the delayed production of documents by Applicants, the additional delay caused by Applicants' insistence upon highly specific and unjustified terms in their proposed confidentiality order, and by Applicants' filing of massive amounts of evidence in this proceeding under seal. It would be manifestly unjust to force CARE's experts to participate in an adjudicatory hearing for which they have had only days to read of thousands of documents, where Applicants witnesses have been under no such disability.

CONCLUSION

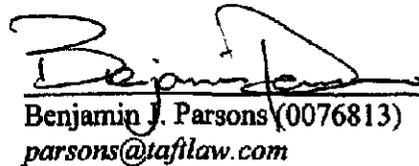
For the foregoing reasons, CARE respectfully moves that the adjudicatory hearing be continued until at least October, 2008, that the deadlines for discovery completion and that the deadlines for filing of direct testimony be similarly continued. Further, in view of the impending deadlines, CARE requests an immediate ruling on this motion.

Respectfully submitted,



Thomas J. Lee (0009529)
ilee@taftlaw.com

Julie A. Crocker (0081231)
jcrocker@taftlaw.com
Taft, Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
(216) 241-2838
(216) 241-3707 (facsimile)



Benjamin J. Parsons (0076813)
parsons@taftlaw.com

Taft Stettinius & Hollister LLP
21 East State Street, Suite 1200
Columbus, Ohio 43215
(614) 221-2838
(614) 221-2007 (facsimile)

Counsel for Citizens Advocating
Responsible Energy

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing is being served this 7th day of August, 2008, via electronic mail and regular U.S. Mail upon the following:

Christopher Schraff
cschraff@porterwright.com
Robert J. Schmidt, Jr.
rschmidt@porterwright.com
Porter Wright Morris & Arthur
41 South High Street
Columbus, Ohio 43215

*Attorneys for Applicants
American Transmission Systems, Inc.
And The Cleveland Electric Illuminating
Company*

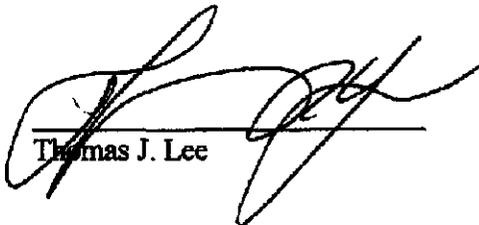
I hereby certify that a true and accurate copy of the foregoing is being served this 7th day of August, 2008, by regular U.S. Mail upon the following:

Ted Krauss
American Transmission Systems, Inc.
76 South Main Street
Akron, Ohio 44308-1890

*Representative of Applicant American
Transmission Systems, Inc.*

Morgan Parke
Michael R. Beiting
First Energy Service Company
76 South Main Street
Akron, Ohio 44308

*Representatives of Applicants
American Transmission Systems, Inc.
and The Cleveland Electric
Illuminating Company*



Thomas J. Lee