

BEFORE

THE OHIO POWER SITING BOARD

In the Matter of the Application of Duke)
Energy Ohio, Inc., for a Certificate of)
Environmental Compatibility and Public) Case No. 16-253-GA-BTX
Need for the C314V Central Corridor)
Pipeline Extension Project.)

APPLICATION FOR REHEARING BY INTERVENOR CITY OF READING, OHIO

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APPLICATION FOR REHEARING

The City of Reading, pursuant to R.C. 4903.10 and O.A.C. 4906-2-32, seeks rehearing of the Opinion, Order, and Certificate issued by the Ohio Power Siting Board (herein “OPSB”) in this proceeding on November 21, 2019. The specific grounds for this Application for Rehearing are described in greater detail below and in the accompanying memorandum.

1. The City of Reading joins in and adopts the stated reasons within the Applications for Rehearing filed by intervening parties Neighbors Opposed to Pipeline Extension, LLC. (herein “NOPE”); the City of Cincinnati; the City of Blue Ash; and the Village of Evendale.
2. The failure of the OPSB to enforce its own regulations in the route selection process renders its selection of the Alternate Route arbitrary and capricious and in violation of the due process rights of the municipalities and citizens along said route.
3. The elimination of Interstate and other Ohio Department of Transportation rights-of-way from route consideration resulted in a route selection process that was unreasonable, arbitrary, and capricious.
4. The OPSB unreasonably and unlawfully relied on matters not in evidence to dismiss concerns regarding the displacement of residents during construction along the Alternate Route on Third Street in Reading.
5. Arbitrarily assigning equal scoring weight to homes that lie from zero to one hundred feet from the proposed pipeline location, to those houses between one hundred and one thousand feet ignores the actual and continued inconvenience and disruption that will be suffered by homeowners and residents living immediately adjacent to the pipeline that will not be suffered by those residing hundreds of yards away. As such this weighting scheme is unreasonable.

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. BACKGROUND

Following an adjudicatory hearing and briefing by the parties, the OPSB entered an Order on November 21, 2019, granting a certificate of environmental compatibility permitting Duke

Energy Ohio, Inc., to construct its proposed C314V Central Corridor Extension (herein “CCE) in Hamilton County. The construction of this major utility facility will occur along the proposed alternate route and is subject to 41 conditions.

Duke’s application for a certificate was opposed by, among others, the cities of Cincinnati, Blue Ash, and Reading, the Village of Evendale, and a group of residents living along both the preferred and alternate routes organized as Neighbors Opposed to Pipeline Extension, LLC. (referred to throughout the proceedings as NOPE). It is anticipated that the aforementioned municipalities and NOPE will file applications for rehearing of the OPSB’s opinion, order, and certificate. For its part, the City of Reading joins, in, adopts, and incorporates by reference the issues raised by the applications for rehearing that have been or which may be filed in this matter, by the City of Cincinnati, the City of Blue Ash, the Village of Evendale, and NOPE.

Reading’s concerns with the CCE project are largely outlined in pages 55-58, ¶¶109-113 of the opinion and order. These concerns are accurately re-stated and will be discussed in further detail below.

II. GROUNDS FOR REHEARING

The failure of the OPSB to enforce its own regulations in the route selection process renders its selection of the Alternate Route arbitrary and capricious and in violation of the due process rights of the municipalities and citizens along said route.

The proposed alternate route will pass in and along city streets in Reading as well as property owned by the city for future development. Political subdivisions are “persons” as defined in Chapter 4906 of the Revised Code, R.C. 4906.01(A), and such subdivisions and their property interests are protected by the due process clauses of the Ohio and United States Constitutions against arbitrary and unreasonable acts of other governmental units. *Art I, Sec. 1*

Ohio Const.; Fourteenth Amendment, United States Const.; see also: *City of Warrensville Hts. V. City of Shaker Hts.*, 8th Dist. Cuyahoga No. 38356, 1979 WL 209954, 1979 Ohio App. LEXIS 9516. Due process consists of both procedural and substantive components. The essence of substantive due process is the protection from certain arbitrary, wrongful governmental actions irrespective of the fairness of the procedures used to implement them. *Morning View Care Center-Fulton v. Ohio Dep't of Human Servs.*, 148 Ohio App. 3d 518, 529, 2002-Ohio-2878, P29, 774 N.E.2d 300, 309, 2002 Ohio App. LEXIS 2822, *23-24. Rules promulgated by an administrative agency have the force and effect of law unless they are unreasonable or are in conflict with related statutes enacted by the General Assembly. *Id.* (internal citations omitted). They must have a reasonable relation to a proper legislative purpose and must not be arbitrary or discriminatory in their effect. *Id.* To satisfy substantive due process requirements, an administrative agency must interpret its own rules and apply them in a fashion that is neither arbitrary nor capricious. *Id.* (internal citations omitted).

Pertinent to this matter, OPSB regulation 4906-3-05 provides that “[a]ll standard certificate applications for electric power transmission facilities and gas pipelines shall include fully developed information on two sites/routes.” OPSB regulation 4906-3-06 provides that incomplete applications shall be rejected. See OAC 4906-3-06(A)(2). These regulations are couched in mandatory language, using “shall” as opposed to “may.” Their enforcement is not optional or curable. The OPSB acknowledges that Duke Energy informed them that its initial application was incomplete as it had focused its attention on the preferred route and that additional investigation of the alternate route was necessary *after* the staff of OPSB recommended its adoption. *Opinion* at 64. Rather than rejecting Duke’s incomplete application, the OPSB staff permitted Duke to paper over the application’s deficiencies in support of the

staff's initial route selection. The opinion explains away the intervenors' concerns with this process by converting OAC 4906-3-05 into a "general" requirement, stating further that Duke provided the information delineated in R.C. 4906.06 and the Board's rules concomitantly. The opinion also finds that staff received the information necessary to investigate the application. *Id.* at pp 64-65, ¶122. Notwithstanding the position of the OPSB, it is undisputed that the staff's initial selection of the alternate route was based upon incomplete information. This initial failure is what has manifestly poisoned these whole proceedings. Reading requests that the route selection process be reopened and the matter be reheard.

The elimination of Interstate and other Ohio Department of Transportation rights-of-way from route consideration resulted in a route selection process that was unreasonable, arbitrary, and capricious.

The parties do not dispute that the constraints applied during the route selection process to interstate highways and other ODOT rights-of-way differed from those applied to city streets. These technical constraint criteria included placement of the routes along interstates at least ten feet outside of the Ohio Department of Transportation right-of-way, and along other roads placing the routes outside of the right-of-way. The question is whether the constraint applied to interstate highways was legally required or was simply an invention of Duke Energy. Duke acknowledges in its reply brief that "it is true that the constraint is different for interstates than it is for other roads." Duke Reply Brief at 29-30. Duke further alleges that this fact is not within its control and that Reading did not "offer any evidence to the contrary." Reviewing the testimony reveals otherwise. Duke's own route selection expert, Dr. James Nicholas, testified that he was informed of this constraint by Duke Energy and that he was unaware of any legal requirement to impose it. *Hearing Trans.* Vol II, pp 50 ln 20 – 51 ln 15.

It is not the job of Reading, or Blue Ash, or Evendale, or Cincinnati to suss out the origin of this constraint. If Duke Energy has a legal reason why the interstate right-of-way constraint is required, let them produce it. Then Duke can explain why it is legal to arbitrarily treat city streets under a different set of rules.

The OPSB unreasonably and unlawfully relied on matters not in evidence to dismiss concerns regarding the displacement of residents during construction along the Alternate Route on Third Street in Reading.

Duke Energy's constructability review (*Reading* Ex. 4) was never communicated to the OPSB staff during the application process. The review highlights the engineering challenges with constructing the CCE through the narrow streets of Reading and indicates that residents along Third Street in Reading will lose access to their homes during construction. Duke Energy's omission of the Constructability Review from the Staff's investigatory process denied the Staff the opportunity to consider this issue prior to issuing its recommendation. Prior to any final recommendation that the installation will proceed along the Alternate Route, the Staff should have – at a minimum – been apprised of this circumstance. In dismissing Reading's concerns, the OPSB points only to statements by Duke Energy in its reply brief. See *Opinion* at 56, ¶ 109. Unlike Reading's exhibit, Duke's reply brief is not evidence and should not have been relied on by the OPSB to form any basis of its decision. It is unreasonable for the OPSB to have done so.¹

Arbitrarily assigning equal scoring weight to homes that lie from zero to one hundred feet from the proposed pipeline location, to those houses between one hundred and one thousand feet ignores the actual and continued inconvenience and disruption that will be suffered by homeowners and residents living immediately adjacent to the pipeline that will not be suffered by those residing hundreds of yards away. As such this weighting scheme is unreasonable.

¹ Reading notes that the OPSB has included language in its Condition 30 that requires Duke Energy to use construction techniques that will ensure that access to residences remains available throughout construction. But given that Reading lies roughly half-way along the alternate route, the condition by itself provides little assurance that it will be met if Duke finds that such techniques cannot not be used.

The OPSB staff justified its original selection of the alternate route, in part, on the fact that the alternate route impacts fewer residences within 1000 feet of the centerline, while the preferred route impacted fewer residences within 100 feet of the centerline. *Staff Report* at 47. The observation is repeated (with different numbers) in the amended staff report. *Amended Staff Report* at 49. The use of the simple rooftop count favored by the staff is both arbitrary and deceptive. Duke Energy's Amended Application points out that the impact of the proposed pipeline on residences is greater in several respects along the alternate route than on the preferred. The alternate route has a higher percentage of right-of-way in residential areas than does the preferred – 5.4% to 3.8%. *Amended Application* at 7-17. The alternate route has 1480 more linear feet in residential areas than does the preferred. *Id.* Finally the alternate route has more residential structures within 200 feet of the proposed right-of-way than does the preferred route. *Id.* at Appx 7-1. Given these realities, it is clear that Duke Energy's original assessment of the impact on residential areas is correct. In making its recommendation, the staff ignored these realities and instead opted for the only number that supported its decision to place the CCE on the alternate route.

III. CONCLUSION

For all of the forgoing reasons and those advanced by intervening parties: NOPE, the City of Cincinnati, the City of Blue Ash, and the Village of Evendale, a rehearing in this matter is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Initial Brief filed on behalf of Intervenor City of Reading was served by electronic mail on the same day it was filed with the Ohio Power Siting Board upon counsel of record for the parties in the matter to the following electronic addresses:

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Summary: App for Rehearing Application for Rehearing by City of Reading electronically filed by Mr. DAVID T STEVENSON on behalf of CITY OF READING