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

ENTRY

The Ohio Power Siting Board finds:

(1) NRG Ohio Pipeline Company LLC (NRG Pipeline or Company) is a person as defined in R.C. 4906.01.

(2) R.C. 4906.04 provides that no person shall commence to construct a major utility facility in the state without first having obtained a certificate for the facility from the Ohio Power Siting Board (Board). Additionally, R.C. 4906.03(F) requires the Board to adopt rules to provide for an accelerated review of an application for a construction certificate for a gas pipeline that is not more than five miles in length or is primarily needed to meet the requirements of a specific customer or specific customers. The statute specifies that the Board must adopt rules that provide for the automatic certification of such pipelines when the application is not suspended by the Board, administrative law judge, or chairperson or executive director of the Board for good cause shown, within 90 days of submission of the application. If an application is suspended, the Board shall approve, disapprove, or modify and approve the application not later than 90 days after the date of the suspension.

(3) On December 19, 2014, NRG Pipeline filed a letter of notification application, pursuant to R.C. 4906.03(F), for the purpose of constructing the Avon Lake Gas Addition Project (project), which consists of a proposed natural gas pipeline designed at 24 inches in diameter and approximately 20 miles in length, along with a metering station and regulating station, in Lorain County, Ohio. In the application, NRG Pipeline explained that its sole customer is the Avon Lake

power plant and the primary purpose of the project is to provide natural gas as a fuel source for the plant.

(4) On January 9, 2015, and April 13, 2015, petitions to intervene in this proceeding were filed by various property owners in Lorain County, Ohio (collectively, LCPO): Wesley Parker; Brandon and Mary Thorne; Charles Borling; Samuel Dennis; Carlos and Sonia Llado; Edmund and Angie Carter; Gary and Kathleen Conlin; Stephanie K. Unger; Edward Kurianowicz; Lawrence R. Plas; Mary B. Miller; Richard and Carol Petersen; Richard and Ellen Braatz; Thomas and Johanna Julius; Louis and Gale Betzel; Fathers of St. Joseph Church; K. Hovnanian Oster Homes, LLC; Barbara and Thomas Demaline; Matthias and Joanne Helfrich; Mark and Darlene Julius; Marty and Irene Kaulins; Thomas Oster, President, Avon Development, LLC; Robert and Debra Kubasak; George Mekker and Irene Noster; Joan Kerecz; Albert Kelling; William and Anna Marie Holt; and Theresa M. Wukie.

(5) By Entry dated March 9, 2015, the Board found that there was good cause to suspend NRG Pipeline's letter of notification application and the 90-day automatic certification process, pursuant to R.C. 4906.03(F), in order for the Board and Staff to conduct a thorough review of the application. Additionally, the Board determined that a local public hearing and an adjudicatory hearing should be held in this matter.

(6) The adjudicatory hearing commenced on April 23, 2015, and concluded on April 24, 2015.

(7) On June 4, 2015, the Board issued an Opinion, Order, and Certificate granting NRG Pipeline authority to construct the project, subject to a number of specified conditions.

(8) On October 5, 2016, NRG Pipeline filed a motion to extend the duration of its certificate from June 4, 2017, to June 4, 2018, in order for the certificate to be consistent with the Board's current rule regarding certificate expiration. In the motion, NRG Pipeline explains that, at the time of the issuance of the Opinion, Order, and Certificate, Ohio Adm.Code 4906-5-02(A)(4) provided that, if a continuous course of construction has not commenced within two years of the letter of

notification approval date, the Board's approval of the letter of notification project shall automatically expire. NRG Pipeline notes that, in accordance with this rule, its certificate will expire on June 4, 2017. NRG Pipeline further notes that, following the issuance of its certificate, the Board completed a comprehensive review and revision of its rules, including the adoption of new Ohio Adm.Code 4906-6-12(B), which extended the duration of a certificate issued pursuant to a letter of notification application from two years to three years. NRG Pipeline states that, in the rulemaking proceeding, the Board agreed with stakeholders that the condemnation process alone consumes approximately two years and, therefore, the time period in the rule was changed to three years. *In re Review of Chapters 4906-1, 4906-5, 4906-7, 4906-9, 4906-11, 4906-13, 4906-15, and 4906-17 of the Ohio Administrative Code*, Case No. 12-1981-GE-BRO, Finding and Order (Feb. 18, 2014) at 93. NRG Pipeline, therefore, requests that the Board extend its certificate by one year, or until June 4, 2018. According to NRG Pipeline, the extension would eliminate any potential confusion among regulators or the public as to which rule applies to the certificate and would be consistent with the Board's rationale for modifying the rule. NRG Pipeline adds that much of the development, engineering, and planning work for the project is complete and the Company is currently acquiring easements along the pipeline route.

(9) On October 20, 2016, LCPO filed a response in opposition to NRG Pipeline's motion to extend the duration of the certificate, along with a motion to enforce the expiration of the certificate and a motion for oral hearing. LCPO argues that retroactive application of Ohio Adm.Code 4906-6-12(B) is strictly prohibited by Ohio law. LCPO contends that, like statutes, administrative rules are presumed to have a prospective effect unless otherwise clearly indicated. R.C. 1.48; *Kiser v. Coleman*, 28 Ohio St.3d 259, 262, 503 N.E.2d 753 (1986); *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St.3d 232, 234, 527 N.E.2d 828 (1988). LCPO notes that new Ohio Adm.Code 4906-6-12(B) is devoid of any language regarding retrospective application and, therefore, the rule may apply only to cases that have been initiated subsequent to its adoption. LCPO further notes that the Supreme Court of

Ohio has recognized that the prohibition against retroactivity protects individuals relying upon the law as written and ensures that they are not subject to new burdens or obligations that arise out of a subsequent change. *Lakengren, Inc. v. Kosydar*, 44 Ohio St.2d 199, 201, 339 N.E.2d 814 (1975). According to LCPO, its members have relied on the expiration of NRG Pipeline's certificate on June 4, 2017, as the end point of the ongoing prospect of disturbances and disruptions associated with land clearing, excavations, trenching, heavy equipment operation, and construction of the project on its members' property. Further, LCPO argues that NRG Pipeline should not be permitted to exploit the Board's process as a means to impose further delay and burden on LCPO's members. Specifically, LCPO contends that NRG Pipeline has intentionally delayed the project and the associated eminent domain proceedings, because the Company has no definite plan to proceed with the project. LCPO concludes that NRG Pipeline's motion is a delay tactic to obtain an additional year before the Company must make the financial commitments to acquire easements and begin construction.

(10) On October 20, 2016, Moore Road, LLC (Moore Road) also filed a response in opposition to NRG Pipeline's motion to extend the duration of its certificate. In its response, Moore Road notes that it owns property along the project route and is involved in an eminent domain proceeding related to the project. Moore Road asserts that, like LCPO, it has experienced delay tactics in the eminent domain proceeding, which contradicts NRG Pipeline's claim that it needs additional time to secure the necessary easements. According to Moore Road, the Avon Lake power plant continues to operate as a coal-fired plant and NRG Pipeline has no present intention of converting the plant to natural gas.

(11) On October 27, 2016, NRG Pipeline filed a reply to LCPO's response. Noting that it is actively pursuing the project and acquiring easements along the pipeline route, NRG Pipeline asserts that its request to extend its certificate is consistent with the Board's authority, precedent, and recent rule revisions. NRG Pipeline adds that LCPO's reliance on Ohio's retroactivity doctrine is misplaced for several reasons,

including the fact that the Board has inherent authority to extend a certificate. NRG Pipeline contends that there is no retroactive application of Ohio Adm.Code 4906-6-12(B) under the circumstances, given that the Company has specifically requested that the new rule be applied to extend the duration of its certificate. According to NRG Pipeline, even if the retroactivity doctrine were considered with respect to the Board's rule amendments, the doctrine would protect the Company's preexisting legal right to maintain its certificate rather than any right of the members of LCPO. Further, NRG Pipeline argues that LCPO seeks to litigate issues related to the eminent domain proceedings that are outside the scope of the case before the Board. Finally, NRG Pipeline argues that LCPO's request for an oral hearing should be denied, because the Company's extension request does not trigger the need for a hearing under R.C. 4906.07(B).

(12) On October 27, 2016, NRG Pipeline also filed a reply to Moore Road's response. Initially, NRG Pipeline argues that Moore Road lacks standing to object to the Company's motion, because Moore Road has not obtained party status in this case or even filed a petition to intervene. NRG Pipeline adds that, regardless, Moore Road's objections lack merit and should be rejected. NRG Pipeline asserts that Moore Road improperly seeks to use this case to litigate issues that relate to the ongoing eminent domain proceedings. NRG Pipeline notes that the Board has indicated, on multiple occasions, that issues involving easements and monetary compensation are beyond the scope of its proceedings.

(13) On October 31, 2016, LCPO filed a reply in support of its motion to enforce the expiration of the certificate and its motion for oral hearing. LCPO reiterates its position that retrospective application of Ohio Adm.Code 4906-6-12(B) is strictly prohibited by Ohio law. LCPO adds that NRG Pipeline should not be permitted to use this proceeding to impose further burdens on LCPO's members by encumbering their property with what amounts to an option to acquire an easement and subjecting them to the ongoing threat of major disturbances and disruptions.

(14) On November 8, 2016, Fieldstone Lakes, Ltd. and Fieldstone Lakes Homeowners Association, Inc. (jointly, Fieldstone

Lakes) filed a response in opposition to NRG Pipeline's motion to extend the duration of the certificate, along with a motion to enforce the expiration of the certificate and a motion for oral hearing. Fieldstone Lakes asserts that its property remains unduly encumbered by this case and the related eminent domain proceedings and that NRG Pipeline seeks to interpose unwarranted delay to the detriment of Fieldstone Lakes. For the same reasons noted by LCPO, Fieldstone Lakes joins in LCPO's opposition to NRG Pipeline's motion for an extension of its certificate.

(15) On November 9, 2016, NRG Pipeline filed a reply to Fieldstone Lakes' response. NRG Pipeline argues that Fieldstone Lakes' response should not be considered by the Board, because Fieldstone Lakes lacks standing to object to the Company's motion. NRG Pipeline notes that Fieldstone Lakes is not a member of LCPO, has not otherwise been granted party status, and has not filed a petition to intervene in this case. Further, NRG Pipeline contends that Fieldstone Lakes' objections should be rejected for the same reasons noted in the Company's reply to LCPO.

(16) Upon review of NRG Pipeline's motion for an extension of its certificate, the Board finds that the motion is reasonable and should be granted. We agree with NRG Pipeline that an extension of the duration of its certificate, specifically from two years to three years, is appropriate to afford the Company additional time to complete the condemnation process. Additionally, according to NRG Pipeline, the Company is actively pursuing the project and acquiring easements, with considerable development, engineering, and planning work for the project complete at this point. In its reply to LCPO, NRG Pipeline also represented that it has invested significant resources in the project and continues to work in good faith to negotiate with the affected property owners. For these reasons, we find that NRG Pipeline has stated good cause for the requested extension, such that the Company's certificate to construct the project should be extended to June 4, 2018.

(17) We note that Ohio Adm.Code 4906-5-02(A)(4), which was in effect at the time of our approval of NRG Pipeline's application, provided that the Board's approval of a letter of notification project would automatically expire, if a continuous course of construction had not commenced within two years of the approval date. We find that it is appropriate to waive the automatic expiration provision in the rule, pursuant to Ohio Adm.Code 4906-1-03, which was also in effect at the time of our approval of NRG's application. Ohio Adm.Code 4906-1-03 provided that the Board may, for good cause shown, waive any requirement, standard, or rule set forth in Ohio Adm.Code Chapters 4906-1 to 4906-17, except where precluded by statute. As we have previously stated, the Board has a longstanding practice of considering, pursuant to a proper motion, requests to extend the term of a certificate for a major utility facility. *In re Buckeye Wind, LLC*, Case No. 08-666-EL-BGN, et al., Entry (Aug. 25, 2014) at 6. In the present case, the Board determined, in light of a number of concerns raised by LCPO, as well as other issues raised in the proceeding, that it was appropriate to consider NRG Pipeline's letter of notification application as if it were a standard certificate application to construct a major utility facility. Opinion, Order, and Certificate at 8. We also found that the project constitutes a major utility facility as defined in R.C. 4906.01(B)(1)(c). Opinion, Order, and Certificate at 31. Consistent with our practice of granting, for good cause shown, extensions of a certificate to construct a major utility facility, we find that it is appropriate to grant NRG Pipeline's requested extension for the reasons noted above.

(18) With respect to the arguments raised by LCPO in opposition to NRG Pipeline's motion, the Board does not agree that Ohio's retroactivity doctrine has any relevance to the Company's request for an extension. We agree with NRG Pipeline that there is no retroactive application of Ohio Adm.Code 4906-6-12(B). Rather, NRG Pipeline has sought an extension of the two-year period provided for in Ohio Adm.Code 4906-5-02(A)(4), which was in effect at the time of the issuance of the Company's certificate. As explained above, the Board routinely grants, for good cause shown, requests for an extension of a certificate to construct a major utility facility. Further, as we have already stated in this case,

issues related to monetary compensation, the valuation of property, and other contractual terms for easements are not within the scope of this proceeding. Opinion, Order, and Certificate at 23. Finally, the Board notes that LCPO has offered no support for its request for an oral hearing and, in any event, we find that it is not necessary to hold a hearing on the requested extension. LCPO's motion for an oral hearing should, therefore, be denied.

(19) Turning to the memoranda filed by Moore Road and Fieldstone Lakes, the Board notes that Moore Road and Fieldstone Lakes are not parties to this proceeding and have not sought leave to file an untimely petition to intervene. Accordingly, we find that the memoranda filed by Moore Road and Fieldstone Lakes are procedurally improper.

It is, therefore,

ORDERED, That NRG Pipeline's motion to extend the duration of its certificate be granted. It is, further,

ORDERED, That NRG Pipeline's certificate be extended in accordance with finding (16). It is, further,

ORDERED, That LCPO's motion to enforce the expiration of the certificate and motion for oral hearing be denied. It is, further,

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

THE OHIO POWER SITING BOARD

Asim Z. Haque, Chairman
Public Utilities Commission of Ohio

David Goodman, Board Member
and Director of the Ohio
Development Services Agency

James Zehringer, Board Member
and Director of the Ohio
Department of Natural Resources

Richard Hodges, Board Member
and Director of the Ohio
Department of Health

Craig Butler, Board Member
and Director of the Ohio
Environmental Protection Agency

David Daniels, Board Member
and Director of the Ohio
Department of Agriculture

Jeffrey J. Lechak, Board Member
and Public Member

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Entered in the Journal

Barcy F. McNeal
Secretary