



Phillips Lytle LLP

VIA Email and Hand Delivery

May 23, 2017

Town of Pendleton
Zoning Board of Appeals
c/o Wolfgang Buechler
Chairman, Zoning Board of Appeals
Pendleton Town Hall
6570 Campbell Blvd.
Lockport, NY 14094

Re: **Supplement to Request for Interpretation/Use Variance** by Empire Pipeline, Inc. Regarding a Proposed Compressor Station and Related Equipment Located at 4281 Killian Road in a Light Industrial District in the Town of Pendleton, New York

Dear Chairman Buechler and Members of the Town of Pendleton Zoning Board of Appeals:

As you know, we represent Empire Pipeline, Inc. ("**Empire**") with respect to the proposed construction and operation of a 22,214 horsepower compressor station and related equipment ("**Facility**" or "**Project**") on a 20-acre parcel located at 4281 Killian Road ("**Site**") in the Town of Pendleton, New York ("**Town**"). The Facility is part of Empire and National Fuel Gas Supply Corporation (collectively, "**National Fuel**")'s Northern Access 2016 project ("**Northern Access**"), which involves improvements to existing interstate pipeline systems in Northern Pennsylvania and Western New York.

On behalf of Empire, and as a follow-up to the April 25, 2017 meeting of the Town of Pendleton Zoning Board of Appeals ("**ZBA**"), we hereby submit an original, and seven (7) copies of this supplement to Empire's Application to the ZBA appealing the Town of Pendleton Building Inspector's denial of a building permit for the Facility, or in the

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alternative, requesting a Use Variance ("**Application**").¹ The Application was filed pursuant to §§ 247-75(A)&(B), respectively, of the Town's Zoning Code ("**Code**").

We hereby submit the following exhibits, which are attached hereto, and made part of the Application:

- Exhibit A:** Transcript of April 25th ZBA meeting
- Exhibit B:** Deed and Recording Documentation for 4281 Killian Road
- Exhibit C:** *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y. 2d 598, 610-611 (1978) (relevant sections highlighted for reference)
- Exhibit D:** *Cellular Tel. Co. v. Rosenberg*, 82 N.Y. 2d 364, 372 (1993) (relevant sections highlighted for reference)
- Exhibit E:** "What if...Pipelines Aren't Built into the Northeast?" Report by U.S. Chamber of Commerce, Institute for 21st Century Energy (relevant sections highlighted for reference)

April 25th ZBA Meeting

As the Board is aware, Empire had a court reporter attend the April 25th ZBA meeting to make a transcript of the discussions on the Application before the Board. A true and correct copy of that transcript is attached hereto as *Exhibit A* for the ZBA's record in this matter. As discussed with the ZBA at the April 25th meeting, Empire has arranged for a court reporter to attend the public hearing on May 25th and will provide the ZBA with a transcript of the hearing.

Acquisition of the Site

On behalf of Empire, we would like to advise the ZBA that on May, 5, 2017, Empire formally acquired the Site from the Tonawandas Sportsmen's Club, Inc. Attached hereto as *Exhibit B* is a copy of the deed and recording information to demonstrate ownership for the Town's reference.

¹ As explained in the Application, the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over the siting, construction and/or operation of facilities associated with interstate natural pipelines including the Facility. In submitting this supplement to the Application, Empire in no way concedes any authority over the siting of the Facility to the Town, and this submission is made without any admission of fact or concession of law on Empire's part, and with full reservation of all of Empire's rights.



**Additional Information on the
Essential Services that Empire Provides**

As you know, pursuant to Code § 247-75, Empire is currently before the ZBA respectfully requesting that the ZBA: (1) find that Empire is an “essential service” under Code § 247-4; or, in the alternative, (2) grant Empire a use variance to place, construct and/or operate the Facility on the Site.

In the Application dated April 12, 2017, we detailed the Project’s status as providing an essential service, and provided further detail on the Project and Empire’s status as a public utility for purposes of zoning in New York State. In follow-up to our appearance before the ZBA on April 25, 2017, we are providing additional information on Empire’s status as both an essential service and public utility for purposes of zoning in New York State, and to highlight further the deference owed to a public utility such as Empire in the zoning context.

**A. The Facility Constitutes an Essential Service under the
Town Code**

The Site is located in the Town’s Industrial District. Permitted uses in the Industrial District include “essential services.” Code §247-14(C)(22). The Town’s Code defines “Essential Services” as:

The erection, construction, alteration, or maintenance by public utilities or municipal or other governmental agencies of gas, electrical, steam, water, sewage and communication systems and facilities. Railroad trackage and facilities and bus shelters shall also be considered as providing an “essential service.”

Code § 247-4.

As detailed in the Application, in the denial of a building permit for the Facility, the Building Inspector has found that the Facility is not an essential service because it does not service end-users within the Town. However, this requirement - that the Facility serve end-users - is nowhere to be found in the plain language of the Code. Under the Code, an essential service has two parts: *first*, it must include the erection, construction, alteration or maintenance of gas, electrical, steam, water sewage and communication



systems and facilities; and *second*, the entity involved must be a public utility, municipality or other governmental agency.

In the Application, we cited two cases decided by the New York Court of Appeals, the State's highest Court, in support of the proposition that under New York law, Empire is considered a public utility for purposes of zoning: *Consol. Edison Co. of New York v. Hoffman*, 43 N.Y. 2d 598, 610-611 (1978) and *Cellular Tel. Co. v. Rosenberg*, 82 N.Y. 2d 364, 372 (1993). We thought it would be helpful to provide the ZBA with a detailed analysis of both of these cases.

1. Consol. Edison Co. of New York v. Hoffman, 43 N.Y. 2d 598 (1978)

In *Hoffman*, (attached hereto as *Exhibit C*), Consolidated Edison Company ("ConEd"), sought a use variance and area variance to modify Indian Point nuclear generating plant by constructing a 565-foot natural draft, wet cooling tower. ConEd was denied the necessary use variance by the Zoning Board of Appeals. 43 N.Y. 2d 598.

The Court noted that the legal issue before it was limited to whether or not the denial of the use variance was an abuse of discretion. The Court explained, "where there are practical difficulties or unnecessary hardships in the way of carrying out an ordinance, a zoning board of appeals has the power to issue a variance." *Id.* at 606. To be granted a use variance, given that such a variance essentially allows a prohibited use, an applicant typically faces a heavy burden and must show an "unnecessary hardship." *Id.* at 606. This requires a showing that there is no permitted use that will obtain a reasonable return on the land; that the circumstances that cause this hardship are unique to the land; and, that the proposed use will not alter the essential character of the community. *Id.* at 607.

However, the Court noted that such hardship showings are not appropriate when a public utility is involved. The Court placed an emphasis on the public necessity involved when considering a variance application by a utility. *Id.* Local concerns, while relevant, are not the only criteria to be used, as utilities are required to "provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." *Id.* at 608. As the needs of the broader public are contemplated by the enabling legislation, when looking to the question of hardship, "the effect on the utility's customers is a significant factor to be considered by local zoning boards." (emphasis added) *Id.* It is important to note here that the Court references the need to



focus on *all customers of the utility*, rather than solely the utility's customers in the municipality in question.

At its Zoning Board of Appeals meeting, ConEd noted that, were its variance to be denied, the utility may have to shut down a unit at the power plant, resulting in excessive capital costs. *Id.* ConEd provided testimony that the plant's operation saved ConEd customers \$78,000,000 in one year, and, if the facility were to shut down, the need for increased production at other plants would translate to significant costs and the use of imported oil. In its decision, the Court specifically pointed to "the potential hardship to Con Edison's approximately three million customers, and millions of others affected, not to mention the harm to the utility's huge investment." *Id.* at 609.

The Court explained that it is well-settled that a zoning board cannot bar a utility from a community where the utility has clearly demonstrated there is a need for its facilities. *Id.* at 610. For a public utility to be granted a use variance, a utility must show that the variance is a public necessity and is required to render safe and adequate service. Further, where the burden on the community is minimal, the showing required by a public utility should be reduced even further. *Id.* at 607.

Hoffman is particularly helpful in its discussion of public utilities for purposes of determining whether the Facility is an essential service. As detailed in the Application, the Project is necessary to provide safe, adequate and reliable service to Empire's customers, which includes NYSEG, which services residents of the Town. The Facility will provide the capacity and infrastructure needed to transport reliable, clean, and cost-efficient natural gas supplies from Pennsylvania to, *inter alia*, Western New York, the Northeastern United States and Canada. The Facility is a compressor station, which is a critical part of the Project because it will maintain pressure necessary to transport natural gas between the Supply and Empire pipeline systems.

The Facility serves the broader public by increasing the supply of natural gas available in the market areas. As explained by the Court of Appeals in *Hoffman*, "in resolving the question of hardship, the effect on the utility customers is a significant factor to be considered by local zoning boards." *Id.* at 608. Thus, it is service to the utility's customers that must be shown for the determination of status as a public utility - and not service to the local residents. In fact, the cooling tower in *Hoffman* was of limited value to residents of the local Village, but was of critical importance to Con Ed's three million customers.



When the Court in *Hoffman* describes the nature of a public utility, the Court points to the utility's need to service its customers, and to the potential harm to the customers should the variance be denied and significant economic impacts follow. Empire's Facility is key to the provision of natural gas to its customers, including those within the Town and throughout the Northeast and United States. Without the Facility, Empire's ability to provide such services will be compromised. As detailed below, the inability to provide such services has significant economic consequences for the Northeast. Accordingly, Empire provides exactly the type of services discussed in *Hoffman*, and its customers will face exactly the types of harm referenced in *Hoffman*, should the Project not be able to proceed.

2. Cellular Tel. Co. v. Rosenberg, 82 N.Y. 2d 364 (1993)

In *Rosenberg* (attached hereto as *Exhibit D*), the Court elaborated on *Hoffman*'s discussion of public utilities. A cell phone company, Cellular One, had proposed a cell site in Dobbs Ferry to expand and fill a gap in coverage to its customers in its service area. 82 N.Y. 2d 364, 368. Without the additional cell site, calls from the cell phone company's customers were disrupted due to a lack of antennas. As cell sites were not a permitted use in the zoning district in which the project was proposed, Cellular One applied for a use variance. *Id.*

The Zoning Board denied the use variance, finding that Cellular One did not establish that 1) the land could not achieve a reasonable return with a permitted use; 2) that its circumstances were unique, 3) that there was a public necessity for its service or that it was a public utility, 4) the absence of future hazards and 5) the lack of alternate sites. *Id.* at 370. At issue was whether or not this was the appropriate standard by which to review Cellular One's application. The analysis turned on whether or not Cellular One constituted a public utility for purposes of zoning in New York. This was the first time that the Court found that the related standard applies to entities other than traditional public utilities like ConEd in *Hoffman*.

Rosenberg sets forth a three-part test to determine whether a private business should be considered a public utility for purposes of zoning in New York. *Id.* Under *Rosenberg*, the characteristics of a public utility include: (1) the essential nature of the services offered; (2) operation under a franchise, subject to some measure of public regulation; and (3) logistic problems, such as the fact that the produce of the utility must be piped, wired or otherwise served to each user, the supply must be maintained at a constant level to meet demand, and the user has no alternative source and the supplier



commonly has no alternative means of delivery. *Id.* The Court held that Cellular One met the definition of a public utility.

The Court expanded upon the standard for public utilities established in *Hoffman*, and noted that this standard applies to all utilities, and includes entirely new sitings of facilities as well as modifications of existing facilities. *Id.* at 372. The Court reiterated *Hoffman's* standard that a zoning board cannot exclude a utility from a community if the utility has shown a need for its facilities. *Id.* Cellular One had adequately demonstrated that its proposed cell site would improve its existing service.

As the Town is well aware, and as detailed in the April 12, 2017 supplement to the Application, Empire satisfies the *Rosenberg* test and should therefore be treated as a public utility for zoning purposes under New York law. First, Empire is an interstate pipeline which supplies natural gas, which is the type of essential service for which federal legislation, *i.e.*, the NGA, has been enacted to place limits on local regulations that “prohibit or unreasonably delay the construction or operation of facilities approved by [FERC].” *See, e.g. Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 573-74 (D. Md. 2013).

Additionally, Empire, as a natural gas company regulated by the NGA, operates under authority of FERC and enjoys the power and privilege of eminent domain. Further, as evidenced by the April 12, 2017 supplement to the Application, FERC sets rates for interstate natural gas pipelines such as Empire, and has standard rate setting regulations, which Empire in general, and the Project in particular, are subject to under federal law.

Lastly, the interstate delivery and supply of natural gas tracks closely with the logistical problems articulated by the Court of Appeals in *Rosenberg*. Indeed, the Facility is a compressor station which exists to address one type of logistical problem encountered by natural gas providers, namely the need for gas to be pressurized in order for it to be transported through a pipeline (*i.e.* from a lower pressure pipeline to a higher pressure pipeline). Just as with the wireless service provider regulated by the FCC in *Rosenberg*, Empire fits within the definition of a public utility for purposes of zoning under New York law, including for purposes of the ZBA's interpretation of Code § 247-4.

Importantly, neither case distinguishes between “end-users” and other utilities which serve as intermediaries between pipelines and end users. The focus is on the essential nature of the services being provided in this case, the distribution of natural gas. Both within the plain language of the Code, and as demonstrated through the Courts’



description of public utilities and public necessity found in *Hoffman* and *Rosenberg*, the Facility clearly constitutes an essential service. The Facility is necessary for the provision of safe and adequate natural gas service to Empire's customers, as determined by FERC in issuing a certificate of public convenience and necessity to Empire for the Project.

B. U.S. Chamber of Commerce Report Regarding Northeast Pipeline Infrastructure Needs

Since the filing of the Application, an extremely relevant report has been released that sheds additional light on the essential nature of the services that the proposed pipeline will provide. Last month, the U.S. Chamber of Commerce ("**Chamber**") released a report as part of its Energy Accountability Series titled "*What if...Pipelines Aren't Built in the Northeast?*" ("**Chamber Report**"), attached hereto as *Exhibit E*, which outlines the significant challenges facing the Northeast due to the lack of pipeline infrastructure. The Chamber Report attempts to quantify the impacts to the Northeast region from the significant delays and hurdles faced by attempts to improve infrastructure in the region. In addition to the inability to meet ever-increasing demands for natural gas provision, creating capacity concerns, the lack of infrastructure and the delays pipeline projects have been facing in the northeast are creating substantial impacts, including significant reductions in GDP, lost opportunities for sizeable job creation, and noteworthy increases in rates compared to the rest of the nation. These impacts to customers are exactly the type of concerns noted in both *Hoffman* and *Rosenberg*, which lead to the need for deference to a public utility in the zoning context.

The Chamber Report notes that as natural gas production in the U.S. has increased, the U.S. has seen energy-usage cost savings, the creation of millions of jobs, and lowering of the nation's greenhouse gas emissions. In fact, for the first time, natural gas-fired electricity production has bypassed coal generation for 2016. *Chamber Report* at p. 18. The Northeast, however, has not been able to receive its share in these benefits because of supply limitations. In fact, Northeast residents are paying some of the highest prices in the nation for natural gas delivery. Given the steady increase in demand, it is essential that new pipeline capacity be added to the system to meet current and future needs and to keep costs consistent with those of the rest of the nation. *Id.* at p. 27.

The Chamber Report notes that installing the proper pipeline infrastructure is as essential to the U.S. as "having good roads, safe bridges and world-class airports."



FERC has noted that “with the exception of the Northeast...regional price differences across the country were not large...”. *Chamber Report* at p. 10. FERC stated that “pipeline constraints” throughout the Northeast were to blame for higher gas prices for customers in the Northeast. *Id.* In addition to price increases, the Chamber Report notes that the lack of adequate gas infrastructure in the region has caused “winter reliability challenges” in the Northeast. *Id.* As a result of this lack of infrastructure, Northeast residents pay 29% more for their natural gas than the national average, and 44% more for their electricity, while industrial users in the Northeast pay more than double for their natural gas. *Id.* As demand for natural gas rises, and pipeline projects continue to face delays or denials of local and State approvals, the Northeast will continue to face high energy costs, lower household income and spending power, and economic losses in manufacturing and industry. *Id.* at 19.

The Chamber Report estimates that if the status quo remains with respect to infrastructure, and new infrastructure projects are unable to become permitted, New York alone stands to lose 17,400 jobs and \$1.6 billion in lost state GDP. *Id.* at 11. New York’s losses come from both lost opportunities in the pipeline development job creation and economic impact, and significant lost GDP from higher electricity and natural gas costs passed on to customers in the State. *Id.* at p. 41. The Chamber Report notes that the “primary impediments to these projects advancing in the Northeast” are found at the state and local levels, creating a “unilateral blockade...denying residents access to cheaper, cleaner, more proximal and more reliable sources of natural gas.” *Id.*

The Chamber Report is extremely helpful in highlighting the public necessity of expanding pipeline infrastructure in the Northeast, and the realities of the potential impacts to customers that are noted in *Hoffman* and *Rosenberg*. It is exactly those types of concerns, coupled with the unique needs of public utilities, which have given rise to the relaxed zoning standards for critical infrastructure, such as the Project.

Conclusion

The Facility meets the Code’s definition of “essential service” because it is entitled to the relaxed zoning standard of a public utility under New York law. As demonstrated by the Chamber Report, infrastructure projects such as the Facility are critical to the Northeast economy and to meeting ever-increasing capacity needs and the needs of Empire’s customers.



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Accordingly, we respectfully request that the ZBA issue an interpretation of the Code confirming the Project's classification as an essential service, or, in the alternative, granting the Project a use variance under the relaxed zoning standard.

If you have any questions concerning the Application or information contained herein, please do not hesitate to contact the undersigned.

Respectfully submitted,

Phillips Lytle LLP

By 

Adam S. Walters

Enclosure

cc: Edward P. Perlman, Esq., ZBA Attorney
Tim Masters, Town of Pendleton Building Inspector
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