

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of NRG Ohio Pipeline)
Company LLC for Approval of a Letter of)
Notification for the Avon Lake Gas Addition Project)
in Lorain County, Ohio)
Case No. 14-1717-GA-BLN

**NRG OHIO PIPELINE COMPANY LLC’S REPLY TO
LORAIN COUNTY PROPERTY OWNERS’:**

- 1. RESPONSE IN OPPOSITION TO NRG’S MOTION TO EXTEND THE DURATION OF THE CERTIFICATE**
 - 2. MOTION TO ENFORCE CODIFIED EXPIRATION OF THE CERTIFICATE**
 - 3. MOTION FOR ORAL HEARING**
-

I. INTRODUCTION

Pursuant to Ohio Administrative Code (“OAC”) Rule 4906-2-27(B)(2), NRG Ohio Pipeline Company LLC (“NRG”) respectfully submits a reply to the Ohio Power Siting Board (“OPSB” or “Board”) in response to Lorain County Property Owners’ (“Property Owners”):

1. Response in Opposition To NRG’s Motion To Extend The Duration of The Certificate For The Construction, Operation And Maintenance of A Natural Gas Pipeline, Metering Station, and Regulating Station In Lorain County, Ohio;
2. Motion To Enforce The Codified Expiration of The Certificate For The Construction, Operation And Maintenance Of A Natural Gas Pipeline In Lorain County, Ohio; and
3. Motion for Oral Hearing

Property Owners’ motion should be denied. Property Owners’ provide no good cause for the Board to deny NRG’s motion to extend its certificate.

II. ARGUMENT

A. NRG's request to extend its certificate is consistent with the Board's authority and the Board's recent rule revisions.

NRG's request is straightforward. NRG requests that the Board or administrative law judge grant its motion to extend the term of its certificate from June 4, 2017 to June 4, 2018 to reflect the recent revision of O.A.C. Rule 4906-6-12(B), which extends the period of time before an accelerated application certificate expires, from two years to three years. It is well within the Board's authority to extend certificates, which it routinely does. Moreover, the request is consistent with the reason for the rule revision in the first place, namely that condemnation activities require a substantial period of time before construction may begin.

1. The Board has authority to extend the duration of certificates.

The Board possesses the inherent authority to grant the requested extension of NRG's certificate—the Board is under no statutory or other constraint limiting its authority to grant the requested extension. Further, the Board's precedent clearly demonstrates its authority to extend the term of existing certificates.¹ Indeed, in many instances the Board has approved project requests for *multiple* certificate requests for *multiple* years, for a variety of reasons including changed economic conditions, construction delays, and litigation.² Here, NRG requests a single year extension to reflect the revised rule as it continues to acquire easements along the pipeline route and prepare for construction.

¹ See *In the Matter of the Application of Summit Energy Storage*, Case No. 89-1302-EL-BGN (November 23, 1998), granting a certificate extension for a period of two years; see also, *In the Matter of the Application of Norton Energy Storage, LLC for a Certificate of Environmental Compatibility and Public Need for an Electric Power Generating Facility in Norton, Ohio*, Case No. 99-1626-EL-BGN (June 2, 2008), approving applicant's second thirty month certificate extension; see also, *In the Matter of the Application of Lawrence County Energy Center, LLC, for a Certificate of Environmental Compatibility and Public Need for the Lawrence County Energy Center Electric Generation Facility in Lawrence County, Ohio* (Case No. 01-369-EL-BGN), granting applicant's twelve month extension.

² *Id.*

2. *NRG's request is consistent with the Board's precedent and the Board's recent rule revisions.*

NRG's request for an extension is reasonable and should be granted. As stated in its motion to extend, NRG is actively pursuing the pipeline project. Much of the development, engineering, and planning work for the project is complete. Further, NRG is currently acquiring easements along the pipeline route. As the Property Owners readily acknowledge, eminent domain proceedings are ongoing in the Lorain County Court of Common Pleas.³ Far from engaging in "repeated delay tactics," NRG is working in good faith to negotiate with landowners and is nearing a settlement with several landowners along the route.⁴

NRG has invested significant resources in planning the project, preparing for construction, and now, acquiring property through eminent domain and negotiations. The Property Owners contradict themselves by arguing that NRG is not actively pursuing the project, while simultaneously complaining about the ongoing eminent domain proceedings that NRG initiated in order to acquire the land necessary to build the project. Their reasoning is confused, at best.

The fact is that condemnation proceedings often take significant financial commitment and time to complete. Indeed, the Board expressly recognized this fact when it revised OAC Rule 4906-6-12(B), extending the expiration period from two years to three years. In that

³ See, Property Owners' Response at 9.

⁴ Property Owners' suggestion that NRG has failed to expediently resolve the appropriations cases filed as part of this project is specious. For instance, the case of *NRG v. Mary B. Miller*, Case No. 15CV185336 was continued by the Lorain County Court of Common Pleas, not NRG.. See Journal Entry dated August 2, 2016. More telling, *NRG v. K. Hovnanian Oster Homes LLC*, Case No. 15CV185331 was continued as a result of the defendant (here, a landowner member of the Property Owners) – and defendants' counsel (here, the same counsel for Property Owners) – failure to provide complete and timely discovery responses. It was the defendants' (Property Owners') own motion resulted in the delay of the proceedings. It is the defendants (here, the Property Owners) and not NRG that have delayed the appropriations proceedings.

rulemaking, commenting parties urged the Board to revise the expiration period because of the lengthy condemnation process under Ohio law:

Under the new provision of SB 315 a large project, such as a long natural gas line, is permitted to utilize the LON 90 day process. In the case of long gas lines and even in the case of gas lines that qualify for LON treatment under the current rules, it could become necessary for gas utilities to invoke their condemnation powers. Whether or not the new provisions for an LON are invoked, Ohio's landscape is one in which much more natural gas facilities have been and will continue to be built. If condemnation is necessary to procure easements for a pipeline, the condemnation process alone consumes approximately two years. Thus in light of the changes in today's environment, the rule should be changed to three years, rather than two, to allow the applicant to begin construction.⁵

In its Order adopting the new rules, the Board explicitly agreed with the commenters, noting:

OGA states, and FirstEnergy agrees, that, if condemnation is necessary to procure easements for a pipeline, the condemnation process alone consumes approximately two years; therefore, the time period states in rule should be changed to three years rather than two. The Board agrees and finds that this recommendation should be adopted.⁶

NRG's request that its certificate be extended to align with the revised rule is entirely consistent with the reasoning behind the rule revision in the first place. Further, NRG's request is consistent with Board precedent and is well within the Board's authority. Therefore there is good cause to grant NRG's motion to extend its certificate.

3. Property Owners completely misapply Ohio's Retroactivity Clause.

Property Owners' response in opposition to NRG's motion relies significantly on the application of the Ohio Constitution's "Retroactivity Clause."⁷ Ohio's Retroactivity Clause "nullifies those new laws that reach back and create new burdens, new duties, new obligations,

⁵ *In the Matter of the Ohio Power Siting Board's Review of Chapter 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15 and 4906-17 of the Ohio Administrative Code*, Case No. 12-1982-GE-BRO, Comments of the Ohio Gas Association (June 3, 2013) at 13.

⁶ Finding and Order, Case No. 12-1981-GE-BRO (Feb. 18, 2014) at 93. The revised rules became effective December 11, 2015.

⁷ Property Owners' Response, at 6-8.

or new liabilities not existing at the time [the statute becomes effective].”⁸ Property Owners’ reliance on this doctrine is entirely misplaced.

First, there is no occurrence of retroactive operation of a law in this situation. NRG, through its motion, is expressly requesting that the Board exercise its authority and apply the new rule’s expiration period to NRG’s certificate. NRG makes no argument that the new rule automatically operates retrospectively to its certificate. Rather, NRG is asking the Board to act based on the current law. There is simply no retroactive application here.

Second, the purpose of the Retroactivity Clause is to protect a party from a law that permits the retroactive extinguishment of a pre-existing legal right.⁹ Again, Property Owners are confused. Even if the Retroactivity Clause applied here, only NRG would have a basis to raise this issue because the law would have to be retrospectively operating against NRG’s pre-existing legal-right, the certificate. Property Owners would have no such basis to raise this issue, assuming the doctrine even applies. The rule at issue does not retroactively operate to extinguish the certificate, and therefore the doctrine does not apply.

Finally, the Board, as discussed above, has the inherent authority to extend project certificates. If the Board were to grant NRG’s motion, it would be doing so through its own authority, not solely on the authority of a recently revised rule. For this reason, Property Owners’ Retroactivity Clause arguments—which themselves are fundamentally flawed—is moot.

⁸ *Miller v. Hixson*, 64 Ohio St. 39, 51 (1901); see also, *Bd. of Trs. of the Tobacco Use Prevention & Control Found. v. Boyce*, 127 Ohio St. 3d 511, 514 (Ohio 2010).

⁹ *Bd. of Trs. of the Tobacco Use Prevention & Control Found. v. Boyce*, 127 Ohio St. 3d 511, 514 (Ohio 2010).

B. Property Owners’ objections lack merit and improperly seek to litigate issues outside of the scope of this proceeding.

Except for their flawed Retroactivity Doctrine argument, discussed above, Property Owners’ objections all stem from the ongoing eminent domain proceedings in the Lorain County Court of Common Pleas. NRG’s application for a certificate was heavily litigated and thoroughly reviewed by the Board. For instance, the Board exercised its authority to suspend NRG’s letter of notification application and the 90-day automatic approval certification process, pursuant to R.C. 4906.03(F).¹⁰ Further, the Board decided “to consider NRG’s letter of notification application as if it were a standard certificate application to construct a major utility facility”¹¹ Through this rigorous evaluation, the Board found that “the requirements for a letter of notification application . . . as well as the criteria found in R.C. 4906.10 for a standard certificate application, are satisfied for the construction, operation, and maintenance of the proposed project”¹²

Property Owners now seek to re-open this proceeding by thrusting the Board into the role of supervising the Lorain County Court of Common Pleas. Through their arguments, it is clear that Property Owners want the Board to make a determination as to whether or not the eminent domain proceedings properly before the Lorain County Court of Common Pleas are progressing at an appropriate speed.¹³

The Board has indicated in multiple cases that issues concerning monetary compensation, the valuation of property, and other contractual terms for easements are not within the scope of

¹⁰ Opinion, Order and Certificate, Case No. 14-1717-GA-BLN (June 4, 2015) at 3.

¹¹ *Id.* at 8.

¹² *Id.* at 26.

¹³ Property Owners’ Response at 9-11.

the Board's proceedings.¹⁴ Property Owners, nonetheless, now asks the Board to involve itself in the eminent domain proceedings to make a determination as to the progress of those proceedings, which directly involve these issues, such as monetary compensation.¹⁵

- C. Property Owner's motion for an oral hearing should be denied because NRG's request does not encompass any change that potentially affects either the environmental impact of the facility or that potentially affects the facility's location.

The Board's precedent is clear that, when a certificate request under consideration potentially affects only the lifespan of the involved certificate, then there is no need for a public hearing. In a recent case where it approved the extension of a certificate, the Board stated:

The certificate extension request under consideration in this case potentially affects only the lifespan of the involved certificate. The request does not encompass any change that potentially affects either the environmental impact of the facility or that potentially affects the facility's location. Therefore, the request does not trigger the need for a public hearing under R.C 4906.07(B) and the Board may proceed to rule on it without first holding a public hearing.¹⁶

NRG's motion does not propose any change that potentially affects either the environmental impact of the facility or that potentially affects the facility's location. Rather, NRG's motion involves only the expiration period of its certificate. For this reason, the Board should deny Property Owners' motion for an oral hearing.

¹⁴ *In the Matter of the Application of NRG Ohio Pipeline Company LLC for Approval of a Letter of Notification for the Avon Lake Gas Addition Project in Lorain County, Ohio*, Case No. 14-1717-GA-BLN, Opinion, Order and Certificate (June 4, 2015) at 16; see also, *North Coast Gas Transmission, LLC*, Case No 14-1754-GA-BLN, Entry (April 6, 2015) at 10.

¹⁵ *Id.* at 9.

¹⁶ *In the Matter of the Application of Black Fork Wind Energy, LLC for a Certificate to Site a Wind-Powered Electric Generating Facility in Crawford and Richland Counties, Ohio*, Case No. 10-2865, Entry (March 24, 2016) at ¶ 11.

III. CONCLUSION

For the reasons given above, the Property Owners' Motions should be denied and NRG's motion to extend the duration of its certificate be granted.

Respectfully submitted on behalf of
NRG OHIO PIPELINE COMPANY LLC



Dylan F. Borchers (0090690)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-4914
Facsimile: (614) 227-2390
E-mail: dborchers@bricker.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply has been served upon the following parties listed below via electronic mail, this ____ day of October 2016.



Dylan F. Borchers (0090690)

Robert J. Schmidt, Jr.
L. Bradfield Hughes
Porter Wright Morris & Arthur, LLP
41 South High Street
Columbus, OH 43215
rschmidt@porterwright.com

Anne Rericha
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
arericha@firstenergycorp.com

Michael Braunstein
Clinton Stahler
Goldman & Braunstein, LLP
500 South Front Street, Suite 1200
Columbus, OH 43215
Braunstein@GBlegal.net
Stahler@GBlegal.net

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Summary: Reply of NRG Ohio Pipeline Company LLC to Lorain County Property Owners'
Response and Motions electronically filed by Teresa Orahod on behalf of Dylan F. Borchers