

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

MOUNTAIN VALLEY PIPELINE, L.L.C.,

Plaintiff,

v.

Civil Action No. 2:17-cv-04214

AN EASEMENT TO CONSTRUCT, OPERATE
AND MAINTAIN A 42-INCH GAS
TRANSMISSION LINE ACROSS PROPERTIES
IN THE COUNTIES OF NICOLAS,
GREENBRIER, MONROE, SUMMERS,
BRAXTON, HARRISON, LEWIS, WEBSTER
AND WETZEL, WEST VIRGINIA, OWNED
BY D. LANE MCMILLION, ET AL.,

Defendants.

**DEFENDANTS MANN'S' AND CROSIER'S ANSWER TO
COMPLAINT TO ACQUIRE PROPERTY INTERESTS BY EMINENT DOMAIN**

NOW COME Defendants, Norvel P. Mann, Jean M. Mann, Thomas B. Mann, Hannah G. Mann and Chloda Crosier (hereinafter collectively referred to as "Landowners"), by counsel, pursuant to FRCP Rule 71.1, as their answer, objections, and grounds of defense to the complaint ("Complaint") filed herein by Plaintiff Mountain Valley Pipeline, L.L.C. ("MVP"), and state as follows:

I.

Rule 71.1 (e)(2)(A) and (B) Statements

As required by FRCP Rule 71.1(e)(2) subsections (A) and (B), Landowners hereby identify the real property in which they claim an interest to be that real property described in

Exhibit A of the Complaint, as Tax Map No. 05-25-31.3, and state the nature and extent of their interest in such property to be fee simple.

II.

Response to Allegations of Complaint

In response to the first sentence of the preamble in the opening un-numbered paragraphs of MVP's Complaint, Landowners state that MVP's allegations constitute legal conclusions as opposed to facts, to which no response is required. Landowners admit that the Federal Energy Regulatory Commission (the "FERC") entered an order on October 13, 2017, granting MVP the certificate attached as Exhibit B to the Complaint, the content of which speaks for itself.

Landowners deny that the property interests described in the Complaint and in Exhibit B are "necessary for the construction, operation, and maintenance of an interstate pipeline and associated appurtenances necessary for its operation" (defined as the "MVP Project") or that it is in the public interest, and affirmatively allege that only two recently appointed FERC commissioners voted in favor of issuing MVP a certificate; the third commissioner questioned the public interest and need, finding that MVP failed to establish need for the gas its pipeline would transmit through the properties of Landowners and other defendants, relying instead upon its projections of need without any factual basis to support them. Landowners further deny that "the MVP Project seeks to help meet the public's demand for natural gas in the Mid-and South Atlantic regions of the United States by providing transportation of natural gas to those regions from the Marcellus and Utica Shale formations in central Appalachia," and affirmatively allege that the public's demand for natural gas, especially in those regions of the United States, continues to decrease due primarily to the existing abundant supply of natural gas. The transmission of gas in a manner that has such a negative impact on the utility and market value of large amounts of private properties is not in the public's best interest, nor is it convenient or

necessary. Landowners deny that the MVP Project requires, as a part of its FERC certification, all the property interests described in the Complaint across the described properties including those of Landowners. Landowners further deny that MVP has attempted to negotiate mutually agreeable easement agreements, and affirmatively allege that easement negotiations between MVP's land agents and private property owners throughout West Virginia were intended to intimidate and instill fear in such property owners to motivate them to sign MVP's form easement agreements, which granted rights well beyond those needed or authorized by the FERC. The remaining allegations of the opening un-numbered paragraphs are denied, and Landowners require strict proof thereof.

JURISDICTION AND VENUE

1. Paragraph 1 of the Complaint alleges legal conclusions to which no response is required. To the extent that Paragraph 1 alleges facts, Landowners are without specific knowledge of them and therefore deny the same and call for strict proof thereof.

2. Landowners admit the allegations of paragraph 2 of the Complaint.

3. Landowners admit that their property is located in the Southern District of West Virginia. The allegation in paragraph 3 of the Complaint that venue is proper under the cited statute is a legal conclusion to which no response is required.

THE AUTHORITY TO CONDEMN

4. Landowners are without specific knowledge of the allegations contained in Paragraph 4 of the Complaint relating to MVP's composition or purpose, and therefore deny the same and require strict proof thereof. The remaining allegations of paragraph 4 are legal conclusions to which no response is required; to the extent they allege any facts, Landowners are without specific knowledge of them and therefore deny the same and call for strict proof thereof.

5. In response to paragraph 5 of the Complaint, Landowners admit that the FERC entered an order granting MVP a certificate, to which order Landowners object and assert defenses for the reasons set forth in Section III. below; Landowners state that Exhibit B speaks for itself as to any findings by the FERC.

6. The allegations contained in paragraph 6 of the Complaint were previously alleged in the Complaint's opening un-numbered paragraphs, and are again denied by Landowners; Landowners' affirmative allegations in response thereto are re-alleged as if set forth in full herein.

7. The allegations contained in paragraph 7 of the Complaint were previously alleged in the Complaint's opening un-numbered paragraphs, and are again denied by Landowners; Landowners' affirmative allegations in response thereto are re-alleged as if set forth in full herein. Landowners further affirmatively allege that the easements which MVP seeks to acquire across properties of Landowners and other named defendants herein are neither necessary nor convenient to the public.

8. The allegations contained in paragraph 8 of the Complaint were previously alleged in the Complaint's opening un-numbered paragraphs, and are again denied by Landowners; Landowners' affirmative allegations in response thereto are re-alleged as if set forth in full herein.

9. Paragraph 9 of the Complaint alleges legal conclusions to which no response is required. To the extent that Paragraph 9 alleges facts, Landowners deny the same and call for strict proof thereof. Landowners affirmatively deny that MVP was granted by the FERC or Section 7(h) of the *Natural Gas Act* ("NGA") all the rights it claims to have acquired as described in the Complaint, to construct, operate and maintain the MVP Project.

THE EASEMENTS TO BE TAKEN

10. Landowners deny the allegations contained in paragraph 10 of the Complaint, and affirmatively allege that the property and property rights MVP sues to acquire in the Complaint are unnecessary. Landowners further affirmatively allege that the maps/plats attached as Exhibit C, as they pertain to property of Landowners, have descriptions insufficient to transfer on the public records real property rights of the nature being sought in this proceeding, and deny that all easements are located over and along the route approved by FERC.

11. In response to the allegations contained in paragraph 11, subparagraphs (a) through (f), Landowners deny that the easements described therein are necessary, and affirmatively allege that MVP seeks to acquire more rights than it needs to construct, operate and maintain the Pipeline. Landowners deny that the MVP Project will provide any significant public use, purpose or benefit, and affirmatively allege that instead the MVP Project will enable natural gas to be transported to foreign overseas markets for MVP's private gain, all at great cost and expense to Landowners and other defendants herein, who have refused to involuntarily partner with MVP. Landowners further affirmatively allege that none of the map/plats attached as Exhibit C to the Complaint have descriptions sufficient to transfer on the public records real property rights or interests of the nature being sought in this proceeding.

12. Landowners are without specific knowledge of the facts alleged in paragraph 12 of the Complaint, relating to pipeline construction specifications, and therefore deny the same and require strict proof thereof. Landowners affirmatively allege that the depth of the pipeline is not set forth in the Complaint, the interference with Owner's cultivation and use of their properties will be permanent, and the negative impact upon the values of their properties will be substantial. The allegations in paragraph 12 describing the limitations MVP intends to place upon

Landowners properties are a contributing but not only factor in the diminution in value the MVP Project will cause to Landowners' remaining property.

THE PROPERTY OWNERS

13. Paragraph 13 of the Complaint alleges facts relating to the ownership interests of each of the named defendants therein in certain real properties described in Exhibit A, in which MVP seeks to acquire property rights in this condemnation proceeding. Landowners admit they own fee simple interests in the real properties set forth in Section I of this Answer. As to the descriptions of the other properties alleged to be owned by other defendants herein, Landowners are without specific knowledge as to the accuracy of them, and therefore deny the same and require strict proof thereof.

OTHERS WHO MAY CLAIM AN INTEREST

14. Landowners are without specific knowledge of the allegations contained in Paragraph 14 of the Complaint relating to other persons who claim an interest in the property rights MVP seeks to condemn, and therefore deny the same and require strict proof thereof.

15. Landowners deny any and all allegations of fact not specifically admitted herein.

16. Landowners reserve the right to assert any and all additional defenses, legal or factual, affirmative or otherwise, which may be justified by facts learned through discovery or otherwise prior to any hearing or trial on the Complaint or by evidence upon any such hearing or trial.

III.

Rule 71.1 (e)(2)(C) Statement of All of Landowners’ Objections To Complaint and Defenses to Taking

Pursuant to FRCP Rule 71.1 (e)(2)(C), Landowners object to the relief requested in MVP’s Complaint, and assert as their specific objections and defenses to the taking by eminent domain of Landowners’ property and property rights, the following:

1. MVP has not obtained all of the necessary approvals and permits (the “Permits”) which are conditions precedent in FERC’s Order granting MVP a Section (e) conditional certificate for the project to proceed, specifically in respect to the:

- (a) Permit required under § 404 of the Clean Water Act, 33 U.S.C. § 1344, following input from the Army Corps of Engineers Pittsburgh, Huntington and Norfolk Districts;
- (b) Permit from the Virginia Marine Resources Commission for crossing Virginia streams and rivers with drainage areas greater than 5 square miles;
- (c) Permit from the Army Corps of Engineers for wetlands crossings along the proposed pipeline path in West Virginia and Virginia;
- (d) Permit and/or final approval from West Virginia Division of Culture and History, required under § 106 of the National Historic Preservation Act, 54 U.S.C. § 306108.
- (e) Permit from a West Virginia locality for the compressor station which is part of the MVP Project;
- (f) Permit from the U.S. Forest Service for the MVP Project;
- (g) Leases with the Bureau of Land Management which are required for the MVP Project to go through lands of the U.S. Forest Service.

2. MVP cannot establish any substantive right of eminent domain because without the Permits the certificate remains conditional under the NGA.

3. There exists no urgency to justify immediate entry since construction cannot begin until the Permits issue.

4. MVP has no power of quick-take similar to that granted to the federal government in the *Declaration of Taking Act*, 40 U.S.C. § 3114 (b), as Congress granted natural gas companies a right of eminent domain under Section (h) of the NGA that only provides possession upon compensation by trial.

5. MVP has failed to even attempt to reach any reasonable agreement with Landowners to acquire by contract the easements it is seeking in this proceeding.

6. The Complaint describes rights to be acquired in Landowners' properties that exceed the rights granted by FERC in its certificate, including, without limitation, the right to use Landowners' private roads and properties to access it proposed easements.

7. FERC's order granting MVP the right of eminent domain under Section (h) of the NGA and the regulatory approval process before FERC are being challenged in proceedings filed in the U.S. District Court for the Western District of Virginia (*Berkley, et al. v. Mountain Valley Pipeline, LLC, et al.*, Case No. 7:17-cv-00357, filed July 27, 2017) and in the U.S. District Court for the District of Columbia (*Bold Alliance et al., v. Federal Energy Regulatory Comm'n, et al.*, Case No. 1:17-cv-01822-RJL, filed Sept. 5, 2017). This condemnation proceeding should be stayed or dismissed until such time as these (Berkeley and Bold) lawsuits can be fully adjudicated.

8. FERC's former Acting Chair, Commissioner LaFleur, wrote a dissenting opinion (the second time ever for a dissent by a FERC commissioner in a Section 7 gas pipeline certificate case) in a 2-1 vote approving MVP's certificate, concluding that the MVP Project as proposed is not in the public interest for two reasons: (a) the FERC records demonstrate that regional needs may be met by *alternate approaches* that could provide significantly fewer environmental impacts; and (b) the *need* for gas to be provided by the MVP proposed project is unknown, a fact that shifts the balance analysis toward denial of the certificate. *Mountain Valley Pipeline, LLC, Equitrans, L.P.* 161 FERC ¶ 61,744. These issues should therefore be thoroughly discovered, briefed, argued and adjudicated before construction of a project of this magnitude is allowed to begin on the private properties of Landowners and other defendants herein.

9. More than twenty requests for a rehearing before FERC have been filed by groups of FERC intervenors, as interested parties, some requesting a stay of the certificate order (FERC Docket No. CP16-10); MVP should therefore not be allowed to proceed with the right of eminent domain in the MVP Project until FERC has ruled upon those requests, as the substantive right of eminent domain claimed by MVP is still before FERC.

10. MVP's proposed project violates Section 4(f) of the *U.S. Department of Transportation Act*, 49 U.S.C. § 303 and 23 U.S.C. § 138.

11. MVP's proposed project violates Art. III, Section 3-9 of the *West Virginia Constitution* and the Fifth Amendment of the *U.S. Constitution*.

12. MVP has failed to comply with the Uniform Policy on Real Property Acquisition practices, 42 U.S.C. § 4651 and the *Uniform Relocation Assistance Act*, 42 U.S.C § 4621-4638,

specifically no appraisals have been presented to Landowners in order to provide evidence of value.

13. MVP has failed to describe easement areas in sufficient detail to adhere to minimal requirements to transfer real property interests and provide constructive notice to the public under federal or West Virginia law.

14. A judicial grant of MVP's request for immediate access and entry prior to the determination of just compensation will violate the separation of powers doctrine, in that only Congress can grant MVP quick-take power of eminent domain, which it has not done in the NGA.

15. MVP failed to demonstrate in proceedings before the FERC, and cannot demonstrate, nor has it alleged its Complaint, that it is financially capable of justly compensating all defendants herein, including Landowners, for the property interest and property it seeks to acquire by the extraordinary governmental power of eminent domain. Unless and until such financial condition is established by actual payments following just compensation trials, MVP has no right to enter, take possession, and begin construction of the MVP Project.

16. The FERC cannot lawfully grant the right of eminent domain delegated to it by Congress via the NGA because Congress' delegation of the power under 15 U.S.C. § 717f(h) is overly broad. Under the non-delegation doctrine, Congress must properly limit the exercise of any delegated power by setting forth an intelligible principle—a standard—for the regulatory body to follow in its case-by-case assessments. Congress failed to set forth any intelligible principle to FERC under the NGA. In doing so, Congress delegated not only the authority to execute the law to FERC but also the authority to determine what the law shall be, which is

impermissible under the *U.S. Constitution*, regardless of whether the standard applied by FERC could even pass constitutional muster, which it does not here. Because Congress' delegation of the power of eminent domain to FERC is overly broad, FERC cannot lawfully exercise the power of eminent domain and cannot confer the power to MVP or any other natural gas company.

17. MVP's motion for FRCP Rule 56 partial summary judgment on immediate access and entry prior to the determination of just compensation raises a multitude of factual issues upon which Landowners should be allowed the right to take discovery under Rule 56(d)(2) and/or through any others means available to Landowners.

18. Landowners reserve the right to make further objections and assert further defenses to the take which may be learned through discovery or otherwise requested herein or through any other means available, prior to or during any hearing or trial.

IV

DEMAND FOR JURY TRIAL

Landowners respectfully request and assert their right to a jury trial separate from other defendants herein, as to their constitutional right to be justly compensated for property and property rights acquired in this proceeding.

WHEREFORE, Landowners pray that the Court:

- a. Enter an order dismissing the Complaint;
- b. Alternatively, if it is determined that MVP has a substantive right to proceed to acquire from Landowners the properties and property rights described in the Complaint, that Landowners be awarded full and just compensation for such interests as determined by a jury in a separate trial from the other defendants, to occur before any construction of the MVP Project begins;

- c. That Landowners be awarded reasonable attorneys' fees and costs in this matter;
- d. For such other and further relief as the nature of this case and equity and justice may require to make Landowners whole in this proceeding.

Respectfully submitted,

/s/Charles M. Lollar, Jr.

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Certificate of Service

I hereby certify that on December 4, 2017, I electronically filed the foregoing Answer, Objections and Defenses to Taking with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record, including the following:

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