

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of Columbia Gas of Ohio,
Inc.'s Letter of Notification for the
Marysville Connector Pipeline Project.

Case No. 19-2148-GA-BLN

**SUPPLEMENT TO MOTION FOR LEAVE TO INTERVENE AND
FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION INSTANTER OF PATRICK
E. BAILEY, WHITNEY BAILEY, DON BAILEY SUCCESSOR TRUSTEE OF ARNO
RENNER TRUST DATED APRIL 24, 1997 AND CHARLES PETER RENNER
AND
PUBLIC COMMENT**

Patrick E. Bailey, Whitney Bailey, Don Bailey, Jr., Successor Trustee of the Arno Renner Trust Dated April 24, 1997, and Charles Peter Renner (hereinafter referred to collectively as “Intervenors”) moved to intervene in this matter pursuant to Ohio Adm.Code 4906-2-12(C). Additionally, Intervenors moved the Ohio Power Siting Board (“OPSB”) for leave to file a memorandum in opposition to the Motion for Waiver filed by Columbia Gas of Ohio, Inc. (“Columbia”). Intervenors now supplement their Motion for Leave To Intervene to incorporate the Judgment Entry and Opinion of the Third Appellate District Court of Appeals in *Columbia Gas of Ohio, Inc. v. Patrick E. Bailey, et al.* (2023-Ohio-1245, Third District Court of Appeals Case No. 14-22-13, Union County Common Pleas Court Case No. 21 CV 0112) and *Columbia Gas of Ohio, Inc. v. Don Bailey, Jr., et al.* (2023-Ohio-1245, Third District Court of Appeals Case No. 14-22-14, Union County Common Pleas Court Case No. 21 CV 113). (Collectively, the “Bailey Case”). The Bailey Case Appeals Court Decision and Opinion are attached hereto as Exhibit A.

Additionally, Intervenors submit this supplement with exhibit as a Public Comment.

Respectfully submitted,

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/s/ David Watkins

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MEMORANDUM IN SUPPORT

Columbia acknowledges in its Motion for Waiver that it will not begin a continuous course of construction within three years of the accelerated application approval date for the Marysville Connector, as required by Ohio Adm. Code 4906-6-12(B). Columbia admits that it has been unable to acquire the easements over private property necessary for its project. It cites delay in the condemnation process due to the decisions of Union County Common Pleas Court in seven condemnation cases, including the Bailey Cases, wherein the Common Pleas Court ruled that there was no necessity for the appropriations.

Prior to appealing the Bailey Case to the Third District Court of Appeals, Columbia appealed the Common Pleas Court's decision in *Columbia Gas of Ohio v. Phelps Preferred Investments, LLC*, Case No. 2021-CV-0137. By decision rendered on July 25, 2022, the Third District Court of Appeals affirmed the decision of the Union County Common Pleas Court that there was no necessity for the appropriation (2022-Ohio-2540, Third District Court of Appeals Case No. 14-22-07).

Columbia appealed the Common Pleas Court's decision that there was no necessity for the for the appropriation in the Bailey Case on May 18, 2022. The Intervenor cross-appealed the

Common Pleas Court’s finding that the agricultural easement on the Intervenor’s property was not an existing public use that barred the appropriation.

Columbia states on page 2 of the Motion for Waiver. “[i]mportantly, as Columbia continues to appeal these decisions, the Ohio Supreme Court decided *Ohio Power Company v. Burns* at the end of 2022.” (2022-Ohio-4713, December 29, 2022). More than three months after the Supreme Court’s decision in *Burns*, the Third District Court of Appeals decided the Bailey Case. The Third District affirmed the Common Pleas Court’s judgment that there was no necessity for the appropriation and remanded the issue of the prior public use back to the Common Pleas Court.

Relevant to this Ohio Power Siting Board case, the Third District Court of Appeals found:

¶71 In its second assignment of error, Columbia Gas contends that it is entitled to the irrebuttable presumption on necessity under R.C. 163.09(B)(1)(c) because the OPSB approved its pipeline project. Columbia Gas’s argument is unfounded. Indeed, the Supreme Court of Ohio recently determined that an agency is entitled to the irrebuttable presumption of necessity under R.C. 163.09(B)(1)(c) if a state or federal regulatory authority, such as the OPSB, approves “appropriation of the individual property, or the interest or right therein, that is sought to be taken by the agency, *not* the project in its entirety.” (Emphasis added.) [*Ohio Power Company v. Burns*] at ¶28.

¶80 Nevertheless, this case may be resolved on evidence that Columbia Gas acted in bad faith, abused its discretion or acted with improper purpose to satisfy its burden of proof. . . . Here, there is some competent credible evidence supporting the trial court’s determination that Columbia Gas acted in bad faith to satisfy its burden of proving that the taking is necessary. That is, there is some competent, credible evidence in the record supporting the trial court’s assessment that since “the 25 foot easement was labeled ‘temporary’ before the [OPSB] and transformed itself to ‘perpetual’ before this Court, amounted to “bad faith.”

¶91 Regardless of any presumption applied to Columbia Gas’s petitions, the respondents [Intervenors] contend under their first assignment of error that they are entitled to judgment in their favor as a matter of law because Columbia Gas’s appropriation of the specific easement rights in these cases is not authorized as a result

of the agricultural easement. Specifically, the respondents argue that “the express terms of the Ag Easement prohibit the installation of the Columbia Gas pipeline on the [protected] Property.

¶97 Decisively, the respondents argue that the agricultural easement restricts the construction of the pipeline project by means of “the prior public use doctrine”... That is, the respondents advocate that the “doctrine prohibits the taking [of respondents’ property] because the prior public use in place under the Ag Easement to perpetually preserve agricultural lands through the preservation and protection of soils for the full range of agricultural activities under law, as defined by R.C. §5713.30***.”

¶104 Our review of the record reflects that the respondents presented some competent credible evidence that the protected property is encumbered by a prior public use.

¶106 ... [W]e remand these cases to the trial court to determine whether Columbia Gas presented evidence contradicting the evidence presented by the respondents that Columbia Gas’s proposed use will destroy the existing public use of the protected property.

The Common Pleas Court dismissed the Bailey Case. The Third District Court of Appeals upheld the dismissal. Columbia states in its Motion for Waiver that it is seeking “another three years for its certificate to ensure it has adequate time to secure land rights through the condemnation process.” However, given the decisions of the Union County Common Pleas Court, the Third District Court of Appeals, and the Ohio Supreme Court in *Burns*, the claim that Columbia will be able to secure land rights by condemnation if provided more time is unsupportable. There is nothing in the record of any of the Union Count pipeline appropriation cases to suggest that Columbia will secure necessary land rights even if it is provided more time.

Respectfully submitted,

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Peter Renner*

CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Ohio Power Siting Board on April 20, 2023.
The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the
filing of this documents on the parties referenced on the service list of the docket card who have
electronically subscribed to this case.

/s/ David Watkins
David Watkins (0059242)

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in

Case No(s). 19-2148-GA-BLN

Summary: Memorandum Supplement to Motion for Leave to Intervene and For Leave to File Memorandum in Opposition Instanter of Patrick E. Bailey, Whitney Bailey, Don Bailey and Charles Peter Renner and Public Comment electronically filed by David Watkins on behalf of Bailey, Patrick and Bailey, Whitney and Bailey, Don and Renner, Charles.