

CODV

FILED
15 DEC 14 PM 1:09
LESLIE A. MILLER
CLERK OF COURTS
HARRISON COUNTY, OHIO

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

SUNOCO PIPELINE L.P.
Plaintiff,

CASE NO. CVH-2015-0058

vs.

JUDGMENT ENTRY

CAROL A. TETER TRUSTEE, ET AL
Defendants.

This matter is before the Court on Plaintiff's complaint to appropriate property pursuant to 1723 of the Ohio Revised Code. A Full Hearing on said complaint was heard before the Court on October 21, 2015. Attorney Gregory D. Brunton represented Plaintiff Sunoco Pipeline L. P. Attorney Nicholas I. Anderson represented Defendant Carol A. Teter, Trustee.

Facts

Sunoco Pipeline L.P. hereinafter referred to as "Sunoco" intends to build a pipeline from Scio, Ohio to Marcus Hook Industrial Complex located in Marcus Hook, Pennsylvania and Claymont, Delaware. The project known as the "Mariner East 2 Pipeline" will cross portions of Ohio, West Virginia, Pennsylvania, and Delaware.

The purported purpose of the pipeline is to transport primarily propane and butane. The source of the propane and butane comes from the Utica Shale region of South Eastern Ohio and the fractionation process at the Harrison County origination plants which fractionate the new materials drawn from wells.

Plaintiff contended that they have standing under Ohio Law to appropriate land for said pipeline pursuant to Ohio Revised Code §1723.01. Plaintiff contends that they will be transporting petroleum. Plaintiff further contends that they are common carriers in that the pipeline is open to the public at large and has met the Federal Energy Regulatory Commission Rules for common carriers. Plaintiff argues that the pipeline will serve a public use by facilitating the transport of Utica Shale production of “wet” gases to market.

Defendant’s (Teter) claim that no authority for appropriation exists as Plaintiff’s will not be piping petroleum. Defendant’s (Teter) further claim that no Ohio public purpose exists for said pipeline.

The Court must resolve the following issues:

1. Do the products that will be shipped through the pipeline meet the definition of petroleum?
2. Is the pipeline a common carrier?
3. Does the pipeline serve a public purpose?

§1723.01 of the Ohio Revised Code is an appropriation statute, which reads as follows:

“if 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 or pipes.”

The standard of review on such cases where eminent domain is proposed by a corporation was articulated in “*Parkside Cemetery Assn. v. Cleveland, Bedford & Geauga Lake Traction Co.*” 93 Ohio St. 161 (Ohio 1915)

“The right of eminent domain belongs to the sovereign power, and statutes delegating authority to exercise it must be strictly construed. When it is sought to take the property of an individual under statutes granting such authority to corporations, subject to conditions set specifically, the protection of the constitutional guaranty of the right of private property requires that the powers granted by the legislature be strictly pursued...”

Under Ohio’s appropriation statute Ohio Revised Code. §163.021 the burden of proof initially rests with the agency to show “by a preponderance of the evidence that the taking is necessary and for a public use.

Plaintiff argues that they have the power of eminent domain because:

1. They are transporting petroleum through their pipeline.
2. They are a common carrier as defined by federal law.
3. They are serving a public purpose by providing a source for the Utica Shale play to bring its products to market and provide a heating source to consumers through its delivery of propane.

Defendants dispute Plaintiff's authority of eminent domain as Defendant (Teter) contends that Plaintiff does not meet the standard of:

1. Transporting petroleum.
2. Being a common carrier.
3. Serving a public purpose.

Petroleum

The parties disagree whether the intended products to be delivered by the pipeline constitute petroleum.

The Court's understanding of what the process is for transporting materials in the pipeline is as follows.

- 1) Raw materials are extracted from wells and transported to fractionation plants in Scio, Ohio and Jewett, Ohio.
- 2) The fractionation plant separates the raw materials to component products.
- 3) The component products are usually more than 90% pure and are liquefied for transport.
- 4) In the case at bar the Mariner 2 East Pipeline will be transporting butane and propane.

Ohio Revised Code §1723.01 allows companies transporting petroleum through their pipelines to appropriate property for that purpose. The Plaintiff will be transporting liquefied butane and propane through their pipeline. Does liquefied propane and butane meet the statutory definition of petroleum?

Ohio Revised Code §1723.01 does not define petroleum. 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 Ohio Revised Code "*Ohio River Pipeline LLC. v. Gutheil* 144 Ohio App 3d 694, 700. (4th Dist 2001) citing *Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St. 3d 541 (1994).

Ohio Revised Code §3746.01 (L) defines petroleum as . . . "oil or petroleum of any kind and in any form, including without limitation, crude oil or any fraction thereof, petroleum, gasoline, kerosene, fuel oil, oil sludge, oil refuse, used oil, substances or additives utilized in the refining of crude petroleum or petroleum stock, natural gas, natural gas liquids, liquefied natural gas, synthetic gas useable for fuel and mixture of natural gas and synthetic gas.

The Ohio Administrative Code §1301-7-7-38 states that propane and butane are to be considered liquefied petroleum gases.

The Court also recognizes that the U. S. Energy Information Administration has defined petroleum and that both the Plaintiff's witness and Defendant's (Teter) expert referred in their testimony to the EIA's definitions. The EIA defines petroleum among other things as natural gas plant liquids. Furthermore, the EIA defines natural gas plant liquids as those 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 and normal butane, and isobutene), and natural gasoline. Components may be fractionated or mixed.

The Court heard testimony from Dr. Matter regarding definition of petroleum. Dr. Matter's testimony concentrated on propane and between be fractionated to a pure or over 90% pure state and that fact that in order to be

shipped via pipeline propane and butane would be liquefied. Pursuant to his testimony Dr. Matter concluded that propane and butane in pure form should be excluded from the definition of petroleum.

In reviewing arguments of the parties, testimony of the witnesses and corresponding case law the Court comes to the following conclusion.

The Court finds that propane and butane meet the statutory definition of petroleum under Ohio law. The Court finds its decision follows decisions of the Fourth and Fifth Ohio Appellate Districts. In *Ohio River Pipeline LLC v Henley* 144 Ohio App. 3d 703 at 708 (5 Dist. 2001) and *Gutheil*, 144 Ohio App. 3d at 700-701.

Specifically the Court finds that:

- 1) Petroleum pursuant to Ohio Revised Code §3746.01(L) includes liquefied natural gas.
- 2) Liquefied natural gas – Liquefied petroleum gases pursuant to Ohio Administrative Code §1301:7-7-38 specifically includes propane and butane.
- 3) The EIA which both parties sight as definitional authority for the energy industry include in its definition of petroleum natural gas plant liquids.
- 4) The EIA defines natural gas plant liquids to include propane and butane and that components may be fractionated or mixed.

The Court makes the following Conclusion of Law.

Propane and butane are natural gas plant liquids and definitionally petroleum pursuant to United States Energy Information Agency. The Court finds

that propane and butane are liquefied natural gases pursuant to Ohio Revised Code §3746.01(L) and Ohio Administrative Code 1301: 7-7-38.

Both Ohio Administrative Code 1301: 7-7-38 and the EIA allow the gases to be fractionated and liquefied. Thus this Court expressly rejects the Defendant's (Teter) assertion that propane and butane in their liquefied and purified status fail to meet the petroleum definition as both fractionated and liquefied natural gas products are included in the definition of petroleum as explained in the preceding paragraphs.

Is the pipeline a common carrier?

Ohio Revised Code §163.01(H)(1) provides:

“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 converted or leased to one of the following:

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

Furthermore, Ohio Revised Code §1723.08 states that a company organized to transport petroleum pipelines is a common carrier.

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 of place, for compensation, offering his services to the public generally.” *Columbus–Cincinnati Trucking Co. v. Public Utilities Commission* 141 Ohio St. 228-231-32, *Petrasek v. TC3 Operations Inc.* 8th Dist No. 95519, 2011-Ohio-1962, *Korner v. Cosgrove*, 108 Ohio St. 484 (1923). The decisive

feature of whether or not 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?" *Brewer v. Public Utilities Commission of Ohio*, 118 Ohio St. 95, 98-99 (1928).

The Court finds that Plaintiff is a company organized to transport petroleum.

The Court further finds that Plaintiff complied with the Federal Energy Regulating Commissions requirement for common carriers in that:

- 1) They entered into a public open season where any interested shippers had the opportunity to commit to using the Mariner East 2 Pipeline.
- 2) The shippers were charged a rate approved by the Federal Energy Regulating Commissions.
- 3) General public still will have access to 10% of the pipelines capacity on a walk up basis without commitment.

WHEREFORE, the Court finds that Plaintiff is a common carrier pursuant to Ohio law in that they are:

- 1) A company organized to transport petroleum.
- 2) The products to be transported are definitionally petroleum.
- 3) The shipping was offered to the general public at a Federal Energy Regulating Commissions open season period.
- 4) 10% of shipping capacity remains open to the general public.

Is the pipeline necessary and does it constitute a public use?

Under the 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. The 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 Ohio Revised Code §163.021.

The Court recognizes that the term “necessary” only requires a showing that the proposed product is “reasonably convenient or useful to the public” *Solether v. Turnpike Comm.*, 99 Ohio App. 228 (1954) “In statutory eminent domain cases it cannot be limited to an absolute physical necessity Id at 228. 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*, 2011 Ohio 32510, P10 (Ohio App. Lorain County).

The Court finds that the pipeline is necessary. The Court relies on the “Solether” court’s decision that necessary requires that the proposed project is reasonably convenient or useful to the public.

The Court finds that it is undisputed that Eastern Ohio has an abundance of wet gas in its Utica shale. The Court takes note of the expanding drilling operations and the construction of oil and gas fractionating facilities in Harrison County, Ohio.

The Court is further cognizant that in order for the Utica shale play to develop, pipelines must be constructed to move the wet gas to the fractionating

plants in their raw form and from the fractionating plants in their useful forms to consumers.

The Court finds that it is reasonably convenient and useful to the public to provide a streamlined means to take raw materials from the well site to the plant and from the plant to consumers.

The Court specifically finds that the pipeline will be convenient and useful to Ohio citizens whose oil and gas will be sold to consumers serviced by the pipeline.

WHEREFORE, the Court finds that the appropriation of property for the pipeline is necessary.

The Court finds the pipeline will service a public use.

The Court further finds:

- 1) It is a common carrier pipeline whose use is open to any member of the public wishing to transport product through it.
- 2) The pipeline creates a means to deliver eastern Ohio resources to market.
- 3) The pipeline provides a heating source to consumers by delivering propane.

WHEREFORE, the Court finds the pipeline will service multiple public uses.

In conclusion, the Court is well aware that appropriation of property goes against the fundamental concept of a person's right to be secure in the ownership and use of their property. That is why appropriation of property must be narrowly tailored and used only for legitimate and necessary purpose to further the public

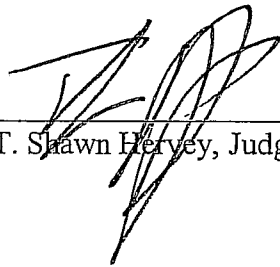
good. The State of Ohio through its' statutes and court cases have extended appropriation rights to common carriers of petroleum.

The Court finds that Plaintiff is constructing a pipeline which will convey propane and butane from eastern Ohio to Markus Hook Pennsylvania. The Court finds that butane and propane meet the legislative definition of petroleum for Ohio. The Court finds that the pipeline is a common carrier in that shipping on said pipeline was open to public bidding and that 10% of shipping capacity is open to the public on a continuing basis. The Court further finds that the pipeline is necessary to move product from eastern Ohio to market and that it serves a public use by providing access for Ohio products to consumers, by providing the public with a means for propane and butane distribution and by providing propane heat to consumers.

WHEREFORE, the Court finds Plaintiff's Verified Complaint For Condemnation And Verified Petition For Appropriation Of Easement Interests In Real Property filed May 19, 2015 is well taken and grants the same.

This matter will come before the Court on **February 5, 2016 at 10:00 a.m.** for a **Hearing on Compensation.**

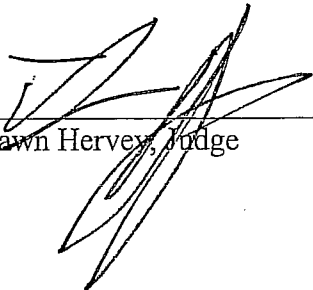
SO ORDERED.



T. Shawn Hervey, Judge

NOTICE: FINAL APPEALABLE ORDER

This is a final appealable order. For each party who is not in default, serve notice to the attorney for each party and to each party who represents himself or herself by regular mail service with certificate of mailing making notation of same upon case docket.



T. Shawn Hervey, Judge

Stamped copies:

Attorney Gregory D. Brunton
Attorney Nicholas I. Anderson
Attorney Andrew King
Wells Resources Group LLC
Texas Eastern Products Pipeline
Sinclair Oil & Gas Co.