

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of NRG Ohio)
Pipeline Company LLC for a Letter of)
Notification to Construct, Own, and Operate a) Case No. 14-1717-GA-BLN
Natural Gas Pipeline to be Located in Lorain)
County, Ohio)

**LORAIN COUNTY PROPERTY OWNERS’ REPLY TO:
NRG OHIO PIPELINE COMPANY’S REPLY TO LORAIN COUNTY PROPERTY
OWNERS’ MOTION TO ENFORCE THE CODIFIED EXPIRATION OF THE
CERTIFICATE AND FOR ORAL HEARING**

NRG Ohio Pipeline Company LLC (“NRG Pipeline”) argues that the Ohio Power Siting Board (“Board”) has the authority to and should extend the duration of NRG Pipeline’s Certificate of Environmental Compatibility and Public Need (“Certificate”) by ignoring the Lorain County Property Owners (“Property Owners”)¹ pertinent legal arguments and by mischaracterizing the facts of the parallel eminent domain proceedings in which NRG Pipeline’s counsel in this proceeding is not involved. Regardless of whether this Board truly has the statutory authority to extend NRG Pipeline’s Certificate, the facts of this proceeding and the eminent domain proceedings provide ample support for denying such an extension.

NRG Pipeline’s Motion is intended only to interpose further delay in these and the parallel eminent domain proceedings in order to improperly extend what amounts to “options” in the Property Owners’ lands for which NRG Pipeline has paid no compensation. NRG Pipeline’s delay tactics impose undue burdens on the Property Owners whose lives and lands remain

¹ The Lorain County Property Owners are: Betzel, Louis & Gale; Borling, Charles & David; Braatz, Richard & Ellen; Carter, Edmund & Angie; Conlin, Gary & Kathleen; Dennis, Samuel; Julius, Thomas & Johanna; K. Hovnanian Oster Homes LLC; Kurianowicz, Edward; Miller, Mary B.; Parker, Wesley A.; Petersen, Richard & Carol; Plas, Lawrence R.; Fathers of St. Joseph; Thorne, Brandon & Mary; Unger, Stephanie K.; Helfrich, Matthias & Joanne; Julius, Mark and Darlene; Kaulins, Marty & Irene; Oster, Thomas; Kubasak, Robert & Debra; Mekker, George; Noster, Irene; Kerecz, Joan; Kelling, Albert; Holt, William & Anna; and Wukie, Theresa.

encumbered by these languishing proceedings. NRG Pipeline has received fair treatment from the Board under the applicable provisions of the Ohio Administrative Code (“Code”) and has been provided sufficient time to meet the requirements of the Code, just as the hundreds of the projects that have preceded it under the same provisions. NRG Pipeline’s unsupported Motion and misleading reply provide no legitimate basis for extending its Certificate and its Motion should be denied.

I. Retrospective Application of the Ohio Administrative Code 4906-6-12(B) is Strictly Prohibited by Ohio Law.

NRG Pipeline’s motion for retrospective application of the three-year automatic expiration provision of Ohio Administrative Code Section 4906-6-12(B) is strictly prohibited by Ohio law. As discussed in the Property Owners’ Motion to Enforce and for Oral Hearing (“Property Owners’ Motion”), newly enacted provisions of the Code may not be applied retrospectively to this case because the Code makes no express provision for it. The Ohio Supreme Court has repeatedly held that, “[i]f there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.”² This is codified by R.C. 1.48 which states, “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” This rule of law applies equally to the Board’s rules under the Code. “[A]n administrative rule, promulgated in accordance with statutory authority, has the force and effect of law. Thus, like a statute, **an administrative rule is presumed to have a prospective effect unless a retrospective intent is clearly indicated.**”³ This well-established Ohio law has been consistently followed by Ohio courts confronting this very issue.⁴

² *Kiser v. Coleman*, 28 Ohio St. 3d 259, 262, 503 N.E. 2d 753 (1986); *see also Wean, Inc. v. Industrial Com. of Ohio*, 52 Ohio St.3d 266, 268, 557 N.E.2d 121 (1990).

³ *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St. 3d 232, 234, 527 N.E.2d 828 (1988).

⁴ *See, e.g., Bellefontaine City School Dist., Bd. of Educ. v. Benjamin Logan Local School Dist. Bd. of Educ.*, 10th Dist. Franklin No. 91AP-1277 (June 16, 1992), *citing Greene v. United States* (1964), 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576; *See also Martin v. Ohio Dep’t of Human Serv.*, 130 Ohio App.3d 512, 524, 720 N.E.2d 576 (2nd Dist.

NRG Pipeline speciously argues that the Property Owners misapply the Ohio Constitution's retroactivity clause. NRG Pipeline, however, ignores the pertinent Ohio Supreme Court authority against the retrospective application of the Ohio Administrative Code. As was previously stated, the Property Owners submitted the Ohio Constitution's similar prohibition against retroactivity only to illustrate Ohio's longstanding disfavor of retroactivity, which is similar to the more recent judicial and legislative prohibitions against the retrospective application of statutes and Codes.

Under Ohio law, the Board cannot apply the three-year expiration provision of Ohio Adm. Code 4906-6-12(B) to NRG's Pipeline's Certificate. NRG Pipeline's Certificate was issued on June 4, 2015 under the then-effective Ohio Adm. Code 4906-5-02(A)(4), which provided that NRG Pipeline's Certificate would automatically expire in two years if a continuous course of construction had not commenced within that time.⁵ On December 11, 2015, more than six months after the Certificate issued, Ohio Adm. Code 4906-6-12(B), which provides for a longer, three-year automatic expiration period, was enacted.⁶ Ohio Adm. Code 4906-6-12(B) is clearly devoid of any language regarding retrospective application. Therefore, Ohio Adm. Code 4906-6-12(B) may apply only to cases that arose subsequent to its enactment. As such, the three-year expiration provision of Ohio Adm. Code 4906-6-12(B) cannot be retrospectively applied to this case and the two-year expiration must be enforced.

Notwithstanding the foregoing discussion, this Board need not even address the legal issue of whether it has the authority to grant NRG Pipeline's requested extension. The facts of these proceedings alone warrant denial of NRG Pipeline's request.

1998), *citing Batchelor v. Newness*, 145 Ohio St. 115, 60 N.E.2d 685 (1945).

⁵ O.A.C. 4906-5-02(A)(4), effective: Jan. 25, 2009.

⁶ O.A.C. 4906-6-12(B), effective: Dec. 11, 2015.

II. NRG Pipeline Should Not be Permitted to Exploit this Board's Proceedings in Order to Extend its Options and Impose Further Burdens on the Property Owners.

NRG Pipeline is attempting to use this Board's proceeding to extend its options in the Property Owners' lands which NRG Pipeline has tied up in the parallel eminent domain litigation. NRG Pipeline argues that the Property Owners' reference to the eminent domain litigation is beyond the scope of this proceeding. However, it is NRG Pipeline that relies upon the circumstances of those eminent domain proceedings to support its Motion.⁷ Furthermore, the facts of those proceedings are entirely relevant to the Board's decision whether to grant or deny NRG Pipeline's Motion. Notably, the delay tactics employed by NRG Pipeline in those eminent domain proceedings and the explanatory evidence discovered by the Property Owners through discovery in those cases (i.e., testimony by NRG officers that NRG Pipeline has no defined time period or plans to commence the pipeline or gas addition projects), explain why NRG Pipeline has imposed repeated delays and has made no substantial financial commitments to acquire rights-of-way from the Property Owners or to follow through with construction. That evidence is entirely relevant to whether the Board should grant NRG Pipeline's requested extension.

NRG Pipeline has merely tied up the Property Owners' lands in what amounts to "options to acquire," without actually paying compensation for what would otherwise be valuable real estate options in order to accommodate its own uncertainty about the project. NRG Pipeline now requests an extension from this Board in order to further extend those options in order to further avoid any financial commitment to the construction of the project (which at this point amounts to little more than paperwork), and to further avoid incurring any obligations or making any payments to the Property Owners whose lands NRG Pipeline continues to needlessly encumber. The Board should not enable NRG Pipeline to continue this improper course and should therefore deny its Motion.

Additionally, NRG Pipeline has done nothing to expedite its eminent domain

⁷ See NRG Pipeline's Motion at 2.

proceedings against the Property Owners and has instead caused numerous delays. NRG Pipeline's reply is highly misleading on this point. NRG Pipeline references an eminent domain case involving property owner, Mary B. Miller, and falsely claims that it did not file for a continuance.⁸ Indeed, NRG Pipeline filed a motion to continue that trial in late May, prior to the Court's subsequent and second continuance. NRG Pipeline also fails to mention that in moving for that continuance it claimed support in a purported scheduling conflict that it had admittedly known about for nearly a year at that time.

NRG Pipeline also relies on the eminent domain case involving K. Hovnanian Oster Homes LLC, in which NRG Pipeline now claims that it moved for a continuance due to a discovery dispute with the property owner. NRG Pipeline, however, misdirects from the fact that it actually claimed that it needed more time to analyze an engineering report which was provided to it within the court's imposed deadline. It is also important to note that NRG Pipeline's counsel in this proceeding is not involved in the parallel eminent domain proceedings it references. Thus, the fact that NRG Pipeline has submitted merely second or third-hand accounts of facts pertaining to the eminent domain proceedings likely explains their inaccuracy and incompleteness.

Contrary to its representations to this Board, NRG Pipeline has not actively pursued this project and, as discussed in the Property Owners' Motion, NRG Pipeline has in fact taken steps to the contrary. Based on the evidence discovered by the Property Owners discussed in their Motion, and contrary to NRG Pipeline's empty rhetoric, NRG Pipeline is either undecided or has decided against constructing the gas addition and pipeline entirely, which explains why NRG Pipeline has neglected to expedite its eminent domain proceedings and construction activities.

⁸ NRG Pipeline's Reply, Note 4.

III. The Board Should Not Permit Further Burdens to be Imposed on the Property Owners.

The Property Owners involved are primarily residential occupants of their affected properties. These people have been subjected to the ongoing threat of major disturbances and disruptions associated with land clearing, excavations, trenching, heavy equipment operation and heavy construction of NRG Pipeline's project on their properties for nearly three years. NRG Pipeline continues to tie up the Property Owners' lands through languishing litigation and unapologetically detains these Property Owners in a prolonged and burdensome state of limbo in order to improperly extend its options and avoid its obligations. NRG Pipeline, realizing that it cannot maintain this untenable status quo beyond the expiration of its Certificate now asks this Board to assist it in doing just that. These Property Owners should not be subjected to this untenable condition for any longer than the Certificate issued by this board permits.

NRG Pipeline's Motion is unsupported in law, is improper in practice and attempts to further impose burdens on the Property Owners in order to accommodate its own illegitimate interests. NRG Pipeline's Motion should therefore be denied.

IV. Conclusion

For all of the foregoing reasons NRG's motion should be denied, and the Property Owners hereby respectfully renew their Motion to enforce the two-year automatic expiration of NRG's Certificate of June 4, 2017, and for an oral hearing on the matters set forth herein.

[SIGNATURE NEXT PAGE]

Respectfully submitted,

/s/ Clinton P. Stahler

GOLDMAN & BRAUNSTEIN, LLP

Michael Braunstein (0060898)

[Braunstein@GBlegal.net](mailto:braunstein@GBlegal.net)

Clinton P. Stahler (0092560)

[Stahler@GBlegal.net](mailto:stahler@GBlegal.net)

Matthew L. Strayer (0092068)

[Strayer@GBlegal.net](mailto:strayer@GBlegal.net)

500 South Front Street, Suite 1200

Columbus, OH 43215

(614) 229-4540/Telephone

(614) 229-4568/Facsimile

Attorneys for Lorain County Property Owners

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *REPLY* has been filed with the Ohio Power Siting Board and has been served upon the following parties via electronic mail this 31st day of October 2016.

/s/ Clinton P. Stahler

Clinton P. Stahler (0092560)

PARTIES SERVED

John Jones
Ohio Power Siting Board
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
John.Jones@puc.state.oh.us

Sally W. Bloomfield
Dylan F. Borchers
Teresa Orahood
Thomas O'Brien
Bricker & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215-4291
sbloomfield@bricker.com
dborchers@bricker.com
torahood@bricker.com
tobrien@bricker.com

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

Anne Rericha
First Energy Service Company
76 South Main Street
Akron, Ohio 44308
arericha@firstenergycorp.com

[ADDITIONAL PARTIES ON FOLLOWING PAGE]

Matt Butler
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215
Matthew.Butler@puc.state.oh.us

Sandra Coffey
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215
Sandra.Coffey@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/31/2016 4:10:37 PM

in

Case No(s). 14-1717-GA-BLN

Summary: Reply Reply of Goldman & Braunstein, LLP to NRG Pipeline's Reply electronically filed by Mr. Clinton P. Stahler on behalf of Goldman & Braunstein, LLP