TOM RUGG, SR.

JUDGE
COUNTY COURT AT LAW NO. 1
JEFFERSON COUNTY COURTHOUSE
BEAUMONT, TEXAS 77701

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September 24, 2012

To: All Counsel of Record

Re: No. 118,867; TransCanada Keystone Pipeline, LP v. Texas Rice Land Partners, Ltd., et.al.; No. 119,161; TransCanada Keystone Pipeline, LP v. Herbert Eugene Dishman, III, et.al.; No. 119,243; TransCanada Keystone Pipeline, LP v. Mickey Phelan B Land, L.P., et.al.

Counsel:

The court is of the opinion that the following reflects a correct interpretation of the law as it applies to the three cases that are the subject of the application for Writ of Possession filed by the Plaintiff.

The law requires this court to issue a writ of possession to the condemnor and against the condemnee so long as the requirements of the law are satisfied. The issuance of such an order has been described as a "ministerial" duty of the court; however, the term "ministerial" as applied to such a writ is used only in the sense that its issuance is administrative and not subject to appeal. *Pinnacle Gas Treating, Inc. v. Read*, 160 S.W.3d 564, 567 (Tex. 2005). I have concluded that the issuance of the writ is discretionary with the court and not a ministerial duty in the tradition sense. Having said that, the writ should issue if the statutory requirements for possession are met by the Plaintiff.

The Defendants resist the motion to issue the writ on several grounds here discussed, but not in the same order presented.

Common Carrier Status

Perhaps the most difficult issue is the contentions of the parties concerning the common carrier status of the Plaintiff and when and how that status should be established. The parties rely on and distinguish the "guiding light" of *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC.*, 363 S.W.3d 192; 55 Tex. Sup. J. 380 (2012). This court is of the opinion that the case does provide some guidance notwithstanding the expression by the court apparently intending to limit the effect of its ruling.

As stated by the court: "We have long held that the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts. We have also held in numerous contexts that the Commission does not have authority to determine property rights." *Id.* @ 198 (footnotes & internal quotes omitted). In the cases before this court the common carrier status and therefore the ultimate right to condemn under the statutory scheme will ultimately require resolution through the judicial process. It is sufficiently clear in the statute that the ultimate resolution of that issue is not determinative of the issue of possessory rights that clearly exist by statute independent of the ultimate resolution of disputed facts. Thus the various bonding requirements to protect the owner should the ultimate fact issue resolution preclude the taking. Nothing in *Denbury Green, supra,* suggests to this court that a pre-possession determination of common carrier status is required or allowed under the statutory scheme.

Property Code 21.021

Possession Pending Litigation

(a) After the special commissioners have made an award in a condemnation proceeding, except as provided by Subsection (c) of this section, the condemnor may take possession of the condemned property pending the results of further litigation if the condemnor:

(1) pays to the property owner the amount of damages and costs awarded by the special commissioners or deposits that amount of money with the court subject to the order of the property owner;

(2) deposits with the court either the amount of money awarded by the special commissioners as damages or a surety bond in the same amount issued by a surety company qualified to do business in this state, conditioned to secure the payment of an award of damages by the court in excess of the award of the special commissioners; and

(3) executes a bond that has two or more good and solvent sureties approved by the judge of the court in which the proceeding is pending and conditioned to secure the payment of additional costs that may be awarded to the property owner by the trial court or on appeal.

First of all the court observes that it is almost axiomatic that the Plaintiff can only take possession of property interests sought in its petition. Specifically that means that the Plaintiff can acquire no right to possess property interests of non-parties because the Plaintiff obviously cannot satisfy the statutory prerequisites as to an owner not named in its pleadings. However, the Plaintiff can acquire rights to possession superior to those of the named owners even if all of the owners are not named. *Metropolitan Transit Authority of Harris County, Texas v. Estate of Roy Hofheinz, et.al.*, 105 S.W.3d 754; 2003 Tex. App. LEXIS 3949.

The record before the court reflects that the Plaintiff has satisfied conditions 1 & 2 in the statute. I believe that the Plaintiff has failed to satisfy condition 3 in that the bond

filed (and approved by the court) does not have two sureties. The court also considers the challenge of the Defendants as to the adequacy of the bond to be an invocation of the responsibility of this court to insure that an adequate amount is required for the bond and therefore have set this matter for consideration on the 28th of September at 1:00 p.m., and the parties, through their attorneys, have been notified of this setting. At the hearing the court will consider whether a single, corporate surety bond meets the conditions of the statute[1] and will entertain such evidence as the parties may wish to submit concerning the adequacy of the bond amount.

Notice of Commissioners Hearing

This court and the Commissioners appointed by this court cannot acquire jurisdiction over an owner's interest in property in a condemnation proceeding unless statutory notice provisions are met. *City of Houston v. Melva R. Kunze et al,* 153 Tex. 42; 262 S.W.2d 947 (1953). In cause No.119,243 two of the parties contend that they were given untimely notice of the commissioners hearing[2]. The petition in the case was filed on August 31, 2011 and names as defendants Mickey Phelan B Land L.P. and Eleven Phelan B L.L.C. On May 16, 2012 the Plaintiff filed its First Amended petition naming two new defendants, Mary Ann Edson, Trustee, and K.H. Phelan Land L.P. and deleting Eleven Phelan B L.L.C. The commissioners hearing was held on June 18, 2012 and the record reflects that Mary Ann Edson, Trustee was served on May 26, 2012, and the remaining Defendants were served on May 31, 2012. Defendants Mickey Phelan B Land L.P. and K.H. Phelan Land L.P. take the position that they are entitled to a minimum of 20 days notice of the hearing which they did not receive and that this failure is jurisdictional. Plaintiff is of the opinion that as the original petition was filed before the statutory change that the Defendants were entitled to not more than 11 days notice of the commissioners hearing and that the amended pleading "relates back" to the original petition and therefore the notice provisions in effect prior to the amendment of the statute govern.

The court is of the opinion that the procedural requirements that invoke the commissioners jurisdiction over a property owner are rights are held by the property owners as those rights were specified by the statute at the time the property owner was named in the petition for condemnation. In other words, I am of the opinion that K.H. Phelan Land L.P. was entitled to a minimum of 20 days notice in order for the commissioners to acquire jurisdiction to make an award of that interest in the subject property. Accordingly, it is the opinion of the court that it has not acquired jurisdiction of the ownership interest of K.H. Phelan Land L.P. As Defendant Mickey Phelan B Land L.P. was named in the original petition the notice provisions in effect at that time control and the notice was sufficient and jurisdiction obtained over that ownership interest.

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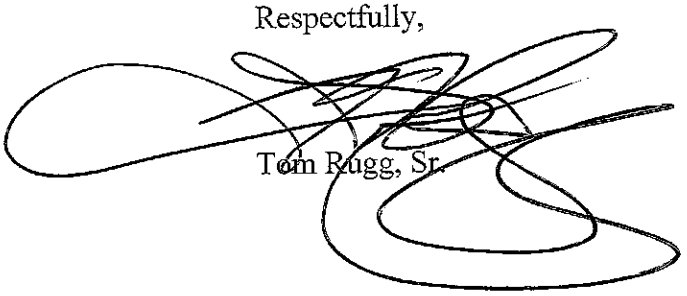
[1] While the court has reservations about the purpose of the two surety requirement and whether the surety undertaking by a single corporate surety licensed to do business in Texas substantially complies with the requirement, the court, absent authority to the contrary, is not inclined to rule counter to a clear legislative mandate.

[2] Specifically Defendants Mickey Phelan B Land, L.P. and K.H. Phelan Land, L.P. contend they were never properly served with notice.

The resolution of the remaining issues before the court at this time will resolve the matter of whether writs of possession will issue. The court anticipates that those issues will be resolved at the hearing on Friday and that a decision will be announced at that time. As previously expressed, if writs are issued they will be narrowly drawn to affect only the property ownership interests properly before the court.

Respectfully,



Tom Rugg, Sr.