

**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’ RESPONSE IN OPPOSITION TO
NRG OHIO PIPELINE COMPANY’S SECOND 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**

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”) **Second** 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 already-extended expiration date of June 4, 2018.

In the alternative, the Property Owners respectfully move this Board to set a firm deadline for commencement of construction of this Pipeline and only grant another extension on the strict condition that no further extensions will be granted. A brief Memorandum in Support follows.

[SIGNATURE ON FOLLOWING PAGE]

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 Ohio 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.

Respectfully submitted,

/s/ Clinton P. Stahler

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MEMORANDUM IN SUPPORT

I. NRG/NRG Pipeline’s Unsupported Motion Should be Denied.

NRG/NRG Pipeline’s latest Motion to Extend merely seeks to impose further delay to accommodate the indecisiveness of its parent NRG Energy, Inc. (“NRG”) and its web of subsidiary-affiliates, which include the companies that own the Avon Lake Power Plant—Genon Energy, Inc. and NRG Power Midwest LP—to the severe detriment of the Property Owners. The bases set forth in NRG’s Motion are far outweighed by the burdens that further delay would impose upon the Property Owners and the Motion should therefore be denied.

A. The NRG Subsidiaries’ Bankruptcy is Not an Economic Condition Outside NRG’s Control.

Contrary to NRG/NRG Pipeline’s assertion, the bankruptcy filed by Genon Energy, Inc. and NRG Power Midwest LP—both under the control of NRG—are not “economic conditions outside the Company’s control.” This bankruptcy was entirely within NRG’s control and should provide no persuasive basis of support for its Motion.

B. The Bankrupting Subsidiaries have no Involvement in Project Development.

NRG’s argument that further development of the Pipeline, including the exercise of eminent domain, is beyond the scope of GenOn’s permissive “ordinary course” activities in bankruptcy, is disingenuous. The bankrupting entities have no involvement in the Pipeline’s development activities or eminent domain proceedings. Those activities are or were being carried out entirely by NRG and NRG Pipeline, as this Board and the Lorain County Court of Common Pleas are well-aware.

C. Extensions Granted for Other Projects do Not Support an Extension Here.

NRG also attempts to support its erroneous position by pointing to extensions granted by the Board for other projects. The facts and circumstances of those other projects, however, are entirely inapposite and provide no support for NRG/NRG Pipeline's Motion. Neither of the power plant projects cited posed direct surface impacts, let alone substantial disruptions, to numerous non-applicant-owned tracts of land as does this Pipeline. Furthermore, the pendency of construction of those projects did not hold private property owners in a burdensome state of limbo as does this impending project. The Property Owners cannot fully utilize or enjoy their remaining private property rights, including engaging in fair market sales, until the specter of substantial disruptive pipeline construction on their properties has passed.

With regard to the Black Fork Wind Project, NRG might argue that project similarly affects numerous surface property owners. But unlike here, those property rights were acquired on a purely voluntary basis as that project does not have the power of eminent domain under Ohio law. Property owners who granted rights to Black Fork freely assumed the risk of burdensome delays on terms they negotiated and agreed to as willing sellers in voluntary, arm's length transactions. The situation here is entirely different. The Property Owners here had their property rights taken by eminent domain with no way to bargain for or refuse the possibility of lengthy delays as they would have in voluntary, arm's length transactions.²

² Even settlements reached during the pendency of eminent domain proceedings are considered forced-takings, for good reason, and are not willing-seller, arm's length transactions under Ohio law. *see Masheter v. Brewer* (1974), 40 Ohio St.2d 31, 33, 318 N.E.2d 849 (“[a] sale in an appropriation proceeding has some of the characteristics of a forced sale. The property owner is forced to sell; therefore, he is not a willing seller.”); *see also Wray v. Parsson* (1995), 101 Ohio App.3d 514, 517, 655 N.E.2d 1365 (“[t]he price of a sale to an appropriating authority may reflect a compromise between the authority with the power to force a sale and the owner with little power to oppose it.”); *see also Kent v. Atkinson*, 11th Dist. Portage No. 2010-P-0084, 2011-Ohio-6204 at ¶ 67, *citing Brewer*; *see also Proctor v. Hall*, 4th Dist. Lawrence Nos. 05CA3, 05CA8, 2006-Ohio-2228, ¶ 38, *citing Toledo v. Kim's Auto & Truck Sev., Inc.*, 6th Dist. Lucas No. L-02-1318, 2003-Ohio-5604 at ¶ 38; *and see Toledo Edison Co. v. Roller* (1974), 46 Ohio App.2d 61, 62, 345 N.E.2d 430.

i. NRG's Use of Eminent Domain Against the Property Owners Belies Any Potential Justifications for Further, Burdensome Delays.

These Property Owners had no way to protect against or recover for potential burdensome delays in the eminent domain proceedings because, despite the repeated assertions of the undersigned, such was repeatedly denied by NRG/NRG Pipeline and could never have been proven prospectively at a compensation hearing. NRG's witness on this subject repeatedly testified that NRG intended to begin construction as soon as it had acquired all of the right-of-way.³ When pressed on this point, NRG's witnesses refused to concede, admit, acknowledge, or otherwise indicate the potential for lengthy delays. NRG/NRG Pipeline shouldn't not be able to have it both ways—not compensating the Property Owners for burdensome delays and then turning around and asking this Board to aid in granting those delays.

This Board has a responsibility to the Property Owners against whom the Board made it possible for NRG/NRG Pipeline to exercise the power of eminent domain. The Board should stand guard against abuses of this process and thoroughly consider the Property Owners' interests in bringing an end to this languishing disruption to their properties, homes and lives. The Property Owners appeal to the sound judgment of this Board, as that is all that stands between them and such further abuses by NRG.

II. Conclusion

NRG's latest Motion is merely another ploy to further delay construction of this project and further deny resolution to the Property Owners who must continue to live in the shadow of impending heavy construction and major disruptions on their properties—most of which are residential.

³ See, e.g., Deposition of Alan Sawyer, July 11, 2017, 49:8-18. **Exhibit A.**

For all of the foregoing reasons, NRG's Motion should be denied and the June 4, 2018 expiration enforced. In the alternative, this Board should commit to set a firm deadline for commencement of construction of this Pipeline and only issue the requested extension on the strict condition that no further extensions will be granted.

Respectfully submitted,

/s/ Clinton P. Stahler

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *RESPONSE IN OPPOSITION AND MOTION TO ENFORCE* has been filed with the Ohio Power Siting Board and has been served upon the following parties via electronic mail this 23rd day of March, 2018.

/s/ Clinton P. Stahler
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1 A. I do not know.

2 Q. Because your counsel argues that
3 that's a public record, so I'm trying to figure
4 out if in fact it is. And if it is, I'll do what
5 I can to locate it, but you don't know for a fact
6 that that's a publically available document?

7 A. I don't know how you request that.

8 Q. Mr. Sawyer, I know I've asked you
9 this in other cases, but things do change and we
10 haven't discussed this in a while. When does NRG
11 Energy, Inc., or its subsidiary, including NRG
12 Pipeline Company, LLC, intend to begin
13 construction of this pipeline?

14 MR. GEMBALA: Objection. You can
15 answer.

16 A. We've answered this, right. I said
17 as soon as feasible after we've acquired all the
18 land.

19 Q. I think you answered that with
20 regard to the gas addition at the power station.
21 This is a different question. I'm asking when
22 you intend to begin construction of the pipeline.

23 MR. GEMBALA: Same objection.

24 A. Then I'll answer it that the
25 construction of the pipeline would occur as soon

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Summary: Response of Lorain County Property Owners' in Opposition to NRG's Second 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 electronically filed by Clinton P Stahler on behalf of Goldman & Braunstein, LLP