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November 7, 2016

BY UPS

ATTN: Docketing, 11th Floor
PUCO
180 East Broad Street
Columbus, Ohio 43215

2016 NOV -8 AM 10:58
PUCO

Re: *In the Matter of the Application of NRG Ohio Pipeline Company, LLC, for a Letter of Notification to Construct, Own and Operate a Natural Gas Pipeline to be Located in Lorain County, Ohio*

CASE NO.: 14-1717-GA-BLN

Dear Docketing:

Enclosed please find an original and five (5) copies of a Motion of an Additional Lorain County Property Owner for filing in the above-captioned case. Please file and return a time-stamped copy of the title page in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter. If you should have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Bruce G. Rinker

Bruce G. Rinker

BGR/dat
Enclosures
cc: Parties of Record

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Technician AS Date Processed 11/8/16

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 FIELDSTONE LAKES, LTD.

1. **RESPONSE IN OPPOSITION TO NRG'S MOTION TO EXTEND THE DURATION OF THE CERTIFICATE FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF A NATURAL GAS PIPELINE, METERING STATION, AND REGULATING STATION IN LORAIN COUNTY, OHIO;**
2. **MOTION TO ENFORCE THE CODIFIED EXPIRATION OF THE CERTIFICATE FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF A NATURAL GAS PIPELINE IN LORAIN COUNTY, OHIO; AND,**
3. **MOTION FOR ORAL HEARING.**

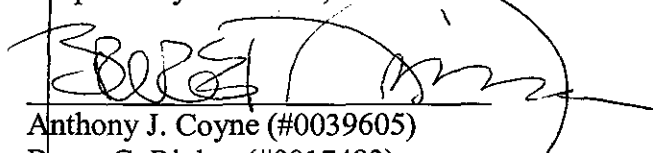
Now come additional Lorain County Property Owners, Fieldstone Lakes, Ltd. and Fieldstone Lakes Homeowners Association, Inc. (together "Fieldstone Lakes"), by and through undersigned counsel to join in the opposition recently filed by certain other Lorain County Property Owners, as set forth in the attached Exhibit "1".

Insofar as the other Lorain County Property Owners have therein identified the specific points of their opposition to NRG, and as further reflected in Exhibit "1" through the attached excerpt of the deposition of Alan Sawyer conducted by undersigned counsel, Fieldstone Lakes

herein respectively moves this Ohio Power Siting Board to enforce the two-year automatic expiration of NRG Pipeline's Certificate, per Ohio Administrative Code Section 4906-5-02(A)(4) that was in effect when the Certificate was issued on June 4, 2015.

NRG Pipeline's Motion seeks retrospective application of the three-year automatic expiration provision of OAC Section 4906-6-12(B), which runs afoul of the Ohio Constitution and is strictly prohibited by well-settled Ohio law pertaining to the application of administrative rules. Fieldstone Lakes joins in the other Property Owners' contention that NRG's Motion is intended solely to interpose unwarranted delay in these proceedings, which delay shall directly adversely affect Fieldstone Lakes, whose property remains unduly encumbered by this proceeding and the related pending eminent domain cases that NRG has failed to prosecute diligently. The result of NRG's dilatory conduct has been to cause permanent irreparable harm, which shall continue forward. NRG's unsupported and inappropriate motion for an extension should be denied. Fieldstone Lakes joins with the other Lorain Property Owners in their Memorandum in Support of these requested remedies, further requesting a hearing thereon.

Respectfully submitted,



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Association, Inc.*

**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)	Case No. 14-1717-GA-BLN
a Natural Gas Pipeline to be Located in Lorain)	
County, Ohio)	

LORAIN COUNTY PROPERTY OWNERS:

1. **RESPONSE IN OPPOSITION TO NRG'S MOTION TO EXTEND THE DURATION OF THE CERTIFICATE FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF A NATURAL GAS PIPELINE, METERING STATION, AND REGULATING STATION IN LORAIN COUNTY, OHIO;**
2. **MOTION TO ENFORCE THE CODIFIED EXPIRATION OF THE CERTIFICATE FOR THE CONSTRUCTION, OPERATION AND MAINTENANCE OF A NATURAL GAS PIPELINE IN LORAIN COUNTY, OHIO; AND**
3. **MOTION FOR ORAL HEARING**

Now come the Lorain County Property Owners ("Property Owners"),¹ by and through their undersigned counsel, in opposition to NRG Ohio Pipeline Company LLC's ("NRG Pipeline") Motion to Extend the Duration of the Certificate ("Certificate") for the Construction, Operation and Maintenance of a Natural Gas Pipeline, Metering Station and Regulating Station ("Pipeline" or "Project") in Lorain County, Ohio ("Motion"), and hereby respectfully move this Ohio Power Siting Board ("Board") to enforce the two-year automatic expiration of NRG

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.



Pipeline's Certificate per Ohio Administrative Code Section 4906-5-02(A)(4) that was in effect when the Certificate issued on June 4, 2015.

NRG Pipeline's Motion seeks retrospective application of the three-year automatic expiration provision of Ohio Administrative Code Section 4906-6-12(B), which runs afoul of the Ohio Constitution and is strictly prohibited by well-settled Ohio law pertaining to the application of Administrative Rules. Moreover, NRG's Motion is intended only to interpose further delay in these proceedings to the direct detriment of the Property Owners whose lives and lands remain encumbered by this proceeding and NRG Pipeline's parallel, languishing eminent domain proceedings against them. NRG Pipeline's unsupported, improper Motion should therefore be denied. A memorandum in support follows.

Respectfully submitted,

/s/ Clinton P. Stahler

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MEMORANDUM IN SUPPORT

I. Summary of the Argument

NRG Pipeline's Motion for retrospective application of the three-year automatic expiration provision of Ohio Adm. Code 4906-6-12(B) runs afoul of the Ohio Constitution and is strictly prohibited by well-settled Ohio law pertaining to the application of Administrative Rules. Under Ohio law, in order to retrospectively apply an administrative rule, that rule must contain express language providing for such retrospective application. Where, as here, the code section is silent on retrospective application, retrospective application is strictly prohibited. For that reason alone NRG Pipeline's Motion must be denied.

Moreover, NRG Pipeline's Motion is intended only to interpose further delay in these proceedings in order to accommodate its indecisiveness regarding its languishing Project and to thus avoid making any substantial commitment to the Project. So far NRG Pipeline has taken only preliminary actions that amount to little more than paperwork. Since its Certificate issued, NRG Pipeline has done more to delay the Project than to pursue it. Facts that have recently come to light indicate that NRG Pipeline has no definite intention to build the Pipeline or the Avon Lake power plant gas addition that supposedly justified its purpose and eminent domain authority. This explains, at least in part, why NRG Pipeline has engaged in repeated delay tactics and has thus far sought to avoid making a substantial financial commitment to the Project.

NRG Pipeline's Motion for retrospective application of Ohio Adm. Code 4906-6-12(B) is another such delay tactic purposed only on buying NRG Pipeline an additional year before it is forced to make a concrete decision and the financial commitments to acquire rights-of-way and begin construction. The automatic expiration date has impacts far beyond the mere construction deadline; it has a direct impact on the lives and rights of the affected Property Owners.

In its parallel eminent domain proceedings against the Property Owners, NRG Pipeline has thus far engaged in similar delay tactics. However, as with the Pipeline's construction, the eminent domain proceedings are only able to languish until the expiration of the Certificate. By that time NRG Pipeline will have been required to acquire the land and commence construction or else surrender their Certificate. The Property Owners have come to rely on the two-year expiration date of June 4, 2017 as a date certain for construction to commence and for the eminent domain litigation against them to be resolved or at least to be in its final stages.

If the Board grants NRG Pipeline's Motion, it will only further enable NRG Pipeline to improperly delay these proceedings and impose further hardship on the Property Owners. Moreover, NRG Pipeline has no legitimate basis for its Motion and Ohio law strictly prohibits the retrospective application that it seeks. For these reasons, and as further discussed below, NRG Pipeline's Motion should be denied.

II. Factual Background

NRG Pipeline was formed by its parent, NRG Energy, Inc. ("NRG"), on October 17, 2013 for the purpose of constructing and operating the Pipeline. Shortly thereafter, NRG Pipeline applied to the Public Utilities Commission of Ohio ("PUCO") to obtain authority to operate as an intrastate pipeline company in the State of Ohio.² That authority was subsequently granted by the PUCO on February 26, 2014.³ On December 19, 2014 NRG Pipeline filed its Letter of Notification application ("LON") with the Board to "construct, own, and operate approximately 20 miles of 24 to 30-inch high-pressure steel pipeline in Lorain County, Ohio to serve the Avon Lake Facility (i.e., power plant)."⁴

² PUCO Case No. 13-2315-PL-ACE.

³ *Id.*

⁴ LON at 1.

At least as early as November 6, 2014, NRG Pipeline sent out Notices of Intent to Acquire (“NOI”) to landowners from whom NRG Pipeline sought to acquire right-of-way easements.⁵ The NOI is a procedural step required by R.C. 163.04 in order to initiate eminent domain proceedings. The NOI also puts landowners on notice that their land is subject to a taking by eminent domain, which constructively encumbers the land’s title and restricts its uses. NRG Pipeline subsequently filed eminent domain lawsuits against each of the Property Owners beginning in January 2015.

On June 4, 2015 NRG Pipeline received its approval and Certificate from the Board. Since that time, however, NRG Pipeline has done little to further the Project or the gas addition at the Avon Lake power plant.⁶ NRG has in fact taken actions to eliminate the need for the gas addition and the Pipeline.⁷ Nonetheless, NRG has continued to tie up the Property Owners’ lands along the 20-mile right-of-way in unresolved eminent domain proceedings.

The Property Owners, upon learning of NRG’s lack of clear intent to perform the gas addition and of NRG’s actions to maintain coal burning at the Avon Lake power plant, recently moved to dismiss the eminent domain lawsuits against them.⁸ Now, NRG Pipeline moves this Board for an illegal, retrospective application of Ohio Adm. Code 4906-6-12(B) in order to exploit this proceeding and the eminent domain proceedings for the improper purpose of extending what essentially amounts to options in the encumbered lands, while further avoiding any obligations or commitments on its part.

⁵ See attached Notice of Intent to Acquire. **Exhibit A.**

⁶ See discussion, page 10, *infra*.

⁷ See discussion, *Id.*

⁸ See Defendants’ Motion for Summary Judgment and Immediate Dismissal, filed Sep. 23, 2016, *NRG v. Matthias Helfrich, et al.*, Lorain C.P. 15CV185927. **Exhibit B.**

III. Law and Argument

A. Retroactive Application of Ohio Adm. Code 4906-6-12(B) is Strictly Prohibited by Ohio Law.

i. Ohio Law Disfavors Retroactivity.

Ohio law disfavors retroactivity. The Ohio Constitution, Section 28, art. II expressly provides that “the general assembly shall have no power to pass retroactive laws.” As the Ohio Supreme Court observed, “the Ohio Constitution, unlike the United States Constitution and those of many of the states, specifically prohibits retroactive laws. Retroactive federal laws have been upheld where reasonable, but the Ohio Constitution flatly prohibits such laws, reasonable or not.”⁹ The Court also noted that “[t]he prohibition against retroactive laws is not a form of words; (...) it is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject new obligations thereby.”¹⁰ (Emphasis added.)

ii. Statutes May Operate Retrospectively—Only if Expressly Provided.

The Ohio Supreme Court has come to recognize that while retroactive laws are unconstitutional, certain laws may operate retrospectively without violating the Ohio Constitution.¹¹ However, in order for a law to operate retrospectively that law must expressly provide for such operation. As the Ohio Supreme Court has repeatedly held, “[i]f there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.”¹² (Emphasis added.) This basic tenet of Ohio law is codified by

⁹ *Lakengren, Inc. v. Kosydar*, 44 Ohio St.2d 199, 203, 339 N.E.2d 814 (1975).

¹⁰ *Id.*

¹¹ *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ. of Ohio*, 146 Ohio St.3d 356, 361, 2016-Ohio-2806, 56 N.E.3d 950.

¹² *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).

R.C. 1.48 which states, “[a] statute is presumed to be prospective in its operation unless **expressly made retrospective.**” (Emphasis added.)

iii. Ohio Administrative Rules, Likewise, May Operate Retrospectively Only if Expressly Provided.

Ohio Administrative Rules, like statutes, may only apply prospectively unless the rule expressly provides for retrospective application. As the Ohio Supreme Court has held, “an 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.”¹³ These basic tenets of Ohio Administrative Law are well-established and have been consistently followed by Ohio courts that have confronted this very issue.¹⁴

iv. Under Ohio Law the Three-Year Expiration Provided by Ohio Adm. Code 4906-6-12(B) Cannot be Retrospectively Applied 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.¹⁵ 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.¹⁶ 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

¹³ *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St. 3d 232, 234, 527 N.E.2d 828 (1988).

¹⁴ 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. 1998), citing *Batchelor v. Newness*, 145 Ohio St. 115, 60 N.E.2d 685 (1945).

¹⁵ O.A.C. 4906-5-02(A)(4), effective: Jan. 25, 2009.

¹⁶ O.A.C. 4906-6-12(B), effective: Dec. 11, 2015.

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.

The Ohio Supreme Court, in its wisdom, recognized that this prohibition against retroactivity is a protection for individuals who rely upon the law as written and should not later be subject to new burdens or obligations that arise out of a subsequent change. The Court's point rings true in this case. The Property Owners here, who are primarily residential occupants of the affected properties, have been subjected to the ongoing prospect of 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's languishing project has consigned these Property Owners to a state of limbo, with no way of knowing if or when NRG Pipeline will commence or complete the threatened activities, and resolve its pending litigation against them. These Property Owners continue to rely on the June 4, 2017 expiration of NRG Pipeline's Certificate as a light at the end of a long tunnel of both practical and legal consequence.

The pronouncements of the Ohio Administrative Code, together with the State's prohibition against retrospective applications of new codes, provide this much-needed certainty for the Property Owners. Ohio law and the Ohio Supreme Court fully appreciate the Property Owners' justified reliance on the two-year automatic expiration set forth in the applicable Ohio Adm. Code 4906-5-02(A)(4). Under Ohio law, the retrospective application of the three-year expiration in Ohio Adm. Code 4906-6-12(B) is thus strictly prohibited and the two-year expiration must be enforced.

B. NRG Pipeline Should Not be Permitted to Exploit the Board's Proceedings in Order to Cause Further Delays and Impose Further Burden on the Property Owners.

NRG Pipeline attempts to persuade this Board to improperly apply the new rule under the guise that it “will eliminate any potential confusion among regulators or the public as to which rule applies to [NRG Pipeline’s] Certificate.”¹⁷ This cursory argument is without merit. NRG Pipeline cites no instances of confusion among regulators or the public, much less any imagined ill-effects. Furthermore, the Property Owners whose lives and lands are being affected by the ongoing proceedings are well aware of and justifiably rely upon the June 4, 2017 expiration date.

i. NRG Pipeline has Intentionally Delayed the Project and Associated Eminent Domain Proceedings.

NRG Pipeline further argues that, contrary Ohio law, the new rule should apply based on an unsupported claim that the new rule was created to accommodate the “substantial period of time” required for eminent domain proceedings.¹⁸ NRG Pipeline, however, cites no authority to tie the rule change to that, or any other particular purpose. Even if it could, that would not overcome the strict prohibition against such retrospective application. Second, NRG Pipeline has done nothing to expedite its eminent domain proceedings against the Property Owners. In fact, NRG Pipeline has done just the opposite by moving for multiple continuances of trial dates¹⁹ and by neglecting to take the final steps necessary to close numerous cases and pay compensation to Property Owners who have long since agreed to settle.²⁰

¹⁷ Motion at 3.

¹⁸ *Id.*

¹⁹ See, e.g., *NRG Ohio Pipeline Company LLC v. Mary B. Miller, et al.*, Lorain C.P. 15CV185336; and see *NRG Ohio Pipeline Company LLC v. K. Hovnanian Oster Homes, et al.*, Lorain C.P. 15CV185331.

²⁰ NRG Pipeline has delayed in finalizing easement terms on which to execute the transfer of easement interests. One such case has been resolved as to compensation since April, 2016, several others since July, 2016.

ii. NRG Pipeline has Interposed Delays because it has no Definite Intention to Proceed.

NRG Pipeline's counsel mistakenly asserts that NRG Pipeline is "actively pursuing the pipeline project."²¹ This unverified assertion is hardly accurate. Facts have recently come to light that have exposed NRG Pipeline's decided lack of activity in pursuing the Project.

NRG Pipeline admittedly has no idea when it will begin construction of the Pipeline and has not even selected a contractor.²² This is likely due to NRG's apparent change in course with regard to the Avon Lake power plant gas addition—the supposed purpose for the Pipeline. NRG has not acquired any of the equipment necessary to perform the gas addition,²³ and has no established timeframe for doing so.²⁴ NRG has also not performed any of the necessary preliminary engineering or design work for the gas addition²⁵ and has not even selected contractors to do that work.²⁶

NRG has, on the other hand, taken actions at the Avon Lake power plant to eliminate the need for the gas addition and the Pipeline. First, NRG obtained an exemption for the Avon Lake power plant's B010 generator from the new air emissions standards that supported the alleged need for the gas addition and Pipeline.²⁷ Second, NRG installed air pollution control equipment that enables the Avon Lake power plant to meet those emission standards with its coal-fired B012 generator.²⁸ And on September 2, 2016, the Ohio EPA issued a letter finding that the

²¹ Motion at 2.

²² *Id.* at 32:3-9.

²³ Deposition of Alan Sawyer, Sep. 9, 2016 ("Sawyer Dep."), 29:15-30:8. **Exhibit C.**

²⁴ *Id.* at 30:14-23.

²⁵ *Id.* at 38:15-24.

²⁶ *Id.* at 32:10-14.

²⁷ See Draft Title V Permit at 22. **Exhibit D.**

²⁸ *Id.*

Avon Lake power plant had complied with emissions standards for “all pollutants” without the gas addition.²⁹

Contrary to its representations to this Board, NRG Pipeline has not actively pursued this Pipeline project and has in fact taken steps that are contrary to it. NRG Pipeline’s lack of progress stands in stark contrast to other gas pipeline projects under this Board’s review and which *have* actively pursued their projects by acquiring the necessary rights-of-way and by putting their pipelines into service in a fraction of the time as here. For example, the North Coast Gas Transmission “Oregon Lateral Pipeline” (OPSB No. 14-1754-GA-BLN) filed its LON just weeks before NRG Pipeline and acquired all of its rights-of-way in 2015 and early 2016, constructed its pipeline and put the pipeline into service several months ago. Notably, the undersigned represented 17 property owners affected by that project and all of those cases were timely resolved. Similarly, the Columbia Gas of Ohio “Sofidel Project Pipeline” (OPSB No. 16-0079-GA-BLN) filed its LON in March of this year and has acquired nearly 90% of its easement rights-of-way in barely seven months.

NRG, by contrast, is not actively pursuing its Pipeline project. NRG principle Alan Sawyer summed it up when he testified that he is not in a position to make a decision about whether the Avon Lake power plant would ever add natural gas as a fuel source³⁰ and that “never put[ing] the pipeline in” is a possibility.³¹ NRG/NRG Pipeline is evidently either undecided or has decided against constructing the gas addition and Pipeline. This explains why NRG/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 the gas addition and Pipeline projects after more than three years of languishing regulatory and judicial

²⁹ See Letter from Matt Campbell to Brian Green, dated Sept 2, 2016. **Exhibit E.**

³⁰ Sawyer Dep. 39:5-12.

³¹ Deposition of Alan Sawyer, June 20, 2016, 91:9-25. **Exhibit F.**

proceedings—proceedings that profoundly and unfairly burden the lives and lands of the Property Owners.

IV. Conclusion

For all of the foregoing reasons NRG's motion should be denied, and the Property Owners hereby respectfully move to enforce the two-year automatic expiration of NRG's Certificate on June 4, 2017, in accordance with Ohio law. The Property Owners further move for an oral hearing on the matters set forth herein.

Respectfully submitted,

/s/ Clinton P. Stahler

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Attorneys for Lorain County Property Owners

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *MOTION* has been filed with the Ohio Power Siting Board and has been served upon the following parties via electronic mail this 18th day of October 2016.

/s/ Clinton P. Stahler
Clinton P. Stahler (0092560)

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NRG Ohio Pipeline Company LLC
211 Carnegie Center
Princeton, NJ 08540

NOTICE OF INTENT TO ACQUIRE

November 6, 2014

[REDACTED]
[REDACTED]
Avon, Ohio 44011

Dear Mr. & Mrs. [REDACTED]

As you may be aware, NRG Ohio Pipeline Company LLC ("NRG") will be constructing a natural gas pipeline from central Lorain County to the Avon Lake Power Plant. The pipeline will allow the plant to generate electricity from natural gas. As part of this project, your property has been identified as one of the parcels that the natural gas pipeline will cross, and therefore NRG respectfully requests an easement for this limited purpose. Attached to this letter is the general description of the property that NRG understands you own and across and through which the easement will be required. Also attached, as part of that description of the property, is the specific location of the easement and, as you will note, is generally described as a permanent easement 50 feet wide and a temporary easement 100 feet wide. Of course, the pipeline will be buried underground and in complete compliance with all state and federal regulatory and safety standards.

As the NRG representative for this project, I am and will continue to be available to answer any questions or concerns you might have. I also have the responsibility to send this letter to you that generally describes the easement acquisition process, your legal rights, and NRG's obligations to you as part of this process. Please read the remainder of this letter carefully. If you have any questions, do not hesitate to contact me at your convenience.

Ohio law authorizes NRG to obtain your property or an easement across your property for certain public purposes. The legal description of your property that NRG needs for the easement is attached. NRG is only interested in acquiring an easement for this natural gas pipeline and is not asking or seeking to acquire legal title to your property or even a portion of your property; only an easement for the natural gas pipeline.

NRG is offering \$6,407.30 for this easement across parcel [REDACTED]. This price is based on an expert appraiser's determination of the fair market value of the easement and use of temporary work area. Please see the attached appraisal report. Please also note that NRG will also be responsible for returning your property to the condition it was before the construction and to compensate you for any damages caused by the construction. Loss of trees, shrubbery, landscaping and crops, if applicable, is included in the offer of \$6,407.30. We are required by Ohio law to advise you that you have 10 days from receipt of this letter to accept or reject this offer. During this time, I am willing to discuss the offer with you. You are not required to accept the offer. If you reject the





NRG Ohio Pipeline Company LLC
211 Carnegie Center
Princeton, NJ 08540

offer, or we are unable to come to an agreement, NRG may have to exercise its eminent domain authority to appropriate the portion of your property necessary for the easement, which requires a court proceeding. In a court proceeding, you may disagree with any of the following: whether the project is necessary, whether the project is a public use, and whether NRG's offer reflects the fair market value of the property.

HERE IS A BRIEF SUMMARY OF YOUR OPTIONS AND LEGALLY PROTECTED RIGHTS:

1. By law, NRG is required to make a good faith effort to purchase an easement across your property.
2. You do not have to accept this offer and NRG is not required to agree to your demands.
3. If you do not accept this offer, and we cannot come to an agreement on the acquisition of an easement, NRG has the right to file suit to acquire the easement by eminent domain in the county in which the property is located.
4. You have the right to seek the advice of an attorney, real estate appraiser, or any other person of your choice in this matter.
5. You have a right to appeal this decision and may object to this project's public purposes, necessity, or valuation by writing, within 10 business days of receiving this notice, to:

NRG Ohio Pipeline Company LLC
Attn: Alan Sawyer, Vice President
211 Carnegie Center
Princeton, NJ 08540-6213

6. We are required by law to provide you with a written offer and the appraisal or summary appraisal on which we base that offer. This letter serves as the written offer. Again, the appraisal is enclosed with this letter.
7. After a trial, a jury will decide the amount you are to be awarded for your property that is taken, for the damage that is caused by the taking, if applicable, and for other damages permitted by law, which could either exceed or be less than our offer. During the court proceeding, you have the right to testify as to the value of your property or the property interest being acquired, and you and NRG are entitled to present evidence of the fair market value of the property interest sought to be acquired.
8. You may employ, at your own expense, appraisers and attorneys to represent you at this time or at any time during the proceedings described in this notice.
9. If we go to court to determine the amount NRG will pay for the easement it is acquiring and the jury awards you an amount that is significantly in excess of a good faith offer, revised offer, or offer made after an exchange of appraisals, as provided by law, you may be entitled to recover attorney's fees, costs, and expenses, subject to certain statutory limits.



NRG Ohio Pipeline Company LLC
211 Carnegie Center
Princeton, NJ 08540

10. If we go to court to determine whether the project is necessary for a public use, and the court decides that it is not necessary or not for a public use, the judge shall award you your full amount of attorney's fees, costs, and expenses.

11. You also have the right to request that the issue of the value of your property be submitted to non-binding mediation. You must submit your written request for mediation within 10 business days after you file an answer to NRG's petition for an appropriation proceeding. If a settlement is not reached at mediation, the matter will proceed to a jury valuation trial.

If you have any questions concerning this matter, you may contact me at:

NRG Ohio Pipeline Company LLC
Attn: Alan Sawyer, Vice President
211 Carnegie Center
Princeton, NJ 08540-6213
(609)-524-4677



Alan Sawyer, Vice President

G:\2727744\Notice of Intent Letters\Braatz.docx

**IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO**

NRG OHIO PIPELINE COMPANY LLC,	:	
	:	CASE NO. 15CV185927
Plaintiff,	:	
	:	JUDGE JAMES L. MIRALDI
vs.	:	
	:	MAGISTRATE JAMES L. BLASZAK
MATTHIAS HELFRICH, ET AL.,	:	
	:	
Defendants.	:	

DEFENDANTS MATTHIAS AND JOANNE HELFRICH'S URGENT:

- 1. MOTION FOR LEAVE TO AMEND THEIR ANSWER BASED ON NEWLY DISCOVERED EVIDENCE REGARDING THE NECESSITY OF THE TAKE;**
- 2. MOTION TO CONTINUE THE TRIAL OF THIS MATTER; AND**
- 3. MOTION FOR SUMMARY JUDGMENT AND IMMEDIATE DISMISSAL, OR, IN THE ALTERNATIVE, TO CONVERT THE UPCOMING TRIAL DATE INTO A HEARING ON THE NECESSITY OF THE APPROPRIATION**

Defendants, Matthias and Joanne Helfrich (the "Helfriches"), by and through counsel, respectfully and urgently move this Court for an Order (1) granting them leave to amend their Answer to assert a necessity challenge based on newly discovered evidence; (2) continuing the trial date to provide sufficient time to resolve that challenge; and (3) granting summary judgment in their favor because, based on new evidence, Plaintiff NRG Ohio Pipeline LLC ("Plaintiff") has no intention of building its pipeline within a defined and reasonable period of time—if ever.

Alternatively, if the Court declines to grant summary judgment, the Helfriches move for



the Court to convert the scheduled trial date into hearing on the necessity of the take.

A memorandum in support and Proposed Order are attached.

Respectfully submitted,

GOLDMAN & BRAUNSTEIN, LLP



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*Attorneys for Defendants Matthias
and Joanne Helfrich*

MEMORANDUM IN SUPPORT

I. SUMMARY OF THE ARGUMENT

Land speculation is not a proper use of eminent domain. Yet, that appears to be the only definite purpose for Plaintiff's taking of the Helfriches' property. Nearly two years after applying to the Ohio Power Siting Board for approval to build a 24-inch pipeline for the purpose of supplying natural gas to the Avon Lake Power Plant, new evidence shows that Plaintiff has no intention of constructing the pipeline within a defined and reasonable time—if ever.

The Helfriches should be permitted to meet that new evidence by being granted leave to amend their Answer to raise a new necessity challenge. Moreover, in light of the new evidence set forth in this memorandum, the Court should grant summary judgment in the Helfriches' favor and immediately dismiss this action. *See* R.C. 163.59(B); *City of Wadsworth v. Yannerilla*, 170

Ohio App.3d 264, 2006-Ohio-6477, 866 N.E.2d 1113 (9th Dist.); *See City of Mentor v. Osborne*, 143 Ohio App.3d 439, 447, 758 N.E.2d 252 (11th Dist. 2001). Alternatively, the Court should convert the upcoming trial date into a hearing on Plaintiff's right to appropriate.

II. STATEMENT OF FACTS

Plaintiff filed a Letter of Notification Application ("LON") with the Ohio Power Siting Board ("OPSB") on December 19, 2014 for approval to build a 24-inch, 20-mile pipeline. (*See Ex. A.*) Plaintiff's LON stated that "the sole customer is the Avon Lake Power Plant and the primary purpose of the Project is to provide natural gas as a fuel source to the Plant." (LON at 3.) The Avon Lake Power Plant intended "to move ahead with a gas addition project," with the supply of natural gas to be delivered to the plant via Plaintiff's proposed pipeline. (*Id.*)

Plaintiff initiated this appropriation case on March 17, 2015 by filing a Verified Petition to Appropriate Property and to Fix Value Thereof. The petition concurred with the LON, stating that the appropriation was for the "purpose of serving the Avon Lake Power Plant, such that natural gas may be used in place of coal for the generation of electricity at the facility." (*See Petition to Appropriate* ¶ 1.) Plaintiff's Vice President, Alan Sawyer, signed the petition's Verification.

Eighteen months later, the Avon Lake Power Plant is still the sole customer for the pipeline. (*See Alan Sawyer Dep. 21:15-20 (Sept. 9, 2016)*, attached as *Ex. B*). And, it appears not much else has changed in the last two years, either—except Plaintiff's mind about building the pipeline and the need to add natural gas as a fuel source at the Avon Lake Power Plant.

To complete the gas addition, the Avon Lake Power Plant must "install pipes to feed the natural gas from the Ohio pipeline pipe up to the boiler and then probably make changes to the burners and the boiler to burn the natural gas." (*Sawyer Dep. 29:20-24.*) Mr. Sawyer, an insider

with all of the companies involved in the project,¹ testified that the necessary equipment has not been procured for the gas addition at the Avon Lake Power Plant and the proposed time frame for purchasing that equipment is “unknown at this time.” (*See* Sawyer Dep. 30:4-23.)

Contractors have not been selected for either pipeline construction or the gas addition. (*See id.* at 32:7-14.) And, two years after Plaintiff sought the OPSB’s approval for the pipeline, Mr. Sawyer testified that engineering and design work on the gas addition at Avon Lake Power Plant has “probably not” begun. (*Id.* at 38:16-24.) Mr. Sawyer also testified that engineering and design work would not begin until a purchase order goes out to a contractor. (*Id.* at 38:25-39:4.) He also testified that the time frame for beginning the process for the gas addition is “[u]ndetermined at this time” and “[s]ometime after we finish acquisition of easements.” (*Id.* at 26:3-10.)

The need to add natural gas as a fuel source at the Avon Lake Power Plant to meet air emissions standards has disappeared. On September 5, 2013, the Ohio Environmental Protection Agency (“OEPA”) granted the Avon Lake Power Plant a one-year extension to bring its B010 and B012 coal-fired generators into compliance with Mercury and Air Toxics Standards (“MATS”) emission standards. (*See* Letter from OEPA Director Scott J. Nally to NRG Environmental Director Keith A. Schmidt, attached as Ex. C [hereinafter “OEPA MATS Letter”]; Draft Division of Air Pollution Control Title V Permit for Avon Lake Power Plant p. 22 (issued July 26, 2016), attached as Ex. D [hereinafter “Draft Title V Permit”]). The deadline was extended to April 16, 2016, because “the Gas Addition Project at the Avon Lake Generating Station will require additional time to achieve compliance with the MATS rule.” (OEPA MATS Letter at 1.)

¹ The Avon Lake Power Plant is owned by NRG Power Midwest LP. (*See* LON at 3, attached as Ex. A.) Both Plaintiff and NRG Power Midwest LP are subsidiaries of NRG Energy, Inc. Mr. Sawyer is an officer of Plaintiff, an employee of NRG Energy, Inc., and the project manager for another pipeline owned by NRG Power Midwest LP in Pennsylvania. (Sawyer Dep. 13:11-12.) Therefore, Mr. Sawyer has personal knowledge and is qualified to speak about all of the testimony provided at his deposition on September 9, 2016.

The OEPA recognized in July 2016 that “[t]he requested one-year compliance extension was to provide time for [Avon Lake Power Plant] to construct a gas line to the facility and then install natural gas burners in emissions units B010 (Unit 7) and B012 (Unit 9).” As demonstrated above by Mr. Sawyer’s testimony, not only has the pipeline not been installed, but, five months after the Avon Lake Power Plant’s extended MATS compliance deadline expired, the preliminary phases of the gas addition project have not yet begun. (*See supra* pp. 3-4.) Instead of building the pipeline, the Avon Lake Power Plant has made other changes to bring its B010 and B012 generators into compliance with MATS standards. In April 2016, the OEPA issued a PTI Administrative Modification to designate B010 as a “limited use boiler” and thus exempted it from the MATS standards. (*See* Draft Title V Permit at 22, attached as **Ex. D.**)

Moreover, the OEPA found the following with respect to the B012 generator:

Due to delays in extending the natural gas line to the facility, the Avon Lake Generating Station has installed air pollution control equipment (Activated Carbon Injection and Dry Sorbent Injection Systems) on emissions unit B012 in an effort to comply with [the MATS emission standards] since it will retain the ability to burn coal as a bridge until the natural gas project is completed. (*Id.*)

According to Mr. Sawyer, the completion of the natural gas project is uncertain. Asked whether there is any certainty about whether natural gas would ever be used to generate power at the Avon Lake Power Plant, Mr. Sawyer stated, “I’m not in a position to make a decision on that at all.” (Sawyer Dep. 39:5-12.) This is consistent with a statement Mr. Sawyer made on June 20, 2016 in a deposition in *NRG Ohio Pipeline Company LLC v. Fieldstone Lakes Ltd.*, Lorain Cty. C.P. Case No. 15CV185335. Asked why Plaintiff sought to pay for the easements in two installments, one at the time of execution of the easement and the second when construction begins, Mr. Sawyer stated, “If we never put the pipeline in, that’s why we are delaying the payment until such time that the construction begins.” (Sawyer Fieldstone Dep. 91:19-25, attached as **Ex. E**)

(Emphasis added).) He also testified that Plaintiff would “absolutely” still own an easement on the properties if it acquired that easement but never built the pipeline. (*Id.* at 93:5-10.)

Plaintiff filed numerous appropriation actions against landowners with this Court in the first three months of 2015. Those cases have languished for more than a year and a half as Plaintiff has failed to show any urgency to resolve them despite that R.C. Chapter 163 provides an expedited procedure that is intended to benefit the condemning agency. None of the 26 cases currently in litigation and in which the undersigned represents the landowner has gone to trial. Plaintiff recently moved to continue trial dates in *NRG Ohio Pipeline LLC v. Mary B. Miller*, Lorain Cty. C.P. Case No. 15CV185336 and *NRG Ohio Pipeline LLC v. K. Hovnanian Oster Homes LLC*, Lorain Cty. C.P. Case No. 15CV185331, which previously had been set in June and September 2016, respectively. Plaintiff has shown no sign in this litigation that it actually needs the easements to construct a pipeline for the Avon Lake Power Plant or for any other legitimate purpose.

The OPSB concluded that Plaintiff’s pipeline would serve the public interest, convenience, and necessity based on its finding that the project would “enabl[e] the Avon Lake Power Plant to generate electricity using natural gas, thus, allowing the plant to remain in operation, fulfill its capacity to PJM, and assist in maintaining the stability of the electric grid.” (See Opinion, Order, and Certificate, OPSB Case No. 14-1717-GA-BLN, attached as Ex. F). The necessity set forth in the OPSB certificate will not be satisfied without the gas addition or the pipeline. New evidence, demonstrated above, shows that Plaintiff has no intent of building the pipeline within a defined and reasonable time—if ever. Accordingly, the Helfriches ask the Court to dismiss this case.

III. LAW AND ARGUMENT

A. The Court Should Grant Leave for the Helfriches to Amend Their Answer to Raise a Necessity Challenge Based on New Evidence, and the Answer Should Be So Amended to Reflect the Challenge Raised Herein.

Rule 15 of the Ohio Rules of Civil Procedure provides that a party may amend its pleading with leave of court after the time for amending as a matter of right has expired and the Court “shall freely give leave when justice so requires.” The Ohio Supreme Court explained that Rule 15 “expresses a liberal policy” of allowing amendments. *Hall v. Bunn*, 11 Ohio St.3d 118, 121, 464 N.E.2d 516 (1984). The Court recognized that the purpose of Rule 15 is “to provide the maximum opportunity for each claim to be decided on its merits.” *Id.*, citing *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). Where a party moving to amend presents new evidence that the opposing party is not prepared to meet, the trial court should permit the amendment and grant a continuance to allow the opposing party an opportunity to respond. *Body, Vickers & Daniels v. Custom Machine, Inc.*, 77 Ohio App.3d 587, 591, 602 N.E.2d 1237 (8th Dist. 1991).

Here, new evidence shows that Plaintiff does not intend to build the pipeline within a defined and reasonable time—if ever. The Helfriches did not raise this challenge when they filed their Answer in April 2015 because, until recently, there was no conclusive evidence to suggest that Plaintiff intended to abuse its eminent domain authority by taking the property without being certain it would actually build the pipeline. The Court should permit the Helfriches to amend their Answer so that this matter may be decided on its merits. Moreover, because the Helfriches also move for summary judgment or, in the alternative, to convert the compensation trial of this matter into a hearing on Plaintiff’s right to appropriate, this Court should continue the trial date to permit full briefing on the motion and to allow the Court sufficient time to decide the issue.

B. The Court Should Grant Summary Judgment in the Helfriches' Favor and Dismiss this Appropriation Because New Evidence Shows Plaintiff Does Not Intend to Build the Pipeline in a Defined and Reasoned Time—If Ever.

A defendant in an action may move for summary judgment at any time, but if the matter has been set for trial, such a motion requires leave of court. Civ.R. 56(B). A court has sound discretion, however, to consider a motion for summary judgment made “without express leave of the court” after the matter has been set for trial, and “where the acceptance of a motion occurs by the grace of the court, the decision to accept it is by itself leave of court.” *Meyer v. Wabash Alloys, L.L.C.*, 8th Dist. Cuyahoga No. 80884, 2003-Ohio-4400, ¶ 16, quoting *Lachman v. Wietmarschen*, 1st Dist. Hamilton No. C-020208, 2002-Ohio-6656, ¶ 6. Because newly discovered evidence is involved, the Helfriches could not have made this motion at any earlier time. Accordingly, the Helfriches respectfully ask this Court to grant them leave by accepting this motion.

A party is entitled to summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Summary judgment is appropriate where reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Id.* Once the moving party meets its Rule 56 burden, that burden shifts to the non-moving party to set forth specific facts, supported by the type of evidence required under Rule 56(C), to show a genuine issue for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). A non-moving party “may not rest upon the mere allegations or denials of the party’s pleadings.” Civ.R. 56(E). Similarly, a non-moving party cannot meet its reciprocal burden through a self-serving affidavit that merely contradicts the evidence offered by the moving party or fails to corroborate the affiant’s statements with materials required by Civ.R. 56. *FIA Card Servs., N.A. v. Pfundstein*, 8th Dist. Cuyahoga No. 101808, 2015-Ohio-2514, ¶¶ 11-12. If the non-moving party fails to meet this burden, summary judgment must be granted. *Dresher* at 293.

1. **Plaintiff cannot take property unless the public purpose of the project is to be achieved within a defined and reasonable time, nor can Plaintiff take land it knows will not be used for that public purpose.**

The Helfriches are entitled to know with certainty whether Plaintiff intends to build a pipeline on their property before Plaintiff is permitted to exercise eminent domain. Plaintiff should not be permitted to speculate by tying up the Helfriches' property indefinitely without first committing itself to build the pipeline. Unless Plaintiff comes forward with Rule 56 evidence demonstrating that it intends to build the pipeline within a defined and reasonable time after it has taken an easement, the Helfriches are entitled to summary judgment and dismissal of this case.

A condemning agency shall not appropriate land "except as necessary and for a public use." R.C. 163.021; *see also* Ohio Const. art. 1, ¶ 19. The burden is on the condemning agency to show that the taking meets those requirements. R.C. 163.021. A condemning agency cannot take land it does not actually need and the take cannot exceed that which is necessary to accomplish the stated public purpose. *See City of Mentor v. Osborne*, 143 Ohio App.3d 439, 447, 758 N.E.2d 252 (11th Dist. 2001), discussing *East Cleveland v. Nau*, 124 Ohio St. 433, 179 N.E. 187 (1931). A taking is excessive and unconstitutional where a condemning agency seeks "to take land that it knows will not be used for the stated public purpose." *Osborne* at 447, discussing *Nau*.

These rules restrict the scope of authority even when a municipality takes land under a constitutional provision allowing excess takings by such agencies. Ohio Const. art. XVIII, § 10. They should be enforced even more rigorously in takings by private corporations. *See City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶¶ 70-71 (explaining that the sovereign's delegation of eminent domain authority to private corporations must be strictly construed and any doubt about the propriety of the taking be resolved in the landowner's favor).

Moreover, R.C. 163.59(B) provides that, as a prerequisite to acquiring property, "the

acquisition shall be for a defined public purpose that is to be achieved in a defined and reasonable period of time.” The binding Ninth District Court of Appeals found this provision to be applicable and mandatory in a case involving a taking by a municipality for water transmission easements. *See City of Wadsworth v. Yannerilla*, 170 Ohio App.3d 264, 2006-Ohio-6477, 866 N.E.2d 1113, ¶ 14 (9th Dist.). Even though that court held that a condemning agency does not need to have all of the necessary government approvals before acquiring property, it recognized that prospective takings are limited by the reasonableness and definiteness of the project’s timeframe. *Id.*

2. Plaintiff is seeking to take land it knows will not be used for the stated public purpose within a defined and reasonable time—if ever.

Plaintiff’s Vice President, Alan Sawyer, has testified that Plaintiff might “never put the pipeline in,” and thus it does not want to make the financial commitment of paying for easements in full up front. (Sawyer Fieldstone Dep. 91:19-25, attached at Ex. E.) He also stated that it is not his decision whether the Avon Lake Power Plant ever adds natural gas as a fuel source for its generators, demonstrating that such a decision has not yet been made. (See Sawyer Dep. 39:5-12, attached as Ex. B.) Despite that Plaintiff said two years ago in its LON and its Petition to Appropriate in this case that the pipeline’s sole purpose is to supply natural gas as a fuel source to the Avon Lake Power Plant, the plant has not procured the equipment necessary for the gas addition, selected a contractor, put a bid out for that work, or even begun the design and engineering for the gas addition. (See *supra* at 3-4.) Plaintiff also has not selected a contractor to build the pipeline despite filing lawsuits against numerous landowners in early 2015. (*Id.*)

The petition in this case states that the pipeline’s purpose is to serve the Avon Lake Power Plant so that “natural gas may be used in place of coal” to generate electricity at the facility. (See Petition to Appropriate at ¶ 1 (Emphasis added).) But, within the past few months, the Avon Lake Power Plant has taken steps to bring its B010 and B012 generators into compliance with applicable

air emissions standards so that they can continue burning coal. (*See supra* at 4-5.) Plaintiff, through its statements and inaction, certainly has not indicated that it needs the easements for its proposed pipeline, as shown by its lackadaisical attitude in prosecuting appropriation cases it filed against landowners in this Court a year and a half to two years ago. (*See supra* at 6.)

Even if it intended to do so, Plaintiff may not be able to commence construction of the pipeline if it does not obtain the easements by June 2017. The Ohio regulations in place at the time the OPSB issued Plaintiff a certificate in June 2015 provide that “[i]f a continuous course of construction has not commenced within two years of the letter of notification approval date, the [OPSB’s] approval of the letter of notification project shall automatically expire.” (Ohio Adm. Code 4906-5-02(A)(4), amended at Ohio Adm. Code 4906-3-13 on Dec. 11, 2015 to provide a five-year period without construction before the certificate expires); *see also* R.C. 1.48 (providing that legislative enactments are prospective unless expressly made retroactive). Given that Plaintiff has yet to obtain a large percentage of the easements, (Sawyer Dep. 31:7-8), including more than 25 other cases in pending litigation, and the fact that Plaintiff has not yet selected a contractor to construct the pipeline, (*id.* at 32:7-14), it is almost certain that Plaintiff will not be able to commence construction before its OPSB certificate expires in June 2017.

Accordingly, reasonable minds could conclude only that Plaintiff is seeking to obtain an easement from the Helfriches that it knows will not be used to build a pipeline to serve the Avon Lake Power Plant in a defined and reasonable period of time—if ever. *See Osborne* at 447, discussing *Nau*; *Wadsworth* at ¶ 14, citing R.C. 163.59(B). The most that could reasonably be said about Plaintiff’s intent, based on the evidence, is that Plaintiff seeks to take an easement to hold if it decides to build a pipeline someday or for another illegitimate, speculative purpose. Such use of eminent domain is an abuse of authority and violates the Ohio Constitution’s requirement that

property be taken only for a public use. Accordingly, the Helfriches are entitled to summary judgment under Civ.R. 56 and the immediate dismissal of Plaintiff's appropriation action.


IV. CONCLUSION

For each of these reasons, the Helfriches respectfully and urgently ask this Court to:

1. Grant them leave to amend their answer to raise a challenge to the necessity of the appropriation based on new evidence discussed herein;
2. Continue the trial of this matter to allow time to brief and decide this issue; and
3. Grant summary judgment in their favor and dismiss Plaintiff's appropriation or, in the alternative, convert the trial into a hearing on Plaintiff's right to appropriate.

Respectfully submitted,

GOLDMAN & BRAUNSTEIN, LLP



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*Attorneys for Defendants Matthias
and Joanne Helfrich*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served by electronic mail, pursuant to Civ.R. 5(B)(2)(f), on the 23rd day of September, 2016, upon:

Dennis M. O'Toole
John D. Latchney
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& PECORA CO. LPA
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Lorain County Treasurer



Matthew L. Strayer (0092068)
Attorney for Defendants Matthias
and Joanne Helfrich

Exhibits A—F are too voluminous to fax file and will be sent to the Clerk of Courts via overnight Federal Express in accordance with Local Rule 3(V).

EXHIBIT A:

Letter of Notification Application (“LON”) with the Ohio Power Siting Board (“OPSB”) on December 19, 2014 for approval to build a 24-inch, 20-mile pipeline

EXHIBIT B:

Deposition Transcript of Alan Sawyer (Sept. 9, 2016)

EXHIBIT C:

Letter from OEPA Director Scott J. Nally to NRG Environmental Director Keith A. Schmidt (Sept. 5, 2013)

EXHIBIT D:

Draft Division of Air Pollution Control Title V Permit for Avon Lake Power Plant p. 22 (issued July 26, 2016)

EXHIBIT E:

Fieldstone Deposition Transcript of Alan Sawyer excerpts (June 20, 2016)

EXHIBIT F:

Opinion, Order, and Certificate, OPSB Case No. 14-1717-GA-BLN

Send Result Report

MFP



TASK: Job 101

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CASE NUMBER: 15CV185831	
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IN THE COURT OF COMMON PLEAS
OF LORAIN COUNTY, OHIO

NRG Ohio Pipeline Co.,
Plaintiff,

vs. Case No. 15 CV 185927

MATTHIAS HELFRICH, et al.,
Defendants.

Deposition of
ALAN SAWYER

September 9, 2016
11:06 a.m.

Taken at:
O'Toole, McLaughlin, Dooley & Pecora
5455 Detroit Road
Sheffield Village, Ohio 44054

Nancy L. Molnar, RPR, CLR

²
MOLNAR MUNGUA
COURT REPORTING, LLC

3

INDEX
EXAMINATION OF ALAN SAWYER

BY MR. STAHLER:

4

EXHIBIT MARKED
(None)

2

1 APPEARANCES:

2

3 On behalf of the Plaintiff:

4

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11 On behalf of the Defendants:

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Goldman & Braunstein, LLP, by

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strayer@gblegal.net

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~ ~ ~ ~ ~

21

22

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24

25

EXHIBIT

C

4

1 ALAN SAWYER, of lawful age, called for
2 examination, as provided by the Ohio Rules of Civil
3 Procedure, being by me first duly sworn, as
4 hereinafter certified, deposed and said as follows:

5

EXAMINATION OF ALAN SAWYER

6

BY MR. STAHLER:

7

Q. Good morning, Mr. Sawyer.

8

A. Good morning.

9

Q. Please state your full name and

11:06:48

professional address for the record.

11

A. Alan Sawyer. I work for NRG Energy at
804 Carnegie Center, Princeton, New Jersey.

12

13

Q. All right. Thank you. Since this is

14

the first time I've deposed you, we've obviously

11:07:10

been in depositions together before, but just a

15

few ground rules. We'll do our best not to talk

16

over each other. It makes the court reporter's

17

job easier. If you don't understand a question,

18

just please let me know, I'll rephrase. It's

11:07:23

probably because I don't know enough about the

19

subject matter personally to ask a great

20

question.

21

Other than that, I'm really just trying

22

to get information, so I'm certainly not trying

23

to ask confusing questions or trick questions or

11:07:37

5

1 anything like that. I'm just trying to develop
 2 my knowledge of the case. That's all I have.
 3 Do you have any questions for me?
 4 **A. I do not.**
 11:07:47 5 **Q.** Okay. And, Mr. Sawyer, are you aware --
 6 do you want to go by Mr. Sawyer or Alan?
 7 **A. Either one.**
 8 **Q.** Okay. Mr. Sawyer, are you aware that
 9 you're here today to be deposed in an
 11:08:04 10 appropriation matter filed by Plaintiff NRG Ohio
 11 Pipeline Company LLC in Lorain County, Ohio
 12 against Defendants Matthias and Joanne Helfrich?
 13 **A. Correct.**
 14 **Q.** And I'll just refer to the Plaintiff as
 11:08:16 15 Plaintiff or NRG Pipeline interchangeably if
 16 that's all right with you.
 17 **A. Okay.**
 18 **Q.** I'll refer to the Defendants simply as
 19 the Helfriches?
 11:08:26 20 **A. Okay.**
 21 **Q.** As your counsel has previously agreed,
 22 you're appearing here today pursuant to a notice
 23 of deposition that was issued in the matter of
 24 NRG versus K. Hovnanian Oster Homes; is that
 11:08:40 25 right?

Molnar & Munguia Court Reporting (440) 377-5030

6

1 **A. Yes.**
 2 **Q.** Okay. And I'll mark for identification
 3 as Exhibit A the notice that I'm referring to.
 4 And if you would, please review that for accuracy
 11:08:58 5 and confirm that that is an accurate copy of the
 6 notice you received for your deposition here
 7 today.
 8 **A. Okay.**
 9 **Q.** I'd like to draw your attention to the
 11:09:09 10 duces tecum portion, where we requested various
 11 documents. And did you bring with you today the
 12 documents described in the duces tecum portion?
 13 **A. No, I do not have any of the documents,**
 14 **other than the appraisal report for Helfrich at**
 11:09:30 15 **the moment.**
 16 **Q.** Okay. The appraisal report by whom?
 17 **A. This is appraisal report by Mollica for**
 18 **Helfrich.**
 19 **Q.** Okay. And what is the reason that you
 11:09:39 20 do not have the other requested documents?
 21 **A. So I have sent this on to our legal**
 22 **department. And they need to take responsibility**
 23 **for determining what is the scope of the**
 24 **questions and getting those documents, if any do**
 11:10:00 25 **exist, produced and over to counsel.**

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1 **Q.** Okay. And do you have an estimated time
 2 frame for when we can anticipate those documents
 3 being produced?
 4 **A. I do not have a time frame yet, because**
 11:10:13 5 **we haven't -- what's the right word I want to say**
 6 **here? The legal department who will do any and**
 7 **all searches haven't finalized the search**
 8 **parameters and so that would happen next week.**
 9 **And once the search parameters are finalized,**
 11:10:33 10 **then they'll be able to tell you how long it will**
 11 **take to get the documents and produced over to**
 12 **you.**
 13 **Q.** Okay. Thank you.
 14 **MR. STAHLER:** And, Dennis, would you be
 11:10:41 15 willing to provide us an update when those search
 16 parameters are finalized?
 17 **MR. O'TOOLE:** Absolutely.
 18 **MR. STAHLER:** Great.
 19 **MR. O'TOOLE:** The turnaround here is as
 11:10:53 20 soon as we get something, it just goes right to
 21 you. We review it, of course, but we turn it
 22 around the same day.
 23 **MR. STAHLER:** We appreciate that. Thank
 24 you.
 11:11:01 25 **MR. O'TOOLE:** Absolutely.

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1 **BY MR. STAHLER:**
 2 **Q.** Mr. Sawyer, are you aware that you've
 3 been named as a trial witness in this matter?
 4 **A. Correct.**
 11:11:06 5 **Q.** Okay. What is your current position
 6 with NRG Pipeline?
 7 **A. I'm the vice-president of pipeline as**
 8 **you refer to it, yes.**
 9 **Q.** Okay. In your role as vice-president,
 11:11:21 10 what are your responsibilities?
 11 **A. My responsibilities are generally to**
 12 **develop the pipeline ready to construct, that's**
 13 **what we're working on at the moment. "We" being**
 14 **a broad number of people, including counsel and**
 11:11:41 15 **everybody else trying to get us to that point.**
 16 **Q.** How many employees does NRG Pipeline
 17 have?
 18 **A. There are no employees.**
 19 **Q.** Okay. So what other -- you yourself are
 11:11:57 20 vice-president. What other corporate officers
 21 does NRG Pipeline have?
 22 **A. There is going to be a list of officers.**
 23 **I don't have that in front of me. I would go to**
 24 **our corporate structure group to get the current**
 11:12:18 25 **and exact list, but there will be a president,**

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1 there's probably a treasurer, there's a
2 secretary, there may be other vice-presidents
3 depending upon how they've arranged the titles.

4 Q. Okay. Thank you.

11:12:39 5 Would there have been any changes in
6 that person, in this personnel since the 27th of
7 May of this year?

8 A. Could well have been.

9 Q. Okay.

11:12:47 10 A. The reason why I say that is there could
11 have been changes in some of the corporate
12 functions, people may have moved positions, you
13 know, like treasurer, secretary, that kind of
14 thing.

11:13:01 15 Q. Okay.

16 A. So there may have been a change since
17 then.

18 Q. All right. Has your position with NRG
19 Pipeline changed since the 27th of May of this
11:13:11 20 year?

21 A. No, it has not.

22 Q. What is your current position with NRG
23 Energy, Inc.?

24 A. So at NRG, Inc., I am an asset manager,
11:13:24 25 an asset manager within the east region. And I'm
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1 also the vice-president of a subsidiary of NRG
2 Energy, the pipeline company.

3 Q. Okay. And in your position as an asset
4 manager for NRG Energy, Inc., what are your
11:13:44 5 responsibilities in that role?

6 A. So the responsibilities as an asset
7 manager is to look after the business
8 relationships of various power plants that we
9 own. It's kind of a very nebulous description as
11:14:06 10 kind of a look after a lot of loose ends.

11 Q. Okay. We may come back to that.

12 What is your current position, if any,
13 with NRG Power Midwest LP?

14 A. I am not an employee or an officer of
11:14:22 15 NRG Power Midwest.

16 Q. Okay. And just to confirm, NRG Power
17 Midwest LP is a subsidiary of NRG Energy, Inc.?

18 A. Indirect subsidiary, that is correct.

19 Q. Okay. And NRG Power Midwest LP owns or
11:14:44 20 do they own or operate the Avon Lake power plant?

21 A. They own it. I do not know if -- I
22 doubt that -- I doubt they're the operator. The
23 operator may be another subsidiary of GenOn,
24 G-E-N-O-N.

11:15:06 25 Q. And is GenOn a subsidiary of NRG Energy,
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1 Inc.?

2 A. That is correct.

3 Q. Okay. To the best of your knowledge,
4 what will be the subject or subjects of your
11:15:20 5 trial testimony in this case?

6 A. Good question. But I would imagine it's
7 going to be questions about where is the pipe
8 located and, you know, where crossing the
9 Helfrich property.

11:15:43 10 Q. Do you intend to give any engineering
11 opinions?

12 A. Not that I'm aware of.

13 Q. Okay. Are you qualified to give
14 engineering opinions in this case?

11:16:02 15 A. I suspect that because I am not a
16 registered PE in the State of Ohio, I may not be
17 qualified. I don't know.

18 Q. Have you had any involvement in
19 engineering decisions with regard to the
11:16:15 20 pipeline?

21 A. Not really. The engineering decisions
22 were made by our engineering consultant.

23 Q. Okay. Have you had any input into the
24 engineering analysis of the pipeline?

11:16:28 25 A. No.

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1 Q. Do you intend to give valuation opinions
2 at trial?

3 A. I don't think so.

4 Q. Are you qualified to give valuation
11:16:41 5 opinions in this case?

6 A. No.

7 Q. Okay. So you described your role with
8 NRG Pipeline.

9 How would you characterize your
11:16:51 10 involvement in the pipeline project?

11 A. I would -- for lack of better word, I'm
12 the project manager for the effort to, as I said,
13 to develop the pipeline. Develop in this sense
14 means put together whatever team is necessary,
11:17:17 15 manage those folks to obtain easements and
16 permits to be able to build the pipeline.

17 Q. And did you have any input into design
18 characteristics of the pipeline?

19 A. Design characteristics, I would say yes,
11:18:00 20 because I helped quantify the amount of gas the
21 pipeline needed to flow.

22 Q. Okay. Did you have input into the
23 dimensions of the easement areas, that being the
24 permanent and temporary easement areas?

11:18:21 25 A. I was involved with conversations with

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1 our consultants and other folks about whether or
2 not it made sense to reduce the size of
3 easements.

11:18:40 4 Q. Okay. And by "size", you're referring
5 with the width?

6 A. Size, shape, length, location, I'm going
7 to say all of that is size.

8 Q. Okay. So in terms of your involvement
9 in this project, do you have any prior experience
11:18:57 10 in managing a pipeline project?

11 A. Concurrent with this pipeline project, I
12 also manage the pipeline project in Pennsylvania.

13 Q. And that is another project being
14 developed by NRG Energy, Inc. or a subsidiary?

11:19:15 15 A. By a subsidiary, that is correct.

16 Q. And what's the name of that subsidiary?

17 A. The pipeline of Pennsylvania is owned by
18 NRG Power Midwest.

11:19:32 19 Q. Okay. And that's the same company that
20 owns the power plant here in Avon Lake?

21 A. That is correct.

22 Q. Okay. Is that also a conversion to
23 natural gas of a power line?

24 A. It's a gas addition not a conversion.

11:19:45 25 Q. Okay. Would you characterize what's

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1 going on here in Avon Lake as a gas addition as
2 well?

3 A. Yes.

11:19:53 4 Q. Okay. I want to make sure I get the
5 terminology right.

6 How many other pipelines has NRG Energy,
7 Inc. or its subsidiaries constructed?

8 A. I don't know the answer to that. A
9 couple.

11:20:11 10 Q. Well, two that we've identified here.
11 Do you know if there were any others?

12 A. I'm aware that there is -- I know of at
13 least three other pipelines within the company.

11:20:26 14 Q. Okay. Aside from this one here and the
15 one in Pennsylvania you just discussed, where is
16 the third one located?

17 A. There's one in New York, there's one in
18 Maryland, and there's one in Texas.

11:20:43 19 Q. Okay. Do you happen to know what the
20 diameter in inches of those pipelines are?

21 A. No, I do not.

22 Q. Okay. Do you know what the length of
23 those pipelines are?

24 A. No.

11:20:59 25 Q. Do you know what materials are being

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1 transported by those pipelines?

2 A. I believe it's gas, oil, and CO2.

3 Q. Okay. Do you know what the purposes of
4 any of those pipelines are?

11:21:15 5 A. To transport gas, oil, and CO2.

6 Q. Okay. Specifically to a power plant or
7 for transmission between -- for some other
8 purpose?

9 A. So the gas and oil would be to bring
11:21:30 10 fuel to a power plant and the CO2 is to inject
11 it.

12 Q. To inject CO2 into equipment at the
13 power plant?

11:21:43 14 A. No, to inject it into -- where is it
15 going? I think it's going into, for lack of a
16 better word, enhanced oil recovery.

17 Q. I can probably just Google that when I
18 get home.

19 A. I would think so.

11:21:56 20 Q. All right. Mr. Sawyer, have you ever
21 personally visited the Helfriches property?

22 A. Yes, I have.

23 Q. Okay. Are you aware that the property
24 is partially wooded?

11:22:06 25 A. Yes.

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1 Q. Okay. Have you ever spoken with the
2 Helfriches?

3 A. I don't think so, but I don't remember
4 if -- were they at the siting board?

11:22:27 5 Q. I do not believe so.

6 A. Okay. Then I don't think we've spoken.

7 Q. Okay. You're aware that the Helfriches
8 property is located in the Flint Ridge
9 Subdivision?

11:22:41 10 A. Correct.

11 Q. To your knowledge, are there any other
12 active pipelines in the Flint Ridge neighborhood,
13 other than residential service lines?

11:22:59 14 A. There is a forcemain and there is a
15 Columbia Gas pipe.

16 Q. Okay. The forcemain, I believe that's
17 the Lorain County or LORCO sewer main?

18 A. Correct.

11:23:12 19 Q. Okay. In terms of the Columbia Gas
20 pipeline, do you know any of the specifications
21 on that line, like the pipe diameter in inches?

22 A. I understand it's a 16-inch pipe.

23 Q. Okay. Do you know what it transports?

24 A. Natural gas.

11:23:29 25 Q. That would make sense.

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1 Okay. Do you know if that pipeline
2 crosses the Helfrich property?
3 **A. I do not believe it does.**
4 **Q.** Okay. Does Plaintiff's proposed
5 easement in this case cross an existing electric
6 power line easement on the Helfrich property?
7 **A. We're the Plaintiff.**
8 **Q.** Excuse me?
9 **A. Pipeline is the Plaintiff? I always get**
10 **the terminology wrong.**
11 **Q.** Well, in these cases, it's easy to do.
12 The Helfriches are the main Plaintiff,
13 NRG is the other.
14 **A. All right. I got hung up on the**
15 **Plaintiff. Say your question again. I**
16 **apologize.**
17 **Q.** NRG Pipeline's proposed easement on the
18 Helfrich property, does it cross an existing
19 electric power line easement on the Helfrich
20 property?
21 **A. Yes, it does.**
22 **Q.** Okay. I notice that the -- well, who
23 owns the power line easement?
24 **A. I don't know which First Energy**
25 **subsidiary. I just go by First Energy.**

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1 **Q.** That's a subsidiary of First Energy?
2 **A. Correct.**
3 **Q.** Okay. Now, I noticed that in the
4 petition to appropriate, they were not named as a
5 co-Defendant.
6 Do you know why or why not?
7 **A. I would think that you need to name the**
8 **people who own the land as opposed to easements.**
9 **Q.** Okay. Has NRG to your knowledge, do
10 they have an agreement in place with the First
11 Energy subsidiary to cross that easement?
12 **A. I'm sure they do.**
13 **Q.** Okay. How wide is NRG Pipeline's
14 permanent easement on the Helfrich property?
15 **A. Let me look. 25 feet.**
16 **Q.** And how wide is the temporary easement
17 on the Helfrich property?
18 **A. A combined 25 feet.**
19 **Q.** So what is the combined width of the
20 temporary and permanent easement on the Helfrich
21 property?
22 **A. That would be 50 feet.**
23 **Q.** All right. And are you aware that at
24 least part of this easement crosses through a
25 wooded section of the Helfrich property?

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1 **A. I don't think it does.**
2 **Q.** Okay.
3 **A. I haven't been on the property in a**
4 **while, but I thought it was strictly in the**
5 **grassy area.**
6 **Q.** Okay. Where this easement crosses
7 through wooded areas, is the entire width of the
8 permanent and temporary easement clearcut?
9 **A. Generally, that is a correct statement.**
10 **Q.** Okay. Well, I'd like to relate that
11 back to the Helfrich's property. If there are
12 trees located in the permanent or temporary
13 easement area on the Helfrich property, will
14 those trees be cut down?
15 **A. Correct. That is a correct statement.**
16 **Q.** Do you happen to know how close NRG
17 Pipeline's temporary easement right-of-way will
18 come to the Helfriches home?
19 **A. Not off the top of my head.**
20 **Q.** Okay. Who would have that information?
21 **A. I'm sure the engineers -- well, to get**
22 **that information, I would go to the engineers and**
23 **ask them to give me that information off of their**
24 **electronic mapping system.**
25 **Q.** When you say "engineers", who

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1 specifically are you referring to?
2 **A. Hanover.**
3 **Q.** Excuse me?
4 **A. Hanover. Sal Calazzo you remember from**
5 **the siting board.**
6 **Q.** Okay. So Hanover Engineering out of
7 Pennsylvania?
8 **A. That is correct.**
9 **Q.** And Salvatore Calazzo and then a
10 gentleman by the last name of Frederick?
11 **A. Kevin, yeah.**
12 **Q.** Kevin Frederick?
13 **A. Correct.**
14 **Q.** Those would be the most appropriate
15 people to answer that question?
16 **A. Yes.**
17 **MR. STAHLER:** Okay. And Dennis, we've
18 requested remote depositions with those folks.
19 Do we have an update yet?
20 **MR. O'TOOLE:** Let's go off the record
21 for a minute.
22 (Discussion off record.)
23 **MR. STAHLER:** Back on.
24 **BY MR. STAHLER:**
25 **Q.** So do you know how close the permanent

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<p style="text-align: center;">21</p> <p>1 easement will be to the Helfriches house?</p> <p>2 A. Again, not off the top of my head. I</p> <p>3 would ask the engineers to give me that</p> <p>4 dimension.</p> <p>11:30:17 5 Q. Okay. Sal Caiazzo and Kevin Frederick?</p> <p>6 A. That is correct.</p> <p>7 Q. It's going to seem like a very basic</p> <p>8 question, but what is the purpose of the</p> <p>9 easements NRG Pipeline is taking?</p> <p>11:30:30 10 A. The purpose of the easements are to</p> <p>11 install, maintain, and operate a pipeline under</p> <p>12 the property of the easement.</p> <p>13 Q. Okay. And what is the purpose of the</p> <p>14 pipeline?</p> <p>11:30:49 15 A. The purpose of the pipeline is to</p> <p>16 provide natural gas to the Avon Lake power</p> <p>17 station.</p> <p>18 Q. Okay. Are there any other intended</p> <p>19 customers of the NRG Pipeline?</p> <p>11:31:01 20 A. Not at this time.</p> <p>21 Q. All right. So you mentioned earlier</p> <p>22 that the Avon Lake power plant is going to be</p> <p>23 undergoing something you referred to as a gas</p> <p>24 addition?</p> <p>11:31:24 25 A. Correct.</p> <p style="text-align: right;">Molnar & Munguia Court Reporting (440) 377-5030</p>	<p style="text-align: center;">23</p> <p>1 and natural gas?</p> <p>2 A. Very nuance specific, I believe that</p> <p>3 there is an ability to burn oil in start-up on</p> <p>4 coal. So to answer your question, it can burn</p> <p>11:33:24 5 some oil in the initial start-up, but no, it's</p> <p>6 not designed to -- for example, it's not designed</p> <p>7 to burn oil as a fuel that would run the plant up</p> <p>8 to full power.</p> <p>9 Q. Okay. Is the purpose of this pipeline</p> <p>11:33:42 10 then in serving the Avon Lake power plant, is it</p> <p>11 solely to transport natural gas for the gas</p> <p>12 addition?</p> <p>13 A. You know, your question just passed by</p> <p>14 me. I think the answer is yes, but could you</p> <p>11:33:58 15 just say the exact question again?</p> <p>16 Q. Yes. And it probably wasn't an artful</p> <p>17 question.</p> <p>18 In serving the Avon Lake power plant</p> <p>19 after the gas addition is installed, is this</p> <p>11:34:08 20 pipeline solely purposed on transporting natural</p> <p>21 gas?</p> <p>22 A. So yeah, the purpose of the pipeline is</p> <p>23 to transport natural gas. Its current only</p> <p>24 customer is the Avon Lake power station. So yes,</p> <p>11:34:30 25 this pipeline is designed to transport natural</p> <p style="text-align: right;">Molnar & Munguia Court Reporting (440) 377-5030</p>
<p style="text-align: center;">22</p> <p>1 Q. Okay. And what is the reason for doing</p> <p>2 the gas addition?</p> <p>3 A. The gas addition is an change -- the</p> <p>4 ability to burn a different fuel than coal in</p> <p>11:31:46 5 order to reduce air emissions in accordance with</p> <p>6 federal and state rules.</p> <p>7 Q. Okay. When the plant has undergone the</p> <p>8 gas addition, what other types of fuels will it</p> <p>9 be able to use to generate power?</p> <p>11:32:08 10 A. So by way of explanation and background,</p> <p>11 I use the term gas addition, because the concept</p> <p>12 of this project is to go to the Ohio EPA, who</p> <p>13 issues and manages and governs the air emissions</p> <p>14 permit for the power plant, you need to get</p> <p>11:32:32 15 permission from the Ohio EPA for any and all</p> <p>16 types of fuel used at the power plant.</p> <p>17 The plant is currently authorized to</p> <p>18 burn coal. We are asking the Ohio EPA -- we will</p> <p>19 be asking the Ohio EPA to give us a permit to</p> <p>11:32:48 20 additionally burn natural gas at the power plant.</p> <p>21 So by way of explanation, when the gas addition</p> <p>22 project is done, the plant should still have the</p> <p>23 ability to burn coal and natural gas.</p> <p>24 Q. Okay. But it will not have the ability</p> <p>11:33:04 25 to burn any other types of fuels, other than coal</p> <p style="text-align: right;">Molnar & Munguia Court Reporting (440) 377-5030</p>	<p style="text-align: center;">24</p> <p>1 gas.</p> <p>2 Q. Okay. And the pipeline is being</p> <p>3 built-in conjunction with the gas addition</p> <p>4 project at the Avon Lake power plant?</p> <p>11:34:43 5 A. That's a fine characterization.</p> <p>6 Q. Okay. Because the purpose of the</p> <p>7 pipeline is to serve the gas addition --</p> <p>8 A. Correct.</p> <p>9 Q. -- at the Avon Lake power plant?</p> <p>11:34:51 10 Okay. After that gas addition is in</p> <p>11 place, the Avon Lake power plant will only be</p> <p>12 able to burn coal and natural gas as a means of</p> <p>13 generating power?</p> <p>14 A. That is correct.</p> <p>11:35:04 15 Q. All right. So does NRG Pipeline intend</p> <p>16 to transport anything other than natural gas</p> <p>17 through this pipeline?</p> <p>18 A. Not at this time.</p> <p>19 Q. And would it be fair to say that if NRG</p> <p>11:35:32 20 Pipeline at some time in the future decided to</p> <p>21 transport some other material other than natural</p> <p>22 gas, that would have nothing to do with the</p> <p>23 current purpose for which the pipeline is being</p> <p>24 built?</p> <p>11:35:49 25 A. I don't know if that's a complete</p> <p style="text-align: right;">Molnar & Munguia Court Reporting (440) 377-5030</p>

1 accurate characterization. There are many -- I
2 suggest that there are many different types of
3 hydrocarbons that can be used as fuel, natural
4 gas being a very specific hydrocarbon. There
5 might be other types of hydrocarbon that could
6 become a fuel for the power plant, but right now
7 it's natural gas.

8 Q. All right. To burn some other -- well,
9 for example, what other type of hydrocarbon could
10 be used as a fuel?

11 A. Oil.

12 Q. Okay. And what sort of process would
13 NRG have to go through to be able to burn oil as
14 a source of power generation at the Avon Lake
15 power plant?

16 A. Again, you would have to go through a
17 permit process with the Ohio EPA for the right to
18 burn oil and decide that that's the right thing
19 to do.

20 Q. Okay. Has NRG Energy, Inc. or any of
21 its subsidiaries initiated the approval process
22 to burn any other type of fuel at the Avon Lake
23 plant, other than natural gas?

24 A. Slight nuance, the answer to your
25 question, we have not asked for permission to

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1 burn -- to add any fuel other than natural gas,
2 so that's correct.

3 Q. What is the current proposed time frame
4 for completing the gas addition at the Avon Lake
5 plant?

6 A. Undetermined at this time.

7 Q. Okay. What's the proposed time frame
8 for beginning the process of the gas addition?

9 A. Sometime after we finish acquisition of
10 easements.

11 Q. Okay. You were talking about EPA
12 permits for the gas addition earlier.

13 Has NRG commenced the process of
14 applying for those approvals?

15 A. Yes.

16 Q. Okay. And what sort of steps has NRG
17 taken so far?

18 A. We have asked the director of the Ohio
19 EPA to give us the authority to start the
20 process, so there's a two step -- back up.

21 There's a two-step process for getting
22 an air permit. One is you need to get -- and
23 this is a very generic description. You need to
24 get a permission to install, which is in the
25 acronym abbreviation of our industry, we call

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1 call it PTI, Permit to Install. You have to get
2 that before you can install any equipment or any
3 changes in the plant. And then after you get a
4 permit to install, you need to change your actual
5 emissions permit to actually use the fuel and
6 emit emissions based on that fuel.

7 Q. Okay. And that second step, does that
8 generally occur before all of the equipment under
9 the PTI has actually been installed?

10 A. Generally, yes.

11 Q. Okay.

12 A. You generally get both of those steps
13 done before you proceed.

14 Q. Okay.

15 A. Because you wouldn't want to buy
16 equipment and not have the ability to use it.

17 Q. Certainly. Has NRG applied for its
18 Permit to Install?

19 A. Yes.

20 Q. Okay. Is there a -- I assume there's a
21 public record of that document?

22 A. There is, yeah. It will be under the
23 Ohio EPA.

24 Q. Okay. Has NRG initiated the second step
25 you described?

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1 A. We did, yes.

2 Q. Okay. And there's a public record of
3 that somewhere?

4 A. I'm trying to remember. Now, my mind is
5 a little fuzzy here. Is that part of the siting
6 board? I think that was one of the attachments
7 to the siting board application. I'm trying to
8 remember.

9 Q. Okay. I don't know.

10 A. I know you and I have been through all
11 that. If you recall, right, there were a large
12 number of attachments that you had to go in with
13 the siting board application. I'd be surprised
14 if that wasn't one of them.

15 Q. Okay. Is there any expiration on any of
16 that documentation? Some of that documentation
17 is probably close to two years old.

18 A. I'm sure there are. There may well be.
19 I do not know those off the top of my head.

20 Q. And to your knowledge, though, none of
21 those have expired to date?

22 A. To my knowledge, none of those have
23 expired, that's correct.

24 Q. Okay. Now, in the documents request
25 that we talked about earlier that's in Exhibit A,

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1 I believe we asked for documents like those we
2 just discussed that there are public records of
3 we believe. All right.

11:42:19 4 MR. STAHLER: Well, counsel has told us
5 you'll keep us up-to-date on the document
6 assembly.

7 MR. O'TOOLE: Absolutely.

8 MR. STAHLER: Okay.

11:42:30 9 MR. O'TOOLE: Clint, we understand that
10 there's time issues here, so we're sensitive to
11 that. And I don't want you to think we have a
12 cavalier attitude about it. We don't.

13 MR. STAHLER: I appreciate it.

14 BY MR. STAHLER:

11:42:40 15 Q. What kind of new equipment will be
16 required to carry out the gas addition?

17 A. Generally --

18 MR. O'TOOLE: Let me just object. Go
19 ahead.

11:42:57 20 A. Generally the plant is going to need to
21 install pipes to feed the natural gas from the
22 Ohio pipeline pipe up to the boiler and then
23 probably make changes to the burners and the
24 boiler to burn the natural gas.

11:43:19 25 Q. Okay. And so NRG has not yet obtained
Molnar & Munguia Court Reporting (440) 377-5030

1 their PTI; is that correct?

2 A. No, I think we have a PTI.

3 Q. You have the PTI.

4 Okay. Has any of the equipment you just
11:43:34 5 described, burners and boilers, excuse my
6 terminology, has any of that equipment been
7 procured by NRG?

8 A. No.

9 MR. O'TOOLE: Objection.

11:43:45 10 Q. Okay.

11 THE WITNESS: Sorry. I didn't mean to
12 talk over you.

13 MR. O'TOOLE: That's all right.

11:43:56 14 Q. Does NRG have an intended time frame to
15 procure that equipment?

16 MR. O'TOOLE: Objection. Show a
17 continuing line of objection regarding what's
18 going to happen down at the power plant and
19 questions related to it.

11:44:09 20 Go ahead and answer.

21 A. I answered the question earlier that you
22 said what's the schedule and the answer is it's
23 unknown at this time.

11:44:19 24 Q. Okay. And I believe you said it depends
25 on when all of the right-of-way is acquired for

Molnar & Munguia Court Reporting (440) 377-5030

1 the pipeline?

2 A. Right now that's the critical path.

3 Q. Okay. What percentage by -- in terms of
4 number of easements required to build the
11:44:49 5 pipeline, what percentage has NRG acquired to
6 date?

7 A. I don't know the exact number, but
8 greater than 50 percent.

9 Q. Greater than 50 percent?

11:45:06 10 A. Yes.

11 Q. Okay. How about in terms of length of
12 easements, what percentage has been acquired to
13 date?

14 A. I don't know that answer without
11:45:20 15 trying --

16 MR. O'TOOLE: I'm going to object.

17 Clint, could you be a little more specific by
18 what you mean by "acquired"? The reason why I
19 mention that is there may be some that there's an
11:45:31 20 agreement, but there hasn't been a transfer of
21 the interest.

22 Q. I would be referring to the transfer of
23 interest, actually having acquired an executed
24 easement?

11:45:46 25 A. And again, I'd have to calculate the
Molnar & Munguia Court Reporting (440) 377-5030

1 number. I don't know that number off the top of
2 my head.

3 Q. Okay. When does NRG intend to begin
4 construction of the pipeline?

11:46:09 5 A. Sometime after we finish getting
6 easements.

7 Q. Has NRG selected a contractor for the
8 pipeline construction?

9 A. No.

11:46:18 10 Q. Okay. Has NRG selected -- I hear an
11 objection coming. Has NRG selected contractors
12 for the work required for the gas addition at the
13 plant?

14 A. No.

11:46:28 15 Q. Okay. What is the proposed duration of
16 the temporary easement areas?

17 A. In general, you know, they're expected
18 to last during the construction period, which is,
19 you know, I don't know that we put a specific
11:47:14 20 date on those, but I would say they're going to
21 exist for a number of months during which you're
22 going to need to do the construction and the
23 restoration activities.

11:47:31 24 Q. Okay. But there's no definite time
25 frame on an expiration or termination of those

Molnar & Munguia Court Reporting (440) 377-5030

1 temporary easements?

2 **A. No.**

3 **Q.** Are there any other factors that are
4 determinative of when -- strike that.

11:48:11 5 **MR. STAHLER:** I think we're going to
6 take a break for a few minutes, so this might
7 actually be shorter than we thought. We'll go
8 off.

9 **MR. O'TOOLE:** Okay.

11:57:04 10 **(Recess taken.)**

11 **MR. STAHLER:** We'll go back on.

12 **BY MR. STAHLER:**

13 **Q.** Earlier you mentioned that you were
14 involved in another pipeline project over in
11:57:20 15 Pennsylvania.

16 When did that project begin?

17 **A. Let me think. That project began in**
18 **either 2013 or 2014.**

11:57:50 19 **Q.** Okay. And what was your role in that
20 project?

21 **A. Similar role as to here, project manager**
22 **responsible to get the pipeline ready to build.**

23 **Q.** Okay. What is the size in diameter in
24 inches of that pipeline?

11:58:19 25 **A. I'm trying to remember. I think it's a**
Molnar & Munguia Court Reporting (440) 377-5030

1 **16-inch pipe.**

2 **Q.** And what materials does that pipeline
3 transport?

4 **A. Natural gas.**

11:58:30 5 **Q.** What's the pipeline's purpose?

6 **A. To provide gas to one of our power**
7 **stations.**

8 **Q.** Okay. Was eminent domain exercised?

9 **A. No.**

11:58:42 10 **Q.** What's the length of that pipeline?

11 **A. Just under five miles.**

12 **Q.** And you mentioned some other projects
13 earlier, some other pipelines that NRG operates.

11:59:12 14 Do you have any idea when each of those
15 were built?

16 **A. No, I do not.**

17 **Q.** Okay. Do you know if eminent domain was
18 used on any of those?

19 **A. I do not.**

11:59:19 20 **Q.** Okay. To your knowledge, has NRG had
21 any governmental violations in relation to any of
22 the pipelines it operates?

23 **A. Not that I'm aware.**

24 **Q.** Okay. Any safety problems, explosions?

11:59:47 25 **A. Not that I'm aware.**

Molnar & Munguia Court Reporting (440) 377-5030

1 **Q.** Okay. Do you know if NRG Energy, Inc.
2 or its subsidiary ever had a permit revoked due
3 to a safety violation with regard to a pipeline?

4 **A. Again, not that I'm aware of.**

12:00:07 5 **Q.** Okay. Do you know if NRG Energy, Inc.
6 or its subsidiaries have ever abandoned a
7 pipeline?

8 **A. Not that I'm aware of.**

12:00:24 9 **Q.** Okay. You were mentioning the Permit to
10 Install, the PTI, earlier. When did NRG apply
11 for its PTI?

12 **A. The power plant applied for its PTI -- I**
13 **have to go back and look. It was probably in the**
14 **2013 to 2014 time frame.**

12:00:50 15 **Q.** Okay. And you said that NRG has
16 received its PTI?

17 **A. Yes.**

18 **Q.** Okay. And what does the PTI actually
19 authorize NRG to do?

12:01:05 20 **A. In general, it authorizes the plant to**
21 **go ahead and install the systems to add natural**
22 **gas.**

23 **Q.** Okay. Do you know when NRG received the
24 PTI?

12:01:30 25 **A. No. Again, it's going to be in probably**
Molnar & Munguia Court Reporting (440) 377-5030

1 **the 2014 time frame.**

2 **Q.** Okay. Do you know if NRG received the
3 PTI prior to filing petitions to appropriate for
4 the pipeline?

12:01:51 5 **A. Don't know the specific dates, no. I**
6 **can't say that off the top of my head. I don't**
7 **know that.**

8 **MR. STAHLER:** Again, in the notice that
9 we issued for this deposition, we requested
12:02:01 10 documents evidencing the application and
11 permitting with regard to the PTI. I believe
12 that is all covered in there.

13 **MR. O'TOOLE:** That is probably something
14 that pipeline is not going to have, but again, as
12:02:25 15 Alan testified to, that's been turned over to the
16 legal department of the company and so I can't
17 represent that we can get that for you by Monday.
18 I don't have any control over that, but I think
19 everyone is aware of the time frame. And there's
12:02:46 20 just some corporate culture processes that are
21 beyond either Mr. Sawyer's control and certainly
22 beyond mine.

23 **BY MR. STAHLER:**

12:03:06 24 **Q.** Okay. On the step two you were talking
25 about earlier, which I believe had to do with the

Molnar & Munguia Court Reporting (440) 377-5030

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1 OEPA emissions permit?

2 A. Okay.

3 Q. Okay. Has NRG received that permit?

4 A. I don't recall.

12:03:24 5 Q. Okay. Well, that probably answers the

6 next question. It's a different question.

7 To your knowledge, has NRG Energy, Inc.

8 or its subsidiaries received all necessary

9 governmental approvals to begin burning natural

12:03:47 10 gas at the power plant as of right now?

11 MR. O'TOOLE: Objection.

12 A. Yeah, I don't know that answer.

13 Q. Okay. Who would know that answer?

14 A. I would have to go ask somebody from the

12:04:06 15 environmental team.

16 Q. Who is the environmental team?

17 A. It's a whole organization within the

18 company. I have to go find out who the right

19 person is.

12:04:28 20 Q. Will you or your counsel be willing to

21 provide us with that information prior to the

22 trial in this matter?

23 A. I can ask, yeah.

24 MR. O'TOOLE: Sure.

12:04:39 25 Q. Okay. Would you be able to provide us

Molnar & Munguia Court Reporting (440) 377-5030

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1 that like, say, within the next week?

2 MR. O'TOOLE: The name of the person who

3 would know?

4 MR. STAHLER: Yes.

12:04:48 5 MR. O'TOOLE: If we can find out who

6 that is, sure. Again, you're asking questions

7 that my immediate response is absolutely, we can

8 do that. I don't know on the other end how that

9 is done, Clint.

12:05:03 10 MR. STAHLER: Okay.

11 MR. O'TOOLE: We'll certainly make the

12 best effort to find that information. Let me

13 answer it that way.

14 BY MR. STAHLER:

12:05:11 15 Q. Okay. In carrying out the gas addition,

16 there's additional -- there's engineering work

17 and design work that needs to be done before the

18 equipment is installed; is that right?

19 A. Correct.

12:05:28 20 Q. Okay. Now, you said that the equipment

21 had not yet been procured by NRG earlier.

22 Has there been any engineering or design

23 work done on the gas addition?

24 A. Probably not.

12:05:41 25 Q. Okay. Do you know if there's a time

Molnar & Munguia Court Reporting (440) 377-5030

39

1 frame within which that work would start?

2 A. That work probably won't start until

3 after there's a purchase order given to a

4 contractor to do that.

12:06:00 5 Q. Okay. As we sit here today, based on

6 your testimony, would it be fair to say that

7 there is no certainty as to whether natural gas

8 will ever be used to generate power at the Avon

9 Lake power plant?

12:07:39 10 MR. O'TOOLE: Objection.

11 A. I'm not in a position to make a decision

12 on that at all.

13 MR. STAHLER: All right. I think we're

14 done. That's fine.

12:08:06 15 MR. O'TOOLE: Okay.

16 MR. STAHLER: I appreciate your time.

17 MR. O'TOOLE: You're welcome. Will not

18 waive.

19 (Deposition concluded at 12:08 p.m.)

20 ~ ~ ~ ~ ~

21

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23

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Molnar & Munguia Court Reporting (440) 377-5030

40

CERTIFICATE

1 The State of Ohio,)

2) SS:

3 County of Lorain.)

4 I, Nancy L. Molnar, a Notary Public within

5 and for the State of Ohio, duly commissioned and

6 qualified, do hereby certify that the within named

7 witness, ALAN SAWYER, was by me first duly sworn to

8 testify the truth, the whole truth and nothing but

9 the truth in the cause aforesaid; that the

10 testimony then given by the above-referenced

11 witness was by me reduced to stenotypy in the

12 presence of said witness; afterwards transcribed,

13 and that the foregoing is a true and correct

14 transcription of the testimony so given by the

15 above-referenced witness.

16 I do further certify that this deposition

17 was taken at the time and place in the foregoing

18 caption specified and was completed without

19 adjournment.

20 I do further certify that I am not a

21 relative, counsel or attorney for either party, or

22 otherwise interested in the event of this action.

23 IN WITNESS WHEREOF, I have hereunto set my

24 hand and affixed my seal of office at Avon Lake,

25 Ohio, on this 19th day of September, 2016.

Nancy L. Molnar, Notary Public
Within and for the State of Ohio

My commission expires June 22, 2018.

Molnar & Munguia Court Reporting (440) 377-5030

AFFIDAVIT

1
2 **The State of Ohio,)**
3 **) SS:**
4 **County of _____)**
5
6 Before me, a Notary Public in and for said
7 County and State, personally appeared **ALAN SAWYER,**
8 who acknowledged that he did read his transcript in
9 the above-captioned matter, listed any necessary
10 corrections on the accompanying errata sheet, and
11 did sign the foregoing sworn statement and that the
12 same is his free act and deed.
13 In the TESTIMONY WHEREOF, I have hereunto
14 affixed my name and official seal at this _____
15 day of _____ A.D. 2016.
16
17
18 _____
19 Notary Public
20
21 _____
22 My Commission Expires:
23
24
25

Molnar & Munguia Court Reporting (440) 377-5030

1	PAGE	LINE	CORRECTION
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25	ALAN SAWYER	_____	_____

Molnar & Munguia Court Reporting (440) 377-5030

DEPOSITION ERRATA SHEET

1
2
3 **RE: NRG Ohio Pipeline Company LLC vs.**
4 **MATTHIAS HELFRICH, et al.**
5 **Case No.: 15 CV 185927**
6 **Deponent: ALAN SAWYER**
7 **Deposition Date: September 9, 2016**
8
9 To the Reporter:
10 I have read the entire transcript of my Deposition
11 taken in the captioned matter or the same has been
12 read to me. I request that the following changes
13 be entered upon the record for the reasons
14 indicated. I have signed my name to the Errata
15 Sheet and the appropriate Certificate and authorize
16 you to attach both to the original transcript.
17
18
19
20
21 _____
22 **ALAN SAWYER**
23
24
25

Molnar & Munguia Court Reporting (440) 377-5030



John R. Kasich, Governor
Mary Taylor, Lt. Governor
Craig W. Butler, Director

7/26/2016

Certified Mail

Mr. Anthony Catanese
Avon Lake Power Plant
121 Champion Way, Suite 300
Canonsburg, PA 15317

Facility ID: 0247030013
Permit Number: P0085253
County: Lorain

RE: DRAFT AIR POLLUTION TITLE V PERMIT
Permit Type: Renewal

Dear Permit Holder:

A draft of the OAC Chapter 3745-77 Title V permit for the referenced facility has been issued. The purpose of this draft is to solicit public comments. A public notice will appear in the Ohio Environmental Protection Agency (EPA) Weekly Review and the local newspaper, The Chronicle Telegram. A copy of the public notice, the Statement of Basis, and the draft permit are enclosed. This permit can be accessed electronically on the Division of Air Pollution Control (DAPC) Web page, www.epa.ohio.gov/dapc by clicking the "Search for Permits" link under the Permitting topic on the Programs tab. Comments will be accepted as a marked-up copy of the draft permit or in narrative format. Any comments must be sent to the following:

Andrew Hall
Permit Review/Development Section
Ohio EPA, DAPC
50 West Town Street, Suite 700
P.O. Box 1049
Columbus, Ohio 43216-1049

and Ohio EPA DAPC, Northeast District Office
2110 East Aurora Road
Twinsburg, OH 44087

Comments and/or a request for a public hearing will be accepted within 30 days of the date the notice is published in the newspaper. You will be notified if a public hearing is scheduled. A decision on processing the Title V permit will be made after consideration of comments received and oral testimony if a public hearing is conducted. You will then be provided with a Preliminary Proposed Title V permit and another opportunity to comment prior to the 45-day Proposed Title V permit submittal to U.S. EPA Region 5. The permit will be issued final after U.S. EPA review is completed and no objections to the final issuance have been received. If you have any questions, please contact Ohio EPA DAPC, Northeast District Office at (330)963-1200.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael E. Hopkins".

Michael E. Hopkins, P.E.
Assistant Chief, Permitting Section, DAPC

Cc: U.S. EPA Region 5 - Via E-Mail Notification
Ohio EPA-NEDO





DRAFT

**Division of Air Pollution Control
Title V Permit
for
Avon Lake Power Plant**

Facility ID:	0247030013
Permit Number:	P0085253
Permit Type:	Renewal
Issued:	7/26/2016
Effective:	To be entered upon final issuance
Expiration:	To be entered upon final issuance



Draft Title V Permit
Avon Lake Power Plant
Permit Number: P0085253
Facility ID: 0247030013

Effective Date: To be entered upon final issuance

Authorization

Facility ID: 0247030013
Facility Description: Electric Utility Generating Station
Application Number(s): A0015880, A0053351, A0054498
Permit Number: P0085253
Permit Description: Renewal of Title V Permit for electric utility generating station.
Permit Type: Renewal
Issue Date: 7/26/2016
Effective Date: To be entered upon final issuance
Expiration Date: To be entered upon final issuance
Superseded Permit Number: P0085252

This document constitutes issuance of an OAC Chapter 3745-77 Title V permit to:

Avon Lake Power Plant
33570 Lake Road
Avon Lake, OH 44012-0000

Ohio Environmental Protection Agency (EPA) District Office or local air agency responsible for processing and administering your permit:

Ohio EPA DAPC, Northeast District Office
2110 East Aurora Road
Twinsburg, OH 44087
(330)963-1200

The above named entity is hereby granted a Title V permit pursuant to Chapter 3745-77 of the Ohio Administrative Code. This permit and the authorization to operate the air contaminant sources (emissions units) at this facility shall expire at midnight on the expiration date shown above. You will be sent a notice approximately 18 months prior to the expiration date regarding the renewal of this permit. If you do not receive a notice, please contact the Ohio EPA DAPC, Northeast District Office. If a renewal permit is not issued prior to the expiration date, the permittee may continue to operate pursuant to OAC rule 3745-77-08(E) and in accordance with the terms of this permit beyond the expiration date, if a timely renewal application is submitted. A renewal application will be considered timely if it is submitted no earlier than 18 months and no later than 6 months prior to the expiration date.

This permit is granted subject to the conditions attached hereto.

Ohio Environmental Protection Agency

Craig W. Butler
Director

(Authority for term: 40 CFR Part 63)

9. This facility has operated two existing, coal-fired electric steam generating units (EGUs) (emissions units B010 and B012). The emissions units were both initially subject to a compliance deadline of April 16, 2015, in accordance with Section 40 CFR 63.9984(b).

On September 5, 2013, the Ohio EPA Director granted this facility a one-year MATS compliance extension following receipt of a written request from the applicant, per Section 63.6 of 40 CFR Part 63, Subpart A - General Provisions.

In accordance with the terms of the one-year compliance extension, the compliance deadline expired on April 16, 2016.

Per 40 CFR Part 63, Subpart UUUUU, any electric utility steam generating unit that has the capability of combusting more than 25 MW of coal or oil but did not fire coal or oil for more than 10.0 percent of the average annual heat input during any 3 calendar years or for more than 15.0 percent of the annual heat input during any calendar year is not subject to 40 CFR Part 63, Subpart UUUUU. Accordingly, a PTI Administrative Modification (P0120245) was issued on April 19, 2016 designating emissions unit B010 as a "limited use boiler", thereby exempting the emissions unit from 40 CFR Part 63, Subpart UUUUU.

The requested one-year compliance extension was to provide time for the applicant to construct a gas line to the facility and then install natural gas burners in emissions units B010 (Unit 7) and B012 (Unit 9). Due to delays in extending the natural gas line to the facility, the Avon Lake Generating Station has installed air pollution control equipment (Activated Carbon Injection and Dry Sorbent Injection Systems) on emissions unit B012 in an effort to comply with 40 CFR Part 63, Subpart UUUUU since it will retain the ability to burn coal as a bridge until the natural gas project is completed.

10. As part of the aforementioned one-year compliance extension, the applicant shall submit quarterly reports to Ohio EPA no later than 15 days after the end of the calendar quarter. The first submission shall begin after the quarter ending December 31 2013. Said reports shall be submitted to Christopher Beekman at Ohio EPA Central Office, Division of Air Pollution Control and a copy to Ed Fasko of the Northeast District Office. Information in the quarterly updates shall include, at a minimum, the project status of major construction milestones such as pipeline procurement, pipeline route development, pipeline permitting and Ohio Power Siting Board approval, erection of burner equipment and the status of final commissioning activities.

The requirement to submit said quarterly reports shall end upon achievement of the final report indicating MATS compliance has been achieved (the final report shall be submitted in the 3rd quarter of 2016).

[As a bridge until the natural gas project is completed, the Avon Lake Generating Station has installed additional control equipment for the purpose of MATS compliance while running on coal. Please note that failure to achieve MATS compliance will result in NRG being subject to enforcement action(s) by the Ohio EPA and the U.S. EPA]

11. On March 3, 2014, Ohio EPA received a request for an environmentally beneficial determination from NRG Energy. The proposed environmentally beneficial project is for the installation of natural gas-fired burners in B010 and B012.



John R. Kasich, Governor
Mary Taylor, Lt. Governor
Craig W. Butler, Director

September 2, 2016

Mr. Brian Green
Senior Air Quality Specialist
NRG Power Midwest
121 Champion Way
Suite 300
Canonsburg, PA 15317

Re: **NRG Power Midwest, LP-Avon Lake
Emissions Test
Air Permit
Lorain County
0247030013**

Division of Air Pollution Control

Subject: Letter of Compliance

Dear Mr. Green:

Ohio EPA has reviewed the compliance stack test report for NRG Power Midwest in Avon Lake Ohio, for emissions unit B012 (unit #9). The test was conducted to determine compliance with the applicable permitted level of particulate emissions (PE), as a surrogate for non-mercury metals and Hydrogen chloride (HCl) for acid gases. The test was conducted on July 7, 2016 and was witnessed by Matt Campbell of the Ohio EPA's Northeast District Office (NEDO). The test report was received by NEDO on August 30, 2016.

The required testing protocols and methodologies were reportedly performed within method specifications. The test report indicated that the average mass emission rate for all pollutants successfully demonstrated compliance as shown in the table below:

NRG Power Midwest-Avon Lake, OH			Test Date: 7/7/2016
Unit	Parameter	Permit Limits	Test Results
Unit #9 (B012)	HCl	2.0E-3 lb/MMBtu or 2.0E-2 lb/MWh	1.02E-3 lb/MMBtu or 8.87E-3 lb/MWh
	PE	0.10 lb/MMBtu	0.005 lb/MMBtu
	Load	6040 MMBtu/hr & 680 MW	5659.76 MMBtu/hr & 642.6 MW



Northeast District Office • 2110 East Aurora Road • Twinsburg, OH 44087-1924
epa.ohio.gov • (330) 963-1200 • (330) 487-0769 (fax)

MR. BRIAN GREEN
SEPTEMBER 2, 2016
PAGE 2

Accordingly, this office accepts these results as a compliance demonstration for the boiler exhaust. If you have any questions regarding this letter, please do not hesitate to contact me at (330) 963-1243. Should you have any questions regarding your permit, please contact Corey Kurjian at (330) 963-1216.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matt Campbell', with a long horizontal flourish extending to the right.

Matt Campbell
Environmental Specialist II
Division of Air Pollution Control
Northeast District Office

MC:bo

ec: Brian Kearney, NRG Power Midwest, LP, brian.kearney@nrg.com
Tim Fischer, Supervisor, DAPC/NEDO
Corey Kurjian, Supervisor, DAPC/NEDO

1 IN THE COURT OF COMMON PLEAS
2 OF LORAIN COUNTY, OHIO

3 - - - - -

4
5 NRG OHIO PIPELINE COMPANY LLC,
6 Plaintiff,

7 vs Case No. 15CV185335
8 Judge Christopher Rothgery
9 Magistrate Blaszak

10 FIELDSTONE LAKES LTD., et al.,
11 Defendants.
12

13 - - - - -

14 DEPOSITION OF ALAN SAWYER
15 MONDAY, JUNE 20, 2016
16 2:00 O'CLOCK P.M.
17 - - - - -

18
19 Taken at:
20 O'Toole McLaughlin Dooley Pecora
21 5455 Detroit Road
22 Sheffield Village, Ohio 44054

23 Vivian L. Gordon, FAPR, RDR
24 - - - - -
25

EXHIBIT

F

1 or whatever the appropriate means are.

2 Q. Okay.

3 A. But I would expect that over the
4 lifetime of the pipe I wouldn't expect anybody
5 to be digging up the land.

6 Q. Okay. I want you to look at Exhibit
7 B on page two.

8 A. Okay.

9 Q. It's the second full paragraph that
10 starts, the consideration paid to grantor by
11 current grantee for the easements shall be, and
12 it's blank. There is nothing here because there
13 hasn't been anything accrued yet. Payable as
14 follows: One-half of this stated amount shall be
15 paid upon the signing of this easement agreement
16 and the balance shall be paid within 30 days
17 after the commencement of the construction of
18 the pipeline on grantor's property.

19 Why aren't you just paying them the
20 full amount?

21 A. Because a significant value to the
22 easement is us digging up your land and putting
23 the pipeline in. If we never put the pipeline
24 in, that's why we are delaying the payment until
25 such time that the construction begins.

1 Q. Does it have anything to do with the
2 inability to actually pay all that money until
3 the pipeline is in?

4 A. No.

5 Q. Is there some funding prerequisite
6 as it relates to the pipeline that would prevent
7 you from paying?

8 A. There is certainly always a time
9 value of money. So, I mean, as a corporation
10 that needs to make a return on your investment,
11 if we can delay investment, there is always
12 value in that. And this is the case, this is
13 how we offer to do payments.

14 Q. Okay. Is there any time limitation
15 on the easement?

16 A. Not that I'm aware of. There
17 shouldn't be.

18 Q. So this is permanent?

19 A. Yes. Well, there are generally two
20 parts to an easement. There's a permanent
21 easement, which is permanent.

22 Q. Right.

23 A. And then in some cases we would ask
24 for a temporary easement for additional property
25 to be used during construction.

1 Q. Park your equipment there and things
2 like that?

3 A. You put the dirt pile on the
4 temporary easement and that goes away.

5 Q. What if you never build a pipeline?

6 A. In terms of what?

7 Q. So you acquire the easement
8 necessary to build a pipeline and don't build a
9 pipeline, do you still own the easement?

10 A. The permanent easement, absolutely.

11 Q. What if the pipeline would go out of
12 service?

13 A. If the pipeline goes out of service,
14 I believe the easement stays in existence as
15 long as the pipes are there.

16 Q. Is there any obligation that NRG has
17 to remove the pipeline? Like say it goes go out
18 of service and it's at the end of its use, would
19 you remove the pipeline or would it stay there?

20 A. A general good engineering practice
21 is that you would leave it in place but you
22 would -- what's the word I want to say -- retire
23 the pipeline. So you would probably clean it
24 and make sure it's been inert with nitrogen and
25 you would just abandon it in place.