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

REPLY BRIEF OF APPELLANT

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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DISCUSSION

1. Contrary to Tennessee's assertion, Miller does not control because a separate body of state law governs determination of damages in condemnations by a private entity.

At its heart, this case is about a *private entity* exercising the power of eminent domain to acquire private property rights for its private, profit-oriented purposes. Every court, except the Fox Hollow court, which has analyzed the reasons for the application of state law to the determination of just compensation has found state law applies in actions involving a private entity condemnor. Contrary to Tennessee's assertion, King Arthur does not attempt to *create* a distinction between takings by the United States and takings by natural gas transmission companies; the courts, for many decades, have done so. Those courts recognize the multiple distinctions in takings by the United States for projects to be used by the public, in contrast to those in which a private entity acquires private property rights for its private, profit-oriented business purposes. Tennessee seeks to have this court ignore those distinctions and ignore the Congressional mandate in the Rules of Decision Act requiring state law to be regarded as rules of decision in civil action in the federal courts. Further, Tennessee would have this court ignore the Supreme Court's holding in Kamen v. Kemper Financial Services, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed. 2d 152 (1991), that "[t]he 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." 500 U.S. at 98. Tennessee further ignores that the application of state law would not frustrate specific objectives of the Natural Gas Act, a factor the court established in United States v. Kimble Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979).

Contrary to Tennessee's misplaced argument, Miller is not applicable to condemnations by private entities. Miller, instead was a case about the federal government condemning for public use.

In arguing Miller is applicable to condemnation actions instituted by private entities engaged in the interstate transmission of natural gas, Tennessee ignores the express and unambiguous language of Miller. The Miller opinion begins with the sentence: "This case presents important questions regarding standards for valuing property taken for *public use* (emphasis added)." 317 U.S. at 370. It goes on to provide "the U.S. condemned a strip across the respondent's lands …". The project was specifically authorized by Congress. 317 U.S. at 370. By so stating, the court acknowledges the use of public funds by the United States for the acquisition of property to be used by the public that triggers the application of federal law.

No case arising in this Circuit cited by Tennessee arises from a taking under the Natural Gas Act by a private entity in its business interests. Tennessee's

argument that Miller is precedential to the facts *sub judice* is incorrect. Indeed, Tennessee fails to cite any cases directly on point that involve a private entity condemnor. To the contrary, in each case cited by Tennessee, the United States was the condemnor, the purpose of the taking was for a clear governmental purpose and the Natural Gas Act was not involved. In United States v. Certain Parcels of Land in Philadelphia, 144 F.2d 626 (1944), the United States condemned an 88 acre tract which was under a contract of sale. The issue was the admissibility in evidence of the contract under the federal and state rules of evidence. The case is limited to "…condemnation proceedings *brought by the United States* (emphasis added) against land in Pennsylvania." 144 F.2d at 628. In the United States v. 27.93 Acres of Land, 924 F.2d 506 (3d Cir. 1991), the United States acquired the subject property as part of the Appalachian Natural Scenic Trail. The taking was by the government for the use of the property by the public. In United States v. 412.93 Acres of Land, 455 F.2d 1242 (3d Cir. 1972), the United States acquired the subject property as part of the Beltzville Dam and Reservoir project, once again a project for the use by the public. In United States v. 60.14 Acres of Land, 362 F.2d 660, 662, 665 (3d Cir. 1966), the United States acquired the property as part of the Allegheny River Reservoir project. In United States v. 15.3 Acres of Land, 154 F. Supp. 770, 783 (M.D. Pa. 1957), the United States acquired the property for military purposes. In United States v. 13.98 Acres, 702 F. Supp. 1113, 1116 (D. Del. 1988), the United

States acquired the property as a runway for an Air Force base. Not one case cited by Tennessee applies in the instant case.

Similarly, a review of the cases Tennessee cites as "[t]he majority of appellate courts around the country" (Tennessee Brief, page 17) again fails to demonstrate Miller is applicable here. Each case cited is, again, a taking by the United States for use by the public.

The foundation of Tennessee's argument is that, somehow, by the application of state law to the determination of damages, a property owner whose property is condemned by a private company engaged in the business of interstate natural gas transmission will somehow obtain a "windfall" (Tennessee Brief, page 19). This argument is fallacious for a number of reasons. First, it presumes state law will afford a greater measure of compensation than does federal law. Secondly, it ignores the various states have duly considered damages which properties within their boundaries will suffer as a result of being condemned. Thirdly, it ignores the vast body of precedent, Columbia Gas v. Exclusive Natural Gas, 962 F.2d 1192 (6TH Cir. 1992); Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980); Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662 (5th Cir. 1985); Rockies Express Pipeline, LLC, 734 F.3d 424 (6th Cir. 2013); Bison Pipeline, LLC v. 102.84 Acres of Land, 732 F.3d 1215 (10th Cir. 2013); Northern Natural Gas Co. v. Approximately 9117.3 Acres, 781 F. Supp. 2d 1155 (D.C.D.Ka. 2011); Perryville Storage, LLC v.

Dawson Farms, LLC, 2012 U.S. Dist. LEXIS 147478 (D.C.W.D.La. 2012); Natural Fuel Gas Supply Corp. v. 138 Acres of Land, etc., 84 F. Supp. 2d 405 (D.C.W.D.NY 2000); Tennessee Gas Pipeline Company v. 104 Acres of Land, etc., 780 F. Supp. 82 (D.C.Ri) (Rhode Island Law applies); 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); Sabal Trail Transmission, LLC v. Real Estate, 255 F. Supp. 3d 1213 (D.C.N.D.Fla.2017), and the more recent decision of the Tenth Circuit in Northern Natural Gas Company v. L.D. Drilling, 862 F. 3d 1221 (2017), in which the Tenth Circuit again ruled that valuation of property rights taken by a gas company under the Natural Gas Act was controlled by state law.

2. Tennessee has not acquired the easements across King Arthur's property for use by the public.

Tennessee's assertion that King Arthur is in error in asserting "[n]owhere in the Natural Gas Act is there any reference to condemnation proceedings under that Act for the public use" simply ignores the very language of the Act. Tennessee attempts to misdirect the focus of the issue. The Fifth Amendment authority for the taking is not the point. What is, is the use being made of King Arthur's property by the gas company. That use is for the gas company's business purposes. In citing §717(a) of the Act, Tennessee fails to perceive the distinction between the *public interest* (emphasis added) of protecting the consuming public from exploitation at the hands of natural gas companies, (Federal Power Commission v. Louisiana Power

& Light Co., 92 S. Ct. 1827, 406 U.S. 621, 32 L. Ed. 2d 369 (1972)), and the use of the property taken. Similarly, Tennessee fails to address the congressional recognition in §717(a) of the Act that "... the business of transporting and selling natural gas for ultimate distribution to the public is *affected* with a public interest ..." (emphasis added). Congress recognizes in that section it is the business interest of the natural gas companies that must be regulated because such business interests affect the public interest. Tennessee's *sub rosa* assertion that its profit oriented business interests are to be ignored in determining the applicable law ignores the Congressional declaration that such business interests are essential factors considered by Congress in enacting the Act to protect consumers against exploitation at the hands of natural gas companies.

§717f(a) provides:

> "Whenever the Commission ... finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company" ... .

That section not only addresses the public interest sought to be furthered and protected by the Act but also specifically recognized by use of the possessive

pronoun "its" that the facilities and the use is owned by, and that of, the natural gas companies.

Similarly, in §717f(h) Congress again recognizes that pipelines and equipment incident thereto are not the property of the public, but are those of the gas transmission companies. Certainly, the same cannot be said of reservoirs, airports, military facilities or the like recognized by the Courts in this Circuit as constituting public uses.

3. Tennessee's assertion that extensive precedent exists for the use of Federal Common Law for the measure of damages in taking cases under the Natural Gas Act is not supported by the cases it cites.

In §D.2 of its brief, Tennessee cites a number of cases, ostensibly to bolster its assertion that precedent exists for the application of some federal common law to the measure of damages to be paid in taking cases under the Natural Gas Act. A review of those purported authorities shows Tennessee's assertion is again without merit.

In U.G.I. Sunbury, LLC v. A Permanent Easement for 0.4944 Acres, 3:16-CV-00783, 2018 WL 1014136 (M.D. Pa. Feb. 22, 2018). Judge Brann deferred ruling on whether state law was to be applied in determining the amount of "just compensation" until this case is decided by this court.

Columbia Gas Transmission, LLC v. An Easement to Construct, Operate & Maintain a 20-Inch Gas Transmission Pipeline, No. 16-1243, 2017 WL 1355418

(W.D. Pa. Apr. 13, 2017) makes no mention of the issue of the application of state law. The case deals with whether the comparable sales method or income method of appraisal should be employed.

Columbia Gas, LLC v. 252.071 Acres, More or Less, No. ELH-15-3462, 2016 WL 7167979 (D. Md. Dec. 8, 2016) again makes no mention of the issue of state law. It deals with the question of immediate possession of the property by the Condemnor.

Transcontinental Gas Pipe Line Co., LLC v. A. Permanent Easement Totaling 0.799 Acres, No. 3:14-CV-00407-HEH, 2014 WL 6685410 (E.D. Va. Nov. 25, 2014) merely addresses compensation being based on the fair market value of the property as of the date of the taking.

Hardy Storage Co., LLC v. An Easement to Construct, Operate & Maintain 12-Inch & 20-Inch Gas Transmission Pipelines Across Properties in Hardy, No. 2:06-CV7, 2009 WL 900157 (N.D.W. Va. Mar. 31, 2009) deals with the issue of the property owner having produced no appraisal report to refute the Plaintiff's appraisal.

Columbia Gas Transmission, LLC v. 76 Acres More or Less, No. CIV.A. ELH-14-00110, 2014 WL 4723066 (D. Md. Sept. 22, 2014) similarly makes no mention of the issue of state law. It simply defines in general terms what constitutes "just compensation".

Perhaps most interestingly, in Northern Natural Gas Co. v. Approximately 9117 Acres in Pratt, Kingman, 862 F.3d 1221 (10th Cir. 2017) the 10th Circuit again applied state law, in this case Kansas law, to the determination of the compensation to be paid to the property owner for a taking under the Natural Gas Act.

Tennessee attempts to confuse "public interest" and "public use" with the nature of the use to be made by the Condemnor of the property taken. The public interest, as expressed by Congress is to facilitate the interstate movement of natural gas. That intent does not make either the properties condemned nor the facilities constructed by natural gas companies thereon public. To the contrary, Tennessee cleaves unto itself extreme limitations on the use of the condemned properties, even by the fee owners thereof.

Similarly, Tennessee's effort to distinguish the clearly on point decisions cited by King Arthur is baseless. In Mississippi River Transmission Corp. v. Tabor, 757 F.2d 662 (5th Cir. 1985), the gas company "expropriated" (757 F.2d at 665), the Defendant's property rights under §717f(h). The entirety of the decision is predicated on the application of Louisiana law to the property rights of the property owner and the compensation to which he was entitled under Louisiana law for the expropriation of those rights.

Tennessee's effort to distinguish Bison Pipeline, LLC v. 102.84 Acres of Land, 732 F.3d 1215 (10th Cir. 2013), ignores the unequivocal holding of the Tenth Circuit. In Bison, Bison raised for the first time on appeal a challenge to the application of Wyoming law to the question of the compensation to be paid. Although not raised in the District Court, the issue was heard and decided by the Circuit Court. Clearly the issue of the applicability of state law to the question of damages was an issue in contention, which was decided by that Circuit, by applying Wyoming law.

More recently, in Northern Natural Gas Company v. L.D. Drilling Defendants, et al., 862 F.3d 1221 (10th Cir. 2017), the Tenth Circuit again applied state law, in this case, Kansas law, to determine both the property rights involved and the measure of damages the property owner was entitled in a Natural Gas Act taking case.[1]

Tennessee fails to offer any explanation of its assertion that "just compensation" must be determined by the same standards in every federal eminent domain action. Certainly just compensation must be received. However, it is the method by which that compensation is to be determined which is in issue. Tennessee

[1] Tennessee incorrectly cites Northern as precedent that the court there determined Miller applies "to determine valuation question". Tennessee Brief page 23. To the contrary, the Northern court cites Miller solely for establishing the date of taking for valuation purposes. 862 F.3d at 1225.

erroneously believes simply because it chooses to bring its actions in federal court rather than state court, Tennessee is able to choose the law under which just compensation is to be determined. Had Congress wished that to occur, it could have said so. In authorizing actions under the Act to be brought in either state or federal courts, it is submitted by implication Congress has recognized the applicability of state law. There is nothing in the Act remotely evidencing the Congressional directive required by Kamen v. Kemper Financial Services, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed. 2d 152 (1991) and United States v. Kimble Foods, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979) to establish a body of federal law.

Tennessee further boldly asserts "...an extensive body of federal common law already exists." (Tennessee Brief pg. 33) Such a body of law does exist where the United States is the condemnor, the property is taken for use by the public, and public money is used to pay just compensation. However, no federal common law at all exists applicable to just compensation cases where the condemnor is a private business entity taking property for its business purposes. The federal courts considering the issue have, until Fox Hollow, uniformly held the laws of the various states have been adopted as the federal rule.

The "FERC Order" evidences Tennessee determined to expand its gas transmission facilities. It was not compelled to do so by the government. It negotiated contracts with natural gas suppliers and had rates determined. It did so

voluntarily. It chose to construct facilities in Pennsylvania, knowing full well that courts heretofore have required it to pay just compensation in accordance with state law. Tennessee Gas Pipeling Company v. 104 Acres of Land More or Less, 780 F. Supp. 82 (D.C.R.I. 1991). In voluntarily coming into Pennsylvania, Tennessee exposed itself to application of Pennsylvania law to the determination of just compensation. The owners of property in Pennsylvania own their property under the laws of Pennsylvania. Tennessee does not have the right to displace the state's property laws simply by having chosen to file its actions under the Natural Gas Act.

In Kamen v. Kemper Financial Services, supra 11, the court instructs:

> [W]e 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 specific objectives of the federal programs." 500 U.S. at 98

Tennessee offers no explanation of how the application of Pennsylvania law concerning determination of damages would frustrate any specific objective of the Act. In In re: Columbia Gas Corp., 997 F. 2d 1039 (3d Cir. 1993), this court recognized the need to establish such frustration. The reality is no such frustration exists, as was decided in Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement, 962 F.2d 1192 (6th Cir. 1992).

Tennessee's argument reduced to its most simple terms is that every court (except the Fox Hollow court) which has painstakingly examined the issues is in error. While Tennessee offers up what it asserts are distinctions, it fails to offer any

reason why the court should direct the development of a body of federal common law to be applied in the determination of compensation to be paid under the Act, other than the rote application of Miller. Tennessee offers no valid reasons this court should ignore the Supreme Court's holdings of when consideration should be given to the application of a materially uniform body of law, as set forth in Kimble Foods and Kemper. It offers no reasons why this court should reject its favorable consideration of the holding of Columbia Gas v. Exclusive Natural Gas, nor does Tennessee offer any reason why the court should deviate from the reluctance to create federal common law it expressed in Pennsylvania, Department of Public Welfare v. United States, 781 F.2d 334 (3d Cir.1986).

Perhaps most concerning is the effort of Tennessee to expand the eminent domain authority granted to natural gas transmission companies under the Act. Tennessee seeks to have the court grant to it the unique status now vested only in the United States. It is respectfully submitted that is not a path which should be taken. Congress has not authorized that to occur. No court heretofore has authorized that to occur. No precedent or policy reason exists for that to occur. With the primary aim of the Act being to protect consumers from exploitation at the hands of natural gas companies, if that unique status was to be granted to Tennessee, it is submitted that primary aim would be thwarted. Recent challenges by interstate gas transmission companies to the now long established body of law that state law of

damages is the federal rule, evidence the zeal of those companies to avoid having to compensate land owners for their property rights established by the laws of the various states. It is gas transmission companies, in this case Tennessee which seek to supplant that long established body of law in the hope of paying less in just compensation than allowed by state law. It is submitted those efforts should be brought to a halt here.

CONCLUSION

Tennessee has offered no legally well founded bases for this court to deviate from the Congressional and Supreme Court requirements that State law is to be applied as the federal rule in condemnations by a private entity. There has been no showing of either an expression of legislative intent that state law should not apply nor does the applicable Pennsylvania law conflict significantly with any federal interest or policy present in this case. Accordingly, it is respectfully submitted the determination by the District Court that federal law governs the substantive determination of just compensation in this condemnation action commenced under the Natural Gas Act should be reversed and the case be remanded to the District Court with instructions to allow the introduction in evidence of the damages for expert fees and additional development costs.

Date: 6/14/18

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 this Reply 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 Appellant certifies that this Reply Brief for Defendant-Appellant complies with R.A.P. 32(a)(7)(B) containing 3,486 words, comprising 15 pages, 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 June 14, 2018, this Brief was checked for viruses using Panda software and the document is free of viruses.

5. On June 14, 2018, an 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 June 14, 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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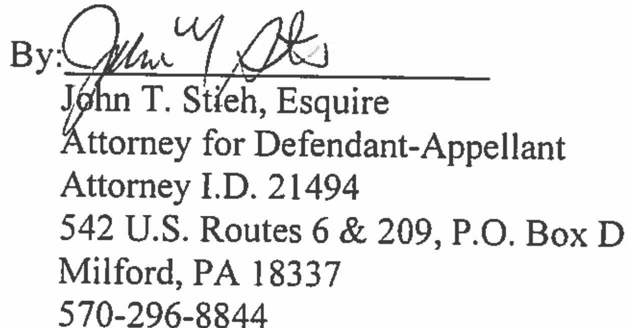

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