United States Court of Appeals

for the

Third Circuit

Case No. 17-3700

TENNESSEE GAS PIPELINE COMPANY, L.L.C.,

Appellee,

– v. –

PERMANENT EASEMENT FOR 7.053 ACRES, PERMANENT OVERLAY EASEMENT FOR 1.709 ACRES AND TEMPORARY EASEMENTS FOR 8.551 ACRES IN MILFORD AND WESTFALL TOWNSHIPS, PIKE COUNTY, PENNSYLVANIA, TAX PARCEL NUMBERS; KING ARTHUR ESTATES, A Limited Partnership; RIOTHAMUS CORP, General Partner of King Estates c/o Ernest Bertuzzi President; ALL UNKNOWN OWNERS AND INTERESTED PARTIES,

KING ARTHUR ESTATES, L.P. and RIOTHAMUS CORPORATION,

Appellants.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA IN CASE NO. 3-12-CV-01477, HONORABLE A. RICHARD CAPUTO, U.S. DISTRICT JUDGE

BRIEF FOR PLAINTIFF-APPELLEE TENNESSEE GAS PIPELINE COMPANY, L.L.C.

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 17-3700

Tennessee Gas Pipeline Company, L.L.C.

v.

Permanent Easement for 7.053 Acres, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Tennessee Gas Pipeline Company, L.L.C. makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: The immediate parent of Tennessee Gas Pipeline Company, L.L.C. ("Tennessee") is Kinder Morgan Operating LP. "A" ("KMOLPA"), which owns all of the outstanding membership interests of Tennessee. KMOLPA is a Delaware limited partnership, the 98.9899% limited partner interest of which is owned by Kinder Morgan Energy Partners, LP. ("KMP"), and the 1.0101% general partner interest is owned by Kinder Morgan G.P., Inc. ("KMGP"). KMP is a Delaware limited partnership, the 99% limited partner interest of which is held by Kinder Morgan, Inc. and KMGP, with the 1% general partnership interest of which is held by KMGP. All of the common stock of KMGP is owned by Kinder Morgan, Inc. Kinder Morgan, Inc., a Delaware corporation, is a publicly traded company listed on the New Stock Exchange under the symbol "KMI."

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

The following individual owns the following percentage of KMI: Richard D. Kinder -- 11.0000%. The remaining interests in KMI are owned by individuals are entities, none of which own more than a 10% interest.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

s/ Elizabeth U. Witmer Dated: May 30, 2018

(Signature of Counsel or Party)

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GLOSSARY

District Court	United States District Court for the Middle District of Pennsylvania
FERC	Federal Energy Regulatory Commission
FERC Order	Tenn. Gas Pipeline Company, L.L.C., 139 FERC ¶ 61,161 (May 29, 2012)
King Arthur	Appellants King Arthur Estates, L.P. and Riothamus Corporation
Project	Appellee Tennessee Gas Pipeline Company, L.L.C.'s Northeast Upgrade Project
Rights of Way	Interests acquired on Appellant King Arthur Estates, L.P.'s property by Appellee Tennessee Gas Pipeline Company, L.L.C.
Tennessee	Appellee Tennessee Gas Pipeline Company, L.L.C.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Pennsylvania ("District Court") has jurisdiction under 28 U.S.C.A. § 1331 and 15 U.S.C.A. § 717f(h) because: (a) Appellee, Tennessee Gas Pipeline Company, L.L.C. ("Tennessee"), holds a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC") authorizing the construction and operation of interstate natural gas pipeline infrastructure within Pennsylvania in connection with Tennessee's Northeast Upgrade Project (the "Project"); (b) Tennessee was unable to reach an agreement with Appellants, King Arthur Estates, L.P. and Riothamus Corporation (collectively, "King Arthur"), the owners of the property at issue, to purchase easements and other interests necessary for the construction and operation of the Project; (c) the right-of-way interests in the real property that Tennessee has condemned (the "Rights of Way") are located within the Middle District of Pennsylvania; and (d) the value of same exceeds $3,000.00.

This Court has jurisdiction under 28 U.S.C.A. § 1292(b) because the District Court granted leave to King Arthur to file an interlocutory appeal regarding the issue discussed herein and this Court granted King Arthur's Petition for Permission to Appeal by an Order dated December 4, 2017. See A.1.[1]

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[1] Citations to the Appendix filed by King Arthur are designated as "A.x."

STATEMENT OF THE ISSUE

Whether federal law governs the substantive determination of just compensation in condemnation actions commenced under the Natural Gas Act, 15 U.S.C.A. § 717, *et seq.*?

STATEMENT OF RELATED CASES AND PROCEEDINGS

On June 25, 2015, King Arthur filed a civil action in the Court of Common Pleas of Pike County, Pennsylvania, claiming that it is entitled to damages as a result of Tennessee allegedly trespassing on King Arthur's property. See King Arthur Estates, L.P. v. Tenn. Gas Pipeline Co., L.L.C., No. 897-2015 (Pike Cty. Com. Pl. 2015). This state court action has been stayed pending resolution of the underlying condemnation action before the District Court.

STATEMENT OF THE CASE

The underlying District Court litigation involves a federal condemnation action brought by Tennessee against King Arthur under Section 7(h) of the Natural Gas Act, 15 U.S.C.A. § 717f(h). In July 2012, pursuant to Federal Rule of Civil Procedure 71.1, Tennessee filed a Complaint in condemnation against property owned by King Arthur to acquire certain Rights of Way needed to construct the Project, which FERC determined to be necessary for the public convenience and necessity. A.4. In October 2012, the District Court determined that Tennessee had the authority to condemn the King Arthur property under that Natural Gas Act, and granted Tennessee the right to access and possess the Rights of Way identified in Tennessee's Complaint. A.5. The only remaining issue in the case is compensation. The parties engaged in discovery, and Tennessee moved for partial summary judgment on a number of issues, only one of which is pertinent to the instant appeal. Specifically, Tennessee moved for partial summary judgment that King Arthur's alleged consequential damages for professional fees and development costs were unrecoverable as a matter of law. On August 30, 2017, the District Court issued an Opinion and Order (the "Opinion and Order") granting partial summary judgment in favor of Tennessee and ruling that, as a matter of law, King Arthur could not recover professional fees and development costs at a forthcoming compensation trial.

The District Court's ruling that alleged consequential damages were unrecoverable as a matter of law was based in part on its determination that federal common law – which does not permit the introduction of consequential damages in eminent domain compensation proceedings – applies to compensation proceedings resulting from condemnations brought under the Natural Gas Act. In so ruling, the District Court relied on Supreme Court and Third Circuit precedent as previously applied in a 2014 opinion from the Middle District of Pennsylvania which held that federal substantive law applies in such situations. See Tenn. Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres, No. 3:CV-11-028, 2014 WL 690700, at *9 (M.D. Pa. Feb. 24, 2014) (hereafter, "Fox Hollow"). In Fox Hollow, the Honorable A. Richard Caputo had also considered all of the arguments that King Arthur raises in the instant appeal and concluded as follows:

> [F]ederal substantive law will be applied to determine the compensation owed by [Landowner] to Tennessee for the taking of the Rights of Way. In contrast to the authority cited by [Landowner], I am of the view that federal law governs the substantive determination of just compensation in a condemnation action commenced under the Natural Gas Act. Significantly, the Supreme Court in *Miller* held that federal law governs the determination of compensation in federal condemnation proceedings because the measure of compensation is a question of substantive right "grounded upon the Constitution of the United States." *Miller*, 317 U.S. at 379-80 . . . . And, since *Miller* was decided, the Third Circuit, as well as district courts in the Third Circuit, have applied federal law in determining compensation in condemnation actions commenced pursuant to the federal

> power of eminent domain. *See, e.g.*, *412.93 Acres of Land*, 455 F.2d at 1242; *60.14 Acres of Land*, 362 F.2d at 660; *13.98 Acres*, 702 F. Supp. at 1116; *15.3 Acres of Land in Scranton*, 154 F. Supp. at 783. These considerations . . . strongly support the application of federal substantive law to determine compensation owed in condemnation proceedings commenced pursuant to the Natural Gas Act.

Fox Hollow, 2014 WL 690700, at *9.

On September 21, 2017, King Arthur moved to amend the District Court's Opinion and Order, arguing that the issue of whether federal or state law governs the determination of just compensation in condemnation actions brought under the Natural Gas Act was ripe for an interlocutory appeal. A.18. On November 1, 2017, the District Court granted King Arthur's motion and certified the instant appeal. A.22. King Arthur thereafter filed its Petition for Permission to Appeal, which was granted by this Court on December 4, 2017. A.1.

STANDARD OF REVIEW

This interlocutory appeal involves a question of law, namely, whether federal common law applies to the determination of just compensation in federal condemnation actions brought under the Natural Gas Act. This Court's review of this question is therefore *de novo*. Paredes v. Attorney Gen. of the United States, 528 F.3d 196, 198 (3d Cir. 2008).

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's Opinion and Order because 75-year old precedent from the United States Supreme Court clearly holds that the "measure of compensation" for federal exercises of eminent domain is an issue of federal substantive law because it is "grounded upon the Constitution of the United States." United States v. Miller, 317 U.S. 369, 380 (1943). Moreover, decades of Third Circuit case law relies on Miller for the proposition that federal substantive law applies to compensation proceedings relating to the federal exercise of eminent domain, which is the core issue in this appeal.

King Arthur does not, and cannot, dispute that Tennessee's authority to condemn King Arthur's property is federal in nature, as this authority arises from the Natural Gas Act. Instead, King Arthur claims that Miller and the Third Circuit authority relying on it should be limited to situations in which the United States acts as the condemnor. However, there is no legally tenable reason to limit Miller and its progeny in this way – because the "just compensation" due for a federal taking is a constitutional entitlement, the measure of "just compensation" is necessarily a question of federal substantive law. See D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Federal common law implements the federal Constitution and statutes, and is conditioned by them."). This is particularly true here, where the application of

state substantive law would create a legal framework in which the definition of "just compensation" would vary from state to state with different results for landowners in a single interstate natural gas pipeline project – a result that would render the constitutional guarantee arbitrary and entirely context-dependent. These principles are true irrespective of the identity of the condemnor.

King Arthur, unable to meaningfully distinguish Miller and the line of Third Circuit authority relying thereon, advances four arguments why Miller should not apply, and then asks this Court to analyze this case under the framework set forth in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979). Those arguments are unavailing.

First, King Arthur asks this Court to find that the substantive law applied in federal condemnations when the condemnor is a holder of a federal certificate of public convenience and necessity should differ from federal condemnations where the condemnor is the United States or its agencies, citing cases from the Fifth Circuit, Sixth Circuit, and Tenth Circuit. However, limiting Miller to such situations is arbitrary and predicated upon flawed reasoning; condemnations under the Natural Gas Act are no less federal exercises of eminent domain implicating the constitutional guarantee of "just compensation" than condemnations brought by the United States. Thus, the case law that King Arthur relies on should not be followed.

Second, King Arthur asks the Court to analyze this case under the framework set forth in United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), and concludes that state law should apply. Kimbell Foods, however, applies to situations where federal common law has not yet been developed – not situations where, as here, *an extensive body of federal case law already exists*. Alternatively, even if this Court applies the Kimbell Foods framework, federal common law should still control based on Miller and the strong federal prerogatives underlying the Natural Gas Act.

Although King Arthur devotes considerable attention to case law from other Circuits and Kimbell Foods' reluctance to create federal common law, it pays remarkably little attention to the fact that the central legal issue underlying this appeal – what law should apply in compensation proceedings relating to federal exercises of eminent domain – was resolved long ago, as the District Court recognized. Fox Hollow rigorously analyzed all of the arguments King Arthur now raises and concluded that Miller definitively spoke on this issue. Here, King Arthur has recycled all of the arguments that Fox Hollow rejected and, rather than address Miller's reasoning, King Arthur relies on inapposite and unpersuasive legal authorities in an effort to drive an artificial wedge between federal condemnations brought by the United States and federal condemnations brought by private entities acting pursuant to congressionally delegated authority. This Court should pay no

mind to this immaterial distinction and should instead follow Miller and the longstanding rule in this Circuit that federal substantive law applies to federal eminent domain actions. The District Court's decision should be affirmed.

ARGUMENT

In Federal Condemnations, the Measure of Damages Is Determined by Federal Law

The Fifth Amendment to the United States Constitution guarantees ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. As the Supreme Court has explained, "[t]he Constitution and the statutes do not define the meaning of just compensation." United States v. Petty Motor Co., 327 U.S. 372, 377 (1946). Over time, this gap has been filled by the development of federal common law establishing "that just compensation is the value of the interest taken." See id. at 377-78 ("Since market value does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings.") (internal quotations omitted).

The question in this case is what body of law provides the measure of the constitutional guarantee of "just compensation" in federal condemnation proceedings arising under the Natural Gas Act, 15 U.S.C.A. § 717, *et seq.* – federal law or state law? The case pending in the District Court is a federal condemnation brought pursuant to Federal Rule of Civil Procedure 71.1 under the authority of the Natural Gas Act. In the Natural Gas Act, Congress delegated to holders of a

federal certificate of public convenience and necessity issued by FERC the limited authority to condemn certain property:

> **When any holder of a certificate of public convenience and necessity** cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, **the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas**, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, **it may acquire the same by the exercise of the right of eminent domain** in the district court of the United States for the district in which such property may be located, or in the State courts. **The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated:** *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C.A. § 717f(h) (emphases added).

The "practice and procedure" clause of the Natural Gas Act was superseded by Federal Rule of Civil Procedure 71.1,[2] which provides the procedure for such

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[2] Rule 71.1(h) contains the following provisions regarding the trial of issues relating to compensation:

(h) Trial of the Issues

condemnations. See, e.g., All. Pipeline L.P. v. 4.360 Acres of Land, 746 F.3d 362, 367 (8th Cir. 2014) (explaining that several courts have observed that "§ 717f(h)'s state-law directive has been superseded" by Rule 71.1 and collecting cases).

While the Natural Gas Act provides the delegation of condemnation authority, and Rule 71.1 provides that there is no right to a jury trial on compensation issues, though the District Court can choose to refer the matter to a

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> (1) *Issues Other Than Compensation; Compensation.* **In an action involving eminent domain under federal law, the court tries all issues, including compensation,** except when compensation must be determined:
>
> (A) by any tribunal specially constituted by a federal statute to determine compensation; or
>
> (B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.
>
> (2) *Appointing a Commission; Commission's Powers and Report.*
>
> (A) *Reasons for Appointing.* If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.
>
> (B) *Alternate Commissioners.* The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.
>
> Fed. R. Civ. P. 71.1(h) (emphases added).

jury, neither the Natural Gas Act nor Rule 71.1 speak directly to the substantive law to be applied to determine the compensation due during the trial.

I. United States v. Miller and the Long Line of Third Circuit Authority Following and Relying on Miller Control

A. The Supreme Court's Decision in Miller

In Miller, the Supreme Court held that federal law governs the determination of compensation in federal eminent domain proceedings because the measure of compensation is a question of substantive right "grounded upon the Constitution of the United States." 317 U.S. at 380. Miller involved a factual situation in which the United States had condemned land situated in California. Id. at 370. The Court applied federal law in holding that when determining compensation, the landowner was not entitled to the benefit of any increase in the value of his property resulting from the condemnation of adjacent lands, even though California law would consider that benefit as part of fair market value. Id. at 379. In doing so, the Court rejected the argument that state substantive law should apply to the determination of compensation, even when the federal statute at issue requires the court in condemnation proceedings to follow the procedures of the state in which the court sits. Id. at 379-80. Instead, Miller focused on what the Fifth Amendment requires, holding that "the Constitution has never been construed as requiring payment of consequential damages." Id. at 376.

B. This Court's Adoption of Miller in Federal Eminent Domain Actions

King Arthur's Brief largely glosses over the fact that this Court has long held that federal law – and not Pennsylvania law – applies to the determination of compensation in a federal condemnation proceeding against land in Pennsylvania. One year after Miller was decided, this Court decided United States v. Certain Parcels of Land in Phila., which held that Miller dispositively answered the question of "whether the Pennsylvania concept of value for purposes of eminent domain governs in a condemnation proceeding brought by the United States against land in Pennsylvania." 144 F.2d 626, 628 (3d Cir. 1944).

Following Certain Parcels of Land, both this Court and district courts within this Circuit have uniformly applied federal law **in every case** involving the determination of compensation in a condemnation pursuant to the federal power of eminent domain. See, e.g., United States v. 27.93 Acres of Land, 924 F.2d 506 (3d Cir. 1991); United States v. 412.93 Acres of Land, 455 F.2d 1242 (3d Cir. 1972); United States v. 60.14 Acres of Land, 362 F.2d 660, 662, 665 (3d Cir. 1966); United States v. 15.3 Acres of Land, 154 F. Supp. 770, 783 (M.D. Pa. 1957); see also United States v. 13.98 Acres, 702 F. Supp. 1113, 1116 (D. Del. 1988) (finding that state law for determining compensation is not applicable to condemnation under federal power of eminent domain).

The majority of appellate courts around the country – including the Fifth, Sixth, and Tenth Circuits – have similarly followed Miller for federal condemnations. See, e.g., U.S. ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land, 821 F.3d 742, 756 (6th Cir. 2016) (citing Miller and explaining that "[t]he Supreme Court has defined just compensation to mean the fair market value of the property on the date of the taking"); United States v. 2,560.00 Acres of Land, More or Less, 836 F.2d 498, 501 (10th Cir. 1988) (citing Miller and explaining that "fully compensating a landowner in a condemnation suit requires a consideration of the diminution of value of property not expressly taken"); United States v. 33.5 Acres of Land, More or Less, 789 F.2d 1396, 1400 (9th Cir. 1986) ("We . . . hold that the district court did not err in applying federal law to determine the appropriate level of compensation."); United States v. 320.0 Acres of Land, More or Less, 605 F.2d 762, 781 (5th Cir. 1979) (citing Miller and explaining that "[t]he measure of compensation is to be the [v]alue of the property [a]t the [d]ate of taking"); United States v. Certain Prop. Located in Borough of Manhattan, 344 F.2d 142, 146 (2d Cir. 1965) ("The Government next says that if fixtures of the sort here at issue are included in the taking, the basis of compensation is a matter of federal law. . . . [W]e readily agree."); United States v. Certain Interests in Prop. in Champaign County, 271 F.2d 379, 384 (7th Cir. 1959) (explaining that "federal law rather than state law governs in federal eminent domain cases"); United States

v. Mahowald, 209 F.2d 751, 752 (8th Cir. 1954) ("What constitutes just compensation in a federal condemnation proceeding is a question of federal law.").

C. Miller Governs Condemnations Under the Natural Gas Act

Because condemnations under the Natural Gas Act, 15 U.S.C.A. § 717f(h), are exercises of the federal power of eminent domain, Miller controls, and this Court should find that federal substantive law applies to the determination of compensation for the Rights of Way. As the District Court determined in Fox Hollow, the compensation due to a condemnee from the exercise of eminent domain under the Natural Gas Act stems from the guarantee in the United States Constitution just as in a condemnation by the United States. Fox Hollow, 2014 WL 690700, at *9. The District Court's reasoning in this regard was correct – a condemnation under the Natural Gas Act is no less federal in character than the United States using its sovereign authority to condemn. See, e.g., Maritimes & Ne. Pipeline, L.L.C. v. Decoulos, 146 F. App'x 495, 496 (1st Cir. 2005) (explaining that "[t]he [Natural Gas Act] grants private natural gas companies the federal power of eminent domain in the event that they" meet the conditions set forth in 15 U.S.C.A. § 717(h)); S. Nat. Gas Co. v. Land, Cullman Cty., 197 F.3d 1368, 1372 (11th Cir. 1999) ("Passed in 1938, the Natural Gas Act, 15 U.S.C. § 717f(h), gives private gas companies the federal power of eminent domain to acquire the necessary right of way to construct, operate, and maintain a pipeline for the

transportation of natural gas."); Robinson v. Transcon. Gas Pipe Line Corp., 421 F.2d 1397, 1398 (5th Cir. 1970) (characterizing condemnation under the Natural Gas Act as "the federal power of eminent domain").

Miller also controls here because there is a sound policy reason for having federal substantive law apply to the determination of "just compensation" – if different state standards apply, the definition of "just compensation" would vary from state to state with different results for landowners in a single interstate natural gas pipeline project, and such a result would defeat the point of a constitutional guarantee. As the Northern District of Illinois has explained:

> A developed body of substantive federal law should normally control. But if a mechanical application of some federal standard would lead to an unfair result, then the court should consider adopting a better state law standard or rethink the federal standard. ***It should not adopt a state law approach that provides a windfall for either condemnor or condemnee. The goal, after all, mandated by the Constitution, is to provide fair compensation***.

Guardian Pipeline, L.L.C. v. 950.80 Acres of Land, No. 01 C 4696, 2002 WL 1160939, at *1 (N.D. Ill. May 30, 2002) (emphasis added); see also United States v. Carr, 608 F.2d 886, 887-88 (1st Cir. 1979) (finding that where issue in dispute "stems from the federal constitution and laws" the rule of decision "should also derive from a federal source").

Miller correctly recognized that the only way to consistently uphold constitutional guarantees is to have a uniform body of federal law relating to those guarantees. The District Court's decision, which reflected this principle, should therefore be affirmed.

D. King Arthur's Attempts to Distinguish Miller Are Unavailing

King Arthur asserts four reasons why Miller should be limited to situations in which the United States is the condemnor (see Brief at 17), but there is no legally sound reason to limit Miller in this fashion.

1. The Transportation of Natural Gas in Interstate Commerce Is a Public Use and Is in the Public Interest, and Only Holders of Certificates of Public Convenience and Necessity May Exercise Eminent Domain under the Natural Gas Act.

First, King Arthur claims that takings under the Natural Gas Act are "for the direct use and benefit of the licensee," rather than for a public use. This claim is belied both by Congress' intent in enacting the Natural Gas Act and case law interpreting the Natural Gas Act. By enacting the Natural Gas Act, Congress determined that "the business of **transporting** and selling **natural gas for ultimate distribution to the public is affected with a public interest**, and that Federal regulation in matters relating to the transportation [and sale] of natural gas . . . is necessary in the public interest." 15 U.S.C.A. § 717(a) (emphases added). Further, Congress has "spoken on the subject" of whether takings for interstate natural gas pipeline projects is a public purpose by delegating the right of eminent

domain to pipeline companies as part of its regulation of the transportation and sale of natural gas under the Natural Gas Act. *See* 15 U.S.C.A. § 717f(h); E. Tenn. Nat. Gas Co. v. Sage, 361 F.3d 808, 821 (4th Cir. 2004) ("Congress may, as it did in the [Natural Gas Act], grant condemnation power to 'private corporations . . . execut[ing] works in which the public is interested.') (quoting Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878)); Equitrans, L.P. v. 0.56 Acres More or Less, 145 F. Supp. 3d 622, 631 (N.D.W. Va. 2015) ("By enacting § 717f(h), Congress concluded that the taking of rights-of-way to build natural gas pipelines is a public use, as it furthers the public interest . . . .").

King Arthur's argument that "[n]owhere in the Natural Gas Act is there any reference to condemnation proceedings under that Act being for the public use" (Brief at 17) is simply wrong. The Act first establishes that the transportation of natural gas in interstate commerce is in the public interest, and then grants eminent domain authority to holders of a federal certificate of public necessity and convenience. See 15 U.S.C.A. § 717(a); *id.* § 717f(h); see also New York State Nat. Gas Corp. v. Town of Elma, 182 F. Supp. 1, 6 (W.D.N.Y. 1960) ("That Congress has viewed the subject of interstate transmission of natural gas as of substantial national importance is attested by its grant of the power of eminent domain to companies constructing lines and facilities pursuant to a Certificate of Public Convenience and Necessity . . . ."). The public benefit associated with

Tennessee's use of eminent domain to construct the Project is substantively no different than the public benefit associated with the United States' use of eminent domain to perform other work that is in the national interest.

2. Contrary to King Arthur's Claims, Extensive Precedent Exists for the Use of Federal Common Law for the Measure of Damages in Federal Takings Cases Under the Natural Gas Act.

Second, King Arthur claims that "no precedent exists" for the application of federal common law to takings under the Natural Gas Act, but this claim defines "precedent" in such a way that conveniently ignores Fox Hollow and the district court cases that have adopted Fox Hollow's reasoning. See, e.g., UGI Sunbury, LLC v. A Permanent Easement for 0.4944 Acres, No. 3:16-CV-00783, 2018 WL 1014136, at *2 (M.D. Pa. Feb. 22, 2018); Columbia Gas Transmission, LLC v. An Easement to Construct, Operate & Maintain a 20-Inch Gas Transmission Pipeline, No. 16-1243, 2017 WL 1355418, at *2 (W.D. Pa. Apr. 13, 2017); Columbia Gas Transmission, LLC v. 252.071 Acres, More or Less, No. ELH-15-3462, 2016 WL 7167979, at *3 (D. Md. Dec. 8, 2016); Transcon. Gas Pipe Line Co., LLC v. A Permanent Easement Totaling 0.799 Acres, No. 3:14-CV-00407-HEH, 2014 WL 6685410, at *3 (E.D. Va. Nov. 25, 2014); Hardy Storage Co., LLC v. An Easement to Construct, Operate & Maintain 12-Inch & 20-inch Gas Transmission Pipelines Across Properties in Hardy, No. 2:06CV7, 2009 WL 900157, at *2 (N.D.W. Va. Mar. 31, 2009); Columbia Gas Transmission, LLC v. 76 Acres More or Less, No.

CIV.A. ELH-14-00110, 2014 WL 4723066, at *3 (D. Md. Sept. 22, 2014), aff'd in part, vacated in part, remanded sub nom. Columbia Gas Transmission, LLC v. 76 Acres, More or Less, 701 F. App'x 221 (4th Cir. 2017) ("In the context of eminent domain cases, "just compensation" is a legal term of art, which generally means that the owner of property taken by eminent domain is entitled to the fair market value of the property."); see also Columbia Gas Transmission Corp. v. Rodriguez, 551 F. Supp. 2d 460, 462 (W.D. Va. 2008) (quoting Petty Motor, 327 U.S. at 377-78) ("'Market value,' rather than the value to the condemnor or the owner, is the proper measure of just compensation."); N. Nat. Gas Co. v. Approximately 9117 Acres in Pratt, Kingman, No. 10-1232-MLB, 2015 WL 471244, at *8-*9 (D. Kan. Feb. 4, 2015), aff'd in part, rev'd in part on other grounds sub nom. N. Nat. Gas Co. v. L.D. Drilling, 862 F.3d 1221 (10th Cir. 2017) (applying Miller to determine valuation question). To the extent that the "precedent" to which King Arthur refers is case law from the Fifth, Sixth, and Tenth Circuits, these cases were either wrongly decided or are inapposite, as explained below in Section II.

3. The Eminent Domain Authority Granted to Tennessee Is Federal Authority, and There Is No Support for the Proposition that the United States Must Pay for Property Condemned for Federal Law to Apply.

Third, King Arthur stresses that "the United States is not paying for the land," but King Arthur fails to explain why this point is material. Miller and its progeny were not based on the fact that the United States was paying for the

properties at issue. Instead, they were based on the premise that because the determination of "just compensation" is a constitutional issue, federal substantive law should govern. Thus, King Arthur's attempt to drive a wedge between situations where the United States is the condemnor and situations where a private company, acting under congressionally granted eminent domain authority, is the condemnor falls flat. See Guardian Pipeline, 2002 WL 1160939, at *1 (noting that difference between a government and a private entity exercising the federal power of eminent domain was "a dubious distinction").

4. The Nature of the Federal Interest Is Not Different When the Condemnor is the Holder of a Federal Certificate of Public Convenience and Necessity.

Fourth, King Arthur claims that "the nature of the federal interest" is different in situations where a private party is the condemnor, but King Arthur again fails to explain why this point is material. As discussed above, whether the taking is for "public use" is the constitutional touchstone that triggers the application of federal common law. That Tennessee will profit from the Project in no way negates the fact that the Project serves a public use. See, e.g., Equitrans, 145 F. Supp. 3d at 631.

II. All of the Cases Cited by King Arthur Are Distinguishable

Notwithstanding Miller and the line of Third Circuit authority adopting Miller's holding, King Arthur focuses on three cases, from the Fifth, Sixth, and

Tenth Circuits, and claims that they establish that state law should apply in compensation proceedings under the Natural Gas Act. See Br. at 6 (discussing Miss. River Transmission Corp. v. Tabor, 757 F.2d 662 (5th Cir. 1985), Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992) (hereafter, "Columbia Gas"), and Bison Pipeline, LLC v. 102.84 Acres of Land, 732 F.3d 1215 (10th Cir. 2013)).[3] King Arthur also focuses on a recent district court case from the Northern District of Florida that reached the same conclusion. See Br. at 20-21 (citing Sabal Trail Transmission, LLC v. Real Estate, 255 F. Supp. 3d 1213, 1215 (N.D. Fla. 2017), opinion amended and superseded, No. 1:16-CV-063-MW-GRJ, 2017 WL 2783995 (N.D. Fla. June 27, 2017)) (hereafter, "Sabal Trail").[4]

Notably, like the Third Circuit, the Fifth, Sixth, and Tenth Circuits all follow Miller and apply federal common law to federal condemnations in which the United States is the condemnor. See United States v. 320.0 Acres of Land, 605 F.2d at 781; see also U.S. ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land, 821

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[3] King Arthur provides an incorrect citation to Bison Pipeline. Although this case was originally published in the Federal Reporter, this was in error, and the case has been republished in the Federal Appendix. See Bison Pipeline, LLC v. 102.84 Acres of Land, 560 F. App'x 690 (10th Cir. 2013).

[4] King Arthur cites to the version of the Sabal Trail decision appearing in the Federal Supplement, but this version was superseded by the version appearing at 2017 WL 2783995. Tennessee uses the latter citation herein.

F.3d at 756; see also United States v. 2,560.00 Acres of Land, 836 F.2d at 501. These three cases are distinguishable on the facts, and are inconsistent with Miller. Accordingly, none of the cases cited by King Arthur provide a sound reason for this Court to depart from or limit Miller and its progeny in ruling on the instant appeal.

A. Tabor Ignored Miller and Relied on an Incorrect Reading of the Natural Gas Act's "Practice and Procedure" Clause.

In Tabor, the Fifth Circuit was asked on appeal to determine whether, under Louisiana law, the trial court award of compensation was "just compensation." 757 F.2d at 665. The Tabor court's analysis of the applicable substantive law was limited to a footnote where it cited to only the "practice and procedure" clause of the Natural Gas Act and stated that Louisiana law therefore controls the issues. Id. at 665 n.3. Notably, the Tabor court did not address Miller or the well-established body of federal eminent domain law holding that federal law governs substantive issues in condemnation cases, including the measure of compensation. It likewise failed to address the fact that the "practice and procedure" clause of the Natural Gas Act was superseded by Rule 71A (now Rule 71.1), and to distinguish between the application of substantive law versus procedural law under that clause.[5]

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[5] The Supreme Court held that a similar "practice and procedure" clause only required the application of state **procedural** law, as opposed to **substantive** law. United States v. 93.970 Acres, 360 U.S. 328, 333 n.7 (1959) (holding

Because Tabor ignores Miller and did not conduct any analysis of whether federal law should apply, its holding carries no persuasive value. For the same reason, two district court cases cited by King Arthur – Tennessee Gas Pipeline Co. v. 104 Acres of Land More or Less, 780 F. Supp. 82 (D.R.I. 1991), and Perryville Gas Storage, LLC v. Dawson Farms, LLC, No. 11-1883, 2012 WL 5499892 (W.D. La. Nov. 13, 2012) – carry little weight because they simply followed Tabor without any analysis and likewise ignored Miller.

B. Columbia Gas Is Contrary to Miller and Relied on Inapposite Fifth Circuit Authority.

The Sixth Circuit's decision in Columbia Gas is also unpersuasive. Columbia Gas relied heavily on the Fifth Circuit's decision in Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980), which applied state substantive law to the amount of damages to be paid for a taking under the Federal Power Act. See Columbia Gas, 962 F.2d at 1197-99. In addition to being directly contrary to Miller, both cases are factually and legally distinguishable.

The Columbia Gas court's reliance on Georgia Power was misplaced because that case involved a section of the Federal Power Act, which makes a

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> that it was settled that statutory language providing for condemnation proceedings "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted" required conformity in procedural matters only and that such procedural conformity was clearly repealed by Rule 71A).

distinction between condemnation power exercised by private entities and by the United States. See Georgia Power, 617 F.2d at 1113. The Federal Power Act requires that FERC reject any applications for projects affecting "the development of any water resources for public purposes [that] should be undertaken by the United States itself." 16 U.S.C.A. § 800(b). Therefore, projects approved by the Federal Power Act do not "implicate the interests of the United States to the degree that it is thought desirable that the project be undertaken by the United States itself." Georgia Power, 617 F.2d at 1118. Furthermore, private condemnors under the Federal Power Act often act "on a local scale" in contrast to the United States, which "acts [under the Federal Power Act] in the public interest on a national scale." Nat'l R.R. Passenger Corp. v. Two Parcels of Land, 822 F.2d 1261, 1267 (2d Cir. 1987) (distinguishing Georgia Power). The Natural Gas Act makes no such distinction, and indeed private condemnors under the Natural Gas Act are operating on a national scale with federally approved transmission pipelines traversing every state in the nation.[6]

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[6] The Fifth and Sixth Circuit cases both involved projects that did not cross state lines, which may have been a factor in why the courts did not find a need for a national uniform rule. Columbia Gas, 962 F.2d at 1194; Georgia Power, 617 F.2d at 1114. Here, on the other hand, Tennessee's Project traverses Pennsylvania and New Jersey to provide additional natural gas capacity to markets in the Northeast. See Del. Riverkeeper Network v. F.E.R.C., 753 F.3d 1304, 1307 (D.C. Cir. 2014); see also Tenn. Gas Pipeline Company, L.L.C., 139 FERC ¶ 61,161 (May 29, 2012) ("FERC Order").

Further, the Columbia Gas court wrongly concludes that the statute and subsequent legislative history is silent with respect to the need for nationwide standards. 962 F.2d at 1199. To the contrary, Congress expressly stated that "a natural gas pipeline company cannot rely upon the eminent domain laws of the States [because] a State only has the constitutional authority to confer this right on utilities and pipeline companies serving the people of that State."[7]

The FERC Order is a matter of public record that is subject to judicial notice. The full FERC Order is available at https://www.ferc.gov/CalendarFiles/20120529165448-CP11-161-000.pdf.

[7] In 1942, Congress granted pipeline companies the authority to exercise eminent domain. Notes of the House Committee on Commerce and Energy in 1947 explained the change:

> Many of the eminent domain laws of the States are inadequate. Some States confer the right only upon corporations incorporated under the laws of such States. Other States grant the right only to public utilities and pipe lines which are serving the people of those States. … The principal reason that a natural gas pipeline company cannot rely upon the eminent domain laws of the States is that a State only has the constitutional authority to confer this right on utilities and pipeline companies serving the people of that State.

Comments of House Comm. on Commerce and Energy relating to 1947 amendment of 15 U.S.C.A. § 717; see also 15 U.S.C.A. § 717, *et seq*. (1938) (the original iteration of the Natural Gas Act stated that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest").

Finally, the Columbia Gas court should have concluded that state substantive law does not apply because it conflicts with the federal objective of the Natural Gas Act in regulating interstate natural gas pipelines. E.g., Georgia Power, 617 F.2d at 1118. Under Georgia Power, state law will not apply where "the effect of applying state law is virtually to nullify the federal objectives." Id. Further, "[i]f application of state law would arguably interfere with an identifiable federal policy or interest, but not amount to a conflict which would preclude application of state law [the court] must proceed to an examination of the relative strength of the state's interests in having its rules applied." Id. Here, application of various differing state substantive compensation law will interfere with the constitutional guarantee of just compensation. See Nat'l R.R., 822 F.2d at 1266-67 (refusing to apply state law to measure of compensation in taking by Amtrak for interstate railroad system)[8]; see also Abbott, Kevin C., et al., Condemnation in the Natural

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[8] In National R.R., the Second Circuit found that Amtrak was created to serve national needs and "railroad's lines and services do not confine themselves to state or county lines but traverse the entire continental United States." Id. at 1267. The court held that application of different state laws to Amtrak's interstate railroad system would cause delays and uncertainty in the exercise of its condemnation power. Accordingly, the court held that application of state law would conflict with the federal objective of Congress in granting eminent domain authority to Amtrak. Id. Similarly, the application of state law here would conflict with the federal objective of Congress in granting eminent domain authority to natural gas companies holding FERC certificates of public convenience and necessity, in addition to conflicting

Gas Industry: Who Can Take What, When, and How Much Will It Cost?, 32 Energy & Min. L. Inst. 10, p. 388 n.108 (2011) (noting that "[f]ederal law governs the determination of just compensation" and that the Sixth Circuit's holding in Columbia Gas that federal law would look to state law as to the determination of just compensation "seems to ignore the extensive body of *federal* eminent domain law," citing to this Court's decision to adopt Miller in Certain Parcels of Land, as an example).

C. Bison Pipeline Did Not Hold That State Substantive Law Applies to the Measure of Compensation Under the Natural Gas Act as a Matter of Law.

King Arthur's reliance on Bison Pipeline is misplaced because in that case, the parties agreed at the trial level that the amount of just compensation would be determined under Wyoming state law. 560 F. App'x at 692-93. As a result, the court did not address the question of whether the measure of compensation is governed by federal law absent such an agreement. See id. at 693. Moreover, the court expressly limited its holding that Wyoming law did not frustrate the purposes of the Natural Gas Act such that it applied only to the unique facts of the case. See id. Accordingly, this decision does not bear any weight with respect to the

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with the long-established rule in Miller that federal common law governs the measure of compensation in federal condemnations.

application of federal law to the determination of just compensation as set forth in Miller and expressly adopted by this Court in Certain Parcels.

D. Sabal Trail Erroneously Relied on Georgia Power and Ignored That the Constitutional Interest in "Just Compensation" Is the Same in All Federal Eminent Domain Actions.

Finally, King Arthur cites to Sabal Trail, a district court case which disagreed with Fox Hollow. See 2017 WL 2783995, at *5 n.7. Sabal Trail, however, relied extensively on Georgia Power (see id. at *3-*4), which is inapposite for all of the reasons set forth above. Moreover, although Sabal Trail opined that Miller was distinguishable, the district court's reasoning in this regard was flawed. Specifically, the Sabal Trail court wrote as follows:

> Plaintiff contends that "*Miller* is strikingly similar to this case." But that simply is not true. In fact, a deep-dive into *Miller* reveals glaring inconsistencies in Plaintiff's argument. The eminent-domain power in *Miller* allowed the federal government "to purchase or condemn . . . suitable land for relocation of [transportation facilities and utilities]" as necessary to accommodate the project at issue in that case. That is far from "strikingly similar to" the Natural Gas Act.

Sabal Trail, at *6 n.10 (internal citations omitted).

Tennessee respectfully submits that Sabal Trail was wrongly decided and elevated form over substance. It is true that the federal statute which is the source of the eminent domain power in Miller is not the Natural Gas Act, but both statutes authorize the use of federal eminent domain to condemn land necessary for linear

federal projects – railroads and natural gas pipelines, respectively. This distinction, however, has no bearing on the question of whether federal or state substantive law should apply to the *constitutional determination* of what constitutes "just compensation." Miller, Sabal Trail, and the underlying litigation here all involved federal condemnations through which private property was taken for public use, which triggers the Fifth Amendment's guarantee of "just compensation." In the underlying federal condemnation, as in all other federal condemnations, "just compensation is the value of the interest taken." Petty Motor Co., 327 U.S. 377-78.

III. Kimbell Foods Is Not Applicable, And Even If It Is Applicable, Federal Substantive Law Should Govern the Compensation Proceedings in the District Court

King Arthur relies heavily on United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979), which is not a condemnation case, claiming that this opinion established a "three prong test" to determine when federal common law should be adopted as the rule of decision in a particular case. See Brief at 8-9. King Arthur's reliance on Kimbell Foods is misplaced, however, because the framework set forth therein applies to situations where a court faces a choice between adopting state law as a rule of decision or developing a body of federal common law – not situations where, as here, an extensive body of federal common law already exists. In the alternative, even if the Kimbell Foods framework applies in this case, all

three prongs of that framework test are easily satisfied such that this Court should still affirm the District Court's Opinion and Order.

As the United States Supreme Court has recognized, cases involving situations where federal common law need not be created do not present the same federalism concerns as situations in which federal law would need to be developed in the first instance. See California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 284, judgment entered sub nom. California ex rel State Lands Comm'n v. United States, 459 U.S. 1 (1982) (applying federal common law and emphasizing that "this is not a case in which federal common law must be *created*") (emphasis in original); see also Home Sav. Bank by Resolution Tr. Corp. v. Gillam, 952 F.2d 1152, 1162 (9th Cir. 1991) ("Incorporation of state law occurs in federal question cases only in the absence of federal common or statutory law. Use of state law in such instances avoids the creation of new federal common law. However, when federal common law already exists, as it does here, the Supreme Court has refused to apply state law.").[9] Here, as discussed above, a significant body of federal common law relating to the compensation due from federal

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[9] See also United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 43-44 (1st Cir. 1999) (discussing Kimbell Foods as analyzing "what may be characterized as the source question and the substance question," with the latter involving a determination of whether state law should be adopted "as a proxy for an independent federal common law rule," or alternatively, *whether a uniform federal rule should be "fashion[ed]"*) (emphasis added).

exercises of eminent domain already exists, and there is no legitimate reason to limit that body of law to situations in which the United States is the condemnor. Accordingly, this Court need not evaluate this dispute under the Kimbell Foods framework to affirm the District Court's decision.

Alternatively, should the Court opt to analyze this case under Kimbell Foods, the District Court's decision also easily passes muster under the three-part Kimbell Foods framework. First, Miller already determined that there is a need for a nationally uniform body of law regarding the amount of compensation due for federal exercises of eminent domain because the right to just compensation is a "substantive right . . . grounded upon the Constitution of the United States." Miller, 317 U.S. at 380. Second, application of state law in this instance would frustrate the uniform constitutional guarantee of "just compensation," as well as the National Gas Act's objective of promoting the development of interstate pipeline infrastructure, as explained above. See In re Columbia Gas Sys. Inc., 997 F.2d 1039, 1056 (3d Cir. 1993) (determining that "[a]pplication of state law" to determine pipeline company's property rights in refunds would "frustrate the purpose of the [Natural Gas Act]"); see also Reo v. U.S. Postal Serv., 98 F.3d 73, 76 (3d Cir. 1996) ("[W]here application of state law would impair the federal policy . . . federal standards must be developed."); Kern River Gas Transmission Co. v. Clark Cty., Nev., 757 F. Supp. 1110, 1118 (D. Nev. 1990) ("It is manifestly

unlikely that Congress would have created the substantive right of eminent domain, clearly addressed in the Natural Gas Act, only to have that right held hostage to various state substantive schemes.").[10] Finally, the application of existing federal common law in this instance would not upset commercial relationships predicated on state law because the expectations of the parties have already been set. See In re Columbia Gas Sys. Inc., 997 F.2d at 1056 ("[A]pplying federal common law will not upset commercial expectations that state law would govern. . . . [T]his court already has developed federal common law concerning trusts. . . . Therefore, our decision to apply federal common law will not require us to announce new doctrines of substantive law unforeseen by the parties.") (internal citation omitted).[11]

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[10] King Arthur relies on Sabal Trail for the proposition that "nothing in the Natural Gas Act evidences a distinct need for nationwide legal standards," see 2017 WL 2783995, at *4 (internal quotations omitted), but this argument ignores that uniform federal standards facilitate the timely construction of interstate pipeline infrastructure, as discussed above in Section II.B.

[11] Tennessee respectfully submits that if this Court were to find that state law governs the underlying compensation proceedings, such a result would not square with Miller – as discussed above, the fact that Tennessee is not the sovereign has no bearing on the reasoning underlying Miller.

CONCLUSION

For all of the foregoing reasons, Tennessee respectfully requests that this Court affirm the District Court's determination that federal law governs the substantive determination of just compensation in condemnation actions commenced under the Natural Gas Act.

Respectfully submitted this 30th day of May, 2018.

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CERTIFICATE OF ADMISSION TO THE BAR

I hereby certify pursuant to Local Rule 28.3(d) that Elizabeth U. Witmer, Sean T. O'Neill, and Albert F. Moran are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: May 30, 2018

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 8,257 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: May 30, 2018

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CERTIFICATE OF FILING AND SERVICE

I, Marianna Iannotta, hereby certify pursuant to Fed. R. App. P. 25(d) that, on May 30, 2018, the foregoing *Brief of Appellee* was filed through the CM/ECF system and served electronically.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

/s/ Marianna Iannotta

Marianna Iannotta