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October 5, 2018

Via FedEx

Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

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OCT - 8 2018

S.C. SUPREME COURT

Re: ***Piedmont Natural Gas Co. v. Richeous Smith, et al.***
Appellate Case No. 2015-001909
Supplemental Citations for New Case Law Decided After Briefing Ended

Dear Mr. Shearouse:

This letter provides the Court with supplemental citations pursuant to Rule 208(7), SCRAP for case law that was entered after the parties filed their final briefs. The citations relate to the sections of Appellant's arguments regarding stigma damages, which begins on Page 5 of the Brief, and the admission of Respondents' expert's testimony regarding alleged stigma damage, which begins on Page 13 of the Brief. Copies of the unpublished decisions are attached.

1. Enbridge Energy (Illinois), L.L.C. v. Kuerth, 2016 IL App (4th) 150519, ¶¶ 95, 114, 117, 69 N.E.3d 287 (Dec. 13, 2016);
2. Enbridge Pipeline (Illinois), LLC v. Monarch Farms, LLC, 2017 IL App (4th) 150807, ¶ 77, 82 N.E.3d 1234, 1250 (July 28, 2017);
3. Condemnation of Permanent & Temp. Rights of Way for Transportation of Nat. Gas in Buffalo Twp. v. Nat'l Fuel Gas Supply Corp., No. 1093 C.D. 2017, 2018 WL 2945112, at *2 (Pa. Comm. Ct. June 13, 2018);
4. Rover Pipeline, LLC v. 10.55 Acres of Land, More or Less, in Ashland Cty., Ohio, No. 5:17-CV-239, 2018 WL 4386024 (N.D. Ohio Sept. 14, 2018);
5. Rover Pipeline, LLC v. 1.23 Acres of Land, More or Less, Permanent Easement (Pipeline Right-of-Way Servitude), No. 17-CV-10365, 2018 WL 3322995 (E.D. Mich. July 6, 2018);
6. UGI Sunbury LLC v. A Permanent Easement for 0.4308 Acres, No. 3:16-CV-00794, 2018 WL 4184324 (M.D. Pa. Aug. 31, 2018), appeal docketed, No. 18-3127 (3rd Cir., Sept. 27, 2018); and

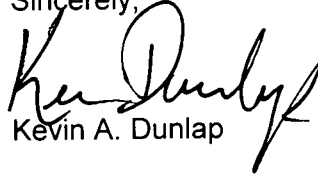
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7. UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres, No. 3:16-CV-00788, 2018 WL 4069160 (M.D. Pa. Aug. 27, 2018), appeal docketed, No. 18-3126 (3rd Cir., Sept. 27, 2018).

By copy of the letter, I am notifying counsel for the Respondents of the supplemental citations.

Sincerely,


Kevin A. Dunlap

cc: Mr. David B. Ward, Esq.
Ms. Erin Culbertson, Esq.

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S.C. SUPREME COURT

2018 WL 2945112

Only the Westlaw citation is currently available.

THIS IS AN UNREPORTED PANEL DECISION OF THE COMMONWEALTH COURT. AS SUCH, IT MAY BE CITED FOR ITS PERSUASIVE VALUE, BUT NOT AS BINDING PRECEDENT. SEE SECTION 414 OF THE COMMONWEALTH COURT'S INTERNAL OPERATING PROCEDURES.

OPINION NOT REPORTED

Commonwealth Court of Pennsylvania.

CONDEMNATION OF PERMANENT AND TEMPORARY RIGHTS OF WAY FOR the TRANSPORTATION OF NATURAL GAS IN BUFFALO TOWNSHIP, Washington County, Pennsylvania, Over Lands of Dr. Larry G. and Mary P. Smith by National Fuel Gas Supply Corporation

Dr. Larry G. Smith and Mrs.
Mary P. Smith, husband and wife,

v.

NATIONAL FUEL GAS SUPPLY CORPORATION
Appeal of: Larry G. Smith and Mary P. Smith

No. 1093 C.D. 2017

|
Argued: May 7, 2018

|
Filed: June 13, 2018

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge, HONORABLE ANNE E. COVEY, Judge, HONORABLE CHRISTINE FIZZANO CANNON, Judge

Opinion

MEMORANDUM OPINION BY JUDGE FIZZANO CANNON

*1 Appellants Larry G. Smith and Mary P. Smith (Smiths) appeal from the July 7, 2017 order of the Washington County Court of Common Pleas (trial court) denying their motion for a new trial and directing the Prothonotary to enter judgment in favor of National Fuel Gas Supply Corporation (National Fuel). Upon review, we affirm.

In January 2011, National Fuel, a natural gas company regulated by the Federal Energy Regulatory Commission, began this condemnation action by filing a Petition for Approval and Order Filing Bond by Petitioner–Condemnor National Fuel Gas Supply Corporation (Petition). The Petition sought a 50–foot–wide eminent domain easement running the length of the Smiths' property to allow for the construction and installation of an underground 20–inch high-pressure gas transmission line across the property. On February 10, 2011, the trial court entered an order approving the Petition and granting the requested easement (Taking).¹

Unable to agree on the appropriate amount of just compensation due the Smiths under Pennsylvania's Eminent Domain Code² for the Taking, the parties participated in a hearing before a board of view on October 20, 2011. The board of view issued a report and just compensation award from which the Smiths appealed seeking a trial *de novo*, as allowed by the Eminent Domain Code. See 26 Pa. C.S. § 516. The trial court scheduled a trial to begin on January 9, 2017 to determine the amount of just compensation due the Smiths pursuant to the Eminent Domain Code as a result of the Taking.

The parties then caused multiple assessments to be conducted for the purpose of determining the just compensation amount to which the Smiths were entitled as a result of the Taking and disclosed their respective appraisers and reports to one another. The Smiths identified Dennis Cestra, David Vogel, and Francis R. and/or Paul Chiappetta of the Chiappetta Agency, Inc. (collectively, the Smiths' Appraisers) as their appraisers. The Smiths served the Smiths' Appraisers' reports on National Fuel in addition to a report by an engineer, James E. Gillett, dated October 20, 2016, and titled “Historical Sample of Damage From Natural Gas Transmission Pipelines Explosions” (Gillett Report), upon which the Smiths' Appraisers had partially based their reports. National Fuel noticed its intent to present the report (Hayden Report or Hayden Appraisal) and testimony of Gary Hayden and Gary Ciarimboli, both of Hayden Appraisal Services (National Fuel's Appraisers), at trial. Each parties' expert appraisals contained similar pre-easement assessment valuations as follows: David Vogel reported a value of \$1,650,000.00; Hayden Appraisal Services reported a value of \$1,464,000.00; Dennis Cestra's reported value was \$1,300,000.00; and

Francis Chiappetta reported a value of \$1,430,000.00. Supplemental Reproduced Record (S.R.R.) at 24b, 105b, 255b & 374b. The parties' experts' post-easement net diminution valuation amounts, however, varied considerably. As to these valuations, the Hayden Appraisal reported the net diminution of value at \$58,500.00; the Cestra appraisal reported \$464,000.00; the Chiappetta appraisal reported \$500,000.00; and the Vogel appraisal reported \$1,339,200.00. *See* S.R.R. at 105b, 255b, 374b & 4b, respectively.

*2 Prior to trial, National Fuel and the Smiths each filed motions in limine seeking the preclusion of the other side's expert testimony and reports.³ On the morning of the trial date, January 9, 2017, prior to the commencement of the trial, the trial court heard argument on the motions in limine and issued two orders. The first order denied the Smiths' motion in limine. *See* Trial Court Order, filed January 9, 2017, Reproduced Record (R.R.) at 100a (First Order). The second order partially granted National Fuel's motion in limine by excluding and striking both the expert report of David Vogel⁴ and the Gillett Report, and further provided that:

All testimony and reports, expert or otherwise, that relate to or incorporate indefinite, theoretical or remote damages, including but not limited to pipeline explosions, burn areas, potential impact, blast zones and perceived risks associated with proximity to natural gas pipelines is precluded, without supporting market data.

Trial Court Order, filed January 9, 2017, R.R. at 99a (Second Order).

After the trial court ruled on the motions in limine, the Smiths did not request a continuance to either obtain new expert reports or otherwise modify their existing expert reports. During trial, the Smiths did not present the testimony of any valuation experts. Instead, the Smiths offered only their own testimony as the former owners of the property.⁵ *See* Notes of Testimony (N.T.) 1/10/2017 at 55–160; R.R. at 155a–260a; N.T. 1/11/2017 at 171–83; R.R. at 271a–82a. Larry Smith testified that the correct just compensation was \$660,000.00. N.T. 1/10/2017 at 129; R.R. at 229a. For valuation purposes, National Fuel

presented the testimony of Gary Ciarimboli of Hayden Appraisal Services, who testified consistent with the Hayden Report and valued the correct just compensation amount at \$58,500.00. *See* N.T. 1/11/2017 at 186–256; R.R. at 286a–356a.

On January 11, 2017, the jury returned a verdict awarding the Smiths \$58,500.00 as just compensation for the Taking. N.T. 1/10/2017 at 321–24; R.R. at 421a–24a, 427a. The Smiths filed a Motion for Post-Trial Relief requesting a new trial two days later. *See* R.R. at 428a–60a. On July 6, 2017, the trial court issued its Order and Memorandum denying the Smiths' post-trial motion and directing entry of judgment on the jury's verdict. R.R. at 487a–91a. The Smiths timely appealed to this Court on July 20, 2017.⁶

*3 In eminent domain cases, this Court reviews whether the trial court committed an abuse of discretion or error of law. *Lang v. Dep't of Transp.*, 135 A.3d 225, 228 n.8 (Pa. Cmwlth. 2016). Further, we note:

The decision to order a new trial is one that lies within the discretion of the trial court. When determining whether the trial court abused its discretion, the appellate court must confine itself to the scope of review. Where, as here, the trial court has provided a specific reason for its ruling on a request for a new trial, and it is clear that the trial court based its decision on that reason, the appellate court must apply a narrow scope of review and may only reverse the decision of the trial court if it finds no basis on the record to support the reason of the trial court. Absent a clear abuse of discretion, an appellate court will not interfere with a trial court's authority to grant or deny a new trial.

Discretion is abused when a trial court's decision represents not merely an error of judgment but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Lahr v. City of York, 972 A.2d 41, 52 (Pa. Cmwlth. 2009) (internal citations omitted).

The Smiths present the following claims for review:

A. Whether the [t]rial [c]ourt erred when it allowed the introduction of the testimony and appraisal report of National Fuel's Appraiser to the jury.

(i) Whether the jury improperly relied upon, and based their [sic] award of just compensation on, inadmissible evidence.

B. Whether the [t]rial [c]ourt erred when it excluded the introduction of the Gillett Report; and Ordered all testimony and reports, expert or otherwise, that relate to damages including but not limited to pipeline explosions, burn areas, potential impact, blast zones, and perceived risks associated with proximity to natural gas pipelines were precluded, without supporting market data.

(i) Whether the [t]rial [c]ourt[] erred when it determined its Order excluding the aforesaid evidence did not entirely preclude introduction of the testimony and reports of the Smiths' Appraisers.

Smiths' Brief at 4.

The Smiths' claims question the trial court's ruling on the admissibility of expert testimony. The admission or exclusion of evidence is within the sound discretion of the trial court, and we will not disturb a trial court's evidentiary rulings absent an abuse of discretion. *Lower Makefield Twp. v. Lands of Dalgewicz*, 4 A.3d 1114, 1117 (Pa. Cmwlth. 2010). "A trial court's ruling on the admissibility of an expert opinion will not be reversed on appeal absent clear error." *Milan v. Com., Dep't of Transp.*, 620 A.2d 721, 726 (Pa. Cmwlth. 1993) (citing *B.P. Oil Co. v. Del. Cty. Bd. of Assessment Appeals*, 539 A.2d 473, 476 (Pa. Cmwlth. 1988)).

A. National Fuel's Appraiser's Testimony and Report

The Smiths claim that the trial court erred by allowing into evidence the testimony and an appraisal report of National Fuel's appraiser. See Smiths' Brief at 20–23. The Smiths argue that National Fuel's Hayden Appraisal failed to consider the fair market value of the Smiths' entire property before and after the Taking in that the report did not consider: interference with subterranean mineral rights and the diminution in value resulting from such interference; the reduction in value due to the "division" of the property; or the value of, and accommodations required by, the temporary construction easement. *Id.* The Smiths further argue that National Fuel's appraiser's failure to consider these items resulted in an improper and inadmissible expert report and that,

as such, the jury based its just compensation award upon inadmissible evidence. *Id.*

*4 National Fuel, on the other hand, argues the Hayden Appraisal conformed to the standards articulated by the Eminent Domain Code to determine damages resulting from a taking. See National Fuel's Brief at 12–19. National Fuel argues that: (1) the Eminent Domain Code does not require consideration of mineral rights in just compensation appraisals; (2) none of the appraisals considered the mineral lease; (3) the Smiths offered no evidence related to the lease at trial; and (4) the Hayden Appraisal expressly considered the impact of the easement location and the temporary construction easement. *Id.*

1) Consideration of the Mineral Estate and the Impact of the Property's Existing Mineral Lease

The Smiths first argue that National Fuel's appraiser failed to consider the impact the easements had on the value of the Smiths' mineral estate⁷ and a lease thereon. See Smiths' Brief at 20–21. The Smiths rely on *Werner v. Department of Highways*, 247 A.2d 444 (Pa. 1968), *In re Condemnation Proceeding by S. Whitehall Township Authority*, 940 A.2d 624 (Pa. Cmwlth. 2008), and *Morgan Signs, Inc. v. Department of Transportation*, 723 A.2d 1096 (Pa. Cmwlth. 1999), for the proposition that a failure by an appraiser to consider mineral estate values, or leases concerning such estates, renders a compensation appraisal completely incompetent. We disagree.

Initially, the Eminent Domain Code defines "just compensation" as follows:

Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected by the condemnation and the fair market^[8] value of the property interest remaining immediately after the condemnation and as affected by the condemnation.

26 Pa. C.S. § 702(a). Thus, to determine just compensation, the Eminent Domain Code requires an examination of a property's value both before and after a

taking. *Id.* Further, our Supreme Court has pronounced the following basic principles of condemnation:

First, the general rule is that the proper measure of damage for lands taken under the power of eminent domain is the difference between the market value of the land before the exercise of the power and as unaffected by it and the market value immediately after the appropriation and as affected by it. Second, it is permissible for the condemnee to introduce evidence of particular items lost through the condemnation. The condemnee may not, however, introduce evidence of the [v]alue of the particular items lost through condemnation but merely the fact that these items were lost. Third, as far as mineral deposits are concerned, the condemnee may not introduce evidence of the number of tons of minerals lost and then multiply that number by some dollar figure such as the market price or the royalty payment.

Werner, 247 A.2d at 446–47 (internal citations omitted).

*5 The Eminent Domain Code does not include a requirement that, to be valid, a property assessment must contain a valuation of a mineral estate. Further, the Smiths' cited case law does not advance their argument that without an assessment of a mineral estate, an appraisal is completely incompetent. *In re Condemnation Proceeding by South Whitehall Township Authority* concerned whether the condemnation of a 25-foot-wide utility easement amounted to a fee simple taking, but did not discuss any requirements relating to expert mineral estate valuations. *Morgan Signs* addressed the valuation of a lease for advertising sign boards on a condemned property. Neither case stands for the proposition that a failure to consider either the value of a property's mineral estate or a lease thereon renders an expert's property value assessment infirm.

Likewise, while it does concern a mineral estate, *Werner* does not stand for the proposition that a proper

appraisal must contain a valuation of a mineral estate. In *Werner*, our Supreme Court held that a condemnee could introduce evidence of the existence of a certain tonnage of subsurface sand and gravel on condemned land, but could not offer a specific calculation of the value of those subsurface minerals as a deduction from the “before” value of the property for assessment purposes. *Id.* at 449. While the Supreme Court determined that mineral estate valuations *could* form part of just compensation appraisals, the Court did not make such valuations *mandatory*. *Id.* In fact, the Supreme Court noted that without accurate and current information regarding costs of mining minerals, bringing them to market, and market prices, knowledge of the quantity of minerals contained within a parcel of land does not help to value the land. *Id.* at 447 (citing *Searle v. Lackawanna & B.R. Co.*, 33 Pa. 57, 64 (1859)).

As a result, in practice, just compensation appraisals conducted by individuals lacking geology or engineering backgrounds often contain reservation language explaining that the appraisal does not include the value of a property's mineral estate. This occurred in National Fuel's Hayden Appraisal. However, while the Hayden Appraisal did not include a discussion of the property's underlying mineral estate, it did contain the following express limitation:

7. No opinion is expressed as to the value of subsurface oil, gas or mineral rights, if any, and we have assumed that the property is not subject to surface entry for the exploration or removal of such materials, unless otherwise noted in our appraisal.

Hayden Appraisal at 8; S.R.R. at 111b.⁹ At trial, on cross-examination, National Fuel's appraiser, Gary Ciarimboli, explained that, while the mineral estate is included in fee simple ownership, it is not included in the appraisal due to lack of pertinent expertise. N.T. 1/10/2017 at 238–39; R.R. at 338a–39a. Mr. Ciarimboli explained that appraisals typically do not include mineral estates for that reason. *Id.* at 239; R.R. at 339a. In fact, the Smiths' appraisals also contained similar reservation language regarding the mineral estate in question. The Chiappetta Appraisal stated: “7) Subsurface rights such as minerals, oil and gas deposits were not considered in this report unless specifically noted to the contrary.”

Chiappetta Appraisal Addendum; S.R.R. at 502b. The Cestra Appraisal stated: "6. It is assumed that there are no hidden or unapparent conditions of the property, subsoil, or structures that render it more or less valuable. No responsibility is assumed for any such conditions or for arranging for engineering studies that may be required to discover them." Cestra Appraisal at 39; S.R.R. at 303b. With no legal requirement for the inclusion of a valuation of the mineral estate, and with proper notation of its exclusion, the trial court did not abuse its discretion by refusing to preclude the Hayden Appraisal or the testimony of Mr. Ciarimboli.

*6 The lack of an examination of the property's mineral estate did not render the Hayden Appraisal incompetent. The Hayden Appraisal noted its lack of a mineral estate assessment and appropriately limited its findings regarding such estate. The Smiths had ample opportunity to challenge the Hayden Appraisal through cross-examination of Mr. Ciarimboli and/or by introducing their own evidence as to the mineral estate's value during their case.

The Smiths also argue that the Hayden Appraisal failed to consider the impact of the Taking on an existing mineral lease on the property.¹⁰ See Smiths' Brief at 21–22. None of the appraisals discussed this lease, including the Smiths' appraisals. As the trial court noted:

No one, neither the condemnor nor condemnees, offered the slightest suggestion that the value of the lease would be impacted in any way by a pipeline four feet below the surface. It is perfectly obvious that the market value of the oil and gas estate was exactly the same, both before and after the [T]aking.

Trial Court Memorandum, dated July 7, 2017 (Trial Court Memorandum), at 3.

Additionally, the absence of testimony or evidence of the impact of the Taking on the existing mineral lease does not render the Hayden Appraisal inadmissible. As with the failure to discuss the mineral estate,¹¹ the Smiths could have addressed the issue during cross-examination of Mr. Ciarimboli or through their own expert testimony and/or reports, but elected not to do so.

2) *Consideration of the Easement Location and the Temporary Construction Easement*

Next, the Smiths argue the Hayden Appraisal failed to consider 1) the negative impact and reduced utility occasioned by the division of the Smith property into two parcels and 2) the effect of the temporary construction easement on the property. See Smiths' Brief at 22. These assertions are incorrect.

Contrary to the Smiths' suggestions, and as the trial court properly noted, the Hayden Appraisal and the testimony of Mr. Ciarimboli contemplated both the division of the property and the effect of the temporary construction easement. See Trial Court Memorandum at 3; N.T. 1/10/2017 at 223–24, 242–43; R.R. at 323a–24a, 342a–43a; Hayden Appraisal at 16; S.R.R. at 119b. Regarding the division of the property, Mr. Ciarimboli testified as follows:

Q. But more importantly, you say [in the Hayden Appraisal], the new easement divides the site in two parcels?

A. That's correct.

Q. What did you mean by that?

*7 A. The easement severs the property into two sections. There's the main section where the house and the majority of the land is, then you have the easement and then you have the area, basically, slopes down to Interstate 70.

Q. Before the easement was there, what was the topography like where the easement is now?

A. Again, I didn't see it before the easement. I can go with what the topography map showed. It's, basically, the same as what the easement is now.

Q. Was it capable of having a building put on it?

A. Yes.

Q. Then you go on to say, the new easement restricts the overall utility of the site. What did you mean by that?

A. Well, again, before the easement, the property is a whole. After the easement, the property is not a whole because you have the easement that divides the property

in two sections. So, again, you don't have that unity of use. But again, the area that the easement divided, that's what you can't, basically, use. You lose some rights of that easement area. You can't build on it. However, you can walk on it, you can ride a horse on it, you can ride a bicycle or whatever, I don't know about a bicycle, but you just can't build on that easement area.

N.T. 1/10/2017 at 242–43; R.R. at 342a–43a. Regarding the temporary construction easement, Mr. Ciarimboli testified as follows:

Q: Now, we were talking about the temporary construction easement. Is that somehow in [the Hayden Appraisal]? Do you factor that into damages?

A. Yes. That's included in the damages. Basically, a temporary construction easement, when somebody takes a temporary construction easement, they are, basically, renting the ground for a two-year period.

So what we do in the appraisal world, we take the area, in this instance, it was .7372 acres, times the after value land value, which was \$3,700 an acre, we give it a 10 percent return, which is a pretty good return, times 10 percent times 2 years. In this instance, the temporary construction easement number would be \$546, and that's incorporated in my damage figure.

N.T. 1/10/2017 at 223–24; R.R. at 323a–24a. Accordingly, the record reflects that both the division of the property and the effect of the temporary construction easement were addressed, despite the Smiths' assertion to the contrary.

The Smiths are not entitled to relief on the denial of their motion in limine as the trial court did not abuse its discretion by refusing to preclude National Fuel's Appraisal or the testimony of their expert witness.

B. The Gillett Report and the Limitation of the Smiths' Appraisers' Testimony

In their second claim, the Smiths argue that the trial court erred by partially granting National Fuel's motion in limine. *See* Smiths' Brief at 23–32. The Smiths argue that the trial court improperly excluded the Gillett Report and further improperly limited the testimony of their witnesses to preclude references to perceived risks associated with proximity to natural gas pipelines (pipeline stigma) without supporting market data. *Id.* The

Smiths argue that the trial court's limitation on their experts' testimony effectively precluded the experts from testifying, as the experts' reports and opinions all were based, to a certain degree, on the pipeline stigma notions and data. *Id.*

*8 National Fuel argues that the trial court properly partially granted its motion in limine. *See* National Fuel's Brief at 19–40. National Fuel argues the Gillett Report was a compilation of pipeline explosion data completely unrelated to the subject pipeline and/or National Fuel's operations, and that the Smiths' appraisers ultimately improperly set the “after” value for the property based on the indefinite, speculative, and remote possibilities/information contained in the Gillett Report. *Id.* Further, National Fuel argues that the trial court merely limited, not completely precluded, the Smiths' experts from testifying. *Id.* at 35–40.

1) The Gillett Report

Our Supreme Court has long held that, in eminent domain takings cases, a landowner may expect just compensation based on “reasonable certainties inherent in the present, not for chances or future possibilities.” *Gilleland v. New York State Nat. Gas Corp.*, 159 A.2d 673, 676 (Pa. 1960); *see also Wallace v. Jefferson Gas Co.*, 23 A. 416, 419 (Pa. 1892) (holding that testimony of merely speculative, imaginary, theoretical, and doubtful character, founded upon remote and uncertain possibilities, should be excluded).

The Gillett Report “provides a historical sample of the observed damage resulting from the explosions of natural gas transmission pipelines.” Gillett Report at 2; S.R.R. at 516b. Specifically, the Gillett Report details a 2012 gas pipeline rupture and explosion in Sissonville, West Virginia. Gillett Report at 2–11; S.R.R. at 516b–525b. Thereafter, the Gillett Report discusses sample data from 19 separate rupture events that occurred throughout Canada and the United States over the course of 47 years, but never addresses how these events affected real estate markets in which they occurred. Gillett Report at 12–28; S.R.R. at 526b–42b. National Fuel did not operate any of the pipelines involved in the explosions discussed in the Gillett Report.

While relevant in a theoretical sense, the Gillett Report represented chance or future possibilities as opposed to reasonable, present certainties. Accordingly, the trial

court did not abuse its discretion in precluding admission of the Gillett Report from trial.

2) *Limitation of the Smiths' Appraisers' Testimony*

Our Supreme Court has held that, “[w]hile an expert’s opinion may not be based upon pure conjecture, [] an appraisal expert’s best efforts to quantify a reduction in property valuation as a result of a subjective and intangible stigma is permissible.” *Harley–Davidson Motor Co. v. Springettsbury Twp.*, 124 A.3d 270, 286 (Pa. 2015). However, the Court cautioned, “while consideration of an environmental stigma may be examined when determining fair market value, expert testimony of such stigma may not be offered without any foundation.” *Id.*

Here, the Smiths’ Appraisers reduced the property valuation based on the possibility of a catastrophic explosion caused by a future pipeline rupture.¹² The Smiths’ Appraisers did not base their stigma valuations on a foundation of market data indicating an actual fear in the community of a possible gas pipeline explosion. Instead, the Smith Appraisers based their valuations on speculation of a remotely possible future cataclysmic event such as those discussed in the Gillett Report without offering any evidence or foundation of the market effect of the stigma in the area. *See* Cestra Report at 36; S.R.R. at 300b (discussing pipeline accidents nationwide as a valuation adjustment); Chiappetta Report at 22, 27–29; S.R.R. at 427b, 432b–34b. The trial court elaborated on its decision to preclude from appraiser testimony references to possible pipeline explosions without a foundation of market data as follows:

*9 There is no doubt that a buyer would rather not have a pipeline on his or her property if it could [b]e avoided. That is why property owners are awarded just compensation. When a pipeline comes through, the surface is disrupted and the owners must deal with dust, noise and mud. The value of the land taken is largely lost. After the pipeline is installed, the owners can expect to encounter from time to time strangers on their land as maintenance is performed. And every once in a while, in this huge nation, a pipeline blows up.

The danger of a pipeline is just one of many factors associated with a diminution in value. If there is any place where the effect of that danger could be quantified, it would be in southwestern Pennsylvania[,] which is virtually cross-hatched with pipelines of all sizes and descriptions. If such a factor exists in any significant degree, it would be observable in market data, but none of [the appraisals] offered any evidence whatsoever that proximity to pipelines actually decreases property values.

Trial Court Memorandum at 3–4.

The Smiths appear to have drawn the conclusion that the trial court’s second order limiting the expert testimony in fact completely precluded them from offering any testimony at trial relating to the risk of pipeline explosions or the effect such a risk would have on an appraiser’s property valuation, as well as any testimony from appraisers who had considered such risks in conducting their appraisals. *See* Smiths’ Brief at 32. We disagree with this interpretation and further note that the Smiths did not request a continuance to obtain new experts or to amend existing expert reports in light of the trial court’s order.

The trial court’s order did not completely preclude testimony from the Smiths’ appraisers Dennis Cestra or Francis Chiappetta and Paul Chiappetta, or prevent those appraisers from testifying that pipeline properties are less valuable than non-pipeline properties, partially due to a risk of explosion. *See* Second Order; R.R. at 99a. The order instead restricted the appraisers’ possible testimony in terms of quantification of the reduction in market value based on a possibility of a pipeline explosion in the absence of market data. *Id.* Prior to the commencement of trial, the trial court explained the restriction as follows:

I mean, I don’t [m]ind somebody saying a pipeline property is less valuable than non-pipeline property, and one of those reasons is because there is a potential for explosion. What I don’t want is somebody saying that’s 30 percent or 20 percent, because no one knows that. I don’t care what Gillett[] says.

But it's a factor, so I think you can refer to that. I don't think you can quantify it. I don't think it can be quantified. I think it could, but nobody has done it....

So I'm not going to say he cannot mention the possibility of an explosion or a failure, but I don't want to hear any of that 30 percent....

I don't want [the appraiser] to mention any numbers. [The appraiser] has got no basis for any numbers, no legitimate basis for any numbers that I'm aware of.... [T]hat's the ruling.

N.T. 1/10/2017 at 12–14; R.R. at 112a–14a. The trial court further elaborated on the effect of its second order as follows:

Our order *in limine* did not exclude the [Smiths'] experts' reports, only that portion of those reports that sought to introduce an arbitrary percentage deduction in value because of stigma. Those experts were permitted to offer their opinion of the amount of just compensation due the Smiths based on market data. For whatever reason, the [Smiths] elected to offer no evidence on just compensation except their own opinion. They cannot complain when the jury apparently accepted the testimony of the only professional appraiser they heard.

*10 Trial Court Memorandum at 4.

We find no abuse of discretion in the trial court's preclusion of reference to remote possibilities of explosion

without a foundation based on market data or other verifiable information, and we agree with the trial court that the order so limiting such testimony did not preclude the Smiths' Appraisers from testifying at trial. We further note that even if the Smiths believed that the trial court's ruling completely precluded their experts on the eve of trial, they made no request to continue the trial to obtain new experts or to have their expert reports conform to the ruling.

The trial court did not abuse its discretion in denying the Smiths' motion in limine because the Hayden Appraisal properly considered the fair market value of the Smiths' entire property before and after the Taking. Likewise, the trial court did not abuse its discretion in partially granting National Fuel's motion in limine to exclude the Gillett Report and limiting the testimony of witnesses to preclude references to perceived explosion risks associated with properties' proximity to natural gas pipelines without supporting market data. Accordingly, we affirm the July 7, 2017 trial court order denying the Smiths' motion for a new trial and directing the Prothonotary to enter judgment in favor of National Fuel.

ORDER

AND NOW, this 13th day of June, 2018, the order of the Washington County Court of Common Pleas dated July 7, 2017 denying Appellants Larry G. Smith and Mary P. Smith's motion for a new trial and directing the Prothonotary to enter judgment in favor of National Fuel Gas Supply Corporation is **AFFIRMED**.

All Citations

Not Reported in Atl. Rptr., 2018 WL 2945112

Footnotes

- 1 The trial court granted National Fuel a permanent 50-foot-wide easement running the entire 2,007-foot length of the Smiths' property, which encumbered a total of 2.3 acres of the Smiths' 117-acre property. The trial court also granted a temporary construction easement situated one foot on the northern side and 15 feet on the southern side of the permanent easement, containing a total temporary easement of 32,112 square feet, or 0.74 acres.
- 2 26 Pa. C.S. §§ 101–1106.
- 3 National Fuel styled its motion as "Motion in Limine to Exclude the Testimony and Appraisal Reports of David E. Vogel, Dennis Cestra, Francis Chiappetta and Paul Chiappetta, and Testimony or Reports on Indefinite, Theoretical or Remote Damages." See Reproduced Record (R.R.) at 3a–26a. The Smiths' motion in limine, which they styled as "Motion for

Protective Order in Limine to Disqualify Expert Report and Testimony," sought to disqualify the expert report Hayden Appraisal and the testimony of Gary Ciarimboli. R.R. at 27a–57a.

4 The Smiths announced their intention to withdraw the Vogel Report prior to trial in their pretrial statement and during argument on their motion in limine. See Notes of Testimony (N.T.) 1/9/2017 at 10–11.

5 Larry Smith testified that, in 2010, prior to the Taking, he sold Consol Pennsylvania Coal Company an option to purchase the Smiths' property for \$1,550,000.00 without mineral rights and \$1,901,000.00 with mineral rights. N.T. 1/10/2017 at 104–07; R.R. at 104a–07a. Mr. Smith further explained that the Smiths sold their property in 2012 for \$890,000.00. N.T. 1/10/2017 at 96–99; R.R. at 96a–99a.

6 On July 26, 2017, the trial court ordered the Smiths to file a Pa.R.A.P. 1925(b) Concise Statement of Errors Complained of on Appeal, and the Smiths complied on August 14, 2017. Thereafter, on September 1, 2017, and September 13, 2017, the trial court issued an Order and Amended Order, respectively, indicating that it would rely on the Memorandum portion of its July 6, 2017 Order and Memorandum as its Pa.R.A.P. 1925(a) opinion in the appeal of this matter.

7 "Pennsylvania law recognizes three discrete estates in land: the surface estate, the mineral estate, and the right to subjacent (surface) support." *Consolidation Coal Co. v. White*, 875 A.2d 318, 326 (Pa. Super. 2005). These estates are severable, and so different owners may hold title to separate and distinct estates in the same land. *Id.*

8 The Eminent Domain Code defines "fair market value" as follows:

Fair market value shall be the price which would be agreed to by a willing and informed seller and buyer, taking into consideration but not limited to the following factors:

- (1) The present use of the property and its value for that use.
- (2) The highest and best reasonably available use of the property and its value for that use.
- (3) The machinery, equipment and fixtures forming part of the real estate taken.
- (4) Other factors as to which evidence may be offered as provided by Chapter 11 (relating to evidence).

26 Pa. C.S. § 703.

9 The Hayden Appraisal went on to further limit its findings as follows:

8. We accept no responsibility for considerations requiring expertise in other fields. Such considerations include, but are not limited to, legal descriptions and other legal matters such as legal title, geologic considerations, such as soils and seismic stability, and civil, mechanical, electrical, structural and other engineering and environmental matters.

Hayden Appraisal at 8; S.R.R. at 111b.

10 In 2007, the Smiths encumbered the property with a lease that enabled Great Lakes Energy Partners, LLC, to drill and lay pipelines on the property. See N.T. 1/10/2017 at 101–03; R.R. at 201a–03a; see also Oil, Gas, and Coalbed Lease executed June 13, 2007 (Lease), R.R. at 48a–56a. The Lease defined the leased mineral estate as the "oil, gas, coalbed methane gas and liquid hydrocarbons" beneath the property. See Lease at 1; R.R. at 48a.

11 In addition to *Werner and Morgan Signs*, the Smiths cite *Captline v. County of Allegheny*, 727 A.2d 169 (Pa. Cmwlth. 1999), in an attempt to extend their argument that assessments that do not consider mineral estates are invalid to also require assessments to expressly consider leases that concern the mineral estates of such properties. *Captline* involved a claim for attorneys' fees and expenses in a just compensation/taking matter that hinged on whether a taking was a de jure or de facto condemnation, and does not advance the Smiths' argument.

12 The Cestra Report provided for a 35% downward adjustment of the property's overall valuation based on the risk of a pipeline explosion. See Cestra Report at 36–37; S.R.R. at 300b–01b. The Chiappetta Report provided for a 20% downward adjustment in total value, which it described as "a subjective conclusion[.]" Chiappetta Report at 22; S.R.R. at 427b.

2018 WL 3322995

United States District Court, E.D.
Michigan, Southern Division.

ROVER PIPELINE, LLC, Plaintiff,

v.

1.23 ACRES OF LAND, MORE OR LESS,
PERMANENT EASEMENT (PIPELINE RIGHT-
OF-WAY SERVITUDE), et al., Defendants.

Civil Action No. 17-cv-10365

Signed 07/06/2018

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Pleasant, MI, Christopher E. McNeely, Mittelstaedt &
McNeely, Rochester Hills, MI, William J. McHenry, Law
Office of William J. McHenry, PLLC, Farmington Hills,
MI, for Defendants.

1.23 Acres of Land, More or Less, Permanent Easement
(Pipeline Right-of-Way Servitude), and 3.74 Acres of
Land, More or Less, Temporary Work Space, in Lenawee
County, Michigan, Office of the Lenawee C, pro se.

0.76 Acres of Land, More or Less, Permanent Easement
(Pipeline Right-of-Way Servitude), and 2.28 Acres of
Land, More or Less, Temporary Work Space, in Lenawee
County, Michigan, Midwest Energy Cooperat, pro se.

2.73 Acres of Land, More or Less, Permanent Easement
(Pipeline Right-of-Way Servitude), and 4.05 Acres of
Land, More or Less, Temporary Work Space, in

Washtenaw County, Michigan, Michigan Paving and M,
pro se.

0.04 Acres of Land, More or Less, Permanent Easement
(Pipeline Right-of-Way Servitude), and 0.06 Acres of
Land, More or Less, Temporary Work Space, in
Washtenaw County, Michigan, Michigan Paving and M,
pro se.

**OPINION & ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE OF CONSUMERS
ENERGY PIPELINE EXPLOSION (Dkt. 813);
GRANTING PLAINTIFF'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE OF ROUTE CHANGES
(Dkt. 814); GRANTING IN PART AND DENYING
IN PART PLAINTIFF'S MOTION IN LIMINE
AS TO WAYNE ESCH (Dkt. 816); DENYING
PLAINTIFF'S MOTION IN LIMINE AS TO ERIC
GARNDER AND MARK KOENINGER (Dkt.
817); GRANTING IN PART AND DENYING IN
PART PLAINTIFF'S MOTION IN LIMINE AS TO
WILLIAM LAWRENCE AND ERIC GARDNER
(Dkt. 819); GRANTING IN PART AND DENYING
IN PART PLAINTIFF'S MOTION IN LIMINE AS
TO FRANK TOKAR, JR. AND ERIC GARDNER
(Dkt. 820); GRANTING IN PART AND DENYING
IN PART PLAINTIFF'S MOTION IN LIMINE TO
EXCLUDE EVIDENCE OF PRIOR EASEMENT
PURCHASES AND SETTLEMENTS (Dkt. 821);
GRANTING DEFENDANTS' MOTION IN LIMINE
AS TO MIKE ISRANI AND RICHARD HURIAUX
(Dkt. 822); DENYING DEFENDANTS' MOTION
IN LIMINE AS TO ANTHONY SANNA (Dkt. 823);
DENYING DEFENDANTS' MOTION IN LIMINE AS
TO JEFFREY KERN AND DAVID FALKENSTERN
AND TO STRIKE SUPPLEMENTAL REPORT
(Dkt. 824); AND DENYING WITHOUT PREJUDICE
DEFENDANTS' MOTION IN LIMINE TO
EXCLUDE PIPELINE IMPACT STUDY (Dkt. 825)**

MARK A. GOLDSMITH, United States District Judge

*1 This matter is before the Court on several motions in
limine brought by Plaintiffs (Dkts. 813-814, 816-821) and
Defendant landowners (Dkts. 822-825). Most of the issues
have been fully briefed; for those without full briefing, the
time to file has since passed. See E.D. Mich. LR 7.1(e)(2).
The Court has dispensed with oral argument, as it will not

aid in the decisional process. See E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b). The disposition of each motion will be addressed below and summarized in the conclusion of this opinion and order.

I. ANALYSIS

The majority of the motions in limine presently before the Court are those brought pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Court will thus first address each Daubert motion, followed by a discussion of the remaining motions in limine.

A. Daubert Motions

Under Federal Rule of Evidence 702, a “witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion” if the following criteria are met:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Rule 702 places a special obligation on the trial court to be a gatekeeper, ensuring that “any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Daubert, 509 U.S. at 589, 597. In Kumho Tire Company v. Carmichael, 526 U.S. 137 (1999), the Supreme Court clarified that the “gatekeeping obligation” is not limited to “scientific” expert testimony, but applies to all expert testimony. In other words, Rule 702 requires a district court to satisfy itself that the proposed expert testimony will assist the trier of fact, before permitting the trier of fact to assess such testimony. Id. at 148-149. The proponent of the expert must establish admissibility by a preponderance of the evidence. Nelson v. Tenn. Gas Pipeline, Co., 243 F.3d 244, 251 (6th Cir. 2001).

1. Wayne Esch

The first Daubert motion brought by Rover concerns Wayne Esch, a realtor based in Washtenaw County, Michigan. Esch was retained by Defendants to assess the effect of the Rover pipeline on the following property tracts: (i) MI-WA-006.000 and MI-WA-009.500 (owned by Barry Kenyon/BVK Holdings, LLC); (ii) MI-WA-052.000 (owned by Jean and Matthew Little, Trustees of the Little Trust (“Little Trust”)); (iii) MI-WA-058.000 (owned by William and Karen Zimmer); (iv) MI-WA-059.000 and MI-WA-059.500 (owned by L&B Schaible, LLC); and (v) MI-WA-064.000-T (owned by Cynthia and William Kemner).¹ Esch ultimately concluded that the Rover pipeline “will have a severe and negative impact on the marketability of the properties in the future,” to the tune of a 25% decrease in value for each property. Esch Decl., Ex. 1 to Defs. Mot., ¶ 10 (Dkt. 816-2). Esch also opined that the location of the properties made them ideal for residential subdivision development, but the presence of the pipeline “will have a substantial negative impact on their ability to be developed.” Ex. D to Esch Decl. at PageID.9613. Rover argues that Defendants have failed to satisfy any of the requirements set forth in Rule 702. The Court will address each requirement in turn.

*2 Rover argues that while Esch has experience as a realtor, he does not have any relevant experience with properties encumbered by pipelines or large properties sold for potential development as residential subdivisions. It notes Esch’s assertion that a pipeline on the subject properties would cause a 25% loss in value cited to only one previous experience where one of his buyers insisted on a discount because of a pipeline. Rover notes the Sixth Circuit’s holding in Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994), that “[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.” Defendants argue that Esch’s “experience and specialized knowledge as a successful realtor” in the Washtenaw County market qualify him as an expert under Rule 702. They note that he has been in the top five percent of realtors in Washtenaw County by annual sales each of the past ten years. See Ex. D to Esch Decl. at PageID.9614.

Esch’s experience as a longtime realtor in Washtenaw County satisfies the first requirement under Rule 702.

While Esch could only name one specific transaction where a buyer demanded a price decrease due to an oil pipeline, he noted that he had dealt with several other instances of encumbrances, including electrical lines. He also has been working for over fifteen years in Washtenaw County, where each of the properties at issue is located. Putting aside the methods used to come to his conclusion, his credentials qualify him to testify regarding the effect a pipeline would have on the resale value of property in the county.

Despite his experience, Esch did not base his conclusion regarding the property values on sufficient facts or data, or reliable principles and methods. While the Court in Daubert set forth factors to consider when determining whether an expert's methods are reliable, including whether the methods have been tested, subject to peer review, and generally accepted in the scientific community, the "factors utilized in Daubert may be of limited utility in the context of non-scientific expert testimony." First Tennessee Bank Nat. Ass'n v. Barreto, 268 F.3d 319, 334 (6th Cir. 2001). "In some cases (even cases involving non-scientific expert testimony), the factors may be pertinent, while in other cases 'the relevant reliability concerns may focus upon personal knowledge or experience.'" Id. at 335 (quoting Kumho Tire, 526 U.S. at 150). "[W]hether Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." Id. (quoting Kumho Tire, 526 U.S. at 153).

Defendants argue that Esch should be permitted to testify based solely on his past experience, because his testimony is only being offered to "educate the jury as to the condition of the real estate market where these properties are located." Def. Resp. at 7. Esch's report does begin by discussing the nature of the Washtenaw County market, noting that "[m]any environmental conscience [sic] Buyers refuse to live close to gas pipelines, others will consider purchasing only if the price is adjusted." Ex. D to Esch. Decl. at PageID.9610. However, he then gets into much more detail regarding the effect of the Rover pipeline on the subject properties. Esch stated in his report and at his deposition that the highest and best use for each of the properties is to convert them into residential subdivisions, and that the presence of the Rover pipeline will cause this land to decrease in value by 25%. In coming to the precise conclusion in his report that the subject properties will lose

a quarter of their value, Esch relies solely "upon my real estate experience in Washtenaw County." Id.

Although the Daubert factors may not be applicable where, as here, the issue involves a non-scientific opinion, the trier of fact needs to be given some basis, other than a generalized reference to experience, when being presented with a statistical conclusion regarding the value of specific properties. See Newell Rubbermaid, Inc. v. Raymond Corp., 676 F.3d 521, 527 (6th Cir. 2012) ("Red flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity."). Esch conceded that he did not inspect any of the subject properties, compare sales data for properties with and without pipeline easements, review or conduct any studies examining the effect of pipelines on home values, nor did he consider the fact that three of the properties already have pipeline easements, a fact that might well alter his 25% devaluation estimate. When asked what market data he used to arrive at his 25% conclusion, he once again relied on his anecdotal experience of "taking buyers out to look at properties and the market feedback that they give to me based upon that." Id. at 54.² Esch Dep., Ex. 2 to Defs. Mot., at 54, PageID.9629 (Dkt. 816-3).

*3 While Defendants now try to characterize Esch's testimony as a mere general discussion of the Washtenaw County housing market, this is belied by Esch's own report and testimony, which give a precise percentage of how much the landowners can expect their property to be devalued by the Rover pipeline. The failure to rely on any meaningful data in coming to his conclusion regarding the 25% devaluation of the Kenyon, Little Trust, Zimmer, L&B Schiable, and Kemner properties renders this portion of Esch's opinion unreliable. As a result, this portion of his testimony is excluded.³ However, based on his experience, the Court will allow him to testify about the market generally, as well as the highest and best use of the property.

2. Mark Koeninger and Eric Gardner: PIR/Stigma Theory

Rover next seeks to exclude the opinions of Mark Koeninger, an architect, and Eric Gardner, an appraiser, both of whom were retained by the Kenyon, Little Trust, Zimmer, Schiable, and Kemner landowners.

Gardner appraised all six of the properties, and based his appraisals in part on Koeninger's potential impact radius ("PIR")/stigma theory. This theory relies on the Pipeline and Hazardous Safety Materials Administration's ("PHMSA") definition of PIR, which it defines as "the radius of a circle within which the potential failure of a pipeline could have significant impact on people or property." 49 C.F.R. § 192.903. Koeninger estimates that the PIR for the Rover pipeline is 1,100 feet on each side of the pipeline. According to Koeninger, this potential blast radius causes a stigma which devalues not just the land on which the pipeline is situated, but also the land that is within the PIR, and even the land outside the PIR. Koeninger estimates that the land within the radius is devalued anywhere from 25% to 40%, with the land outside of the PIR losing 10% of its value.

Defendants now seek what is sometimes referred to as "severance damages," which arise where a "partial taking not only deprives the owner of the property that is actually taken but also diminishes the value of the property remaining to the owner." United States v. 91.90 Acres of Land, Situate in Monroe Cty., Mo., 586 F.2d 79, 86 (8th Cir. 1978). Koeninger and Gardner assert that because of the stigma caused by the pipeline and its PIR, the value of the property remaining to Defendants has diminished. Rover now moves to exclude this opinion, on the grounds that it is not based on sufficient facts or data, is not the product of reliable principles and methods, and even if it was, the principles and methods were not reliably applied to the facts of the case.

*4 Rover asserts that neither Gardner nor Koeninger relied on sufficient facts or data when conducting the appraisals, or formulating the PIR/stigma theory, respectively. Rover's main point of contention is that while the putative experts reviewed market data to determine the "before take" value of Defendants' land, they did not consult any market data within Washtenaw County to determine the "after take" value of the properties.

A review of Gardner's reports shows that, in addition to reviewing regional and neighborhood data, he began by comparing each subject property with four to five comparable properties to determine each property's "before take" value. See, e.g., Kemner Appraisal, Ex. 1 to Pl. Mot., at 28, PageID.9745 (Dkt. 817-2). He also toured each property, met with the landowners, and

spoke with local officials. He then adjusted this value based on Koeninger's PIR/stigma theory, a theory which Koeninger became familiar with after reviewing a 2002 study of the effects of the Guardian Pipeline in Wisconsin ("the Guardian Pipeline study"), as well as a study in Right of Way magazine, in order to arrive at the "after take" valuation. Id. at 13. A review of Koeninger's deposition indicates that he reviewed some market data—what he refers to as "demographic information"—to get a general sense of the housing market in Washtenaw County. See Koeninger Dep., Ex. 8 to Pl. Mot., at 55, PageID.10134 (Dkt. 817-9). In addition to the Guardian Pipeline Study, he reviewed zoning information and master plans. Id. He also used the county auditor's surveys and records to determine which easements already existed on the subject properties. Id. at 50.

Rover contends that, instead of relying on the PIR/stigma theory and two studies that supposedly support that theory, Gardner should have compared the subject properties to comparable properties that sold after being encumbered by pipelines in order to determine the "after take" value of the properties. See Rockies Exp. Pipeline LLC v. Hopkins, No. 1:08-CV-00751-RLY, 2012 WL 1622532, at *5 (S.D. Ind. May 9, 2012) ("One would expect that if the presence of an underground natural gas pipeline makes residential development economically non-viable, then some market data would exist to evidence that."). Rover takes issue with Gardner's and Koeninger's failure to examine sales data along the Rover pipeline to determine whether news of the pipeline had caused properties to depreciate. However, there is authority that holds that "[c]omparable sales are only one method of estimating property values. Other methods may be used 'where no comparable sales exist.'" Vector Pipeline, L.P. v. 68.55 Acres of Land, 157 F. Supp. 2d 949, 956 (N.D. Ill. 2001) (quoting United States v. 99.66 Acres of Land, 970 F.2d 651, 655 (9th Cir. 1992)). Gardner testified that such comparable properties do not exist at this time, because while there are some properties with six to twelve inch pipelines, the Rover pipeline's forty-two inch diameter makes it distinguishable. Gardner Dep., Ex. 9 to Pl. Mot., at 43 (Dkt. 817-10); see also id. (describing the Rover pipeline as a "game changer."). Gardner instead relied on the PIR and literature on the stigma of pipelines to determine the decrease in value caused by the Rover pipeline.

Rover insists that comparable sales do exist, noting a study by Integra Realty Resources (“Integra Study”), to which Gardner and Koeninger were privy, which analyzed homes on and off other large pipelines in Ohio, Virginia, New Jersey, Pennsylvania, and Mississippi. The report ultimately concluded that “there is a sales frequency for homes ‘on’ a pipeline that is consistent with those ‘off’ a pipeline. This indicates that the presence of a pipeline does not inhibit sales.” IRR Report, Ex. 11 to Pl. Mot., PageID. 10303 (Dkt. 817-12). Contrary to Gardner’s conclusion, the report also concluded that the “size of the pipeline has no effect on sales price in the study areas.” *Id.*

*5 While this report may contradict the PIR/stigma theory, it is well-settled that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Clay*, 215 F.3d at 669. Gardner was entitled to rely on his experience and the literature he reviewed in order to conclude that the PIR/stigma effect was real. *See Vector Pipeline*, 157 F. Supp. 2d at 957 (“Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience.”) (internal citation and quotations omitted).

Rover also takes issue with the literature relied on for Gardner’s “after take” valuation, first arguing that the study of the stigma caused by the Guardian Pipeline is unreliable because it consisted of a phone survey of individuals selected at random, rather than a survey of only active home buyers. A review of the study reveals that it conducted a thorough, scientific survey of homeowners regarding how the then-forthcoming Guardian pipeline in Wisconsin would affect their home-buying decisions. *See Guardian Pipeline Study*, Ex. A to Defs. Resp. to Mot. to App. Comm. (Dkt. 689-2). The study began by asking respondents generally whether a pipeline would impact their decision to purchase a home, and then followed up by asking by what percentage the property would have to be reduced for them to make a purchase. *Id.* at 3-7. While Rover believes the study should have only surveyed those active in the market, this critique does not render the entire study unreliable. Rover does not actually critique the Right of Way magazine article, but instead notes the article’s recommendation that appraisers also analyze comparable sales to determine the “after take” value. However, as noted above, Gardner insisted that, in light of the size of the Rover pipeline, there were not comparable

sales in Washtenaw County.⁴ The Court concludes that Koeninger and Gardner could reasonably rely on both pieces of literature in lieu of comparable sales in order to satisfy Rule 702(b)’s mandate that they rely on sufficient facts and data in formulating their opinions.

The next issue concerns whether Koeninger’s PIR/stigma theory itself is the product of reliable principles and methods. As noted above, “*Daubert* provided a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony. These factors include: testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique’s operation, and general acceptance in the relevant scientific community.” *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008) (internal citation and quotations omitted).

Rover contends that the PIR/Stigma theory “has failed” when tested, ostensibly referring to the Integra study, and has not been the subject of peer review or publication. However, as noted above, it has found support in the Guardian Pipeline Study, and in the study published in Right of Way Magazine. While Rover notes that a court in the Southern District of Ohio explicitly found that Koeninger’s PIR/stigma theory possessed a “fundamental weakness,” *see Rockies Exp. Pipeline, LLC v. 4.895 Acres of Land, More or Less, in Butler Cty., Ohio (Pipeline Right-Of-Way Servitude)*, No. 2:08-CV-554, 2011 WL 1043493, at *1 (S.D. Ohio Mar. 16, 2011), the court held that the PIR was properly considered and was “an interesting theory that lacks persuasive force under the circumstances of this case.” *Id.* This lends more support to the argument that the weaknesses in the PIR/stigma theory go towards the theory’s weight, not its admissibility.⁵

*6 Lastly, Rover argues that, even if the PIR/stigma theory is reliable, Gardner and Koeninger did not reliably apply the theory to each tract they evaluated. It argues that the theory was misapplied because the putative experts failed to take into account that three of the properties—those owned by Kemner, Schiable, and Zimmer—were already encumbered with pipelines. As a result, Rover argues, the theory should have led to a diminished “before take” value in light of the preexisting pipelines.

In Gardner's expert reports on the Kemner, Schiable, and Zimmer properties, he acknowledges that there are existing pipelines on the properties, but concedes that "the size, pressure and contents of the pipe are unknown and therefore not included in this report." *See, e.g.,* Kemner Appraisal, Ex. 6 to Pl. Mot., at PageID.10080 (Dkt. 817-17). The failure to consider the potential stigma of the existing pipelines on the "before take" value of the Kemner, Schiable, and Zimmer properties allows for the inference that Gardner did not faithfully apply the PIR/stigma theory. Even allowing for their contention that the Rover pipeline is a "game changer" in terms of its size, it stands to reason that under the PIR/stigma theory, the "before take" value of the three pieces of property would at least be marginally depressed by the purportedly smaller preexisting pipelines. The failure to at least consider their impact on the property values makes it appear as though Gardner was attempting to inflate the "before take" value of the properties, so that he could then apply the PIR/stigma theory to the Rover pipeline to maximize Defendants' just compensation.

Despite this apparent flaw in Gardner's appraisals, the Court holds that it is not grounds for a wholesale exclusion of Koeninger's PIR/stigma theory, or Gardner's application of the theory to his appraisals. As noted above, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Clay*, 215 F.3d at 669. It is for the trier of fact to determine whether, in light of the apparent disparity in size between the preexisting pipelines and the Rover pipeline, Gardner was correct in choosing not to apply the PIR/stigma theory to determine the "before take" value. As a result, the Court holds that the testimony of Koeninger is admissible, as is the testimony of Gardner as it pertains to his application of the PIR/stigma theory.

3. William Lawrence and Eric Gardner: Cost to Cure

The next *Daubert* motion concerns William Lawrence, an arborist retained by the Kemner, Little Trust, and Zimmer Defendants, as well as Gardner's incorporation of Lawrence's opinions into his appraisals. Rover argues that Lawrence's opinion should be barred because his method of calculating the value of trees felled on the subject properties, as well as the cost to replace those trees, is not

reliable under Rule 702. When evaluating the trees felled, Lawrence applied the trunk formula method, which values each tree distinctly from the land on which it was situated. Defendants' appraiser, Gardner, then took Lawrence's valuation of the felled trees, and added that amount to his appraisal of the land itself. Rover argues that because the rule in Michigan, known as the unit rule, requires that land be valued as an integrated whole, rather than as a sum of its components, Lawrence's opinion and reports, as well as Gardner's incorporation of Lawrence's opinion, should be excluded as evidence of just compensation due.

*7 As a threshold matter, Defendants argue that Rover is bound, as a contractual matter, by the Federal Energy Regulatory Commission's ("FERC") Certificate of Public Convenience and Necessity and Rover's Final Environmental Impact Statement ("FEIS") to pay them the value of the trees as damages, in addition to the just compensation owed to them for the diminution in their land's value. Defendants argue that while they "do not challenge the general utility of the 'unit rule,' Rover's conduct in agreeing to the terms contained within the FEIS has waived its application to the issue of the trees removed from Defendants' properties." Defs. Resp. at 7-8.

There are numerous problems with Defendants' theory that the Certificate of Public Convenience and Necessity and FEIS can contractually bind Rover to pay damages above and beyond just compensation. To begin, Defendants do not provide any cases or other authority where an individual (or group of individuals) successfully brought a breach of contract action as a third-party beneficiary against the drafter of an environmental impact statement, or the grantee of a Certificate of Public Convenience and Necessity.

Even assuming the Certificate and the FEIS are a contract, and that Defendants have standing to assert a claim under that contract, a review of both documents does not show a promise to provide damages for the trees in addition to any just compensation. Defendants highlight language in the FEIS that states that Rover is required to compensate the landowners for "damages incurred during construction," and that if there are trees of commercial or other value that have to be removed during construction, "Rover would allow the landowner the right to retain ownership of the trees and negotiate with them regarding the disposition of the trees." *See* Defs. FEIS Excerpt, Ex. A to Defs. Resp., at PageID.12648-12649

(Dkt. 838-2). This language does not establish a promise by Rover to provide damages above and beyond just compensation. Indeed, another section of the FEIS, omitted by Defendants, explicitly addresses the method of compensation for the forthcoming tree removal. Noting that roughly 3,000 acres of forested land would be affected by the project, Rover stated that it “retained appraisers to help determine property values and fair market value.” Pl. FEIS Excerpts, Ex. 1 to Pl. Reply, at PageID.12871 (Dkt. 850-1). It also stated that “[l]andowners would be compensated for any marketable timber that is removed from their property during construction.” *Id.* The FEIS makes clear that this compensation will be determined through negotiation between Rover and the landowners, or if necessary, through eminent domain proceedings.

Finally, as noted by Rover, even if there was evidence that it breached the FEIS and Certificate, Federal Rule of Civil Procedure 71.1, the rule governing condemnation cases, “provides that other than an answer, no pleading or motion asserting any additional defense or objection shall be allowed by the defendant.” *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 380 (4th Cir. 1995) (holding that breach of contract counterclaim was barred in an eminent domain proceeding). As a result, the FEIS and Certificate do not entitle Defendants to any amount of above just compensation.⁶

*8 Turning to the admissibility of Lawrence’s opinion, Rover argues that it should be excluded because he determined a value for the trees that was separate and distinct from the value the trees may have contributed to the fair market value of the underlying land as a whole. Michigan law, which governs here under the Natural Gas Act, *see Columbia Gas Transmission Corp. v. Exclusive Nat. Gas Storage Easement*, 962 F.2d 1192, 1199 (6th Cir. 1992), allows for application of the unit rule, which states that “the value of natural physical assets ... will not be valued separately from the land.” *Muskegon Cty. v. Bakale*, 303 N.W.2d 29, 30 (Mich. Ct. App. 1981). The court in *Bakale* stated that

Where land taken in eminent domain has ... trees capable of being converted into lumber, these circumstances may be considered so far as they affect the market value of the land; but part of the realty cannot as a rule be separately valued

for its materials, trees, etc., as an item additional to the value of the land for the purpose of sale.

Id. (quoting 26 Am. Jur. 2d Eminent Domain § 279).

However, contrary to Rover’s assertion, the unit rule is not the exclusive measure of damages in Michigan where a partial taking is at issue. “Generally, in eminent domain cases a condemnee’s damages are measured by the fair market value of the property taken. However, where ... a partial taking occurs, it is possible for the property not taken (the remainder) to suffer damages attributable to the taking. These damages have been described as ‘severance damages.’ ” *Dep’t of Transp. v. Sherburn*, 492 N.W.2d 517, 519–520 (Mich. Ct. App. 1992).

“[T]he proper measure of damages in a condemnation case involving a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property if applicable. To calculate the severance damages, the parties may present evidence of the cost to cure.” *Id.* In order to calculate the cost to cure, Lawrence employed the trunk formula method, which is a way to value large trees that have been felled. Lawrence described the method as “an attempt to reflect the cost of a tree if you were to replace it. It is essentially the landscape installation and guarantee cost of smaller trees extrapolated with a mathematical formula to larger trees.” Lawrence Dep., Ex. 5 to Pl. Mot., at 32, PageID.10697 (Dkt. 819-6).

Rover does not contest that the trunk formula method is a reliable methodology for determining the cost to cure. It argues that Lawrence’s opinion should be excluded because he cannot prove that the cost to cure will actually decrease the amount of severance damages, and correspondingly increase the parcel’s value. Rover notes the court’s ruling in *Sherburn* that “curing,” by its very nature, “decreas[es] the amount of severance damages and correspondingly increase[s] the parcel’s market value.” *Sherburn*, 492 N.W.2d at 520. Rover contends that because Lawrence does not assert that he knows the parcel’s actual market value, he has no way of knowing whether the proposed replacement of the felled trees would actually cause the property to appreciate. However, such knowledge does not seem necessary for Lawrence to conclude that curing the felled trees would cause an increase in the property’s value. The Michigan Tree Valuation Guide, relied on heavily by both parties,

begins by stating that “[t]rees and other landscape plants have a value.” Mich. Tree Guide, Ex. F to Defs. Resp., at 4, PageID.12667 (Dkt. 838-7). The guide notes that, in addition to aesthetic value, it is widely accepted that trees provide functional value, serving to abate noise, provide screening, and traffic control. Id. Indeed, it is hard to imagine a scenario where expending the cost to cure would somehow increase the severance damages, and correspondingly decrease the property value. Further, as noted infra, Lawrence has provided testimony that each of the trees at issue provides distinct value to the subject properties.

*9 Lastly, Rover argues that, while the trunk formula method is reliable, it was not reliably applied by Lawrence. It notes the statement in the Michigan Tree Valuation Guide that the guide is meant to “provide[] a framework of the acceptable practices or methods used to value trees in maintained landscapes.” Id. at 5, PageID.12667. The guide cautions that “[i]t is not intended to be used as a framework for determining the value of trees outside of landscaped settings such as woodlots and fencerows where the tree does not add distinct value to the landscape through attributes such as aesthetics, shading, etc.” Id. Rover points to Lawrence’s testimony that the felled trees on the Kemner, Little Trust, and Zimmer properties were located in woodlots and fencerows. Lawrence Dep. at 18, PageID.12684. Based on this testimony, Rover argues, the trunk formula method should not have been applied to the trees on the subject properties.

A review of Lawrence’s deposition and report indicate that he applied the trunk formula method reliably. The Michigan Tree Valuation Guide specifically provides that it can be used as a framework for trees located in woodlots and fencerows, provided that those trees add “distinct value to the landscape through aesthetics, shading, etc.” Mich. Tree Guide at 5. Lawrence testified that the trees on each subject property provided distinct value. As to the Little Trust property, Lawrence testified that the trees contributed to the owners’ recreational use of the property. Lawrence Dep. at 36-37, PageID.12688-12689. Lawrence testified that the property had long been used for hunting, and that the trees played an important role in this activity. Id. at 37, PageID.12689. Regarding the Zimmer property, Lawrence testified that the trunk formula method was appropriate because the area around the trees was regularly mowed and maintained as if it were in a landscape setting, which contributed to the home

on the property. Id. at 38, PageID.12689. Finally, with regard to the Kemner property, Lawrence believed the trunk formula method was appropriate because the owner intended to subdivide the property, with plans to preserve the trees as a nature preservation area for the subdivision. Id.

Lawrence also testified that based on his extensive experience, which Rover does not contest, he believed the trunk formula method “comes closest to the true value of the trees on those properties based on the existing land uses.” Id. at 36. Because he considered the distinct value of the trees, and his own experience, Lawrence reliably applied the trunk formula method to the subject properties. His opinion is thus admissible as evidence of the cost to cure.

Rover also contends that Gardner’s appraisal should be excluded because he failed to apply the unit rule. It argues that he merely added Lawrence’s tree valuations to his opinion of diminution in market value of the Kemner, Little Trust, and Zimmer properties in order to arrive at the amounts due. Defendants do not address this argument in their response.

There are two different ways Gardner could have arrived at the amount due under Michigan law. He could have applied the unit rule, whereby he would have considered how the trees added to fair market value of the subject properties as a whole, and correspondingly, how much the removal of those trees lowered the fair market value of the property, if at all. Such a valuation would have conformed to the unit rule as announced in Bakale. Alternatively, Gardner could have arrived at the damages due to the landowners by applying the method set forth in Sherburn. As noted above, the court in that case held that “the proper measure of damages in a condemnation case involving a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property if applicable.” Sherburn, 492 N.W.2d at 520.

Gardner appears to have taken a third course. For each landowner, he assessed how much Rover’s partial taking lowered the value of the entire property (not just the fair market value of the property taken), to arrive at his “value conclusion,” i.e. how much Rover owed the landowner for the diminution of the entire tract. He then added the cost of the trees as estimated by Lawrence on

top of his “value conclusion” in order to arrive at the total amount due to the landowner. This method involves double-counting—by accounting for the lowered value triggered by the partial taking and then adding the value of lost trees. Because this methodology is not supported under Michigan law, it cannot be said that Gardner’s appraisal is reliable.

*10 Gardner’s appraisals as to the Kemner, Little Trust, and Zimmer properties are excluded. Lawrence’s testimony is relevant to the extent that Defendants seek to introduce evidence of severance damages.

4. Frank Tokar, Jr.: Mineral Valuation

Rover next seeks to exclude the opinions of Frank Tokar, Jr., an expert retained by Defendant Little Trust to opine on the value of mineral deposits on their property. Like with the opinion of Lawrence, the Little Trust’s arborist, Rover seeks to exclude Tokar’s testimony and report on the grounds that Tokar’s opinion is “fundamentally flawed” because he considered the value of the mineral deposits separately from the value they contribute to the land as a whole, thus violating the unit rule. He also argues that Tokar’s opinion is not reliable because the factual assumptions underlying his opinion are false. Rover again seeks to exclude Gardner’s appraisal, this time on the grounds that he has simply taken Tokar’s valuation of the minerals and added it to the decrease in land value to arrive at the Little Trust’s just compensation.

This brings the Court to Rover’s first argument for exclusion—that Tokar’s opinion is inadmissible because he values the minerals independently from the land. This is not grounds for exclusion. In order for an appraiser to take into account the contributory value of the minerals to the land as a whole, it is instructive for the appraiser to first understand how much the minerals are worth. See Columbia Gas, 962 F.2d at 1199 (holding that while, under Ohio law, mineral deposits are not valued separately from the land on which they are located, it is still proper to admit evidence that the land contains valuable deposits in order to determine the land’s fair market value). Further, Tokar’s opinions are probative of potential severance damages. See Sherburn, 492 N.W.2d at 520.

Rover next argues that Tokar’s method for determining the minerals’ worth does not pass muster under Rule 702 because the assumptions underlying his valuation are “demonstrably false.” In his report, Tokar valued the mineral deposits at \$448,000. Rover contends that this valuation was entirely dependent on Tokar’s assumption that, but for the Rover pipeline, the Little Trust would have contracted with Stoneco, a construction materials provider that purchased land adjacent to the Little Trust property, to mine the minerals on the Little Trust’s land. As initial matter, it does not appear that Tokar limited his valuation to a scenario where Stoneco would mine the minerals on the Little Trust’s property; his report states that his valuation is based upon “the present value that would be realized by an owner if leased to an operator, such as Stoneco of Michigan or other mining company capable of conducting such operation.” Tokar Report, Ex. 4 to Pl. Mot., at 9, PageID.10858 (Dkt. 820-5) (emphasis added).

Assuming Tokar limited his estimation to Stoneco, Rover argues that he had no basis to believe that the company would have been interested in mining the Little Trust minerals. It notes that in private communications between Tokar and Stoneco, Tokar represented to the company that the amount of minerals on the Little Trust property was less than the amount necessary for mining to be economically feasible for Stoneco. During his deposition, Tokar testified that a property would need to contain approximately 600,000 tons of minerals for mining to be worthwhile. Tokar Dep., Ex. 3 to Pl. Mot., at 93, PageID.10843 (Dkt. 820-4). In his emails with Stoneco, Tokar estimated that there was a total of 530,000 tons of minerals on the Little Trust’s property. See 4/26/2017 Email, Ex. 5 to Pl. Mot. (Dkt. 820-6). Rover also notes estimates by Stoneco that there would be less minerals than Tokar represented. However, in his expert report, issued a month after his communication with Stoneco, Tokar concluded that there was 673,000 tons of minerals, above the threshold to make mining economically feasible. Tokar Report at 8, PageID.10857.

*11 To the extent Rover argues that this inconsistency in estimates renders Tokar’s opinion unreliable, it is well-settled that Rule 702 “is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.” Micro Chem., Inc. v. Lextron, Inc., 317 F.3d 1387, 1392 (Fed. Cir. 2003) (quoting Advisory Committee Note

to Rule 702); see also Pipitone v. Biomatrix, Inc., 288 F.3d 239, 250 (5th Cir. 2002) (“The fact-finder is entitled to hear Dr. Coco’s testimony and decide whether it should accept or reject that testimony after considering all factors that weigh on credibility, including whether the predicate facts on which Dr. Coco relied are accurate.”). Tokar’s varying estimates of the amount of mineral deposits on the Little Trust property is not grounds for exclusion of his opinion.

Even assuming mining the Little Trust property would be economically feasible, Rover argues that it is entirely speculative whether Stoneco would have agreed to lease the property but for the Rover pipeline. In support of this assertion, Rover submits the declaration of Jay Ellis, an administrative manager for Stoneco. See Ellis Decl, Ex. 11 to Pl. Mot., ¶ 1 (Dkt. 820-12). Ellis states that prior to its most recent discussions with the Littles in April 2017, Stoneco discussed mining the property in 2015, but never reached an agreement. Id. ¶ 6. According to Ellis, over the course of their most recent discussions with the Littles, they were provided with samples of the minerals from Tokar, and determined that “the quality and the quantity of the materials were not worth the investment.” Id. ¶ 9. Ellis stated that while the pipeline may have affected one of the two areas to be mined, Stoneco would likely not have been interested regardless of the pipeline. Id. ¶ 10. Stoneco also indicated that it would not be ready to mine the materials until at least 2020, which affects Tokar’s royalty calculation. See Stoneco Annual Report, Ex. 12 to Pl. Mot., at PageID.10966 (Dkt. 820-13).

In response, the Little Trust notes that construction of the Rover pipeline was already before the FERC at the time of the 2015 negotiations, which likely led to the failure to reach an agreement. See Def. Resp. at 11. They also note that Stoneco, originally a Defendant in this matter, has since settled with Rover and has provided materials as part of the construction of the pipeline. Id. at 11-12. As with Rover’s argument regarding the amount of minerals to be mined, whether Stoneco was actually agreeable to mining the Little Trust property but for the Rover pipeline is a question for the trier of fact. While Ellis’s declaration asserts that Stoneco was likely not going to enter an agreement due to factors aside from the Rover pipeline, the failure to reach a deal in 2015, shortly after the pipeline was proposed, as well as Stoneco’s potential bias as a supplier of the pipeline, could lead the trier of fact to conclude that the pipeline did in fact prevent the Little Trust from reaching a mining agreement with

Stoneco. The trier of fact is entitled to hear Tokar’s opinion and assess his credibility in light of Ellis’s rebuttal. See Pipitone, 288 F.3d at 250.⁷

*12 Finally, Rover again challenges Gardner’s appraisal on the grounds that he reached his conclusion by simply adding Lawrence’s mineral valuation on top of the amount of fair market value lost for the entire tract as a result of the Rover pipeline. The Court agrees. As noted above, Gardner’s appraisal method improperly combines the unit rule and severance damages by calculating the loss in value for the entire tract (rather than just the portion taken) and then adding the value of the minerals and trees on top of that calculation. See United States v. 0.648 Acres or Land, No. CIV.A. 13-4722, 2014 WL 2533778, at *2 (E.D. La. June 5, 2014) (“[S]everance damages should not be assessed separately from the before-and-after method because the before-and-after method already includes severance damages in the calculation.”).

As a result, Gardner’s appraisal for the Little Trust property is excluded.⁸

5. Mike Israni and Richard Huriaux: Rebuttal to PIR/Stigma Theory

Defendants bring their first Daubert motion in response to the proposed testimony of Mike Israni and Richard Huriaux. Israni and Huriaux, engineers and former PHMSA employees, were retained by Rover for the sole purpose of rebutting the PIR/stigma theory set forth by Koeninger and adopted by Gardner in his appraisal. They state in their report that “the additional safety requirements that may be triggered by a larger PIR ... are designed to equalize risk across a pipeline system.” See Israni and Huriaux Report, Ex. A to Defs. Mot., at 7, PageID.11116 (Dkt. 822-3). Thus, according to the report, “the use of a PIR as an arbitrary marker of risk or the reflection of a PIR in property market value makes no sense.” Id. Defendants argue that these putative rebuttal experts fail to meet any of the Rule 702 requirements.

The Court holds that the proposed testimony of Israni and Huriaux fails to satisfy Rule 702(a) because it will not help the trier of fact determine a fact in issue. “While an expert may opine on an issue of fact within the jury’s province, an expert may not give testimony stating ultimate legal conclusions based on those facts.” Scott v. Chipotle

Mexican Grill, Inc., 315 F.R.D. 33, 48 (S.D.N.Y. 2016) (internal citation and quotations omitted). “Accordingly, courts exclude expert testimony that provide[s] legal opinions, legal conclusions, or interpret[s] legal terms; those roles fall solely within the province of the court.” Id. (internal citation and quotations omitted).

Israni and Huriaux’s report ultimately concludes that Koeninger has misused the PIR, which they contend was solely meant as an evaluation of risk, as a measure of property value. This legal conclusion is outside of their purview as engineers. Simply because PIR was created in order to mitigate risk along pipeline, does not mean that it can be summarily dismissed as an indicator of property values. Because the interpretation of the federal regulation establishing PIR falls beyond the expertise of Israni and Huriaux, their rebuttal testimony is excluded.

6. Anthony Sanna

The next Daubert motion is brought by Defendants Little Trust, Zimmer, and Kemner, owners of what have been identified as “timber tracts,” which contained trees that were felled by Rover while constructing the pipeline. In addition to trees, the Little Trust seeks compensation for the loss of sand and gravel minerals on its property. Defendants argue that Rover’s appraiser, Anthony Sanna of Integra Realty Resources, should be excluded from presenting his opinion because his appraisals failed to attribute any value to the trees and minerals at issue.

*13 Defendants do not challenge Sanna’s qualifications. Their argument is that Sanna’s appraisal is unreliable because it focuses on an “extraordinary assumption” made by Sanna, defined as “uncertain information accepted as fact.” See, e.g., Sanna Little Appraisal, Ex. A to Defs. Mot., at PageID.11286 (Dkt. 823-3). The extraordinary assumption at issue states that “[t]his appraisal does not address compensation for ... commercial-grade timber ... Specific instructions for this appraisal include the extraordinary assumption that Rover Pipeline, LLC will separately reimburse the owners for ... commercial-grade timber damaged or removed during construction.” Id. Sanna testified that Rover informed him “that part of our plan is to restore these to the original condition so the appraisal doesn’t need to reflect that.” Sanna Dep., Ex. D to Defs. Mot. at 171, PageID.11338 (Dkt. 823-6). Defendants now argue that

Sanna’s assumption that only commercial-grade timber is compensable renders his appraisals unreliable.

In response, Rover notes Sanna’s deposition testimony. When asked whether the extraordinary assumption in his report regarding commercial-grade timber meant that Rover only agreed to reimburse landowners for commercial timber, Sanna testified that “I don’t think our comment was intended to be all inclusive, that it was only going to pay for commercial timber.” See Sanna Dep. at 178, PageID.11340 (Dkt. 823). Sanna testified that his just compensation conclusion incorporated the contributory value of noncommercial trees; he stated that “our data had trees on the comparables. So the comparables [that] sold with trees, we’re giving them a value for any trees that may have been on that site prior to the take.” Id. at 179, PageID.11340. As a result, it does not appear that either Sanna or Rover limited the compensation due to the property owners to just commercial-grade timber. Consistent with the unit rule, Sanna considered the contributory value of timber found on comparable properties when conducting his appraisals.

Defendants also object to Sanna’s failure to attribute any value to the mineral reserves found on the Little Trust property. In his report, Sanna states that “[n]o opinion is expressed as to the value of subsurface oil, gas or mineral rights, if any, and we have assumed that the property is not subject to surface entry for the exploration or removal of such materials, unless otherwise noted in our appraisal.” Sanna Little Appraisal at 43. Defendants argue that Sanna’s “failure to even mention the presence of known extractable mineral deposits ... represents deliberate chicanery on the part of the Plaintiff.” Defs. Mot. at 12.

Rover’s decision to limit Sanna’s consideration of the value of any subsurface minerals is permissible. Rover notes that, under Michigan law, “[i]n determining fair market value, one must ... determine the highest and best use of the property.” Detroit/Wayne Cty. Stadium Auth. v. Drinkwater, Taylor, & Merrill, Inc., 705 N.W.2d 549, 557 (Mich. Ct. App. 2005). “‘Highest and best use’ means the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use.” Id. (internal citation and quotations omitted). With regard to alternate uses of condemned property, Michigan law holds as follows:

To warrant admission of testimony as to the value for purposes other than that to which the land is being put ... the landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, and (3) that the market value of the land has been enhanced by the other use for which it is adaptable.

Id. at 560.

Rover argues that there are questions of fact regarding whether the Little Trust property would be adaptable from its current rural and agricultural use, and whether it is reasonably probable that the property would be put to use within a reasonable time. Rover again notes the Ellis declaration, which casts doubt on the economic feasibility of mining the Little Trust property, and notes that Stoneco could not begin any mining until sometime between 2020 and 2023. It also argues that there is no evidence to show that adapting the land's use would enhance its property value.

*14 Rover was entitled to rely on these facts when commissioning its expert. It instructed Sanna not to consider subsurface minerals because it concluded that they essentially had no value. Like with Tokar, a disputed factual predicate is not grounds for exclusion of an expert opinion. See Pipitone, 288 F.3d at 250.

Defendants lastly argue that Sanna's appraisal method violated multiple USPAP standards, contained errors and omissions, and failed to apply an appropriate methodology, all of which resulted in unreasonable valuations. Defendants do not elaborate on the alleged errors or omissions (beyond previously noting their objection to the failure to consider the mineral reserves), and do not explain how Sanna's appraisal methods are inappropriate or violate USPAP. Indeed, one of the USPAP standards cited by Defendants requires appraisers to identify a property's "physical, legal, and economic attributes" when formulating a valuation. See Defs. Mot. at 13. Each of Sanna's appraisals determined the physical attributes, legally permissible uses, feasibility of

development on the land, and its most productive use. See, e.g., Sanna Little Appraisal at 28-29.

For all of these reasons, Sanna's opinion is reliable under Daubert.⁹

7. Jeffrey Kern and David Falkenstern: Rebuttal to Frank Tokar

The final Daubert challenge concerns Defendant Little Trust's motion to exclude Rover's putative rebuttal experts Jeffrey Kern and David Falkenstern. Kern and Falkenstern were retained to opine on Tokar's expert report, which addressed the value of the subsurface minerals on the Little Trust property. As noted above, Tokar concluded that there were enough minerals on the property to make mining feasible for Stoneco, the gravel mining company that owns the land adjacent to the Little Trust's mineral deposits. In their report, Kern and Falkenstern agree with Tokar's conclusion that one section of the mineral deposits, identified as "Area A," will be rendered at least partially inoperable by the pipeline. They disagree that the other section of the mineral deposits, identified as "Area B," would be affected at all by the Rover pipeline.

The Little Trust argues that the opinions of Kern and Falkenstern fail to satisfy the requirements of Rule 702. It begins by arguing that the proposed testimony will not help the trier of fact to understand the evidence or determine a fact in issue, contending that the testimony is "nothing more than a straw man through which Plaintiff counsel [sic] can proffer a preview of its closing arguments." Def. Mot. at 6. It notes Kern and Falkenstern's approval of Tokar's methodology, and contrast it with their conclusion ("an abrupt about-face") that Tokar's valuation was less accurate than the valuation arrived at by Rover's mineral expert, Glen Tolsdorf. While Falkenstern acknowledged that Tokar's decision to bore into the soil was more reliable than Tolsdorf's decision to simply look into the trench, Falkenstern Dep., Ex. B to Defs. Mot., at 26, PageID.11415 (Dkt. 824-4), he also testified that, these differing methodologies notwithstanding, Tolsdorf did a better job of defining which areas of the mineral deposits were within wetlands, which made mining impractical, id. at 49, PageID.11421. By acknowledging those portions of Tokar's report that they were in agreement with,

and critiquing portions with which they disagreed, Kern and Falkenstern were acting as quintessential rebuttal experts. See Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc., 829 F. Supp. 2d 802, 835 (D. Minn. 2011) (“It is the proper role of rebuttal experts to critique plaintiffs’ expert’s methodologies and point out potential flaws in the plaintiff’s experts’ reports.”).

*15 The trust next argues that the opinions of Kern and Falkenstern fail to satisfy Rule 702(b)-(d) because their opinions do not rely on sufficient facts and are not the result of a reliably applied methodology. It notes that neither Kern nor Falkenstern conducted a site visit or conducted their own independent analysis of the mineral deposits. It is well-settled that rebuttal experts are not required to independently assess the fact in issue. See E.E.O.C. v. Tepro, Inc., 133 F. Supp. 3d 1034, 1047 (E.D. Tenn. 2015) (“Rebuttal experts can properly respond[] to the content of [the original] expert witness’ report and opinions.”); see also Rivas v. Preston, No. 11-0193, 2012 WL 7782960, at *5 (W.D. Tex. Feb. 29, 2012) (“Rule 703 provides that an expert may base his opinion on facts or data in the case that the expert has been made aware of or personally observed.”).¹⁰

Defendants also seek to strike a supplemental report submitted by Kern and Falkenstern. Their original report was served on Defendants on October 30, 2017, and Falkenstern was deposed on December 21, 2017. However, it was not until December 29, 2017 that counsel for Rover was provided with Tokar’s entire work file. On January 26, 2018, subsequent to receipt of the file, Rover served on Defendants Kern and Falkenstern’s supplemental report. Federal Rule of Civil Procedure 26(a)(2)(D)(ii) provides that expert rebuttals are to be provided within thirty days of the other party’s disclosure. It is undisputed that the entirety of Tokar’s work file was not provided to counsel for Rover until December 29, 2017. Because the supplemental report was served on January 26, 2018, less than thirty days after receipt of the entire file, Kern and Falkenstern complied with Rule 26.¹¹

In any event, the supplemental report arrives at essentially the same conclusion as the original report—that while at least a portion of “Area A” of the Little Trust’s property will be rendered unusable by the Rover pipeline, “Area B” of the property is unaffected by the pipeline. The supplemental report includes a few criticisms of Tokar

that were not present in the original report, namely, that he did not conduct a feasibility study for mining on the property, and that his valuation did not take into account Stoneco’s statement that they would not be able to mine the property for at least three years. While Defendants characterize the supplemental report as coming to a “completely different” conclusion than the original report, a review of the reports demonstrates that this is simply not the case. As a result, the Court denies Defendant Little Trust’s motion to exclude Kern and Falkenstern and to strike their supplemental report.

B. Remaining Motions in Limine

1. Consumers Energy Pipeline Explosion

Rover has brought a motion in limine seeking to exclude evidence of a November 2017 explosion of a Consumers Energy Pipeline in Orion Township (Dkt. 813). It argues that the explosion is irrelevant to the issue of just compensation, and thus should be excluded under Federal Rule of Evidence 401, and that even if the Court deems the incident relevant, any relevance is substantially outweighed by the risk of prejudice, in contravention of Rule 403.

*16 The Court denies Rover’s motion without prejudice. The Court must first allow trial proofs to proceed, including Koeninger’s testimony regarding PIR. The Court will also have to review the video on its own to determine whether it is admissible as a demonstrative exhibit, or possibly admissible as evidence. Rover may renew its motion at trial.

2. Pipeline Route Changes

Rover’s next motion in limine seeks to exclude evidence of alternate routes for the Rover pipeline (Dkt. 814). Rover notes that Defendant Mark Selby seeks to introduce an expert report noting that the pipeline could have taken a less intrusive route through his property. It argues that pipeline routes are irrelevant to the issue of just compensation, and the FERC establishes the pipeline route and is the only venue in which to challenge the route.

Defendants have failed to file a response to this motion. The Court has reviewed the motion and concludes that it

is meritorious. Federal Rule of Civil Procedure 401 states that evidence is relevant if it has “any tendency to make a fact more or less and probable than it would be without the evidence; and the fact is of consequence in determining the action.” The sole issue to be determined is the amount of just compensation owed by Rover to Defendants. While alternate routes may have resulted in a smaller taking to certain properties, they are not probative of how much compensation is owed to Defendants in light of the routes that were actually chosen by FERC. As a result, the Court grants Rover’s motion to exclude all evidence of route changes, considerations, and alternative routes.

3. Construction Damages

Rover next seeks to exclude all evidence of damages caused to the subject properties by negligence, nuisance, or trespass during construction of the pipeline (Dkt. 818). Rover argues that such evidence is outside of this Court’s jurisdiction, irrelevant or, to the extent the Court deems it relevant, substantially outweighed by the risk of unfair prejudice, confusion, and undue delay.

In response, the “non-Selby Defendants” (those Defendants other than Mark and Linda Selby) state that they have no objection to Rover’s motion and do not intend to offer any evidence relating to tort claims against Rover. However, the Selby Defendants argue that this motion is premature because it was filed in advance of the deadline for all Selby-related pretrial motions. The Selbys state that because they intend to file a motion to consolidate in their companion case, Selby v. Rover Pipeline, LLC, No. 18-cv-10066, alleging tort claims, it is premature to exclude all tort related evidence. The Court disagrees. It is well-settled, and Defendants do not contest, that damages to the remainder property during construction are not compensable in a condemnation proceeding. See, e.g., United States v. 79.20 Acres of Land, More or Less, Situated in Stoddard Cty., Missouri, 710 F.2d 1352, 1356 (8th Cir. 1983). Thus, any evidence of alleged torts committed during the course of construction is excluded for this condemnation case. In the event the Selby’s companion case asserting tort claims is consolidated with this case, any evidentiary issues relating to the tort claims will be addressed at that time.

4. Prior Easement Purchases and Settlement Negotiations

Rover also brings a motion in limine to exclude two categories of information that it believes Defendants seek to introduce to establish fair market value: (i) settlement discussions between Rover and Defendants; and (ii) the price paid for easements purchased on certain Defendants’ properties by other condemning authorities prior to this litigation (Dkt. 821). In their response, Defendants state that they agree that any evidence of settlement discussions is barred by Federal Rule of Evidence 408. Thus, the only issue remaining is whether evidence of previous easements that were purchased on Defendants’ properties is admissible.

^{*17} “The traditional rule is that ‘[t]he price paid by a condemnor in settlement of condemnation proceedings or in anticipation of such proceedings is inadmissible to establish value of comparable land as such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value.’ ” Rockies Express Pipeline, LLC v. 4.895 Acres of Land, More or Less, In Butler Cty., Ohio, No. 2:08-CV-554, 2009 WL 1163054, at *1 (S.D. Ohio Apr. 28, 2009) (quoting United States v. 10.48 Acres of Land, 621 F.2d 338, 339 (9th Cir. 1980)). However, courts have held that such evidence may be admitted where the proponent of the evidence makes a preliminary showing that the purchase was actually voluntary. Id. There is also an exception if “the fact that parties were condemnor and condemnee either was not known or had no influence because the sale was not in connection with, or in anticipation of condemnation proceedings.” Id. (quoting Transwestern Pipeline Co. v. O’Brien, 418 F.2d 15, 19 (5th Cir. 1969)). Defendants have also offered a ruling by the Southern District of Ohio in a suit concerning the Rover pipeline, in which the court allowed for the admission of prior easement purchases where the proponent lays a foundation establishing that the transaction was voluntary and conducted at arms-length. See 2/26/2018 Order, Ex. A to Defs. Resp. (Dkt. 834-1).

The Court believes this approach, rather than a wholesale exclusion of all prior easement purchases, as argued by Rover, is appropriate. As a result, evidence of these purchases will only be admitted if the proponent lays an adequate foundation establishing that the transaction was

voluntary, including that the transaction was conducted at arms-length, i.e., not influenced by the fact of the impending condemnation. See Rockies Express, 2009 WL 1163054, at *1.

5. Pipeline Impact Study

The final motion in limine is brought by Defendants, and seeks to exclude a February 2016 report prepared by Integra Realty Resources on behalf of the Interstate Natural Gas Association of America entitled Pipeline Impact Property Value and Property Insurability (Dkt. 825). Defendants argue that the study is inadmissible hearsay and that it is also barred by Rule 403, because its probative value is substantially outweighed by the risk of prejudice.

The Court denies this motion without prejudice. A review of the briefing indicates that the parties dispute whether Sanna, Rover's appraiser, relied on the report in coming to his valuations, or merely "considered" the report. Prior to ruling on this issue, the Court will need to hear Sanna's testimony at trial. Further, whether the report is only admissible as rebuttal evidence is dependent on the testimony of Defendants' experts. As a result, Defendants' motion is denied without prejudice.

II. CONCLUSION

For the foregoing reasons, the Court (i) grants in part and denies in part Rover's motion as to Wayne Esch (Dkt. 816); (ii) denies Rover's motion as to Mark Koeninger and Eric Gardner (Dkt. 817); (iii) grants in part and denies in part Rover's motion as to William Lawrence and Gardner (Dkt. 819); (iv) grants in part and denies in part Rover's motion as to Frank Tokar Jr. and Gardner (Dkt. 820); (v) grants Defendants' motion as to Mike Israni and Richard Huriaux (Dkt. 822); (vi) denies Defendants' motion as to Anthony Sanna (Dkt. 823); (vii) denies Defendants' motion as to Jeffrey Kern and David Falkenstein and to strike their supplemental report (Dkt. 824); (viii) denies without prejudice Rover's motion as to the Consumers Energy explosion (Dkt. 813); (ix) grants Rover's motion as to alternate pipeline routes (Dkt. 814); (x) grants Rover's motion as to construction damages (Dkt. 818); (xi) grants in part and denies in part Rover's motion as to prior easement purchases and settlements (Dkt. 821); and (xii) denies without prejudice Defendants' motion as to the pipeline impact study (Dkt. 825).

SO ORDERED.

All Citations

Slip Copy, 2018 WL 3322995, 106 Fed. R. Evid. Serv. 1020

Footnotes

- 1 Esch was also retained to opine on tract MI-WA-017.000, owned by Sue and Sally Schiel. The Schiels have since been dismissed from this case.
- 2 Regarding his assertion that the pipeline will hinder the ability to convert the subject properties into residential subdivisions, their highest and best use, Esch conceded that he did not determine whether the properties could be reclassified as residential, or whether building permits would issue. He instead relied on a search of the Multiple Listing Service, and saw that some houses had sold in the general area of the subject properties. While he failed to consider the zoning of the properties, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Clay v. Ford Motor Co., 215 F.3d 663, 669 (6th Cir. 2000) (quoting Daubert, 509 U.S. at 596).
- 3 Defendants rely on a ruling by the Michigan Court of Appeals in Lenawee Co. v. Wagley, 836 N.W.2d 193, 209 (Mich. Ct. App. 2013), in which the county appealed a ruling by the trial court allowing an appraiser to testify on behalf of the landowner. Despite the fact that the appraisal was not based on "professional literature or studies," the court held that testimony was admissible because it "was limited to the marketability of the property and the necessity for disclosures." As discussed above, Esch's testimony goes beyond a general discussion of marketability and disclosures; it gives a precise percentage for the value lost as a result of the Rover pipeline. The Wagley court also indicated that the appraiser had specific experience with the easements involved in that case, noting his "expertise and its direct relationship to the facts of the case." Id. at 209. While Esch is qualified to speak on real estate valuations in Washtenaw County, his experience, without more, is insufficient to conclude that Defendants' properties will lose a quarter of their value from the pipeline.

- 4 Rover also argues that the opinions of Gardner and Koeninger are unreliable because they did not incorporate the opinions set forth in the Final Environmental Impact Statement created by FERC when it approved the pipeline, and a report by Integra Realty Resources, which concluded that natural gas pipelines do not create a "stigma impact" on property values. Pl. Mot. at 10. However, as noted by Defendants, they "were not required to match [the Plaintiff] study for study or produce evidence of a particular type." Vector Pipeline, 157 F. Supp. 2d at 957.
- 5 Rover also argues that Gardner violated the Uniform Standards of Professional Appraisal ("USPAP") when he failed to use comparable sales for his "after-take valuation." Gardner asserts in his report that the use of PIR/stigma theory is a valid sales comparison approach, and that the report thus complies with the USPAP. Like with Rover's other objections, this issue may be used to impeach Gardner; it does not render his opinion inadmissible.
- 6 Defendants also note that Anthony Sanna, Rover's appraiser, testified that he did not consider the value of the trees when making his appraisal, because he was told they would be valued separately. Defendants cite this testimony as evidence that Rover has changed its position regarding whether they would separately compensate the landowners for the trees, in addition to paying the loss of fair market value of the land itself. Such a statement would go towards the reliability of Sanna's appraisal, not whether Defendants are legally entitled under either the FEIS, Certificate, or Michigan law to separate, distinct damages for tree loss.
- 7 Rover also argues that Tokar's opinion should be excluded because his report does not contain all the facts or data considered by Tokar in forming his opinion, as required by Federal Rule of Civil Procedure 26(a)(2)(B)(ii). It notes a statement in Tokar's report that "[s]ome information used in this report is proprietary ... Because of this, details of some sources ... or other aspects of the mineral mining operations cannot be presented in this report." See Tokar Report at 3. Rule 37(c)(1) provides that if information is withheld under Rule 26(a), "the party is not allowed to use that information or witness to supply evidence ... unless the failure was substantially justified or is harmless." Tokar testified that the referenced information did not influence the methodology or his ultimate conclusion regarding the value, and that while the proprietary information was not attached to his report, these confidentially designated materials were produced in his work file. See Tokar Dep. at 123-124, PageID.12257. It thus appears that there was either no actual failure to disclose, or if there was, such failure was harmless.
- 8 Rover also again argues that this method of appraisal violates the Uniform Standards of Professional Appraisal Practice, and that failure to abide by USPAP renders Gardner's opinion unreliable. Noncompliance with USPAP does not render testimony per se unreliable; courts have held that it bears on credibility rather than admissibility. See Whitehouse Hotel Ltd. P'ship v. C.I.R., 615 F.3d 321, 332 (5th Cir. 2010) ("[T]he tax court acted within its ample discretion in considering USPAP compliance as relevant to the weight Argote's report should be given, instead of whether it should be admitted.").
- 9 Defendants again set forth a cursory argument that Sanna's opinion is inadmissible under Fed. R. Evid. 403 for the same reasons that it does not pass muster under Daubert. They do not elaborate on why Fed. R. Evid. 403 bars Sanna's testimony, other than a conclusory allegation that his opinions "would serve only to mislead and confuse the jury." Def. Mot. at 15. Because the Court concludes that Sanna's testimony is reliable under Daubert, it is not barred by Rule 403.
- 10 They also argue that Kern and Falkenstern's testimony will confuse and mislead the trier of fact in violation of Federal Rule of Evidence 403. Because their testimony is merely a critique of Tokar's valuation, it cannot be said that that the risk of misleading or confusing the trier of fact substantially outweighs the relevance of the testimony.
- 11 Rule 26(e)(2), governing supplemental expert disclosures, states that any supplement to an expert report "must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due." Under Rule 26(a)(3), these disclosures are due at least thirty days before trial. The Court has suspended all trial dates until disposition of the pending motions in limine; however, because the supplemental report was submitted back in January 2018, the disclosure was made well in advance of any plausible trial date.

2018 WL 4386024

Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio, Eastern Division.

ROVER PIPELINE, LLC, Plaintiff,

v.

10.55 ACRES OF LAND, MORE OR LESS, IN
ASHLAND COUNTY, OHIO, et al., Defendants.

Case No. 5:17-CV-239

Signed 09/14/2018

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MEMORANDUM OPINION

SARA LIOI, UNITED STATES DISTRICT JUDGE

*1 Several motions are pending in this condemnation case concerning the property owned by defendants Roger and Rita Dush ("the landowners"). Plaintiff Rover Pipeline, LLC ("Rover") moves to exclude the expert testimony of Cathy Roche ("Roche") on lost profits (Doc. No. 691) and the expert testimony of Mark D. Koeninger ("Koeninger") and Eric J. Gardner ("Gardner") on potential impact radius ("PIR") and stigma associated with the presence of a gas pipeline on the condemned property. (Doc. No. 693.) The landowners seek to exclude the expert testimony of Rover's rebuttal experts Richard D. Huriaux ("Huriaux") and Mike Israni ("Israni") (Doc. No. 694); the expert testimony of Rover's arborist, Alan D. Klonowski ("Klonowski") (Doc. No. 695); and the expert testimony of rebuttal expert Rebekah A. Smith ("Smith"). (Doc. No. 696.) The motions are fully briefed, and the Court conducted an evidentiary hearing on August 27, 2018 and August 28, 2018.

I. BACKGROUND

On February 6, 2017, Rover brought this action pursuant to the Natural Gas Act ("NGA") and under the procedural framework of Federal Rule of Civil Procedure 71.1. By this action, Rover sought condemnation of approximately 700 tracts of land located within this judicial district and through which it intended to construct a pipeline, having previously received a certificate from the Federal Energy Regulatory Commission ("FERC") and having reached settlement with the majority of property owners along the route of the proposed pipeline. Following numerous hearings and mediation sessions, Rover arrived at an agreement with all defendants on the issue of immediate possession, and it reached agreement with all but a few property owners, including the landowners, on the issue of compensation. The Court determined that a jury would resolve the issue of compensation for the remaining tracts. The Court has scheduled a jury trial on the issue of compensation for the landowners' property for September 17, 2018.

The present parcel being condemned consists of approximately 7.528 acres of land in Wayne County, Ohio (the "Property"), which includes a temporary construction easement and a smaller permanent easement. The Property is part of a larger tract of land that totals more than 100 acres and is owned by the landowners.

During construction, Rover utilized a 150-foot wide easement of the Property to construct and install the pipeline. This initial easement occupied a total of 3.4199 acres. Within the initial easement was a smaller 60-foot wide permanent easement that is currently being used by Rover to operate and maintain its pipeline. The permanent easement, which is the only easement currently in place on the Property, occupies approximately 1.3719 of the 7.528 acre tract. Because the pipeline is buried a minimum of four feet underground on the Property, the landowners are permitted to continue to utilize the 60-foot permanent easement area for certain limited purposes including farming, utility construction, driveway cross, and other uses not inconsistent with Rover's operation and maintenance of the pipeline.

*2 The parties agree that the Property and the adjoining farm acreage that makes up the 100 acres are utilized as a collective unit to grow Christmas trees. (Doc. No. 695 at 10338.¹) The business—"The Farms at Pine Tree Barn"—is organized as a Chapter S Corporation with the landowners owning 100% of its stock. "The Farms at Pine Tree Barn focuses on providing people with a memorable Holiday experience wherein individuals and families go into the field, on a horse drawn carriage, and cut down their own Christmas trees." The Farms at Pine Tree Barn grows, among other trees, "the highly coveted Fraser fir tree, which is not indigenous to Ohio." (*Id.*) According to the landowners, this particular species of evergreen tree requires a specific combination of soil composition and growing conditions that were present on the Property prior to the installation of the pipeline. It is the landowners' position that, after the installation of the pipeline and what it views as Rover's inadequate remediation efforts, "commercially marketable Fraser fir trees will no longer grow on the" Property.² (*Id.*)

In anticipation of the trial on compensation, the parties have identified approximately ten expert witnesses. These witnesses intend to provide opinions on a variety of topics ranging from soil and horticulture to real estate and economics. The present in limine motions address the admissibility of the opinions of several of these witnesses.

II. LEGAL STANDARDS

A. Motions in Limine

Although not explicitly authorized by the Federal Rules of Evidence or the Federal Rules of Civil Procedure, the practice of ruling on motions in limine "has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). Motions in limine allow the court to rule on evidentiary issues prior to trial in order to avoid delay and focus pertinent issues for the jury's consideration. *See United States v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999); *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997).

Courts should exclude evidence on a motion in limine only when it is clearly inadmissible. *Indiana Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004). If the court is unable to determine whether or not certain evidence is clearly inadmissible, it should defer ruling until trial so that questions of foundation, relevancy, and potential prejudice can be evaluated in proper context. *Id.* Ultimately, the determination whether to grant or deny a motion in limine is within the sound discretion of the trial court. *Goldman v. Healthcare Mgmt. Sys., Inc.*, 559 F. Supp. 2d 853, 858 (W.D. Mich. 2008) (citing *United States v. Certain Lands Situated in the City of Detroit*, 547 F. Supp. 680, 681 (E.D. Mich. 1982)). In limine rulings are preliminary, and the district court may change its ruling at trial for any reason it deems appropriate. *United States v. Yannott*, 42 F.3d 999, 1007 (6th Cir. 1994).

B. Rule 702

The parties' motions are governed by Rule 702 of the Federal Rules of Evidence. Rule 702 allows an expert witness to provide testimony in opinion form if: "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. The Supreme Court has interpreted this rule to require judges to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). These prerequisites apply to not only "'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho*

Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L.Ed. 2d 238 (1999) (quoting Fed. R. Evid. 702). Thus, “*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading ‘junk science’ on the other.” *Best v. Lowe’s Home Ctrs., Inc.*, 563 F.3d 171, 176-77 (6th Cir. 2009) (citation omitted).

*3 Although there is “no definitive checklist or test” to strike this balance, relevant factors include: (1) whether a theory or technique “can be (and has been) tested;” (2) whether a “theory or technique has been subjected to peer review and publication;” (3) the “known or potential rate of error;” and (4) whether the theory or technique is generally accepted. *Daubert*, 509 U.S. 593-94 (citations omitted). These factors are not exhaustive and the inquiry is “a flexible one,” *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 677 (6th Cir. 2011) (citations omitted), for districts courts must be mindful that “the gatekeeping inquiry must be ‘tied to the facts of a particular case.’” *Kumho*, 526 U.S. 150 (quoting *Daubert*, 509 U.S. at 591) (internal quotation marks omitted). Notwithstanding this individualized inquiry, a district court is not “required to admit expert testimony ‘that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 254 (6th Cir. 2001) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512, 139, L.Ed. 2d 508 (1997)). Finally, “it is the proponent of the testimony that must establish its admissibility by a preponderance of proof.” *Id.* at 251 (citing *Daubert*, 509 U.S. at 592 n.10).

III. JUST COMPENSATION—GUIDING PRINCIPLES

The Fifth Amendment of the United States Constitution provides that “no private property shall be taken for public use without ‘just compensation.’” U.S. CONST. amend V. “The measure of compensation is the value of the property at the time of the taking. The owner of the property is entitled to receive ‘what a willing buyer would pay in cash to a willing seller.’” *United States v. 25.202 Acres of Land*, 860 F. Supp. 2d 165, 174 (N.D.N.Y. 2010) (quoting, among authority, *United States v. Certain Land Situated in the City of Detroit*, 148 F. Supp. 2d 863, 870 (D. Mich. 2001)); See *United States v. 104 Acres, More or Less, in Keeler Twp. (Van Buren)*, 666 F. Supp. 1017, 1020 (W.D. Mich. 1987) (“In most cases, just compensation

means ‘the fair market value of the property on the date it is appropriated.’ ”) (quoting *Kirby Forest Indust., Inc. v. United States*, 467 U.S. 1, 10, 104 S. Ct. 2187, 2194, 81 L.Ed. 2d 1 (1984)); see also *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 78 L.Ed. 1236 (1934) (a land owner is entitled to receive “the market value of the property at the time of the taking contemporaneously paid in money”). Moreover, the amount of compensation “includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from the taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.” *United States v. Grizzard*, 219 U.S. 180, 183, 31 S. Ct. 162, 55 L.Ed. 165 (1911). The Fifth Amendment guarantee of “just compensation” contains an element of equity, as its focus is to place the owner in as good a financial position as if the property had not been taken. *Olson*, 292 U.S. at 255. Nonetheless, “overcompensation is as unjust to the public as undercompensation is to the property owner” *United States v. L. E. Cooke Co., Inc.*, 991 F.2d 336, 341 (6th Cir. 1993) (citation omitted).

Fair market value is determined by considering what a “rational seller, willing but not obligated to sell, would take for the property, and what a rational buyer, willing but not obligated to buy, would pay for the property, and must take into account ‘[a]ll considerations that might fairly be brought forward and given substantial weight in bargaining between an owner willing to sell and a purchaser desiring to buy.’ ” *Van Buren*, 666 F. Supp. at 1020 (quoting *United States v. 1, 291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969) (further citations omitted)). “A court must also consider ‘the highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future.’ ” *Id.* (quoting *1,291.83 Acres of Land*, 411 F.3d at 1084); See *Olson*, 292 U.S. at 255. “Generally, the highest and best use of a property is presumed to be the property’s current use, but it can also be a future use if the property has a future use which may be anticipated with reasonable certainty.” *Rockies Exp. Pipeline, LLC v. Burtle*, 492 F. App’x 666, 670 (7th Cir. 2012) (quotation marks and citation omitted); See *Cooke*, 991 F.2d at 341 (“In the absence of proof to the contrary, the current use is presumed to be the best use.”) (citation omitted); see also *Olson*, 292 U.S. at 255 (The Court must consider the highest and best use of the property, either in its current state or for what it is likely to be needed in the reasonably near future, not necessarily ‘as

the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.”) (citations omitted). “[H]owever, speculative and remote possibilities cannot become a guide for the ascertainment of value, especially when the creation of such a potential use would require a substantial investment of capital.” *Cooke*, 991 F.2d at 341 (quotation marks and citation omitted).

*4 In cases, such as this, involving a partial taking of a property owner’s land rights, the “Sixth Circuit has indicated” that a district court “should employ a three step method of analysis. First, it should determine the before taking value of the property. Second, it should determine the taking value of the property lying within the easement. Finally, it should determine the incidental damages, arising from the easement, to any land adjacent to the easement.” *Van Buren*, 666 F. Supp. at 1020 (citing *United States ex rel. TVA v. An Easement and Right of Way 200 Feet Wide and 3,435 Feet Long Over a Tract of Land in Madison County, Tenn.*, 405 F.2d 305, 307 (6th Cir. 1968)); see also *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1199 (6th Cir. 1992) (“As a general rule, the correct measure of valuation of a partial taking of property is the difference between the property’s fair market value immediately before and after the taking.”)³ (citations omitted).

Federal courts apply “ ‘the law of the state in which the condemned property is located in determining the amount of compensation due.’ ” *Rockies Exp. Pipeline LLC v. 4.895 Acres of Land*, 734 F.3d 424, 429 (6th Cir. 2013) (quoting *Columbia Gas Transmission Corp.*, 962 F.2d at 1199). In *Am. Energy Corp. v. Rockies Exp. Pipeline LLC*, 622 F.3d 602, 606-07 (6th Cir. 2010), the Sixth Circuit had occasion to summarize the relevant Ohio law:

Under Ohio law, the landowner in an eminent domain action is entitled both to the value of the land taken and to “damages” to the “residue” of the property. *City of Norwood v. Forest Converting Co.*, 16 Ohio App. 3d 411, 476 N.E.2d 695, 700 (1984). Damages to the residue compensate for “any injury that may result to the remaining lands by reason of the construction of the proposed improvement,” measured by the difference in the residue’s fair market value before and after the taking. *Id.* A court determining fair market value should take into consideration “every element that can fairly

enter into the question of value.” *Sowers v. Schaeffer*, 155 Ohio St. 454, 99 N.E.2d 313, 317 (1951).

IV. ROVER’S MOTIONS

A. Lost Profits

*5 As an initial matter, Rover seeks to exclude all testimony of lost profits proffered by the landowners, including any and all testimony of the landowner’s business valuation expert, Cathy Roche. It is Rover’s position that “consideration of lost profits is not permitted when calculating fair market value in condemnation actions under the Fifth Amendment and well-established case law from the Supreme Court of the United States[.]” (Doc. No. 691 at 9935.) The landowners insist that lost profits are available under federal and Ohio law.

As a general rule, federal courts have refused to consider income generated by, or the “going concern” value of, businesses that are condemned. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379, 65 S. Ct. 357, 89 L.Ed. 311 (1945) (Compensation for a fee taking by the government “does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land....”); see also *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11, 69 S. Ct. 1434, 93 L.Ed. 1765 (1949) (denial of going concern damages rests on the principle that a business owner can move his business). But “the Supreme Court has steadfastly refused to declare any hard and fast rules in eminent domain cases.” *Certain Land Situated in Detroit*, 148 F. Supp. 2d at 879-80 (collecting cases where the Supreme Court carved out exceptions to the general prohibition on awarding lost profits). Additionally, even where the Supreme Court has found that lost profits and other going concern damages are not available in condemnation proceedings, it has recognized that a loss in the income generating power of the property would be relevant to a potential buyer and, therefore, should inform the fair market analysis. See *Gen. Motors Corp.*, 323 U.S. at 379.

Ohio follows the general rule that lost profits are *usually* not available in condemnation. “The business-losses rule is a judicial construct that holds that the power of appropriated property may not be compensated for the

loss of future profits from any commercial enterprise on the property.” *Cincinnati v. Banks*, 757 N.E.2d 1205, 1215 (Ohio App. Ct. 2001) (citing, among authority, *Preston v. Stover Leslie Flying Serv. Inc.*, 190 N.E.2d 446 (Ohio 1963)). Like its federal counterpart, the Ohio rule against awarding lost profits is not absolute and “requires the trial court to ‘look to the evidence to determine whether it is of such a character as to take the determination of [lost future profits] out of the field of speculation. Thus, compensation for lost future profits may be permitted if such profits can be proven with reasonable exactitude.” *Id.* at 1216 (quotation marks and citations omitted); see *Columbia Gas Transmission Corp.*, 962 F.2d at 1199 (similar) (citing *Preston*, 190 N.E.2d at 450).

As potentially applicable to this case, lost profits have been found to be relevant where the business’ profitability was “attributable to the property’s unique location, rather than the business acumen of its owners.” *Cincinnati*, 757 N.E.2d at 1215 (citing *Wray v. Hart*, No. 91CA20, 1992 WL 208900 (Ohio App. Ct. Aug. 13, 1992) (“exceptions to the general rule precluding evidence of business income occur when the character of property is such that a profit is produced without regard to the labor of the owner, where the profits derived from its use are the chief source of its value, or where the property is so unique as to make any comparable sales data unavailable”)). In *Wray*, for example, the court found that lost profits were relevant because the “record was replete with evidence” that the property was unique and that the lottery sales on the property were largely the result of the location such that truly comparable sales were unavailable. *Wray*, 1992 WL 208900, at *7.

*6 Given that federal and state law permit the award of lost profits in limited circumstances, and further recognizing that the overall goal of the just compensation guaranteed by the Fifth Amendment is equitable in nature and designed to make the landowner whole, the Court refuses to exclude, as a matter of law, all evidence of lost profits.

B. Landowners’ Piecemeal Approach

Rather than applying Ohio law to determine the before and after value of the fee, and factoring in any incidental damages from the taking, the landowners have chosen to separate the Property from the business and value

each individually, something that even Roche testified could not be done, given the business’s connection to and interdependence with the land. (Doc. No. 718 (Hearing Transcript [“Tr.”]) at 11247-48.) Specifically, the landowners asked Eric J. Gardner, a certified real estate appraiser, to treat the condemned property as if it were a vacant lot and then value this vacant lot before and after the taking. (Tr. at 11084.) Upon a determination that the highest and best use of the property before the taking was for residential development, Gardner opined that prior to the taking the condemned property alone was worth \$135,000. (Tr. at 11077, 11082, 11085-86.) Then, relying on Mark D. Koeninger’s PIR/stigma analysis, which will be addressed *infra* and recognizes a stigma attached to property through which a pipeline runs, he determined both that the highest and best use was now as green space and that its value had dropped to \$0.00. (Tr. at 11087, 11093, 11104, 11106-07.)

Then the landowners asked Roche to provide an analysis of the Christmas tree business. Assuming that no trees (including the Fraser fir) would ever be grown on the Property again, she valued the business under three different approaches—the asset approach, the market approach, and the income approach. According to Roche, the first two approaches resulted in a loss to the landowners of \$167,000 and \$157,000 respectively. Finding that the “income approach” best captured the loss from the easement, however, Roche determined that the loss to the landowners was actually \$888,000. (Doc. No. 691-1 (Expert Report of Cathy Roche [“Roche Report”]) at 9994.)

Without even getting into the factual basis and the methodology supporting each expert’s opinions, the Court finds that this piecemeal approach does not meet the Rule 702 standard for admission of expert evidence. First, because the approach does not value the actual property, before and after the taking, it will not assist the jury in their assigned task. Separate analyses of a vacant lot, and an unattached business will not inform the jury on the decrease in the value of the property, as improved by the business, before and after the condemnation.

Moreover, this is not a “business taking” under the law. *Cf. Kimball Laundry Co.*, 338 U.S. at 3 (government appropriated laundry for temporary use by the military); *Certain Lands in City of Detroit*, 148 F. Supp. 2d at 880 (valuation of duty-free business on condemned

property appropriate where the government's "taking of Defendant's property is akin to the situation in which the Government condemns property with the intention of carrying on the business of the condemnee"). While the condemnation of the property in this case may have compromised the Christmas tree business, it was not tantamount to the government (or Rover in its stead) taking over the business.

*7 Second, this "divide and conquer" approach has resulted in a loss value that, when added together, far exceeds the value of the fee, even when incidental damages are factored in.⁴ However, under Ohio law, a landowner's total damage award—combining the value of the taken land and any damages to the residue—cannot exceed the total before construction fair market value of the residue. *Sowers v. Schaeffer*, 99 N.E.2d 313, 316 (Ohio 1951) ("in fixing compensation for property taken by appropriation proceedings, the total award should not be less than the fair market value of the property to be appropriated *but it cannot exceed the fair market value of the property as a whole*") (emphasis add). Such an understanding of the outer limits of damages in condemnation is consistent with federal law. See *United States v. 6.45 Acres of Land*, 409 F.3d 139, 146-47 (3d Cir. 2005) ("In prescribing [the before and after rule], we have explained that the value of the separate interests cannot exceed the worth of the whole.")

Finally, the approach has resulted in internal inconsistencies that could not be easily reconciled by a fact-finder. For example, while Gardner and Koeninger each opined that the highest and best use of the property was for residential development—a position that runs contra to the presumption in favor of the current use being the highest and best use—Roche opined that the highest and best use was as a Christmas tree farm. (Roche Report at 9982; Doc. No. 693-2 (Expert Report of Eric J. Gardner ["Gardner Report"]) at 10236-7; Tr. at 11016, 11082, 11086.) In another apparent contradiction, it was Roche's opinion that the income approach best estimated the value of the Christmas tree business both before and after the taking. (Roche Report at 9994.) Gardner, on the other hand, believed that the income approach was an inappropriate (or less appropriate) method of valuing the landowners' type of business. (Tr. at 11097-98.) In both instances, the jury would be left with the task of reconciling seemingly irreconcilable opinions of the landowners' own experts in order to accept any part of the landowners' valuation expert evidence.

In combination, these reasons illustrate the fatal flaws in the landowners' approach, and demonstrate why the expert opinions of Gardner and Roche will not "help the trier of fact to understand the evidence or to determine a fact or data" necessary to award just compensation in this case. Fed. R. Evid. 702. For this reason alone, the expert opinions of Gardner and Roche are excluded.

C. Experts Mark D. Koeninger and Eric J. Gardner

The Court now turns to the other Rule 702 requirements for expert testimony. The cornerstone of Koeninger's expert report is his PIR analysis. Koeninger, who is an architect by training and experience, explained that the PIR is defined solely by federal regulation and "is an area around any high pressure pipeline transporting hazardous materials. The PIR is defined as the area where if the pipe should impact, there could be loss of life and/or property within the PIRA area (*as defined by the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration Regulations*). (Doc. No. 693-1, Expert Report of Mark D. Koeninger ["Koeninger Report"]) at 10195) (emphasis in original). He then offers his opinion that "any potential developer or agri-business owner, realizing the fact that the PIR will encumber 100% of the Dush property, will have concerns over the risks of property damage and injuries to persons and property that could result from a pipeline explosion." (*Id.*, emphasis in original). "These concerns[.]" Koeninger surmises, "will cause potential developers to look at other unencumbered property," rendering the Dush's property essentially valueless for residential development. (*Id.*) Gardner, in turn, relied on Koeninger's PIR analysis to formulate his valuation of the Property. (Gardner Report at 10216.)

*8 Koeninger's report fails to explain the basis for his conclusion that the existence of a PIR on the Property, as defined by federal regulations,⁵ would substantially decrease the value of the Property. In fact, the Koeninger Report is devoid of any support for its author's opinion. Further, at the hearing, Koeninger admitted that he did not rely on sales along the Rover Pipeline and, in fact, conceded that his opinion was not based on any objective facts or data that would suggest that potential property purchasers would be disinclined to purchase

property because of the existence of Rover's pipeline. (Tr. at 11023-25, 11065, 11070-71.)

Before an individual can give expert testimony, Rule 702 requires that the testimony be "based on sufficient facts or data[.]" Fed. R. Evid. 702(b); *See Cooke*, 991 F.2d at 342 (Expert testimony necessarily requires a "reasonable factual basis" to avoid exclusion.). In *Rockies Exp. Pipeline LLC v. Hopkins*, No. 1:08-CV-751-RLY-DML, 2012 WL 1622532, at *4 (S.D. Ind. May 9, 2012), the court rejected expert testimony that a pipeline caused "stigma" and land value reduction because the expert failed to present any objective sales data to support such an assumption and "did not conduct any market analysis pertinent to the issue[.]" The court reasoned that, if such a stigma existed, "[o]ne would expect" that "some market data would exist to evidence that." *Id.* at *5. Similarly, a district court in the Southern District of Ohio considered but ultimately rejected as unpersuasive Koeninger's PIR/stigma testimony because it was premised on an "insufficient factual basis[.]" *See Rockies Exp. Pipeline LLC v. 4.895 Acres of Land*, No. 2:08-CV-554, 2011 WL 1043493, at *1-2 (S.D. Ohio Mar. 16, 2011) ("This leaves the PIR approach an interesting theory that lacks persuasive force under the circumstances of this case.").

The landowners underscore the fact that the commission in *4.895 Acres of Land* did permit Koeninger and Gardner to offer PIR testimony even if it, and the district court that reviewed the commission's recommendations, ultimately rejected the testimony as unpersuasive. *See id.* at *1 ("The commission did not adopt a position that it was unwilling to entertain the PIR concept; rather, the Commission reasonably rejected the PIR analysis because the preponderance of the evidence undercut its application under the facts presented."). They also note that other courts have permitted Koeninger and others to offer PIR stigma testimony in condemnation cases. *See, e.g., Vector Pipeline, LLC v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 957 (N.D. Ill. 2001) (allowing testimony of "stigma effect" of pipeline from "experienced and qualified appraisers").

*9 With respect to proffered expert testimony, this Court is required to perform its own gatekeeper duties by evaluating the opinions in light of the record in the case before it and the requirements of Rule 702 and relevant case law. While there may be situations where expert testimony on the issue of PIR stigma may be

properly admitted to support a property valuation, the record fails to support the introduction of such evidence here. Koeninger's opinion testimony is not support by *any* facts or relevant sales or market data.⁶ Expert testimony may not be based on mere speculation, and assumptions must be supported by evidence in the record. *Lozar v. Birds Eye Foods, Inc.*, 529 F. App'x 527, 530-31 (6th Cir. 2013) (rejecting expert testimony that was not supported by, and was actually contradicted by, the available sales data). Further, reliability under Rule 702 requires that an expert's opinion not have "too great an analytical gap between the expert's conclusions, on the one hand, and the data that allegedly supports it, on the other."). *Id.* at 530 (quotation marks and citations omitted). Because Koeninger is unable to bridge the analytical gap between his conclusion and any facts that would have lent support for his conclusion in this case, the PIR remains an "interesting theory" that finds no application here.⁷ Accordingly, Koeninger's testimony, as well as Gardner's testimony that was based on Koeninger's PIR analysis, are excluded. (*See* Tr. at 11106-07.)

D. Expert Cathy Roche

Even though the Court has rejected Rover's overly broad position that evidence of "lost profits" is never relevant in condemnation proceedings, it has determined that Roche's testimony would not assist the jury in fixing just compensation in this case. Additionally, the Court finds that Roche's income approach analysis is unreliable because the methodology employed is fatally flawed and not supported by a sufficient factual basis.

At the outset, the Court finds that Roche failed to apply the generally accepted definition of fair market value to her business valuation calculations. It is well settled that the fair market value is defined as "what a willing buyer would pay in cash to a willing seller" if both were in the position to bargain freely and had reasonable time to negotiate and explore alternatives. *United States v. Miller*, 317 U.S. 369, 374, 63 S. Ct. 276, 87 L.Ed. 336 (1943). Moreover, for purposes of Fifth Amendment compensation, this valuation must be calculated as of the time of the taking. *See First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles Cnty., CA*, 482 U.S. 304, 319-20, 107 S. Ct. 2378, 96 L.Ed. 2d 250 (1978).

*10 While the report cites the proper standard, Roche testified in her deposition that valuation can vary depending on the “purpose of the valuation.” (Doc. No. 691-2 (Excerpts from Deposition of Cathy Roche [“Roche Dep.”]) at 81.) When asked what she understood the purpose of her valuation in this case to be, she responded that it was “[t]o value the business before and after the pipeline.” (*Id.*) At the motion hearing, Roche further clarified that her valuation focused on the perceived value of the property to the landowners. (Doc. No. 718 (Hearing Transcript [“Tr.”]) at 11197; *see id.* at 11148, 11153, 11215-16, 11244.)⁸ In fact, in cross-examination, Roche underscored the fact that certain assumptions she made in arriving at her calculations were based upon her assumption that there would be no sale. (*Id.* at 11215-16.) Rather than applying the well accepted definition of fair market value that would consider the value to a willing purchaser at the time of the taking, it would appear that Roche determined the continued value to the landowners after the installation of the pipeline. Because Roche’s employed methodology was not designed to determine the fair market value of the property, her conclusions would not assist the jury in their task.⁹ *Cf. In re Neal*, No. CIV 06-421-TUC-CKJ, 2008 WL 6759954 (D. Ariz. Sept. 30, 2008) (expert testimony would assist the jury, and was not subject to exclusion under Rule 702, where standard applied by expert in determining fair market value was substantially equivalent to the standard for determining the distressed value of the property).

However, the Court finds even more disturbing the fact that her valuation under the income approach fails to deliver a conclusion that has any indicia of reliability. In particular, Roche’s determination of the “capitalization rate” is entirely suspect. The “capitalization (or discount) rate” is the “required rate of return that an investor would demand—based on the risks associated with the benefit stream under consideration—to induce him or her to make the investment.” (*Understanding Business Valuation—A Practical Guide to Valuing Small to Medium Sized Businesses*, Fifth ed., Gary R. Trugman, at 513.) The parties agree that Roche utilized a “build-up method,” which factors into consideration long-term sustainable growth and a variety of risks associated with the business and the industry in arriving at the capitalization rate.

Roche applied the “risk free rate of return” and “equity risk premium” she found in Duff & Phelps, a recognized guide in business valuation, but rejected the Duff & Phelps

number for small stock risk premium of 5.9 %, opting for a 1% figure instead.¹⁰ (Tr. at 11196.) The impact of the decision to apply a 1% for small stock risk premium was significant, as when the Duff & Phelps’s 5.9% number is applied, the business valuation—even without any other changes in the calculation—is reduced from \$888,000 to \$338,787.¹¹ (Tr. at 11196, 11201.)

At her deposition, Roche offered no explanation for why she used the “generally accepted” Duff & Phelps numbers when they raised her valuation but ignored the guide’s suggested number when it lowered her valuation. (Roche Dep. at 76-77.) She further admitted that she did not rely on any other “authoritative guide” in selecting the 1% figure. (*Id.* at 82.) At the hearing, Roche testified that she relied on information she received at a continuing education class she attended 2015 that was presented at a conference of the National Association of Certified Valuation Analysts. (Tr. at 11189-90.) She admitted that she did not provide any of the materials from this course, and her report does not reference this unnamed course. (*Id.* at 11190.) Nonetheless, she explained on cross-examination that the course instructor’s presentation on risk evaluation was persuasive, and that a copy of the industry-specific breakdown of risk premiums prepared for the seminar is “pinned up on my board at the office, and I just refer to it as I am going through business valuation.” (*Id.* at 11221.)

*11 It is evident that Roche relied substantially on information she received at an unidentified seminar in arriving at the risk factors she selected for her valuation which, in turn, resulted in her use of multipliers that varied considerably from the established and accepted industry guides identified at the hearing. Unfortunately, the Court cannot evaluate Roche’s reliance on an unnamed seminar or the unseen documents created for the seminar. In the absence of any reassurance that Roche’s reliance on this seminar and its teachings is grounded in sound valuation principles, accepted in the industry, the Court is left with nothing more than the “ipse dixit” of the expert. *See Nelson*, 243 F.3d at 254; *Davis v. Carroll*, 937 F. Supp. 2d 390, 418 (S.D.N.Y. 2013) (It is especially appropriate to reject speculative expert opinions “where a field is characterized by established standards for arriving at expert conclusions and a proposed expert fails to engage with those standards, departs from them in a report, or cannot cite published works in support of a position.”) (citing *Dev. Specialists, Inc. v. Weiser Realty*

Advisors LLC, No. 09 Civ. 4084, 2012 WL 242835, at *8 (S.D.N.Y. Jan. 24, 2012)). Given the fact that this decision resulted in a calculation that was several times what the other two valuation methods yielded, Roche's inability to adequately explain or defend her calculation is decidedly troubling.

With respect to company-specific risk, Roche testified that she assigned a pre-taking "company specific risk premium" of 0% to the property, notwithstanding the fact that she admitted that there is always risk in any business. (Tr. at 11199-99; Roche Dep. at 104.) Additionally, while she acknowledged that the risk for an agricultural property—such as The Farms at Pine Tree Barns—included pests, drought, floods, and other weather-related conditions, she explained that she did not take them into consideration because "the Dushs monitor that risk or pay for that risk on a year-to-year basis." (Tr. at 11199; Roche Dep. at 104.) She then applied a 2% company specific risk premium post-taking to account for any problems associated with the construction and maintenance of the pipeline on the property. Yet, she was unable to identify any generally accepted treatises, literature, or other reference sources from the real estate or business valuation industry that would support assigning a company-specific pre-taking risk of 0% or a 2% post-taking risk.¹² Instead, she simply explained that relevant "literature" permitted the appraiser to utilize her professional judgment. (Tr. at 11199.) Like the decision to utilize a 1% small stock risk premium, her selection of company-specific risk percentages also had a substantial effect on the outcome of her calculations. Roche agreed that, without the 2% risk factor and assuming a 5.59% small stock risk premium, the business valuation post-taking would be \$148,905, substantially less than the \$888,000 she calculated. (Tr. at 11203, 11241.)

"Experts in disciplines that require the use of professional judgment are less likely candidates for exclusion because challenges may be ultimately viewed as matters in which reasonable experts may differ in exercising their judgment as to the appropriate methodology to employ or the appropriate variable to plug into a calculation." *In re Commercial Fin. Servs., Inc.*, 350 B.R. 520, 528–29 (Bankr. N.D. Okla. 2005) (citation omitted). Nevertheless, "[a]n expert's professional judgment, standing alone and without any supporting facts or data, is insufficient to support opinion testimony." *Antekeier v. Lab. Corp. of Am.*, No. 1:17-cv-786, 2018 WL 3028609, at *1 (E.D. Va.

May 1, 2018) (rejecting expert testimony where expert could not cite "reliable data or other facts" that formed his turnover rate estimate) (citing *Alveromagiros v. Hechinger Co.*, 993 F.2d 417, 421 (4th Cir. 1993)). Roche offers no explanation for her conclusions regarding the pre and post-taking company risk factors, making her conclusions merely "unsupported speculation" that must be excluded under Rule 702. *See Cooke*, 991 F.2d. at 342 ("Where an expert's testimony amounts to 'mere guess or speculation,' the court should exclude his testimony, but where the opinion has a reasonable factual basis, it should not be excluded."); *see, e.g., Lippe v. Bairnco Corp.*, 99 F. App'x 274, 279 (2d Cir. 2004) (excluding expert testimony where expert could not articulate reasons for why she adopted a percentage she used in her calculation).

*12 To be clear, the Court does not exclude this testimony on the basis of any assumptions Roche made regarding the Dushs' tree farm business, facts she may have chosen to discount in formulating her conclusion, or in differences of opinion in the proper execution of professional accounting judgment, as these categories of dispute would all be proper subjects for vigorous cross-examination. *See Cooke*, 991 F.2d at 342; *See, e.g., In re Joy Recovery Tech.*, 286 B.R. 54, 70 (B.R. N. Ill. 2002). Instead, the Court relies on the fact that Roche was entirely unable to explain the basis for many of her figures and calculations; calculations, the Court adds, resulted in a value amount that was several times that of Roche's own valuations in two other accepted valuation methods. Under these circumstances, the Court finds that Roche's income analysis has an indicia of unreliability that warrants exclusion under Rule 702.

For all of the foregoing reasons, Rover's motion to exclude PIR testimony (Doc. No. 693) is granted in full, and its motion to exclude all testimony of "lost profits" (Doc. No. 691) is granted in part, as set forth above. The expert testimony of Gardner, Koeninger, and Roche shall be excluded.

V. THE LANDOWNERS' MOTIONS

Because the Court shall exclude all expert testimony on the subject of PIR stigma, the landowners' motion to exclude Rover's rebuttal experts on the subject—Richard D. Huriaux and Michael Israni—is moot. Similarly, because Rover sought to offer the expert testimony of Smith to rebut Roche's business valuation testimony, and that

testimony will also be excluded, the landowners' motion to exclude Smith's testimony is also moot.

In their third motion, the landowners challenge the admission of the testimony of arborist Alan Klonowski. In his report, Klonowski opined that Rover's site restoration process will return the land subject to the temporary easement "to the production of high quality Fir Christmas trees." (Doc. No. 695-1 (Report of Alan Klonowski ["Klonowski Report"]) at 10358; Tr. at 11260.) The landowners challenge this conclusion primarily upon the fact that the conclusion is based on the quality of the soil *before* Rover engaged in remediation efforts.¹³

"The Federal Rules of Evidence allow an expert great liberty in determining the basis of his opinions and whether an expert opinion should be accepted as having an adequate basis is a matter for the trier of fact to decide." *Cooke*, 991 F.2d at 342 (citation omitted.) Here, Klonowski's opinion is not mere speculation, but has a factual basis—his inspection of the site on October 27, 2017 and his review of area soil surveys. (Tr. at 11253-54,

11261-12.) To the extent that his opinion is compromised by the fact that he evaluated the site prior to Rover's planned attempts to restore the land, the landowners may properly inquire on cross-examination. *Cooke*, 991 F.2d at 342 ("any weakness in the factual basis of an expert witness' opinion, including unfamiliarity with standards, bears on the weight of the evidence rather than on its admissibility") (citation omitted). The landowners' motion to exclude this testimony is denied.

VI. CONCLUSION

For all of the foregoing reasons, Doc. No. 691 is granted in part, Doc. No. 693 is granted in full, Doc. Nos. 694 and 696 are denied as moot, and Doc. No. 695 is denied.

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 4386024

Footnotes

- 1 All page numbers, with the exception of deposition citations, refer to the page identification number generated by the Court's electronic docketing system. For the sake of clarity, deposition citations refer to the page number assigned by the transcribing court report.
- 2 The property owners also maintain that they were forced to prematurely harvest the Christmas trees that were growing on the Property. Because the growth cycle for Christmas trees is several years, the landowners insist that the loss from these trees, alone, is substantial.
- 3 In fact, where the property shares a common and integrated use with other tracts, the weight of authority would provide that both the before and after analysis should consider the entire fee. *United States v. Certain Land Situated in City of Detroit*, 188 F. Supp. 2d 747, 751 (E.D. Mich. 2002) (collecting cases, including *United States v. 1,162.65 Acres of Land*, 498 F.2d 1298, 1300 (8th Cir. 1974) ("[T]he applicable working rule requires that if, on the facts of a particular case, it is determined that the particular tracts condemned were, at the time of taking, in fact being used and devoted to a unitary use together with another tract, the tracts taken and the tracts not taken must be considered as a single unit in both the before and after valuations")); see also *United States v. 287.89 Acres of Land, More or Less, in Clearwater Cnty.*, 241 F. Supp. 464 (W.D. Pa 1965) ("In determining just compensation in this case for the taking of one of three tracts of land which were in the same ownership and in fact have been used and treated as a unit, we think it is the law that they should be treated as a unit in estimating damages.") (citations omitted). Because the landowners concede that the condemned land was dedicated to a unitary use with the remainder, consideration of the value of the entire fee—both before and after the taking—would be appropriate. (See Doc. No. 695 at 10338 ["The Farms at Pine Tree Barn specialize in growing Christmas trees on the [] Property, and the adjoining farm acreage operated as a collective economic unit...."] (emphasis added)).
- 4 This result is not surprising given that both experts factored into their analyses the impact of the pipeline. By double-counting the anticipated damage from the pipeline, the landowners were able to over-represent their losses.
- 5 Instead, he said that his "conclusions were based on" the determination of a PIR on the property. (Tr. at 11024, 11040, 11044, 11045 ["I did not rely on anything other than the Department of Justice regulations in my report for PIR"].) Yet, Koeninger admitted that the PIR is not an "architectural issue." (Tr. at 11042.) He explained that the purpose of the PIR determination is to identify properties for which an integrity management program would need to be established. (Tr. at

11031.) Rover agrees the PIR is a technical tool used for pipeline integrity management, and that it is not a real estate valuation tool. In fact, it intends to offer the expert testimony of Huriaux and Israni on the origins of the PIR under the federal regulations to attack Koeninger's use of the PIR in establishing property value. Because the Court finds that Koeninger's testimony does not satisfy Rule 702, it need not reach the propriety of Rover's rebuttal testimony. Still, it is clear that the injection of PIR evidence in this case would have likely resulted in a mini-trial on federal pipeline safety regulations and detract from the jury's task of determining compensation.

- 6 At the motion hearing, Koeninger referenced the Guardian Pipeline Study, a telephone survey made to several hundred landowners inquiring about whether the existence of a hypothetical pipeline might influence a future land purchase. Koeninger did not reference this study in his report or offer it as the basis for the conclusions he offers in his report. (Tr. at 11021, 11070.) At the hearing, Koeninger also mentioned his general experience, not involving sales along Rover's pipeline, but involving what he perceived as delays in selling property encumbered by pipelines. This, too, was not mentioned in the report. Moreover, Koeninger was emphatic at the hearing that he relied *solely* on the identification of a PIR on the condemned property. (Tr. at 11024, 11040, 11044, 11045.) Accordingly, even if the Court were to acknowledge the study and Koeninger's general experience as relevant on the subject of PIR stigma, it would not lend credit to the opinion Koeninger offers in this case.
- 7 Additionally, unlike the "qualified appraisers" that offered the stigma testimony in *Vector*, the landowners fail to demonstrate how Koeninger—an architect with no appraisal training or experience with pipeline construction or regulation—is qualified under Rule 702 to offers such an opinion. (Tr. at 11013-15.) However, even if he were qualified and his opinion was based on his experience, he still was required to explain how that experience lead him to the conclusion he reached. See Fed. R. Evid. 702 Advisory Committee note, 2000 amend. ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the experts word for it.' ")
- 8 In explaining that a company's specific risk can vary, Roche noted that she assigned a company specific risk factor of zero to the business because she was valuing "the fair market value of the business for the Dushs." (*Id.* at 11197.)
- 9 Rover also complains that Roche fails to explain why she rejected the asset approach, which is generally accepted to be the preferred method of valuation, for an approach that yielded a result more than five times greater. While Roche acknowledged that the asset approach was an acceptable method of valuation, she also testified at the hearing that the income approach permitted the analyst to look at the income that is being produced by all of the involved assets involved in the business. (Tr. at 11165, 11211.) While this explanation might be fodder for cross-examination, it would not be a reason to exclude the testimony.
- 10 The Court also questions Roche's decision to use the first two Duff & Phelps risk numbers, as Roche admitted that they are reserved for much larger companies worth between 2.3 and 5.6 billion. (Tr. at 11194, 11196.)
- 11 Roche also admitted that she overlooked or missed an appropriate multiplier for agricultural businesses, set forth in an authoritative guide known as Orion, and inexplicitly relied on a multiplier three times greater. (Tr. at 11174.)
- 12 She also admitted that she could point to no authoritative treatises, literature, guide, or industry standard that would support a 2% company specific premium following the installation of a pipeline. (Tr. at 11202.)
- 13 The Court notes that, it was only recently that Rover completed its remediation efforts, and that it would not have been possible for Rover to offer this expert report prior to the Court's deadline. In fact, at the hearing, the landowners were still waiting on their expert's report as this expert elected to do a post-remediation inspection.

KeyCite Blue Flag – Appeal Notification
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FOR 0.4308, ET AL., 3rd Cir., September 27, 2018

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MEMORANDUM OPINION

Matthew W. Brann, United States District Judge

I. BACKGROUND

*1 On July 1, 2015, UGI applied to the Federal Energy Regulatory Commission for authorization under the Natural Gas Act¹ to construct a 34.4-mile natural gas pipeline and related facilities through portions of Snyder, Union, Northumberland, Montour, and Lycoming Counties, to a power plant located in Snyder County (the “Sunbury Pipeline Project”).² FERC approved UGI’s application and issued a certificate of public convenience and necessity (“FERC Certificate”) to UGI on April 29, 2016.³

Because the planned pipeline traversed the Defendants’ property, UGI needed to obtain permanent easements from the Defendants for the areas on (and under)

which the pipeline and related facilities would sit once completed. UGI also needed to obtain temporary easements for areas of the Defendants’ land that would be occupied temporarily during the construction. The parties attempted to negotiate compensation terms for those easements, to no avail. Consequently, UGI filed a complaint in this Court, seeking to obtain the necessary easements through condemnation.⁴

On August 2, 2016, this Court issued an Order granting the requested easements to UGI.⁵ A bench trial was subsequently held on May 17, 2018, in order to determine the amount of compensation owed to Defendants as a result of that taking.

The first witness at trial was the Defendants’ land valuation expert, Don Paul Shearer, who explained that the subject property was located along the commercial portion of Routes 11 and 15 in the Borough of Shamokin Dam, Snyder County, Pennsylvania.⁶ Although the subject property had some buildings on it, Mr. Shearer explained that they were currently not being utilized.⁷

Mr. Shearer calculated the pre-taking value of Defendants’ property by using the “sales comparison approach.”⁸ After analyzing the 1.6-acre property, Mr. Shearer determined that its “highest and best use” was for future commercial development.⁹ As a result, he selected three nearby, recently-sold commercial properties to use as comparators, which ranged in size from 0.6 to 2.0 acres.¹⁰ The comparators’ overall sales prices ranged from \$750,000 to \$975,000; calculated on a per-acre basis, the least expensive property sold for \$375,000 per acre, the most for \$1,541,667 per acre.¹¹ After comparing the qualities of these properties to the qualities of Defendants’ property, Mr. Shearer calculated that Defendants’ property was worth \$475,000 per acre, for a total value of \$760,000.¹²

*2 Mr. Shearer could not find comparable properties to use when calculating the property’s post-taking value (*i.e.*, properties sold after the installation of a natural gas pipeline);¹³ therefore, he relied, in part, on a self-authored “damaged goods” theory.¹⁴ Under this theory, potential buyers of Defendants’ property would, when calculating the property’s value, consider not only the

land actually utilized and occupied by the gas pipeline and its appurtenances, but would also consider the fact that the remaining land “potentially could be damaged”—presumably, by a natural gas pipeline explosion.¹⁵ This potential danger would, under Mr. Shearer’s theory, create a “stigma” on the property, lowering its value.¹⁶ In his report, Mr. Shearer admitted that “[m]easuring the effect of [such] stigma on value can be difficult,” and that “[i]t is often and most usually difficult for a qualified real estate appraiser or analyst to quantify the actual loss ... as an objective opinion.”¹⁷ Correspondingly, “[a]ny opinion of said diminution in value is very subjective.”¹⁸

Mr. Shearer’s report noted that the permanent easement covered 27% of the total land area of the Defendants’ property, and that the terms of the easement prevented Defendants from erecting any buildings upon it, which “substantially reduced” the potential for development on the property.¹⁹ Considering this fact, combined with the “stigma” damages discussed above, Mr. Shearer’s opinion was that the post-taking value of Defendants’ property was \$304,000—a decrease from its pre-taking value of 60%, or \$456,000.²⁰ Mr. Shearer did not place a value on the taking of the temporary easement.²¹

The next witness was Donald D. Pontius, one of the trustees of the property.²² Mr. Pontius testified that he had signed an agreement to sell the property for \$875,000 in 2009, which price, in his opinion, fairly represented the property’s pre-taking value.²³ Mr. Pontius also testified about his observations of the work that UGI had done on his property in order to install the pipeline.²⁴

The next trial witness was John Gillooly, the land valuation expert for UGI. Like Mr. Shearer, Mr. Gillooly utilized the sales comparison approach to determine the subject property’s pre-taking value.²⁵ Because Mr. Gillooly also determined that the property’s highest and best use was for future commercial development, he—again, like Mr. Shearer—selected nearby commercial properties to serve as comparators.²⁶ The sales prices of these comparator properties ranged from \$650,000 to \$1,000,000.²⁷ Based on various “adjustments” to these sales prices, Mr. Gillooly concluded that Defendants’ property was worth \$750,000 before the taking, or \$10.73 per square foot.²⁸

To determine the property’s post-taking value, Mr. Gillooly first concluded that UGI’s use of the land encumbered by the permanent easement would “consume” 75% of that land’s “fee value.”²⁹ He then multiplied his pre-taking, per-square foot estimated value of \$10.73 by the size of the permanent easement (18,766 square feet), and further multiplied that number by 75%.³⁰ The rounded result—\$151,000—was Mr. Gillooly’s appraisal of the value of the permanent easement; his appraisal of the land’s post-taking value, then, was \$599,000 (\$750,000 - \$151,000 = \$599,000).³¹

To calculate the value of the temporary easement, Mr. Gillooly multiplied his pre-taking, per-square foot value of \$10.73 by the size of the temporary easement (19,937 square feet), and multiplied that number by 6% (his calculation of the land’s “annual rental rate”), which resulted in a (rounded) figure of \$12,800.³²

The final trial witness was Casey Monagan, the Sunbury Pipeline Project’s project manager. Mr. Monagan discussed pipeline installation generally, including how easements such as those taken from Defendants’ property generally play out in practice.³³ Mr. Monagan also spent some time describing specifics of Defendants’ property and some limitations on its potential use.³⁴

II. DISCUSSION

*3 The parties have stipulated that the date of the taking was August 2, 2016,³⁵ but dispute whether federal or state substantive law applies to the determination of “just compensation.”³⁶ For the reasons stated by the Honorable A. Richard Caputo of this Court in *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*,³⁷ I will apply federal substantive law here.³⁸ Therefore, because the permanent easement is a partial taking—i.e., because UGI did not take the entirety of Defendants’ property, but only certain rights from certain portions of it—“just compensation” for that taking is determined “by the difference between the market value of the entire holding immediately before the taking and the remaining market value immediately thereafter of the portion of property rights not taken.”³⁹ Defendants, as landowners, have the burden of proving the amount of just compensation they are owed.⁴⁰

The two experts, Mr. Shearer and Mr. Gillooly, came to quite similar pre-taking values: \$760,000 and \$750,000, respectively. Mr. Pontius, however, believed that his property was worth significantly more: \$875,000. Mr. Pontius's valuation, however, was based on a nearly 10-year-old unconsummated sale, the relevance of which (to present values, at least) may be questioned. Because this Court believes that both appraisers' methodologies were sound, it will split their estimates and find that the pre-taking value of Defendants' property was \$755,000.

The experts, however, came to quite divergent appraisals of the property after the taking of the permanent easement. Mr. Gillooly believes that the land lost only \$151,000 in value as the result of that taking. His calculation, however, assumes that *only* the land actually constituting the permanent easement lost any value. That is a difficult premise to accept: not only does it ignore any diminution in value to the land not actually touched by the permanent easement (diminution caused by, *inter alia*, a decrease in that land's usefulness due to the reduced area available for building), but it also assumes that a buyer would completely ignore the fact that the land covers a comparatively large pipeline carrying explosive natural gas.

Instead, this Court is inclined to agree with Mr. Shearer that there was an overall decrease to the value of the property as a whole, which decrease is, at least in part, due to the "stigma" of being located so close to a natural gas pipeline.⁴¹ This Court cannot, however, accept Mr. Shearer's opinion that the property's value decreased by an exceedingly large 60%—after all, the property maintains its prime location on a well-trafficked highway and may still be developed for some commercial use. Mr. Shearer himself said that his theory is based upon a "very subjective" foundation; consequently, this Court believes that the taking of the permanent easement resulted in a 30% reduction in value. This Court, therefore, will find that the property's post-taking value was \$528,500 and will award Defendants \$226,500 in compensation for the taking of the permanent easement.

*4 As noted above, Mr. Shearer did not place any value on the taking of the temporary easement. Consequently, the Court will accept Mr. Gillooly's appraisal, and will award Defendants \$12,800 in compensation for the taking of the temporary easement.

III. CONCLUSION

In sum, this Court will find that just compensation in this case is \$226,500 for the permanent easement and \$12,800 for the temporary easement, for a subtotal of \$239,300. Defendants are entitled to prejudgment interest on that award;⁴² at a rate of 3%,⁴³ that interest comes to \$14,928.39. This Court, therefore, will enter judgment in favor of Defendants in the amount of \$254,228.39.

IV. FINDINGS OF FACT

1. Defendants own 1.6 acres of property at 2577 North Susquehanna Trail, Shamokin Dam, Snyder County, Pennsylvania ("the Property").
2. On August 2, 2016, this Court granted UGI Sunbury LLC a permanent easement and a temporary easement over the Property.
3. The permanent easement consisted of 18,766 square feet.
4. The temporary easement consisted of 19,937 square feet.
5. At the time of the taking, the Property contained some buildings but was not being utilized for commercial purposes.
6. UGI Sunbury installed a natural gas pipeline under the land covered by the permanent easement.
7. UGI Sunbury utilized the land covered by the temporary easement for a period of one year during the construction of that pipeline.
8. The highest and best use of the Property is for future commercial development.
9. The market value of the Property immediately before the taking was \$755,000.
10. The taking of the permanent easement caused the value of the Property to decrease in value because of the reduced area available to build on the Property and because of the "stigma" associated with having a natural gas pipeline installed on the property.
11. The market value of the Property immediately after the taking was \$528,500.

12. Just compensation for the taking of the permanent easement, then, was \$226,500.
13. Just compensation for the taking of the temporary easement, then, was \$12,800.
14. Total just compensation for the taking of the permanent and the temporary easements was \$239,300.
15. Defendants are entitled to 3% interest on their total just compensation award, beginning on August 2, 2016, for a total of \$14,928.39.
16. The total award to the Defendants from UGI Sunbury, therefore, is \$254,228.39.

V. CONCLUSIONS OF LAW

1. The Defendants are entitled to just compensation from UGI Sunbury for the taking of their property.⁴⁴
2. Federal law governs the calculation of that compensation.⁴⁵
3. Under federal law, just compensation “is measured by the difference between the market value of the entire holding immediately before the taking and the remaining market value immediately thereafter of the portion of property rights not taken.”⁴⁶

- *5 4. Immediately before the taking, the market value of the Defendants' property was \$755,000.
5. Immediately after the taking, the market value of the Defendants' property was \$528,500.
6. Therefore, just compensation for the taking of the permanent easement on the Defendants' property is \$226,500.
7. Just compensation for the taking of the temporary easement on the Defendants' property was \$12,800.
8. The total just compensation owed to the Defendants for the permanent and the temporary easements is \$239,300.
9. The Defendants are entitled to 3% prejudgment interest on their award.
10. Prejudgment interest began accruing on August 2, 2016—the date of the taking.
11. The Defendants are entitled to \$14,928.39 in prejudgment interest.
12. The Defendants' total award, therefore, is \$254,228.39.

All Citations

Slip Copy, 2018 WL 4184324

Footnotes

- 1 15 U.S.C. § 717f(c).
- 2 UGI Sunbury, LLC, 155 FERC 61 ¶ 61,115 at 1-2 (2016).
- 3 *Id.*
- 4 See 15 U.S.C. § 717f(h) (“When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.”)
- 5 ECF Nos. 23, 24.
- 6 May 17, 2018 Trial Transcript (“Trial Transcript”; ECF No. 109) at 13.
- 7 Trial Transcript at 17.
- 8 Trial Exhibit D-3, Don Paul Shearer’s Appraisal Report (“DPS Report”) at 20-21.
- 9 DPS Report at 18.
- 10 *Id.* at 20-21.
- 11 *Id.*

- 12 *Id.* at 21.
- 13 *Id.* at 21.
- 14 *Id.* at 8-9.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* at 7, 9.
- 18 *Id.* at 21.
- 19 *Id.* at 22.
- 20 *Id.* at 22.
- 21 Trial Transcript at 18.
- 22 *Id.* at 80.
- 23 *Id.* at 80, 82.
- 24 *Id.* at 83.
- 25 JG Report at 6.
- 26 *Id.* at 22-26.
- 27 *Id.*
- 28 *Id.*
- 29 *Id.* at 30.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.* at 31.
- 33 Trial Transcript at 137-39.
- 34 *Id.* at 130-36.
- 35 *Id.* at 11.
- 36 Defendants' Motion in Limine to Apply to State Law (ECF No. 64).
- 37 No. 3:11-CV-00028, 2014 WL 690700, at *6-10 (M.D. Pa. Feb. 24, 2014) ("just compensation owed by [Plaintiff] to [the landowner] will be determined through application of federal law").
- 38 Therefore, Defendant's Motion in Limine to Apply State Law will be denied. *See also Columbia Gas Transmission, LLC v. An Easement to Construct Operate and Maintain a 20 Inch Gas Transmission Pipeline*, Nos. 17-2096 & 17-3312, 2018 WL 3773655, at *2 n.4 (3rd Cir. Aug. 9, 2018) ("Federal law governs the measure of just compensation owed to landowners in condemnation actions under the Natural Gas Act." (citing *United States v. Certain Parcels of Land*, 144 F.2d 626, 628-30 (3rd Cir. 1944)).
- 39 *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 n.3 (3rd Cir. 1990).
- 40 *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, 2014 WL 690700 (M.D. Pa. Feb. 24, 2014) at *11.
- 41 *See, e.g., United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1079 (5th Cir. 1996) ("[T]his Court [has] recognized the viability of claims for severance damages based on the likelihood that prospective buyers would fear hazards arising from the [condemnor's] use of condemned property."); *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 957 (N.D. Ill. 2001) ("evidence of stigma damages ... may be credited"); *see generally* Vitauts M. Gulbis, Annotation, *Fear of Powerline, Gas or Oil Pipeline, or Related Structure as Element of Damages in Easement Condemnation Proceeding*, 23 A.L.R.4th 631 (1983).
- 42 *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 11 (1984)
- 43 The rate of prejudgment interest is within this Court's discretion. *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, 2014 WL 690770 at *13 (M.D. Pa. Feb. 24, 2014). In this case, the prejudgment interest began accruing on the undisputed date of the taking (August 2, 2016).
- 44 *United States v. Miller*, 317 U.S. 369 (1943); 15 U.S.C. § 717f(h).
- 45 *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, 2014 WL 690700 at *10 (M.D. Pa. Feb. 24, 2014).
- 46 *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 n.3 (3rd Cir. 1990).

KeyCite Blue Flag – Appeal Notification
Appeal Filed by UGI SUNBURY LLC v. PERMANENT EASEMENT
FOR 1.7575, ET AL., 3rd Cir., September 27, 2018

2018 WL 4069160

Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

UGI SUNBURY LLC, Plaintiff.

v.

A PERMANENT EASEMENT FOR 1.7575
ACRES, and Temporary Construction and
Access Easement for 2.956 Acres in Limestone
Township, Montour County, Pennsylvania
Tax Parcel No. 5-10-19, et al., Defendants.

No. 3:16-CV-00788

|
Filed 08/27/2018

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MEMORANDUM OPINION

Matthew W. Brann, United States District Judge

I. BACKGROUND

*1 On July 1, 2015, UGI applied to the Federal Energy Regulatory Commission for authorization under the Natural Gas Act¹ to construct a 34.4-mile natural gas pipeline and related facilities through portions of Snyder, Union, Northumberland, Montour, and Lycoming Counties, to a power plant located in Snyder County (the “Sunbury Pipeline Project”).² FERC approved UGI’s application and issued a certificate of public convenience and necessity (“FERC Certificate”) to UGI on April 29, 2016.³

Because the planned pipeline traversed Defendants’ property,⁴ UGI needed to obtain permanent easements from the Defendants for the areas on (and under) which the pipeline and related facilities would sit

once completed. UGI also needed to obtain temporary easements for areas of Defendants’ land that would be occupied temporarily during the construction. The parties attempted to negotiate compensation terms for those easements, to no avail. Consequently, UGI filed a complaint in this Court, seeking to obtain the necessary easements through condemnation.⁵

On August 2, 2016, this Court issued an Order granting the requested easements to UGI.⁶ A two-day bench trial was subsequently held on April 16 and 17, 2018, in order to determine the amount of compensation owed to Defendants as a result of that taking.⁷

Defendant David Beachel, the property’s owner, was the first witness at that trial. Mr. Beachel explained how he has used his land to operate a dairy and kosher poultry farm,⁸ which farming operation has continued essentially undisturbed after the pipeline installation was complete.⁹ Mr. Beachel also described the current structures on his property, which include several barns and the farmhouse in which he lives.¹⁰ Regarding the property’s value, Mr. Beachel testified that he believed that his property was worth \$850,000 right before the taking of the permanent easement¹¹ and \$600,000 immediately after it¹²—a difference of \$250,000. Mr. Beachel also noted that the temporary easement covered an area normally used by him to grow feed crops for his livestock, and that UGI’s use of that land required him to spend \$4,000 purchasing replacement feed.¹³

*2 The next witness was Mr. Beachel’s land valuation expert, Don Paul Shearer, who explained that he calculated the pre-taking value of Mr. Beachel’s property by using the “sales comparison approach.”¹⁴ After analyzing Mr. Beachel’s 96.3-acre property (which analysis included an inspection of the interior and exterior of the property’s buildings),¹⁵ Mr. Shearer determined that Mr. Beachel’s current use of the property for agricultural purposes was, in fact, the property’s “highest and best use.”¹⁶ As a result, Mr. Shearer selected six nearby, recently-sold farms to use as comparators.¹⁷ Those farms ranged in size from 77 to 156 acres, and were all improved with varying numbers of farm-related buildings. Their overall sales prices ranged from \$610,000 to \$1,350,000; calculated on a per-acre basis, the least

expensive property sold for \$6,351 per acre, the most for \$9,990 per acre.¹⁸ Because Mr. Shearer believed that the improvements to Mr. Beachel's property were "superior" to most of those comparator properties, Mr. Shearer calculated that Mr. Beachel's property was worth \$10,000 per acre immediately before the taking, for a (rounded) total of \$965,000.¹⁹

Mr. Shearer could not find comparable properties to use when calculating the property's post-taking value (*i.e.*, properties sold after the installation of a natural gas pipeline);²⁰ therefore, he relied on a self-authored "damaged goods" theory.²¹ Under this theory, potential buyers of Mr. Beachel's property would, when calculating the property's value, consider not only the land actually utilized and occupied by the gas pipeline and its appurtenances, but would also consider the fact that the remaining land "potentially could be damaged"—presumably, by a natural gas pipeline explosion. This potential danger would, under Mr. Shearer's theory, create a "stigma" on the property, lowering its value. In his report, Mr. Shearer admitted that "[m]easuring the effect of [such] stigma on value can be difficult," and that "[i]t is often and most usually difficult for a qualified real estate appraiser or analyst to quantify the actual loss ... as an objective opinion."²² Correspondingly, "[a]ny opinion of said diminution in value is very subjective."²³ It was Mr. Shearer's opinion, however, "[b]ased on [his] experience in appraising properties affected by stigma and as damaged goods," that the post-taking value of Mr. Beachel's property was \$579,000²⁴—a decrease from its pre-taking value of 40%, or \$386,000. Mr. Shearer did not place a separate value on the taking of the temporary easement.

The next trial witness was John Gillooly, the land valuation expert for UGI Sunbury. Like Mr. Shearer, Mr. Gillooly utilized the sales comparison approach to determine the subject property's pre-taking value.²⁵ Because Mr. Gillooly also determined that the property's highest and best use was continued agricultural use,²⁶ he—again, like Mr. Shearer—selected nearby farms to serve as comparators.²⁷ Unlike Mr. Shearer, however, the four selected farms were devoid of improvements, and comprised vacant farmland.²⁸ As Mr. Gillooly explained at trial, this was a deliberate choice on his behalf; while

the pipeline cut through Mr. Beachel's open fields, its installation did not require the demolition or alteration of any of the structures located on the property.²⁹

The sales prices of these comparator farms ranged from \$530,000 to \$780,000, with per-acre values ranging from \$4,911 to \$7,557.³⁰ Based on various "adjustments" to these per-acre prices, Mr. Gillooly concluded that Mr. Beachel's farm was worth \$6,500 per acre, for a pre-taking (rounded) total of \$630,000.³¹

*3 Once again, like Mr. Shearer, Mr. Gillooly could not find comparable post-taking properties,³² and therefore used an alternate methodology. Regarding the permanent easement's effect on the value of Mr. Beachel's property, Mr. Gillooly first concluded that UGI Sunbury's use of the land encumbered by that easement would "consume" 75% of that land's "fee value." He then multiplied his pre-taking, per-acre estimated value of \$6,500 by the size of the permanent easement (1.7575 acres), and further multiplied that number by 75%. The rounded result—\$8,600—was Mr. Gillooly's appraisal of the value of the permanent easement; his appraisal of the land's post-taking value, then, was \$621,400 (\$630,000 - \$8,600 = \$621,400).³³

To calculate the value of the temporary easement, Mr. Gillooly multiplied his pre-taking, per acre estimated value of \$6,500 by the size of the temporary easement (2.9560 acres), and multiplied that number by 6% (his calculation of the land's "annual rental rate").³⁴ Because he believed that result was too small to "allow for transactional costs," he rounded that number up to a "nominal value" of \$1,500.³⁵

The final trial witness was Casey Monagan, the Sunbury Pipeline Project's project manager. Mr. Monagan discussed pipeline installation generally, including how easements such as those taken from Mr. Beachel's property generally play out in practice.³⁶

II. DISCUSSION

Mr. Beachel, as the landowner, has the burden of proving the amount of compensation he is owed for the takings in this case.³⁷

Because the permanent easement is a partial taking—*i.e.*, because UGI did not take the entirety of Mr. Beachel's property, but only certain rights from certain portions of it—"just compensation" for that taking is determined "by the difference between the market value of the entire holding immediately before the taking and the remaining market value immediately thereafter of the portion of property rights not taken."³⁸

The two experts in this case, Mr. Shearer and Mr. Gillooly, came to quite divergent pre-taking values: \$965,000 and \$630,000, respectively. Since both appraisers basically agreed upon various attributes of Mr. Beachel's property (including its size and improvements), the difference in these numbers is due entirely to each individual's appraisal of the pre-taking per-acre value of Mr. Beachel's land. As noted above, while Mr. Shearer used improved farms as comparators, Mr. Gillooly used vacant land, a decision he based upon his opinion that the pipeline would not affect any of the land's improvements.

This Court is not convinced that Mr. Gillooly's approach is sound. While the pipeline and its appurtenances may not have physically affected any of the structures on Mr. Beachel's land, it does not follow that Mr. Beachel's land is less valuable *before* that pipeline is even installed. Additionally, common sense would dictate that an acre of farmland abutted by a barn and other farm-related structures would be worth more than an otherwise identical acre *sans* the proximity of useful buildings. Therefore, this Court will accept Mr. Shearer's appraisal and find that the market value of Mr. Beachel's land before the taking of the permanent easement was \$10,000 per acre, for a total of \$963,000.

*4 Mr. Gillooly's approach is arguably better suited for determining the value of land actually occupied by the permanent easement itself. However, this Court has a hard time accepting Mr. Gillooly's conclusion that the installation of a comparatively large pipeline, carrying explosive natural gas, has absolutely no impact on the value of the remaining portions of Mr. Beachel's land not so encumbered. Instead, this Court is inclined to agree with Mr. Shearer that some form of "stigma" attaches to the property as a whole.³⁹

This Court, however, cannot agree with Mr. Shearer that the effect of that stigma results in a 40% decrease to the value of Mr. Beachel's property. It seems patently

impossible that this pipeline, large as it is, eliminates nearly half the value of Mr. Beachel's farmhouse and other buildings, which are apparently located around 1,000 feet away from that pipeline.⁴⁰ Mr. Shearer himself said that his theory is based upon a "very subjective" foundation, and this Court concurs. Consequently, this Court will find that the value of Mr. Beachel's property was reduced by 15%—not 40%—as a result of the taking of the permanent easement, and will therefore find that the property's post-taking value was \$818,550, a decrease of \$144,450 from its pre-taking value.

Regarding the temporary easement, Mr. Beachel testified that he had to spend \$4,000 to replace the crops that he would have grown on the land occupied by UGI during the construction. It is not clear, however, how much Mr. Beachel would have expended, both in labor and in supplies, if he were permitted to grow the crops in question—*i.e.*, it is not clear that the \$4,000 expenditure was, in fact, a pure loss. This figure, then, does not seem to be a solid basis on which to calculate just compensation for the taking of the temporary easement.

Mr. Beachel presented no evidence contradicting Mr. Gillooly's claim that a fair rental rate for his land should be 6% of that land's value, so this Court will accept that rate. Utilizing Mr. Shearer's \$10,000 per-acre value, it appears that the fee simple value of the land encompassed by the temporary easement (2.9560 acres) was \$29,560. The temporary easement was exactly one year in duration; therefore, this Court will find that \$1,773.60 (6% of \$29,560) will justly compensate Mr. Beachel for its use.

III. CONCLUSION

In sum, then, this Court will find that just compensation in this case is \$144,450 for the permanent easement and \$1,773.60 for the temporary easement, for a total of \$146,223.60. Mr. Beachel asserts, and UGI does not dispute, that he is entitled to prejudgment interest on that award. At a rate of 3%,⁴¹ that interest comes to \$9,073.88, bringing the total to \$155,297.48. UGI asserts, and Mr. Beachel does not dispute, that this award should be reduced by \$28,365, the amount UGI agreed to pay Mrs. Beachel under the terms of a pretrial settlement agreement. This Court, therefore, will enter judgment in favor of Mr. Beachel in the amount of \$126,932.48. An appropriate order follows.

IV. FINDINGS OF FACT

- *5 1. David and Joy Beachel own 96.2988 acres of property at 599 Strick Road, Limestone Township, Montour County, Pennsylvania ("the Property").
2. On August 2, 2016, this Court granted UGI Sunbury LLC a permanent easement and a temporary easement over the Property.
3. The permanent easement consisted of 1.7575 acres.
4. The temporary easement consisted of 2.9560 acres.
5. At the time of the taking, the Beachels operated a farm on the Property.
6. The farm contained several barns, a large field in which to grow crops, and the farmhouse in which the Beachels lived.
7. The Beachels continued to operate their farm on the Property after the taking.
8. UGI Sunbury installed a natural gas pipeline under the land covered by the permanent easement.
9. The pipeline went through the field but did not disturb any of the buildings on the Property.
10. UGI Sunbury utilized the land covered by the temporary easement for a period of one year during the construction of that pipeline.
11. UGI Sunbury's use of the temporary easement did not disturb any of the buildings on the Property.
12. The highest and best use of the Property was its current agricultural use.
13. The market value of the Property immediately before the taking was \$963,000.
14. The taking of the permanent easement caused the value of the Property to decrease in value.
15. Part of that decrease in value was due to the "stigma" associated with having a natural gas pipeline installed on the property.
16. The market value of the property immediately after the taking was \$818,550.
17. Just compensation for the taking of the permanent easement, then, was \$144,450.
18. The market value of the land encumbered by the temporary easement was \$29,560.
19. The yearly rental value of that land was 6% of its fair market value.
20. Just compensation for the taking of the temporary easement, then, was \$1,773.60.
21. Total just compensation for the taking of the permanent and the temporary easements was \$146,223.60.
22. The Beachels are entitled to 3% interest on their total just compensation award, beginning on August 2, 2016, for a total of \$9,073.88.
23. The total award to the Beachels from UGI Sunbury, therefore, is \$155,297.48.
24. Because UGI Sunbury agreed to pay \$28,365 to Mrs. Beachel to settle her claim against it, UGI Sunbury may subtract that amount from the amount it owes Mr. Beachel.
25. Mr. Beachel is, therefore, entitled to an award of \$126,932.48 from UGI Sunbury for its taking of a permanent and a temporary easement on the Property.

V. CONCLUSIONS OF LAW

1. The Beachels are entitled to just compensation from UGI Sunbury for the taking of their property.⁴²
2. Federal law governs the calculation of that compensation.⁴³
3. Under federal law, just compensation "is measured by the difference between the market value of the entire holding immediately before the taking and the remaining market value immediately thereafter of the portion of property rights not taken."⁴⁴
- *6 4. Immediately before the taking, the market value of the Beachels' property was \$963,000.
5. Immediately after the taking, the market value of the Beachels' property was \$818,550.

6. Therefore, just compensation for the taking of the permanent easement on the Beachels' property is \$144,450.
7. The market value of the land encumbered by the temporary easement on the Beachels' property was \$29,560.
8. The yearly rental value of that land was 6% of its market value.
9. Just compensation for the taking of the temporary easement, then, was \$1,773.60.
10. The total just compensation owed to the Beachels for the permanent and the temporary easements is \$146,223.60.
11. The Beachels are entitled to 3% prejudgment interest on their award.
12. Prejudgment interest began accruing on August 2, 2016—the date of the taking.
13. The Beachels are entitled to \$9,073.88 in prejudgment interest.
14. The Beachels' total award, therefore, is \$155,297.48.
15. Because UGI Sunbury already agreed to pay Mrs. Beachel \$28,365, it may reduce that amount from the Beachels' total award.
16. UGI Sunbury owes Mr. Beachel \$126,932.48.

All Citations

Slip Copy, 2018 WL 4069160

Footnotes

- 1 15 U.S.C. § 717f(c).
- 2 UGI Sunbury, LLC, 155 FERC 61 ¶ 61,115 at 1-2 (2016).
- 3 *Id.*
- 4 The property in question is located in Limestone Township, Montour County, Pennsylvania. April 15, 2018 Trial Transcript ("Trial Transcript I") at 12. At the time of trial, the property was owned jointly by Defendant David Beachel and his ex-wife, Defendant Joy Beachel, but Mr. Beachel was in the process of paying Ms. Beachel for her share. *Id.* at 12-13.
- 5 See 15 U.S.C. § 717f(h) ("When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.")
- 6 ECF No. 21.
- 7 UGI apparently settled with Joy Beachel before trial for the sum of \$28,365. See ECF No. 76-1.
- 8 See, e.g., Trial Transcript I at 13-16
- 9 *Id.* at 104.
- 10 *Id.* at 23.
- 11 *Id.* at 39.
- 12 *Id.* at 64.
- 13 *Id.* at 55.
- 14 Trial Exhibit D-1, Don Paul Shearer's Appraisal Report ("DPS Report") at 19-20.
- 15 Trial Transcript I at 130-31.
- 16 DPS Report at 17-18.
- 17 *Id.* at 21-24.
- 18 *Id.*
- 19 *Id.* This appraisal was calculated to be effective as of August 2, 2016, the undisputed date of the taking. *Id.* at 2.
- 20 Trial Transcript I at 168.
- 21 DPS Report at 7-9.

- 22 *Id.* at 7-8.
- 23 *Id.* at 25.
- 24 *Id.* at 26.
- 25 Trial Exhibit P-2, John Gillooly's Appraisal report ("JG Report") at 22.
- 26 JG Report at 21.
- 27 *Id.* at 23-26.
- 28 *Id.*
- 29 April 16, 2018 Trial Transcript ("Trial Transcript II") at 82. See also JG Report at 21 ("While the proposed permanent easement encumbers a portion of the subject property, no buildings or significant building envelope will be encroached upon or be affected by the easement.").
- 30 JG Report at 29.
- 31 *Id.*
- 32 Trial Transcript II at 82.
- 33 This appraisal was based on an effective date of October 13, 2015. JG Report at 1. At trial, however, Mr. Gillooly testified that, based on his research, that calculated value would have remained the same through August 2, 2016, the undisputed date of the taking. Trial Transcript II at 45-46.
- 34 JG Report at 32.
- 35 *Id.*
- 36 Trial Transcript II at 106-150.
- 37 *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, 2014 WL 90700 (M.D. Pa. Feb. 24, 2014) at *11.
- 38 *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 n.3 (3rd Cir. 1990). This is the federal standard, which both parties agree applies in this case. See UGI's Post-Trial Proposed Conclusions of Law (ECF No. 89) ¶ 166; Mr. Beachel's Post-Trial Proposed Conclusions of Law (ECF No. 90) ¶¶ 1-3.
- 39 See, e.g., *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1079 (5th Cir. 1996) ("[T]his Court [has] recognized the viability of claims for severance damages based on the likelihood that prospective buyers would fear hazards arising from the [condemnor's] use of condemned property."); *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 957 (N.D. Ill. 2001) ("evidence of stigma damages ... may be credited"); see generally Vitauts M. Gulbis, Annotation, *Fear of Powerline, Gas or Oil Pipeline, or Related Structure as Element of Damages in Easement Condemnation Proceeding*, 23 A.L.R.4th 631 (1983).
- 40 Trial Transcript II at 131.
- 41 The rate of prejudgment interest is within this Court's discretion. *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, 2014 WL 690770 at *13 (M.D. Pa. Feb. 24, 2014). In this case, the prejudgment interest began accruing on the undisputed date of the taking (August 2, 2016).
- 42 *United States v. Miller*, 317 U.S. 369 (1943); 15 U.S.C. § 717f(h).
- 43 *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, 2014 WL 690700 at *10 (M.D. Pa. Feb. 24, 2014).
- 44 *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 n.3 (3rd Cir. 1990).