

THE OHIO POWER SITING BOARD

IN THE MATTER OF THE APPLICATION
OF DUKE ENERGY OHIO, INC. FOR
A CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED FOR THE
C314V CENTRAL CORRIDOR PIPELINE
EXTENSION PROJECT.

CASE NO. 16-253-GA-BTX

ENTRY ON REHEARING

Entered in the Journal on February 20, 2020

I. SUMMARY

{¶ 1} The Ohio Power Siting Board denies the applications for rehearing of the November 21, 2019 Opinion, Order, and Certificate filed by the city of Reading, village of Evendale, NOPE - Neighbors Opposed to Pipeline Extension, LLC, and city of Blue Ash, as well as the joint application filed by the city of Cincinnati and Board of County Commissioners of Hamilton County.

II. DISCUSSION

A. *Procedural Background*

{¶ 2} Duke Energy Ohio, Inc. (Duke, Company, or Applicant) is a person as defined in R.C. 4906.01.

{¶ 3} Pursuant to R.C. 4906.04, no person shall construct a major utility facility in the state without first having obtained a certificate from the Ohio Power Siting Board (Board). In seeking a certificate for a gas pipeline, applicants must comply with the filing requirements outlined in R.C. 4906.06, as well as Ohio Adm.Code Chapters 4906-3 and 4906-5.

{¶ 4} On March 8, 2016, Duke filed a pre-application notification letter with the Board regarding its proposal to construct a 30-inch diameter natural gas pipeline, with a length of approximately 12 miles, to be known as the Central Corridor Extension (CCE). Duke noted that the pipeline extension was being planned in order to increase the reliability

and dependability of the natural gas delivery system in the central portion of Cincinnati, Ohio.

{¶ 5} On September 13, 2016, Duke filed with the Board an application for a certificate of environmental compatibility and public need to construct the proposed natural gas pipeline extension. As a result of its review of public comments and meetings with elected representatives, community leaders, and members of the public, Duke proposed to reduce the size of the natural gas pipeline to 20 inches in diameter, as well as to reduce the operating pressure from the originally planned 600 pounds per square inch gauge (psig) to 400 psig.

{¶ 6} On January 20, 2017, Duke amended and refiled its entire application for a certificate of environmental compatibility and public need, which proposed to construct a natural gas pipeline extension, approximately 14 miles in length and 20 inches in diameter, from the Applicant's WW Feed Station to an existing gas pipeline in the village of Fairfax or the city of Norwood area (hereafter, the Project or CCE). The Project would be located entirely in Hamilton County, Ohio. Duke further amended and supplemented its application on February 13, 2017, February 24, 2017, March 3, 2017, and May 11, 2017.

{¶ 7} By letter dated March 3, 2017, the Board notified Duke that its amended application had been certified as sufficiently complete to move forward and directed the Applicant to serve appropriate government officials and public agencies with copies of the complete, certified application.

{¶ 8} By Entry dated April 13, 2017, a procedural schedule was established for this case, including a local public hearing to occur on June 15, 2017, and an adjudicatory hearing to commence on July 12, 2017.

{¶ 9} On May 31, 2017, the Staff Report of Investigation was filed. In the report, Staff recommended that the Project be installed on Duke's proposed alternate route, subject to numerous conditions.

{¶ 10} By Entry dated June 15, 2017, numerous entities were granted intervention in this proceeding, including the city of Reading (Reading), village of Evendale (Evendale), city of Blue Ash (Blue Ash), city of Cincinnati (Cincinnati), Board of County Commissioners of Hamilton County (Hamilton County), and NOPE - Neighbors Opposed to Pipeline Extension, LLC (NOPE).

{¶ 11} The local public hearing occurred, as scheduled, on June 15, 2017.

{¶ 12} On June 21, 2017, at the request of some of the intervenors in this case, the administrative law judge (ALJ) granted a continuance of the adjudicatory hearing, which was rescheduled to commence on September 11, 2017.

{¶ 13} By Entry dated August 24, 2017, the ALJ granted a motion filed by Duke to suspend the procedural schedule, in order to permit the Company to conduct additional investigation of certain site-specific matters and to solicit input from affected communities and property owners.

{¶ 14} On April 13, 2018, Duke filed supplemental information to support its application, along with a motion seeking to reestablish the procedural schedule.

{¶ 15} On July 26, 2018, Duke further supplemented its application by filing two environmental summary reports.

{¶ 16} By Entry dated December 18, 2018, the ALJ, among other things, reestablished the procedural schedule, with a second local public hearing to occur on March 21, 2019, and the adjudicatory hearing to commence on April 9, 2019.

{¶ 17} In accordance with the procedural schedule, Staff filed, pursuant to R.C. 4906.07(C), an Amended Staff Report of Investigation (Staff Report) on March 5, 2019. Staff noted that its amended report was intended to supersede the report filed on May 31, 2017. As in the earlier report, Staff recommended that the Project be installed on Duke's proposed alternate route, subject to numerous conditions.

{¶ 18} The second local public hearing occurred, as scheduled, on March 21, 2019.

{¶ 19} The adjudicatory hearing commenced on April 9, 2019, and concluded on April 11, 2019.

{¶ 20} Initial and reply briefs were filed on May 13, 2019, and June 10, 2019, respectively.

{¶ 21} By Opinion, Order, and Certificate dated November 21, 2019, the Board issued a certificate of environmental compatibility and public need to Duke for the construction, operation, and maintenance of the CCE along the alternate route, subject to 41 conditions set forth by the Board.

{¶ 22} R.C. 4906.12 provides that R.C. 4903.02 to 4903.16 and R.C. 4903.20 to 4903.23 apply to any proceeding or order of the Board, as if the Board were the Public Utilities Commission of Ohio (Commission).

{¶ 23} Ohio Adm.Code 4906-2-32(A) states, in relevant part, that any party or affected person may file an application for rehearing, within 30 days after the issuance of a Board order, in the manner, form, and circumstances set forth in R.C. 4903.10. R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.

{¶ 24} Ohio Adm.Code 4906-2-32(E) provides that the ALJ may issue an order granting rehearing for the purpose of affording the Board more time to consider the issues raised in an application for rehearing.

{¶ 25} On December 23, 2019, applications for rehearing of the November 21, 2019 Opinion, Order, and Certificate were filed by Reading, Evendale, NOPE, Blue Ash, and jointly by Cincinnati and Hamilton County. Duke filed a memorandum contra the applications for rehearing on January 2, 2020.

{¶ 26} By Entry dated January 17, 2020, the ALJ, pursuant to Ohio Adm.Code 4906-2-32(E), granted the applications for rehearing filed by Reading, Evendale, NOPE, Blue Ash, and Cincinnati/Hamilton County for the limited purpose of affording the Board additional time to consider the issues raised in the applications for rehearing. The ALJ specifically reserved for the Board's determination the matter of whether the applications for rehearing were filed consistent with the requirements of R.C. 4903.10 and Ohio Adm.Code 4906-2-32(A).

{¶ 27} The Board has reviewed and considered all of the arguments raised in the applications for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Board and should be denied.

B. Consideration of the Applications for Rehearing

1. BASIS OF NEED

{¶ 28} In their first ground for rehearing, Cincinnati/Hamilton County argue that the Board unreasonably and unlawfully found that Duke demonstrated the basis of need for the CCE.¹ More specifically, Cincinnati/Hamilton County claim that the Board's decision unjustifiably relied on a lack of evidence that the CCE is needed to replace or upgrade aging infrastructure, enable the retirement of the propane-air peaking plants, and solve the north/south system supply balance problem in the area. In support of their contention that there is little evidence demonstrating the need for the CCE, Cincinnati/Hamilton County first note that Duke initially stated that the Project is needed to further the Company's regional expansion and long-range plans, with a focus on improving pressures in the area and accommodating potential growth, despite the fact that population forecasts project a population decrease in Hamilton County over the next 20 years. Cincinnati/Hamilton County contend that Duke then changed course in favor of the three objectives stated above,

¹ In their application for rehearing, Cincinnati/Hamilton County state that they also support the arguments raised in the applications for rehearing filed by the other intervenors in this matter.

which Cincinnati/Hamilton County believe would be more meaningfully addressed through other options.

{¶ 29} Addressing each of Duke's three objectives, Cincinnati/Hamilton County first reiterate their position that the CCE does not solve the north/south system supply balance problem in the central Hamilton County area. Cincinnati/Hamilton County assert that the Board did not address the arguments advanced by numerous intervenors that Duke's stated need would be entirely unmet by the CCE. According to Cincinnati/Hamilton County, the Board unreasonably and unlawfully ignored compelling evidence that the CCE will not solve or even meaningfully address the north/south system supply balance problem, which Duke's own consultant describes as a major reliability risk. Next, Cincinnati/Hamilton County contend that, although the CCE may make it more convenient for Duke to replace or upgrade aging infrastructure, the Project is not needed for this purpose. Cincinnati/Hamilton County emphasize that Duke conceded that its repair and replacement work can be completed without causing outages to customers during the heating season. Cincinnati/Hamilton County add that the Board overlooked substantial and incontrovertible record evidence indicating that, if the CCE is not approved, Duke will remain more than capable of repairing and replacing its aging infrastructure, without requiring customers to endure lengthy outages. Finally, Cincinnati/Hamilton County argue that the propane-air peaking plants do not need to be retired and that, regardless, the CCE is not needed to accomplish this purpose. Cincinnati/Hamilton County claim that the Board did not address record evidence demonstrating that the propane-air facilities continue to be safe and reliable and that their retirement is not an urgent concern. In particular, Cincinnati/Hamilton County assert that, by ignoring evidence from Duke's consultant that the propane storage caverns were not leaking and that the limestone in the caverns showed no pressure loss and was suitable for continued use in propane storage service, the Board unreasonably and unlawfully concluded that there is nothing in the record that contradicts the Company's testimony that the propane-air facilities are at the end of their useful lives.

{¶ 30} Initially, Duke asserts that its three stated objectives for the Project have remained consistent throughout this proceeding, despite Cincinnati/Hamilton County's implication that the Company changed its purpose based on a forecasted population decrease in the area. Addressing its objectives, Duke first argues that the CCE will result in a substantial improvement in the north/south balance of supply that could mean the difference between widespread winter outages and none. Duke adds that Cincinnati/Hamilton County overlook the fact that the CCE will also enable the Company to decommission the propane-air peaking plants, which contribute approximately ten percent of the overall system supply requirement on a peak day. Regarding the replacement of aging infrastructure, Duke contends that Cincinnati/Hamilton County unreasonably assume that, because the Company can, in certain circumstances, replace existing lines without causing outages for customers, the CCE is unnecessary for the accomplishment of any such replacements. Duke also emphasizes that the fact that there have been no lengthy outages for customers in the central corridor area is not evidence that such outages could always be avoided on a going-forward basis with the existing infrastructure. Finally, with respect to the retirement of the propane-air facilities, Duke argues that Cincinnati/Hamilton County, in asserting that the facilities should continue to be used because they have not yet failed, ignore the reality of the current situation. Duke points out that the process of permitting and constructing a replacement will take many years and that the Company will be unable to supply natural gas to its customers on a peak winter day, if the propane storage caverns fail before that process is complete. Duke also asserts that Cincinnati/Hamilton County have misrepresented the testimony of Company witness Long in reaching their conclusion that the propane-air facilities do not need to be retired.

{¶ 31} In its first ground for rehearing, NOPE argues that the Board unlawfully applied a standard that accommodated Duke's convenience in determining the basis of need for the CCE rather than using a legal standard that considers whether the general public has a definite need or would benefit from the Project. With respect to the retirement of the propane-air plants, NOPE claims that the Board's decision is based on evidence offered by witnesses who lacked knowledge of the plants and instead relied on general third-party

conclusions that the plants should be retired. According to NOPE, such conclusory opinions are nothing more than evidence of Duke's desire to construct the CCE and cannot amount to a definite need of the general public. NOPE also argues that the Board found that the CCE is needed based on growth and forecasting, in the face of evidence showing declining population projections and the ability of the current system to serve public needs for the foreseeable future. Regarding the replacement and upgrading of existing infrastructure, NOPE agrees that the CCE will likely support Duke's need to replace and upgrade aging pipelines and related infrastructure; however, according to NOPE, the Board must consider the definite need of the general public, not the Company's need, and that the Board must focus on the public's need as it relates to the Project, not the existing infrastructure. NOPE maintains that the CCE will facilitate Duke's convenience in repairing and replacing other pipelines in the central corridor, which does not meet the legal standard requiring a definite need of the general public.

{¶ 32} In its memorandum contra the applications for rehearing, Duke asserts that the Board applied the correct standard to determine the basis of need for the Project and reached conclusions that were supported by record evidence. Duke emphasizes that, at no point, did the Board apply a standard of mere convenience; rather, according to the Company, NOPE's contention that the Board applied an incorrect legal standard is based on NOPE's own analysis of the evidence. Regarding the retirement of the propane-air facilities, Duke argues that it would be imprudent to wait until the facilities fail to retire them and that, contrary to NOPE's claims, the propane storage caverns cannot be inspected and leaks in the caverns cannot be repaired. Addressing NOPE's arguments regarding growth and forecasting, Duke emphasizes that, even under the forecast offered by NOPE, the Company would be unable to serve the needs of the system without the propane-air peaking facilities. Finally, Duke notes that its response to Cincinnati/Hamilton County on the issue of the replacement of aging infrastructure, as summarized above, also serves as its response to NOPE's similar arguments.

{¶ 33} The Board finds that Cincinnati/Hamilton County's and NOPE's respective first grounds for rehearing should be denied. In the Opinion, Order, and Certificate, the Board thoroughly addressed all of the parties' arguments regarding the basis of need for the CCE. Following a review of the parties' positions, the Board fully explained its conclusion that Duke had demonstrated the basis of need for the Project, in accordance with R.C. 4906.10(A)(1). Opinion, Order, and Certificate at ¶¶ 54-60. The Board agreed with Duke and Staff that the CCE is needed to facilitate the retirement of the Company's aged and outdated propane-air facilities, while the Project will also improve the north/south system balance of supply and enable the Company to replace Line A and other aging pipelines in its system without the occurrence of service interruptions for customers. Contrary to the assertions of Cincinnati/Hamilton County and NOPE, the Board was persuaded not only by the testimony and other evidence provided by Duke and Staff on the question of need, but also by the Gas System Master Plan Study 2015-2035 prepared by the Company's consultant, Lummus Consultants International, Inc. (Lummus), which was offered into evidence by NOPE and was extensively relied upon by both Cincinnati/Hamilton County and NOPE in making their various arguments in this case. Additionally, neither Cincinnati/Hamilton County nor NOPE has offered any new consideration for the Board with respect to the evidence of record on the matter of need and we decline their request for a reweighing of that evidence.

{¶ 34} Turning to the other arguments raised by Cincinnati/Hamilton County and NOPE, the Board finds no merit in Cincinnati/Hamilton County's contention that Duke changed course and restated the Project's purpose at some point during this proceeding. Rather, from the beginning, Duke has informed the Board, as reflected in its application, that the Company's objectives for the Project are threefold; the Company seeks to retire its propane-air peaking facilities, to improve the north/south supply balance in its system, and to facilitate the replacement of aging infrastructure (Duke Ex. 3 at 2-2, 3-1). The evidence addressing these three objectives constituted the basis for the Board's finding of need and, at no point, did the Board rely on evidence of growth projections, contrary to NOPE's claim. Cincinnati/Hamilton County also question the Board's finding that there is nothing in the

record that contradicts the testimony of Duke witnesses Long and Hebbeler that the propane-air facilities are near the end of their useful lives. We disagree with Cincinnati/Hamilton County's position that evidence that the 1960s-era propane-air facilities and associated propane storage caverns continue to provide service and have not yet failed should be equated with evidence that the facilities are not approaching the end of their useful lives. The Board reiterates that prudent system planning requires a proactive approach that includes the periodic retirement of old and outmoded facilities. Opinion, Order, and Certificate at ¶ 57.

{¶ 35} Further, we find no merit in NOPE's contention that the Board merely accommodated Duke's convenience in determining the basis of need for the CCE or that the Board's analysis under R.C. 4906.10(A)(1) should have employed a legal standard that considers whether the general public has a definite need for the Project. As noted above, the Board thoroughly explained and analyzed the evidence of record on the basis of need, which demonstrates that the CCE is needed to fulfill the three objectives for the Project. Although NOPE contends that the Board's analysis should have focused on the interests of the general public, the Board's consideration of the basis of need criterion set forth in R.C. 4906.10(A)(1) involves a review of such factors as specific projections of system conditions, local requirements, load flow studies, and contingency analyses and a focus on system performance and improvement, consistent with Ohio Adm.Code 4906-5-03. The interests of the general public are fully considered under the public interest, convenience, and necessity criterion found in R.C. 4906.10(A)(6). In any event, as discussed further below, the legal standard propounded by NOPE does not govern the Board's review of Duke's application, which must be evaluated based on the statutory criteria in R.C. 4906.10(A). NOPE's arguments regarding the knowledge and expertise of certain witnesses are also addressed below.

{¶ 36} In its second ground for rehearing, NOPE asserts that the Board unreasonably and unlawfully issued a certificate to Duke in the absence of a finding that no reasonably adequate public service exists. Identifying the source of its argument that the Board applied

an unlawful standard in determining the basis of need for the CCE, NOPE states that, in similar contexts, the Ohio Supreme Court has interpreted “necessity” in “public convenience and necessity” as contemplating “a definite need of the general public * * * where no reasonably adequate service exists.” *Mason v. Pub. Util. Comm.*, 34 Ohio St.2d 21, 23, 295 N.E.2d 412 (1973). NOPE asserts that, in the present case, the record demonstrates that adequate service currently exists and will continue to exist well into the future and, therefore, the Board erred in its finding of need for the Project.

{¶ 37} In response, Duke contends that the Board was not required to make the finding that “no reasonably adequate service exists” to issue the certificate. Duke notes that NOPE relies on an inapposite case in which the Ohio Supreme Court interpreted the use of the word “necessity” in R.C. 4921.10, a since-repealed statute that governed situations where a motor transportation company sought a certificate to operate in a territory where another motor transportation company was already operating. According to Duke, NOPE cites no instance of the Board applying R.C. 4921.10 or any case interpreting it to the Board’s required analysis under R.C. 4906.10. Given its obligation under R.C. 4905.22 to provide adequate service at all times, Duke asserts that it would be nonsensical to require the Company to demonstrate a lack of adequate service before it is permitted to construct a new pipeline. Regarding NOPE’s contention that adequate service will continue to exist well into the future, Duke counters that the record demonstrates that the CCE is needed for the continued provision of adequate service. Duke notes that NOPE fails to explain its position and instead merely offers citations to the record that fail to address adequacy of service, show merely that adequate service currently exists, fall short of supporting NOPE’s belief that adequate service will continue in the absence of the CCE, or undermine NOPE’s position altogether.

{¶ 38} The Board finds that the proper legal standard has been applied to determine the basis of the need for the CCE. R.C. 4906.10(A) sets forth the criteria that must be used by the Board in rendering a decision either granting or denying an application for a certificate as filed, or granting it upon such terms, conditions, or modifications of the

construction, operation, or maintenance of the major utility facility as the Board considers appropriate. *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 27 (determining that, “[i]n granting a certificate for the construction, operation, and maintenance of a major utility facility, the [B]oard must determine eight specific points,” pursuant to R.C. 4906.10(A)). Under R.C. 4906.10(A)(1), the Board is directed to determine the basis of the need for the facility if the facility is a gas pipeline. Ohio Adm.Code 4906-5-03, in turn, specifies the information to be provided by an applicant to facilitate the Board’s review of the need for a proposed facility. In this case, the Board thoroughly considered Duke’s application pursuant to R.C. 4906.10(A)(1) and Ohio Adm.Code 4906-5-03 and the Board’s finding of need for the Project was consistent with the applicable legal requirements.

{¶ 39} NOPE’s reliance on *Mason* is misplaced, as the case pertains to the issuance of a certificate of public convenience and necessity to a motor transportation company under the Motor Transportation Act, specifically now-repealed R.C. 4921.10. With respect to the legal standard referenced in *Mason* and here propounded by NOPE, the Ohio Supreme Court stated that “[a] ‘necessity’ for motor transportation service as contemplated by the Motor Transportation Act is not synonymous with a ‘convenience,’ but is a definite need of the general public for a transportation service where no reasonably adequate service exists.” *Mason* at 23, quoting *Canton-East Liverpool Coach Co. v. Pub. Util. Comm.*, 123 Ohio St. 127, 174 N.E. 244 (1930). NOPE has not explained how the *Mason* case, which clearly pertains to motor transportation service under the now defunct Motor Transportation Act, has any bearing on the Board’s consideration of an application for a certificate for the construction of a major utility facility. As noted above, the interests of the general public are considered under the public interest, convenience, and necessity criterion in R.C. 4906.10(A)(6), and the Board fully evaluated and addressed the parties’ arguments regarding the public interest, convenience, and necessity in the Opinion, Order, and Certificate. Opinion, Order, and Certificate at ¶¶ 151-157. NOPE’s second ground for rehearing should, therefore, be denied.

{¶ 40} In its third ground for rehearing, NOPE contends that, using an unlawful standard, the Board unreasonably and unlawfully found that Duke demonstrated the basis of need, because the Board found that additional service is necessary by relying on discredited and inadmissible evidence on growth and capacity, aging infrastructure, and balance of supply. NOPE claims that the Board's decision is based on the inadmissible hearsay evidence offered by Duke and Staff witnesses who lacked the knowledge or technical expertise to support their opinions regarding the retirement of the propane-air plants.

{¶ 41} Duke responds that NOPE did not identify a specific instance where the Board relied on Staff witness Conway's testimony regarding the retirement of the propane-air peaking plants. Duke adds that, regardless, the Board often allows hearsay testimony and uses its administrative expertise to accord the testimony the appropriate weight. Turning to the testimony of Duke witness Long, the Company notes that Mr. Long relied on the opinions of a third-party expert, which is both supported by the Board's practice and Ohio's rules of evidence. According to Duke, Mr. Long's conclusion regarding the need to retire the propane-air facilities was supported by substantial evidence of record, including the Lummus report.

{¶ 42} The Board finds no merit in NOPE's argument that the Board relied on discredited or inadmissible evidence in reaching its conclusion on the basis of the need for the CCE. In support of its contention, NOPE points to three limited instances of purported hearsay testimony offered by Staff witness Conway and Duke witness Long on cross-examination; however, the statements in question are not among the cited evidence upon which the Board relied in reaching its decision regarding the Company's need to retire the propane-air plants. In any event, NOPE has not disputed the propriety of any evidentiary ruling issued during the hearing in this matter, and the testimony cited by NOPE was admitted into the record in this proceeding, consistent with the Board's broad discretion in the conduct of its hearings. *In re Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 15. Neither are we persuaded by NOPE's assertion that

Mr. Long's testimony should be disregarded because he is not a geologist. As we noted in the Opinion, Order, and Certificate, Mr. Long is employed as General Manager of Pipeline Operations for Duke Energy Corp., Piedmont Natural Gas, and oversees natural gas facilities, propane facilities, liquefied natural gas facilities, pipeline control systems, and control room operations located in service areas in Ohio, Kentucky, Tennessee, North Carolina, and South Carolina. Opinion, Order, and Certificate at ¶ 55, fn. 9. As Mr. Long explained, he has a bachelor's degree in mechanical engineering and has been employed for the past 20 years by multiple pipeline companies with significant experience in the design, construction, and operations of natural gas and hydrocarbon liquid facilities. (Duke Ex. 8 at 1; Tr. I at 144.) We, therefore, do not agree that Mr. Long lacks the appropriate education, experience, or personal knowledge to address Duke's propane-air peaking plants and related infrastructure or the need for their retirement. Finally, NOPE argues that the Board relied on discredited testimony, because Mr. Long was unaware of other propane-peaking facilities in use across the country. The cited portion of Mr. Long's cross-examination merely indicates that Mr. Long testified that he is not aware of any other local distribution company that uses propane-air peaking, which was not discredited by NOPE or any other party (Tr. I at 173). Regardless, NOPE has failed to identify any point in the Opinion, Order, and Certificate where the Board relied on this statement from Mr. Long in support of its conclusion on the issue of the need for the CCE. For these reasons, NOPE's third ground for rehearing should be denied.

2. NATURE OF PROBABLE ENVIRONMENTAL IMPACT AND MINIMUM ADVERSE ENVIRONMENTAL IMPACT

{¶ 43} In its fourth ground for rehearing, NOPE asserts that the Board unreasonably and unlawfully issued a certificate to Duke, given that the Company failed to evaluate environmental impacts to allow the Board to determine the nature of the probable environmental impact and whether the preferred or alternate route posed the minimum adverse environmental impact. NOPE argues that the Board's conclusions regarding the environmental impact of the Project are based on a check-the-box approach, whereby the Board accepted any evidence offered by Duke and employed an administrative checklist in

conducting the impact analysis. NOPE further argues that the record reflects a number of probable socioeconomic, ecological, and other environmental impacts that remain unanalyzed. NOPE asserts that the Board has unlawfully and unreasonably required an after-the-fact review process and shifted responsibility for addressing the impacts to the public.

{¶ 44} Duke responds that the Board properly considered the Company's evaluation of environmental impacts. Duke adds that, although NOPE provided a list of citations to the hearing transcripts, NOPE failed to explain or even identify any specific impact that it believes to have been incompletely analyzed.

{¶ 45} In the Opinion, Order, and Certificate, the Board thoroughly evaluated the evidence of record addressing the socioeconomic, ecological, and other impacts associated with the Project and fully explained the basis for its conclusion that Duke had demonstrated the nature of the probable environmental impact, consistent with R.C. 4906.10(A)(2). Opinion, Order, and Certificate at ¶¶ 73-76, 82, 90, 92-93. With respect to R.C. 4906.10(A)(3), the Board completed the same comprehensive evidentiary review and provided a detailed explanation of its finding that the alternate route represents the minimum adverse environmental impact. Opinion, Order, and Certificate at ¶¶ 118-123. Initially, we note that NOPE has not identified any specific impact that it believes to have been incompletely analyzed by the Board. Further, although NOPE characterizes the Board's evaluation of Duke's application as a check-the-box approach, the Board, in fact, conducted a comprehensive review of the probable environmental impact of the CCE, as it has in other cases proposing the construction of a major utility facility. As part of this review, the Board must ensure that an applicant has provided sufficient information to comply with the Board's rules and to enable the Board to make the statutory findings under R.C. 4906.10(A).

{¶ 46} NOPE also argues that the conditions imposed by the Board on the certificate unreasonably require ongoing consultation with impacted communities, which shifts responsibility for addressing certain impacts to the public. However, R.C. 4906.10(A) specifically authorizes the Board to grant a certificate upon such terms, conditions, or

modifications of the construction, operation, or maintenance of the major utility facility as the Board considers appropriate, which the Ohio Supreme Court has recognized. *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 16. As we stated in the Opinion, Order, and Certificate, the Court has acknowledged that the construction of power siting projects subject to the Board's authority necessitates a dynamic process that does not end with the issuance of a certificate. Opinion, Order, and Certificate at ¶ 164. In this case, the conditions imposed by the Board are intended to mitigate the CCE's impacts and to ensure that Duke continues to involve and inform the local communities as the Company proceeds with the Project, particularly with respect to construction-related concerns identified by the intervenors. Accordingly, we find that NOPE's fourth ground for rehearing should be denied.

{¶ 47} In its fifth ground for rehearing, NOPE claims that the Board unreasonably and unlawfully disregarded less impactful routes proposed by Lummus and by NOPE witness Guldmann. Noting the Board's finding that the western route options evaluated by Lummus were located partly in Kentucky, NOPE contends that nothing in R.C. 4906.10 prohibits the Board from considering less impactful routes that traverse multiple jurisdictions. NOPE also argues that the Board's decision appears to be based on the unreasonable and unlawful assumption that the Board can only consider the routes proposed by Duke, even in the face of evidence that less impactful routes exist.

{¶ 48} In response, Duke contends that the Board adequately considered other route options mentioned in the Lummus report and by Dr. Guldmann. Duke also argues that NOPE misrepresents the Board's reasoning. According to Duke, the Board did not cursorily exclude other route options merely because they were partly located in Kentucky, as NOPE claims. Further, with respect to NOPE's position that the Board limited its review to the two routes proposed by the Company, Duke emphasizes that NOPE ignored the fact that the Board provided an extensive analysis of other routes under consideration and their respective abilities to address the basis of the need for the Project and their probable relative impact.

{¶ 49} In their second ground for rehearing, Cincinnati/Hamilton County argue that the Board unreasonably and unlawfully ratified Duke's inadequate review of pipeline routes and disregarded less impactful routes proposed by the Company's own consultants and the intervenors. Cincinnati/Hamilton County contend that the Board failed to address other routes proposed by Lummus that would have enabled the retirement of the propane-air facilities and substantially reduced reliance on the Foster Station. Cincinnati/Hamilton County add that the Board misconstrued evidence regarding western route options and based its decision on the inaccurate premise that the western route options evaluated by Lummus were not suitable to meet Duke's stated need for the Project, as they would not allow for the retirement of the propane-air facilities. Cincinnati/Hamilton County maintain that the Board ignored evidence that Duke constrained and manipulated the route selection study to arrive at a predetermined outcome and, therefore, disregarded routes outside of the central corridor that would be more viable, safer, and less disruptive. Cincinnati/Hamilton County request that the Board consider all potential routes, particularly the eastern and western routes recommended by Duke's consultant.

{¶ 50} Duke asserts that the Board reasonably and lawfully determined that the Company and its siting consultant completed a reasonable route alternatives analysis, consistent with Ohio Adm.Code 4906-5-04, and that Cincinnati/Hamilton County have not identified any way in which the Company's analysis failed to comply with any legal requirement. Regarding the extent of Duke's involvement in the route selection study, the Company responds that it was not required to use a third-party siting consultant, while the Board's rules contemplate that the applicant will conduct the route selection study. Disputing the assertion that the Board misconstrued evidence regarding western route options, Duke maintains that the Lummus report does not support Cincinnati/Hamilton County's position that the propane-air peaking facilities could have been retired under any of the routes considered by Lummus. With respect to eastern route options, Duke points out that Cincinnati/Hamilton County made no attempt to question the Board's finding that such options, given their longer length, would have similar or greater overall impacts than the central routes and require at least one additional lateral.

{¶ 51} The Board finds that NOPE's fifth ground for rehearing and Cincinnati/Hamilton County's second ground for rehearing should be denied. Upon review of the evidence of record, the Board reasonably concluded that Duke and its siting consultant, CH2M, completed a reasonable route alternatives analysis, consistent with Ohio Adm.Code 4906-5-04, and utilized an appropriate route selection process within the constraints of the Project. The Board also thoroughly considered both the preferred and alternate routes, as well as eastern and western route options that were addressed in the route selection study, application, and Staff Report. Additionally, the Board specifically considered the route options noted in the Lummus report. Opinion, Order, and Certificate at ¶¶ 118-123. We find that our adoption of the alternate route, as recommended by Staff, was reasonable, supported by the evidentiary record, and consistent with R.C. 4906.10(A)(3).

{¶ 52} Contrary to the position of NOPE and Cincinnati/Hamilton County, the Board addressed the western and eastern route options identified in the Lummus report. Among other findings, the Board noted that no party had explained how a much longer pipeline of 44 miles in length, as proposed under the eastern expansion scenario in the Lummus report, would have fewer overall impacts. Opinion, Order, and Certificate at ¶ 120. The three western expansion scenarios in the Lummus report would likewise involve the construction of longer pipelines, with lengths ranging from 18.1 to 21.6 miles. (NOPE Ex. 19 at Ex. JMG-7 at 64-67, 69-70, 72.) Although NOPE witness Guldmann conducted a self-described "detailed geographical analysis" of the W-1 expansion scenario identified in the Lummus report, his analysis was limited to a review of population/residence and land uses, with no assessment of any other environmental factor considered by the Board (NOPE Ex. 19 at 30-33). Further, Dr. Guldmann acknowledged that the W-1 route option would be located partly in Kentucky (Tr. III at 548). Although NOPE asserts in its application for rehearing that nothing in R.C. 4906.10 restricts the Board from considering routes that would cross multiple jurisdictions, the Board's authority is governed by R.C. Chapter 4906 in its totality. As relevant to this case, the Board is authorized, pursuant to R.C. 4906.04, to issue certificates for the construction of a major utility facility only in the state of Ohio.

{¶ 53} NOPE also claims that the eastern and western route options were highly ranked in the Lummus report. However, in the Opinion, Order, and Certificate, we noted that Lummus clearly indicated that its ranking of the expansion options was merely provided as an example showing how the options might be weighted by Duke, with Lummus concluding only that the Company should implement at least one of the seven pipeline expansions addressed in the report. The Board, therefore, rejected NOPE's contention that the western route options were more favorably ranked by Lummus. Opinion, Order, and Certificate at ¶ 120. Finally, we disagree with NOPE's contention that the Opinion, Order, and Certificate indicates that the Board's review is limited to the routes proposed by an applicant. Here, the Board considered not only the preferred and alternate routes proposed by Duke, but numerous other route options addressed by Lummus and the intervenors and discussed in the route selection study and Staff Report. Opinion, Order, and Certificate at ¶¶ 118-121.

{¶ 54} We also disagree with Cincinnati/Hamilton County's argument that the Board based its decision on the inaccurate premise that the western route options in the Lummus report would not allow for the retirement of Duke's propane-air facilities. In the Opinion, Order, and Certificate, the Board noted that Duke's application reflects that three western scenarios outside of the 1-275 loop and beyond the route selection study area were ultimately rejected by the Company, given that its system modeling study indicated that the routes would not allow for retirement of the propane-air facilities or facilitate replacement work in the central core area. Opinion, Order, and Certificate at ¶ 120. Cincinnati/Hamilton County's position is based on a single sentence in the Lummus report stating that "[e]ach scenario assumes a system peak sendout of 42,462 [thousand cubic feet per hour], available Foster pressure of 400 psig, and no contribution from the propane air plants." However, the Lummus report also forecasts the peak hourly flow for 2014 through 2035, with a one-percent probability of exceedance, at more than 45,500 thousand cubic feet per hour. (NOPE Ex. 19 at Ex. JMG-7 at 48-49, 61.) As we noted, nothing precluded the intervenors from questioning Duke witness Long, as the system modeling expert, about these western route options. Opinion, Order, and Certificate at ¶ 120. Finally, regarding Cincinnati/Hamilton

County's assertion that Duke unreasonably constrained the route selection study to arrive at a predetermined outcome, the Board thoroughly addressed this argument in the Opinion, Order, and Certificate and explained the basis for its conclusion that Duke, in conjunction with CH2M, had completed a reasonable route alternatives analysis, consistent with Ohio Adm.Code 4906-5-04, and properly delineated the study area. Opinion, Order, and Certificate at ¶¶ 118-119. Although Cincinnati/Hamilton County object to the extent of Duke's role in the route selection study, Ohio Adm.Code 4906-5-04 contemplates that the study will be conducted by the applicant.

{¶ 55} In its application for rehearing, Reading argues that the Board failed to enforce its own regulations in the route selection process, which renders the Board's selection of the alternate route arbitrary and capricious and in violation of the due process rights of the municipalities and citizens along the alternate route.² Specifically, Reading notes that Ohio Adm.Code 4906-3-05 provides that "[a]ll standard certificate applications for electric power transmission facilities and gas pipelines shall include fully developed information on two sites/routes," while Ohio Adm.Code 4906-3-06(A)(2) requires that incomplete applications be rejected. According to Reading, the Board acknowledged that Duke informed the Board that its initial application was incomplete, as the Company had focused its attention on the preferred route, and that additional investigation of the alternate route was necessary after Staff recommended its adoption. Reading asserts that the Board interpreted Ohio Adm.Code 4906-3-05 as a general requirement instead of rejecting Duke's application under the rules. Reading contends that it is undisputed that Staff's initial selection of the alternate route was based on incomplete information. Reading, therefore, requests that the route selection process be reopened.

{¶ 56} Duke disagrees with Reading's contention that the Board acknowledged that Duke admitted that its initial application was incomplete. According to Duke, the Board specifically considered the issue of the completeness of the application and found that Duke

² In its application for rehearing, Reading states that it also adopts the arguments raised in the applications for rehearing filed by Cincinnati, Blue Ash, Evendale, and NOPE.

provided all required information for review by Staff. Duke adds that the parties have not been prejudiced in this proceeding.

{¶ 57} In the Opinion, Order, and Certificate, the Board thoroughly addressed the contention of Reading and other intervenors that Duke has not provided sufficient information for the Board to make the necessary determination under R.C. 4906.10(A)(3). Although we noted that Duke acknowledged in its April 2018 supplemental filing that it had focused more on the preferred route and that additional investigation of the alternate route was necessary after Staff recommended its adoption in Staff's initial report, the Board concluded that, over the course of the proceeding, Duke has provided the information delineated in R.C. 4906.06(A) and the Board's rules, which has enabled Staff to investigate the application, as required by R.C. 4906.07(C). Opinion, Order, and Certificate at ¶ 122.

{¶ 58} In its application for rehearing, Reading asserts that Staff's selection of the alternate route was based on insufficient information. Reading also contends that Duke's application should have been rejected as incomplete pursuant to Ohio Adm.Code 4906-3-06(A). The Board, however, notified Duke, by correspondence dated March 3, 2017, that its application had been found to comply with Ohio Adm.Code Chapters 4906-1 et seq. and that Staff had received sufficient information to begin its review of the application. Nothing in R.C. Chapter 4906 or the Board's rules precludes an applicant, as Duke has done in this case, from supplementing its application after Staff begins its statutory investigation under R.C. 4906.07(C). In fact, Ohio Adm.Code 4906-3-11 contemplates that an applicant may seek to amend or modify a pending application that has been accepted by the Board as sufficiently complete for investigation. We, therefore, do not agree with Reading's apparent belief that Duke should have been precluded from undertaking additional review of the alternate route and subsequently amending or modifying its application as deemed necessary by the Company. The Ohio Supreme Court has recognized that "proper facility siting is subject to modification as the process continues – proposals are tested and matched to the defined conditions." *In re Application of Buckeye Wind, LLC*, 131 Ohio St.3d 449, 2012-Ohio-878, 966 N.E.2d 869, ¶ 17.

{¶ 59} Consistent with Ohio Adm.Code 4906-3-11(A)(6), the ALJ determined, by Entry dated December 18, 2018, that Duke's supplemental information should be considered an amendment of a pending accepted, complete application, in light of Staff's representation that the Company's revisions to the proposed alternate route may impact two additional landowners. The ALJ also directed, pursuant to Ohio Adm.Code 4906-3-11(A)(5), that Staff review the application for amendment and file a report of investigation. As directed, Staff filed the Staff Report on March 5, 2019, which superseded its earlier report and addressed the supplemental information filed by Duke on April 13, 2018. The basis for Staff's recommendation of the alternate route was explained in the Staff Report (Staff Ex. 1 at 47-50). We find that nothing in this procedural history has been contrary to the Board's rules. Further, as we noted in the Opinion, Order, and Certificate, all of the intervenors have been afforded ample opportunity to fully participate in this proceeding through discovery, an evidentiary hearing providing for cross-examination of Duke's and Staff's witnesses and presentation of their own witnesses, and post-hearing briefing. Opinion, Order, and Certificate at ¶ 122. Finally, through the conditions imposed on the certificate, the Board has required Duke to continue to work with the local communities along the alternate route throughout the remainder of the siting process. Opinion, Order, and Certificate at ¶ 190. The Board, therefore, finds that Reading's request for rehearing on this issue should be denied.

{¶ 60} Reading also asserts that the elimination of interstate and other Ohio Department of Transportation (ODOT) rights of way from route consideration resulted in a route selection process that was unreasonable, arbitrary, and capricious. Reading notes that the technical constraint criteria used in the route selection process included placement of the routes along interstates at least ten feet outside of ODOT's rights of way and, along other roads, placing the routes outside of the right of way. Noting that Duke's route selection expert, Dr. Nicholas, testified that he was informed of this technical constraint by the Company and that he was unaware of any legal requirement to impose it, Reading contends that Duke failed to offer a reason as to why the constraint was legally required. Similarly, in its memorandum in support of its application for rehearing, Blue Ash contends that there

is nothing in the record from an ODOT representative establishing any restriction on construction of the CCE along Interstate 71 and that the Board, therefore, erred in addressing this restriction without record support.³

{¶ 61} Duke responds that its removal of interstate highways from consideration was not unreasonable. Duke notes that the only evidence on this issue is that provided by the Company in its application and that no party rebutted the Company's position that the siting of the CCE in parallel with an interstate highway, within the right of way, would not be permitted.

{¶ 62} In the Opinion, Order, and Certificate, the Board addressed Reading's contention that Duke unreasonably eliminated route options along interstates as a result of ODOT's restrictions. Specifically, the Board found that Duke examined the option of constructing the Project within the right of way along I-71 and consulted with ODOT regarding its existing regulations and policies, which confirmed that longitudinal placement of utility infrastructure within interstate rights of way is not generally permitted for several reasons, including maintenance access, potential road expansions, public safety, and utility construction and repair activities. The Board further found that Duke's siting team, therefore, considered routes parallel to I-71, yet outside of the right of way. Opinion, Order, and Certificate at ¶ 119. In reaching this determination, the Board relied on information provided by Duke in its application and route selection study. This information is part of the evidentiary record in this proceeding (Duke Ex. 3 at 4-15, App. 4-1 at 1-3 to 1-7, 2-6 to 2-9). Duke explained the basis for its use of this technical constraint in the application and route selection study and, contrary to Reading's position, an applicant may impose technical constraints in the siting process for reasons other than legal obligation. Accordingly, the

³ Blue Ash states that it also incorporates by reference the arguments raised in the applications for rehearing filed by Cincinnati, Reading, Evendale, and NOPE.

Board finds that the rehearing requests of Reading and Blue Ash on this issue should be denied.⁴

{¶ 63} Next, Reading submits that, because Duke did not include the constructability review with its application for a certificate, Staff did not have an opportunity to consider, prior to its final recommendation, the engineering challenges of constructing the CCE through Reading. Specifically, Reading argues that Staff should have been apprised that construction, along Third Street in Reading, would restrict residents' access to their homes. Reading avers that, in dismissing Reading's concerns, the Board points to statements by Duke in its reply brief as opposed to record evidence. Reading argues that Duke's reply brief is not evidence and that the Board should not have relied on the brief to form the basis of its decision.

{¶ 64} Duke replies that Reading's claims regarding the Board's reliance on Duke's reply brief, as opposed to record evidence, are misleading. Duke notes that, although the Opinion, Order, and Certificate cites to the Company's reply brief, the cited portion of the reply brief quotes and cites the constructability review, which stated that Third Street could be kept open, although conventional construction would restrict access. Duke further acknowledges that its reply brief mentioned plating over of driveways as an example of possible nonconventional construction techniques to facilitate resident access. Duke avers that the constructability review is record evidence that supports the Company's ability to keep Third Street open during construction. Duke adds that Condition 30 requires that the Company use construction techniques that will ensure residents' access to their homes during construction.

{¶ 65} The Board notes that the paragraph cited by Reading in the Opinion, Order, and Certificate, Paragraph 109, is the Board's recitation of Reading's opposition to the

⁴ Blue Ash's application for rehearing on this issue is also procedurally deficient. R.C. 4906.12 and 4903.10 (providing that an application for rehearing "shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful"). Although Blue Ash disputes, in its memorandum in support of its application for rehearing, the Board's findings regarding the ODOT restrictions, Blue Ash failed to raise the issue in its application for rehearing.

construction of the CCE along the alternate route and Duke's response. Reading overlooks that this paragraph of the Opinion, Order, and Certificate cites not only Duke's reply brief in response to Reading's arguments but also the constructability review, which is part of the evidence of record in this proceeding (Reading Ex. 4).⁵ To be clear, the Opinion, Order, and Certificate cited Duke's reply brief because it included the Company's declaration that the Company is willing to use unconventional construction techniques, where needed, and is amenable to working with residents to ensure minimal disruption during construction, including plating over driveways to allow for resident access (Duke Reply Br. at 21). Rather than relying on this representation to dismiss the issue, as Reading claims, the Board required, through the conditions on the certificate, that Duke take measures to fully address Reading's concerns. The Board directed Duke to use construction techniques that will ensure access to residences during construction, as part of Condition 30. Opinion, Order, and Certificate Order at ¶¶ 184-185, 190. In a footnote to its request for rehearing, Reading states that the condition by itself provides little assurance that it will be met, if Duke finds that construction techniques that will ensure access cannot be used. We remind Reading that Staff monitors compliance with the certificate conditions and that, if Staff determines that Duke is not in compliance with any of the certificate conditions, Staff can bring the concern to the attention of the Board. Opinion, Order, and Certificate at ¶ 164. In addition, Duke is required to establish a complaint resolution procedure to address public grievances as a result of construction of the CCE, in accordance with Condition 5. Opinion, Order, and Certificate at ¶ 190. These are two means by which the Board enforces certificate conditions. Accordingly, the Board finds that the Opinion, Order, and Certificate reflects thorough consideration of this issue and that Reading's request for rehearing should be denied.

{¶ 66} Additionally, Reading contends that the Board relied upon an unreasonable weighting scheme, which, according to Reading, arbitrarily assigned equal scoring weight to homes between zero to 100 feet from the CCE and homes between 100 and 1,000 feet.

⁵ The constructability review indicates that, although Third Street is narrow, it could be kept open during construction, with some restrictions on access to homes if conventional construction techniques are used (Reading Ex. 4 at 49).

Reading believes that this weighting scheme ignored the actual and continued inconvenience and disruption that will be suffered by homeowners and residents living immediately adjacent to the CCE that will not be suffered by those residing hundreds of yards away. According to Reading, Staff's preference for the alternate route was based, in part, on the fact that the alternate route impacts fewer residences within 1,000 feet of the centerline, while the preferred route impacts fewer residences within 100 feet of the centerline. Reading asserts that Staff ignored other impacts, such as the fact that the alternate route has a higher percentage of right of way in residential areas than the preferred route (5.4 percent and 3.8 percent, respectively); the alternate route has 1,480 more linear feet in residential areas than the preferred route; and the alternate route has more residential structures within 200 feet of the right of way than the preferred route.

{¶ 67} Duke asserts that the use of unweighted scoring in the route selection study was reasonable. Duke points out that its routing expert, Dr. Nicholas, testified that weighting would have had little impact on the outcome of the route selection study and that, even where weighting is used, higher or lower weights are assigned to categories of factors, not individual factors as Reading proposes. Duke maintains that Reading overlooks the fact that arithmetic scoring of routes is only part of the process, given that scored routes are further evaluated. Additionally, Duke notes that, in light of Reading's concerns, the Board imposed conditions that require the Company to ensure access for residents on Third Street and that permit the Company to negotiate longer construction hours with local communities so as to shorten the impact of construction on residents.

{¶ 68} The Board finds that Reading's request for rehearing on this issue should be denied. The Staff Report, in assessing the nature of the probable impact of the Project, provides the number of residences both within 100 feet and within 1,000 feet of the preferred and alternate routes.⁶ In recommending approval of the alternate route, Staff also noted, in the Staff Report, that the alternate route has significantly fewer residences within 1,000 feet.

⁶ Specifically, Staff reported there are 115 residences within 100 feet and 3,153 residences within 1,000 feet of the preferred route, while there are 182 residences within 100 feet and 2,186 residences within 1,000 feet of the alternate route (Staff Ex. 1 at 33).

However, Staff offered other justifications for its recommendation, including that the alternate route presents fewer potential economic, ecological, and cultural resource impacts. (Staff Ex. 1 at 33, 49-50.) The Board's adoption of Staff's recommendation was similarly based on a comprehensive review of the CCE's probable environmental impact. Opinion, Order, and Certificate at ¶¶ 73-76, 82, 90, 92-93. The Board's determination that the alternate route represents the minimum adverse environmental impact was likewise reached after consideration of numerous socioeconomic, ecological, and other environmental factors and review of multiple route options and non-pipeline alternatives. Opinion, Order, and Certificate at ¶¶ 118-123. Although a major utility facility's proximity to residences is an important factor in our review of an application, it is not the only matter of concern, as the Board is required under R.C. 4906.10(A)(2) and (A)(3) to evaluate the facility's "environmental impact" and "other pertinent considerations." We, therefore, do not agree with Reading's contention that an unreasonable weighting scheme has been applied in this case. Further, regarding the argument that the Board has ignored inconvenience and disruption to residents, Reading acknowledges that Condition 30 requires Duke to use construction techniques that will ensure that access to residences remains available throughout construction. Although Reading professes doubt that Duke will adhere to this condition, the Board reiterates that, if the Company fails to comply with any of the established conditions, the Board may take appropriate action to ensure compliance, in accordance with R.C. Chapter 4906. Additionally, pursuant to Condition 5, the Board has required that Duke establish a complaint resolution procedure to address potential public grievances. Opinion, Order, and Certificate at ¶¶ 164, 190.

{¶ 69} In its third ground for rehearing, Blue Ash argues that the Board's decision is unlawful and unreasonable because the Board found that Duke did not follow or even review the most recent Blue Ash Comprehensive Development Plan in selecting the proposed routes, contrary to Ohio Adm.Code 4906-5-07(D). Blue Ash emphasizes that Duke's route selection study relied on the 2003 Blue Ash Comprehensive Development Plan rather than the plan adopted in early 2016. Blue Ash concludes that it was unreasonable

and unlawful for the Board to determine that Duke complied with R.C. 4906.10(A)(3), in the face of evidence showing that the Company relied on outdated information.

{¶ 70} Duke, in its memorandum contra, responds that the Company reasonably reviewed the Blue Ash Comprehensive Development Plan that was in effect when the route selection study was commenced. Duke notes that, by the time Blue Ash adopted its revised plan in early 2016, the Company had already developed the routing options discussed in the route selection study, as well as completed its efforts to obtain any then-current regional land use plans.

{¶ 71} We find no merit in Blue Ash's contention that the Board acknowledged that Duke did not attempt to obtain the most recent Blue Ash Comprehensive Development Plan. Blue Ash points to the Board's summary of the arguments raised in Blue Ash's briefs, which does not constitute the Board's conclusion on this issue. Opinion, Order, and Certificate at ¶ 72. In addressing the Blue Ash Comprehensive Development Plan in the Opinion, Order, and Certificate, the Board concluded that Duke had provided sufficient information to comply with Ohio Adm.Code 4906-5-07(D), which requires an applicant to provide both a description of the impact of the facility on regional development, referring to pertinent formally adopted regional development plans, and an assessment of the compatibility of the proposed facility and the anticipated resultant regional development with current regional land use plans. In encouraging consultation with local officials to identify and avoid conflicts, the Board also noted that an applicant should attempt to obtain the most recent land use planning documents in the course of preparing its application. Opinion, Order, and Certificate at ¶ 75, fn. 13. Here, however, Blue Ash acknowledges that its Comprehensive Development Plan was updated in early 2016. Given that CH2M's route selection study report was already completed by May 2016, we do not agree with Blue Ash's contention that there is clear evidence showing that Duke relied on outdated information (Duke Ex. 3 at App. 4-1). Accordingly, the Board finds that Blue Ash's third ground for rehearing should be denied.

{¶ 72} In its fourth ground for rehearing, Blue Ash contends that the Board's decision is unlawful and unreasonable because the tax revenue benefits expected to result from the CCE, as relied upon by Duke and the Board, were not supported by the evidence in the record. Blue Ash emphasizes that the Board acknowledged that Duke's economic impact calculations were speculative, as well as ignored the inconsistency in the Company's tax revenue estimates for the preferred and alternate routes and the admitted absence of a basis to support them. Asserting that there is nothing in the record to establish that Duke's estimates are accurate, Blue Ash also claims that the Company did not explain the basis for the increased amounts to be apportioned to the city, as initially reflected in the Company's application and later revised through the testimony of Company witness Hebbeler. According to Blue Ash, the Board unreasonably and unlawfully relied on Duke's unsubstantiated tax revenue calculations to support certification of the Project.

{¶ 73} Duke responds that it provided the property tax information in response to the requirement for its application. Duke adds that the accuracy of its tax calculations is not cause to overturn its certificate.

{¶ 74} In the Opinion, Order, and Certificate, the Board found that, consistent with Ohio Adm.Code 4906-5-06(D)(5), Duke provided, in its supplemented application, estimated tax revenues for the Project, with the Company projecting that the total first year property tax revenues, based on 2018 tax rates, would be \$3.3 million and \$2.9 million for the preferred and alternate routes, respectively. Opinion, Order, and Certificate at ¶ 74. The Board also noted that Mr. Hebbeler's testimony provided estimated annual property taxes of \$2.8 million and \$2.2 million for the preferred and alternate routes, respectively, which were based on 2016 tax rates. Opinion, Order, and Certificate at ¶ 74, fn. 12. We, therefore, do not agree with Blue Ash's contention that the Board ignored an inconsistency in Duke's estimated tax revenues. Neither do we agree that Duke was required to explain the underlying basis of its tax revenue projections or confirm its calculations; Ohio Adm.Code 4906-5-06(D)(5) merely requires an applicant to "provide an estimate of the increase in tax revenues as a result of facility placement." Finally, contrary to Blue Ash's assertion, the

Board did not admit that Duke's tax estimates were speculative and unreliable.⁷ In support of its argument, Blue Ash merely cites the Board's summary of Blue Ash's position in its briefs. Opinion, Order, and Certificate at ¶ 72. Nothing in the Board's conclusion on this issue suggests that the Board found Duke's estimated tax revenues to be unreliable. Rather, the Board concluded that Duke had provided sufficient tax estimates, consistent with the Board's rules, to determine the expected economic impact of the Project and to compare the preferred and alternate routes. Opinion, Order, and Certificate at ¶ 74. We, therefore, find that Blue Ash's fourth ground for rehearing should be denied.

{¶ 75} In the memorandum in support of its application for rehearing, Evendale makes three general arguments that the Opinion, Order, and Certificate is unreasonable.⁸ Evendale's first claim is that the Opinion, Order, and Certificate places an undue and unreasonable burden on the village and its residents. Evendale states that the construction of the CCE and the replacement of Line A will impact 20 percent of the households in Evendale. Evendale's second claim is that the Opinion, Order, and Certificate is unreasonable to the extent that it fails to explore other route options proposed by the Company or to consider Evendale's request that Duke replace its existing peaking plants rather than construct the CCE. Evendale's third claim is that the Opinion, Order, and Certificate is unreasonable, as it fails to account for the financial damage the CCE has caused and will cause Evendale in lost opportunities for businesses to locate to Evendale or to expand businesses already located in Evendale.

{¶ 76} Duke submits that Evendale's application for rehearing should be denied on the basis that it fails to meet the procedural requirements for an application for rehearing pursuant to R.C. 4903.10. Duke notes that Evendale makes conclusory unsupported assertions that fail to set forth specifically the ground or grounds on which Evendale considers the Opinion, Order, and Certificate to be unreasonable or unlawful. Responding

⁷ To the extent that Blue Ash uses the word "speculative" to mean "projected," the Board agrees that Duke has provided tax revenue estimates or projections, which is consistent with the Board's rules.

⁸ Evendale states that it also adopts the arguments raised in the application for rehearing filed by NOPE.

to the merits of Evendale's arguments, Duke contends that Evendale cites no evidence for its 20 percent figure and does not identify any specific inconvenience. Duke reiterates that the Board adequately considered the relative impacts of the proposed routes. According to Duke, Evendale did not specify any options that it deems more beneficial and, regardless, the Board determined that the Company's route selection study was reasonable. Duke also asserts that there is no record evidence that suggests that replacement of the current propane facilities with above-ground propane storage would be feasible or that it could be legally sited. Regarding the alleged financial damage, Duke states that Evendale did not explain how its lost business opportunities are relevant to the statutory criteria or cite any evidence that they even occurred.

{¶ 77} As their third ground for rehearing, Cincinnati/Hamilton County state that they support all specific grounds set forth in the applications for rehearing filed by the other intervenors. Similarly, in its first ground for rehearing, Reading states that it adopts the reasons within the applications for rehearing filed by NOPE, Cincinnati, Blue Ash, and Evendale.

{¶ 78} The Board finds that Cincinnati/Hamilton County's third ground for rehearing and Reading's first ground for rehearing are procedurally deficient, as they fail to meet the minimal requirement for an application for rehearing to state, with specificity, the ground or grounds for rehearing, as required by R.C. 4903.10 and applicable to Board proceedings pursuant to R.C. 4906.12, and Ohio Adm.Code 4906-2-32(A). For the same reason, Evendale's application for rehearing, which sets forth no grounds for rehearing, is also procedurally deficient. Further, Evendale's memorandum in support of its application for rehearing makes broad general claims about the Opinion, Order, and Certificate, without any citations to the order, statutes, regulations, transcripts, or other record evidence, including testimony offered by Evendale, in support of its claims that the order is unreasonable.⁹ We note that counsel for Evendale did not file an initial brief or a reply brief,

⁹ The Board notes that counsel for Evendale did not enter an appearance at any point during the evidentiary hearing held in this proceeding. With authority granted by counsel for Evendale to counsel for Reading,

with references to the record, to explain its position for the Board's consideration. With only the general claims in the memorandum in support, the Board finds that Evendale's application for rehearing fails to meet the specificity requirement of R.C. 4903.10 and, therefore, the application for rehearing, in its entirety, should be denied. *In re SRS, Inc.*, Case No. 01-2675-TR-UNC, Entry on Rehearing (Dec. 20, 2001) at 1-2; *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 376-378, 86 N.E.2d 10 (1949). Cincinnati/Hamilton County's third ground for rehearing and Reading's first ground for rehearing should also be denied.

{¶ 79} Even if the Board were to consider the merits of Evendale's claims on rehearing, the Board finds that Evendale's application for rehearing should be denied. In regard to Evendale's first claim, we note that the CCE will facilitate the replacement of Line A, but Line A is not part of this application. Further, the Opinion, Order, and Certificate considered and addressed certain impacts of construction, particularly on residential communities, and safety concerns and, to that end, the Board amended, supplemented, and adopted Conditions 5, 8, 13, 14, 15, 30, 33, 40, and 41 to mitigate the impact and limit the inconvenience to the communities along the alternate route. Opinion, Order, and Certificate at ¶ 190. With respect to Evendale's second claim, regarding replacement of the propane plants, the Opinion, Order, and Certificate included an extensive discussion of the parties' positions and the Board's rationale for concluding that the need for the CCE has been demonstrated. Opinion, Order, and Certificate at ¶¶ 35-60. Further, as addressed above, the Board thoroughly considered other route options. Opinion, Order, and Certificate at ¶¶ 118-123. Finally, Evendale does not cite record evidence in support of its claims regarding damage to the community and lost business opportunities. However, we note that, as stated in the Opinion, Order, and Certificate, the Board added Condition 41, which requires Duke to establish an ongoing process through which the Company shall engage local officials, including Evendale, to identify opportunities and options for promoting regional expansion and accommodating load growth. Opinion, Order, and Certificate at ¶¶ 73, 190. Therefore,

the joint testimony of two witnesses on behalf of Evendale was moved into the record by counsel for Reading (Tr. III at 748). Neither witness was present at the evidentiary hearing.

the Board finds that the three claims raised by Evendale in the memorandum in support of its application for rehearing were considered and addressed by the Board.

3. PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

{¶ 80} As its first ground for rehearing, Blue Ash argues that the Opinion, Order, and Certificate is unlawful and unreasonable because the Board did not evaluate legitimate safety concerns regarding the CCE. Blue Ash reasons that Duke provided inaccurate and inconsistent information regarding the potential impact radius (PIR), as the Company's website listed a calculated PIR of 326 feet and, in response to a discovery request, the Company calculated a PIR of 308.58 for the CCE. Blue Ash also notes that Duke subsequently classified the entire pipeline as being in a high consequence area. As a result of Duke providing inaccurate and inconsistent information, Blue Ash submits it and the public were prevented from effectively evaluating the impact and risks associated with the CCE at hearing. Blue Ash contends that, nonetheless, the Board determined that Duke and Staff thoroughly addressed safety concerns. Blue Ash argues that, given the inaccurate, misleading, and contradictory information that Duke published on its website, all of the information that Duke presented during this proceeding should be reevaluated by Staff and intervenors and a new hearing should be held. Blue Ash cites the Ohio Supreme Court's decision in *Middletown Coke* as a basis for the Board to declare that Duke failed to provide sufficient information for Staff, intervenors, and the public to effectively evaluate the statutory requirements under R.C. 4906.10(A) or for the Board to determine that the requirements were satisfied. *In re Application of Middletown Coke Co.*, 127 Ohio St.3d 348, 2010-Ohio-5725, 939 N.E.2d 1210.

{¶ 81} Duke asserts that Blue Ash fails to consider the totality of the information in the record and overstates and mischaracterizes transcripts and record evidence. Duke states that, in addition to the calculation of the PIR on its website, the Company provided countless other information regarding the CCE, including an expert to discuss and evaluate safety considerations. Duke proclaims that Blue Ash overlooks that the design of the CCE was altered in response to public concern. Duke states that Blue Ash has not identified any

statutory requirement with which the Company failed to comply. In regard to *Middletown Coke*, Duke asserts that the issue decided by the Court was whether the application to the Board needed to include information about the siting of parts of the coke plant that were also intricate to the cogeneration facility and, therefore, constituted associated facilities under the Board's jurisdiction and applicable statutes. According to Duke, *Middletown Coke* is not simply a case about the sufficiency of information but the breadth of the Board's jurisdiction. Duke argues that *Middletown Coke* is not relevant to Blue Ash's claims regarding whether the Company provided enough safety-related information to the Board. For these reasons, Duke submits that Blue Ash's request for rehearing should be denied.

{¶ 82} The Board notes that Blue Ash largely reiterates the arguments asserted in its post-hearing brief. The Board thoroughly considered and explained its rationale in support of the Opinion, Order, and Certificate. Opinion, Order, and Certificate at ¶¶ 151-157. Further, the Board finds that Blue Ash's reliance on *Middletown Coke* is misplaced. In that case, the Middletown Coke Company filed an application with the Board for a certificate to construct a cogeneration facility just beyond the Monroe, Ohio city limits. As proposed, the cogeneration facility would be adjacent and connected to a coke plant. The city of Monroe filed a motion to intervene that requested that the Board evaluate the entire cogeneration facility, including the steam generation facilities that were part of the coke plant, to determine the probable environmental impact of the proposed cogeneration facility, as well as permits associated with the coke plant. The Board refused the city of Monroe's request on the basis that the Board lacked jurisdiction over the permits for construction of the coke plant. On appeal, the Ohio Supreme Court reasoned that, as a result of the Board's determination that it lacked jurisdiction over the land and facilities associated with the coke plant, the Board also declined to consider whether there was another feasible location for the generation facility. The Court found that the Board failed to consider whether aspects of the coke plant also constituted land and equipment of an electric generating plant and associated facilities, which placed it within the Board's jurisdiction. The Court noted that the Board's jurisdictional error occurred early in the proceeding, which limited both the scope of the Board's analysis and the scope of discovery, cross-examination, and the city of

Monroe's ability to introduce its own evidence into the record. *In re Application of Middletown Coke Co.*, 127 Ohio St.3d 348, 2010-Ohio-5725, 939 N.E.2d 1210.

{¶ 83} As discussed above, the Board determined, by letter dated March 3, 2017, that Duke's application had provided sufficient information to permit Staff to initiate its investigation of the CCE, pursuant to Ohio Adm.Code Chapters 4906-01 et seq. Contrary to the circumstances in *Middletown Coke*, the record in this case demonstrates that all parties were afforded the opportunity to actively participate in the adjudicatory hearing in support of their respective positions. Further, all parties to this case had sufficient time and the opportunity to conduct discovery. Blue Ash and other intervenors cross-examined Duke's and Staff's witnesses at the adjudicatory hearing and offered evidence into the record regarding the PIR and other safety-related concerns, the route selection process, and the impact of the CCE, among other matters. On rehearing, Blue Ash argues that Duke did not provide Blue Ash sufficient information before the selection of the route. The Board notes that, in recognition of the safety concerns raised by the public and intervenors, the Opinion, Order, and Certificate significantly amended and supplemented the recommended conditions of the certificate, including Condition 40, which requires Duke to provide local officials with contact information for two Company employees to educate and assist the communities with gas pipeline safety issues, including evacuation and emergency response planning. Opinion, Order, and Certificate at ¶ 190. Accordingly, the Board finds that the issues raised by Blue Ash in its first ground for rehearing were adequately and thoroughly addressed and that the request for rehearing should be denied.

{¶ 84} NOPE, in its sixth ground for rehearing, contends that the Board unreasonably and unlawfully determined that the CCE is a distribution line rather than a transmission line. NOPE argues that there is no dispute that the CCE would connect one transmission line to another transmission line and that the CCE will not have service lines connected to it to distribute gas to customers. While NOPE acknowledges that, pursuant to the Opinion, Order, and Certificate, Duke commits to follow the enhanced design, construction, and assessment criteria applicable to transmission lines. However, NOPE reasons that the

requirement that Duke follow the criteria applicable to transmission lines is a contractual arrangement between the Company and the Board that is unreasonable and unlawful, as it violates the intent of 49 C.F.R. 192.3. Accordingly, NOPE requests that the Board reconsider its determination that the CCE is a distribution line.

{¶ 85} Duke offers that, in NOPE's request for reconsideration of this issue, NOPE does not cite any authority explaining how the fact that the CCE connects two transmission lines or that it will not have service lines connected to it is dispositive as to its pipeline classification. Duke asserts that NOPE ignores that the federal regulations promulgated by the Pipeline and Hazardous Materials Safety Administration define a transmission line as a pipeline that operates at a hoop stress of 20 percent or more of the specified minimum yield strength (SMYS) pursuant to 49 C.F.R. 192.3. Duke reiterates that it is undisputed that the CCE will operate at a SMYS of 19 percent to withstand pressures of more than five times the planned maximum allowable operating pressure. Thus, Duke declares that the Board lawfully and reasonably found the CCE to be a distribution line and requests that NOPE's request for rehearing be denied.

{¶ 86} The Board notes that the issue of whether the CCE is a transmission line or a distribution line was previously raised by NOPE and thoroughly considered by the Board, as reflected in the Opinion, Order, and Certificate. Opinion, Order, and Certificate at ¶¶ 138-139, 155. NOPE does not offer any new argument for the Board's consideration. Accordingly, NOPE's sixth ground for rehearing should be denied.

{¶ 87} In its second ground for rehearing, Blue Ash asserts that the Opinion, Order, and Certificate is unlawful and unreasonable, as Blue Ash and other intervenors were not provided sufficient information about the CCE, which prevented the intervenors from meaningfully participating in the routing and hearing process. Blue Ash asserts that Duke should have been required to provide evacuation and emergency plans and training to emergency first responders for Blue Ash to understand the impact of the CCE before or early in the Board's process. Blue Ash asserts that Duke failed to provide critical information

regarding the CCE's environmental or aesthetic impact to allow the Board and intervenors to determine compliance with R.C. 4906.10(A)(6).

{¶ 88} Duke, in its memorandum contra, submits that, after almost four years of proceedings, countless meetings, and no limit on the amount of discovery propounded, Blue Ash's contention that it did not have access to sufficient information about the CCE is baseless and should be denied.

{¶ 89} The Board finds that Blue Ash's second ground for rehearing should be denied. This second ground for rehearing, like Blue Ash's first ground, is a restatement of Blue Ash's arguments in its post-hearing brief. The Opinion, Order, and Certificate includes an extensive discussion of the parties' positions regarding the environmental and aesthetic impacts of the CCE. Opinion, Order, and Certificate at ¶¶ 62-93. Further, as previously noted in regard to Blue Ash's first ground for rehearing, all parties, including Blue Ash, had sufficient time and the opportunity to conduct discovery pursuant to Ohio Adm.Code 4906-2-14 through 4906-2-20, to obtain information from Duke to facilitate the intervenors' meaningful participation in this proceeding, to cross-examine Duke and Staff witnesses, and to offer into the record evidence as to the environmental and aesthetic impact of the CCE, among other matters. We note that Blue Ash has not offered a citation to any statute, rule, or case law that specifically requires an applicant to provide, and the Board to consider, training or evacuation and emergency plans under R.C. 4906.10(A). As we noted in the Opinion, Order, and Certificate, Duke is required under the Commission's gas pipeline safety regulations to have, among other things, an emergency response plan, which is reviewed as part of the regular safety inspections conducted by the Commission.¹⁰ We further noted that Duke's compliance with all of the numerous gas pipeline safety requirements will be the subject of ongoing safety inspections by the Commission. Opinion, Order, and Certificate at ¶ 154. Additionally, as a part of the Opinion, Order, and Certificate,

¹⁰ As set forth in 49 C.F.R. 192.615, the emergency response plan, among other things, must include written procedures to minimize the hazard resulting from a gas pipeline emergency, provide employee training on emergency procedures, and coordinate with appropriate fire, police, and other public officials with respect to gas pipeline emergencies.

in response to the intervenors' and public's concerns, the Board revised and supplemented the conditions of the certificate, including Conditions 14, 30, and 40, to require Duke to communicate with local officials, particularly as to potential construction impacts, to provide training, and to assist with the development of evacuation and emergency plans. Opinion, Order, and Certificate at ¶ 190. Accordingly, the Board finds that Blue Ash has not presented any new arguments that were not previously considered by the Board.

III. ORDER

{¶ 90} It is, therefore,

{¶ 91} ORDERED, That the applications for rehearing filed by Reading, Evendale, NOPE, Blue Ash, and Cincinnati/Hamilton County on December 23, 2019, be denied. It is, further,

{¶ 92} ORDERED, That a copy of this Entry on Rehearing be served upon all parties and interested persons of record.

BOARD MEMBERS:

Approving:

Sam Randazzo, Chairman
Public Utilities Commission of Ohio

Rachel Near, Designee for Lydia Mihalik, Director
Ohio Development Services Agency

Mary Mertz, Director
Ohio Department of Natural Resources

Gene Phillips, Designee for Amy Acton, M.D., MPH, Director
Ohio Department of Health

Drew Bergman, Designee for Laurie Stevenson, Director
Ohio Environmental Protection Agency

George McNab, Designee for Dorothy Pelanda, Director
Ohio Department of Agriculture

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Case No(s). 16-0253-GA-BTX

Summary: Entry Entry on Rehearing that The Ohio Power Siting Board denies the applications for rehearing of the November 21, 2019 Opinion, Order, and Certificate filed by the city of Reading, village of Evendale, NOPE - Neighbors Opposed to Pipeline Extension, LLC, and city of Blue Ash, as well as the joint application filed by the city of Cincinnati and Board of County Commissioners of Hamilton County electronically filed by Docketing Staff on behalf of Docketing