

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ROCKIES EXPRESS PIPELINE, LLC,

Plaintiff,

v.

Case No. 2:08-cv-554

JUDGE GREGORY L. FROST

Magistrate Judge Terence P. Kemp

**4.895 ACRES OF LAND, MORE OR LESS,
IN BUTLER COUNTY, OHIO
(PIPELINE RIGHT-OF-WAY SERVITUDE), et al.,**

Defendants.

ORDER

Under Federal Rule of Civil Procedure 71.1(h), “[i]f a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.” Fed. R. Civ. P. 71.1(h)(2)(A). Cognizant of this option, this Court in its discretion previously concluded in a November 20, 2008 Opinion and Order that appointment of a compensation commission is in the best interests of those parties that had requested a jury trial in this litigation. (Doc. # 494.) The Court therefore **GRANTED** Plaintiff’s motion to appoint a commission in regard to the qualifying defendants and advised the parties of the identity and qualifications of each of the following prospective commissioners and alternates:

- (1) Gerald Hinkle;
- (2) Craig Paynter;
- (3) Gregory Travalio (Chairperson);

(4) James Trifelos (Alternate); and

(5) Wesley Untied (Alternate).

Although discretionary, the Court then permitted those parties that had made a timely request to examine the prospective commissioners and alternates at a December 8, 2008 in-court hearing. These parties and others were able to object to the appointment of each commission for good cause. *See* Fed. R. Civ. P. 71.1(h)(2)(C). The Court subsequently overruled all objections to the commissioners, indicated that it would proceed to formally appoint the commission, and permitted the parties to file suggested instructions for the commissioners. (Docs. # 546, 552.) In accordance with the Court's direction, various parties then filed proposed instructions. (Docs. # 575, 576, 577, 578, 579, 580, 581, 582, 584, 585.)

Today's decision officially appoints the five individuals identified above as commissioners, with the chairperson and alternate designations applying to Travaglio, Trifelos, and Untied, respectively. The appointment of Paynter carries with it one qualification: to safeguard against any appearance or perception of impropriety, the chairperson of the commission shall replace Paynter on any hearing involving counsel Bruce Ingram with one of the two alternates, who shall serve on the regular commission panel on such hearings on a rotating basis subject to availability. The Court emphasizes that it has no cause to consider this limitation on Paynter's appointment necessary other than as a prophylactic concession to the possible misconceptions of parties or counsel who might unduly question Paynter's participation in hearings involving Ingram due to their acting as opposing advocates in wholly unrelated cases. The qualified appointment is in no way intended to reflect adversely on the character, merits, or professionalism of Paynter or any party or counsel involved.

Having made the formal appointment of the commission and having reviewed the parties' proposed instructions, the Court shall now proceed to set forth the duties of the commissioners and the applicable law as contemplated in *Merz v. United States*, 376 U.S. 192 (1964). In *Merz*, the United States Supreme Court explained:

The first responsibility of the District Court, apart from the selection of responsible commissioners, is careful instruction of them on the law. . . . [T]he instructions should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, and of the limited purpose of viewing. They should be instructed on the kind of evidence that is inadmissible and the manner of ruling on it.

The commissioners should also be instructed as to the kind of report to be filed. Since by Rule 71A(h) the report has the effect of a master's findings of fact under Rule 53(e)(2), the commission should be instructed as to what kind of findings should be included.

Id. at 198 (discussing former Rule 71A, the precursor to Rule 71.1; footnotes omitted). Guided by this directive, the Court shall proceed to set forth the requisite instructions to the commission.

General instructions on commissioners' duties, powers, and report. Pursuant to Rule 71.1, "[a] commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report." Fed. R. Civ. P. 71.1(h)(2)(D). Accordingly, the Court directs that the commissioners shall (1) regulate all commission hearings and all proceedings related to these hearings, such as briefing at the discretion of the commissioners; (2) take all appropriate measures to perform their assigned duties fairly and efficiently; and (3) exercise the same power as this Court to compel, take, and

record evidence. Fed. R. Civ. P. 53(c). The commission shall also produce written orders as necessary, which the commission shall forward to chambers for filing and service on each party involved in a hearing. Fed. R. Civ. P. 53(d). Similarly, the commission shall produce a written report, or recommendation, to the Court that shall be filed and served on each party involved in a hearing. Fed. R. Civ. P. 53(e).

All written orders, reports, or recommendations shall be signed by the participating committee members, and, as with all orders and reports, an electronic signature is sufficient. Evidentiary or procedural orders as recognized below that fall within the province of the chairperson need only be signed by the chairperson. The written orders, reports, or recommendation (which should typically be designated a “Report and Recommendation” when constituting the final commission decision on a hearing) shall include all relevant findings of fact and conclusions of law; procedural orders need not be as comprehensive but should be sufficiently detailed to enable this Court to conduct adequate review when necessary.

The United States Supreme Court has stated that “[c]onclusory findings are alone not sufficient,” because a district court would “have no way of knowing what path the commissioners took through the maze of conflicting evidence.” *Merz*, 376 U.S. at 198. Thus, although “[the commissioners need not make detailed findings such as judges do who try a case without a jury,” the commissioners must nonetheless “reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on.” *Id.* See also 13 James W. Moore, *Moore’s Federal Practice* § 71.1.12[4], at 71.1-61 (“A report containing only conclusory statements and a summary of the evidence is clearly insufficient.”). Additionally, not “every contested issue

raised on the record before the commission must be resolved by a separate finding of fact” and there does not have to be “an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based.” *Id.* at 198-99. Rather, “[t]he path followed by the commissioners in reaching the amount of the award [must], however, be distinctly marked.” *Id.* at 199. The commission is therefore “required to state not only the end result of their inquiry, but the process by which they reached it.” *Id.*

Upon the filing of a commission order or report, a party involved in the hearing with which the order or report is concerned may file specific and detailed objections to—or a motion to adopt or modify—the commission order, report, or recommendation no later than eleven (11) days after a copy is served. Fed. R. Civ. P. 53(f)(2). This shall constitute the party’s notice of and opportunity to be heard on the order, report, or recommendation. Fed. R. Civ. P. 53(f)(1). The Court may in its discretion elect to receive evidence related to the order, report, or recommendation, but no oral argument or hearing on any objection will be held unless ordered by the Court. The parties should note that in acting on a commission order, report, or recommendation, the Court may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the commission with instructions the order, report, or recommendation. Fed. R. Civ. P. 53(f)(1).

The Court’s review of any objection to an order, report, or recommendation shall be *de novo* in regard to findings of fact made or recommended by the commission, unless the parties stipulate that the findings of fact will be reviewed for clear error. Fed. R. Civ. P. 53(f)(3). The Court will decide any objection to a conclusion of law made or recommended by the commission on a *de novo* basis. Fed. R. Civ. P. 53(f)(4). The parties should note that the Court will set aside

a commission ruling on a procedural matter only for an abuse of discretion. Fed. R. Civ. P. 53(f)(5).

Additional duties of chairperson. The Court has designated Gregory Travalio as the Commission Chairperson. In this capacity, Travalio shall make all discovery and evidentiary rulings related to all hearings in which he takes part. *See* 13 James W. Moore, *Moore's Federal Practice* § 71.1.12[1], at 71.1-55 (“A lawyer is often appointed by the court to function as chairperson and to make evidentiary rulings.”). In any hearing in which Travalio does not participate, he shall designate another commissioner to assume the role of chairperson for that hearing and that designated chairperson shall make all evidentiary rulings. The chairperson shall also be responsible for conducting the hearing—i.e., calling the hearing to order and supervising the proceedings. Finally, although all of the exhibits that have been admitted into evidence will go to the courtroom deputy at the conclusion of deliberations, the chairperson is charged with maintaining control of the exhibits until delivery to the courtroom deputy.

Alternate commissioners. The alternate commissioners shall attend each hearing and shall not be discharged until the commission has reached a just compensation decision. Prior to replacing a commissioner, an alternate commissioner cannot be present at, or participate in, the commission's deliberations. If something happens to one of the regular commissioners before or during deliberations—making it impossible for the regular commissioner to continue his duties—the alternate commissioner will replace that regular commissioner. If such replacement occurs during the course of deliberations, the commission must start its deliberations over again. Unless he has replaced a regular commissioner and is engaged in the deliberations, no alternate commissioner may discuss the case with anyone, including the other alternate commissioner.

Viewing property. Any party may file a written request or stipulation thirty (30) days prior to a scheduled hearing for a viewing of the property by the commission. If the assistance to the commission is outweighed by an injustice to the property owner, however, the request for a viewing may be denied. Such denial is proper, for example, where the only purpose the view could serve would be to show the property in an unfair light or where the commission, in the exercise of its discretion, finds that the prejudicial nature of the view exceeds any illustrative benefits or efficacy. If a viewing is not denied or is held by stipulation, the commission and the parties shall then work to coordinate the viewing, which must be completed prior to the close of evidence. Failure to file a written request or stipulation by the deadline described shall constitute a waiver or forfeiture of a request for a viewing, subject to a showing of good cause warranting an exception for an untimely request. The view of the premises is not evidence. Rather, it is solely for the purpose of enabling the commission to better understand the evidence offered by the parties.

Location of hearing. Unless otherwise ordered by the chaiperson or this Court, all hearings shall be held at the Joseph P. Kinneary Courthouse in the United States District Court for the Southern District of Ohio in Columbus, Ohio. Hearings may as necessary be held away from this location in order to accommodate schedules or for the convenience of the parties, counsel, or commission members. Any party may file a written request or stipulation thirty (30) days prior to a scheduled hearing to conduct the hearing in a location other than the courthouse. Failure to file such a written request or stipulation by the deadline described shall constitute a waiver or forfeiture of a request for an alternate location, subject to a showing of good cause warranting an exception for an untimely request.

Manner of hearing. Each property owner is entitled to a separate and distinct hearing before a panel of three commissioners. The alternates shall also attend the hearing. The manner of the hearing shall adhere to the conventions of a trial. Defendant landowner(s) shall present evidence first. Plaintiff shall then present evidence, followed by rebuttal by Defendant. Continued rebuttal is in the discretion of the chairperson. The parties through counsel shall then present an oral closing argument, after which time the panel shall take the matter under advisement and conduct subsequent deliberations that should result in a written Report and Recommendation. The decision of the commission is determined by a majority. *See* 13 James W. Moore, *Moore's Federal Practice* § 71.1.04[2][h], at 71.1-32 (stating that a commission's "action and report are determined by a majority"). All hearings must be on the record through a registered court reporter.

Duty in deliberating. The Court cannot embody all the law in any single part of these instructions. One portion of the instructions should be considered in light of and in harmony with all the instructions. Whether certain instructions are applicable may depend upon the conclusions the commission reaches on the facts. If a commissioner has an impression that the Court indicated how any disputed fact should be decided, the commissioner must put aside such impression because only the commissioners determine such a matter.

The commission must not be influenced by any consideration of sympathy or prejudice. It is the commission's duty to weigh the evidence, to decide the disputed questions of fact, to apply the instructions to the commission's findings, and to render a decision accordingly. In fulfilling their duty, the commissioners' efforts must be to arrive at a fair and just compensation award.

It is the commissioners' duty to consult with one another and to deliberate with a view of reaching an agreement if they can do so without disturbing their individual judgment. Each of the commissioners must decide each contested issue for themselves, but should do so only after an impartial consideration of the evidence in the case with their fellow commissioners. In the course of the commission's deliberations, no commissioner should hesitate to re-examine his own views and change his opinion if he is convinced that it is erroneous. However, no commissioner should surrender his honest conclusion as to the weight or effect of the evidence solely because of the opinion of his fellow commissioners or for the mere purpose of returning a decision.

The commissioners are the judges—impartial triers of the facts. Their sole interest is to ascertain the truth from the evidence in the case. No commissioner should take a firm position at the outset and then be too proud to change his position.

Applicability of federal rules. The commission proceedings shall be conducted as a trial in accordance with the Federal Rules of Evidence and the Federal Rules of Civil Procedure, except where provisions of the latter are clearly inapplicable to commission proceedings. *See* 13 James W. Moore, *Moore's Federal Practice* § 71.1.12[4], at 71.1-59 (noting that “[t]he Federal Rules of Evidence apply in all condemnation proceedings, whether tried before the court, a jury or a commission”). The chairperson may at his election permit the filing of hearing briefs and motions *in limine*, and the parties shall comply with any scheduling order the chairperson issues.

General instruction. It is the duty of the commission to determine the amount of just compensation and any damages to the residue, if any, payable by Plaintiff to each defendant. Although the commissioners are the sole finders of the facts, they are duty bound to follow the

law as stated in the instructions of the Court and to apply the law to the facts as they find the facts from the evidence presented to the commission. The commission is not to single out any one instruction alone as stating the law, but must consider these instructions as a whole.

No commissioner is to be concerned with the wisdom of any rule of law. Regardless of any opinion that a commissioner may have as to what the law ought to be, it would be a violation of that commissioner's duty to base a decision upon any other view of the law than that given in the instructions of the Court, just as it would also be a violation of the commissioner's duty, as a finder of the facts, to base a decision on anything other than the evidence in the case.

Duties of the commission. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a decision upon any view of the law other than that given in the instructions of the Court,

In deciding the facts of each hearing, the commission must not be swayed by bias, prejudice, or sympathy as to any party. Our system of law does not permit the commission to be governed by prejudice, sympathy, or public opinion. The parties and the public expect that the commission will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just compensation decision regardless of the consequences.

Counsel may have referred to some of the governing rules of the law in their arguments. If, however, any difference appears to the commission between the law as stated by counsel and that stated by the Court in these instructions, the commission is, of course, to be governed by the Court's instructions.

All persons equal before the law. The commission should consider and decide each hearing as an action between persons of equal standing in the community, of equal worth, and

holding the same or similar stations in life. All persons, whether corporations or individuals, stand equal before the law and are to be dealt with as equals in a court of justice.

Evidence. The evidence in each hearing consists only of the sworn testimony of the witnesses and all the exhibits that will have been received in evidence in that hearing. The evidence does not include any statements of counsel made during the hearing unless such statement was an admission or agreement admitting certain facts. The opening statements and the closing arguments of counsel are designed to assist the commission, but they are not evidence.

The commission is to consider only the evidence in the hearing. However, the commission is not limited to the mere statements of the witnesses, but is also permitted to draw, from the facts that the commission finds have been proved, such reasonable inferences as seem justified in light of the commissioners' own experiences. That is to say, from the facts that have been proved, each commissioner may draw an inference based upon reason and common sense.

Direct and circumstantial evidence. The commission may properly consider two types of evidence in reaching a just compensation award. They are known as direct evidence and circumstantial evidence.

Direct evidence is where a witness testifies as to what he or she saw or heard. In other words, when a witness testifies about what is known to the witness as personal knowledge by virtue of his or her own senses – what he or she sees or hears – that is called direct evidence. For example, if a witness testified that she saw it raining outside and you believe her, that would be direct evidence that it was raining.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other

facts. You infer on the bases of reason, experience, and common sense from an established fact the existence or the nonexistence of some other fact. For example, if someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

Circumstantial evidence is of the same value and quality as direct evidence.

To infer, or to make an inference, is to reach a reasonable conclusion of fact that you may make, but are not required to make, from other facts that you find have been established by direct evidence. Whether an inference is made rests entirely with the commission. The commission may only draw an inference from the evidence presented. It may not build an inference upon an inference.

Number of witnesses. The number of witnesses who testify does not make any difference. The commission must not make any decision based only on the number of witnesses who testify. What is more important is how believable the witnesses are and how much weight the commission thinks their testimony deserves. The commission should concentrate on that and not on the numbers.

Credibility of witnesses. Another part of the commissioners' job will be to decide how credible or believable each witness was. It is up to each commissioner to decide whether the testimony of a witness was believable and how much weight he thinks it deserves. Each commissioner is free to believe everything that a witness said, only part of it, or none of it at all. But each commissioner should act reasonably and carefully in making these decisions.

A commissioner should consider the following things in evaluating the testimony of each witness:

Ask whether the witness was able to see or hear the events clearly. Sometimes even an honest witness may not have been able to see or hear what was happening and may make a mistake.

Ask how good the memory of the witness seemed to be. Did the witness seem able to remember accurately what happened?

Ask whether there was anything else that may have interfered with the ability of the witness to perceive or remember the events.

Ask how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

Ask whether the witness had any relationship to Plaintiff or Defendant, or anything to gain or lose from the case, that might influence the witness' testimony.

Ask whether the witness had any bias, prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

Ask whether the witness testified inconsistently while on the witness stand, or whether the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying. If a commissioner believes that the witness was inconsistent, he should ask himself whether this makes the testimony of the witness less believable. Sometimes it may; other times it may not. The commissioner should consider whether the inconsistency was about something important or about some unimportant detail, as well as whether it seemed like an innocent mistake or whether it seemed deliberate.

And ask how believable the testimony of the witness was in light of all the other evidence. Was the testimony of the witness supported or contradicted by other evidence that was

found believable? If a commissioner believes that other evidence contradicted the testimony of a witness, that commissioner should remember that people sometimes forget things and that even two honest people who witness the same event may not describe it exactly the same way.

These are only some of the things that the commission may consider in deciding how believable each witness was. The commissioners may also consider other things that they think shed some light on the believability of the witness. They should use their common sense and their everyday experiences in dealing with other people. In daily life, a person is constantly determining who is worthy of belief and who is not. The commissioners should employ the same tests in determining the weight and credibility, if any, that they will assign to the testimony of each witness.

Impeachment of a witness. A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness' present testimony.

If a commissioner believes that any witness has been impeached and thus discredited, it is that commissioner's exclusive decision to give the testimony of that witness such credibility, if any, as the commissioner thinks it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, the commissioner has a right to distrust such witness' testimony in other particulars. The commissioner may reject all the testimony of that witness or give it such credibility as he thinks it deserves.

Opinion testimony. The commission will likely hear the testimony of a witness who has

expressed an opinion. A witness who has specialized knowledge due to knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

No commissioner has to accept this opinion. In deciding how much weight to give it, a commissioner should consider the witness' qualifications and how he or she reached his or her conclusions. Each commissioner should also consider the other factors discussed in these instructions for weighing the credibility of witnesses. The commissioners alone decide how much of a witness' testimony to believe and how much weight it deserves.

In assessing the qualifications of a witness and the admissibility of his or her opinion testimony, the commission should apply the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny.

Diagrams, charts, or summaries of opinion evidence of fair market value. The testimony of an appraiser or an accountant as to any diagrams or charts or summaries, and any summaries or diagrams or charts admitted in evidence, are competent for the purpose of explaining or summarizing facts disclosed by the appraiser's or accountant's testimony, or by other testimony, or by photographs or maps or other documents that are in evidence. If a commissioner should find that such charts or diagrams or summaries do not reflect facts and figures shown by the testimony or other evidence in a hearing, then he should disregard them.

Owner's opinion as to fair market value. The law permits an owner of property taken in a condemnation proceeding to testify as to the fair market value of the owner's estate or interest in the property at the time of taking. The testimony of the defendant-owner as to value is to be weighed and considered by you the same as that of any other witness expressing an opinion as to fair market value at the time of the taking. If a commissioner should decide that the reasons

given in support of the defendant-owner's opinion as to fair market value are not sound, the commissioner may reject that opinion or may give it any weight he may think it deserves.

Evidence as to sales and leases of comparable properties. Evidence may be received as to sales and leases of allegedly comparable properties in the vicinity, and in other areas. Bona fide sales of comparable properties, made within a reasonable time before the date of taking of the property involved may be the best obtainable evidence of market value at the time of taking. Each commissioner should consider such evidence to the extent that he finds it of assistance in arriving at his finding as to market value.

Evidence as to purchase price of property taken. The commission may receive evidence as to the purchase price of the land comprising the easement at issue in a hearing, when acquired by the defendant-owner. Purchase of the land by the defendant-owner constitutes one transaction in the vicinity that each commissioner may consider, along with the other evidence, in arriving at his conclusion as to the fair market value of the property at the time of taking.

Evidence as to offers for sale of comparable properties. The commission may receive evidence as to offers for sale of allegedly comparable properties in the vicinity and in other areas. Each commissioner should consider such evidence to the extent that he finds it of assistance in arriving at his own finding as to market value.

Statistical evidence. Statistics are inherently slippery in nature, are not irrefutable, and, like any other kind of evidence, they may be rebutted.

Number of exhibits. A number of exhibits and testimony related to them will be introduced. Each commissioner should determine what weight, if any, the exhibits should receive in light of all the evidence.

As indicated earlier, the commission must consider, among other things, all exhibits received in evidence, regardless of who may have produced them.

No commissioner should attach any significance whatsoever to the fact that a given item of evidence has been admitted by Plaintiff, as opposed to by the landowner(s). Conversely, no commissioner should attach any significance whatsoever to the fact that a given item of evidence has been admitted by the landowner(s), as opposed to by Plaintiff.

Substantive Ohio law applies. This is an action brought under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, but state law also applies. That is because the Sixth Circuit has held that “although condemnation under the Natural Gas Act is a matter of federal law, § 717f(h) incorporates the law of the state in which the condemned property is located in determining the amount of compensation due.” *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1199 (6th Cir. 1992). Accordingly, the commission shall apply Ohio substantive law in determining the just compensation awards due and federal procedural law in conducting the compensation proceedings. *Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.078 Acres, More or Less, in Monroe Township*, Nos. 08-168, 08-169, 08-177, 08-179, 08-180, 2008 WL 4346405, at *8, *13 (W.D. Pa. Sept. 19, 2008) (collecting cases standing for the proposition that the state procedure language of § 717 f(h) has been superceded by Fed. R. Civ. P. 71.1).

Nature of proceedings. This is an appropriation action brought by Plaintiff, Rockies Express Pipeline, LLC, to acquire a non-exclusive easement from various landowner defendants for a 42" natural gas pipeline, as authorized by the Federal Energy Regulatory Commission (“FERC”), in the interest of public convenience and necessity. The non-exclusive easement to

be taken is fully described in the certified surveys attached to Plaintiff's amended complaint, along with a full description of the landowner(s)' property. The Natural Gas Act, 15 U.S.C. § 717 *et seq.*, gives Plaintiff the right to appropriate the non-exclusive easement subject to the requirement that compensation for such take shall be assessed by the commission. The commission acts as an assessing body in determining the amount of compensation and the amount of any damages.

Burden of proof. As to the amounts of compensation of property and any damages, there is no burden of proof as in other civil cases. The owner does have a burden of proving by the greater weight of the evidence, however, the existence of special damage to the residue, such as underlying minerals, as well as the existence of a residue. *See Tennessee Gas Transmission Co. v. Wolfe*, 159 Ohio St. 3d 391, 394, 112 N.E.2d 376, 378 (1953) (stating that "special damage, such as that to underlying minerals, is a matter usually within the knowledge of the owner rather than the condemner, and there is no valid reason for excusing the owner from the burden of proving the special damage he claims"); *Deercreek Local Bd. of Educ. of Deercreek Twp. v. Payne*, 86 Ohio App. 319, 326, 88 N.E.2d 226, 229 (1949) (placing burden on landowner to prove that various lots constituted a single tract).

Compensation defined. "Compensation" is payment of the fair market value of the property taken.

Damages defined. "Damages" are the loss in value of the residue of the property because of its severance from the property taken because of the imposition of the easement.

Take defined. The "take" is the property that Plaintiff will acquire a title to.

Date of take. Compensation and damages to residue, if any, shall be determined as of

the date of take. The parties agree that, unless otherwise ordered by the Court in advance of a particular hearing, the date of take is May 30, 2008. Any party seeking to modify the date of take for a particular defendant shall file a motion directed to the Court at least thirty (30) days prior to a scheduled hearing. Any responsive memorandum shall be filed within seven (7) days thereafter. No reply memorandum is permitted.

Residue defined. The “residue” is the property that is not being taken but that may be affected after the take occurs.

In addition to the compensation for the property taken, the owner is entitled to any decrease in the fair market value of the residue, or remaining land, that is a direct result of the appropriation. If the residue is less valuable because of the severance, then the commission must consider such injury and determine the amount of such decrease in the fair market value caused by the severance. This will be the amount awarded for damages to the residue.

Easement defined. An “easement” is the right of one to use land of another for a particular purpose. It does not confer ownership of the land, only the right to use the land for the purpose of the natural gas pipeline approved by the Federal Energy Regulatory Commission. The owner may use the area of the easement for all purposes consistent with the easement.

Limited compensation for an easement. Compensation for an easement is limited to the fair market value of the land area covered by the easement.

Fair market value. The commission will award to the property owner(s) the amount of money that the commission determines to be the fair market value of the property taken. Fair market value is the amount of money that could be obtained on the market at a voluntary sale of the property. It is the amount a purchaser who is willing, but not required to buy, would pay and

that a seller who is willing, but not required to sell, would accept, when both are fully aware and informed of all the circumstances involving the value and use of the property. The commission should consider every element that a buyer would consider before making a purchase. The commission should take into consideration the location, surrounding area, quality and general condition of the premises, the improvements thereon, and everything that adds to or detracts from the value of the property.

Highest and best use. The property must be valued at its worth for the most valuable use for which it may reasonably, lawfully, and practically be used. This is called the highest and best use.

No increase or decrease. The value is not to be increased or decreased because of the necessity of Plaintiff, Rockies Express Pipeline, LLC, to take the property, nor because these proceedings require the owners to part with their property, nor because of any benefits that may accrue to the owners because of the natural gas pipeline.

Existing easement(s). If any of the property taken is subject to an existing easement for public purposes, such property has no substantial value and only nominal compensation may be awarded for it. "Nominal" means trifling or small, usually \$10.00 or less.

Measure of damages. The measure of damages is the difference in the fair market value of the whole parcel free of the easement and its fair market value burdened with the easement. In assessing damages, the commission may take into consideration the uses the landowner(s) may have of the easement area. As the appropriator of the easement, Plaintiff may, without further compensation to the landowner(s), enter upon the easement for repair, service, and maintenance of its natural gas pipeline and facilities.

Damages common to the public. Damage to the residue resulting from the exercise of eminent domain may be recovered only for damages not common to the public. Consequential damages such as noise, vibration, circuity of travel, loss of traffic volume, or dust and inconvenience suffered by the landowner(s) in common with the public are not to be considered.

Minimization of damages. If by the expenditure of money in an amount less than the difference between the fair market value of the residue before the taking and the fair market value of the residue after the taking, the landowner(s) can make improvements to the residue to restore its fair market value, such “cost of cure,” if proved, limits the amount of damages to be assessed.

Future additional use. If an additional future use is made of the property appropriated other than uses reasonably foreseeable from the present plans, then further compensation may be obtained by the landowner(s) in another proceeding.

Undeveloped lots. Undeveloped lots in an existing subdivision are to be valued as one parcel, but individual lot value may be considered to arrive at the market value of the entire parcel.

Potential use. Potential use of the property taken and residue may be considered, but a potential use must be one legally permissible within the reasonably foreseeable future and not dependent upon contingencies.

Existing zoning. Zoning may be a significant factor in determining potential use. Compensation must be based upon the market value for the highest and best use lawful under existing zoning regulations.

Possible zoning change. It is a permitted use to hold property for future development in

anticipation of a zoning change that would allow a more valuable use of the property. If an informed and willing purchaser would be presently agreeable to pay more than the amount justified under existing zoning, hoping for a zoning change, that is the fair market value of the property. The commission may consider factors in evidence indicating a likelihood of a zoning change as those factors may reflect upon the fair market value of the property.

Temporary easement. In addition to the permanent easement involved in this litigation, Plaintiff has obtained a temporary easement for the purpose of constructing the natural gas pipeline. A temporary easement is the right to use an area of land for a limited time and limited purposes. The measure of compensation for a temporary taking is the fair market value of the loss of use of the property taken. That fair market value is the fair rental value.

Fixtures. A fixture is an article of personal property or a chattel that, by being attached to realty, became accessory to it and a part of it. If a fixture is removable by the landowner(s), the land with fixtures is valued by reducing the value of the land by the value of the fixture, but the landowner(s) is/are entitled to the cost of removal of personal property.

Timber and crops. Standing timber or crops are a part of the land and shall be considered in determining the value of the land taken or residue.

Other natural assets. Minerals, ore, coal, gravel, stone, oil, and gas are all natural assets that you should consider, if applicable, in determining the market value of the land. A natural asset may affect the value of the land if a reasonable seller would demand more for the land and a reasonable buyer would pay more for the land because of it. The market value of the land may not be reached by combining separately evaluated land and its natural asset(s).

When a condemnor takes an interest in the surface estate only, the owner of the mineral

estate is not entitled to compensation for the minerals themselves, but only to compensation for loss of use of the surface estate. To the extent that the operation of the condemnor will impede removal of such mineral deposits, such factors may be considered in determining the compensation owed.

Objections or supplements to the commission instructions. Any objection or supplemental instruction must be made specifically and in writing to this Court thirty (30) days prior to a scheduled hearing. Any responsive memorandum shall be filed within seven (7) days thereafter. No reply memorandum is permitted. An objection or requested supplemental instruction filed after the deadline shall be stricken unless permitted by this Court for good cause shown and the party filing the untimely objection or supplemental instruction shall be deemed to have waived or forfeited the objection or instruction.

Compensation of commissioners. As Plaintiff has agreed during conferences with the Court, Plaintiff shall be responsible for the cost of the commission. The commission members shall bill at a rate of \$200.00 per hour, in addition to compensable expenses such as copying and travel for property views and hearings. Following the filing of a report and recommendation, each commissioner shall submit an invoice to the Court along with itemized billing records for work performed and expenses incurred related to each hearing. The Court shall then review the billing and shall approve, disprove, or inquire into the fees and costs submitted. All commissioners shall endeavor to control the costs incurred while giving each hearing all necessary attention. Once an invoice has been approved, the Court shall issue an order directing Plaintiff to compensate the commissioner for the amount due. Plaintiff shall tender payment directly to the commissioner at the address the commissioner provides on the invoice within

sixty (60) days of the filing of the Court's order directing payment.

Compensation of court reporters. Plaintiff shall compensate any court reporter used at a hearing at the regular hourly rate of that reporter, in addition to travel expenses. The parties are responsible for the costs of obtaining a transcript just as they would be in any case. The reporter shall bill Plaintiff directly, and any issue surrounding billing or payment should be brought to the attention of the Court promptly.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE