

**IN THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO**

Sunoco Pipeline L.P.)	Case No. :CVH-2015-0058
)	
Plaintiff,)	Judge: T. Shawn Hervey
)	
v.)	<u>CLOSING BRIEF</u>
)	
Carol A. Teter, Trustee of the Carol A. Teter Revocable Living Trust, et al.)	
)	
Defendants.)	

SUNOCO’S CLOSING BRIEF

I. INTRODUCTION

Sunoco Pipeline L.P. (“Sunoco”) is entitled to an entry from this Court approving its condemnation and eminent domain authority over Defendant’s property for the following reasons:

- Sunoco is unquestionably a common carrier, and therefore has the right of eminent domain for a public use;
- Sunoco’s resolution and other evidence of necessity were unrefuted and, therefore, Sunoco Pipeline has irrefutably established a necessity of the condemnation action;
- Sunoco will be transporting “petroleum” through the pipeline pursuant to Ohio law, the Ohio Administrative Code, and industry terms.

Therefore, Sunoco respectfully requests that this Court find that it has the right of condemnation over the Defendant's property and order a hearing to a jury on just compensation to be awarded to Defendant in approximately sixty (60) days.

II. SUMMARY OF TESTIMONY IN EVIDENCE

A. The Mariner East 2 Pipeline Project Overview

Sunoco's representatives testified, that in response to demand by the public, Sunoco intends to build a petroleum pipeline from Scio, Ohio, in Harrison County, to the Marcus Hook Industrial Complex that straddles the state line between Marcus Hook, Pennsylvania and Claymont, Delaware. The project will be known as the "Mariner East 2 Pipeline" and will cross portions of Ohio, West Virginia, Pennsylvania, and Delaware. The Mariner East 2 Pipeline will provide critically needed infrastructure and pipeline capacity to support the development of Ohio's Utica and Marcellus Shale plays.

B. Sunoco is undisputedly a Common Carrier—Organized to Transport Petroleum through Pipes for the Public at Large.

Sunoco's Vice President of Business Development, Hank Alexander, testified that Sunoco is a common carrier organized to construct, operate, and maintain petroleum pipelines. Sunoco's common carrier status was also recognized by the Federal Energy Regulatory Commission ("FERC"). (Pl.'s Ex. D, at ¶ 16.) As a common carrier, Sunoco will operate the Mariner East 2 Pipeline much like a toll road—anyone that wants to use the pipeline to transport their petroleum need only pay the FERC authorized toll to use the pipeline. The open public nature of the Mariner East 2 Pipeline is clearly evident from the Open Season Sunoco held when it first began considering the project. Mr. Alexander testified that during the Open Season,

anyone that wanted to reserve capacity on the Mariner East 2 Pipeline to move their petroleum was able to sign an agreement with Sunoco—numerous third party shippers indeed did so¹. Mr. Alexander further testified, that Sunoco was federal mandated to keep a minimum of ten-percent (10%) of Mariner East 2’s capacity open for “walk-up shippers.” These walk-up shippers are third parties who choose not to reserve capacity on the Mariner East 2 Pipeline, but who have petroleum that needs to be moved to profitable markets efficiently. Much like the committed shippers who signed agreements during the Open Season, walk-up shippers will be charged a federally regulated fee to use the Mariner East 2 Pipeline. By providing a safe and efficient means of transportation for Ohio’s Utica petroleum, the Mariner East 2 project will help to ensure that the Utica Shale play remains economically viable for generations to come.

C. Appropriations to Construct the Mariner East 2 Pipeline Project will Serve a Public Use.

1. The Mariner Project and Similar Pipeline Projects are Critical to Continued Development of the Utica Shale.

Sunoco’s Vice President of Business Development, Hank Alexander, testified that right now the oil and gas business community views the Utica shale as a “hundred year play.” However, the development of the mineral rich Utica shale is in danger of stagnating due to a lack of pipeline infrastructure.

The testimony at trial established that much of the Utica shale development in Ohio is “wet gas” that contains various hydrocarbons including methane (natural gas); as well as important forms of petroleum such as propane, butane, and ethane—known in the Oil and Gas and Petroleum Pipeline industries as Natural Gas Plant Liquids (“NGPL”), Natural Gas Liquids

¹ Detailed testimony regarding these shippers was proffered by Sunoco and is under seal.

(“NGL”), or Liquefied Petroleum Gas (“LPG”). To separate the wet gas into its usable components, the wet gas is taken from the wellhead to a fractionation plant—like the ones located at Scio and Hopedale. At these fractionation plants the wet gas is subjected to extreme temperatures which allow the unmarketable wet gas to be transformed into forms of petroleum on which the world relies.

Without further pipeline infrastructure, this petroleum is essentially “trapped” and cannot efficiently and economically get to the markets that need it most. Without pipelines to efficiently transport the petroleum to markets that need it most, it will become more expensive to produce and transport than the market can afford. Without necessary pipeline infrastructure, the simple economics would disincentivize producers to continue production and development of Ohio’s Utica shale.

Both Mr. Alexander and a Teter Trust representative, Mr. Lovejoy, confirmed that the stagnation of Utica Shale production and development will have a negative impact on not only local economies, but also on the royalties Ohio landowners are set to receive from the development of their mineral interest. If production and development cease, so do royalty payments. If landowners are forced to share in the more expensive transportation costs associated with inefficient rail and truck methods, Ohio landowner royalties will decrease. This decrease in royalty payments will be further exacerbated by a failure to take these products to underserved markets in the Northeastern United States and abroad—markets willing to pay full value for Ohio’s Utica petroleum. Thus, Ohio landowners will see either no royalty payments—if the very useful and valuable products coming out of the Utica shale in Ohio cannot be transported to markets that need them, forcing producers to shut-in wells—or greatly undervalued royalty

payments due to drastically inefficient and expensive transportation methods and an oversaturated local market.

Simply put, undisputed testimony established that the economic viability of the Utica shale—and the valuable petroleum being produced—is in jeopardy. Without the development of an efficient pipeline transportation system to get these products to market, Ohio's extremely valuable one hundred year shale play may simply become too expensive to develop and produce—prohibiting Ohio landowner's from realizing the full potential of their mineral interest. The Teter Trust offered no contradictory evidence for this Court's consideration.

2. The Mariner East 2 Pipeline will serve as a Stable and Efficient Source of Petroleum for Public Consumption.

The Mariner East 2 Pipeline will not only serve the public by providing an efficient means of transportation to Ohio's mineral owners, but it will also provide needed petroleum to public end users for home heating and manufacturing—with many of the manufactured goods potentially returning to Ohio.

While Sunoco has no direct control over what the shippers on Mariner East 2 do with their petroleum, Mr. Alexander testified that the petroleum being shipped on Mariner East 2 would benefit the public in at least very three very important ways. First, the propane being shipped on the pipeline will be used by consumers in the Northeastern United States for heating purposes during the winter. Mr. Alexander testified that during the last polar vortex a drastic shortage of propane for home heating led to shortages and price hikes. The capacity of the Mariner East 2 Pipeline would help to prevent these events from happening again, by providing a stable and efficient means of transporting propane to consumers throughout the North East.

Second, the butane being transported on the pipeline will be blended with gasoline to increase the vaporization pressure to ensure motor vehicles are able to function in cold weather. This blended winter gasoline will then be transported by pipeline back to the Midwest to be sold to local consumers—including those in Ohio.

Finally, the propane and butane being transported will be further refined to create synthetic materials for manufacturing. These synthetic materials are overwhelmingly prevalent in the lives of the public at large as they are used to create everything from water bottles to vehicle dashboards. These materials will very likely help to facilitate growth and prosperity in Ohio's manufacturing industries.

Once again, the Teter Trust provided no testimony to refute these facts.

D. Appropriations to Construct the Mariner East 2 Pipeline are a Necessity.

At the request of the public, Sunoco began exploring the development of the Mariner East 2 Pipeline in December 2013, when it conducted an Open Season to determine the public's need. (*See* Pl.'s Exs. C and D.) This Open Season was open to the public at large until May 2014, and allowed all interested petroleum shippers to reserve capacity on the Mariner East 2 Pipeline. (*Id.*) In August 2014, at the conclusion of the Open Season, Sunoco applied to the Federal Energy Regulatory Commission ("FERC") to approve the tariff it would charge anyone shipping petroleum on the Mariner East 2 Pipeline. (Ex. D.) The FERC issued a Declaratory Order approving the Mariner East 2 Pipeline's petroleum transport tariff in December 2014. (*Id.*) After holding the Open Season and receiving the FERC's approval, Sunoco passed a corporate resolution stating the Mariner East 2 Pipeline "is for the public use and in the public interest and there is a public necessity for acquiring, owning and holding easements, right of way,

and/or fee title . . . necessary for the construction, operation, and maintenance of the Pipeline.” (Ex. B.) The Teter Trust offered **no** evidence to rebut Sunoco’s resolution.

E. The Mariner East 2 Pipeline will Transport Petroleum.

Mr. Alexander, calling upon his twenty plus years of experience in the petroleum pipeline industry, testified that the propane and butane slated to be transported on the Ohio sections of Mariner East 2 are—without question—forms of petroleum. In fact, Mr. Alexander testified that in experience he has never heard anyone in the petroleum pipeline industry refer to propane, butane, and ethane as non-petroleum. This testimony was consistent with the industry terms established by the U.S. Energy Information Administration (“EIA”) admitted into evidence as Plaintiff’s Exhibits M and N. The EIA definition of petroleum expressly includes “Natural Gas Plant Liquids.” (Pl.’s Ex. M.) Indeed, the EIA the goes onto define Natural Gas Plant Liquids as “[t]hose hydrocarbons in natural gas that are separated as liquids at natural gas processing, fractionating, and cycling plants. Products obtained include **ethane, liquefied petroleum gases (propane, normal butane,** and isobutane), and natural gasoline. **Components may be fractionated or mixed.**” (Pl.s Ex. N) (emphasis added). By combing the plain language of these EIA definitions it is clear propane and butane are considered petroleum—by what both Mr. Alexander and Defendant’s Expert Dr. Matter testified to be a trusted source in the petroleum industry.

Despite agreeing with Mr. Alexander on the authoritativeness of the EIA definitions, Defendant’s witness, Dr. Matter weakly attempted to assert that propane and butane were not petroleum. Even after Dr. Matter conceded that propane and butane were hydrocarbons in natural gas that are separated as liquids at natural gas processing, fractionating, and cycling

plants, he would not concede that propane and butane meet the EIA definition of petroleum—apparently due to their refined purity. The conundrum of Dr. Matter’s testimony was further exacerbated when he conceded that the term fractionated as used in the Natural Gas Plant definition equated to “pure” propane or butane. Defying all logic, and despite recognizing that the definition of Natural Gas Plant Liquids encompassed propane and butane in their pure forms, Dr. Matter would not concede that propane and butane met the EIA definition of petroleum. However, Dr. Matter’s testimony was horribly inconsistent with his own EIA standards. Perhaps more importantly, Dr. Matter had no coherent response on what to do with Ohio’s valuable and useful propane and butane.

III. LAW AND ARGUMENT

A. Sunoco Is Authorized To Use Eminent Domain Under Chapter 1723 Of The Ohio Revised Code.

As a company organized for the purpose of transporting petroleum products for the public at large, Sunoco derives its statutory authority to appropriate land from ORC § 1723.01 which states:

[i]f a company is organized for the purpose of . . . transporting natural or artificial gas, petroleum, coal or its derivatives . . . through tubing, [or] pipes . . . then such company may enter upon any private land to examine or survey lines for its tubing, pipes, conduits, . . . **and may appropriate** so much of the land, or any right or interest therein, as is deemed necessary for the laying down or building of such tubing, conduits, pipes.

Ohio Rev. Code Ann. § 1723.01 (West 2015) (emphasis added). The Ohio Supreme Court first recognized and explained this right—as it relates to private companies engaged in the transport of petroleum—more than one hundred years ago:

The production of [petroleum] has become an extensive and valuable business, and for several years has been recognized as a legitimate part of our domestic and interstate commerce, and our general assembly has conferred upon companies organized for the storage and transportation of [petroleum], the right to acquire right of way for pipe lines, erection of tanks, and other means of storage, and such companies are invested with the rights of common carriers and subject to corresponding liabilities.

Langabaugh v. Anderson, 68 Ohio St. 131, 140–41 (1903). Other cases from the same time period make clear the purpose of the original statutory language was to provide pipeline companies with eminent domain authority. See *Columbus v. Federal Gas & Fuel Co.*, 22 Ohio Dec. 250, 252, (Dec. 15, 1910) (“These [Ohio statutory eminent domain] provisions confer the right of eminent domain on companies organized for the purpose, among other things, of the transportation of natural gas, petroleum, water or electricity, through tubing, pipes or conduits.”).

Thus, in this case, Sunoco possesses eminent domain authority because Sunoco is organized for the purpose of “transporting . . . natural or artificial gas, petroleum, coal or its derivatives . . . [through] tubing, pipe, [or] conduits” Ohio Rev. Code Ann. § 1723.01 (West 2015)

1. Sunoco’s Mariner East 2 Pipeline Will Be Used to Transport Petroleum.

The Teter Trust disputes that the products to be transported on the Mariner East 2 Pipeline fall within the language of ORC § 1723.01. Specifically, the Teter Trust asserted that Sunoco does not possess eminent domain authority under ORC § 1723.01 because it will not be transporting “natural or artificial gas, petroleum, coal or its derivatives.”

It appears that the technical, industry specific, nomenclature of hydrocarbons has confused the Teter Trust into the mistaken belief that the terms petroleum, oil, Natural Gas Liquids, propane, butane, and ethane are all mutually exclusive. Despite Defendant's misunderstanding, the testimony presented at trial and even a cursory reading of both the industry and statutory definitions of these terms make it clear that (1) the term petroleum denotes a very broad category that includes raw and refined hydrocarbons in both gaseous and liquid states, (2) the term petroleum includes "Natural Gas Liquids" typically stripped from a raw natural gas stream and then liquefied for transport; (3) propane and butane are explicitly defined to be Liquefied Petroleum Gas, and (4) propane, butane and ethane are forms of petroleum that are included in the Natural Gas Liquids subcategory. As a result, under every standard axiom of statutory construction, Sunoco will be transporting petroleum through the Mariner East 2 Pipeline.

The Teter Trust asserts that the Ohio Supreme Court's holding in *Norwood v. Horney*, requires this Court to apply the most restrictive definition of petroleum available. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶71 (citing *Pontiac Imp. Co. v. Board of Com'rs of Cleveland Metropolitan Park Dist.*, 104 Ohio St. 447, 453-54, 135 N.E. 635 (1922) ("the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner.")) However, this interpretation of the *Norwood* court's statement—which Teeter Trust would like this Court to adopt—is simply incorrect. The Ohio Supreme Court case cited by the *Norwood* court is useful to determine the courts actual meaning. In *Pontiac Improvement Company v. Board of Commissioners of Cleveland Metropolitan Park District*, the Ohio Supreme Court stated:

‘If the Legislature, by a direct exercise of authority, should undertake to appropriate property for purposes beyond the scope of this power; **or if any subordinate agency, under a power properly conferred, should abuse the authority by using it irregularly, oppressively, or in bad faith**, there can be no doubt of the power of the courts to furnish an effectual remedy against such illegal acts.’

Pontiac Imp. Co., 104 Ohio St. at 459. This statement clearly indicates that the scrutiny to be applied as a result of *Norwood* is twofold: (1) the Court must ensure that the Legislature did not go beyond the scope of its constitutionally granted powers in granting a private agency the authority to appropriate; and (2) the Court must ensure that the private subordinate agency has not abused the authority granted it by the legislature. Accordingly, this Court is not required to apply the most restrictive definition of petroleum to this Case, but may use the standard axioms of statutory construction to interpret the legislature’s meaning. This interpretation of the *Norwood* dicta is consistent with the Ohio Supreme Court’s holding in *Ohio Power Co. v. Deist*, which acknowledged “the propriety of placing a reasonable construction upon statutes authorizing condemnation of private land.” *Ohio Power Co. v. Deist*, 154 Ohio St. 473, 481, 96 N.E.2d 771 (1954). As such, this Court should apply the standard reasonable axioms of statutory construction.

i. The Ohio Legislature has defined Liquid Petroleum Gas and Petroleum to include Propane and Butane.

When a statute fails to define a term, courts are guided in construing the statutory term “by the legislature’s use of the same term defined elsewhere in the Revised Code. “*Ohio River Pipeline, LLC v. Gutheil* 144 Ohio App. 3d 694, 700, 761 N.E.2d 633, 638 (4th Dist. 2001) (citing *Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St. 3d 541, 639 N.E.2d 1154 (1994)).

a) The Ohio Administrative Code expressly defines Liquefied Petroleum Gas to include Propane and Butane.

This Court needs look no further than the express definition of Liquefied Petroleum Gas to conclusively establish that propane and butane are petroleum. The Ohio Administrative Code states that propane and butane—the two hydrocarbons going through the Mariner East 2 Pipeline in Ohio—are to be considered Liquefied Petroleum Gas. *See* Ohio Admin Code § 1301:7-7-38. This straight forward definition, that is directly on point with the facts in this case, provides this Court with a clear answer—propane and butane are forms of petroleum. Simply put, Defendant’s argument that propane and butane are not “petroleum” when the Ohio Administrative Code expressly defines them as “Liquefied Petroleum Gases” is an incoherent legal argument. Thus, the pipeline at issue is clearly carrying petroleum, by virtue of the fact it is carrying Liquid Petroleum Gas.

b) The general assembly has expressly defined petroleum to include Natural Gas Liquids—Ethane, Butane, and Propane.

In Ohio Revised Code § 3746.01(L) the Ohio Legislature expressly defined the term petroleum to include natural gas liquids. *See* Ohio Rev. Code. Ann. § 3746.0(L) (“**Petroleum means oil or petroleum of any kind and in any form, including, without limitation, . . . natural gas liquids.**”)(emphasis added). In two contemporaneous decisions, the Fourth and Fifth District Courts of Appeal utilized this definition in conjunction with ORC. § 1723.01 to find that a pipeline company did in fact have the right to appropriate lands for public use. *See Ohio River Pipe Lin LLC v. Henley*, 144 Ohio App. 3d 703, 708, 761 N.E.2d 640, 643–44 (5th Dist. 2001); *Gutheil*, 144 Ohio App. 3d at 700–01. Undisputed testimony from Mr.

Alexander has proven to this Court that butane and propane are part of the petroleum subcategory known as Natural Gas Liquids. Thus, butane and propane are forms of petroleum under the Ohio Revised Code.

Accordingly, pursuant to the definitions of petroleum and Liquefied Petroleum Gas utilized by the Ohio Legislature, Sunoco will be transporting petroleum on the Mariner East 2 Pipeline.

ii. The technical definition of “petroleum” recognized by the petroleum industry clearly encompasses propane and butane.

The Ohio Supreme court has expressly recognized “[a]n axiom of statutory construction is that ‘[w]ords . . . that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.’” *Hoffman v. State Med. Bd. Oh Ohio*, 113 Ohio St. 3d 376, 2007-Ohio-2201, 865 N.E.2d 1259, ¶ 26 (quoting Ohio Rev. Code Ann. § 1.42); *see also State v. Rentex, Inc.*, 51 Ohio App. 2d 57, 365 N.E.2d 1274 (8th Dist. 1977), paragraph one of the syllabus (terms in a statute regulating a specialized industry that uses terms that have acquired technical meanings in the industry require a technical interpretation). This axiom is derived from ORC § 1.42 that requires Courts to use the technical definition of a term if available. *See* Ohio Rev. Code Ann. § 1.42 (West 2015).

Sunoco’s Vice President of Business Development, Hank Alexander, testified that he had over twenty years of experience in the petroleum pipeline industry. Mr. Alexander further testified that in those twenty plus years he had never known the definition of petroleum to not include propane and butane. This testimony was further bolstered by the definitions of petroleum used by the EIA—the Federal body responsible for analyzing and disseminating independent and impartial energy information. The EIA has defined petroleum as “[a] broadly defined class of

liquid hydrocarbon mixtures. Included are crude oil, lease condensate, unfinished oils, refined products obtained from the processing of crude oil, and natural gas plant liquids.” Pl.’s Ex. M (emphasis added). The EIA further defines “natural gas plant liquids” as “[t]hose hydrocarbons in natural gas that are separated as liquids at natural gas processing, fractionating, and cycling plants. Products obtained include ethane, liquefied petroleum gases (propane, normal butane, and isobutane), and natural gasoline.” Pl.’s Ex. N (emphasis added). As discussed above, Sunoco’s Mariner East 2 Pipeline will carry butane and propane through its Ohio pipeline sections. These EIA definitions clearly indicate that the petroleum industry considers natural gas liquids—including butane and propane—to be a form of petroleum.

Accordingly, if this Court needs further guidance other than the legislative and Ohio Administrative Code definition, this Court may utilize the petroleum pipeline industry’s technical definition of the term when interpreting the statute. Thus, the butane and propane that will be transported for the public at large through the Mariner East 2 Pipeline are forms of petroleum under Ohio statutory law. Consequently, Sunoco is authorized under the Ohio Revised Code to appropriate property for the construction of its pipeline.

B. As a Common Carrier Appropriating Necessary Lands for a Public Use, Sunoco Has the Right to Appropriate Defendant’s Property.

Under Ohio’s appropriation statutes, the burden of proof initially rests with the taking agency to show “by a preponderance of the evidence that the taking is necessary and for a public use.” Ohio Rev. Code Ann. § 163.021 (West 2015).

1. Sunoco is Unquestionably a Common Carrier

In Ohio Revised Code § 1723.08, the Ohio Legislature has expressly stated that a company organized to transport petroleum through pipelines is a “common carrier.” Ohio Rev.

Code Ann. § 1723.08 (West 2015). While the term “common carrier” is not defined explicitly by statute, Ohio Courts have consistently held that “[a] common carrier is one who holds [itself] out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally.” *Columbus-Cincinnati Trucking Co. v. Public Utilities Commission*, 141 Ohio St. 228, 231–32, 47 N.E.2d 623, 625 (1943); *Petrasek v. TC3 Operations, Inc.*, 8th Dist. No. 95519, 2011-Ohio-1962, ¶ 3 (2011); *Korner v. Cosgrove*, 108 Ohio St. 484, 141 N.E. 267 (1923). The “decisive feature” of whether a business is operating as a common carrier is whether it “would enter into a contract with any responsible person for a single transaction to the limit of the capacity of [its] equipment.” *Breuer v. Pub. Utilities Commission of Ohio*, 118 Ohio St. 95, 98–99, 160 N.E. 623, 624 (1928); *Loveless v. Ry. Switching Serv., Inc.*, 106 Ohio App. 3d 46, 51 (1st Dist.1995) (finding a distinctive characteristic of a “common carrier” is that it undertakes to carry for all people indifferently, and hence, is regarded in some respects as a public servant.); *see also Petrasek*, 2011-Ohio-1962, ¶23; 67 A.L.R. 588 (Originally published in 1930).

In this case, Sunoco clearly meets the requirements of a common carrier. Not only is Sunoco a company organized to transport petroleum through pipelines as required by ORC § 1728.08, but Sunoco is also a company engaged in transporting property—indiscriminately—from place to place for the general public at large.

In fact, Sunoco’s common carrier status was recognized by the FERC. Pl.’s Ex. D, at ¶ 16. Sunoco held a public open season from December 4, 2013, to May 30, 2014, where any interested shippers had the opportunity to commit to using the Mariner East 2 Pipeline to transport their petroleum products. *See Id.* at p.3. These shippers will be charged the committed

rate recently approved by the Federal Energy Regulatory Commission. *Id.* at p. 1. In this Order, the FERC recognized that Sunoco will be acting as a common carrier in regards to the Mariner East 2 Project, because any person with the capability that wishes to transport petroleum on the Mariner East 2 Pipeline would be permitted carriage, provided sufficient capacity existed. To ensure that the entirety of the general public has an opportunity to transport petroleum on the Mariner East 2 pipeline, Sunoco is federally mandated to keep ten-percent of its capacity available for “walk-up” shippers. These walk-up shippers represent any person or entity that wants to transport petroleum along the Mariner East 2 Pipeline without specific commitment.

2. Lands Appropriated for the Mariner East 2 Project are for a Public Use.

Although Ohio’s appropriation statutes only requires an agency to establish a single public use, the Mariner East 2 Pipeline will serve at least three. First, it is a common carrier pipeline whose use is open to any member of the public wishing to transport petroleum—it will therefore be a “public use” in the most literal sense of the word. Second, it serves the public’s interest by providing critical take-away capacity to natural gas processing facilities in Eastern Ohio—and the Ohio mineral interest owners utilizing the facilities—thereby supporting the development of Ohio’s Marcellus and Utica Shale play. Third, the pipeline will serve the public by delivering propane and butane for sale to public consumers for uses such as home heating and synthetic material manufacturing.

i. Sunoco is a Common Carrier Constructing the Mariner East 2 Pipeline.

Ohio Revised Code section 163.01(H) indicates that a taking by a common carrier—like Sunoco—constitutes a public use under the right circumstances. ORC § 163.01(H) provides:

(H)(1) “Public use” does not include any taking that is for conveyance to a private commercial enterprise, economic development, or solely for the purpose of increasing public revenue, **unless the property is conveyed** or leased **to** one of the following:

(a) A public utility, municipal power agency, or **common carrier**

Ohio Rev. Code Ann. § 163.01(H) (West 2015) (emphasis added). Thus, ORC § 163.01(H) establishes that an appropriation by a private commercial enterprise with common carrier status is statutorily defined to be a public use. *See id.* Just as this Court need look no further than the Ohio Administrative and Revised Codes to find that the term “petroleum” includes butane and propane, this Court need look no further than the Ohio Revised Code to determine that an appropriation by Sunoco to develop the Mariner East 2 Pipeline is without question a Public Use.

ii. Sunoco’s Mariner East 2 Pipeline will Serve as a Public Use by Fulfilling the Dire Needs of Ohio’s Utica and Marcellus Shale Development.

The interest of all Ohioans is furthered through the economic development of Ohio’s shale play. Mr. Alexander testified that Ohio shale is viewed as a “one-hundred year play” by the petroleum and natural gas industries. But without adequate pipeline infrastructure in place, the over saturation of the local market and the inability to transport Ohio petroleum to profitable markets utilizing the safest, most efficient and economical method available, the development and production of the Utica shale will likely stagnate. This use has already been recognized by the FERC. Pl.’s Ex. D, at ¶ 27 (noting that “Sunoco has demonstrated that additional NGL transportation is necessary in the active natural gas production areas to be served by the [Mariner East 2] Project.”).

iii. Sunoco’s Mariner East 2 Pipeline will deliver Propane and Butane for Public Consumption.

Mr. Alexander testified that propane and Butane are extremely important forms of petroleum used by every American. The Butane transported from Ohio’s Utica shale will be blended into gasoline and transported back to the Midwest as winter gasoline ensuring that motor vehicles in Ohio are able to properly function during the winter months. The Mariner East 2 Pipeline will transport propane to be used for both residential and commercial heating. This will help to prevent shortages and price gauging during the frigid winter months in the Northeastern United States. Finally, both the propane and butane will be further refined in to plastics for use in manufacturing industries to create products used every day.

3. Land Appropriation for the Mariner East 2 Pipeline Is A Necessity.

The Ohio Revised Code states that when a common carrier such as Sunoco, presents evidence of the necessity of an appropriation, a rebuttable presumption is established in favor of Sunoco. Ohio Rev. Code Ann. § 163.09 (West 2015) (“[T]he presentation by a public utility or common carrier of evidence of the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation.”). In fact, a “corporate resolution to construct the pipeline was *prima facie* evidence that the pipeline is a public necessity, in the absence of any proof of an abuse of discretion in determining the necessity of the pipeline.” *Gutheil* 144 Ohio App. 3d at 702. In this Case, Sunoco has passed a resolution declaring the necessity of the appropriation and satisfied its burden of demonstrating the necessity of the Mariner East 2 Pipeline Project. Pl.’s Ex. B. Once this evidence was proffered to this Court “the burden was on the landowners to establish that no public necessity existed.” *Gutheil* 144 Ohio App. 3d at 702. The Teter Trust proffered **no** evidence to rebut the presumption of necessity created by Sunoco’s

resolution. “As no evidence was presented on the necessity issue, the landowners did not sustain their burden of proof.” *Id.* Further, failure to present evidence at trial on the lack of necessity constitutes a waiver, and precludes the Defendant from arguing the issue on appeal. *Id.* Accordingly, any appropriations made to construct the Mariner East 2 Pipeline are statutorily deemed to be a necessity.

Even without Sunoco’s resolution which establishes the necessity of the project, Ohio courts have made it clear that “necessary” only requires a showing that the proposed project is “reasonably convenient or useful to the public.” *Bd. of Trs. of Sinclair Cmty. College Dist. v. Farra*, 2nd Dist. No. 22886, 2010 Ohio 568, ¶ 37 (quoting *City of Dayton v. Keys*, 21 Ohio Misc. 105, 112, 252 N.E.2d 655 (1969)). “In statutory eminent domain cases it cannot be limited to an absolute physical necessity.” *Id.* Furthermore, “a contention that some other location or configuration might have served the same purpose is not a valid objection regarding whether the appropriation is necessary.” *Eschtruth Inv. Co., LLC v. City of Amherst*, 9th Dist. No. 10CA009870, 2011-Ohio-3251, ¶ 10.

Thus, it matters not whether the petroleum at issue could arguably be transported by other less safe or less efficient means. The question is whether this Common Carrier pipeline, and pipelines like it, are “convenient or useful to the public,” a standard which Sunoco easily satisfies. FERC itself has already considered this issue in favor of Sunoco’s position as follows:

SUNOCO has demonstrated that additional NGL transportation is necessary in the active natural gas production areas to be served by the [Mariner East 2] Project. SUNOCO has demonstrated that excess NGLs are being produced in the Marcellus and Utica Shale areas, which may impede natural gas production unless additional NGL transportation can be developed.

Pl.'s Ex. D, at ¶ 27. Further, as discussed above the Mariner East 2 Pipeline will fulfill several Public Uses. Accordingly, even at common law, the Mariner East 2 Project is a necessity.

IV. CONCLUSION

The evidence before this Court, proves that Sunoco is a common carrier transporting petroleum through a pipeline that will serve as a public use. Further, the record unquestionably shows that any appropriations made by Sunoco are a necessity. As stipulated on the record, Sunoco complied with all statutory procedural requirements including obtaining an appraisal and notifying the Defendant of its intent to appropriate. Accordingly, Sunoco has the right to appropriate Defendant's property.

Respectfully submitted,

/s/ Gregory D. Brunton

Gregory D. Brunton (0061722)

Daniel J. Hyzak (0091298)

Reminger Co., LPA

65 East State Street, 4th Floor

Columbus, Ohio 43215

(614) 228-1311 (direct dial - Brunton)

(614) 232-2417 (direct dial - Hyzak)

(614) 232-2410 (fax)

Email: gbrunton@reminger.com

Email: dhyzak@reminger.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, by email and regular U.S. mail this 2nd day of November, 2015:

Nicholas I. Anderson, Esq.
Jessica L. Samuel, Esq.
Arenstein & Anderson, Co., LPA
5131 Post Road, Suite 350
Dublin, Ohio 43017
*Attorneys for Defendant, Carol A. Teter,
Trustee of the Carol A. Teter Revocable Trust*

C. Craig Woods, Esq.
Andrew H. King, Esq.
Squire Patton Boogs (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
*Attorneys for Defendant, Enterprise TE
Products Pipeline Company, LLC*

/s/ Gregory D. Brunton
Gregory D. Brunton (0061722)
Daniel J. Hyzak (0091298)