COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. SUPERIOR COURT DEPARTMENT
C.A. No.: 1676CV00083

TENNESSEE GAS PIPELINE COMPANY, L.L.C.

Plaintiff,

v.

SIX ACRES OF LAND, MORE OR LESS, OF PERMANENT EASEMENTS IN SANDISFIELD, MASSACHUSETTS; FIFTEEN AND A HALF ACRES, MORE OR LESS, OF TEMPORARY EASEMENTS IN SANDISFIELD, MASSACHUSETTS; COMMONWEALTH OF MASSACHUSETTS; MASSACHUSETTS DEPARTMENT OF CONSERVATION AND RECREATION; LEO P. ROY, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF CONSERVATION AND RECREATION; WILLIAM S. BOLT; OFFICE OF THE BOARD OF ASSESSORS OF THE TOWN OF SANDISFIELD; NANCY LORING, INDIVIDUALLY, AND FRANK H. ROWLEY AND IRENE M. ROWLEY, TRUSTEES OF THE FRANK H. ROWLEY TRUST; AND UNKNOWN LANDOWNERS

Defendants.

PLAINTIFF TENNESSEE GAS PIPELINE COMPANY, L.L.C.'S RESPONSE TO BERKSHIRE ENVIRONMENTAL ACTION TEAM, INC.'S JANUARY 23, 2017 LETTER TO THE COURT

I. INTRODUCTION

Plaintiff Tennessee Gas Pipeline Company, L.L.C. ("Tennessee") submits this response to Berkshire Environmental Action Team, Inc.'s ("BEAT") letter to the Court dated January 23, 2017 (the "BEAT Letter").[1] Tennessee respectfully requests that the Court overrule BEAT's objection to Tennessee and the Commonwealth of Massachusetts's (the "Commonwealth") Joint Motion to Approve and Enter Consent Judgment Issuing Final Judgment Order of Taking by

[1] A true and accurate copy of the BEAT Letter is attached hereto as Exhibit A.

Eminent Domain (the "Joint Motion"), as outlined in the BEAT Letter, and grant the Joint Motion.

II. BACKGROUND

On January 24, 2015, BEAT served the BEAT Letter on counsel for the Commonwealth.[2] Thereafter, the Commonwealth forwarded the BEAT Letter to counsel for Tennessee. To date, BEAT has not served the BEAT Letter on Tennessee.

BEAT attempted to file the BEAT Letter with the Court, but the Clerk declined the filing because BEAT is not a party to the eminent domain proceeding and did not purport to have a title interest in the property that is the subject of this action. (*See* Exhibit B.) Tennessee responds as follows:

III. ARGUMENT

A. BEAT's Objection is Procedurally Deficient.

To the extent the Court deems the BEAT Letter to be an objection to the Joint Motion, it is procedurally deficient. Notice of the Joint Motion, which was served on BEAT's counsel (Attorney Luke Legere) and published in the *Berkshire Eagle* on January 6, 2017 and January 13, 2017, requires all objections to the proposed Consent Judgment Issuing Final Judgment Order of Taking by Eminent Domain (the "Consent Judgment") to be served in writing on counsel for Tennessee and the Commonwealth, so that the objections are received no later than January 23, 2017. BEAT failed to meet this deadline because it did not serve the BEAT Letter on counsel for the Commonwealth until January 24, 2017. Furthermore, BEAT entirely failed to serve the BEAT Letter on counsel for Tennessee. On this basis, BEAT's objections to the Joint Motion should be overruled.

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[2] A true and accurate copy of the cover email serving the BEAT Letter on counsel for the Commonwealth is attached hereto as Exhibit B.

B. BEAT Lacks Standing to Object to the Consent Judgment and to Participate in the Compensation Hearing.

To the extent the Court deems the BEAT Letter to be an objection to the Joint Motion, BEAT lacks standing to object to the Consent Judgment. As set forth in the Notice of the Joint Motion, only individuals with a possible title interest in the property that is the subject of this action have standing to object to the Consent Judgment. BEAT does not have a title interest in the property. (*See* Exhibit B.)

Only parties with a title interest in the property may participate in eminent domain possession or compensation proceedings, and all other parties lack standing to challenge the taking. *See Tenn. Gas. Pipeline Co. v. Commonwealth,* C.A. No.1676CV00083, Dkt. No. 66, Order on Tennessee's Notice of Voluntary Dismissal (Sept. 14, 2016) ("[S]ince [the Board of Assessors for the Town of Sandisfield] no longer has any title interest in the property, it has no standing to be a party."). *See also Cornell-Andrews Smelting Co. v. Boston & P.R. Corp.,* 209 Mass. 298, 305 (1911) ("The parties [in a condemnation proceeding] who have a right to bring a petition for damages or to intervene in one brought by another are those who have an estate in the lot of land taken or damaged. There is no case in which anyone but the owner of an estate in the land in question has been allowed to bring a petition for land damages or to intervene in one brought by another. . . ."); *Swan v. Mass. Bay Transp. Auth.*, 22 LCR 474, 480 (Mass. Land Ct. 2014) ("I also decide that the Swans lack the standing needed to challenge the taking. They must accept its effect. Only the owner at the time of the taking has standing to seek damages or to contest the validity of the taking. The Swans fall into this category of parties who lack standing to challenge the flaws in the taking, and their lack of standing is jurisdictional in nature, not something which can be waived.") (citations omitted); *Weeks v. Chelmsford Water Dist.*, 8 LCR 313, 314 (2000) ("[P]laintiff has no standing to challenge the validity of the 1985 taking . . .

because she did not own her property (or any easement rights in [the property]) at the time of the taking."). On this basis, BEAT's objections to the Joint Motion should be overruled.

C. The Allegations Outlined in the BEAT Letter Lack Legal and Factual Support.

Notwithstanding that the BEAT Letter is procedurally deficient and that BEAT lacks standing to object to the Consent Judgment and to participate in the Compensation Hearing, as set forth below, the allegations contained in the BEAT Letter lack legal and factual support:

1. Preliminarily, BEAT improperly attempts to object to the Court's grant of possession to Tennessee, which is the subject of the Court's Memorandum of Decision and Order dated May 9, 2016 (the "May 2016 Decision and Order"), and not to the Commonwealth's compensation for the grant of possession, which is the subject of the Consent Judgment.

2. BEAT's claim that the Commonwealth is "egregiously under-compensated" for the permanent easement is meritless. Under Massachusetts law, the value of an easement taken by eminent domain is measured by the difference in the fair market value of the land before and after the taking. *See, e.g, Kane v. Hudson*, 7 Mass. App. Ct. 556, 559 (1979) ("[I]n the case of a partial taking, the landowner is entitled to compensation measured . . . by the diminution of the fair market value of his land caused by the partial taking."). Here, as set forth in the Consent Judgment, Tennessee and the Commonwealth have stipulated that the value of both the permanent and temporary easements is $40,750.00. Accordingly, the total compensation outlined in the Consent Judgment of $640,030.00 is approximately fifteen times the stipulated value of both the permanent and temporary easements.

3. Paragraph 3 of the Consent Judgment: BEAT claims that eminent domain should not be entered until Tennessee obtains all required approvals and permits. As the Court ruled in the May 2016 Decision and Order, eminent domain is not (and should not be) tied to any state or

federal authorization to begin construction. (*See* Tennessee's Preliminary Injunction Brief, at pp. 8-9; May 2016 Decision and Order, at p. 17.) Similarly, the Court must order condemnation in accordance with the terms of the Certificate even if a rehearing or review of the Certificate by an aggrieved party is pending, unless FERC has specifically ordered a stay. *See* 15 U.S.C. § 717r(a)-(c). *See also Steckman Ridge GP, LLC v. An Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres, More or Less, in Monroe Twp.*, No. CIV.A.08-168, 2008 WL 4346405, at *3 (W.D. Pa. Sept. 19, 2008).

4. Paragraph 4 of the Consent Judgment: BEAT objects to Paragraph 4, which states that "Tennessee shall not be required to obtain any permits or authorizations from DCR in connection with the Temporary and Permanent Easements, including, without limitation, the DCR construction and Access Permit." Tennessee and the Commonwealth Defendants have reached a compromise on the Construction and Access Permit that facilitates the resolution of this case, and the payment of compensation. By way of background, at DCR's instruction, Tennessee requested the Temporary Easements by filing for a Construction and Access Permit. (*See* Verified Complaint, at ¶ 51 and Answer of the Commonwealth, at ¶ 51.) DCR did not act on the Construction and Access Permit, and in the May 2016 Decision and Order, this Court granted Tennessee the Temporary Easements that had been sought in the Construction and Access Permit. As reflected in the sixth through eighth whereas clauses of the Consent Judgment, Tennessee and the Commonwealth Defendants disagree on whether a Construction and Access Permit may be required after the May 2016 Decision and Order. Tennessee believes the Construction and Access permit is preempted under federal law (*see* Tennessee's Preliminary Injunction Brief, at pp. 12-15) and that permission cannot be required for possession of temporary easements after the Court has awarded the Temporary Easements. The

Commonwealth Defendants disagree. To resolve this dispute, without either side conceding the correctness of their positions, Tennessee has agreed to include multiple construction and access permit conditions in the Consent Judgment, and DCR has agreed the Construction and Access Permit is not required. Thus, even leaving aside the reasons set forth above, BEAT's objection is moot.

5. Paragraph 5 of the Consent Judgment: BEAT claims that the Consent Judgment should prohibit the transportation of any substances other than natural gas through the pipeline. Federal Energy Regulatory Commission ("FERC") regulations and the FERC-approved tariff for the Connecticut Expansion Project permit and/or require Tennessee to transport substances associated with natural gas through interstate natural gas pipelines. By way of example, interstate natural gas pipeline companies must add a substance to natural gas as a safety measure to ensure that natural gas has a distinct odor. *See* 49 C.F.R. § 192.625. FERC has exclusive jurisdiction over the shipment of natural gas through interstate natural gas pipelines. Respectfully, the Court should not attempt to impose limitations on a matter exclusively regulated by FERC, or refine language agreed to by Tennessee and the Commonwealth in the Consent Judgment.

6. Paragraph 5 of the Consent Judgment: BEAT claims that Tennessee's equipment should not "interfere with the ecology and habitat value of the area." The local, state and federal permits Tennessee has received in connection with the project contain extensive and comprehensive conditions that protect the "ecology and habitat value of the area."

7. Paragraph 6(a) of the Consent Judgment: BEAT claims that DCR has a conflict of interest and lacks the ability to adequately protect the property and its features. BEAT's claims regarding DCR are entirely unsubstantiated and mere speculation.

8. Paragraph 6(b) of the Consent Judgment: BEAT claims that DCR should approve ecologists/environmental monitors used during the construction of the project. BEAT's claim ignores the fact that the provision of ecologists/environmental monitors is extensively conditioned in local, state and federal permits for the project. *See, e.g*, Massachusetts Department of Environmental Protection's 401 Water Quality Certification for the Project. Moreover, BEAT's argument is beyond the scope of this proceeding.

9. Paragraph 6(l) of the Consent Judgment: BEAT claims that there is lack of clarity about what the "plans of record" are and that DCR, the Department of Environmental Protection and the Sandisfield Conservation Commission "require guidance" regarding the plans of record. Each local, state and federal permit that Tennessee has obtained in connection with the project has approved plans of record, to which Tennessee must (and will) adhere. BEAT—an independent and private corporation—cannot speak on behalf of local, state or federal permitting agencies. Moreover, BEAT's argument is beyond the scope of this proceeding.

10. Paragraph 6(n) of the Consent Judgment: BEAT alleges that "Tennessee has a record of spreading invasive species through their pipeline corridor." These allegations are unsubstantiated and false. Moreover, the local, state and federal permits for the project contain conditions that govern soils and invasive species management.

11. Paragraph 6(w) of the Consent Judgment: BEAT claims that the Commonwealth should not relinquish the right to revoke the easements. The Permanent and Temporary Easements were granted to Tennessee pursuant to the Natural Gas Act ("NGA") by the Court in the May 2016 Decision and Order, not by the Commonwealth. The NGA does not authorize landowners, or courts, to revoke easements and Tennessee is not aware of any NGA eminent domain judgment that has ever indicated the easements can be revoked. FERC has exclusive

jurisdiction to regulate the shipment of natural gas, and individual landowners (here, the Commonwealth) cannot reserve the right to revoke easements ordered by a court pursuant to the NGA.

IV. CONCLUSION

For the reasons set forth above, Tennessee respectfully requests that the Court grant the Joint Motion.

Respectfully submitted,

TENNESSEE GAS PIPELINE COMPANY, L.L.C.

By its attorneys,

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Dated: July 30, 2017

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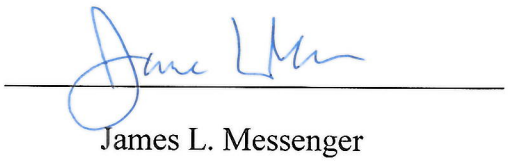
Dated: July 30, 2017

Certificate of Service

I, James L. Messenger, attorney for the plaintiff, Tennessee Gas Pipeline Company, L.L.C., in this above matter, hereby certify that a true copy of the above document was served upon the attorney of record for each party or the party on January 30, 2017 as follows:

1) Matthew Ireland, Esq. (by first class and electronic mail);
2) Nancy Loring (by first-class mail);
3) Frank H. Rowley and Irene M. Rowley, Trustees of the Frank H. Rowley Trust (by first-class mail);
4) Luke H. Legere, Esq. (by first class and electronic mail);
5) Gregor I. McGregor, Esq. (by first class and electronic mail);
6) Michael Pill, Esq. (by first class and electronic mail); and
7) Jeffrey Bernstein, Esq. (by first class and electronic mail).



James L. Messenger

EXHIBIT A

P·L·A·N
PIPE LINE AWARENESS NETWORK
FOR THE NORTHEAST

January 23, 2017

The Honorable John A. Agostini
Berkshire Superior Court
76 East Street
Pittsfield, MA 01201

Re: Tennessee Gas Pipeline Company, LLC v. Six Acres of Land, et al., C.A. No.: 1676CV00083

Your Honor:

We respectfully request that the Court deny the joint motion (the "Joint Motion") of Tennessee Gas Pipeline Company, LLC ("Tennessee") and various Commonwealth of Massachusetts defendants for approval of the settlement (the "Settlement") of the above-referenced eminent domain proceeding.

Berkshire Environmental Action Team, Inc. ("BEAT") is a 501(c)(3) nonprofit with a mission to protect the environment for wildlife in support of the natural world that sustains us all. The Pipe Line Awareness Network for the Northeast, Inc. ("PLAN") is a Massachusetts nonprofit working to prevent the overbuild of natural gas infrastructure.

We write despite the unfortunate situation that the Commonwealth of Massachusetts (the "Commonwealth") has no process for the public to weigh in on the proposed Settlement nor on the construction and access permits that would normally be required by the Department of Conservation and Recreation ("DCR"). We have grave concerns about the compensation amount that Tennessee will pay for being allowed to violate our state constitution (Article 97 of the Articles of Amendment to the Constitution of the Commonwealth). The Commonwealth is being egregiously under-compensated for the destruction of part of a "permanently" protected State Forest that the people and our legislators did not release from protection.

Setting aside the issue of inadequate monetary compensation, several provisions in the Settlement are problematic and, taken together with the compensation package, do not constitute just compensation for the abrogation of constitutional protections to our land. We provide below comments on several provisions in the Settlement:

Paragraph 3: The takings should not go into effect unless and until a final agency decision is issued by the Federal Energy Regulatory Commission ("FERC") and any appeals thereof are concluded. Two rehearing requests remain pending with the agency.

Paragraph 4: DCR should not be allowed to waive all permitting and authorizations, including the construction and vehicle access permit applications filed by Tennessee at the end of 2015. These permit applications were obtained through a public records request; we are not aware of any opportunity having been provided by DCR for public comment on the applications.

Paragraph 5: This paragraph should prohibit the use of the easement for the transport of any substances other than natural gas. As currently drafted, this paragraph of the Settlement grants more to Tennessee than is required under the March 11, 2016 FERC certificate.

Additionally, this paragraph should specify that any equipment that Tennessee proposes to use in its operations must not interfere with the ecology and habitat value of the area.

Paragraph 6:

(a): We are concerned about DCR's potential conflict of interest with regards to decisions about which trees should be cut and which should be saved, as DCR is the recipient of the funds gained from the so-called 'timber harvest" of tree felling for the project. BEAT and a PLAN board member participated in the year-long Forest Visioning process that was organized to try to rectify some of the public's concerns over DCR's aggressive harvesting.

The Commonwealth's Natural Heritage and Endangered Species Program ("NHESP") of the Division of Fisheries and Wildlife, within the Department of Fish and Game, is far more appropriate for this role.

With respect to the "rock outcrops and stone walls" referenced in this paragraph, the Narragansett Indian Tribe has asserted an interest in seeing that ceremonial stone landscape features along the proposed route are protected. It is our understanding that tribal consultations under section 106 of the National Historic Preservation Act are still ongoing with respect to this matter. We are concerned that DCR is not the proper party to protect these features; instead, we urge agreement on an appropriate tribal representative for this role.

(b): NHESP or DCR approval should be required for the ecologist/environmental monitor selected by Tennessee to oversee construction and restoration activities on their behalf.

(*l*): The Settlement should be clearer on which set of plans is considered the "Plans of Record." DCR, the Department of Environmental Protection, and the Sandisfield Conservation Commission require guidance on which one specific set of plans is to be referred to as the Plans of Record in *all* the

permits. Currently there is not clear agreement among these state and local government agencies as to which plans govern the project.

(n): This provision should specify that these topsoils will only be retained if largely free of invasive species and invasive species seed. Tennessee has a record of spreading invasive species throughout their pipeline corridor.

(w): The Commonwealth should not give up the right to revoke the permanent or temporary easements as a final resort should Tennessee fail to comply with stated conditions or if violations of said conditions become egregious.

Thank you for considering our comments.

Respectfully Submitted,

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EXHIBIT B

From: Kathryn Eiseman [mailto:eiseman@plan-ne.org]
Sent: Tuesday, January 24, 2017 1:32 PM
To: Ireland, Matthew (AGO) <Matthew.Ireland@MassMail.State.MA.US>; Roy, Leo (DCR) <Leo.Roy@MassMail.State.MA.US>; Healey, Maura (AGO) <maura.healey@MassMail.State.MA.US>; Beaton, Matthew (EEA) <Matthew.Beaton@MassMail.State.MA.US>
Cc: jane@thebeatnews.org
Subject: Otis State Forest/Settlement with TGP

The attached letter was prepared for submission to Judge Agostini yesterday. However, the Berkshire Superior Court would not accept the letter when Jane Winn of the Berkshire Environmental Action Team (BEAT) sought to submit it, as BEAT is not a party to the eminent domain proceeding. We understand that the Commonwealth's joint motion with the pipeline company does not provide an opportunity for comments or objections from anyone who does not claim a title interest in the property. Nonetheless, we are sending our comments on the settlement for your consideration.

Kathryn R. Eiseman
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