

**BEFORE
THE OHIO POWER SITING BOARD**

In the Matter of the Application of NRG Ohio)
Pipeline Company LLC for Approval of a Letter)
of Notification for the Avon Lake Gas Addition)
Project in Lorain County, Ohio.) Case No. 14-1717-GA-BLN

**NRG OHIO PIPELINE COMPANY’S REPLY IN SUPPORT OF ITS
MOTION TO EXTEND THE DURATION OF THE CERTIFICATE**

I. INTRODUCTION

The Property Owners’¹ untimely memorandum contra should be rejected.² First, the Property Owners ignored the deadline imposed by Ohio Administrative Code (“OAC”) Rule 4906-2-27(B); and the Property Owners did not file an application or motion to waive that deadline as required by OAC Rule 4906-2-01 when a party submits an untimely filing.

Second, the Property Owners’ memorandum contra should be rejected because it misstates the law and facts in the current case. Contrary to the Property Owners’ assertions, the Company is not in control of GenOn’s bankruptcy proceeding, and the bankruptcy is an economic condition outside the Company’s control.

Third, the memorandum contra ignores the fact that of the 40 Property Owners that are objecting to the Company’s extension, 33 have already signed voluntary easements with the Company (the “Settled Owners”).

¹ The Company employs the same definition of this term as that set out by the intervenors in their memorandum contra. As such, this term includes forty landowners of different statuses in the case.

² The Company incorporates by reference all defined terms contained in its 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 (the “Motion”).

II. ARGUMENT

A. The Property Owners' memorandum contra is untimely and should be disregarded.

The text of OAC Rule 4906-2-27(B) is clear and unambiguous: a party that wishes to file a memorandum contra has fifteen (15) days from service of the original motion. The Company filed and served its Motion on March 5, 2018. The Property Owners' deadline to file their opposition was therefore March 20, 2018. The Property Owners missed that deadline by not filing their memorandum contra until March 23, 2018.

In order for a late filing to be accepted, the party must file an application or motion under OAC Rule 4906-2-01, seeking a waiver from the Board's rules. The Property Owners did not make such a filing or make any such request in their memorandum contra. As a result, the Board should follow the lead of the Public Utilities Commission of Ohio,³ and disregard the Property Owners' untimely memorandum contra.

B. GenOn's bankruptcy proceeding is outside of NRG Ohio Pipeline's control.

Contrary to the Property Owners' assertions, GenOn's bankruptcy proceeding is outside of the Company's control. GenOn's bankruptcy filings, for example, demonstrate that GenOn is a separate Securities and Exchange Commission reporting entity.⁴ The Company does not own GenOn, and GenOn does not own the Company. Instead, the Company is a wholly owned subsidiary of NRG Energy, Inc.

Because GenOn and the Company are different entities and the Company does not have any control over GenOn, the GenOn bankruptcy is an economic condition outside of the

³ See, e.g., *In re Ohio Edison Company*, 2016 Ohio PUC LEXIS 270, *64 (Mar. 31, 2016) ("We note that Noble Solutions filed an untimely memorandum contra, which the Commission will disregard due to its untimeliness.").

⁴ The matter is pending in the United States Bankruptcy Court for the Southern District of Texas.

Company's control. And, the Board has consistently granted extensions for changed economic circumstances outside the requesting party's control.⁵

C. Board precedent supports granting an extension to the Company's certificate.

The Board has consistently approved certificate extension requests.⁶ As highlighted in more detail in the Motion, and incorporated herein, companies have requested (and the Board has granted) multiple extensions to the same certificate.⁷ The "good cause" approved by the Board for granting a certificate extension has ranged from changed economic conditions to construction delays to pending litigation.⁸

Nevertheless, without providing any citations to PUCO or Board precedent, the Property Owners argue that the Board's practice of granting extensions for good cause should not be applied here. This argument misstates the facts at issue and misapplies well-established Board precedent.

The Property Owners' central argument is that "the pendency of construction" holds the Property Owners "in a burdensome state of limbo."⁹ For at least 85% of the Property Owners, however, there is no limbo, because they know exactly where the easements will be on their properties. And importantly, they consented to the easement location by signing voluntary easement agreements with the Company.

⁵ See, e.g., *In the Matter of the Application of Norton Energy Storage, LLC for a Certificate of Environmental Compatibility and Public Need for an Electric Power Generating Facility in Norton, Ohio*, Case No. 99-1626-EL-BGN, Entry (March 20, 2006) at 1.

⁶ See *In re Application of Summit Energy Storage*, Case No. 89-1302-EL-BGN, Entry (Nov. 23, 1998), granting a certificate extension for a period of two years; see also *In re Application of Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN, Entry (June 2, 2008), approving applicant's second thirty month certificate extension; *In re Application of Lawrence County Energy Center, LLC*, Case No. 01-369-EL-BGN, Entry (July 13, 2009), granting applicant's twelve month extension.

⁷ *Id.*

⁸ *Id.*

⁹ Memorandum Contra, at 4.

The Property Owners make much ado about the fact that the Company acquired easements across 33 properties after *filing* eminent domain proceedings against those landowners. The Property Owners believe that this somehow alters the analysis for an extension to the Company's certificate. It should not. In all 33 cases at issue, the eminent domain process was never completed, and no appropriations actually occurred. Instead, the Company reached mutually-agreeable resolutions with all 33 landowners (in the form of a recorded easement) without the need for appropriation. Tellingly, no appropriation entries were ever journalized. Instead, all 33 Settled Owners signed and recorded voluntary easements, and all 33 cases were dismissed.

Because the Settled Owners signed *voluntary* easements with the Company, the Board's language granting extensions in wind cases is applicable here. As the Property Owners note in their memorandum contra, the Black Fork Wind Project similarly affected numerous surface property owners.¹⁰ And, in the Black Fork case, the Board approved a two year extension to the certificate.¹¹ The Company requests that the Board follow that precedent here.

D. It is premature to enter an order that sets a firm deadline for construction and that limits future extensions.

Finally, the Company asks that the Board to deny the Property Owners' alternative request for an order that (1) sets a deadline for construction of the pipeline and (2) creates a condition that no further extensions will be granted.

As already demonstrated, the Company cannot agree to a specific deadline for construction of the pipeline because the GenOn bankruptcy proceeding is still ongoing.

¹⁰ Memorandum Contra, at 4 ("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.")

¹¹ *In re Application of Black Fork Wind Energy, LLC*, Case No. 10-2865-EL-BGN, Entry (March 24, 2016).

Likewise, the Board's precedent is to grant extensions—even multiple extensions in the same case—when there is good cause shown.¹² Here, the Company has demonstrated good cause. Namely, that there are economic circumstances outside of the Company's control that have negatively impacted its ability to initiate construction on the Pipeline. Further, the Company diligently invested in the Project after the first extension by continuing to acquire land (with the most recent property settlement occurring within the last two months) and working with landowners to create an agreeable route. Accordingly, the Company has followed Board precedent for requesting an extension.

III. CONCLUSION

For these reasons, the Company respectfully requests that the Board or administrative law judge grant its motion to extend the term of its certificate.

Respectfully submitted on behalf of
NRG OHIO PIPELINE COMPANY LLC



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¹² See, e.g., *In re Application of Norton Energy Storage, LLC*, Case No. 99-1626-EL-BGN, Entry (June 2, 2008), approving applicant's second thirty month certificate extension; *In re Application of Lawrence County Energy Center, LLC*, Case No. 01-369-EL-BGN, Entry (July 13, 2009), granting applicant's twelve month extension.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion was served electronically upon the parties listed below this 30th day of March 2018.



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Summary: Text NRG Ohio Pipeline Company's Reply in Support of Its Motion to Extend The Duration of The Certificate electronically filed by Teresa Orahod on behalf of Dylan F. Borchers