

UNDERSTANDING THE APPALACHIAN BASIN MIDSTREAM INDUSTRY

CANNONSBURG, PENNSYLVANIA

AN UPDATE OF RECENT DECISIONS AFFECTING THE MIDSTREAM INDUSTRY,
AMENDED

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I. INTRODUCTION

As the development in the Utica and Marcellus shale plays has increased in recent years, the need for additional pipeline and processing capacity has grown exponentially. But, while the midstream industry work to meet the demand, numerous hurdles continue to be placed in the way. This presentation will review recent cases and proceedings instituted in the Appalachian Basin region that are impact the midstream industry.

II. THE POWER OF EMINENT DOMAIN

Traditionally, the power of eminent domain has provided governmental entity or its agent the authority to appropriate private property for appropriate public use, provided that fair compensation is paid. But, many statutes, at the state and federal level, extend this power to non-government entities that that seek to appropriate property for “public use.” The decisions below demonstrate how courts in the Appalachian Basin have construed statutes granting eminent domain authority to pipeline companies in the midstream industry.

A. Authority

1. *Robinson Twp. v. Commonwealth*, 96 A.3d 1104 (Pa. Commw. 2014).

The Pennsylvania Supreme Court’s decision in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (2012), arose from several expedited challenges to the Pennsylvania Oil and Gas Act (“Act

13”), which was signed into law in February 2012. Act 13 involved, *inter alia*, constitutional issues relating to the eminent domain power vesting in public utilities. Certain issues were remanded with instruction for reconsideration, including whether conferring the power of eminent domain upon a corporation engaged in the transportation, sale, or storage of natural gas, pursuant to 58 Pa. C.S. §3241(a) is unconstitutional because it permits a taking for a private purpose.

On remand, the petitioners argued that eminent domain power provided to transporters of natural gas pursuant to Pennsylvania statute 58 Pa. C.S. §3241(a) violated the Pennsylvania Constitution and the Fifth Amendment to the United States Constitution.

58 Pa. C.S. § 3241 provides:

(a) General rule. -- Except as provided in this subsection, a corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth may appropriate an interest in real property located in a storage reservoir or reservoir protective area for injection, storage and removal from storage of natural gas or manufactured gas in a stratum which is or previously has been commercially productive of natural gas.

The petitioners likewise argued that Section 204(a) of the Eminent Domain Code prohibited "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise...." 26 Pa. C.S. §204(a).

But, 5 Pa. C.S. § 1511 provides:

(a) General rule. -- A public utility corporation shall, in addition to any other power of eminent domain conferred by any other statute, have the right to take, occupy and condemn property for one or more of the following principal purposes and ancillary purposes reasonably necessary or appropriate for the accomplishment of the principal purposes:

(2) The transportation of artificial or natural gas, electricity, petroleum or petroleum products or water or any combination of such substances for the public.

(3) The production, generation, manufacture, transmission, storage, distribution or furnishing of natural or artificial gas, electricity, steam, air conditioning or refrigerating service or any combination thereof to or for the public.

“Public utility,” as defined by **66 Pa. C.S. § 102**, is:

(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:

(i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas...

(v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.

The Commonwealth Court, dismissing the petition for review, clarified that contrary to Petitioners’ assertions, Pa. C.S. §3241(a) only confers upon a public utility the power of eminent domain to acquire property for the transportation, storage, transmission, distribution, or furnishing of natural gas *to or for the public* and, thus, 26 Pa.C.S. §204(a) (prohibiting the taking of private property for a private enterprise) was inapplicable.

2. *Peregrine Keystone Gas Pipeline, LLC, Pennsylvania Public Utilities Commission No. A-2010-2200201, Recommendation Decision (May 3, 2012).*

Peregrine Keystone Gas Pipeline, LLC, (“Peregrine”) proposed to construct a system for gathering in municipalities located in Greene and Fayette Counties and in East Bethlehem Township in Washington County, Pennsylvania. Peregrine’s proposed system would span approximately nine miles and consist of approximately 58,800 feet of pipeline. Peregrine filed an application with the Pennsylvania Public Utilities Commission (“Commission”) requesting certification as a public utility. The administrative law judge (“ALJ”) assigned to the matter recommended disapproval of the application, stating that Peregrine failed to meet the standard for certification of a public utility under the Public Utility Code.

Referring to the Commission's previous decisions in *Application of Laser Northeast Gathering Company, LLC*,¹ the ALJ noted that transmission line utilities are specifically excluded from Section 1308(d) of the Public Utility Code, but also noted that simply because gathering lines carry gas, they are not necessarily transmission lines under applicable law. The Commission's regulations explain transmission lines and gathering lines as follows:

Gathering line—A pipeline that transports gas from a current production facility **to a transmission line** or main.

* * *

Transmission line—A pipeline, **other than a gathering line** that does one of the following:

Transports gas from a gathering line or storage facility to a distribution center or storage facility;

(ii) Operates at a hoop stress of 20% or more of SMYS

(iii) Transports gas within a storage field.

52 Pa. Code § 59.1 (definitions)(emphasis added).

The ALJ found no evidence was presented to support a finding that a gathering line is a transmission line, and the statutory definitions made it clear that there is a difference between the two. The judge also indicated that the company's operations must be determined by what it is actually doing, rather than what it states it will do. The ALJ, thus, concluded that Peregrine would begin service to only affiliated companies, and its facilities would be designed to serve those entities. The ALJ noted that affiliated companies could not be defined as "the public," and commented that the intent to provide service for others, as long as it is convenient for the provider, is not service for the public. The ALJ concluded that Peregrine's proposed service did not

¹ *Application for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, A-2010-2153371, Order entered June 14, 2011; Order entered July 15, 2011; Order entered August 24, 2011; and Order entered December 5, 2011.

constitute “public utility service” under 66 Pa. C.S.A. § 102, and Peregrine had not satisfied the test in *Laser I* to be a public utility. The ALJ concluded that granting Peregrine’s application was not necessary for the service, accommodation, convenience or safety of the public. 66 Pa. C.S. § 1103(a).

3. *Tex. Eastern Transmission, LP v. 3.2 Acres Permanent Easement, S.D. Ohio No. 2:14-cv-2650, 2015 U.S. Dist. LEXIS 3252 (Jan. 12, 2015).*

Texas Eastern Transmission, LP (“Texas Eastern”), an interstate natural gas transportation company, planned to construct and operate a seventy-six mile natural gas pipeline and associated facilities spanning across five Ohio counties. Texas Eastern moved the Federal District Court for the Southern District of Ohio for an order authorizing it to condemn various property interests that it was unable to acquire through agreement with the property owners and which were necessary to commence construction of the pipeline. Having obtained a Certificate of Public Necessity and Convenience from the Federal Energy Regulatory Commission (“FERC”), Texas Eastern argued that it possessed the substantive authority to condemn the properties at issue, pursuant to the Natural Gas Act, 15 U.S.C. §717 *et seq.*

Under Section 717f (h) of the Natural Gas Act, natural gas companies have the right of eminent domain to acquire property rights necessary to facilitate the operation and construction of a natural gas pipeline. As the District Court stated, a natural gas company must satisfy the following criteria in order to be deemed to have the right to condemn property: (1) hold a certificate of public convenience and necessity; (2) be unable to acquire the property by contract or agree with the property owners as to the amount of compensation to be paid; and (3) the use of the property is necessary to comply with the certificate.

After reviewing the evidence presented, the District Court determined that Texas Eastern had been unable to acquire the property by contract, despite efforts to do so, and that the use of the property was necessary to comply with the certificate issued by FERC. The District Court, thus, concluded that Texas Eastern satisfied the necessary requirements sufficient to be entitled to condemn the property interests at issue.

B. “Public Service”

1. *EQT Gathering, LLC v. Tract of Prop. Situated in Knott Cty.*, 970 F. Supp. 2d 655 (E.D. Ky. 2013).

In the case *EQT Gathering LLC v. Tract of Prop. Situated in Knott Cty.*, an action was filed to condemn rights-of-way on 160 acres in located in Knott County, Kentucky, with the purpose of maintaining and operating an existing pipeline. EQT Gathering, LLC (“EQT”) filed a motion for partial summary judgment on the question of whether it had authority under KRS 278.502 to condemn the property. The property owners opposed summary judgment arguing: (1) EQT was not a pipeline company “in public service”; (2) EQT did not engage in a good faith effort to purchase the land; and (3) condemnation was not necessary, as the pipeline could be relocated.

KRS 278.502 provides:

Any corporation or partnership organized for the purpose of, and any individual engaged in or proposing to engage in, constructing, maintaining, or operating oil or gas wells or pipelines for transporting or delivering oil or gas, including oil and gas products, in public service may, if it is unable to contract or agree with the owner after a good faith effort to do so, condemn the lands and material or the use and occupation of the lands that are necessary for constructing, maintaining, drilling, utilizing, and operating pipelines...

Interpreting KRS 278.502, the court concluded that the transportation of natural gas by a common carrier is in the “public service.” The court stated that, while the property owners appeared to contest whether the grant of authority was constitutional, they did not contest whether

EQT had condemnation authority. The court, thus, declined to rule on constitutionality, as the property owners failed to raise the argument in an appropriate cross motion for summary judgment. The court, thus, determined that EQT had condemnation authority pursuant to KRS 278.502.

While the court agreed that EQT possessed condemnation authority, the court denied EQT's summary judgment motion on the basis that genuine issues of material fact existed with respect to whether EQT engaged in good faith efforts to reach an agreement with the property owner and whether the condemnation was necessary.

2. *Kentuckians United to Restrain Eminent Domain, Inc. v. Bluegrass Pipeline Company, LLC*, No. 12-CI-1402 (Franklin Cir. Ct. March 25, 2014)

Kentuckians United to Restrain Eminent Domain (“KURED”), a Kentucky non-profit organization, filed a complaint in the Franklin Circuit Court of Kentucky seeking a declaration of rights and a ruling adjudicating whether Bluegrass Pipeline Company, LLC (“Bluegrass”) had eminent domain authority pursuant to KRS 278.502, 416.675, and 278.470 to condemn property for the installation of natural gas liquids (“NGLs”) pipelines.

KURED argued that Bluegrass lacked eminent domain authority, because Bluegrass was not “in public service” as provided in KRS 278.502 and was not regulated by the Kentucky Public Service Commission. KURED asserted that, because the pipeline would be transporting NGLs *through* the state of Kentucky rather than serving Kentucky customers, the pipeline did not meet the “in public service” requirement of the statute. KURED also argued that NGLs did not constitute “oil or gas” or “oil or gas products” as are contemplated under KRS 278.502.

The court agreed with KURED, and held that only utilities regulated by the Public Service Commission possessed condemnation power under Kentucky law. Further, the court determined that even if Bluegrass qualified under statute as a common carrier, which the court concluded it

did not, Bluegrass was still in the business of transporting NGLs, not “oil or natural gas”. Since Bluegrass admitted in its pleadings that it was not a public utility regulated by the Public Service Commission, and its operations were not “in public service,” the court granted summary judgment in favor of KURED finding that Bluegrass did not possess eminent domain authority. This case is currently on appeal.

C. Compensation

1. *Tenn. Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, M.D. Penn. No 3: CV-11-028, 2014 U.S. Dist. LEXIS 23895 (Feb. 24, 2014).

In *Tenn. Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, Tennessee Gas Pipeline Company (“Tennessee”) and Fox Hollow Estates, L.P. (“Fox Hollow”) agreed, by stipulation, to Tennessee taking immediate possession of certain rights-of-way after Tennessee filed its January 5, 2011, Complaint in Condemnation seeking to condemn permanent rights-of-way and easements. Tennessee sought the rights-of-way to construct, among other things, new pipeline as part of its 300 Line Project. Unresolved after Tennessee’s construction was the issue of compensation owed by Tennessee to Fox Hollow for the taking of rights-of-way.

In determining the just compensation owed, the court considered whether to apply state or federal substantive law as governing law under the Natural Gas Act. After reviewing arguments in favor of each, the court applied federal substantive law for determination of the issue of compensation under the Natural Gas Act. It determined that “private condemners under the Natural Gas Act operate on a national scale with federally approved pipelines.”

Applying federal law to determine compensation, the court found that in cases involving “partial takings,” the measurement for just compensation is “the difference between the market value of the entire holding immediately before the taking and the remaining market value immediately thereafter of the portion of property rights.” It also found, beyond the landowner’s

burden to prove its owed just compensation, that the landowner is entitled to compensation for both physically appropriated property and diminution in value to non-condemned property “if the value of the remaining land, on a unit basis, diminished when the condemned parcel is removed from the larger whole.”

2. *Rockies Express Pipeline, LLC v. 4.895 Acres of Land*, 734 F.3d 424, 2013 FED App. 0233P (6th Cir. 2013).

Rockies Express Pipeline LLC (“Rockies Express”) filed an application with FERC for a Certificate of Public Convenience and Necessity authorizing the construction and operation of the REX-East Pipeline through certain counties in the state of Ohio. The proposed route cut directly through an existing coal mine. Several coal companies intervened in the proceeding and proposed a different route for the pipeline, one that did not traverse the mine. FERC granted Rockies Express’ application, stating that it was unnecessary to re-route the pipeline around the resources as Rockies Express had adequately proposed a framework for a subsidence mitigation plan and had agreed to cover all costs associated with "monitoring or mitigation of the pipeline should mining advance in close proximity to the pipeline."

After failing to obtain easements from defendants, Rockies Express filed an eminent domain action with the District Court. During the proceedings, the District Court appointed a commission to determine the appropriate value of the easements sought by Rockies Express. At the close of discovery and pre-trial motions, the court determined that defendants suffered no compensable damages as a result of the pipeline. The Sixth Circuit affirmed.

Applying the Natural Gas Act, the Sixth Circuit determined that, as a FERC certificate holder, Rockies Express had eminent domain authority. The court applied Ohio law to determine the amount of compensation. The court opined that under Ohio law, a property owner is entitled

the value of the land taken and the damages to the residue of the property. As Rockies Express only sought to condemn the surface estate, the court determined that the only damages at issue before it were related to the residue.

Applying these principles, the Sixth Circuit agreed with the district court's determination that the defendants failed to demonstrate that their damages claims rested on anything other than speculation. Accordingly, the Sixth Circuit affirmed the decision of the District Court.

III. ZONING

***Markwest Liberty Midstream v. Cecil Twp. Zoning Hearing Bd.*, 102 A.3d 549 (Pa. Commw. 2014).**

This case arose from the appeal of a denial by the Cecil Township Board of a special exception application and exclusionary zoning challenge to build a compressor station within the I-1 Light Industrial District in Cecil Township. Markwest Liberty Midstream & Resources, LLC ("Markwest"), a corporation that owns and operates midstream facilities which transport, compress and process oil, gas and other substances from oil and gas wells, applied to the Cecil Township Zoning Board for a special exception under the Unified Development Ordinance to construct and operate a compressor station in the center 15 acres of a 71.5-acre property. Cecil Township's local ordinance permits natural gas compressor stations that operate as midstream facilities so long as they are consistent with the Township's Unified Development Ordinance. The Unified Development Ordinance allows such processing plants, by special exception. The Cecil Township Zoning Board denied Markwest's application for a special exception.

On appeal, Markwest argued, *inter alia*, that the Unified Development Ordinance, as interpreted and applied by the Board, is an unlawful exclusion of natural gas compressor stations as the Board's interpretation of the ordinance excluded compressor stations as a use anywhere

within Cecil Township. The Commonwealth Court, like the trial court, determined that excluding the compressor station from the I-1 Light Industrial District was not unlawful. The court reasoned that while the Board's decision denied the use in that particular district, the same use was not necessarily excluded from any other district. Further, the Court held that Markwest did not meet its burden to satisfy the requirements for an exception under the ordinance.

In addition to its argument that the compressor station was unlawfully excluded, Markwest asserted that the Unified Development Ordinance was pre-empted by Act 13. The Commonwealth Court determined that as the Unified Development Ordinance did not exclude natural gas compressor stations in all zoning districts, as was asserted by Markwest, Markwest's preemption argument must fail. The court further declined to hold that the ordinance was preempted by state law, because the Pennsylvania Supreme Court in *Robinson Twp. v. Pennsylvania Pub. Util. Comm'n*, 83 A.3d 901 (Pa. 2013) ruled Act 13 unconstitutional.

IV. SITING AND ENVIRONMENTAL CONCERNS

A. *Tex. Eastern Transmission, LP v. 3.2 Acres Permanent Easement*, S.D. Ohio No. 2:14-cv-2650, 2015 U.S. Dist. LEXIS 3252 (Jan. 12, 2015).

The Texas Eastern case discussed above in addition to involving matters of the right of eminent domain and condemnation, also involved a request for immediate possession of the property interests at issue by way of injunction. The District Court stated that, while neither the Natural Gas Act nor the Federal Rules of Civil Procedure provide for immediate possession, numerous federal courts have held that the inherent power of the court to grant immediate possession is provided through the issuance of preliminary injunction. Texas Eastern argued that it would suffer irreparable harm if immediate possession were not granted.

A significant portion of the Texas Eastern project was to be located in known long-eared bat habitats. As a result of this location, Texas Eastern's FERC certificate required tree clearing activities be conducted between October 1, 2014 and March 31, 2015. Because of these environmental considerations, Texas Eastern argued that the failure to grant immediate possession would delay the project to the extent that it would prevent Texas Eastern from meeting its FERC deadline. In granting Texas Eastern's request for immediate possession, the court, weighing the remaining factors required for a grant of an injunction, determined that Texas Eastern had a strong likelihood of success on the merits, substantial harm would not result to third parties, and the public interest would be served by approval of immediate possession.

B. *Texas Eastern Transmission, LP v. Barack*, S.D. Ohio No. 2:14-cv-336 (Apr. 10, 2014).

Texas Eastern Transmission LP ("Texas Eastern") is a natural gas company that filed a Verified Complaint with the Southern District of Ohio seeking a temporary restraining order, preliminary and permanent injunctions, and declaratory judgment with respect to certain properties located in Ohio. Texas Eastern was planning to construct and operate a 30-inch pipeline that would traverse directly through the defendants' property. At the time, Texas Eastern had an application for Certificate of Public Convenience and Necessity pending before FERC.

In its Verified Complaint, Texas Eastern asked the court, *inter alia*, for an order granting it authorization to condemn the property interests of the defendants pursuant to the Natural Gas Act and Ohio Revised Code 1723.01 and 163.03. Texas Eastern moved for immediate possession of the property, because federally-mandated environmental studies relating to certain bat species in the area, if not conducted prior to April 21, 2014, would not be able to be completed until

September and October of 2014. Texas Eastern alleged that such a delay would severely hamper its ability to meet its construction deadlines and service date of November 2015.

The District Court granted Texas Eastern's request for a temporary restraining order and preliminary injunction finding that substantial irreparable harm would have resulted if the motion was not granted, and further delay in conducting the requisite bat studies would have severely impacted the company's FERC application.