Supreme Court of Ohio Clerk of Court - Filed September 17, 2021 - Case No. 2021-1168

IN THE SUPREME COURT OF OHIO

OHIO POWER COMPANY,	)	
	)	
Plaintiff-Appellant,	)	Case No. _____
	)	
vs.	)	On appeal from
	)	the Court of Appeals of Ohio,
MICHAEL BURNS, *et al.,*	)	4th Appellate District, Washington County
	)	Case Nos. 20CA19, 20CA20,
Defendants-Appellees.	)	20CA21 and 20CA22
	)	
	)	Court of Common Pleas,
	)	Washington County, Ohio
	)	Case No. 20AP10, 20AP08,
	)	20AP34 and 20AP93

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT OHIO POWER COMPANY

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The decision below from the Fourth District Court of Appeals will negatively impact the operations of every public utility company in the state, and the millions of Ohio residents and businesses that depend upon them for reliable, safe and affordable utility services. The decision misapplied Ohio's eminent domain statute found at Ohio Revised Code Chapter 163 and related case law. In doing so, it created a new eminent domain framework in which public utilities will find it difficult, if not impossible, to meet their obligations to the public.

Specifically, the Court refused to apply the evidentiary presumptions set forth in R.C. 163.09(B)(1)(a)-(c) relating to the necessity of proposed appropriations, misapplied this Court's decision in *City of Norwood v. Horney*, 110 Ohio St.3d, 353, 2006-Ohio-3799, 853 N.E.2d 1115, and stripped public utilities of any discretion to determine what easement terms are necessary for their facilities. The decision has the potential to turn every eminent domain proceeding into a prohibitively expensive and protracted legal battle over individual easement terms, in direct contravention of both the express language of the eminent domain statute and the legislature's mandate that such proceedings "be advanced as a matter of immediate public interest and concern and * * * heard by the court at the earliest practicable moment." R.C. 163.22.

Public utility companies are required by law to provide safe, economical and reliable services to Ohio businesses and residents. To meet their obligation, they must be able to build, replace and upgrade aging infrastructure in a timely and efficient manner, as well as operate and maintain the infrastructure for decades to come. The ability to complete infrastructure projects quickly and economically is critical not only to the business of the public utilities, but also to the rate-paying public that relies upon, and ultimately pays for, those projects. This reality is nothing new for public utilities within Ohio. Every year, Ohio's public utilities undertake dozens, if not hundreds, of public

projects, many of which are made possible only by the existence of eminent domain authority. Appellant Ohio Power Company ("AEP") alone operates 8,368 miles of electric transmission lines covering 63 of Ohio's 88 counties, and just last year AEP acquired 1,338 electric utility easements for its various transmission projects by voluntary negotiation or eminent domain.

While AEP utilizes eminent domain as a matter of last resort—with only a miniscule number of its acquisitions being obtained through such proceedings—the *right* of public utilities to exercise eminent domain is critical. Without that fundamental public power, it would be impossible for public utilities to supply services to the public, or to do so at affordable rates. But the existence of eminent domain authority is of little value if the interpretation and application of that power is varied and unpredictable. The Fourth District's interpretation creates new eminent domain law that is both.

The need for predictable and consistent application of Ohio's eminent domain laws is particularly important to public utilities whose transmission and distribution lines are necessarily linear, continuous, and must traverse multiple trial court and appellate jurisdictions. Furthermore, because public utilities like AEP do not possess "quick take" rights (unlike ODOT road projects), they cannot take possession of property to begin construction until the eminent-domain case is concluded in its entirety. So, it takes only one landowner along the route of a power line project to disrupt the entire project, to the detriment of everyone the project is intended to serve. Absent clear guidance from this Court on the scope and standards of review in appropriation proceedings, Ohio public utilities, and the customers they serve, will be exposed to long and costly delays to obtain new or upgraded service, and the varied conclusions of every trial court that, according to the Fourth District, must determine what easement terms are strictly necessary.

This Court has long-recognized: "Two great and fundamental rights exist. The right of eminent domain in all people, and the right of private property in each." *Norwood*, 110 Ohio St.3d

353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 33. In its decision, the Fourth District focused almost entirely on the undisputed importance of private property rights, but ignored the countervailing public right of eminent domain. In doing so, it improperly invoked a "strict construction" standard and the "heightened scrutiny" standard applied by this Court in *Norwood*. But this case bears no resemblance to *Norwood*. *Norwood* involved the taking of entire properties and razing of homes by a transfer from the City of Norwood to a *private developer* in order to gentrify a deteriorating residential neighborhood for economic development purposes and increased tax revenue. The question in *Norwood* was whether that private economic development constituted a "public use," and this Court was understandably concerned about the use of eminent domain under such circumstances.

This case is not a "public use" case. Public use is not contested here, as there is no more quintessential "public use" than the delivery of electricity to the public. Nor does this case involve the taking of entire properties through fee simple acquisitions, or the razing of homes. AEP is acquiring a non-exclusive, 100-foot wide, utility easement for the transmission of electricity. Furthermore, AEP already owns an easement across three of the four properties at issue here, and has been operating a transmission line within those easements for decades. It is now simply widening those existing easements to replace the increasingly unreliable, fifty year old, electric transmission line. Moreover, the project at issue in this case, like many public utility projects, has already been the subject of public proceedings and received approval by a governmental body—the Ohio Power Siting Board ("OPSB")[1]. The legal issue in this case is not "public use," but rather "necessity"—whether the proposed appropriation is "necessary." Thus, this case has little in

[1] The OPSB is a board within PUCO. *See* R.C. 4906.02 ("There is hereby created within the public utilities commission the power siting board. . . .")

common with *Norwood*, and most of the concerns this Court rightfully raised about the unusual private taking at issue there simply do not apply here. Nonetheless, the Fourth District's decision relies extensively upon *Norwood* without ever acknowledging these factual and legal distinctions.

Additionally, the primary statute at issue in this case—R.C. 163.09—was amended post-*Norwood*, to legislatively establish new evidentiary standards to be applied under these circumstances, a fact the Fourth District also ignored. This Court has not spoken to the current statutory framework, or how it applies to public utilities and other public agencies. The Fourth District, therefore, applied *Norwood* scrutiny to an entire class of eminent domain cases to which that decision has no direct application. In doing so, it became the only Ohio appellate district to expressly contravene the preponderance of the evidence standard set forth at R.C. 163.09(B)(1), to refuse to apply any of the evidentiary necessity presumptions required by R.C. 163.09(B)(1)(a)-(c), and to hold that a public utility has no discretion to determine which easement terms are necessary for it to safely construct, operate, and maintain utilities that are likely to remain in place for decades. The court went so far as to require the trial court to make individual findings of fact as to the necessity of each and every individual easement term, and held that such issues must be strictly construed in the landowner's favor. It further found that AEP's voluntary withdrawal of a single word within its easement—in the landowners' favor—entitled the landowners to an award of attorneys' fees under R.C. 163.21(B).

The Fourth District's novel application of *Norwood* is in direct conflict with the Twelfth District's decision in *Ohio Power Co. v. Duff*, 12th Dist. Madison CA No. 2020-01-004, 2020-Ohio-4628. There, the court held that when the rebuttable presumption found at R.C. 163.09(B)(1)(a) was applied, it was incumbent upon the landowner to come forward with "evidence that AEP abused its discretion in determining that the easement was necessary" in order to rebut that statutory

presumption. *Id.* at ¶ 33. The Fourth District's decision is also at odds with the Ninth District's decision in *Eschtruth Invest. Co., LLC v. City of Amherst*, 9th Dist. Lorain No. 10CA009870, 2011-Ohio-3251 at ¶ 9, which held that, "a determination that an appropriation is necessary for a public use will not be disturbed unless the property owner proves that the determination was the result of fraud, bad faith, or an abuse of discretion." Finally, the Fourth District's decision is inconsistent with this Court's guidance in *Norwood*. Although this Court expressed real concern with the alleged public use before it in that case, the Court noted that "deference to legislative pronouncements" and a "limited" review is appropriate in cases where there is no ensuing transfer to a private entity, where a novel theory of public use is not at issue, and where there is no showing of "discrimination, bad faith, impermissible financial gain, or other improper purpose." *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶¶ 70,74.

If not corrected, the Fourth District's decision will expose all agencies vested with the power of eminent domain to uncertainty and added delay and expense in connection with a wide array of public projects, particularly those involving easement acquisitions. And because many of those public projects are ultimately funded by the Ohio public whom they serve, the Fourth District's decision stands to negatively impact the pocketbook of every citizen of this state.

STATEMENT OF THE CASE AND FACTS

The public utility project at issue in this case is known as AEP's Devola - Bell Ridge Project (the "Project"). The Project is an electric transmission project designed to improve the safety and reliability of the electric grid in Washington County through the replacement of an aged 23kV transmission line with a safer, more reliable, and higher capacity 138kV transmission line. The existing line is approximately 50 years old and is deteriorating and losing reliability. Between 2015 and 2017, the line experienced 33 outages. The aging structures, if not addressed, create safety concerns as well; deteriorating wood poles and the equipment they support can fall, and are not as

resistant to bad weather, creating a danger to linemen who work on them, and anyone else who may be near them. Downed power lines also create a significant safety risk to the public, to say nothing of the widespread inconvenience caused by the resulting outages. The current kilo-voltage of 23kV is less than most modern electric transmission lines, which means it serves a smaller area and fewer customers. Given these issues, AEP's Board of Directors passed a resolution approving the Project and declared the necessity for the appropriation of easements across each property in the event that negotiations with any of the landowners failed. *See* Order (Appendix, Ex. A), Findings of Fact, ¶ I.

The OPSB—the state agency with jurisdiction over these types of projects—also approved the Project after months of investigation, and expressly concluded that the Project will "serve the public interest, convenience, and necessity." Order, Conclusions of Law, ¶ 7 (citing OPSB Certificate). The OPSB acknowledged "the basis of need due to the reliability issues caused by the age of the existing 23 kV transmission system," and found that the "[the Project] would allow the transmission system to provide safe, reliable electric service." (OPSB Certificate, at p.5, ¶ 19; *see also id.* at p.13, ¶ 41.)[2] The OPSB's approval process involves public hearings. All landowners who are potentially impacted by the Project—like Appellees here—are invited to participate and have their voices heard at the OPSB hearings.

After many months of negotiations with Appellees reached impasse, AEP filed eminent-domain proceedings against them in early 2020. Appellees did not challenge AEP's eminent domain authority, public use, or even the necessity of the Project, but instead challenged the necessity of various individual easement terms that set forth how AEP would access and use the easement. For example, Appellees challenged AEP's right to later transfer the easement to AEP's successors, AEP's right to use the easement for electric distribution or internal communications wires, the right

[2] OPSB Certificate, http://dis.puc.state.oh.us/TiffToPDf/A1001001A18H16B40753J02825.pdf

for AEP to trim or cut down trees and clear brush in the right-of-way or in a defined area beside the right-of-way, and even challenged a term in the easement that recited well established case law that AEP's easement rights could not be deemed abandoned in the future merely through a period of nonuse. At the necessity hearing, AEP presented the testimony of one of its senior transmission right-of-way agents, Ms. Kelly Rentschler, who testified at great length to the propriety and necessity of each challenged easement term. The hearing lasted nearly two and a half hours.

After the hearing, the trial court ruled that three alternative statutory presumptions applied, and ruled in favor of AEP on each. First, the trial court held that the approval of the Project by the OPSB triggered the irrebuttable presumption that the Project was necessary under R.C. 163.09(B)(1)(c). Order, Conclusion of Law, ¶ 7. But even if the irrebuttable presumption did not apply, the trial court also held that AEP was entitled to two separate rebuttable presumptions that the Project was necessary under R.C. 163.09(B)(1)(a) (triggered by the Board Resolution), and R.C. 163.09(B)(1)(b) (triggered by Ms. Rentschler's testimony about the necessity of each challenged easement term). Order, Findings of Fact, ¶ D; Order, Conclusions of Law, ¶¶ 3-4. Despite these rulings, the Court nevertheless went on to examine the propriety of each individual easement term challenged by Appellees, and was "persuaded by Ms. Rentschler's testimony that all of the proposed easements are necessary." Order, Conclusions of Law, ¶¶ 5, 8.

The trial court also addressed AEP's pre-hearing offer to drop the right to affix distribution wires to its poles. The trial court concluded that AEP's offer to remove the solitary word "distribution" from the proposed easement form—because AEP determined that it did not need distribution wires for this project—did not constitute an "abandonment" of the eminent-domain proceedings, and disallowed Appellees' request for an award of fees and costs under R.C. 162.21(A). Order, Findings of Fact, ¶ D; Order, Conclusions of Law, ¶ 9.

On appeal, the Fourth District's decision refused to apply the express terms of R.C. 163.09(B)(1), including all of the presumptions set forth therein. R.C. 163.09(B)(1)(a)-(c). For reasons discussed below, the Fourth District stated that the irrebuttable presumption, and the rebuttable presumption relating to AEP's Board Resolution, did not apply. It then all but ignored, and refused to apply, the remaining presumption that should have arisen by AEP's presentation of hours of testimony on the necessity of the easement terms. Instead, it summarily disregarded all of that testimony, apparently because it believed that the trial court erred in giving any deference to AEP in selecting its own easement terms. *Ohio Power Co. v. Burns*, 4th Dist. Washington Nos. 20CA19, 20CA20, 20CA21, 20CA22, 2021-Ohio-2714, ¶ 59. The Fourth District appears to have applied the "heightened scrutiny" standard from *Norwood* and, to the extent it considered any of the presumptions or evidentiary standards *in favor of AEP* set forth in R.C. 163.09(B)(1) at all, it strictly construed them *against AEP*. *Id.* at ¶ 51. Last, the Fourth District looked past Appellees' only asserted basis for its request for fees and costs, under R.C. 163.21(A), and instead held, *sua sponte*, that fees should be awarded under "R.C. 163.21(B) because the trial court determined * * * that [AEP] was not entitled to appropriate that 'particular property' right." *Id.* at ¶ 69.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Because of the urgent public need for public works of the type at issue here, Ohio's eminent-domain law mandates expedited treatment of eminent domain petitions under R.C. 163.22, and permits landowners to challenge only three limited issues in answer to an eminent-domain petition. One of those issues is the "necessity for the appropriation." R.C. 163.08; R.C. 163.09(B)(1). Ohio courts have consistently held that "necessity" does not require absolute necessity, but rather that the appropriation "is *reasonably convenient or useful* to the public." *Ohio Power Co. v. Duff*, 12th Dist. Madison No. CA2020-01-004, 2020-Ohio-4628, ¶ 32 (emphasis added); *Ferencz v. Toledo*, 6th Dist. Lucas No. L-87-379, 1988 Ohio App. LEXIS 5178, *7 (Dec. 30, 1988) (same); *see also Bd. of Trs.*

of Sinclair Cmty. College Dist. v. Farra, 2d Dist. Montgomery No. 22886, 2010-Ohio-568, ¶ 37 ("In statutory eminent domain cases it cannot be limited to an absolute physical necessity."). Important to this Court's analysis here, "[n]ecessity includes present needs as well as future needs." *Erie-Ottawa-Sandusky Regional Airport Auth. v. Orris*, 6th Dist. Ottawa No. 90-OT-039, 1991 Ohio App. LEXIS 4259, *10 (Sept. 13, 1991); *see also City of Wadsworth v. Yannerilla*, 170 Ohio App.3d 264, 2006-Ohio-6477, 866 N.E.2d 1113, ¶ 14 (9th Dist.) ("In fact, a public agency may provide for not only its present but also its prospective necessities if it is not more than may in good faith be presumed necessary for future use within a reasonable period of time.") (internal quotation marks omitted).

R.C. 163.09(B)(1) provides that the necessity of an appropriation must be proven by the condemning agency by a "preponderance of the evidence" except as set forth in three express statutory presumptions. First, an "[a]pproval by a state * * * regulatory authority of an appropriation by a public utility"—like the Ohio Power Siting Board—"creates an irrebuttable presumption of the necessity for the appropriation." R.C. 163.09(B)(1)(c). Second, an agency board "declaring the necessity for the appropriation"—as the AEP Board of Directors declared here—triggers a "rebuttable presumption of the necessity for the appropriation," thereby shifting the evidentiary burden to the landowner to prove that the appropriation is not "necessary." R.C. 163.09(B)(1)(a). Third, "[t]he presentation by a public utility or common carrier of evidence of the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation." R.C. 163.09(B)(1)(b). Once the rebuttable presumptions are triggered, the burden shifts to the landowner to raise some evidence that the "appropriation" is not "necessary." To meet that burden, Ohio courts have suggested that a landowner must present some evidence of impropriety, such as fraud, bad faith, abuse of discretion, or improper purpose by the condemning agency. *Ohio Power Co. v. Duff*,

12th Dist. Madison No. CA2020-01-004, 2020-Ohio-4628, ¶ 31; *see also Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 at ¶ 74. These three statutory presumptions were enacted in 2007 as part of the post-*Norwood* amendments to the Ohio eminent domain law.

Notably, the eminent-domain statute does not explicitly provide for challenges to the specific terms of an easement, as only a challenge to the necessity of the "appropriation" may be raised. Presumably this is because the terms of the easement detail how the agency will use the property post-appropriation, rather than detailing the necessity of the appropriation itself. The statute does not define "appropriation" but the term is elsewhere in the statute used interchangeably with the word "project," suggesting that the legislature intended to permit landowners to challenge only whether the project is necessary. *See* R.C. 163.09(B); R.C. 163.041.

> **Proposition of Law No. 1: A Trial Court Determines the Necessity of an Appropriation of an Easement by a Preponderance of the Evidence, Subject to the Presumptions Set Forth in R.C. 163.09(B). If a Landowner Specifically Denies that the Easement is Necessary, the Rebuttable Presumptions Set Forth in R.C. 163.09(B)(1)(a) and R.C. 163.09(B)(1)(b) May Be Rebutted Only Upon the Landowner's Presentation of Evidence of Bad Faith, Abuse of Discretion, or Improper Purpose by the Agency.**

Requiring a trial court to strictly construe every term in a public utility easement against the public utility, with no deference to the utility charged with the safe operation of the utility facility, and despite no evidence of impropriety by the public utility, is contrary to the express language of R.C. 163.09(B)(1) and inconsistent with Ohio precedent, including from this Court. After all, it is the public utility, and not the landowner, that possesses the decades of experience in actually building, operating and maintaining high voltage power lines, and bears the enormous burden of ensuring that its power lines are safely, efficiently, and reliably operated on the public's behalf for the decades that the easement is in use. This Court should reverse the Fourth District's interpretation that reads the three statutory presumptions out of R.C. 163.09 and subverts the General Assembly's intent. *See Burns*, 2021-Ohio-2714, ¶¶ 44-59.

The First Proposition of Law gives effect to the plain language of the statute while preserving a landowner's right to overcome the statutory presumptions, if they apply, by producing some evidence of bad faith, abuse of discretion or other impropriety by the condemning agency. *Ohio Power Co. v. Duff*, 12th Dist. Madison No. CA2020-01-004, 2020-Ohio-4628, ¶ 31. See also, *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 74. To be clear, the Proposition of Law still allows a landowner to challenge the necessity of an appropriation, even without evidence of impropriety, in those situations where the presumptions do not apply, such as where there is no board resolution declaring the necessity of the appropriation, or where a public utility does not present evidence of the necessity of the appropriation. This standard will properly balance the "great fundamental rights" of both eminent domain and private property, and is consistent with the plain language of the statute and Ohio appellate precedent.

Proposition of Law No. 2: A Certificate From the Ohio Power Siting Board Declaring that a Utility Project will "Serve the Public Interest, Convenience, and Necessity" Raises an Irrebuttable Presumption under R.C. 163.09(B)(1)(c) that the Appropriation Sought by the Public Utility for that Project Is Necessary.

R.C. 163.09(B)(1)(c) provides an irrebuttable presumption of the necessity of an appropriation when it has the approval of a state regulatory authority. Consistent with the statute, the trial court held that the Ohio Power Siting Board, "the state agency charged with regulatory oversight and approval of the Project, expressly concluded that the Project will 'serve the public interest, convenience, and necessity.'" *See* Order, Findings of Fact, ¶ H; Order, Conclusions of Law, ¶ 7 (citing OPSB Certificate, , p.4 ¶ 15(6), p.15, ¶ 49 and p.28, ¶ 88).

The Fourth District, however, refused to apply the irrebuttable presumption because the OPSB did not review AEP's individual easement terms. *Burns*, 2021-Ohio-2714, ¶¶ 44-59. In so holding, the Fourth District effectively read *into* the statute a landowner challenge that does not exist, while simultaneously reading *out* of the statute the legislatively mandated irrebuttable presumption.

The OPSB plainly exemplifies what the General Assembly envisioned as a state regulatory authority with the statutory power to determine the public necessity of a utility project that falls within its regulatory authority. If the OPSB's declaration that the Project is necessary does not trigger an irrebuttable presumption of necessity, it is inconceivable that any other agency approval could, and R.C. 163.09(B)(1)(c) becomes a vain legislative act, devoid of any meaning or effect. Such result is a clear violation of R.C. 1.47 and associated case law, which requires statutes to be interpreted to achieve a "just and reasonable result" and one "feasible of execution." R.C. 1.47, *see also*, *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ*., 131 Ohio St. 3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 15 ("court[s] should avoid that construction which renders a provision meaningless or inoperative").

Upholding the plain meaning and intent of the irrebuttable presumption does not leave a landowner's rights unprotected. The OPSB may not review individual easement terms, but it does conduct a comprehensive investigation and analysis into the need for a project, including review and approval of the precise route and its impact on the surrounding community and environment, all while collecting public input and holding public meetings to address landowner concerns. The OPSB and PUCO's oversight and control of these sorts of public utility projects is significant. As one court observed, "The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission." *Duke Energy Ohio, Inc. v. City of Hamilton*, 2018-Ohio-2821, 117 N.E.3d 1, ¶ 22 (12th Dist.) *citing Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St.3d 147, 153, 573 N.E.2d 655 (1991). Landowners are afforded due process through those proceedings, including an opportunity to attend meetings and even intervene in OPSB proceedings and appeal

OPSB decisions to this Court.[3]

Landowner's rights are also protected by the statutory and constitutional requirement for the condemnor to pay just compensation to landowners for any rights acquired through eminent domain. It is presumably because of these regulatory and judicial protections that the legislature provided for an irrebuttable presumption of the necessity of the appropriation in this very limited circumstance.

Proposition of Law No. 3: Modification of Easement Terms in an Appropriation Proceeding, Whether Done Voluntarily or By Court Order, Does Not Trigger the Provisions of R.C. 163.09(G), R.C. 163.21(A), or R.C. 163.21(B) Unless the Modification Fundamentally Changes the Appropriation and Prejudices the Landowner.

Landowners have grown increasingly aggressive about challenging proposed easement terms that have no appreciable impact on the appropriation itself and about seeking fee shifting under R.C. 163.09(G), R.C. 163.21(A) or R.C. 163.21(B) based on relatively minor changes in proposed easement terms—even changes that benefit the landowner. The Fourth District's interpretation of the fee-shifting statutes will surely heighten the level of contention in appropriation proceedings.

In this case, AEP voluntarily withdrew the single word "distribution" from its proposed easement before the necessity hearing began, which eliminated one very minor proposed use of the proposed easement—the stringing of distribution wires alongside transmission and communication wires. This change both benefitted the landowners, and did not otherwise affect the property appropriated. Nevertheless, after analyzing and interpreting all three fee shifting provisions in the statute, the Fourth District held that an award of fees and costs was required under R.C. 163.21(B) because, in its view, AEP had failed to appropriate "particular property." The Fourth District's conclusion that the trial court determined that AEP was not entitled to appropriate particular property

[3] https://opsb.ohio.gov/wps/portal/gov/opsb/about-us/resources/public-participation; last accessed 9/17/2021.

is wrong as a matter of law and as a matter of fact. The trial court ruled in AEP's favor and allowed AEP to appropriate all of the property it sought at the hearing.

The Fourth District's construction of the fee-shifting statutes is in direct conflict with the narrow and circumscribed review crafted by the General Assembly to appropriately balance the interests of landowners with the public need. Indeed, the perfection required of public utilities by the Fourth District's holding is neither practical nor consistent with the language of the statutes. The practical reality of many public utility projects is that they are complicated, multi-million dollar affairs that span many miles and require teams of professionals to engineer, plan, coordinate and complete on a specific schedule. Requiring a public utility to pay fees and/or suffer the dismissal of an eminent domain action as a result of any modification to a proposed easement, no matter how small, is an impossibly high bar for a public utility to meet. It also unnecessarily penalizes the general public which ultimately pays these added costs and suffers as a result of the unnecessary delays caused by a dismissal or appeal. Finally, it incentivizes landowners to litigate and to refuse to negotiate with public utilities in the hopes that some minor mistake or voluntary modification to proposed easement terms—even one that benefits the landowner—will give rise to an award of attorneys' fees and/or case dismissal, which might then lead to a windfall settlement. This result is clearly not what the legislature intended, and it threatens the economic viability of Ohio public utility projects while also increasing the cost of the projects ultimately borne by ratepayers.

If accepted, the Proposition of Law will avoid this unreasonable result by providing that a modification of a proposed easement does not trigger the statutory fee shifting provisions unless the modification fundamentally changes the appropriation and prejudices the landowner. This standard will provide much needed clarification of what the General Assembly meant in R.C. 163.21(B) when it required payment of fees and costs upon a finding by a court that an agency is "not entitled to

appropriate *particular property*," what it meant in R.C. 163.21(A) when it required payment of fees and costs if an agency "*abandon[s] appropriation proceedings*," and what the General Assembly meant in R.C. 163.09(G) when it required payment of costs and fees if a court "determines *the matter*" in the favor of the landowner. (Emphasis added).

CONCLUSION

This is a case of public and great general interest as it involves the ability of condemning agencies to provide safe, reliable and affordable public services to Ohio businesses and residents, the proper interpretation of the General Assembly's 2007 amendments to Ohio's eminent domain law, and a conflict in the lower appellate courts as to the scope of judicial review and legal standards to be applied when landowners challenge the terms of an easement rather than the necessity of the appropriation itself. Appellant AEP requests that the Court accept this case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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