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 Need for the C314V Central Corridor Pipeline Extension Project.	)))))	Case No. 16-0253-GA-BTX

MEMORANDUM CONTRA APPLICATIONS FOR REHEARING OF DUKE ENERGY OHIO, INC.

TABLE OF CONTENTS

I. INTRODUCTION

In this proceeding considering the siting of a critical piece of new infrastructure, the Ohio Power Siting Board (Board) considered the evidence before it, applied relevant law, and wisely determined to issue a certificate for the construction of the Central Corridor Pipeline (CCP) by Duke Energy Ohio, Inc. (Duke Energy Ohio or Company).[1] This action will provide benefits for the entire community in southwestern Ohio for years to come.

Nevertheless, various communities in the area, as well as a grass-roots group of residents, have now continued their opposition to CCP by filing applications for rehearing of the decision to issue a certificate.[2]

The applications for rehearing must be denied.

II. ARGUMENT

The Board's authority to issue a certificate allowing the construction of a major utility infrastructure project is laid out in several, very specific, statutory requirements:

> The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:
>
> > (1) The basis of the need for the facility if the facility is an electric transmission line or gas pipeline;
> >
> > (2) The nature of the probable environmental impact;
> >
> > (3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

[1] Opinion, Order, and Certificate (November 21, 2019) (OOC).

[2] Application for Rehearing by Intervenor City of Reading, Ohio (Dec. 23, 2019) (Reading AFR); Application for Rehearing Submitted on Behalf of the City of Blue Ash, Ohio (Dec. 23, 2019) (Blue Ash AFR); Application for Rehearing of the City of Cincinnati and the Bard of County Commissioners of Hamilton County (Dec. 23, 2019) (City and County AFR); Application for Rehearing (Dec. 23, 2019) (Evendale AFR); and Application of Neighbors Opposed to Pipeline Extension, LLC for Rehearing (Dec. 23, 2019) (NOPE AFR).

> (4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;
>
> (5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.
>
> (6) That the facility will serve the public interest, convenience, and necessity;
>
> (7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.
>
> (8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.[3]

Under the Revised Code, an application for rehearing must "set forth **specifically** the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[4] OPSB regulations repeat this dictum and also require that "[a]n application for rehearing must be accompanied by a memorandum in support, which sets forth **an explanation of the basis for each ground for rehearing** identified in the application for rehearing."[5] An application for rehearing

[3] R.C. 4906.10(A).
[4] R.C. 4903.10(B) (rule governing rehearing of Commission orders) (emphasis added); R.C. 4906.12 (adopting R.C. 4903.10, among other provisions, for OPSB proceedings).
[5] O.A.C. 4906-2-32(A) (emphasis added).

that merely asserted that "requiring the company to pay a civil forfeiture based on invalid regulations would deprive the company of due process," was found not to meet this requirement because the applicant did not "specifically set forth its due process argument."[6] Thus, merely articulating a "contention" is insufficient; an applicant seeking rehearing must "provide an explanation or legal support for [its] contention[s]."[7]

Although the intervenors who filed applications for rehearing did not categorize their assignments of error in parallel with the statute, this memorandum contra will attempt to group the parties' concerns, where possible, and address them in the order used in the controlling law. Those assignments of error that are unconnected with the statutory requirements for issuance of a certificate will be covered at the end of the memorandum.

A. The Need for CCP Was Clearly Established (R.C. 4906.10(A)(1)).

The first assignment of error by the city of Cincinnati and the Board of County Commissioners of Hamilton County (City and County) proposes that the Board erred in concluding that the Company had demonstrated the basis of need for CCP, arguing several points to justify that proposal.

1. The Stated Objectives for CCP Remained Consistent Throughout the Proceedings.

The City and County first aver that the Company had "initially stated its need for the Proposed Pipeline [was] to further [its] 'regional expansion plans' and 'long-range plan' . . .."[8]

[6] *In the Matter of the Applications of a Settlement Agreement Between the Public Utilities Commission of Ohio and SRS, Inc.*, Case No. 01-2675-TR-UNC, Entry on Rehearing, pp. 1-2 (December 20, 2001) (denying an application for rehearing that "does not meet this specificity requirement").
[7] *Id.*
[8] City and County AFR, p. 2.

After pointing to evidence of a forecasted population decrease in the area,[9] the City and County then stated that "[c]onsequently, Duke changed course and restated the purpose for the pipeline as falling under three objectives . . .."[10] The implication is that Duke Energy Ohio had an original purpose and then had to change to a new set of goals, based on the City and County's exhibit at hearing. This is a nonsensical rearrangement of facts. For its statement that the Company had an original, failed purpose, the City and County relied on Staff testimony, cross-examination of Staff, and the Company's Amended Application. But the testimony and cross-examination do not suggest in any way that the Company initially wanted to construct CCP simply to address regional expansion plans and its own long-range plan. And although the Amended Application does mention expansion plans and the long-term forecast, it very clearly stated that the purpose of the project was "to retire propane-air plants, balance system supply from north to south, and support the replacement of aging infrastructure."[11] Indeed, to make the odd argument even worse, counsel for the City and County had specifically inquired, at the hearing, whether the Company's objectives had remained the same through the entirety of these proceedings. The answer was yes.[12] The City and County's accusation that the Company's goals were inconsistent is absolutely untrue.

2. CCP Will Result in a Substantial Improvement in the Balance of Supply.

The City and County then go on to argue that CCP will not solve the north/south balance problem and is not needed in order to achieve the other two objectives. With regard to the effect of CCP on the north/south balance issue, the City and County make much of the fact that CCP will

[9] It must also be noted that the notion that there can be no load growth if population in the area decreases is a fallacy. Load growth can occur based on the attraction of commercial or industrial customers, or the switching of fuels to natural gas by customers already in the area. Load growth can also occur by the expansion of the network of pipelines to areas that are currently unserved.
[10] City and County AFR, p. 3.
[11] Duke Energy Ohio Ex. 3, Amended Application, p. 2-1 (January 20, 2017).
[12] Tr. Vol. I, p. 43:9-17.

not **eliminate** the balance issue, and they contrast that with other possible routes proposed in the Lummus Report.[13] Rather, the City and County argue that CCP's reduction in reliance on the Foster Station from 55 percent to 50 percent (which the City and County incorrectly call a 5 percent reduction) is insignificant[14] and that, if Foster Station were to be unusable on a peak, cold-weather day, CCP would not prevent outages.[15]

What the City and County fail to account for is, first, that there are countless circumstances that result in a diminution of supply from Foster Station without the Foster Station supply going all the way to zero. Hence, the 9.1 percent improvement (that is, the reduction in reliance expressed as a percentage of the current reliance (55-50 = 9.1% of 55)) is not only meaningful but critically important. That 9.1 percent improvement could mean the difference between widespread winter outages or none. The second factor that the City and County fail to account for is that the construction of CCP will also allow the Company to decommission the propane-air peaking plants, which themselves contribute approximately 10 percent of the overall system supply requirement on a peak day.[16]

Duke Energy Ohio showed clearly that CCP will indeed result in a substantial improvement in the north/south balance of supply. Rehearing must be denied on the argument to the contrary by the City and County.

3. CCP Will Support the Replacement of Aging Infrastructure.

The City and County next call CCP a mere convenience, suggesting that, because the Company can, in certain circumstances, replace existing lines without causing outages for

[13] City and County AFR, p. 5, *citing* NOPE Ex. 19, Ex. JMG-7, Gas System Master Plan Study 2015-2035 (Lummus Report), pp. 61-73.
[14] City and County AFR, p. 5.
[15] *Id.*, pp. 3-6.
[16] Tr. Vol. I, 12:15-17.

customers, CCP is unnecessary for the accomplishment of any such replacements.[17] Citing to a number of statements by the Company's witness (and ignoring statements they found unhelpful), the City and County make an illogical jump: starting from the premise that **some** infrastructure replacements can be made without causing a lengthy winter-time outage, the City and County then jump to the conclusion that **all** infrastructure replacements can be made without causing winter outages. Not only is this faulty reasoning, but the Company's lead witness, Gary Hebbeler, repeatedly stated otherwise. For example, when asked about a replacement of a section of Line A, he agreed that the project had not caused any customer outages. However, as he pointed out in his response, this was "because that was on the north of Fields-Ertel section. That's much easier to replace."[18] Counsel for the City and County followed up with a question about the Company's ability to minimize or diminish outages that might result from either repair work or replacement projects on Line A. Mr. Hebbeler, in response, differentiated those two situations, emphasizing that larger projects are more difficult to accomplish without outages:

> 13 A. Repair, we can -- **we can work around a**
> **14 small repair. If you had a large replacement, that**
> **15 would be different, probably a different action than**
> **16 a smaller replacement.** The smaller, more confined
> 17 the area is to take care of, the easier it is to --
> 18 to remediate that situation to keep customers from --
> 19 from having an adverse impact.[19]

Counsel attempted to get a more general response to demonstrate that outages will not necessarily occur. After Mr. Hebbeler responded that he would have to define the replacement, counsel referred back to Mr. Hebbeler's deposition, where he had stated:

> 7 "Question: Can you take certain actions
> 8 or measures to minimize or diminish the outage time
> 9 for customers that would be impacted from any type of
> 10 repair or replacement of Line A as again referenced

[17] City and County AFR, pp. 6-8.
[18] Tr. Vol. I, 27:14-16.
[19] *Id.*, p. 28:13-19 (emphasis added).

11 in your testimony here on page 14?
12 "Answer: You could. You could bring
13 laterals over from different areas to try to serve
14 that section, but that may not be sustainable in high
15 flows. It just depends on what you have in the
16 network to supply that area. Line A is the main
17 artery down through the system, and it supplies a lot
18 of neighborhoods."[20]

Counsel for the Company clarified that the discussion in the deposition also included:

6 . . . "I guess what I'm trying to share
7 is, **it makes a difference where you make the**
8 replacements on Line A, and it makes a difference of
9 the length of replacement and, like I said, the
10 location and the length of the replacement."[21]

It is clear from Mr. Hebbeler's explanations that outages could well be unavoidable without CCP being in place.

Finally, the City and County try to bolster their argument by noting that Mr. Hebbeler could not identify an instance when customers in the central corridor area experienced lengthy outages due to infrastructure replacements in the area. The fact that there have been no such instances is a testament to the Company's efforts to avoid lengthy natural gas outages. It is not in any way proof that lengthy outages could always be avoided going forward with the existing infrastructure.

CCP is a necessary support for the replacement of aging infrastructure.

4. <u>The Company's Propane Facilities Need to be Replaced and CCP Is Needed to Accomplish that Goal.</u>

The City and County make the astonishing suggestion that the Company's propane-air peaking plants and the associated propane storage caverns do not need to be retired. They reach this conclusion through a combination of logical errors and the twisting of words.

[20] *Id.*, p. 29:7-18 (reading from deposition transcript).
[21] *Id.*, p. 30:6-10 (reading from deposition transcript) (emphasis added).

First, much like the argument on infrastructure replacement, the City and County assert that the propane caverns should continue to be used because they have not yet failed.[22] This preposterous suggestion ignores the obvious fact that permitting and constructing a replacement takes many years. If the man-made caverns fail, as have other caverns constructed by the same firm at about the same time,[23] Duke Energy Ohio will be unable to supply natural gas to some of its customers on a peak load, winter day. The City and County's concept of appropriate planning would be much like refusing to replace an aging and deteriorating bridge until its support structure has actually failed, with vehicles falling into the river below. Luckily for the customers in southwest Ohio, the Board does not agree with such a wait-and-see approach.

The City and County also twist the words of Company witness Adam Long, not once, but twice. First, they claim that Mr. Long does not believe the caverns' replacement is an urgent concern.[24] While Mr. Long did agree with that wording, it is critical to note his definition of the term "urgent." Urgency, in his usage, meant unsafe. Duke Energy Ohio uses all available avenues to ensure that the caverns are not unsafe; thus, Mr. Long agreed that retirement is not "urgent."[25] But that does not equate to believing that the caverns can or should just be left in operation. Waiting until the retirement becomes "urgent" (*i.e.*, unsafe) is a dubious recommendation, particularly coming from the City and the County.

Second, the City and County also claim, falsely and without citation to the record, that Duke Energy Ohio "admitted" that it intends to continue using the facilities even after completion of CCP.[26]

5 Q. You do not know whether Duke intends to

[22] City and County AFR, pp. 9-10.
[23] Tr. Vol. I, pp. 209:10-211:15.
[24] City and County AFR, pp. 8-9.
[25] Tr. Vol. I, p. 227:1-6.
[26] City and County AFR, p. 8.

6 start retiring the propane-air peaking plants at the
7 same time that it would begin construction of the
8 proposed pipeline, correct?
9 A. I believe in my testimony, it would start
10 after the in-service date of the Central Corridor
11 Pipeline.[27]

Indeed, it would be the height of absurdity to decommission the propane facilities—facilities that the Company has described as essential for the delivery of peak load service to customers—before CCP is operational and has proved its ability to handle that load.

5. The Board Applied the Correct Standard to Determine the Basis of the Need for CCP under R.C. 4906.10(A), and its Conclusions Were Supported by Evidence.

In its first assignment of error, Neighbors Opposed to Pipeline Extension, LCC (NOPE), argues that the Board applied an unlawful standard of "mere convenience to Duke to determine 'basis of need,'"[28] but does not cite any portion of the Board's opinion that actually propounds such a standard. That is because it cannot—NOPE's contention that the Board applied an incorrect legal standard is based on its own analysis of the evidence, which analysis leads NOPE to believe that CCP benefits Duke Energy Ohio and does not sufficiently benefit the public. Notwithstanding NOPE's attempt to frame this as a challenge of statutory interpretation, this is fundamentally a challenge to the evidentiary support underlying the Board's decision.

First, NOPE challenges the need to retire the Company's propane-air peaking facilities, stating that "the caverns have operated and continue to operate safely and reliably, and no maintenance is required," and that "the only reasons provided were that someone else told both Duke and Staff witnesses that a need existed."[29] The second assertion is the subject of NOPE's third assignment of error, and is addressed in Section II.A.7, *infra*. As for the need to retire the

[27] Tr. Vol. I, p. 152:5-11.
[28] NOPE AFR, p. 4.
[29] *Id.*, pp. 4-6.

propane caverns, the Company has repeatedly explained (and the Board has agreed) that the adequate service provided to date does not ensure adequate service in the future and that it would be thoroughly imprudent to wait for existing facilities to fail before retiring them.[30] NOPE indicates that the caverns could be maintained and repaired indefinitely, while providing adequate service, but this is not true. The caverns cannot be inspected and any leak in the containment of the propane cannot be repaired.[31] In such an event, a leaking cavern would simply have to be abandoned, regardless of service needs or impacts on customers. Because "prudent system planning requires a proactive approach,"[32] a proactive plan for the retirement of the caverns **before** they fail is reasonable and lawful.

Second, NOPE claims that the Board did not adequately consider its arguments regarding the existing system's ability to serve peak day demand without the propane-air peaking facilities because the Board did not sufficiently consider projections showing decreases in population and that the Company's forecasts may have been "inflated."[33] But, even the forecast that NOPE considers to be correct, "42,924 mcfh, very close to the existing situation (i.e. 43,000 mcfh)," is impossible to serve without the propane-air peaking facilities.[34] Additionally, NOPE does not dispute the Board's statement that the Company's "analysis is . . . consistent with the Lummus Report, which forecasts the peak hourly flow . . . at more than 45,500 Mcfh."[35] And NOPE does not acknowledge that population growth is only one factor impacting how much system capacity is required. Merely because residential gas usage will not increase does not mean that commercial

[30] *See supra* Section II.A.4 (responding to similar argument in City and County's Application for Rehearing); Duke Energy Ohio Initial Br., pp. 10-11; Duke Energy Ohio Reply Br., pp. 6-14.
[31] Tr. Vol. I, pp. 206-207.
[32] OOC, ¶ 57.
[33] NOPE AFR, p. 6-7.
[34] NOPE Ex. 19, p. 10; Duke Energy Ohio Ex. 8, p. 12.
[35] OOC, ¶ 57.

and industrial gas usage will not increase. For example, Katie Eagan, from the Cincinnati USA Regional Chamber, testified that, in 2018, for example, eight businesses considered locating in southwestern Ohio, but located elsewhere due to inability to get non-interruptible gas service.[36] Between them, those businesses would have created 2,400 jobs[37] and would have resulted in a load increase. Because residential gas demand is not determinative of total demand, the evidence of a projected decrease in population does not undermine the Board's approval of the Company's peak-load modeling as reasonable.

Third, NOPE questions the public benefit of inspection, replacement, and upgrading of aging infrastructure.[38] Its arguments are substantially similar to those of the City and County, and are addressed amply in Section II.A.3, *supra*.

For all of the above reasons, rehearing on NOPE's first assignment of error should be denied.

6. The Board Was Not Required to Make a Finding That "No Reasonably Adequate Public Service Exists" to Issue a Certificate and the Record Demonstrates That The CCP is Needed for Continued Provision of Adequate Service.

In its second assignment of error, NOPE argues that Ohio Supreme Court precedent permits a finding of need for the CCP only when "no reasonably adequate public service exists."[39] Therefore, according to NOPE, the Board had to make a determination that "no reasonably adequate public service exists" in order to find that "the facility will serve the public interest, convenience, and necessity,"[40] and, therefore, to issue a certificate. As a matter of law, NOPE is simply wrong—the standard it propounds is taken from a now-repealed statute governing motor

[36] Public Hearing Tr., pp. 30-31 (April 8, 2019).
[37] *Id.*
[38] NOPE AFR, p. 7.
[39] *Id.*, pp. 4, 8.
[40] R.C. 4906.10(A)(6).

transportation companies seeking to commence operations in an area already served by another motor transportation company and is not applicable to public utility siting for gas or electric facilities. Additionally, NOPE is wrong as a matter of fact, when it represents that the record in this case "demonstrates that adequate service . . . will continue to exist well into the future"[41] without the CCP.

The only authority NOPE cites for its proposed legal standard is a completely inapposite case, interpreting a since-repealed statute. *Mason v. Public Utilities Com.*, 34 Ohio St. 2d 21 (1973), concerns only the meaning of "necessity" "as that word is used . . . in R.C. 4921.10," the since-repealed statute governing certificates of public convenience and necessity for **motor transportation companies**.[42] Although the *Mason* court was interpreting the word "necessity," its reasoning was explicitly specific to the Motor Transportation Act:

> A "necessity" **for motor transportation service as contemplated by the Motor Transportation Act** . . . is a definite need of the general public **for a transportation service** where no reasonably adequate service exists.[43]

The former R.C. 4921.10 (repealed in 2012)[44] specifically contemplated the situation where an additional motor transportation company sought a certificate to operate in a territory where an existing motor transportation company was already operating. In such instances, the former R.C. 4921.10 said that the Commission could only grant a certificate "when the existing motor transportation company or companies serving such territory do not provide the service required or the particular kind of equipment necessary to furnish such service" and must deny a certificate if "the service furnished by existing transportation facilities is reasonably adequate." Although this

[41] NOPE AFR, p. 8.
[42] *Mason*, 34 Ohio St. 2d at 23.
[43] *Id.* (citation and internal quotation marks omitted) (emphasis added).
[44] 2012 Am.Sub.H.B. No. 487, ¶ 105.11.

additional language may have been added after *Mason*, its presence in the former R.C. 4921.10 demonstrates the specificity of this requirement to motor transportation companies.

There is no similar language in R.C. 4906.10, which governs the Board's decision-making in the instant case. And NOPE cites no instance of the Board applying R.C. 4921.10 (or cases interpreting it) to import its language into an analysis under R.C. 4906.10. Indeed, requiring proof of a lack of adequate service before being permitted to build new facilities would make no sense in the context of a public utility seeking to construct a gas pipeline. A public utility is obligated by statute to provide adequate service in its territory at all times;[45] it would be ludicrous to require a public utility to provide inadequate service (thus violating Ohio law) before it could become eligible for a certificate. As the Board aptly put it, "prudent system planning requires a proactive approach."[46] Thus, there is no possible basis or rationale for reading "necessity" in R.C. 4906.10(A)(6) to require a finding that "no reasonably adequate public service exists" as a predicate to issuing a certificate. Such a construction would be contrary to Ohio Supreme Court principles, as the Court has clearly stated that "[w]e . . . must avoid absurd results when construing a statute."[47] The fact that "adequate [gas] service currently exists" is uncontroversial and is no basis for denying a certificate under R.C. 4906.10.

NOPE also fails to support the crucial second part of its contention: that the record demonstrates that adequate service not only "currently exists," but "will continue to exist well into the future" (presumably without CCP).[48] For this point, NOPE offers a string of citations, with no explanation of their nature or significance, perhaps hoping that the sheer number of citations will

[45] *See* R.C. 4905.22.
[46] OOC, ¶ 57.
[47] *State v. Noling*, 153 Ohio St. 3d 108, 126, 101 N.E.3d 435, 2018-Ohio-795, ¶ 75 (citation and internal quotation marks omitted).
[48] NOPE AFR, p. 8.

lead the Board to take NOPE's statement at face value. But the citations fail to support NOPE's conclusion.

NOPE's citations do not even come close to demonstrating its bold assertion that adequate service will continue to exist well into the future. For example, NOPE points to testimony that certain mitigating measures could be taken in the absence of CCP to reduce the impact of key repairs on customers, but that testimony which cautions that mitigating measures "may not be sustainable in high flows" and that the effectiveness of any measures will "depend[] on what you have in the network."[49] Some of NOPE's transcript citations do not speak to adequacy of service at all.[50] Some of the citations actually undermine NOPE's assertion.[51] And some simply support the uncontroversial point that adequate service **currently** exists.[52] The only transcript citations to remotely address the prospect of a long-term solution to **future** service needs discuss a completely hypothetical alternative proposal,[53] and projected population decreases (population being only one of the many variables in adequacy of service).[54] NOPE also cites Dr. Guldmann's testimony, which has already been considered and weighed by the Board.[55] NOPE cites three City and County exhibits, which establish only that certain maintenance and replacements can or will be performed. But these exhibits say nothing about adequacy of service during those procedures or into the

[49] Tr. Vol. I, p. 29:7-20.
[50] *Id.*, pp. 157:5-9 (discussing safety), 177:5-9 (explaining that caverns do not require maintenance, but also that it is impossible to remedy any problem that arises because there is no maintenance available).
[51] Tr. Vol. I, p. 30:13-21 (witness rejecting the proposition that repairs can *always* be scheduled for strategic times of year). This undermines the weight of testimony cited acknowledging that some maintenance can be scheduled to avoid peak times. *Id.*, p. 154:16-21; Tr. Vol. I, p. 185:2-12 (testimony that there is "no guarantee" that custom parts for repairs will be available indefinitely into the future, despite past ability to procure them).
[52] Tr. Vol. I, pp. 32:19-23, 156:13-16; 170:8-17, 171:9-172:6.
[53] Tr. Vol. III, pp. 631:11-632:7.
[54] *Id.*, pp. 695:7-19, 702:15-703:1.
[55] OOC, ¶ 53.

future.[56] None of these demonstrates that adequate service will continue to exist well into the future without CCP. Rehearing on this ground should therefore be denied.

7. The Board Did Not Rely on Discredited or Inadmissible Evidence In Reaching Its Determination Regarding The Basis of Need.

In its third assignment of error, NOPE contends that the Board relied on opinion testimony from witnesses who lacked sufficient qualifications and/or knowledge for their opinions.[57] Specifically, NOPE targets the testimony of two witnesses: Company witness Mr. Long and Staff witness Mr. Conway. However, its challenges do not withstand scrutiny.

Regarding Mr. Conway, NOPE takes issue with the Board's alleged reliance on his opinion that that the "industry trend" was to retire propane-air facilities because Mr. Conway heard this from another Staff member.[58] NOPE does not identify where the Board relied in any way on Mr. Conway's testimony in concluding that the propane plants needed to be retired. And, even if it had done so, the Board is an administrative, quasi-judicial agency that often accepts hearsay testimony, with the understanding that the agency will use its expertise to accord the testimony the appropriate amount of weight.[59] Thus, the fact that Mr. Conway may have relied on hearsay to form an opinion on which the Board may not have even relied is no basis for rehearing.

Regarding Mr. Long, NOPE complains that he "relied on a third party for his opinion on the propane-air caverns" reaching the end of their useful life and is "not a geologist."[60] Indeed, Mr. Long relied on a third party: an expert contractor hired by the Company to evaluate and report

[56] City and County Ex. 31, 33, 40. NOPE also cites generally to City and County Ex. 39, but because NOPE provides no pincite, the Company will not attempt to discern which items in the 15-page exhibit NOPE is referencing.
[57] NOPE AFR, pp. 8-9.
[58] *Id.*, p. 9.
[59] *See, e.g., In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, Opinion and Order, pg. 33 (December 14, 2011).
[60] NOPE AFR, p. 9.

on the current state of the caverns.[61] As explained above, the Board is entitled to grant such testimony the appropriate amount of weight; it is not "inadmissible." Indeed, Ohio's rules of evidence support the reliance of experts on the basis of opinions perceived by the expert or admitted into evidence at the hearing.[62] The Lummus Report relied upon by Mr. Long was admitted into evidence. [63] And NOPE offers no reason why Mr. Long must be a geologist to opine on the caverns—NOPE's own expert witness, Dr. Guldmann, is not a geologist either.[64] Mr. Long's conclusion was further reinforced by considerable evidence, *see supra* Section II.A.4, including the Lummus Report, which stated that the "caverns may need to be decommissioned due to their age and risk (as recommended by PHMSA and supported by Duke Energy's regulators) and listed a number of issues potentially warranting retirement, including but not limited to "age, congestion . . ., a slight propane leak, limited remaining boiler life."[65] Mr. Long's reliance on a third-party expert and his not being a geologist do not offer any basis for rehearing. Moreover, such a position would mean that neither a party nor the Board could rely upon a third-party expert analysis in making any decision whatsoever. Indeed, under such a standard, NOPE's own reliance upon its witness testimony would be problematic.

NOPE's last challenge to Mr. Long's expertise is based on a misrepresentation of an out-of-context excerpt of his testimony. NOPE points to Mr. Long's statement that "I am not aware of any other operators that use propane peaking," to argue that "he is not aware of any other propane-peaking facilities despite the presence of more than 50 [such] facilities."[66] However, the context makes clear that he was specifically referring to LDCs:

[61] *See* Tr. Vol. I, p. 205.
[62] Rule 703, Ohio Rules of Evidence.
[63] *See* NOPE Ex. 19, Ex. JMG-7.
[64] Tr. Vol. III, p. 517:5-6.
[65] Lummus Report, p. 81.
[66] NOPE AFR, p. 9.

> Q. And more than just Duke Energy uses propane peaking, correct?
>
> A. I am not aware of any other operators that use propane peaking.
>
> Q. You are not aware of operators that use aboveground propane peaking facilities for peak services?
>
> A. **I am not aware of any other LDCs that use propane-air peaking**.
>
> Q. Okay. Some companies use liquid natural gas peaking facilities, right?
>
> A. That is correct.[67]

Thus, while the snippet quoted by NOPE may have been unclear, Mr. Long clarified his intent immediately thereafter: his point was specifically that **LDCs** do not use propane-air peaking. And this statement is not impeached by a generic list of propane-air peaking facilities. Indeed, like Mr. Long, NOPE's witness, Dr. Guldmann, was also not aware of any LDCs that utilize subterranean propane caverns for propane-air peaking plants.[68] As the trier of fact, it was within the Board's discretion to choose how to interpret Mr. Long's testimony and to find him a credible witness. Thus, NOPE's challenge offers no basis for rehearing.

B. The Board Fully and Adequately Considered the Nature of the Environmental Impact and Correctly Concluded that CCP Represents the Minimum Adverse Environmental Impact (R.C. 4906.10(A)(2) and (3)).

1. The Board Reasonably and Lawfully Determined that Duke Energy Ohio and its Siting Consultant Completed a Reasonable Route Alternatives Analysis, Consistent with O.A.C. 4906-5-04.

In their second assignment of error, the City and County challenge the Board's determination that "Duke and its siting consultant, CH2M, completed a reasonable route alternatives analysis, consistent with Ohio Adm. Code 4906-5-04, and utilized an appropriate route selection process within the constraints of the Project."[69] The City and County accuse the Board

[67] Tr. Vol. I, p.173:14-25 (emphasis added).
[68] Tr. Vol. III, p. 523:4-7.
[69] OOC, p. 60.

of "ignor[ing] evidence that Duke constrained and manipulated the" analysis and of "disregard[ing] more promising, safer, and less disruptive routes outside of the Central Corridor."[70] However, the City and County fail to identify any way in which the Company's analysis failed to comply with the statute or administrative code and fails to identify any inaccuracies.

First, the City and County complain that Duke Energy Ohio took an active role in the route selection study (RSS) and did not blindly outsource the entire analysis to its third-party consultant, CH2M.[71] But the Ohio Administrative Code specifies that "[t]he applicant shall conduct a site and route selection study," and repeatedly dictates in its enumeration of the study components that "[t]he applicant shall provide" each one.[72] The Company's use of a third-party consultant was not required at all, and nothing in the administrative code precluded the Company from "delineat[ing] the study area," establishing where the studied routes would start or end, or participating in the analysis in any other way that the City and County find objectionable.[73] If the analysis itself is reasonable and meets the statutory and regulatory criteria, the Company's participation in designing the analysis cannot be grounds to deny a certificate.

Second, the City and County claim that the Company "ignored" the eastern and western routes proposed by Lummus, even though (according to the City and County) all such routes would have enabled the retirement of the propane-air peaking facilities.[74] The City and County's conclusion that all the routes considered by Lummus would have enabled the peaking facilities' retirement rests on a single sentence in the Lummus Report, where Lummus specifies that each route scenario "assumes a system peak sendout of 42,462 Mcfh . . . and no contribution from the

[70] City and County AFR, p. 13.
[71] *Id.*, pp. 10-11.
[72] *See* O.A.C. 4906-5-04.
[73] City and County AFR, pp. 10-11.
[74] *Id.*, p. 11.

propane air plants."[75] Thus, the City and County's conclusion depends on the system peak sendout of 42,462 being sufficient for the foreseeable future. But that is not consistent with the Lummus Report.

As the Board pointed out, however, the Lummus Report forecasts peak hourly flow for 2014 through 2035 to be considerably higher: more than 45,500 Mcfh, with a one percent probability of exceedance.[76] With a system peak sendout of only 42,462 Mcfh, the routes would not even quite permit the retirement of the propane-air peaking facilities if a five percent probability of exceedance was considered acceptable,[77] but Lummus Consultants plainly stated that "use of a 1 percent probability level [was] appropriate for calculating peak day flows for purposes of use in Duke Energy's simulation model."[78] Thus, the Lummus Report does not support the City and County's contention that the propane-air peaking facilities could have been retired under any of the routes considered by Lummus. And, contrary to the City and County's assertion, the Board never "acknowledged" otherwise merely by neutrally summarizing the City and County's contention.[79] Thus, the Board correctly determined that the western scenarios would not allow for retirement of the propane-air facilities.[80]

Third, the City and County contend that "an eastern route would impact less residential areas" than the Alternate route selected by the Board.[81] But the City and County make no attempt to respond to the Board's reasoning for disfavoring the eastern routes on the basis that they would have "similar or greater overall impacts." Specifically, the Board observed that "Dr. Nicholas . . .

[75] *Id.*; (citing Lummus Report, p. 61).
[76] OOC, ¶ 57 (citing Lummus Report, pp. 48-49).
[77] *See* Lummus Report, p. 49 (Table 13) (compare 5% column to 1% column).
[78] *Id.*, p. 47.
[79] *See* City and County AFR, pp. 11-12 (citing OOC, ¶ 101).
[80] OOC, ¶ 120.
[81] City and County AFR, p. 11.

stated that the eastern routes are also significantly longer, which would result in similar or greater overall impacts as compared to the central routes, and would require at least one additional lateral westward into the denser central core area" and "the intervenors have not explained how a much longer pipeline can be expected to have fewer overall impacts."[82] Thus, the Board adequately considered the eastern routes before making its selection.

Fourth and finally, the City and County argue generally that (1) placing a pipeline in a "densely populated" area is inappropriate and that (2) "the general public unequivocally oppose[s]" the construction of the CCP along the Alternate Route for which the certificate was granted.[83] The City and County cite no authority for the first proposition and no record evidence for the second. And the City and County's representations regarding the "materially disruptive nature of the project" are baseless. For example, it is not the case that construction "will restrict access to certain residential homes,"[84] because the OOC's Condition 30 ensures that the Company "shall use construction techniques that will ensure that access to residences remains available throughout construction."[85] And the testimony cited regarding possible condemnation proceedings refers only to appropriation of property for easements, not entire homes for demolition.[86] These arguments offer no basis for rehearing. For all of the reasons above, rehearing should be denied on the City and County's second assignment of error.

[82] OOC, ¶ 120.
[83] City and County AFR, p. 13.
[84] *Id.*, p. 12 n.54.
[85] OOC, p. 103.
[86] *See* City and County AFR, p. 12 n.54; Tr. Vol. I, p. 127.

2. Unweighted Scoring in the Route Selection Study Was Reasonable.

In its fifth assignment of error, the city of Reading (Reading) argues that it was arbitrary and unreasonable for the Company to assign equal weights, in the RSS, to homes between zero and 100 feet from the centerline versus those between 100 and 1,000 feet away.[87]

Dr. James Nicholas, the Company's routing expert, discussed the fact that, although the RSS did not weight the various factors in the study, he did test what the effects of weighting would have been, finding little impact. It is also noteworthy that his expert description of typical weighting approaches referred to assigning higher or lower weights to categories of factors, not individual ones such as proposed by Reading.[88]

Reading's concern about weight that it believes should have been given to the proximity of homes to the centerline of the alternate route also ignores the fact that the arithmetic scoring of routes is not the end of the process. Dr. Nicholas explained that the scored routes are further evaluated. "The numeric analysis forms part of the siting study and is valuable for highlighting the best and worst groups of route options. It does less well when more granular detail is needed and where qualitative factors are added."[89] Reading's argument overlooks this part of the process. The particular impact on residences that are extremely close to the centerline is precisely the type of issue where more granular detail is needed and where qualitative factors are added, after the conclusion of the arithmetic scoring. Indeed, the Board did consider this specific qualitative factor in issuing its certificate. After noting the potential access problems for Third Street residents in Reading,[90] the Board concluded that it would amend the recommended conditions for the

[87] Reading AFR, p.2.
[88] Duke Energy Ohio Ex. 9, Direct Testimony of James Nicholas, pp. 13-14; Tr. Vol. II, p. 256:9-16.
[89] *Id.*, p. 14:17-19.
[90] OOC, ¶ 184.

certificate to require the Company to ensure access and to allow the Company to negotiate longer construction hours with local communities so as to shorten the impact on residents.[91]

The scoring process was, therefore, reasonable and Reading's fifth assignment of error must be denied.

3. The Company's Removal of Interstate Highways from Consideration Was Not Unreasonable.

For its third assignment of error, Reading complains that the RSS process was unreasonable, arbitrary, and capricious based on the exclusion of interstate highways and Ohio rights of way from consideration. Reading asserts that testimony in the case proved that the Company's Reply Brief was wrong in stating that the availability of such rights of way was outside of the Company's control. However, what Reading points to as supposed proof that the Company did control this factor is actually testimony by the third-party route selection expert that he did not know of any legal requirement to impose the constraint.[92] Evaluation of Reading's argument requires an understanding of what Dr. Nicholas actually said:

> 6 Q. And who came up with that constraint?
> 7 A. Duke Energy gave that to us.
> 8 Q. Are you aware of whether or not that's a
> 9 legal requirement?
> 10 A. I'm not aware of whether it's legal or
> 11 not.[93]

Dr. Nicholas did not say that the constraint was not based on a legal requirement; he said that he did not know. Thus, the only evidence on this issue is that adduced by the Company in its

[91] *Id.*, ¶ 185.
[92] Reading AFR, p. 5.
[93] Tr. Vol. II, p. 282:6-11.

Application.[94] Neither Reading nor any other party rebutted the Company's statement that siting in parallel with an interstate highway, within its right of way, would not be permitted.[95]

Reading's third assignment of error must be denied.

4. The Board Adequately Considered Alternate Routes Discussed by Lummus and Dr. Guldmann.

In its fifth assignment of error, NOPE contends that the Board "dismissed" certain 'less impactful" routes for one of two reasons (1) solely because the routes traversed areas outside the Board's jurisdiction, namely Kentucky; or (2) because the Board believed it could only consider routes proposed by Duke Energy Ohio.[96] Both contentions misrepresent the Board's reasoning.

First, the Board adequately explained why it did not consider "the western and eastern expansion scenarios identified by Lummus in the [Lummus Report],"[97] to be the least impactful routes, rather than (as NOPE claims) dismissing these scenarios purely because they were based partly in Kentucky. Regarding the eastern expansion scenario, the Board pointed out that the "eastern expansion scenario would entail the construction of a 30-inch pipeline with a length of 44 miles," and that "the intervenors have not explained how a much longer pipeline can be expected to have fewer overall impacts."[98] Regarding the western expansion scenarios, the Board noted that Lummus's rankings of route options were "only an example to demonstrate how the options might be weighted," and the report itself confirms that the rankings were not a conclusion regarding relative impacts of each route.[99] Thus, it is clear that the Board did not cursorily exclude these options merely due to the routes traversing Kentucky.

---

[94] Duke Energy Ohio Ex. 3, pp. 4-15.
[95] Blue Ash also included a brief discussion of the ODOT limitations as part of its fourth assignment of error. This should also be denied, for like reasons.
[96] NOPE AFR, pp.10-11.
[97] OOC, ¶ 120; *see also* NOPE AFR, p. 10.
[98] OOC, ¶ 120.
[99] Lummus Report, p. 91 ("Table 20 is an example suggestion of how Duke Energy might envision a ranking scheme of the expansion options presented. Duke Energy should find consensus on which ranking categories are relevant and

Second, it is simply impossible to conclude from the Board's opinion that the Board "assum[ed] that [it] cannot consider" routes beyond the two proposed by the Company.[100] The only evidence of this assertion to which NOPE points is that the Board's analysis comparing the two proposed routes began with the phrase "Tur[n]ing to the specific routes proposed in this proceeding . . . ."[101] NOPE simply ignores the fact that this paragraph came after an extensive analysis of other routes considered and their respective abilities to address the basis of the need for the project as well as their probable relative impacts.[102] The Board clearly considered other routes before concluding that the alternate route represents the minimum adverse environmental impact. Thus, there is no basis for rehearing on this ground.

5. The Company Reasonably Reviewed the Blue Ash Comprehensive Plan that Was in Effect when the Route Siting Study Was Commenced.

The City of Blue Ash (Blue Ash), in its fourth assignment of error, points out that it adopted a revised Blue Ash Comprehensive Plan for land use in "early 2016," which plan was not considered in the RSS. Instead, the Company relied on an "outdated" plan. In the opinion of Blue Ash, this makes the RSS unreasonable.[103]

What Blue Ash fails to mention is that, by the time it adopted its revised plan in "early 2016," Duke Energy Ohio had already developed the routing options discussed in the RSS, the case docket having been opened on March 8, 2016. Thus, the efforts to obtain then-current regional land-use plans were already complete before the Blue Ash revisions.

The fourth assignment of error by Blue Ash must be denied.

assign ranking weights to each category. Table 20 is only an example of how such a ranking scheme would indicate the relative weight of each option.").
[100] NOPE AFR, p. 11.
[101] *Id.* (citing OOC, ¶ 121).
[102] OOC, ¶¶ 118-120.
[103] Blue Ash AFR, pp. 20-21.

6. The Board Properly Considered the Company's Evaluation of Environmental Impacts.

NOPE's fourth assignment of error complains that the Board should not have issued a certificate on the basis of what it deems to be an incomplete analysis of socioeconomic, ecological, and environmental impacts.[104] Although apparently not finding them important enough to list and explain individually, NOPE did provide a list of citations to the transcript. The following addresses each of those claimed impacts:

- Tr. Vol. II 279:7-280:1 – This cross-examination of Dr. Nichols pointed to the requirement that an RSS address "land use, cultural, ecological and socioeconomic impacts of the project." The questioning continued by asking whether the RSS evaluated routes based on income levels, impacts to minorities, or impacts to Jewish communities. Contrary to NOPE's concerns, there is no rule that requires such evaluations.

- Tr. Vol. II 330:10-19 – This section is part of the cross-examination of Steven Lane, specifically with regard to potential landslides and their impact on operation of gas lines. Counsel attempted to get Mr. Lane to agree that he had only considered landslides as they might impact construction. He demurred and pointed out where in his testimony this issue was noted.

- Tr. Vol. II 332:13-22 – Further cross-examination of Mr. Lane related to the number of trees that might have to be removed along either of the two routes. Apparently NOPE believes that rehearing is appropriate because Mr. Lane had not counted each individual tree.

- Tr. Vol. II 367:17-369:14 – This transcript segment involves a discussion with Mr. Daniel Earhart about the soil and water testing that was performed along the Alternate Route. It appears that NOPE is questioning the adequacy of the sampling procedures, but it has not provided any basis on which the Board could possibly conclude that the sampling was inadequate. Mr. Earhart was qualified as an expert and NOPE did not disagree.

- Tr. Vol. II 371:19-25 – Here, Mr. Earhart was questioned about whether soil and water sampling was performed along the preferred route. It was not, as there was no cause to do so. Nor do the Board's rules require such analysis.

- Tr. Vol. II 376:17-20 – This small section of the transcript merely elicited the fact that the information reviewed by Ms. Julianne Schucker, the Company's expert on the Pristine site, was publicly available.

[104] NOPE AFR, pp. 9-10.

- Tr. Vol. II 375:10-13 – Here, Ms. Schucker admitted that she did no physical sampling near the Pristine site. Of course, the Environmental Protection Agency did so in the course of the Pristine cleanup, and her role in these proceedings was to review the results of that work.

- Tr. Vol. II 376:1-3 – In these few lines, Ms. Schucker admitted that she did not evaluate how construction of CCP might change the flow of surface water or storm runoff. NOPE provides no reason to believe the water on the surface of the site would be impacted by pollution far below the surface.

- Tr. Vol. II 489:14-490:6 – This section is a discussion with Board Staff member, Derek Collins, regarding a necessary geotechnical investigation into soil conditions and another investigation into subsurface soil and rock properties. These investigations will be specific to the precise locations involved. This is not the type of work that can or should be done over a multiple-mile route. It is absolutely reasonable for the Board to allow it to be performed at an appropriate time during the construction process.

- Tr. Vol. III 695:7-19 – In this portion of the transcript, Board Staff member Timothy Burgener was cross-examined about population forecasts. The fact that NOPE may have been able to find statistics and forecasts that differ from those reviewed by Staff does not call for rehearing.

- Tr. Vol. III 702:10-703:24 – This further cross-examination of Mr. Burgener into population forecasts is no more persuasive than the last.

NOPE claims that these examples show that more investigation is needed or that the Board is merely shifting its responsibility to the public. Nothing could be further from the truth, as explained above. This ground for rehearing should be denied.

C. The Board Correctly Found that CCP Will Serve the Public Interest, Convenience, and Necessity (R.C. 4906.10(A)(6)).

1. Although Not Mandated by Ohio Law, Safety Was Fully and Adequately Considered by the Board.

Blue Ash identified two assignments of error relating to the Board's consideration of safety issues related to CCP. The first complained that the Board merely accepted the Company's statement on that matter, without record support.[105] In discussion of that assignment of error, Blue Ash referenced, variously, inconsistent information regarding the potential impact radius, and a

[105] Blue Ash AFR, p. 4, *et seq.*

lack of discussion of risks of ruptures and leaks. But, with regard to these contentions, Blue Ash failed to consider the totality of the information in the record. The potential impact radius was not a calculus that related to this project, as will be discussed further, below. While the Company did have such a calculation available on its website for a period of time, this was but one response out of countless that we also posted. Its deletion at the appropriate time, after the design of the pipeline was altered in response to public concerns, was simply overlooked. And, although safety is not specifically identified as a factor for Board consideration, Duke Energy Ohio provided an expert to discuss and evaluate the safety considerations applicable to this pipeline.

The Board discussed public safety at great length in its order, including specific reference to the fact that the PIR calculation appeared on the website. The Board was aware of all of the factors, considered the testimony and arguments by intervenors, and determined, based on its evaluation of the facts, that safety had been appropriately addressed.[106] The Board's decision was hardly without record support.

Blue Ash also suggests that the "Board even highlighted Mr. Hebbeler's testimony that Duke did not think it was required to establish a potential impact radius in the first instance."[107] Apparently Blue Ash did not understand that paragraph 141 of the Board's OOC, to which it cited, was merely describing the briefs of Blue Ash and Columbia. "Highlighting" Mr. Hebbeler's testimony was in no way the Board's opinion that he was incorrect.

Blue Ash claims that the distinction made by the Company's witnesses between transmission lines (which might rupture) and distribution lines (which are designed to leak rather than rupture) does not answer the public safety question. And Blue Ash believes it was not sufficient "to fulfill the statutory requirement." Blue Ash fails, however, to identify the statutory

[106] OOC, ¶ 153.
[107] Blue Ash AFR, p. 5 (*citing* OOC ¶ 141).

requirement it is referencing. And it fails to explain how the difference between line that might leak and a line that might rupture is not helpful for public safety concerns.

Blue Ash also condemns Mr. Hebbeler for "conceding" that the Company could not rule out the risk of a rupture. Of course, no one can guarantee any future outcome. Mr. Hebbeler simply said what we all know.

Another concern expressed by Blue Ash is that Duke Energy Ohio supposedly "proposed to construct a pipeline without even knowing that the Alternate Route abuts Summit Park – a park that has close to one million visitors each year."[108] It based that absurd and untrue statement on a series of questions asked of Dr. Nicholas at hearing:

> 8 Q. Dr. Nicholas, you told Mr. Keaney that
> 9 the route selection study area in this case is
> 10 congested with development, correct?
> 11 A. Correct.
> 12 Q. And that includes residential land uses?
> 13 A. Correct.
> 14 Q. Includes industrial land uses?
> 15 A. Correct.
> 16 Q. Includes recreational areas?
> 17 A. Correct.
> 18 Q. Includes parks?
> 19 A. Correct.
> 20 Q. Like Summit Park in Blue Ash.
> 21 A. Correct.
> 22 **Q. Are you aware that approximately 850,000**
> **23 people use Summit Park each year?**
> **24 A. I am not aware of that.**
> 25 Q. That was not taken into consideration by
> 1 you, at least during the route selection study, was
> 2 it?
> 3 A. Specifically that 850,000 people use
> 4 Summit Park a year was not taken into account.[109]

[108] Blue Ash AFR, p. 10.
[109] Tr. Vol. II, pp. 299:8-300:4 (emphasis added).

Blue Ash simply took Dr. Nicholas's statement that he did not know the number of people using the park per year and changed that to aver that the Company didn't even know the park was there.

In yet another attempt to identify errors in the Company's arguments, Blue Ash raised the issue of high-consequence areas (HCAs).[110] It claimed that, first, the Company posted information about HCAs on its website and agreed in response to a discovery response that the entire pipeline was in an HCA. But Blue Ash said, then Mr. Hebbeler "backtracked" at the hearing and said that HCA classification was irrelevant because CCP is a distribution line. Therefore, Blue Ash asserted, the Company failed to evaluate whether Summit Park was an HCA.

The reality of the situation is quite different. The discovery request sought production of "any and all reports, studies, analyses, diagrams, charts, maps, and other documents relating to" HCAs along the preferred route. The response read as follows:

> Objection. This Interrogatory is overly broad and unduly burdensome, given that it seeks information that is neither relevant to this proceeding nor likely to lead to the discovery of admissible evidence in this proceeding. HCAs, as defined in 49 CFR 192.903, relate solely to transmission lines. Because the proposed Pipeline is not a transmission line, HCAs are not relevant. Without waiving said objection, to the extent discoverable, and in the spirit of discovery, **because Duke Energy Ohio designs all its pipelines to Class 4 (the most stringent design classification), individual locations of HCAs are not determined due to classifying the entire pipeline as an HCA**.[111]

As is evident from that response, although the Company did not calculate HCAs (and did not have to for this high-pressure distribution line), that fact has no impact on the actual design of the line. The Company designs all of its lines to the highest standard—no different than would be done for a transmission line running through an HCA.

Blue Ash ultimately pointed to precedent at the Supreme Court of Ohio that, it suggests, mandates rehearing. Blue Ash described the opinion in *Middletown Coke*[112] as requiring reversal

[110] Blue Ash AFR, pp. 9-10.
[111] NOPE Ex. 17 (emphasis added).
[112] *In re Middletown Coke Co.*, 2010-Ohio-5725, 127 Ohio St.3d 348.

because the applicant had not provided the Board with sufficient information to allow the Board to evaluate the application fully. That description of the case, however, is so lacking in detail as to be misleading. In *Middletown Coke*, the Board had faced a situation in which the applicant wanted a permit to construct a cogeneration facility. The facility would be sited at the coke plant that would be providing excess heat that would ultimately be used to generate electricity. The applicant argued that the cogeneration facility would only function if sited adjacent to the coke plant. Neighbors wanted the Board to consider the siting of the coke plant itself, an issue over which the Board had no jurisdiction. The issue decided by the Court was whether the application to the Board needed to include information about the siting of the parts of the coke plant that we involved in both the coke plant and the cogeneration facility. The Board had believed that such dual-purpose facilities were not "associated facilities" under the statute that gave it jurisdiction. The Court disagreed, concluding that the Board did have broader jurisdiction than had been taken.

Thus, *Middletown Coke* is no simple case about the sufficiency of information. It is a case about the breadth of the Board's jurisdiction. It is not relevant to Blue Ash's claims about whether the Company provided enough safety-related information to the Board.

Blue Ash's second ground for rehearing with regard to safety matters complains that it was not provided with sufficient information concerning the project, thus preventing it from meaningfully participating in the routing and hearing process.[113] After almost four years of proceedings, countless meetings, and no limit on the amount of discovery it could propound, this contention is baseless.

[113] Blue Ash AFR, unnumbered first page.

In its memorandum supporting rehearing, even Blue Ash itself did not pursue the argument that a lack of information prevented its participation. Instead, Blue Ash switched courses in an attempt to dispute the credibility of Mr. Bruce Paskett, the Company's pipeline safety expert.

- Blue Ash complained that Mr. Paskett insisted that a distribution line would leak rather than rupture, but then refused to "guarantee" that CCP would not rupture.[114] Of course he couldn't guarantee that. No one can guarantee any aspect of the future.

- Blue Ash reviewed five PHMSA violations that occurred on Duke Energy Ohio distribution lines and claimed that, in four of those cases, the violations resulted in explosions. Blue Ash contends that this shows that distribution lines can explode. But Mr. Hebbeler explained why that is not the case:

  4 The term Duke used in four of these
  5 violations was "explosion," right?
  6 A. They did use the word "explosion" and
  7 this was as a result of gas getting into the home,
  8 not a pipe bursting.
  9 Q. Yeah. I will withdraw that.

- Blue Ash subsequently disputed the statistics provided by Mr. Paskett, which showed that serious incidents are decreasing. Although Blue Ash provided different statistics than did Mr. Paskett, it failed to account for the fact that Mr. Paskett's figures were "normalized" to account for changes in the number of miles of lines at issue.[115]

Contrary to the allegations of Blue Ash, Mr. Paskett's testimony was credible and reliable. The Board was aware of the issues raised by intervenors relating to Mr. Paskett's testimony[116] but, as the trier of fact, concluded that it was "persuaded" by his testimony, along with other Company witnesses.[117] This ground for rehearing should be denied.

2. <u>The Board Reasonably and Lawfully Concluded that CCP Is a High-Pressure Distribution Line</u>.

In its sixth assignment of error, NOPE contends that the Pipeline is a transmission line because (1) it will connect one transmission line to another transmission line with a pressure

[114] *Id.*, p. 12.
[115] Duke Energy Ohio Ex. 15, Direct Testimony of Bruce L. Paskett, p. 26:15-18
[116] *E.g.*, OOC ¶ 142.
[117] OOC ¶ 153.

reduction station in between; and (2) it will not have service lines to distribute gas to customers.[118] But NOPE does not cite any authority for why either of these two factors must be dispositive as to pipeline classification. And NOPE ignores the central reason given by Duke Energy Ohio—and accepted by the Board—for classifying the CCP as a distribution line: federal regulations promulgated by the Pipeline and Hazardous Materials Safety Administration (PHMSA). Specifically, 49 C.F.R. § 192.3, which defines a transmission line as a line that "operates at a hoop stress of 20 percent or more of SMYS [specified minimum yield strength]."[119]

As the Company explained in its initial brief:

> PHMSA established definitions for transmission and distribution lines based, in large part, on safety considerations, as it was aware of the change in likely damage mechanics as the safety factor in a pipe diminishes. Specifically, PHMSA uses the measurement known as specified minimum yield strength (SMYS) to determine how a pipeline should be treated. SMYS measures how close the pressure in a pipeline is to the minimum guaranteed strength. Based on its knowledge and history, PHMSA requires that all pipelines with a SMYS of 20 percent or greater be designated as transmission lines and maintained in accordance with transmission standards.[120]

And it is undisputed that the CCP will operate at an SMYS of 19 percent and thus would be able to withstand pressures of more than five times the planned maximum operating pressure.[121] Furthermore, this reduction in pressure from the original design was not made "for the purpose of labeling," as NOPE contends,[122] but in response to comments and concerns raised by local officials and members of the public.[123] Thus, the Board lawfully and reasonably found it to be a distribution

[118] NOPE AFR, p. 11.
[119] The same provision offers two additional definitions of transmission line, neither of which is applicable here.
[120] Duke Energy Ohio Initial Br., p. 22 (citing Duke Energy Ohio Ex. 15, Direct Testimony of Bruce L. Paskett, PE, pp. 9-10).
[121] *See* Tr. Vol. II, pp. 386-387.
[122] NOPE AFR, p. 11.
[123] Duke Energy Ohio Ex. 7, Direct Testimony of Gary J. Hebbeler, p. 15; *see also* Application for a Certificate of Environmental Compatibility and Public Need for the C314V Central Corridor Pipeline Extension Project by Duke Energy Ohio, Inc., p. 2-1 (September 13, 2016).

pipeline, a conclusion with which the Pipeline Safety division of the Public Utilities Commission of Ohio agreed.[124]

NOPE also asserts that "[t]he Board appears to acknowledge that Duke's proposed pipeline is a distribution line rather than a transmission line, but . . . allows the distribution line designation to hold by allowing Duke to merely commit . . . to follow . . . criteria applicable to transmission lines."[125] Of course the Board acknowledges that the CCP is a distribution line—this is the Board's conclusion. If NOPE means to say that the Board acknowledges the CCP to be a transmission line, that is simply untrue and NOPE does not quote any such acknowledgment. The Board's classification of the CCP as a distribution line was not "contractual," but simply based on 49 C.F.R. § 192.3.[126] For these reasons, rehearing on this ground should be denied.

3. The Board's Analysis of the Impact of Construction on Residents of Third Street in Reading Was Reasonable and Supported by Record Evidence.

In its fourth assignment of error, the City of Reading contends that the Board relied exclusively on statements in Duke Energy Ohio's reply brief—rather than evidence in the record—in considering whether residents of Third Street in Reading would maintain access to their homes during the construction of the CCP.[127] However, this assertion is misleading. Although the Board cited to the Company's reply brief, the cited portion of the Company's reply brief quotes and cites the constructability review itself:

> Reading states that "residents along [Third Street] will be displaced from their homes for a month during construction." However, the section of the constructability review discussing Reading specifically states: "The street is narrow, and conventional construction would restrict some access to the houses. However the street could be kept open."[128]

[124] Staff Ex. 12 (Testimony of Peter Chace), p. 9:5-21.
[125] NOPE AFR, p.11.
[126] OOC, ¶ 152 (explaining that "the CCE will be classified as a high-pressure distribution pipeline under 49 C.F.R. § 192.3").
[127] Reading AFR, p. 6 ("In dismissing Reading's concerns, the OPSB points only to statements by Duke Energy in its reply brief.").
[128] Duke Energy Ohio Reply Br., p. 21 (quoting Reading Ex. 4, Western Route Constructability Review, p. 49 of 87).

Thus, although the Board did point readers to the Company's reply brief, that brief itself quoted the constructability's review explicit conclusion that the street "could be kept open," and its narrow determination that **conventional** construction would restrict access (as opposed to a broad determination that any construction would restrict access). Plating over of driveways is only mentioned by the Company as an **example** of possible nonconventional construction techniques.[129] The crucial point is that the Company's ability to keep the street open is supported by record evidence: namely, the constructability review.

Not only is the Company capable of maintaining residents' access to homes, but the OOC's Condition 30 ensures that the Company will do so: "The Applicant shall use construction techniques that will ensure that access to residences remains available throughout construction."[130] Reading's cursory assertion in a footnote that this condition "provides little assurance" is entirely speculative and Reading cites no record support for it.[131] For all of these reasons, rehearing on this ground should be denied.

4. The Calculation of Local Tax Benefits Is Not Cause to Overturn Certification.

The fifth assignment of error by Blue Ash proposes that the Board's decision should be overturned on rehearing due to inaccurate calculations of annual local property tax benefits. Blue Ash claims that the Company "trumpeted" the positive economic impact of the project,[132] but no such "trumpeting" ever occurred. The Company merely provided the information in response to a requirement that it be included in the Application.

[129] *Id.* (referring generally to "actions *such as* plating over driveways") (emphasis added).
[130] OOC, p. 103.
[131] Reading AFR, p. 6 n.1.
[132] Blue Ash AFR, p. 23.

Whether the tax calculations were correct or incorrect—a matter that is within the jurisdiction of the Board as the trier of fact—this is hardly a reason to reverse the OOC. The fifth assignment of error by Blue Ash must be denied.

D. Other Issues Do Not Require Rehearing.

1. The Application Was Properly Treated as Complete When Filed.

Reading's second ground for rehearing asserts that the Board failed to enforce its rule requiring two fully developed routes. Reading states that the Board "acknowledges that Duke Energy informed them that its initial application was incomplete . . .."

Reading's statement is patently false. The OOC, on the page cited by Reading, said nothing about the application being incomplete or about the Company making such a statement to the Board. Indeed, the Board specifically considered the issue of the completeness of the Application and found that all required information had been submitted and considered by Staff, and that parties were not prejudiced.[133]

This ground for rehearing should be denied.

2. The Village of Evendale's Application for Rehearing Should Be Denied as both Procedurally Insufficient and Lacking on the Merits.

The Village of Evendale (Evendale) fails to meet the bare procedural requirements for a valid application for rehearing. Its application should be denied on this ground alone. To the extent that Evendale makes a number of conclusory unsupported assertions, these lack any merit; none constitute a basis for rehearing.

Evendale's application for rehearing[134] fails to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful"[135] and to "set[] forth

[133] OOC, ¶ 122.
[134] Application for Rehearing (December 23, 2019) (Evendale AFR).
[135] R.C. 4903.10(B) (rule governing rehearing of Commission orders) (emphasis added); R.C. 4906.12 (adopting R.C. 4903.10, among other provisions, for OPSB proceedings).

an explanation of the basis for each ground for rehearing."[136] The application contains less than 1.5 pages of text, comprised of an indeterminate number of purported grounds for rehearing,[137] without a single citation to statute, regulation, record evidence, or even to the portions of the OOC that Evendale considers to be unreasonable and unlawful. Evendale provides no "explanation or legal support" for any of its "contention[s]."[138] For these reasons alone, its application for rehearing should be denied.

On the merits, Evendale first complains that the CCP will "place[] an undue and unreasonable burden" on Evendale and its residents because more than 20 percent of Evendale households will be impacted and the OOC "causes significant safety concerns." Evendale cites no evidence for the 20 percent figure and does not specify a single safety concern or specific inconvenience. As described in Sections II.B and II.C.1, *supra*, the Board adequately considered the relative impacts of possible routes and safety concerns.

Evendale then alleges that the OOC is "unreasonable because it does not fully explore" the possibilities of (1) replacing the peaking plants; and (2) "the options first proposed by Duke as more beneficial than the route that was ultimately selected in the Order." Evendale does not specify which it considers to be the "more beneficial" options, but the record is clear that the Board reasonably and lawfully found that the Company's route selection study was reasonable. *See supra* Section II.B. As for the option of replacing the peaking plants, there is no record evidence to suggest that replacement above-ground storage would be feasible or that it could even be legally sited. Evendale does not cite to or even describe any evidence in support of this suggestion.

---

[136] O.A.C. 4906-2-32(A) (emphasis added).
[137] *See* Evendale AFR, pp. 1-2. Evendale's application contains three paragraphs of conclusory allegations, but at least one of these paragraphs appears to allege two separate grounds for rehearing.
[138] *In the Matter of the Applications of a Settlement Agreement Between the Public Utilities Commission of Ohio and SRS, Inc.*, Case No. 01-2675-TR-UNC, Entry on Rehearing, pp. 1-2 (December 20, 2001) (denying an application for rehearing that "does not meet this specificity requirement").

Finally, Evendale argues that the OOC is unreasonable "because it fails to account for the financial damage" CCP "has already caused" and will cause to Evendale. Evendale alleges the loss of one existing business and one potential new business, but does not explain how these losses are relevant under the statutory or regulatory criteria or cite to supporting evidence that they even occurred.

For these reasons, Evendale's application for rehearing should be denied.

III. CONCLUSION

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Board deny rehearing on all grounds.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Jeanne W. Kingery
Rocco O. D'Ascenzo (0077651)
Deputy General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel (Counsel of Record)
Larisa M. Vaysman (0090290)
Senior Counsel
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, Ohio 45201-0960
(513) 287-4359
(513) 287-4385 (facsimile)
Rocco.D'Ascenzo@duke-energy.com
Jeanne.Kingery@duke-energy.com
Larisa.Vaysman@duke-energy.com

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra was served on the following persons, this 2nd day of January, 2020, by electronic delivery.

/s/ Jeanne W. Kingery
Jeanne W. Kingery

'Andrew.Garth@cincinnati-oh.gov';
'Howard.Miller@cincinnati-oh.gov';
'robert.holderbaum@puco.ohio.gov';
'john.jones@ohioattorneygeneral.gov';
'Robert.eubanks@ohioattorneygeneral.gov';
'ecollins@fairshake-els.org';
'bfox@graydon.law';
'jlang@calfee.com';
'slesser@calfee.com';
'mkeaney@calfee.com';
'cjones@calfee.com';
'tburke@manleyburke.com';
'mkamrass@manleyburke.com';
'Bryan.pacheco@dinsmore.com';
'Mark.arnzen@dinsmore.com';
'miller@donnellonlaw.com';
KCMcDonough@woodlamping.com;
'Roger.friedmann@hcpros.org';
'Michael.friedmann@hcpros.org';
'Jay.wampler@hcpros.org';
'tmd@donnellonlaw.com';
'butler@donnellonlaw.com';
'dstevenson@cinci.rr.com';
'ahelmes@deerpark-oh.gov';
'dborchers@bricker.com';
'dparram@bricker.com';
'joliker@igsenergy.com';
'Richard.tranter@dinsmore.com';
'Kevin.detroy@dinsmore.com';
lauxlawesq@gmail.com;
'Paula.boggsmuething@cincinnati-oh.gov'
kherrnstein@bricker.com
bethany.allen@igs.com

Administrative Law Judges:

sarah.parrot@puco.ohio.gov

greta.see@puco.ohio.gov

Summary: Memorandum Contra Applications for Rehearing of Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Duke Energy