UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-3700

TENNESSEE GAS PIPELINE COMPANY, LLC

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 CORPORATION, GENERAL PARTNER OF KING ARTHUR ESTATES C/O ERNEST BERTUZZI, PRESIDENT.,

Appellant

BRIEF OF APPELLANT
and
APPENDIX VOLUME 1 PAGES 1 - 22

An Appeal from the Orders of the United States District Court for the Middle District of Pennsylvania Entered on August 30, 2017 and November 1, 2017 which Granted in Part and Denied in Part Appellee's Motion for Partial Summary Judgment

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Corporate Disclosure Statement

Appellants King Arthur Estates, L.P. and its general partner Riothamus Corporation have no parent corporation nor is any interest in either entity owned by any publically held company.

Table of Contents

Corporate Disclosure Statement	(i)
Table of Contents	(ii)
Table of Citations	(iii)
Statement of Subject Matter and Appellate Jurisdiction	1
Statement of Issue	1
Statement of Related Cases and Proceedings	1
Statement of Case	2
Statement of Standard Review	3
Summary of Argument	4
Argument	7
State law governs the substantive determination of just compensation in condemnation actions commenced under the Natural Gas Act, 15 U.S.C. §717 *et seq.*	
Conclusion	24
Certifications	(vi)
Appendix Volume 1	(viii)

Table of Citations

CASES

Bag of Holdings, LLC v. City of Philadelphia, 682 F. App'x 94, 96 (3d Cir. 2017)	3, 7
Bison Pipeline, LLC v. 102.84 Acres of Land, 732 F.3d 1215 (10th Cir. 2013)	6, 15, 20
Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573 87 L.Ed 838 (1943)	8
Columbia Gas Transmission, LLC v. An Easement to Construct, Operate & Maintain a 20-Inch Gas Transmission Pipeline Across Props., 2017 U.S. Dist. LEXIS 56520, 2017 WL 1355418 (W.D. Pa. 2017))	19
Columbia Gas v. Exclusive Natural Gas, 962 F.2d 1192 (6th Cir. 1992); cert. denied 506 U.S. 1022, 113 S. Ct. 659, 121 L.Ed. 2d 585 (1992)	6, 9, 11, 12, 14,15,21,22
Columbia Gas Transmission, LLC v. 252.07 Acres, More or Less in Baltimore Cty. Md., 2016 WL 7177979 (D.C.Md. 2016)	20
Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion County, West Virginia, et al., 2017 WL 1455023 (N.D.W.Va. 2017)	20
Federal Power Commission v. Hunt, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed. 2d 878 (1964)	17
Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980)	9,11,12,13,14
Giles v. Kearney, 571 F.3d 318, (3d Cir. 2009)	3, 7
Guardian Pipeline, LLC v. 950.80 Acres, 2002 U.S. Dist. LEXIS 9806 (D.C.N.D.Ill. 2002)	18

Illinois v. Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed. 2d 712 (1972) 8

Kamen v. Kemper Financial Services, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed. 2d 152 (1991) 10, 20

Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662 (5th Cir.1985) 6, 15

Natural Fuel Gas Supply Corp. v. 138 Acres of Land, etc., 84 F. Supp. 2d 405 (D.C.W.D.NY 2000) 16

Northern Natural Gas Co. v. Approximately 9117.3 Acres, 781 F. Supp. 2d 1155 (D.C.D.Ka. 2011) (Kansas Law applies) 16

Pennsylvania, Department of Public Welfare v. United States, 781 F.2d 334 (1986) 22

Perryville Storage, LLC v. Dawson Farms, LLC, 2012 U.S. Dist. LEXIS 147478 (D.C.W.D.La. 2012) 16

Portland National Gas Transmission Sys. v. 19.2 Acres of Land in Hanesville, 318 F.3d 279 (1st Cir.2003) 18

Public Utility District No. 1 v. City of Seattle, 382 F.2d 666, (9th Cir.1969) 17, 18

Rockies Express Pipeline, LLC, 734 F.3d 424 (6th Cir.2013) 6, 15

Sabal Trail Transmission, LLC v. Real Estate, 255 F. Supp. 3d 1213 (D.C.N.D.Fla.2017) 20

Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed. 2d 1623 (1960) 13

Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres, et al., No. 11-028, 2014 W.L. 690700 (M.D.Pa. February 24, 2014) 5, 19, 20

Tennessee Gas Pipeline Company v. 104 Acres of Land, etc., 780 F. Supp. 82 (D.C.Ri) (Rhode Island Law applies) 16

United States v. Certain Property, Etc., 344 F.2d 142 (2nd Cir.1965) 18, 19

United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct 357, 98 L.Ed. 311 (1945) 24

United States v. Kimbell Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979) 5, 8

United States v. Little Lake Misere Land Co., 412 U.S. 580, 93 S.Ct. 2389, 2397, 37 L.Ed. 2d 187 (1973) 6, 8

United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943) 5, 16, 19

United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed. 2d 404 (1966) 8

Wallace vs. Pan American Petroleum Corp., 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed. 2d 369 (1966) 12

STATUTES

Federal Power Act, 16 U.S.C. 814 11, 13

Natural Gas Act, 15 U.S.C. §717f 1,4,5,7,9,11 13,14,15,16, 17

Rules of Decision Act, 28 U.S.C. §1652 12

28 U.S.C. §1292(b) 1

Statement of Subject Matter and Appellate Jurisdiction

This is an appeal from Orders of the United States District Court for the Middle District of Pennsylvania dated August 30, 2017 and November 1, 2017 granting in part Tennessee Gas Pipeline Company, LLC's Motion for Partial Summary Judgment. Subject matter jurisdiction arises under the Natural Gas Act, 15 U.S.C. §717f. By Order dated December 4, 2017, this Court granted Appellant King Arthur Estates, L.P.'s Petition for Permission to Appeal pursuant to 28 U.S.C. 1292(b) filed on November 13, 2017.

Statement of Issue

Whether federal law governs the substantive determination of just compensation in condemnation actions commenced under the Natural Gas Act, 15 U.S.C. §717 *et seq.* The issue was raised in the District Court as reflected in the record at appendix pages 3, 14 - 15, and 29 - 30.

Statement of Related Cases and Proceedings

As a result of Tennessee asserting King Arthur was improperly asserting in the instant condemnation action claims for damages arising from Tennessee's continuing trespass onto King Arthur's properties, on June 25, 2015, King Arthur filed an action in the Court of Common Pleas of Pike County, Pennsylvania, commenced by Praecipe for Writ of Summons, to preserve the possible running of the Statute of Limitations, in King Arthur Estates, LP, Adrianne Giusti and Ernesto

Bertuzzi, Sr. v. Tennessee Gas Pipeline Company, LLC, a subsidiary of Kinder Morgan, Inc., No. 897-2015. That action has been held in abeyance pending ultimate resolution of the underlying condemnation action.

Statement of Case

This is an appeal from an order of the District Court granting in part Appellee Tennessee Gas Pipeline Company, LLC's ("Tennessee") Motion for Partial Summary Judgment. Contrary to well established bodies of law by other Circuit Courts and District Courts that state law governs the substantive determination of just compensation in condemnation actions commenced under the Natural Gas Act, here the District Court ruled federal law governs that determination. As a result, in its Order of August 30, 2017 granting in part Tennessee's Motion for Partial Summary Judgment, the District Court precluded the property owner/Appellant King Arthur Estates, LP ("King Arthur") from introducing evidence of consequential damages for professional fees and development costs occasioned as a result of the taking, which are compensable under state law. On September 21, 2017, King Arthur filed its Motion to Amend Memorandum and Order Dated August 30, 2017 to Permit Appeal Pursuant to 28 U.S.C. §1292 (the "Motion to Amend"). Over opposition by Tennessee, the District Court granted the Motion to Amend on November 1, 2017. On November 13, 2017, King Arthur timely filed its Petition

for Permission to Appeal, which this Court, again over opposition from Tennessee, granted on December 4, 2017.

Statement of Standard Review

This appeal presents solely a question of law. As such, this Court's standard of review of the ruling on the question of law made by the District Court is plenary. It is well settled that an appellate court's review of a district court's grant of summary judgment is plenary. Bag of Holdings, LLC v. City of Philadelphia, 682 F. App'x 94, 96 (3d Cir. 2017); Giles v. Kearney, 571 F. 3d 318, 322 (3d Cir. 2009). An appellate court applies the same standards that the district court applied in determining whether summary judgment was appropriate. *id.*

Summary of Argument

On July 31, 2012, Tennessee brought this action pursuant to the Natural Gas Act, 15 U.S.C. 717(f), to condemn both temporary and permanent easements across King Arthur's land, a 975 acre tract in Pike County, Pennsylvania acquired by King Arthur for residential development. (Appendix pg. 608) Because of the taking, King Arthur will suffer consequential damages involving increased development costs to develop the property. King Arthur has further incurred substantial engineering, appraisal and attorneys' fees in connection with this litigation. On July 26, 2016, Tennessee filed a Motion for Partial Summary Judgment (Appendix Pg. 29) seeking summary judgment in part on certain claims for damages sought by King Arthur and allowable under Pennsylvania law. On August 30, 2017, the District Court granted Tennessee's Motion in part, ruling "... just compensation owed to King Arthur by Tennessee in this action will be determined through the application of federal law." (Appendix pg. 10) In so ruling, the District Court precluded King Arthur from introducing evidence of consequential damages for professional fees and development costs occasioned as a result of the taking. In precluding King Arthur from raising claims for those damages, the District Court dismissed multiple precedents from the Supreme Court, this court, the 5th, 6th and 10th Circuits and various district courts across the nation, all of which acknowledge state law applies to substantive questions of property law, including the question of damages in

eminent domain cases like the instant case brought by a private entity. In concluding federal substantive law governed calculation of damages, the District Court relied upon a prior memorandum it had issued in Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres, et. al., No. 11-028, 2014 W.L. 690700 (M.D.Pa. February 24, 2014) (hereafter "Fox Hollow"). In Fox Hollow, the court relied on United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943). Miller, however, is not particularly factually analogous to either the facts in Fox Hollow or the case at bar. It involved a direct eminent domain taking by the United States for land for a railroad being relocated as a result of a Depression-era federal dam project.

More importantly, a substantial body of law since Miller has recognized that "controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules . . . . when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." United States v. Kimbell Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979). Since Kimbell, though this Court has not directly addressed the issue appealed here, those Courts of Appeals which have done so have uniformly held that "Resolution of this issue [amount of compensation for eminent domain taking under the Natural Gas Act] follows the analysis set forth in United States v. Kimbell Foods . . . we conclude that, although condemnation under the Natural Gas Act is a matter of federal law, §717f(h)

incorporates the law of the state in which the condemned property is located in determining the amount of compensation due." Columbia Gas v. Exclusive Natural Gas, 962 F.2d 1192 (6th Cir. 1992); see also Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662 (5th Cir. 1985) (Wisdom, J.); Rockies Express Pipeline, LLC 734 F.3d 424 (6th Cir. 2013), Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir.1980) (addressing the Federal Power Act's eminent domain provision, which is "substantially identical" to the that of the Natural Gas Act). The exhaustive and meticulously-reasoned Georgia Power *en banc* decision is by far the fullest treatment of this issue in a reported federal decision. Significantly, that Court noted: "We do not agree that application of a state law which results in higher awards to the landowners … amounts to the kind of conflict which precluded adoption of state law [in United States v. Little Lake Misere Land Co., 412 U.S. 580, 593, 93 S.Ct. 2389, 2397, 37 L.Ed. 2d 187 (1973)]". 617 F.2d at 1121. The District Court has further ignored the adoption of the Columbia Gas holding by the 10th Circuit in Bison Pipeline, LLC v. 102.84 Acres of Land, 732 F.3d 1215 (10th Cir.2013), which stated "Nothing about the application of Wyoming law in this case gives us cause for immediate concern."

Argument

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

The District Court ruled as a matter of law that federal law governs the substantive determination of just compensation in a condemnation action commenced under the Natural Gas Act (Appendix pg. 10). The Court's standard of review in this case is plenary. Bag of Holdings, LLC v. City of Philadelphia, 682 F. App'x 94, 96 (3d Cir.2017); Giles v. Kearney, 571 F.3d 318, 322 (3d Cir.2009). An appellate court applies the same standards that the district court applied in determining whether summary judgment was appropriate. *id.*

The District Court ruled as a matter of law that King Arthur is not entitled to "damages relating to professional fees and development costs because these expenses are not compensable as just compensation in this action under the Natural Gas Act". (Appendix pg. 9). It precluded those consequential damages based on its holding that federal law of damages, rather than state law, is applicable in this action.

In determining the value of land taken under the Natural Gas Act, 15 U.S.C. §717f, there is no disagreement that federal law controls. However, the real issue is whether a body of federal law should be developed, or whether state law should be

adopted as the applicable federal law, to determine just compensation under the Natural Gas Act.

Controversies affecting federal programs, while governed by federal law, do not require resort to uniform federal rules. Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct 573, 87 L.Ed. 838 (1943). "In many situations, ... rights, interests and legal relations of the United States are determined by the application of state law, where Congress has not acted specifically". United States v. Little Lake Misere Land Co., 412 U.S. 580, 591, 93 S.Ct. 2389, 37 L.Ed. 2d 187 (1973).

To determine whether state law should be adopted as the federal law or whether there is need to fashion a nationwide federal rule in controversies directly affecting the operation of federal programs, in United States v. Kimble Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979), the Court said:

> Undoubtedly, federal programs that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules. United States v. Yazell, 382 U.S. 341, 354 (1966); see *Clearfield Trust Co. v. United States, supra,* at 367; *United States v. Standard Oil Co., supra.*at 311; *Illinois v. Milwaukee,* 406 U.S. 91, 105 n. 6 (1972). Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on

state law.

Applying that three prong test, the Court rejected the government's assertion that a federal uniform body of law should be imposed, holding that there was no compelling federal interest necessitating it "...to override intricate state laws of general applicability on which private creditors base their daily commercial transactions". Kimble Foods, 440 U.S. at 729.

In Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement, 962 F.2d 1192 (6th Cir.1992), cert. denied 506 U.S. 1022, 113 S.Ct. 659, 121 L.Ed. 2d 585 (1992), the court undertook an exhaustive analysis of whether the compensation payable as a result of taking under §717f(h) of the Natural Gas Act should be determined under state law or under federal common law. That court conducted its analysis under the standards set forth in United States v. Kimble Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979).

In Columbia Gas, the court explained the three prong test established in Kimble Foods as follows:

> The Court enunciated three considerations guiding its analysis (1) the need for a nationally uniform body of law, (2) whether the application of state law would frustrate specific objectives of the federal program at issue, and (3) the extent to which application of a federal rule would upset commercial relationships predicated on state law.

Columbia Gas at 1195-1196.

In analyzing the need for a nationally uniform body of law, the 6th Circuit looked to Kamen v. Kemper Financial Services, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed. 2d 152 (1991). There the Court said:

> . . . a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for the nationwide legal standards . . . or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand . . . Otherwise, we have indicated that federal courts should "incorporate [state law] as the federal rule of decision" unless "application of [the particular] State law [in question] would frustrate objectives of the federal programs." . . . The presumption that State law should be incorporated into federal common law is particularly strong in areas which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by State law standards. Kemper at 98. (Internal citations omitted)

In Kemper, in the context of federal securities law, the Court concluded the corporation laws of the State of incorporation should fill the gap, the applicable state law neither permitting actions prohibited by the applicable federal acts nor its application being inconsistent with federal policy. Kemper at 99.

Similarly, in Kimble Foods, the Court found state law applicable in the context of an action against the Small Business Administration. In both Kemper and Kimble Foods, the Court found, absent a congressional directive, there was no need for nationally uniform body of law. In both cases, the parties voluntarily entered into business transactions. Implicit in such transactions is the expectation their respective

rights and obligations would be governed by the law of the state where the transactions occurred. In both cases, the Court found there was no showing that the application of state law would impair federal operations and determined to apply state law as the federal rule of decision.

Besides citing both Kemper and Kimble Foods as authority for declining to supersede state law as the proper law for determining compensation payable under §717f(h) of the Natural Gas Act, the court in Columbia Gas thoroughly analyzed the decision in Georgia Power Co. v. 138.30 Acres of Land (Sanders), 617 F.2d 1112 (5th Cir.1980). While Georgia Power was decided under the Federal Power Act, 16 U.S.C. 814, the applicable language in that Act and §717f(h) is materially identical.

In Columbia Gas, the court recognized Georgia Power considered five factors in determining that federal interests were insufficient to warrant the displacement of state law.

1. No express congressional intent was found that federal common law should supply the federal rule for determining compensation.

2. Since the project involved private parties, the interests of the United States are not implicated to the degree that is thought desirable had the project been undertaken by the United States itself.

3. The application of state law would not frustrate the overriding federal interest at stake of implementing or effectuating the federal program.

4. The adoption of a national rule would not necessarily obscure the goal of national uniformity since the licensee had the option of proceeding under either federal or state law of eminent domain.

5. Since the question of what constitutes property is usually determined with reference to state law, the state has a strong interest in the resolution of disputes over property rights.

(Columbia Gas at 1197 - 1198)

Before analyzing each of these factors, the Georgia Power court began with considering that the Rules of Decision Act, 28 U.S.C. §1652 ". . . prompt us to begin with the premise that state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case. Wallace vs. Pan American Petroleum Corp., 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed. 2d 369 (1966)[1].

Recognizing Supreme Court decisions, including Kimble Food, evidence "a growing desire to minimize displacement of state law", the court concluded ". . . state law should be applied as the federal rule of compensation unless it is shown

1 The Rules of Decision Act, 28 U.S.C. §1652 provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

that legislative intent or other sufficient reasons exist to displace state law with federal common law". Georgia Power, at 1118. Neither under the Federal Power Act nor the Natural Gas Act is there any expression by Congress of any intent to supplant state law with federal common law. The specific federal interests under the Federal Power Act are: (1) maximization of hydroelectric development; (2) reduced energy costs; (3) minimization of the cost to the government to acquire a project at the expiration of the license term. Georgia Power at 1120.

Under the Natural Gas Act, Congress declared:

> . . . 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.
>
> 15 U.S.C. 717(a).

That public interest was explained by the Supreme Court as: "The primary aim of this chapter was to protect consumers against exploitation at the hands of the natural gas companies". Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137, 80 S.Ct. 1392, 4 L.Ed. 2d 1623 (1960). In the instant case, with the judicially recognized purpose of the Natural Gas Act being to protect the consuming public from exploitation by the natural gas industry, it is submitted there is even less federal intent expressed in the Natural Gas Act than in the Federal Power Act in displacing state law.

The court in Georgia Power concluded there was no overriding federal intent sufficient to displace state law.

The Columbia Gas court ultimately concluded "... property rights have traditionally been, and to a large degree are still, defined in substantial part by state law". To create a federal common law rule under §717f(h) would simply superimpose yet another "layer of property right allocation" onto the developed state law, the result of which "... would carry with it the danger of upsetting the parties' commercial expectations founded upon state law". (962 F.2d at 1198)

In considering the objectives of the Natural Gas Act, "...as furthering the public interest 'in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce'", the court determined that incorporating state law would not frustrate the only conceivable effect that adopting state law could have of requiring the gas company to pay more or less under federal common law for property taken under §717f(h). (Columbia Gas at 1198.) Lastly, the court rejected any need for a uniform federal rule of compensation where the parties were private. It concluded that federal law applied to the condemnation under the Natural Gas Act, and as a matter of federal law §717f(h) incorporates the law of the state in which the property is situate to determine the compensation payable.

The Supreme Court denied certiorari. Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, Etc., 506 U.S. 1022, 113 S.Ct. 659, 121 L.Ed. 2d 585 (1992).

Consistent with Columbia Gas, is Mississippi River Transmission Corp v. Tabor, 757 F.2d 662 (5th Cir.1985). While decided prior to Columbia Gas, Mississippi River held:

> 15 U.SC. §717f(h) requires that the practice and procedure in federal expropriation proceedings conform as nearly as possible with the practice and procedure to be followed in a State court actions in the State where the property being expropriated is situate . . . Therefore, Louisiana law controls the issues in this case.

The Sixth Circuit reaffirmed its holding in Columbia Gas in Rockies Express Pipeline LLC v. 4.895 Acres of Land, 734 F.3d 424 (6th Cir.2013), in holding that Ohio law applied in a condemnation of property in Ohio under the Natural Gas Act. Rockies Express at 429.

The Tenth Circuit has also ruled that state law should apply to takings under §717f(h) of the Natural Gas Act. In Bison Pipeline, LLC v. 102.84 Acres of Land, 732 F.3d 1215 (10th Cir.2013), Bison asserted Wyoming law so frustrates the purposes of the Natural Gas Act as to warrant federal pre-emption. In rejecting Bison's argument, the Tenth Circuit agreed with the Sixth Circuit in Columbia Gas, stating:

> As a general matter, we agree with the Sixth Circuit that

> [t]he only conceivable effect that adopting state law as the measure of compensation might have on [the Natural Gas Act's] purpose would be that condemnors proceeding under the Act might be required to pay more or less than under an alternative federal common-law rule. To the extent that compensation under state law might deviate from that under a federal rule, we believe this variance, in the aggregate, is far too speculative to warrant displacing state law. Furthermore, even if it could be shown state law might result, on average and over time, in consistently greater or lesser awards, we seriously doubt that the amount would rise to the level of frustrating the specific objectives of the Natural Gas Act. F.3d 1220-1221

The Court went on to say:

> Nothing about the application of Wyoming law in this case gives us cause for immediate concern. Indeed, Bison's arguments about the application of Wyoming eminent-domain law frustrating the purposes of the Natural Gas Act are mostly speculative. F.3d 1221

Similarly, District Courts have consistenly held state law applies. Perryville Storage, LLC v. Dawson Farms, LLC, 2012 U.S. Dist. LEXIS 147478 (D.C.W.D.La. 2012) (Louisiana Law applies), Northern Natural Gas Co. v. Approximately 9117.3 Acres, 781 F. Supp. 2d 1155 (D.C.D.Ka. 2011) (Kansas Law applies), Natural Fuel Gas Supply Corp. v. 138 Acres of Land, etc., 84 F. Supp. 2d 405 (D.C.W.D.NY 2000) (New York Law applies) and Tennessee Gas Pipeline Company v. 104 Acres of Land, etc., 780 F. Supp. 82 (D.C.D.Ri 1991) (Rhode Island Law applies).

The holding in United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943) (Federal Law of Compensation applies to eminent domain cases in which

the United States is the condemnor and paying for the land.) is inapplicable to takings other than by the United States itself. By its express terms that " . . . case presents important questions respecting standards for valuing property taken for public use." (emphasis added.) Its holding is limited to cases where the United States is the condemnor and the taking is for public use. Takings under the Natural Gas Act are not for public use, but for the direct use and benefit of the licensee. The issuance of a certificate of public convenience and necessity requires only that the service proposed is required by present and future public convenience and necessity. Federal Power Commission v. Hunt, 376 U.S. 515, 84 S.Ct. 861, 11 L.Ed. 2d 878 (1964). Nowhere in the Natural Gas Act is there any reference to condemnation proceedings under that Act being for the public use, unlike where the United States is acquiring property for use by the sovereign. Secondly, no precedent exists for the proposition where the condemnor is a licensee under the Natural Gas Act, federal law of compensation must be applied. To the contrary, uniformly the circuit courts and all reported district court divisions have all held state law applies to the determination of compensation payable. Thirdly, the United States is not paying for the land. Fourth, the nature of the federal interest is significantly different where the parties are private, the use to which the land is to be put is private and profit oriented, and there is no state law hostility which would actually frustrate the federal purpose of providing for an adequate supply of natural gas. As the court said in Public Utility

District No. 1 v. City of Seattle, 382 F.2d 666, 669-70 (9th Cir.1969), "By the issuance of a license the United States is not acting in the national interest through the license to the same extent as it would if it undertook the project itself."

No reported decision has been found which has ruled that federal law must be applied in determining what constituted just compensation under §717f(h) of the Natural Gas Act. To the contrary, every reported decision found has ruled that the law of the state in which the condemned property is located is to be applied in determining the amount of compensation due.

While anecdotally two courts appear to seemingly have questioned the well-established body of law applying state law in these cases, a review of the holding of those courts reflects otherwise. In Portland National Gas Transmission Sys. v. 19.2 Acres of Land in Hanesville, 318 F. 3d 279 (1st Cir.2003), the court accepted the application of the law of the state of Massachusetts by the district court, something the parties did not contest. Had the court truly felt the wrong law had been applied, it had the authority to correct the error had it wished to do so. It did not and decided the case on Massachusetts law.

In Guardian Pipeline, L.L.C. v. 950.80 Acres, 2002 U.S. Dist. LEXIS 9806 (D.C.N.D.Ill.2002), the court referred to the difference between the government and a private entity exercising the power of eminent domain as a "dubious distinction". It went on to apply United States v. Certain Property, Etc., 344 F.2d 142 (2nd Cir.

1965) as the law in that case. In Certain Property, the Second Circuit held that federal courts apply state concepts of real property in determining what comes within a federal taking. Based on that, in Guardian Pipeline, the court instructed valuation was to be determined under state law.

Admittedly, since United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L. Ed. 336 (1943), the courts in the Third Circuit have applied federal law of compensation where the United States has been the condemnor and the property has been taken for public use. However, not one court has been found to have applied the federal law of compensation to takings by natural gas pipeline companies for their private, profit-oriented use, before the memorandum in Tennessee Gas Pipeline Company v. Permanent Easement for 1.7320 Acres, etc., No. 11-028, 2014 W.L. 690700 (M.D.Pa. February 24, 2014) ("Fox Hollow"). That memorandum was issued without the opportunity to consider the substantial body of precedent set forth above.

Since the District Court's Memorandum in Fox Hollow, several courts have spoken on the issue. In Columbia Gas Transmission, LLC v. An Easement to Construct, Operate & Maintain a 20-Inch Gas Transmission Pipeline Across Props., 2017 U.S. Dist. LEXIS 56520, 2017 WL 1355418 (W.D. Pa. 2017), the issue before the court was the validity of comparable sales in an appraisal. In dicta, the court simply cited Fox Hollow, in stating federal law applies to the determination of just

compensation in actions under eminent domain, an issue which was not in dispute in that case. That court undertook no analysis of the issue currently before this Court.

In Columbia Gas Transmission, LLC v. 252.071 Acres, More or Less, in Baltimore Cty, MD, 2016 WL 7177979 (D.C. Md.2016), the issue before the court was a discovery dispute. Again citing Fox Hollow without analysis of those underlying concepts, that court concluded federal law applied.

In another case arising in the 4th Circuit, in Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion County, West Virginia, et al., 2017 WL 1455023 (N.D.W.Va.2017), the court applied the holdings in Bison Pipeline, supra. 15 and Columbia Gas, supra. 9, holding the substantive law of the state in which the property sits applies to determine the just compensation owed, awarding prejudgment interest as allowed by West Virginia law.

In Sabal Trail Transmission, LLC v. Real Estate, 255 F.Supp. 3d 1213 (D.C.N.D.Fla.2017) the Court, in its reported opinion, undertook a thorough analysis of the question, deciding "... nothing in the Natural Gas Act 'evidences a distinct need for nationwide legal standards.' Kamen v. Kemper Financial Services, 500 U.S. 90, 98, 11 S.Ct. 1711, 114 L.Ed. 2d 152 (1991)". Sabal at 1218. The court went on to state it was unpersuaded by both Columbia Gas Transmission, LLC v. 252.07 Acres, More or Less in Baltimore Cty, Md., supra. and Fox Hollow, supra. 5,

finding those cases erroneously relied on United States v. Miller, supra. 5, which the court found distinguishable.

It is submitted that those courts which have conducted a thorough analysis of the issue have all found the law of the state in which the condemned property is located is to be applied in determining the compensation due.

The Third Circuit has favorably cited Columbia Gas[2]. In In re Columbia Gas Sys., 997 F.2d 1039 (3d Cir.1993), the Third Circuit said:

> In that case, a gas pipeline appropriated an exclusive underground natural gas storage easement beneath private property pursuant to its eminent domain authority under the NGA. The NGA required the pipeline to compensate the landowners. The *Exclusive Natural Gas* court declined to create federal common law to calculate the value of the land. 962 F.2d at 1195-99. Instead, it held that the standard of valuation should incorporate the law of the state in which the condemned property is located. Id.
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> *Exclusive Natural Gas* addressed a specific section of the NGA, 15 U.S.C. §717f(h). Section 717f(h), which governs the right of eminent domain, expressly provides that "the practice and procedure in any [eminent domain] action or proceeding . . . 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." Because the statutory language explicitly instructed federal courts to look to state "practice and procedure," the court read the section "as raising a strong presumption" that state substantive law is also applicable.

[2] The court on In re Columbia Gas Sys. refers to Columbia Gas as *Exclusive Natural Gas*.

* * *

> Additionally, the *Exclusive Natural Gas* court found that using state law valuation rules would not undercut the objective of the NGA because the effect of the state law rule would be minimal. All parties agreed that the condemners had to pay for the easement they appropriated; the only disputed issue was how to calculate the value of this easement. The court found that any variance between a conceivable federal common law rule and the state law rule was too small and too speculative to rise to the level of frustrating the NGA.

Clearly, the Third Circuit considers Columbia Gas to be the law applicable to determining the basis on which compensation is to be determined in takings under the Natural Gas Act.

The Third Circuit has also expressed its extreme reluctance to create federal common law. In Pennsylvania, Department of Public Welfare v. United States, 781 F.2d 334 (1986), the court said:

> Judicial deference to the common law, and the reluctance to declare its demise, is based on the federal judicial obligation to protect state sovereignty and laws absent clear declaration by Congress. . . . In contrast, federal courts develop their own common law only where necessary to protect important federal interest, and only where Congress has not addressed the issue. F.2d at 342.

Absent some Congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign

nations and admiralty cases. In re Columbia Gas Sys, 1992 U.S. Dist. LEXIS 9460 (D.C.Del. 1992); aff'd in part 997 F.2d 1039 (3d Cir. 1993)

Here there has been no showing by Tennessee that payment of compensation for taking under the Natural Gas Act falls within any of those "narrow areas". Instead, it would have the court mechanically apply federal law of compensation simply because this action was commenced in federal court under the Natural Gas Act. Tennessee ignores the distinction between takings by the United States - the sovereign - and private parties under the Natural Gas Act. Perhaps more importantly, it ignores the reasons for those distinctions. Tennessee's assertion that federal law must be applied in federal condemnation proceeding fails to recognize the express distinction that it is the identity of the condemnor and the public use to be made of the property[3], and not the law under which the taking occurs, that is the deciding factor in the determination of whether state law should be adopted as the federal rule of decision.

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[3] Tennessee's appraisal witness, Richard Drzewiecki, purports his appraisal to be made in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions. Those standards, by their express terms apply to " . . . various agencies acquiring property on behalf of the Unities States." (UASFLA, Page 1). Its provisions concerning Partial Acquisitions (UASFLA, §B-11) apply "When the United States acquires only a part of a unitary holding . . . " UASFLA applies in ". . . determining just compensation for property acquired by the United States for public purposes". (UASFLA, §B-1). The standards Tennessee seeks to have applied are not applicable by the express provisions of their applicability. The King Arthur property was not acquired by the United States nor was it acquired for public purposes.

The cases Tennessee has heretofore cited are all cases where the United States - "the sovereign" (e.g., United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct 357, 98 L.Ed. 311 (1945)) has taken property for public purposes. Neither circumstance exists here. The property was taken by a private corporation for its business purposes. The benefit to the people of the United States is remote. Tennessee's assertion that it should be allowed to have the unique status of the sovereign is unprecedented. Perhaps more importantly, it is totally unwarranted.

Conclusion

State law is the applicable federal law to be applied to the determination of damages under the Natural Gas Act. The determination by the District Court that federal law governs the substantive determination of just compensation in a condemnation action commenced under the Natural Gas Act should be reversed and the case be remanded to the District Court with instruction to allow the introduction of the damages for expert fees and additional development costs.

Respectfully submitted,

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Certifications

1. The undersigned hereby certifies pursuant to LAR 46.1 that the attorney(s) whose name appears on the Brief of Defendant - Appellant was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit on February 22, 1988 and is presently a member in good standing at the Bar of said Court.

2. The undersigned attorney for Appellants certifies that this Brief for Defendant-Appellant complies with R.A.P. 32(a)(7)(B) containing 5,847 words as determined by the word processing system used in preparation thereof.

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

4. On April 30, 2018, this Brief was checked for viruses using Panda antivirus pro software and the document is free of viruses.

5. On April 30, 2018, and original and six (6) hard copies of this Brief were filed with the Office of the Clerk of the United States Court of Appeals for the Third Circuit via Federal Express.

6. The hard copies and electronic versions of the Brief are identical.

7. On April 30, 2018, the Brief was electronically filed in portable document format (pdf) with the Clerk of the United States Court of Appeals for the Third Circuit via CM/ECF, which sent notification of such filing to the following Filing Users by the Court's Notice of Docket Activity at the following e-mail addresses, with hard copies being served via First Class Mail upon the following:

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