

Chapter 10

Condemnation in the Natural Gas Industry: Who Can Take What, When, and How Much Will It Cost?

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Synopsis

§ 10.01.	Introduction	363
§ 10.02.	Prior to Condemnation	364
	[1] — Source and Scope of Power	364
	[2] — Pre-Condemnation Acquisition of Property	368
§ 10.03.	Condemnation.....	371
	[1] — Federal vs. State Court	371
	[2] — Procedures.....	372
	[a] — The Complaint.....	372
	[b] — Service	378
	[c] — The Answer	381
	[d] — Immediate Possession	385
§ 10.04.	Just Compensation	388
	[1] — Federal Law	388
	[a] — Generally	388
	[b] — Evidence Considered	390
	[c] — Nominal Damages.....	392
	[d] — Interest	392
	[e] — Attorneys’ Fees.....	393
	[2] — State Law	393
	[a] — Generally/Evidence Considered.....	393
	[b] — Procedures.....	395
§ 10.05.	Conclusion.....	397

§ 10.01. Introduction.

The power of eminent domain is a critical tool for interstate natural gas pipeline companies and intrastate utilities in acquiring the necessary property interests to construct natural gas pipelines, storage fields, and other facilities necessary to fulfill the companies’ obligations under law to provide service to the public.

This chapter will analyze what entities are granted the power of eminent domain under federal law and the law of selected states (focusing primarily on the states most affected by the Marcellus Shale boom — Pennsylvania, West Virginia, Maryland, New York, and Ohio), what property interests can be taken, when the interests can be obtained and under what procedures, and how much the interests will cost.

The chapter is organized into separate sections detailing the process from the pre-condemnation phase through the various steps required to condemn.

§ 10.02. Prior to Condemnation.

Before considering condemnation as a means of acquiring property interests for a project, the company must ascertain whether it has the power to condemn the particular interests sought.

The power of eminent domain is a power held by the sovereign to take private property for the public good.¹ By statute, the government can extend that power to publicly regulated companies for projects determined to be in the public's interest.² However, the Fifth Amendment to the United States Constitution prohibits the taking of private property "without just compensation."³

[1] — Source and Scope of Power.

Under the federal Natural Gas Act,⁴ eminent domain powers may be exercised to obtain "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

¹ See *Balant v. City of Wilkes-Barre*, 669 A.2d 309, 314 (Pa. 1995) ("Eminent domain is the power to take property for public use.").

² See *NW. Lehigh Sch. Dist. v. Agric. Lands Condemnation Approval Bd.*, 559 A.2d 978, 980 (Pa. Commw. Ct. 1989) ("The sovereignty can delegate the power to such entities as it sees fit, provided that its exercise is for a public use. This includes not only governmental bodies, but corporations and individuals.").

³ U.S. Const. amend. V.

⁴ 15 U.S.C. § 717 *et seq.* (2006).

of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines.”⁵ In order to condemn under the Natural Gas Act, the condemnor must establish three elements: “(a) it is a holder of a certificate of public convenience and necessity; (b) it needs to acquire an easement, right-of-way, land, or other property necessary to the operation of its pipeline system; and (c) it has been unable to acquire the necessary property interests from the owner.”⁶

The Natural Gas Act has been construed by courts as providing for condemnation of surface and subsurface interests for storage of natural gas.⁷

Under the Natural Gas Act, a natural gas company may not engage in the transportation or sale of natural gas within interstate commerce without obtaining a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC).⁸ “Once the holder of a FERC certificate of public convenience and necessity asks a district court to enforce its right to condemn, the findings in the FERC certificate are treated as conclusive.”⁹ Condemnation proceedings may not be used to challenge the

⁵ 15 U.S.C. § 717f(h)(2006).

⁶ *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al.*, No. 09-cv-294 J, slip op. at p. 6 (D. Wyo. Sept. 17, 2010). *See also* 15 U.S.C. § 717f(h)(2006).

⁷ *See generally* *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations on and beneath Properties Located in Twp. 9 South, Range 23 East, Sections 34, 35 and 36, owned by Catherine D. Fields et al.*, No. CV-09-167-BLG-RFC (D. Mont. Apr. 21, 2011); *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al.*, No. 09-cv-294 J (D. Wyo. Mar. 21, 2011); *Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement (Parrott)*, 578 F. Supp. 930, 933-34 (N.D. Ohio 1983), *aff'd*, 776 F.2d 125, 128-29 (6th Cir. 1985).

⁸ 15 U.S.C. §§ 717, 717f(c)(1)(A)(2006).

⁹ *Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1256 (D. Kan. 2002).

propriety or validity of the certificate of public convenience once it has been awarded.¹⁰ A party who is aggrieved by FERC's award of a certificate of public convenience and necessity can apply for rehearing in front of FERC, and then petition for review in either the D.C. Circuit or the circuit where the natural gas company is located or has its principal place of business.¹¹

Many states likewise grant eminent domain power to utilities regulated by the states' public utility commissions. For example, in Pennsylvania, public utility corporations may condemn for purposes of "[t]he production, generation, manufacture, transmission, storage, distribution or furnishing of natural or artificial gas . . . or any combination thereof to or for the public."¹² In Maryland, section 5-403 of the Public Utilities Code confers the power to condemn upon gas companies "engaged in the business of transmitting or supplying natural gas, artificial gas, or a mixture of natural and artificial gases."¹³ In New York, gas corporations have the power "to acquire such real estate as may be necessary for its corporate purposes and the right of way through any property in the manner prescribed by the eminent domain procedure law."¹⁴ New York law also provides for condemnation for purposes of underground storage.¹⁵ In Ohio,

a company . . . organized for the purpose of . . . transporting natural or artificial gas . . . through tubings, pipes, or conduits

¹⁰ See 15 U.S.C. § 717r (2006)(providing for rehearing procedure in front of FERC); *Nw. Pipeline G.P. v. Francisco*, No. C08-0601MJP, 2008 WL 4547216, at *5 (W.D. Wash. Oct. 3, 2008)(noting that district courts may not entertain collateral attacks on the propriety or validity of certificates of public convenience and necessity); *Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.078 Acres, More or Less, in Monroe Twp.*, Nos. 08-168, 08-169, 08-177, 08-179, 08-180, 2008 WL 4346405, at *5-*6 (W.D. Pa. Sept. 19, 2008)(same).

¹¹ See 15 U.S.C. §§ 717r(a) and (b)(2006).

¹² 15 Pa. Cons. Stat. Ann. § 1511(a)(3)(2010).

¹³ Md. Code Ann., Pub. Util. Cos. § 5-403(a)(2010). The Prince George's County Underground Storage Act also confers eminent domain powers upon gas storage companies seeking to acquire use of geological strata in specified areas. See Md. Code Ann., Envir. § 14-202 (2010).

¹⁴ N.Y. Transp. Corp. Law § 11(3-a)(2010).

¹⁵ N.Y. E.C.L. § 23-1301 *et seq.* (2006)(2010).

. . . [or] for storing, transporting or transmitting . . . natural or artificial gas . . . may enter upon any private land to examine or survey lines for its tubing, pipes, conduits, poles, and wires, or to examine and survey for a reservoir, dams, canals, raceways, a plant, or a powerhouse . . . and may appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building of such tubing, conduits, pipes . . . receiving and delivery structures or facilities, pumping stations, and any other buildings, structures, appliances, or facilities necessary to the purposes of such companies, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such lines.¹⁶

Ohio law also provides for a separate right of eminent domain for purposes of underground storage.¹⁷ The eminent domain power conveyed by West Virginia law is even broader; in West Virginia, *every* corporation organized under the laws of or authorized to transact business in the state (including gas companies) may condemn property “for any purpose of internal improvement for which private property may be taken or damaged for public use.”¹⁸

¹⁶ Ohio Rev. Code Ann. § 1723.01 (2011).

¹⁷ See Ohio Rev. Code Ann. § 1571.17 (2011) (“[A]ny corporation organized under the laws of Ohio for the purpose of transporting, selling, or storing gas” may exercise the power of eminent domain over “any private property or interest therein as is necessary for the establishment, operation or protection of [a gas storage] reservoir” as long as the property is used “in connection with the establishment, operation or protection” of the reservoir.) However, a corporation seeking to utilize this power must “at such time own the right to store gas under at least sixty-five percent of the area of the surface of the earth under which such reservoir extends.” *Id.*

¹⁸ W. Va. Code § 54-1-1 (2011). Importantly, the eminent domain power of gas companies is subject to an exception: “[n]o line for the transportation of natural or artificial gas under pressure . . . and no tank for storing oil or natural gas, shall be laid or constructed within one hundred feet of any occupied dwelling house, without the consent of the owner. This

Because exploration and production companies are not regulated by FERC or state public utility commissioners, they generally do not possess the power of eminent domain.¹⁹

[2] — Pre-Condemnation Acquisition of Property.

In any large project, such as a new or up-sized pipeline or a new or expanded storage field, the acquisition of the property interests necessary for the project generally begins long before the actual certificate of public necessity and convenience is obtained.

The first step is to identify the property interests needed and the owners of those interests. For a pipeline project, the task is fairly straightforward.

section shall not apply to the territory within municipal corporations.” W. Va. Code § 54-1-5 (2011).

¹⁹ However, the Pennsylvania Public Utility Commission (the PUC) recently held that a gas company engaged in “gathering” or “midstream” services met the definition of a “public utility.” The applicant, Laser Northeast Gathering Company (“Laser”), planned to construct a pipeline from wellheads of producers in Susquehanna County (Pennsylvania) to the pipeline for transport to New York for refining and marketing (also known as “gathering” or “midstream” services). Application of Laser Northeast Gathering Co., No. A-2010-2153371, at p. 5 (Pa. Pub. Util. Comm’n adopted May 19, 2011, entered June 14, 2011). An administrative law judge had recommended that Laser be denied public utility status because it did not produce or transport natural gas “to or for the public,” reasoning that the activities in which Laser engages constitute “a business transaction and, therefore, fall within the definition of ‘constructed only to serve specific individuals.’” *Id.* at pp. 12, 18. The administrative law judge also noted that “the pipeline is being designed and constructed to serve a specific group consisting of gas producers who want to take raw gas to refinement and market” and that “Laser is not a public utility because it has the ability to select and control who it will serve through contractual arrangements or otherwise.” *Id.* at pp. 18-19. The PUC rejected the administrative law judge’s analysis and held that Laser had established that its proposed service qualified as a “public utility service.” *Id.* at p. 28. The PUC noted that “Laser has made it clear that it will serve any customer requiring transportation of gas over its system to the extent capacity exists” and that its negotiated contracts are not intended to be exclusionary. *Id.* at p. 26. The PUC remanded the matter to the Office of the Administrative Law Judge “for the limited purpose of determining whether the granting of a certificate of public convenience is ‘necessary or proper for the service, accommodation, convenience, or safety of the public.’” *Id.* at p. 41 (quoting 66 Pa. Cons. Stat. Ann. § 1103(a)).

For a storage field, however, the task is often complicated. Several different “owners” could theoretically claim entitlement to compensation for the taking of land for a storage area — the surface owner, mineral interest owner, royalty owner, coal lessees, oil and gas lessees, etc.²⁰ While the case law is not uniform as to whether the surface owner or the mineral owner owns the underground gas storage rights (and which owner would accordingly be entitled to compensation when property is taken for that purpose),²¹ the prevailing view appears to be that the surface owner is entitled to compensation in cases of condemnation for underground gas storage, but the mineral owner is not entitled to compensation unless there are recoverable commercial quantities of minerals left in the space.²²

²⁰ See generally Williams & Meyers, *Oil and Gas Law* § 222 (2004).

²¹ See *id.* Williams and Meyers noted the split in authority between *Hammonds v. Cent. Ky. Natural Gas Co.*, 75 S.W.2d 204 (Ky. 1934), limited by *Tex. Am. Energy Corp. v. Citizens Fidelity Bank & Trust*, 736 S.W.2d 25 (Ky. 1987) on one hand, which held that the mineral owner (and not the surface owner) is entitled to payments made under a gas storage lease, and the holdings of courts in several other jurisdictions on the other hand, which held that the surface owner (and not the mineral owner) is entitled to gas storage rental when the minerals within a stratum have been depleted. See, e.g., *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65, 71-72 (W. Va. 1952)(holding that if there are no recoverable mineral interests in the stratum, the mineral owner has no right to use that space); *Ellis v. Ark. La. Gas Co.*, 450 F. Supp. 412, 420-22 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436 (10th Cir. 1979)(holding that the surface owner, rather than the mineral owner, had the right to convey the underground storage rights when oil and gas had been removed).

²² See, e.g., *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65, 71-72 (W. Va. 1952)(holding that when minerals have been depleted, mineral owner does not own underground storage rights); *Ellis v. Ark. La. Gas Co.*, 450 F. Supp. 412, 420-22 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436 (10th Cir. 1979)(same); see also *Home Gas Co. v. Miles*, 364 N.Y.S.2d 213, 217 (N.Y. App. Div. 1975)(holding that “[t]he law is clear that a landowner may recover compensation for such [native] gas only if it is commercially recoverable native gas”). Williams and Meyers suggest, however, that mineral owners, royalty owners, and oil and gas lessees should be entitled to compensation for the taking if the area to be employed for gas storage contains “recoverable commercial quantities of minerals,” (and that the consent of the mineral owner should be required even if no such quantities exist), but that the surface owner should not be unless the surface is used for production, injection wells, etc., even where the minerals have been depleted. Williams & Meyers, *Oil and Gas Law*

The Natural Gas Act requires at least one attempt to acquire the necessary property interests by negotiation and most (but not all) state laws likewise require some effort to acquire the interests voluntarily before using eminent domain.²³

There are obvious and some not so obvious benefits to acquiring the property interests by negotiation. First, the price of acquisition is set by the parties rather than by the court or a jury, commission or board of viewers. Second, the company saves the legal costs of condemnation. Third, the company avoids the hidden cost of having its employees tied up in condemnation litigation. Fourth, reaching agreement with the property owners helps the company's future relationship with the property owners. Because the project will likely create a long-term relationship between the owners and the company, avoiding litigation will certainly aid the relationship.²⁴

§ 222 (“We urge, however, adoption of the view that the mineral severance should be construed as granting exclusive rights to subterranean strata for all purposes relating to minerals, whether ‘native’ or ‘injected,’ absent contrary language in the instrument severing such minerals.”).

²³ See 15 U.S.C. § 717f(h)(2006)(granting eminent domain powers only “[w]hen 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 . . .”). Federal courts are divided as to whether “good faith negotiations” are required before filing a condemnation action. State eminent domain laws vary as to the level of effort to negotiate required before condemning property interests. For example, New York’s Eminent Domain Procedures Law specifically requires the condemnor to make every reasonable and expeditious effort to justly compensate for a taking by negotiation and agreement. N.Y. Em. Dom. Proc. Law § 301 (2010). In contrast, Pennsylvania law does not require a condemnor to engage in bona fide negotiations before filing. *In re Sch. Dist. of Pittsburgh, Allegheny Cnty.*, 244 A.2d 42, 45 (Pa. 1968).

²⁴ The concepts underlying the principle of eminent domain — namely the balancing of private property rights versus the public interest — have also been discussed in relation to the topic of “forced pooling” with regard to Marcellus Shale drilling. See, e.g., Donald Gilliland, “Leading Marcellus Geologist Advocates Forced Pooling of Gas over Property Rights,” *The Patriot-News*, June 17, 2011, available at http://www.pennlive.com/midstate/index.ssf/2011/06/leading_marcellus_geologist_ad.html. Critics of forced pooling have

§ 10.03. Condemnation.

For those property interests which cannot be obtained by negotiation, the power of eminent domain as granted by federal or state law must be utilized to obtain the property interests.

[1] — Federal vs. State Court.

For state-regulated utilities, their only option is to file in the courts of the state where they are doing business and are regulated as utilities. Interstate pipeline companies, however, may have a choice between federal and state court as their forum. Under the Natural Gas Act, a condemnation action must be brought in the United States district court where the property at issue is located.²⁵ Where a project crosses state lines (which is often typical for large pipeline projects and storage fields), separate actions must be brought in the districts affected by the project.

Depending on the law of the states where the property is located, the interstate pipeline company may be able to condemn under state law even though it is regulated by FERC and not the state's public utility commission. For example, in Pennsylvania, the power of eminent domain is extended to "public utility corporations," which are defined as "[a]ny domestic or foreign corporation for profit that:

- (1) is subject to regulation as a public utility by the Pennsylvania Public Utility Commission *or an officer or agency of the United States*; or
- (2) was subject to such regulation on December 31, 1980 or would have been so subject if it had been then existing."²⁶

The choice between the federal and state forum should take into account several factors. In states with elected judges (especially at the trial court

explicitly likened the practice to eminent domain. Tom Barnes, "Groups Protest 'Forced Pooling' in Proposed Gas Tax," *Pittsburgh Post-Gazette*, Sept. 14, 2010, *available at* <http://www.post-gazette.com/pg/10257/1087478-100.stm>.

²⁵ 15 U.S.C. § 717f(h)(2006).

²⁶ 15 Pa. Cons. Stat. Ann. § 1103 (2010)(emphasis added).

level), the company may decide that the federal court will provide a more neutral forum. Any differences in procedures should also be considered — in particular cases, the differences between state procedures and federal procedures can be critical. Differences in substantive law should also be considered — the federal law of condemnation is fairly well-settled and is generally favorable to the condemnor.

[2] — Procedures.

Even if the condemnation is filed in federal court, the Natural Gas Act provides that “[t]he practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated”²⁷ However, several courts have held that Rule 71.1 of the Federal Rules of Civil Procedure,²⁸ which governs the procedures for condemnation actions in federal court, repealed the Natural Gas Act’s requirement that procedures for condemnation under the Act must conform with the procedure in the state where the property is located.²⁹

[a] — The Complaint.

Rule 71.1 provides that the condemnation action is commenced by the filing of a complaint. The Complaint “must contain a short and plain statement of (A) the authority for the taking; (B) the uses for which the property is to be taken; (C) a description sufficient to identify the property; (D) the interests to be acquired; and (E) for each piece of property, a designation of each

²⁷ 15 U.S.C. §717f(h)(2006).

²⁸ Rule 71A of the Federal Rules of Civil Procedure was redesignated as Rule 71.1 in 2007 with some minor stylistic changes.

²⁹ See *Transwestern Pipeline Co., LLC v. 9.32 Acres, More or Less, of Permanent Easement Located in Maricopa Cnty*, 544 F. Supp. 2d 939 (D. Ariz. 2008), *aff’d*, 560 F.3d 770 (9th Cir. 2008); *Columbia Gas Transmission Corp. v. An Exclusive Easement (Chapon)*, C.A. No. 94-1336 (W.D. Pa 1994); *USG Pipeline Co. v. 1.74 Acres in Marion Cnty., Tenn.*, 1 F. Supp. 2d 816 (E.D. Tenn. 1998).

defendant who has been joined as an owner or an owner of an interest in it.”³⁰ The Complaint should also state the basis for the Court’s jurisdiction and venue. District courts have federal question jurisdiction under the Natural Gas Act where the amount claimed by the property owner exceeds \$3,000.³¹ (If this threshold is not met, the condemnor must bring the claim in state court.) The complaint should also state that the three elements necessary to condemn under the Natural Gas Act (discussed in § 10.03[1], *supra*) have been met.

The key factor in drafting the Complaint is the precise description of the property interests taken. There is no requirement to file an engineer’s survey or map, but it is good practice to at least submit a construction drawing showing the location of the pipeline or other facility being condemned for. The condemnor may (but is not required to) specify the extent of the easement in the Complaint. Doing so would preclude future disputes over the proper extent. However, because the company is limited by the easement set forth in the Complaint, if the company desires additional rights at a later date, it must acquire or condemn the additional width (even if circumstances have changed).³² If no specific dimensions of an easement are specified, the pipeline company can argue that it is condemning the area that is necessary and reasonable to effectuate the intent of the easement.³³ However, failure to specify the dimensions can make it more difficult to value the property interest taken.

The Natural Gas Act permits the condemnation of “the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the

³⁰ Fed. R. Civ. P. 71.1(c)(2).

³¹ 15 U.S.C. § 717f(h)(2006). In addition to “federal question” jurisdiction, the district court could also have jurisdiction based upon diversity of citizenship, if the condemnor was a citizen of a different state than the condemnees. However, for a district court to have diversity jurisdiction, the amount in controversy would need to be greater than \$75,000.00. *See* 28 U.S.C. § 1332 (2006).

³² *See* *Zettlemoyer v. Transcon. Gas Pipeline Corp.*, 657 A.2d 920, 924 (Pa. 1995).

³³ *See* *Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538, 544 (3d Cir. 1995); *Zettlemoyer*, 657 A.2d at 924.

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,” and courts have construed that language broadly to allow the condemnation of a wide variety of property interests necessary for the operation of the FERC certificated facilities.³⁴

Where the property interest taken is less than the fee simple (for example, an underground storage easement for specified formations or a pipeline right-of-way), the description of the property interest may also include limitations on the property owner’s use of the remainder of the property not condemned. For example, the pipeline right-of-way may limit the property owner’s ability to use the surface by prohibiting digging, the placement of buildings or the use of heavy equipment. Likewise, a storage easement may condition the owner’s ability to drill through the storage formation to lower formations by requiring safeguards to protect the integrity of the storage formation.

While courts will give great latitude in describing the property interest taken, the flip side is that the broader the taking, the higher the just compensation may be. Typically, “[w]here only an easement is taken the full fee value of the land within the easement is not a proper measure of damages,

³⁴ See *Scheinewind v. ANR Pipeline Co.*, 485 U.S. 293, 295 n. 1 (1988)(noting that the underground storage of gas falls under the heading of “transportation” of Gas pursuant to the Natural Gas Act); *Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement*, 776 F.2d 125 (6th Cir. 1985)(holding that “[t]he use of condemnation for underground facilities is within the spirit and intent of the [Natural Gas] Act”); *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al.*, No. 2:09-cv-00294-ABJ (D. Wyo. Sept. 17, 2010)(granting partial summary judgment in eminent domain action where natural gas company sought to condemn property for purposes of underground gas storage); *Hardy Storage Co., LLC v. Property Interests Necessary to Conduct Gas Storage Operations in the Oriskany Sandstone Subterranean Geological Formation*, No. 2:07-CV-5, 2009 WL 689054 (N.D.W. Va. Mar. 9, 2009)(noting use of condemnation procedures to take reserves of native gas and obtain ownership rights necessary to store gas).

since the rights remaining in the landowners are very substantial.”³⁵ However, even if the property interest to be taken is described by the condemnor as an easement, a court may still award compensation in the amount of the fair market value of the fee interest in land if it determines that the restrictions on the landowner are so onerous as to constitute a taking of the entire value of the land.³⁶

The condemnor must undertake a “reasonably diligent search of the records” to determine the owners in the property.³⁷ Other owners may be added under the designation “Unknown Owners.”³⁸

Most states require similar Complaints. However, some states have procedural requirements that deviate substantially from federal law. For example, in New York, the condemnor must conduct public hearings prior to acquisition, publish a synopsis of the determination and findings in newspapers, and send a copy of the synopsis to property owners.³⁹ A Complaint for condemnation in New York must state that the condemnor complied with these procedures or set forth the basis for exemption from this requirement.⁴⁰

Ohio law also sets forth additional requirements with which a condemnor (or in the parlance of the Ohio statute, an “agency”⁴¹) must comply before

³⁵ *United States for the Use of the Tenn. Valley Auth. v. An Easement and Right-of-Way over Two Strips of Land*, 284 F. Supp. 71, 73 (W.D. Ky. 1968).

³⁶ *See, e.g., 293.080 Acres of Land, More or Less, Situate in Westmoreland Cnty., Pa. v. United States*, 169 F. Supp. 305, 308 (W.D. Pa. 1959)(awarding compensation in the amount of the value of the fee simple interest where the condemnor sought “the perpetual right and easement” to flood tracts of subsurface coal where the coal owners had to cease all operations due to the flooding but applying the more common “before and after” rule, discussed *infra*, to ascertain the proper amount of just compensation where the condemnor sought to only intermittently flood the surface of a tract of land, where the landowner could still make some use of his property).

³⁷ Fed. R. Civ. P. 71.1(c)(3).

³⁸ *Id.*

³⁹ N.Y. Em. Dom. Proc. Law §§ 201, 204 (2010).

⁴⁰ *Id.* at § 402(B)(3)(a)(2010).

⁴¹ Under Ohio law, an “agency” is defined as “any public agency or private agency.” Ohio Rev. Code Ann. § 163.01(C)(2011-2012). A “public agency” is defined as “any

filing a “petition for appropriation.” For example, the condemnor must provide the property owner with a notice of intent to acquire the property at least 30 days before filing the petition for appropriation.⁴² The notice must be served on the owner or its representative either personally or through certified mail.⁴³ Further, the condemnor must provide the owner with a “written good faith offer to purchase the property” at least 30 days before filing the petition for appropriation.⁴⁴ The condemnor must also obtain an appraisal of the property and provide a copy of the appraisal to the property owner at the same time or before the condemnor makes its first offer to purchase.⁴⁵ The petition for appropriation must contain, *inter alia*, a statement that the above requirements have been met.⁴⁶

In Pennsylvania, in order to condemn property, a public utility corporation must first apply to the Pennsylvania Public Utility Commission, which must find and determine, after notice and opportunity for hearing, “that the service to be furnished by the corporation through the exercise of those powers is necessary or proper for the service, accommodation, convenience or safety of the public.”⁴⁷ Public utility corporations can file a declaration of taking under the more general procedures set forth in the Eminent Domain Code, or they can utilize special procedures set forth in the Business Corporation Law.⁴⁸ Under the Eminent Domain Code, the public utility corporation must file a declaration of taking *in rem* setting forth the following:

governmental corporation, unit, organization, instrumentality, or officer authorized by law to appropriate property in the courts of this state.” Ohio Rev. Code Ann. § 163.01(A)(2011). A “private agency” is defined as “any corporation, firm, partnership, voluntary association, joint-stock association, or company that is not a public agency and that is authorized by law to appropriate property in the courts of this state.” Ohio Rev. Code Ann. § 163.01(B)(2011). Unless otherwise specified, this paper will only discuss the procedures applicable to private agencies.

⁴² Ohio Rev. Code Ann. § 163.04(A)(2011).

⁴³ *Id.*

⁴⁴ *Id.* at § 163.04(B).

⁴⁵ *Id.* at § 163.04(C).

⁴⁶ *Id.* at § 163.05(F).

⁴⁷ 15 Pa. Cons. Stat. Ann. § 1511(c)(2010).

⁴⁸ *Id.* at § 1511(g)(2)(iv)(2010). See also *In re Carnegie Natural Gas Co.*, 629 A.2d 256, 257 (Pa. Commw. Ct. 1993).

- (1) The name and address of the condemnor.
- (2) A specific reference to the statute and section under which the condemnation is authorized.
- (3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when the action was taken and the place where the record may be examined.
- (4) A brief description of the purpose of the condemnation.
- (5) A description of the property condemned, sufficient for identification, specifying the municipal corporation and the county or counties where the property taken is located, a reference to the place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in the county in accordance with section 304 (relating to recording notice of condemnation).
- (6) A statement of the nature of the title acquired, if any.
- (7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.
- (8) A statement of how just compensation has been made or secured.⁴⁹

The condemnor must file a bond along with declaration of taking.⁵⁰

Under the Business Corporation Law:

“If the [public utility] corporation and any interested party cannot agree on the amount of damages sustained, or if

⁴⁹ 26 Pa. Cons. Stat. Ann. § 302(b)(2010).

⁵⁰ 26 Pa. Cons. Stat. Ann. § 303(a)(2010).

any interested party is an unincorporated association, or is absent, unknown, not of full age or otherwise incompetent or unavailable to contract with the [public utility] corporation, or in the case of disputed, doubtful or defective title, the [public utility] corporation may make a verified application to the appropriate court for an order directing the filing of a bond to the Commonwealth, in an amount and with security to be approved by the court, for the use of the person or persons who may be found to be entitled to the damages sustained.⁵¹

The bond and a certified copy of the resolution of condemnation describing the nature and extent of the taking must accompany the application.⁵²

West Virginia law also sets forth alternative condemnation procedures for business corporations, including gas/pipeline companies, authorized to conduct business in the state. Under this statute, the condemnor may file a bond with its petition, and if the owner (“being *sui generis*”) appears and does not object to the bond, the condemnor may take possession.⁵³ If the owner objects to the bond, or the owner cannot be found, or is not *sui generis*, the court will hear objections on the bond.⁵⁴ The court may require a new and additional bond if it appears necessary to protect the owner.⁵⁵ Under this section, the condemnor cannot enter or take possession, do work on the premises, and then abandon the proceeding for condemnation — the condemnor must see the proceedings through to finality and pay the owner the amount of compensation and damages as finally determined in the proceeding.⁵⁶

[b] — Service.

In condemnation proceedings in federal court under the Natural Gas Act, the condemnor need not serve the complaint, but notice of the proceeding

51 15 Pa. Cons. Stat. Ann. § 1511(g)(2)(i)(2010).

52 *Id.*

53 W. Va. Code § 54-2-15 (2011).

54 *Id.*

55 *Id.*

56 *Id.*

must be served on all defendants.⁵⁷ The notice must contain the following: the court, the title of the action, the defendant to whom it is directed; a description of the property sufficiently to identify it; that the action is to condemn property; the interest to be taken; the authority for the taking; the uses for which the property is to be taken; that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice; that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and that a defendant who does not serve an answer may file a notice of appearance.⁵⁸ The "name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served" must appear at the end of the notice.⁵⁹

If the address of the landowners is known, the notice must be served on the landowner personally.⁶⁰ The landowners may be served by publication if the condemnor is unable to determine the residence or location of the landowners despite diligent efforts.⁶¹

In condemnation proceedings brought in Pennsylvania state court under the Eminent Domain Code, personal service of notice of the filing on the condemnee and all mortgagees and lienholders of record is required within 30 days after the filing of the declaration of taking.⁶² If personal service cannot be effected, then the parties may be served by "by posting a copy of the notice upon the most public part of the property and by publication of a

⁵⁷ Fed. R. Civ. P. 71.1(d)(2)(A) and (c)(4).

⁵⁸ *Id.*

⁵⁹ *Id.* at (d)(2)(B).

⁶⁰ *Id.* at 71.1(d)(3)(A); Fed. R. Civ. P. 4.

⁶¹ *Id.* at 71.1(d)(3)(B); *see also* Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, *et al.*, 2:09-cv-00294-ABJ, slip op. at p. 7 (D. Wyo. Sept. 17, 2010).

⁶² 26 Pa. Cons. Stat. Ann. § 305(a) and (b)(1)(2010).

copy of the notice . . . one time each in one newspaper of general circulation and the legal journal, if any, published in the county.”⁶³ If the public utility corporation instead elects to use the procedures set forth by the Business Corporation Law, written notice of the filing of the application must be sent “by mail or otherwise” to the interested party at least 10 days before the court considers the application if the corporation knows the address of the party.⁶⁴ If the address is unknown, “the corporation shall officially publish such notice in the county or counties where the property is situated twice a week for two weeks prior to consideration by the court and shall give such supplemental or alternative notice as the court may direct.”⁶⁵

In contrast, in New York, the condemnor must file in the office of the clerk of each county where the real property to be acquired or any part thereof is situated, a notice of the pendency of such proceeding. The notice must briefly state the object of the proceeding and shall contain a general description of the real property to be acquired. The notice must also state the names of the condemnees of such real property as known to the condemnor.⁶⁶ At least 20 days prior to the return date of the petition, the condemnor must serve a notice of the time, place and object of the proceeding upon the owner of record of the property to be acquired.⁶⁷ In addition, if service is made by mail, at least 10 but not more than 30 days before the return date of the application, the condemnor must also publish a copy of a diagram or the acquisition map of the property in an official newspaper in the locality where the property is situated, and in at least 10 successive issues of a newspaper of general circulation in such locality.⁶⁸

In Ohio, “[w]hen the residence of the owners is known and is within this state, notice of the filing of a petition . . . shall be given to all such

⁶³ 26 Pa. Cons. Stat. Ann. § 305(b)(2)(2010).

⁶⁴ 15 Pa. Cons. Stat. Ann. § 1511(g)(2)(ii)(2010).

⁶⁵ *Id.*

⁶⁶ N.Y. Em. Dom. Proc. Law § 402(B)(1)(2010).

⁶⁷ *Id.* at § 402(B)(2)(2010).

⁶⁸ *Id.* at § 402(B)(2)(a)(2010).

owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions.”⁶⁹ If an owner resides out of state or cannot be located, the condemnor must give notice by registered mail or “by publishing the substance of the petition, and a statement of the date of the filing thereof and of the date on and after which the matter may be heard, once a week for two consecutive weeks, in a newspaper of general circulation in the county.”⁷⁰

[c] — The Answer.

In federal court, Rule 71.1 provides that the defendant property owners may, but are not required to file an Answer.⁷¹ The Answer is limited to objections to the authority for the taking.

One typical defense raised by Answers is an objection that no “good-faith” attempt was made to acquire the property before filing condemnation. Most courts, however, have rejected such defenses, refusing to engage in a hearing on an issue that is tangential and almost entirely subjective.⁷² The majority view appears to be that good faith is not a requirement under the Natural Gas Act.⁷³ Despite this, it is good practice for a company seeking

⁶⁹ Ohio Rev. Code Ann. § 163.07 (2011).

⁷⁰ *Id.*

⁷¹ Fed. R. Civ. P. 71.1(e)(2).

⁷² See *Northern Natural Gas Co. v. Approx. 9117.53 Acres, No. 10-1232-WEB*, 2011 WL 947091, at *5-*6 (D. Kan. Mar. 15, 2011)(collecting cases).

⁷³ See *id.* (noting that the plain language of the Natural Gas Act only requires that the condemnor be “unable to acquire the property by contract and . . . unable to agree with the defendants on compensation”); *Hardy Storage Co., LLC v. Property Interests Necessary to Conduct Gas Storage Operations in the Oriskany Sandstone, No. 2:07-cv-5*, 2009 WL 689054, at *5 (W. Va. Mar. 9, 2009)(noting that under the Natural Gas Act, a condemnor “need only show that it had been unable to reach an agreement regarding just compensation with the property owners”); *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al., 2:09-cv-00294-ABJ*, slip op. at p. 11 (D. Wyo. Sept. 17, 2010)(collecting cases); *but see Nat’l Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 2d 405, 416 (W.D.N.Y. 2000)(“In addition to showing an inability to agree on a

to exercise its eminent domain powers to maintain accurate records of all contacts with landowners and all offers to purchase.

Another typical defense is an objection that the pipeline or other facility should not be located on the defendant's property or that the description of the property interest should be changed. Such defenses usually fail. Landowners also commonly attempt to argue that the taking does not serve a public purpose (*i.e.* that the taking serves only private purposes or the needs of the utility). These arguments also typically fail. Courts have held that the condemnation Answer cannot be used as a collateral attack on the regulatory agency's grant of a certificate of public convenience and necessity.⁷⁴ As to the description of the taking, courts have held that neither the court nor the defendants can add to, subtract from or change the property taken so long as it falls within the scope of the certificated project.⁷⁵

One defense that will prevail is if the property taken falls outside of the certificated project. Some federal courts have adopted a "map rule" in storage condemnation cases, which forbids a condemnor from condemning property outside of the boundaries of the area certified by FERC.⁷⁶ "Under the map rule, if the original estimate of the [boundaries of the] storage reservoir is wrong, and a new estimate indicates a larger storage field than originally thought, the pipeline will have to return to FERC for a new

price with the landowner, the plaintiff utility company must also establish that it engaged in good faith negotiations with the landowner.").

⁷⁴ See *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al.*, 2:09-cv-00294-ABJ, slip op. at 7 (D. Wyo. Sept. 17, 2010)(citing *Williams Natural Gas Co. v. Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989)); *USG Pipeline Co. v. 1.74 Acres*, 1 F. Supp. 2d 816, 819 (E.D. Tenn. 1998).

⁷⁵ See *United States v. 38.60 Acres of Land*, 625 F.2d 196, 199 (8th Cir. 1980).

⁷⁶ See, e.g., *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 578 F. Supp. 930, 934-35 (N.D. Ohio 1983), *aff'd*, 776 F.2d 125 (6th Cir. 1985); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Lease Hold*, 999 F.2d 546, at *2 (9th Cir. 1993)(unpublished)(assuming but not deciding that the "map rule" applies in the Ninth Circuit).

certificate authority.”⁷⁷ One court has held that “the scope of a certificate of public convenience and necessity is to be construed narrowly against the party exercising the power”⁷⁸ and “the district court’s jurisdiction is limited to condemnation of property *for purposes authorized by the certificate.*”⁷⁹ In other words, if the certificate of public convenience and necessity only authorizes construction of a natural gas pipeline on the condemned property, the condemned property may be used only for that purpose.⁸⁰

If a landowner has no objection or defense to the taking of the property, he may simply serve a notice of appearance designating its interest in the property.⁸¹ Thereafter, the landowner shall receive notice of all proceedings affecting his interest.⁸² If a landowner does have an objection or defense to the taking, the defendant must serve an answer within 21 days after service of the notice or the Complaint upon that defendant.⁸³ The defendant’s response to the condemnation complaint is limited to the Answer described in Rule 71.1. The defendants may not file a motion to dismiss and may not file a counterclaim.⁸⁴

The Answer must state all objections and defenses to the taking of the property, or those defenses and objections are waived.⁸⁵ If no Answer is filed

⁷⁷ *Williston Basin Intrastate Pipeline Co. v. An Exclusive Gas Storage Lease Hold*, 999 F.2d 546 at *2 (9th Cir. 1993)(quoting M. Howard Petricoff and H.L. Snyder, “Underground Gas Storage: Condemnation Problems Under the Natural Gas Act,” 9 *E. Min. L. Inst.* § 16.02[3] at 16-11 (1988)).

⁷⁸ *Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less, in Providence Cnty. of the State of R.I.*, 749 F. Supp. 427, 431-32 (D.R.I. 1990)(collecting cases).

⁷⁹ *Id.* at 432 (emphasis added).

⁸⁰ *Id.*

⁸¹ Fed. R. Civ. P. 71.1(e)(1).

⁸² *Id.*

⁸³ *Id.* at 71.1(e)(2).

⁸⁴ *See United States v. 79.20 Acres of Land*, 710 F.2d 1352, 1356 (8th Cir. 1983); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 122 (D. Mass. 1981); Fed. R. Civ. P. 71.1(e); *but see Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 747 F. Supp. 401, 406 (N.D. Ohio 1990)(granting the landowner leave to assert an inverse condemnation counterclaim).

⁸⁵ Fed. R. Civ. P. 71.1(e)(2)-(3).

and the defenses and objections to the takings are waived, the condemnor will likely obtain summary judgment as to the propriety of the taking, leaving the amount of just compensation the only issue to be determined.⁸⁶ However, even if no Answer is filed, the landowner may still present evidence of just compensation.⁸⁷

It is important to note that some states have condemnation procedures that deviate substantially from federal law. For instance, under Pennsylvania law, preliminary objections (the equivalent of a motion to dismiss) *are* permitted, and are “the exclusive method of challenging: (i) the power or right of the condemnor to appropriate the condemned property unless it has been previously adjudicated; (ii) the sufficiency of the security; (iii) the declaration of taking; and (iv) any other procedure followed by the condemnor.”⁸⁸ In fact, these defenses are waived if not presented in preliminary objections.⁸⁹ In New York, “upon the presentation of the petition and notice with proof of service, a condemnee may appear and file a verified answer, which must contain specific denial of each material allegation of the petition challenged by him, or of any knowledge or information thereof, sufficient to form a belief, or a statement of new matter constituting a defense to the proceeding.”⁹⁰ In Ohio, the answer may contain “a general denial or a specific denial of each material allegation not admitted.”⁹¹ “The agency’s right to make the appropriation, the inability of the parties to agree, and the necessity for the

⁸⁶ See *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al.*, 2:09-cv-00294-ABJ (D. Wyo. Sept. 17, 2010) (granting condemnor’s motion for partial summary judgment where all elements of condemnation action were met and defendants accepted service but did not contest taking by filing an answer).

⁸⁷ See Fed. R. Civ. P. 71.1(e)(3); *Columbia Gas Transmission Corp. v. Rodriguez*, 551 F. Supp. 2d 460, 462 (W.D. Va. 2008).

⁸⁸ 26 Pa. Cons. Stat. Ann. § 306(a)(3)(2010).

⁸⁹ *Id.* at § 306(b)(2010).

⁹⁰ N.Y. Em. Dom. Proc. Law § 402(B)(4)(West, Westlaw through 2010 Sess.).

⁹¹ Ohio Rev. Code Ann. § 163.08 (West, Westlaw through file 6, 2011-2012 Sess.).

appropriation” must be resolved by the court in favor of the condemnor unless the answer sets forth specific denials as well as the facts forming the basis for the denials.⁹²

[d] — Immediate Possession.

After the Complaint has been filed and served and the defendant has responded (or not), the first major issue litigated in many condemnation cases is whether the company can gain possession of the property interests before the issue of just compensation is tried. It is a critical issue in many cases because there is a limited time under the certificate of public convenience and necessity to build the pipeline or storage field and the timing of the construction depends on many factors including weather and environmental impacts. Also, the company may also have contract obligations to provide service from the new facilities on a date certain which requires that access be granted well in advance of paying just compensation.

Neither the Natural Gas Act nor Rule 71.1 specifically provides for obtaining access of the condemned property before payment of just compensation. Most courts, however, have recognized that a district court has the “equitable authority” to grant immediate entry and possession and have permitted immediate access provided that certain criteria are met.⁹³

⁹² *Id.* The Ohio statute also provides that an answer may not deny the matters set forth above when property is taken “in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge.” *Id.*

⁹³ *See, e.g.*, ETC Tiger Pipeline, LLC v. 20 Acres, No. 11-CV-265, 2011 WL 1314452, at *2-3 (W.D. La. Apr. 4, 2011); Hardy Storage Co., LLC, v. An Easement to Construct, Operate and Maintain 12-Inch and 20-inch Gas Transmission Pipelines Across Properties in Hardy Cnty, W. Va., No. Civ. A. 2:06 CV 7, 2006 WL 1004719, at *2 (N.D.W. Va. Apr. 12, 2006)(quoting East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 831 (4th Cir. 2004)); Tenn. Gas Pipeline Co. v. New England Power, C.T.L. Inc., 6 F. Supp. 2d 102, 104 (D. Mass. 1998); *accord* USG Pipeline Co. v. 1.74 Acres in Marion Cnty, Tenn., 1 F. Supp. 2d 816, 825-26 (E.D. Tenn. 1998); Northern Border Pipeline Co. v. 127.79 Acres of Land, 520 F. Supp. 170, 172-73 (D. N.D. 1981). *But see* Tenn. Gas Pipeline Co. v. Garrison, No.

In order to obtain immediate possession, a condemnor must establish the four elements needed to obtain injunctive relief: “a substantial likelihood [of success] on the merits . . . ; a substantial threat that irreparable harm will result . . . ; the harm that would result to the Plaintiff if the injunction is denied must outweigh the harm to the Defendants if the injunction is granted; and granting the injunction will not disserve the public interest.”⁹⁴ In order to determine the likelihood of success on the merits, courts generally evaluate whether the basic elements of the condemnation have been proven.⁹⁵ If the landowner has not filed an answer contesting the authority for the taking, the court may find that there is no issue on the merits and grant partial summary judgment on the issue of propriety of the taking.⁹⁶ With regard to the balance of harm, a pipeline company’s inability to meet its construction schedule or the deadline established by FERC without immediate occupancy has been held sufficient to grant immediate access.⁹⁷ Federal courts will often require the posting of bond to obtain immediate entry.⁹⁸

3:10-cv-1845, 2010 WL 3632152 (M.D. Pa. Sept. 10, 2010)(no immediate right of entry under the Natural Gas Act, even just for surveys, before condemnation proceedings are completed, even though Pennsylvania law permits such immediate entry); *Nat’l Fuel Gas Supply Corp. v. 138 Acres of Land*, 84 F. Supp. 2d 405, 415-16 (W.D.N.Y. 2000)(noting that “courts must exercise inherent powers with great restraint because such powers are shielded from direct democratic controls” and holding that condemnor did not sufficiently establish irreparable injury to justify immediate possession).

⁹⁴ *ETC Tiger Pipeline, LLC v. 20 Acres*, No. 11-CV-265, 2011 WL 1314452, at *2 (W.D. La. Apr. 4, 2011).

⁹⁵ *See, e.g., Hardy Storage Co., LLC v. An Easement to Construct, Operate, and Maintain 12-Inch and 20-Inch Gas Pipelines across Properties in Hardy Cnty., W. Va.*, No. Civ. A. 2:06 CV 7, 2006 WL 1004719, at *2 (N.D. W. Va. Apr. 12, 2006).

⁹⁶ *See id.* at *5.

⁹⁷ *Tenn. Gas. Pipeline Co. v. New England Power, C.T.L., Inc.*, 6 F. Supp. 2d 102, 104 (D. Mass. 1998).

⁹⁸ *See, e.g., Hardy Storage Co., LLC v. An Easement to Construct, Operate, and Maintain 12-Inch and 20-Inch Gas Pipelines across Properties in Hardy Cnty., W. Va.*, No. Civ. A. 2:06 CV 7, 2006 WL 1004719, at *6-7; *Northern Border Pipeline Co. v. 127.79 Acres of Land*, 520 F. Supp. 170, 173 (D. N.D. 1981).

Not all state laws follow the federal law example concerning immediate entry and possession. For instance, under Pennsylvania law, the condemnor or its employees or agents have the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals prior to the filing of the declaration of taking.⁹⁹ Ten days' notice to the property owner is required, and the condemnor is liable to the property owner for damages.¹⁰⁰ Furthermore, once 30 days have passed since the filing of the declaration of taking (*i.e.* the period during which the condemnee could have filed preliminary objections to the declaration of taking has passed), the condemnor is entitled to possession or right of entry upon payment or a written offer to pay to the condemnee the amount of just compensation as estimated by the condemnor.¹⁰¹ Under New York law, the condemnor and its agents have the "right to enter upon the property only for the purpose of making surveys, test pits and borings, or other investigations, and also for temporary occupancy during construction."¹⁰² As in Pennsylvania, notice to the property owner is required, and the condemnor is liable to the property owner for damages.¹⁰³ In West Virginia, a condemnor may enter onto the land for purposes of examining, surveying and laying out the land, ways, and easements that it desires to appropriate, provided that it does not injure the owner or possessor of the land.¹⁰⁴ In Ohio, a condemnor may enter for purposes of making "surveys, soundings, drillings, appraisals, and examinations as are necessary or proper."¹⁰⁵ Notice to the owner or person in possession is required, and the condemnor is liable for damages to the property.¹⁰⁶ In contrast, under Maryland law, there is no right of possession

⁹⁹ 26 Pa. Cons. Stat. Ann. § 309(a)(2010).

¹⁰⁰ *Id.* at §§ 309(b) and (c)(2010).

¹⁰¹ *Id.* at § 307(a)(1)(i)(2010).

¹⁰² N.Y. Em. Dom. Proc. Law § 404 (2010).

¹⁰³ *Id.*

¹⁰⁴ W. Va. Code § 54-1-3 (West, Westlaw through 2011 Sess.).

¹⁰⁵ Ohio Rev. Code Ann. § 163.03 (2011).

¹⁰⁶ *Id.*

for any purpose until after a final judgment is obtained and the condemnor pays the full amount of the judgment, plus costs.¹⁰⁷

§ 10.04. Just Compensation.

[1] — Federal Law.

[a] — Generally.

The central issue in any condemnation proceeding is how much the property interest taken will cost. Under Rule 71.1, the trial may be heard by a judge, jury or a commission. Federal law governs the determination of just compensation.¹⁰⁸

The landowner bears the burden of proof as to just compensation.¹⁰⁹ A landowner may present evidence of compensation even if he has failed to make an appearance or file an answer.¹¹⁰

Just compensation is defined as the fair market value of the property interest lost by owner (*not* by the value of the interest to the condemnor).¹¹¹

¹⁰⁷ *Walker v. Acting Director, Dep't. of Forest & Parks*, 396 A.2d 262, 264 (Md. 1979). Maryland law does permit “quick-take” condemnation under limited circumstances. *See id.* (noting that availability of “quick-take” condemnation is set forth in sections 40A through 40D of Article III of the Maryland Constitution, and that this availability is limited to condemnation for purposes of road and sanitary sewer construction). However, none of these circumstances applies to a gas or pipeline company.

¹⁰⁸ Although holding that federal law governs all aspects of a condemnation action under the Natural Gas Act, the Sixth Circuit has held that federal law would look to state law standards as to the determination of just compensation. *See Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Easement*, 962 F.2d 1192, 1196-99 (6th Cir. 1992), *cert. denied*, 506 U.S. 1022 (1992). However, that holding seems to ignore the extensive body of *federal* eminent domain law. The Third Circuit has held, under a different federal condemnation statute, that federal law applies to the determination of just compensation. *See United States v. Certain Parcels of Land*, 144 F.2d 626, 629 (3d Cir. 1944).

¹⁰⁹ *See United States v. Evans*, 380 F.2d 761, 762 (10th Cir. 1967); *Hardy Storage Co., LLC v. An Easement for Tank Sites on Properties in Hardy Cnty, W. Va.*, No. 2:06-CV-17, 2008 WL 149132, at *1 (N.D. W. Va. Jan. 11, 2008); *United States v. 15.3 Acres of Land*, 154 F. Supp. 770, 783 (M.D. Pa. 1957).

¹¹⁰ Fed. R. Civ. P. 71.1(e)(3); *Columbia Gas Transmission Corp. v. Rodriguez*, 551 F. Supp. 2d 460, 462 (W.D. Va. 2008).

¹¹¹ *United States v. 15.3 Acres of Land*, 154 F. Supp. 770, 784 (M.D. Pa. 1957).

Fair market value is defined as the price that would be agreed upon by a willing and informed buyer and seller, taking into consideration the present use of the property and its highest and best use.¹¹² The United States Supreme Court has defined “highest and best use” as “[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future”¹¹³ “In the absence of proof to the contrary, the highest and best use of property is presumed to be its current use.”¹¹⁴

Fair market value does *not* include lost profits, lost development opportunities, frustration of plans, damage to goodwill, expense of relocation, or the special value of property to the owner arising from its adaptability to his particular use.¹¹⁵ “A plaintiff’s offer on a property interest may constitute the minimum estimate of what constitutes just compensation.”¹¹⁶ Courts may not award compensation for remote or speculative losses.¹¹⁷

The proper amount of just compensation for a partial taking (e.g. an easement) is defined as the diminution in market value as measured by the difference between the fair market value of the land without an easement and fair market value of the land with the easement (also known as the “before and after” rule).¹¹⁸ When a permanent easement is taken by condemnation,

¹¹² See *id.* at 783-84.

¹¹³ *Olson v. United States*, 292 U.S. 246, 255 (1934); see also *United States v. 3.544 Acres of Land*, 147 F.2d 596, 598 (3d Cir. 1945).

¹¹⁴ *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 952 (N.D. Ill. 2001).

¹¹⁵ See *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); *Questar Pipeline Co. v. 94.86 Acres of Land*, No. 2:05-cv-306-TC, 2011 WL 900368, at *2 (D. Utah Mar. 14, 2011)(quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979)).

¹¹⁶ *Columbia Gas Transmission Corp. v. Rodriguez*, 551 F. Supp. 2d at 462.

¹¹⁷ See *United States v. 3.544 Acres of Land*, 147 F.2d 596, 598 (3d Cir. 1945); *Wilson v. United States*, 350 F.2d 901, 909 (10th Cir. 1965).

¹¹⁸ See *United States v. 9.20 Acres, More or Less, Situate in Polk County, Iowa*, 638 F.2d 1123, 1126-27 (8th Cir. 1981)(“In partial taking cases, the proper measure of compensation is the difference between the fair and reasonable market value of the entire ownership immediately before the taking and the fair and reasonable market value of what is left immediately after the taking.”); *Hardy Storage Co., LLC v. Property Interests Necessary*

“the Court must consider not only the market value of the property and the amount of land taken, but also the percentage of the original bundle of ownership rights that the owner retains on the encumbered land.”¹¹⁹ In contrast, when a taking amounts to a temporary easement, “[a] landowner must be compensated for the loss of use of [the] property taken by a temporary easement and any impairment of access to the property during the period of construction.”¹²⁰ Some courts have ruled that the proper amount of compensation in the case of a temporary easement is “the rental value of the property for the period of occupation,” which is “commonly measured by the rental value of the property as a whole.”¹²¹

[b] — Evidence Considered.

Evidence of comparable sales is helpful but not necessarily dispositive of the proper amount of just compensation.¹²² Courts have split on whether it is permissible to take into account evidence of “stigma damages” — a reduction in value of the property based upon “fears about possible mishaps” — when determining just compensation.¹²³ However, speculative testimony

to Conduct Gas Storage Operations in the Oriskany Sandstone Subterranean Geological Formation, No. 2:07CV5, 2009 WL 689054, at *5 (N.D. W. Va. Mar. 9, 2009)(“Where, as here, the property interest condemned is only a partial taking of the property, just compensation is determined by the diminution in market value as measured by the difference between the fair market value of the land before the condemnation and the fair market value after.”); *Lyons v. United States*, 99 F. Supp. 429, 431 (W.D. Pa. 1951)(The amount of compensation to be awarded for the condemnation of a strip of plaintiffs’ farm for use as a railway spur “is the difference between the market value of the farm prior to the taking and the market value of the farm after the taking.”).

¹¹⁹ *Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land*, 195 F. Supp. 2d 314, 322 (D. Mass. 2002), *aff’d*, 318 F.3d 279 (1st Cir. 2003).

¹²⁰ *Id.*

¹²¹ *See id.* at 322-23 (collecting cases).

¹²² *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))(“Comparable sales are only one method of estimating property values. Other methods may be used ‘where no comparable sales exist.’”).

¹²³ *Id.* at 957; *Midwestern Gas Transmission Co. v. 2.62 Acres in Sumner Cnty.*, No. 3:06-cv-0290, 2011 WL 1627169, at *3 (M.D. Tenn. Apr. 28, 2011); *but see* *Southeast*

concerning “explosions or untoward events” is generally not permitted.¹²⁴ Evidence of settlement offers made by the condemnor to other property owners is generally inadmissible to prove just compensation.¹²⁵

The amount of just compensation awarded will frequently turn on use of expert testimony.¹²⁶ Despite the importance of expert testimony, a landowner’s own testimony as to the value of his own land can also play a role in the determination of just compensation. “Unlike other expert witnesses, ‘the opinion of a landowner as to the value of his land is admissible without further qualification.’”¹²⁷ However, such testimony “cannot be based on naked conjecture or solely speculative factors.”¹²⁸ “At minimum, it must offer specific facts that translate into a reduced market value for the property.”¹²⁹

Supply Header, LLC v. 47.75 Acres in Covington Cnty., No. 2:07-cv-216-KS-MTP, 2008 WL 553019, at *3 (S.D. Miss. Feb. 27, 2008)(permitting landowners to testify that “the pipeline is designed to transport a high-pressure, combustible substance” and allowing the introduction of testimony concerning reduction in market value *if such testimony could be corroborated by market data*).

¹²⁴ Southeast Supply Header, LLC v. 47.75 Acres in Covington Cnty., No. 2:07-cv-216-KS-MTP, 2008 WL 553019, at *3 (S.D. Miss. Feb. 27, 2008).

¹²⁵ Hardy Storage Co., LLC v. Property Interests Necessary to Conduct Gas Storage Operations in the Oriskany Sandstone, No. 2:07cv5, 2009 WL 689054, at *7 (N.D.W. Va. Mar. 9, 2009).

¹²⁶ See, e.g., Hardy Storage Co., LLC v. An Easement to Construct, Operate, and Maintain 12-Inch and 20-Inch Gas Transmission Pipelines Across Properties in Hardy Cnty., Nos. 2:06cv7, 2:07cv5, 2009 WL 900157, at *5-6 (N.D.W. Va. Mar. 31, 2009)(relying upon condemnor’s expert’s calculations as dispositive evidence of proper amount of just compensation where landowner offered no evidence to dispute calculations).

¹²⁷ Southeast Supply Header, LLC v. 47.75 Acres in Covington Cnty., No. 2:07-cv-216-KS-MTP, 2008 WL 553019, at *1 (S.D. Miss. Feb. 27, 2008)(quoting United States v. 329.73 Acres of Land, 666 F.2d 281, 284 (5th Cir. 1981)).

¹²⁸ Southeast Supply Header, LLC v. 47.75 Acres in Covington Cnty., No. 2:07-cv-216-KS-MTP, 2008 WL 553019, at *2 (S.D. Miss. Feb. 27, 2008)(quoting King v. Ames, 179 F.2d 370, 376 (5th Cir. 1999)).

¹²⁹ Southeast Supply Header, LLC v. 47.75 Acres in Covington Cnty., No. 2:07-cv-216-KS-MTP, 2008 WL 553019, at *2 (S.D. Miss. Feb. 27, 2008).

[c] — Nominal Damages.

Some courts have held that nominal damages are an appropriate amount of just compensation where the landowner did not present sufficient evidence that the alleged taking impacted the fair market value of the property interests at issue, or where the evidence established that the interest taken was of no value.¹³⁰

[d] — Interest.

Landowners are also entitled to prejudgment interest accrued from the date of the condemnation through the date of the judgment.¹³¹ District courts may exercise discretion in determining the appropriate prejudgment interest rate.¹³² Landowners are also entitled to interest (at federal interest rates) from the date of entry of judgment through the date of the satisfaction of the judgment.¹³³

¹³⁰ See, e.g., *United States v. 50.822 Acres of Land*, 950 F.2d 1165 (5th Cir. 1992); *Seale v. United States*, 243 F.2d 145 (5th Cir. 1997); *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations on and beneath Properties Located in Twp. 9 South, Range 23 East, Sections 34, 35 and 36, owned by Catherine D. Fields et al.*, 1:09-cv-00167-RFC (D. Mont. Apr. 21, 2011); *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al.*, 2:09-cv-000294-ABJ (D. Wyo. Mar. 21, 2011); *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 58 North, Range 100 West, Sections 24 and 15, Owned by Christina Rogers, et al.*, 2:09-cv-000294-ABJ (D. Wyo. Mar. 9, 2011); *Hardy Storage Co., LLC v. Property Interests Necessary to Conduct Gas Storage Operations in the Oriskany Sandstone*, No. 2:07cv5, 2009 WL 689054 (N.D.W. Va. Mar. 9, 2009).

¹³¹ See, e.g., *Hardy Storage Co., LLC v. An Easement to Construct, Operate, and Maintain 12-Inch and 20-Inch Gas Transmission Pipelines Across Properties in Hardy Cnty., Nos. 2:06cv7, 2:07cv5*, 2009 WL 900157, at *7 (N.D.W. Va. 2009); *Portland Natural Gas Transmission System v. 19.2 Acres of Land*, 195 F. Supp. 2d 314, 327 (D. Mass. 2002), *aff'd*, 318 F.3d 279 (1st Cir. 2003).

¹³² *Hardy Storage Co., LLC v. An Easement to Construct, Operate, and Maintain 12-Inch and 20-Inch Gas Transmission Pipelines Across Properties in Hardy Cnty., Nos. 2:06cv7, 2:07cv5*, 2009 WL 900157, at *7 (N.D.W. Va. 2009).

¹³³ *Portland Natural Gas Transmission System v. 19.2 Acres of Land*, 195 F. Supp. 2d 314, 328 (D. Mass. 2002), *aff'd*, 318 F.3d 279 (1st Cir. 2003).

[e] — Attorneys’ Fees.

Attorneys’ fees are generally not available in condemnation actions under the Natural Gas Act.¹³⁴ There is some authority to suggest, however, that a landowner can obtain attorneys’ fees if the gas company condemning the property abandons the condemnation. However, courts are divided on whether this provision applies to private entities.¹³⁵

[2] — State Law.**[a] — Generally/Evidence Considered.**

The definition of “just compensation” under state eminent domain law is usually similar to the definition under the Natural Gas Act. For example, under Pennsylvania law, “[j]ust 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 value of the property interest remaining immediately after the condemnation and as affected by the condemnation.”¹³⁶ However,

¹³⁴ *Williston Basin Interstate Pipeline Co. v. Property Interests Necessary to Conduct Gas Storage Operations in Subterranean Geological Formations on and beneath Properties Located in Twp. 9 South, Range 23 East, Sections 34, 35 and 36, owned by Catherine D. Fields et al.*, No. CV-09-167-BLG-RFC, 2010 WL 5104991, at *3 (D. Mont. 2010)(noting that no attorneys’ fees are awarded “absent a contractual or statutory provision to the contrary” and that there is no provision in either the Natural Gas Act or Rule 71.1 for an award of attorneys’ fees).

¹³⁵ *Compare Transwestern Pipeline Co., LLC v. 17.19 Acres of Property Located in Maricopa Cnty.*, 627 F.3d 1268, 1271-72 (9th Cir. 2010)(no attorneys’ fees/costs are available when a private entity exercising federally granted condemnation power abandons its condemnation proceeding) *and* *Transcon. Gas Pipeline Co. v. A Permanent Easement for 0.018 Acres*, Nos. 09-1385, 09-1396, and 09-1402, 2010 WL 3282954, at *2-3 (E.D. Pa. 2010): (statute awarding attorneys’ fees applies to private companies exercising rights under federal eminent domain law, so attorneys’ fees may be awarded to defendants if plaintiff/putative condemnor abandons the proceeding).

¹³⁶ 26 Pa. Cons. Stat. Ann. § 702(a)(2010). *See also In re Islip*, 402 N.E.2d 1123, 1125 (N.Y. 1980)(holding that under New York law, just compensation is generally measured by the “fair market value at the time of appropriation, that is, the price a willing buyer would have paid to a willing seller for the property”); Md. Code Ann., Real Prop. § 12-

state law occasionally varies as to the types of damages recoverable as “just compensation.” For example, in Ohio, compensation for “loss of goodwill” is recoverable by the owner of a business conducted on the property if the owner proves that both “[t]he loss is caused by the taking of the property” and “[t]he loss cannot reasonably be prevented by relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill.”¹³⁷ An award for loss of goodwill cannot be duplicative of any other compensation awarded to the landowner, cannot exceed ten thousand dollars, and cannot be awarded “in appropriations of less than the entirety of the business property.”¹³⁸

Not all states follow the federal example of placing the burden of proof on the landowners. Under Pennsylvania, New York, and West Virginia law (like under the Natural Gas Act), the landowners bear the burden of proving that the value of their property was impaired by the taking.¹³⁹ However, under Maryland law, the condemnor bears the burden of proof on all issues.¹⁴⁰ Under Ohio law, “if an answer is filed . . . with respect to the value of property, the trier of fact shall determine that value based on the evidence presented, *with neither party having the burden of proof with respect to that value.*”¹⁴¹

105(b)(“The fair market value of property in a condemnation proceeding is the price as of the valuation date for the highest and best use of the property which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay, excluding any increment in value proximately caused by the public project for which the property condemned is needed.”); *Guyandotte Valley Ry. Co. v. Buskirk*, 50 S.E. 521 at Syl. Point 2 (W. Va. 1905)(“The market value in such [an eminent domain] case is the price for which the land could be sold in the market by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, and unaffected by compulsion of any kind.”).

¹³⁷ Ohio Rev. Code Ann. § 163.14(C)(2011).

¹³⁸ *Id.*

¹³⁹ *Morrissey v. Commonwealth*, 225 A.2d 895, 897-98 (Pa. 1967); *United Fuel Gas Co. v. Allen*, 75 S.E.2d 88, 91 (W. Va. 1953); *In re City of New York*, 14 Misc. 3d 1232(A), at *8 (N.Y. Sup. Ct. 2007).

¹⁴⁰ *Kenly v. Washington Co. R.R. Co.*, 98 A. 232, 234 (Md. 1916).

¹⁴¹ Ohio Rev. Code Ann. § 163.09(F)(2011)(emphasis added).

Regardless of whether the condemnor chooses to proceed under state or federal law, evidence of the value of comparable properties will be highly persuasive as to the proper amount of just compensation, provided that certain criteria are met.¹⁴²

[b] — Procedures.

However, the procedures that state courts utilize to determine “just compensation” are often quite different from those utilized in federal court. State laws vary widely as to who is charged with determining the proper amount of just compensation: in some states, the default is for a jury to decide just compensation; in others, the default is for a judge or a board of viewers to decide. State law also varies as to whether the parties may agree to select a different type of fact finder. Finally, state laws differ as to whether a viewing of the property is required or can be waived.

For instance, under Pennsylvania law, either party may request the appointment of a board of viewers to determine the value of the property in order to determine the amount of just compensation to which a landowner is entitled.¹⁴³ The viewers are required to file a report including a schedule of damages awarded and benefits assessed.¹⁴⁴ The report is subject to appeal in

¹⁴² See, e.g., *W. Va. Dept. of Highways v. Brumfield*, 295 S.E.2d 917, at Syl. Point 1 (W. Va. 1982)(holding that the evidence of price paid for comparable properties in eminent domain cases is admissible if the following conditions are met: “(a) The sale must be bona fide; (b) The sale must be voluntary, not forced; (c) The sale must have occurred relevantly in point of time; and (d) The sale must cover property which is comparable to the property being condemned.”); *Porter v. Commonwealth*, 309 A.2d 709, 711 (Pa. 1973)(noting that evidence of the sale price of comparable properties is admissible as long as the sale was “judicially comparable”); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 620 N.E.2d 48, 49 (Ohio 1993)(holding that with regard to the proper amount of just compensation for an underground gas storage easement, “[o]ne method in determining fair market value would be to consider comparable sales of easements for the purpose of allowing the storage of natural gas in the Clinton formation”); *In re City of New York*, 14 Misc. 3d 1232(A), at *6 (N.Y. Sup. Ct. 2007)(noting that “[t]he use of comparable sales is an approved evaluation method for real property”).

¹⁴³ See 26 Pa. Cons. Stat. Ann. § 502 (2010).

¹⁴⁴ *Id.* at § 512 (2010).

the Court of Common Pleas.¹⁴⁵ If the parties agree, the proceedings before a viewer can be waived and the just compensation can be determined by the Court of Common Pleas.¹⁴⁶ The condemnor is required to present expert testimony as to the amount of damages suffered by the condemnees.¹⁴⁷

In contrast, in West Virginia, just compensation can be determined by five disinterested “commissioners” at a hearing, or the parties can waive the commissioners’ hearing and proceed directly to a jury to ascertain compensation and damages.¹⁴⁸ The court may (and will upon the motion of a party) preside over the hearing of the commissioners or appoint its own court commissioner to preside.¹⁴⁹ There will be no viewing of the property unless a party demands it.¹⁵⁰ The commissioners will make a report of their findings.¹⁵¹ Damages must be listed separately from just compensation.¹⁵² The parties can file exceptions to the commissioners’ report within 10 days and demand that the issues of compensation and damages be determined by a jury.¹⁵³ The court can set aside a commissioners’ report for good cause shown.¹⁵⁴

In New York, “the supreme court in the judicial district where the real property or any portion thereof is situated, shall have *exclusive* jurisdiction to hear and determine all claims arising from the acquisition of real property and shall hear such claims *without a jury or without referral to a referee or commissioners.*”¹⁵⁵ “The trial court shall view the property in all claims,

¹⁴⁵ *Id.* at § 516 (2010).

¹⁴⁶ *Id.* at § 520(a)(2010).

¹⁴⁷ *See* 26 Pa. Cons. Stat. Ann. § 1102 (West, Westlaw through 2010 Sess.); *In re Laying Out and Opening a Private Road*, 592 A.2d 343, 347 (Pa. Super. Ct. 1991).

¹⁴⁸ W. Va. Code §§ 54-2-5, 54-2-11a (2011).

¹⁴⁹ *Id.* at § 54-2-7b (2011).

¹⁵⁰ *Id.* at § 54-2-8 (2011).

¹⁵¹ *Id.* at § 54-2-9 (2011).

¹⁵² *Id.* at § 54-2-9a (2011).

¹⁵³ *Id.* at § 54-2-10 (2011).

¹⁵⁴ *Id.* at § 54-2-11 (2011).

¹⁵⁵ N.Y. Em. Dom. Proc. Law § 501(b)(2010)(emphasis added).

unless waived by stipulation of the parties.”¹⁵⁶ Of course, in a case involving purely underground storage rights, a view would have no useful purpose.

In Maryland, “an action for condemnation shall be tried by a jury unless all parties file a written election submitting the case to the court for determination.”¹⁵⁷ Before the production of other evidence, the trier of fact shall view the property sought to be condemned unless the viewing is waived in writing by the parties.¹⁵⁸

In Ohio, the issue of just compensation is tried by a jury.¹⁵⁹ However, either the condemnor or the property owner may request in writing within 10 business days of the filing of the answer that the issue of property value be submitted to non-binding mediation.¹⁶⁰ The condemnor is charged with paying the cost of the mediation.¹⁶¹ Either party may request a viewing of the property.¹⁶²

§ 10.05. Conclusion.

The power of eminent domain is a useful tool for utilities and interstate pipeline companies in meeting their obligations to provide service to the public. When the necessary property interests cannot be obtained through negotiation, the proper use of the power to condemn insures that the public good will be served while providing just compensation for the rights condemned.

¹⁵⁶ *Id.* at § 510.

¹⁵⁷ *See* Md. Rule 12-207(a).

¹⁵⁸ *Id.* at 12-207(c).

¹⁵⁹ Ohio Rev. Code Ann. §§ 163.09(A); 163.14(A)-(E)(2011).

¹⁶⁰ *Id.* at § 163.051 (2011).

¹⁶¹ *Id.*

¹⁶² *Id.* at § 163.12(A)(2011).