UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

SABAL TRAIL TRANSMISSION, LLC,

Plaintiff,

vs.

CONSOLIDATED CASE NO.: 1:16-cv-063-MW-GRJ

REAL ESTATE, et al.,

Defendant(s).
_____/

PLAINTIFF, SABAL TRAIL TRANSMISSION, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Sabal Trail Transmission, LLC ("Sabal Trail") hereby moves for partial summary judgment on the ground that the proper measure of compensation in these actions is "just compensation" pursuant to the Fifth Amendment to the United States Constitution and federal law, which measure does not include a landowner's attorney's fees and litigation costs.[1] As grounds for this motion, Sabal Trail submits the following memorandum of law.

[1] Additional and alternative grounds for the requested relief are identified in the memorandum of law in support of this motion.

INTRODUCTION

This case presents a question of first impression in this Circuit: whether a condemnor exercising the federal power of eminent domain under the Natural Gas Act, 15 U.S.C. § 717f(h) ("Natural Gas Act"), owes a landowner "just compensation" under the Fifth Amendment to the United States Constitution (which does not include the landowner's attorney's fees or costs), or must instead pay a larger amount of compensation owed under the law of the state where the condemned property is located (here, "full" compensation under Florida law, which does include attorney's fees and costs).

United States Supreme Court precedents make the answer clear. When a condemnor exercises federal eminent-domain authority, federal law supplies the exclusive measure of just compensation, because the measure of compensation concerns a substantive right grounded in the United States Constitution. Although this rule may yield if the federal statute that authorizes the taking specifically requires application of state-law measures of compensation, that exception does not apply in this case because the Natural Gas Act contains no such requirement. Notably, multiple federal courts in circuits across the country have so held.

Furthermore, regardless of the outcome of the choice-of-law analysis, federal district courts addressing Natural Gas Act takings have no authority to award compensation that includes amounts for the landowner's attorney's fees and

litigation expenses. This is the natural result of the axiom that federal courts may not award attorney's fees absent express statutory authorizations to do so, as well as settled federal law providing that litigation expenses and costs are not available in federal eminent-domain proceedings.

Nevertheless, Defendant landowners are sure to urge this Court to apply Florida's state-law measure of "full" compensation on the ground that the Eleventh Circuit has held in a Federal Power Act (16 U.S.C. §§ 791, *et seq.*, "Power Act") case that state-law measures should apply in those federal eminent-domain proceedings. This Court should reject that invitation for two separate and independent reasons: *first* because that decision did not involve a request for fees and costs, and *second* because there are critical differences between the Power Act and the Natural Gas Act that dictate that state-law measures of compensation cannot apply in Natural Gas Act cases. Ultimately, these distinctions mean that the Power Act authority is neither binding nor persuasive in this case and that application of that ruling here would be error.

For all these reasons, this Court should grant Sabal Trail's motion and enter a partial summary judgment in its favor.

UNDISPUTED MATERIAL FACT

Sabal Trail's motion presents a pure question of law. There is a single relevant fact, and it is undisputed: that Sabal Trail's eminent domain authority is a

federal power transferred to it under section 717f(h) of the Natural Gas Act, 15 U.S.C. § 717f(h).

SUMMARY OF THE ARGUMENT

This Court should apply the federal measure of "just compensation," and refuse to award amounts for attorney's fees and litigation expenses, for the following reasons.

1. Because Sabal Trail is exercising a federal power of eminent domain under the Natural Gas Act, the federal measure of just compensation under the Fifth Amendment (which does not provide for attorney's fees or costs) supplies the exclusive measure of just compensation.

a. In federal eminent-domain proceedings, the measure of compensation concerns a substantive right grounded in the United States Constitution. The only two federal courts to consider this rule in the context of takings under the Natural Gas Act have held that it requires application of the federal measure of compensation. As a result of this rule, provisions that conform procedures in federal eminent-domain proceedings to state-law procedures do not (indeed, cannot) permit federal courts to employ state-law measures of compensation.

b. Although this rule may yield when the federal statute that authorizes the taking specifically and expressly provides that state-law measures may apply, that exception is inapplicable here because the Natural Gas Act does not authorize

application of state-law measures of compensation. Under settled federal law, the absence of any such authorization amounts to a congressional directive that federal courts awarding compensation in Natural Gas Act cases apply the federal measure of compensation.

2. In any event, even if a district court is persuaded to apply a state-law measure of compensation in a Natural Gas Act taking case, the court lacks authority to award attorney's fees, litigation expenses, and costs because the Natural Gas Act does not provide any authority to award fees, and settled federal law provides that litigation expenses and costs are not available.

3. Although the Eleventh Circuit has held in a Power Act case that the law of the state where the condemned property is located supplies the federal rule for determining just compensation, that case does not require application of Florida's measure of "full" compensation here for three reasons:

a. Most fundamentally, that case did not involve application of state-law measures of compensation that would have resulted in awards of attorney's fees and costs. Rather, it involved application of a state-law measure of compensation that would have altered the valuation of the property to be condemned. Accordingly, it did not consider – and it provides no basis for upending – the rule that federal courts have no authority to award attorney's fees absent an express statutory authorization, which is missing here.

b. Further, critical differences between the Natural Gas Act and the Power Act dictate that for the same reasons that the court in a Power Act case looks to state law to supply the federal rule, a court deciding a Natural Gas Act case should look to federal law to supply a uniform federal rule. Most notably, the federal interests at stake in Natural Gas Act takings are necessarily more compelling than the federal interests that were at stake in the Power Act case. Indeed, multiple federal courts have so held.

c. Alternatively, the Power Act case using state law as the applicable federal rule was wrongly decided and should be overruled.

STANDARD OF REVIEW

Summary judgment shall be granted if a movant establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]here no facts are in dispute and only questions of law are involved, the case is ripe for a summary judgment." *Palmer v. Chamberlin*, 191 F.2d 532, 540 (5th Cir. 1951) (citations omitted). "Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (11th Cir. 1995). In a condemnation action, a condemnor is entitled to judgment as a matter of law on the applicable measure of compensation if there is no valid legal basis for the

measure of compensation sought by a landowner. *See Williston Basin Interstate Pipeline Co. v. Prop. Interests Necessary to Conduct Gas Storage Operations*, No. CV-09-167-BLG-RFC, 2010 WL 5104991, at *3 (D. Mont. Dec. 9, 2010).

ARGUMENT

This case presents a head-on conflict between the federal- and state-law measures of compensation owed to landowners for a taking under the Natural Gas Act. The federal measure of "just compensation" under the Fifth Amendment to the United States Constitution does not require that Sabal Trail reimburse Defendant landowners for their attorney's fees and litigation expenses. Florida's state constitution, by contrast, demands "full compensation," which would require Sabal Trail to compensate Defendant landowners for those expenses.

The United States Supreme Court repeatedly has explained that the federal constitutional measure of just compensation does not include a landowner's attorney's fees or litigation expenses. *See, e.g.*, *United States v. Bodcaw Co.*, 440 U.S. 202, 203-04 (1979); *Dohany v. Rogers*, 281 U.S. 362, 368 (1930); *accord U.S. v. 2,353.28 Acres*, 414 F.2d 965, 972 (5th Cir. 1969). Congress has specifically authorized compensation for a landowner's attorney's fees and litigation expenses in very limited circumstances inapplicable here (such as when the government abandons a condemnation), and the Supreme Court has explained that those authorizations are "a matter of legislative grace rather than constitutional

command." *Bodcaw*, 440 U.S. at 204.

By contrast, the Florida Constitution requires a condemnor to pay "full" compensation, which includes a landowner's attorney's fees and expenses (such as appraiser fees). *See, e.g.*, Fla. Const. Art. X, § 6(a) ("No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner …"); Fla. Stat. Ann. § 73.071(3)(b); *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 292 (Fla. 1958).

In these federal eminent-domain proceedings, this Court should apply the federal constitutional measure of just compensation, not Florida's state-law measure of full compensation. In any event, even if the Court determines that Florida law provides the applicable measure of compensation, the Court lacks authority to award attorney's fees or costs in this condemnation action under the Natural Gas Act.

I. Because Sabal Trail is exercising a federal power of eminent domain under the Natural Gas Act, federal law supplies the exclusive measure of just compensation.

Because Sabal Trail is exercising a federal power of eminent domain, federal law supplies the measure of just compensation and state-law measures cannot enlarge the amount owed, for two reasons.

A. Federal law supplies the exclusive measure of just compensation in federal eminent-domain proceedings because the measure of compensation concerns a substantive right grounded in the United States Constitution.

As an initial matter, federal law supplies the exclusive measure of just compensation in any taking effected pursuant to federal authority because the measure of compensation concerns a federal constitutional right. Sabal Trail is exercising a federal power of eminent domain transferred to it by Congress pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h). *See, e.g., S. Natural Gas Co. v. Land, Cullman Cty.*, 197 F.3d 1368, 1372 (11th Cir. 1999); *accord Sabal Trail Trans'n, LLC, v. Real Estate*, No. 1:16-cv-00124-MW-GRJ, Doc. 13 at 13 (N.D. Fla. May 23, 2016).

The United States Supreme Court long ago explained that federal law must determine the proper measure of compensation for a taking effected pursuant to federal authority because just compensation is a substantive right under the United States Constitution. *See United States v. Miller*, 317 U.S. 369, 379-80 (1943) (refusing to look to California law to determine the appropriate measure for market value on the ground that just compensation is a matter of federal constitutional law).

In *Miller*, the landowners urged the Court to look to California law concerning the measure of compensation because the federal statute that permitted the taking required that in condemnation proceedings, a federal court "shall adopt

the forms and methods of procedure afforded by the law of the State in which the court sits." *Id.* at 380. The Court refused, explaining that the federal statutes' directives to employ state-law procedures "do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States." *Id.*; *accord State of Neb. v. United States*, 164 F.2d 866, 868 (8th Cir. 1947) (explaining that under *Miller*, in federal eminent-domain proceedings "the question of what is just compensation under the Fifth Amendment for such rights does not turn in any manner upon the compensation standards or prescriptions of state law").

Miller is strikingly similar to this case. Like the condemnation in *Miller*, the condemnation here is effected pursuant to a federal eminent-domain power. Additionally, like the federal statute at issue in *Miller*, the Natural Gas Act expressly directs that "[t]he practice and procedure in any action or proceeding for [eminent-domain] purpose[s] 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." 15 U.S.C. § 717f(h). Accordingly, the result in this case should be the same as in *Miller*: federal constitutional law must supply the exclusive measure of just compensation, and Section 717f(h) may not be read as permission to look outside federal law to Florida-law measures of compensation because the "measure of compensation" is a

"substantive right … grounded upon" the federal Constitution. 317 U.S. at 380. There is no way for this Court to apply Florida's measure of full compensation and remain faithful to the Supreme Court's holding in *Miller*.

The fact that a private entity, rather than a governmental entity, exercises federal eminent-domain authority does not change *Miller*'s rule. Indeed, the congressional transfer of federal eminent-domain authority to a private entity does not alter the federal nature of the eminent-domain authority in any way. As the United States Supreme Court has explained, "[t]he power is not changed by its transfer to another holder." *Kohl v. United States*, 91 U.S. 367, 372 (1875); *accord Thatcher v. Tennessee Gas Trans'n Co.*, 180 F.2d 644, 647 (5th Cir. 1950) ("There is no novelty in the proposition that Congress … may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign."); *Kern River Gas Trans'n Co. v. 8.47 Acres*, No. 2:02–CV–694, 2006 WL 1472602, *4-5 (D. Utah May 23, 2006) ("The fact that Kern River acquires its eminent domain authority from the Natural Gas Act rather than the statutes by which the United States government exercises its eminent domain power is of no consequence.").

Indeed, Natural Gas Act cases present an even more compelling basis for application of the federal measure of just compensation than did *Miller* itself.

Congress added Section 717f(h) to the Natural Gas Act in 1947, four years after *Miller* was decided. Congress is presumed to have been aware that under *Miller*, its provision that federal courts should apply state-law "practice and procedure" in eminent-domain proceedings under the Natural Gas Act would not disturb the application of federal substantive law as to the measure of compensation. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982). This presumption "is itself evidence that Congress affirmatively intended" to preserve the application of the federal measure of compensation. *Id.* at 381-82. Notably, the "practice and procedure" provision of Section 717f(h) has since been superseded by Federal Rule of Civil Procedure 71.1, for the purpose of providing uniform federal procedures for eminent-domain proceedings. *See Cullman Cty.*, 197 F.3d at 1373, 1375 (holding that Rule 71A "supersedes the Natural Gas Act's practice and procedure clause" and concluding that "Rule 71A, not the practice and procedure language of § 717f(h) and not state law, governs the proceedings in the instant case").[2]

Critically, only two other courts have considered the application of *Miller* to conflicts between federal and state-law measures of compensation in Natural Gas Act cases, and ***both*** have held that *Miller* requires application of the federal

[2] Rule 71.1 was previously numbered Rule 71A. *See* Fed. R. Civ. P. 71.1, notes to 2007 amendment.

measure of compensation. *See, e.g., Columbia Gas Transmission, LLC v. 252.071 Acres, More or Less, in Baltimore Cty., Maryland,* No. ELH-15-3462, 2016 WL 7167979, at *3 (D. Md. Dec. 8, 2016) (concluding that "[u]nless otherwise proscribed by Congress, federal law governs questions of substantive right, such as the measure of compensation for federal courts in condemnation proceedings," and citing *Miller*); *Tennessee Gas Pipeline Co. v. Permanent Easement for 1.7320 Acres*, No. 3:CV-11-028, 2014 WL 690700, at *9 (M.D. Pa. Feb. 24, 2014) (concluding that "federal law governs the substantive determination of just compensation in a condemnation action commenced under the Natural Gas Act" because "*Miller* held that federal law governs the determination of compensation in federal condemnation proceedings because the measure of compensation is a question of substantive right grounded upon the Constitution of the United States").

Additionally, the federal government entities that are repeat condemnors have adopted the position that *Miller* requires application of the federal measure of compensation in federal takings cases. *See* Interagency Land Acquisition Conf., *Uniform Appraisal Standards for Federal Land Acquisitions* at 29 (5th ed. Washington, D.C. 2000).[3] The Uniform Standards explain that "in federal

[3] The Interagency Land Acquisition Conference speaks for all major, repeat federal condemnors; it was established in 1968 and "is a voluntary organization

acquisitions, because the meaning of *just compensation* is a matter of fundamental constitutional interpretation, questions with respect to compensation are to be resolved in accordance with federal rather than state law. Because federal law differs in some important aspects from the law of some states, it is incumbent upon both the attorney and the appraiser to make certain that they understand the applicable federal law as it affects the appraisal process in the estimation of market value, which will generally be the basis for determining just compensation for property acquired by the United States for public purposes." *Id.* at 29 (footnote omitted).

In sum, *Miller* dictates that federal law provides the measure of compensation in this action. Sabal Trail is exercising a federal eminent domain power, so federal constitutional law controls issues of substantive federal rights, including compensation. This is the consensus view among the federal courts that have considered this application of *Miller*, and there is no reason to depart from that view.

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composed of representatives from the many federal agencies engaged in the acquisition of real estate for public uses." *Id.* The Uniform Appraisal Standards are "frequently cited by Congress in legislation relating to the valuation of federal land acquisitions and have guided the appraisal process in these matters since their original issuance" in 1971. *Id.*

B. The only possible exception that could allow application of state-law measures of compensation would be an express directive from Congress to that effect, and the Natural Gas Act contains no such directive.

The only possible exception to the rule that federal law must supply the measure of compensation in a federal takings case would be an express directive from Congress to apply state-law measures, and the Natural Gas Act contains no such directive. The federal power of eminent domain may not be diminished or prescribed by state law. *See*, *e.g.*, *Kohl*, 91 U.S. at 374 (1875) ("If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised.").

Accordingly, federal law exclusively controls the exercise of the federal power of eminent domain unless Congress expressly and specifically subjects that power to state law; in the simplest terms, "federal law rules unless Congress chooses to make state laws applicable." *United States v. 93.970 Acres of Land*, 360 U.S. 328, 332–33 (1959); *United States v. 434.00 Acres of Land More or Less, in Camden Cty., State of Ga.*, 792 F.2d 1006, 1010 n.5 (11th Cir. 1986) (citing *93.970 Acres of Land* and explaining that "federal law governs federal property interests unless Congress by enactment makes state law applicable"); *accord City of Pleasant Ridge v. Romney*, 169 N.W.2d 625, 634 (Mich. 1969) ("[T]he Federal power of eminent domain is complete and cannot, absent some specific statutory

limitation in the Federal act itself, be conditioned by any State or local or private rights.").

Critically, there is no express provision in the eminent domain provision of the Natural Gas Act that allows state law to alter the federal measure of just compensation in any fashion. *See* 15 U.S.C. § 717f(h). Nor is there any express provision in the Natural Gas Act that allows state law to alter the federal measure to include a landowner's attorney's fees and litigation expenses. *See id.*

Under *93.970 Acres of Land*, the absence of these kinds of provisions amounts to a directive that federal courts awarding compensation in Natural Gas Act takings cases must apply the federal measure of compensation as they find it, and may not employ a state-law measure. Put simply, "federal law rules" because Congress has not chosen "to make state laws applicable." *93.970 Acres of Land*, 360 U.S. at 332. Standing alone, this circumstance supports Sabal Trail's request for summary judgment.[4]

Here again, though, there is more. The absence of any statutory provision for reimbursement of attorney's fees and expenses has special force in Natural Gas Act cases. This is so for two reasons.

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[4] *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662, 665 (5th Cir. 1985), is not to the contrary. There, the Fifth Circuit applied state law to a taking effected under both state and federal eminent-domain authority. Here, Sabal Trail is exercising an exclusively-federal eminent domain authority.

First, Congress first enacted the Natural Gas Act in 1938, eight years after *Dohany* held that the federal measure of just compensation did not include attorney's fees; Congress then amended the Natural Gas Act nearly ten years after the Supreme Court reiterated that rule in *Bodcaw*. Neither the original nor the amended Natural Gas Act made any provision for attorney's fees or expenses to be paid as part of just compensation. Accordingly, courts examining the proper measure of compensation in Natural Gas Act takings cases must presume that Congress intended to exclude attorney's fees and expenses from the compensation due. *See, e.g.*, *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U.S. 238, 245 (1902) ("[I]t is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation.").

Second, the absence of any provision in the Natural Gas Act for application of state law or awards of attorney's fees is consistent with other applicable rules. Federal Rule of Civil Procedure 71.1, which sets forth procedural rules for eminent domain actions in federal courts, expressly provides that costs are *not* recoverable by prevailing parties in such actions as they ordinarily are under Federal Rule of Civil Procedure 54(d). *See* Fed. R. Civ. P. 71.1(l) ("Costs are not subject to Rule 54(d)."). Further, Rule 71.1 makes no provision for attorney's fees. *See id.* Accordingly, there is no basis in Rule 71.1 for a recovery of costs or fees in a Natural Gas Act takings case.

Put simply, neither the substance of the Natural Gas Act nor the procedure set forth in Rule 71.1 provides any basis for a landowner to recover fees or costs under state-law measures of compensation following a Natural Gas Act taking. Indeed, consistent with the plain language of the Natural Gas Act and Rule 71.1, federal courts in other circuits have "routinely" held that the proper measure of compensation for a Natural Gas Act taking is the federal measure of just compensation and does not include attorney's fees. *Millennium Pipeline Co. v. Acres of Land, Inc.*, 07-CV-6511L, 2015 WL 6126949, at *3-4 (W.D.N.Y. 2015) (observing that "courts routinely hold that 'there is no provision for an award of attorneys' fees in the Natural Gas Act" and the Supreme Court "has expressly stated that attorneys' fees and expenses are not embraced within just compensation") (internal quotation marks and citations omitted); *see also, e.g.*, *Northern Natural Gas Co. v. Approximately 9117 Acres*, 114 F. Supp. 3d 1144, 1171 (D. Kan. 2015) (rejecting reliance on state-law authorization of attorney's fees in Natural Gas Act case), *appeal docketed*; *Williston Basin Interstate Pipeline Co. v. Prop. Interests Necessary to Conduct Gas Storage Operations, 35 & 36*, No. CV-09-167-BLG-RFC, 2010 WL 5104991, at *3 (D. Mont. Dec. 9, 2010) (granting judgment as a matter of law that landowners were not entitled to attorney's fees in Natural Gas Act case because "American law does not provide for the award of attorney fees absent a contractual or statutory provision to the

contrary, and there is no basis in the Natural Gas Act or Rule 71.1 [] for an award of attorney fees") (internal citations omitted); *Irick v. Columbia Gas Transmission Corp.*, No. 5:07CV00095, 2008 WL 191324, *3 (W.D. Va. Jan. 22, 2008) (state law providing for attorneys' fees was inapplicable to action under the Natural Gas Act).

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Because Sabal Trail is exercising federal eminent-domain authority, the federal measure of just compensation under the Fifth Amendment is the exclusive measure applicable in this case. Compensation is a substantive right under the United States Constitution, so federal law controls that issue. This rule yields if and only if Congress expressly permits application of state-law measures, which Congress did not do in the Natural Gas Act. Accordingly, Sabal Trail is entitled to judgment as a matter of law that it is not required to pay Florida's measure of full compensation.

II. Even if a federal district court applies state law to determine the measure of compensation in a Natural Gas Act case, the court has no authority to award attorney's fees, litigation expenses, or costs.

Critically, even if a federal district court were persuaded to apply state law to determine the diminution in the value of the property to be condemned in a Natural Gas Act case, the court has no authority to award attorney's fees or costs. Black-letter federal law and the plain language of the Natural Gas Act, together

with Rule 71.1(l), specifically foreclose any award – on any theory – for those amounts.

A. *Attorney's Fees.* It is a familiar rule – so axiomatic as to be called "the American Rule" – that a federal court considering federal questions may not award attorney's fees absent a specific federal statutory authorization for fees. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) ("Under this 'American Rule,' we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority.") (internal quotation marks omitted); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975) (discussing the explicit allowance of attorney's fees under certain federal statutes and observing that "the circumstances under which attorneys' fees are to be awarded … are matters for Congress to determine"); *Bodcaw*, 440 U.S. at 204 (describing congressionally-authorized fee awards in certain kinds of takings cases as "a matter of legislative grace"); *Design Pallets, Inc. v. Gray Robinson, P.A.*, 583 F. Supp. 2d 1282, 1285 (M.D. Fla. 2008) (explaining that a federal court whose jurisdiction is "founded solely on a federal question" would not apply a Florida attorney's fees statute to the resolution of federal claims, and that the Supreme Court has "consistently adhered to the American Rule and would not, absent a federal statute, allow awards of attorney's fees in federal courts to prevailing parties").

As previously explained, *see supra* at 15-18, the Natural Gas Act contains no express statutory authorization for attorney's fees. Therefore, even if a federal court entering a compensation award following a Natural Gas Act taking were persuaded to apply the state-law measure of compensation, the court still would lack any authority to include in the award an amount for the landowner's attorney fees. *See Buckhannon*, 532 U.S. at 602; *Alyeska Pipeline*, 421 U.S. at 262.

B. *Litigation Expenses and Costs*. A federal district court awarding compensation for a condemnation under the Natural Gas Act also lacks authority to award litigation expenses and costs, but for a different reason: because settled federal law is that litigation expenses are not available, and Rule 71.1(l) specifically provides that costs are not available. As the former Fifth Circuit explained in rejecting a request for expert witness fees in a federal condemnation action more than fifty years ago, "[s]uch fees are never allowed in condemnation cases in Federal Courts." *Kirby Lumber Corp. v. Louisiana*, 293 F.2d 82, 87 (5th Cir. 1961). Similarly, Rule 71.1(l) specifically explains that costs, traditionally available under Rule 54(d), are not available in federal eminent-domain proceedings. Rule 71.1 preempts Florida law as to the recoverability of costs, because the federal rule has "the force [and effect] of a federal statute" under the Rules Enabling Act, 28 U.S.C. § 2072(b). *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941). Additionally, like all the other Federal Rules of Civil Procedure, Rule 71.1

applies in *all* eminent-domain proceedings in federal district courts. *See* Fed. R. Civ. P. 1. This Court may not look beyond the settled law of this Circuit or Rule 71.1 to award litigation expenses or costs to the Defendant landowners.

III. Authority concerning the measure of compensation in a Power Act taking does not require application of Florida's state-law measure of full compensation to this case.

Defendant landowners are certain to urge this Court to follow a decision of the Eleventh Circuit in a Power Act case that adopts as the federal rule for determining just compensation the law of the state where the condemned property is located. *See Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1124 (5th Cir. 1980) (*en banc*). This Court should not apply *Sanders* in this case.

By way of background, *Sanders* squarely presented under the Power Act the choice-of-law question "whether compensation should be determined under federal law or under the law of the state where the condemned property is located." 617 F.2d at 1113. In *Sanders*, the conflict between federal and state law pertained to the method for valuing the land to be condemned, not to recovery of attorney's fees.

The *Sanders* court held that federal law controlled, but looked to state law for the applicable rule: "the law of the state where the condemned property is located is to be adopted as the appropriate federal rule for determining the measure of compensation when a licensee exercises the power of eminent domain pursuant

to Section 21" of the Power Act. *Id.* at 1124.

The *Sanders* court took a two-step approach to the choice-of-law issue. The court's starting premise was that "state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case." *Id.* at 1115-16 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979)). Upon examining the intent behind the relevant section of the Power Act, the court found "no express congressional intent that federal common law and not state law should supply the federal rule in determining the measure of compensation," so the court proceeded to a second step: weighing the relative state and federal interests. *Id.* at 1118. The court explained that "[i]f the effect of applying state law is virtually to nullify the federal objectives, then there is a conflict that precludes application of state law." *Id.*

On the facts, the *Sanders* court concluded that the federal interest in determining the amount of compensation was insufficient to override state law. *Id.* The court reasoned that by definition, there is a diminished federal interest in takings under the Power Act: "Before a license may be issued under the Federal Power Act, there must be a determination by the [Federal Energy Regulatory] Commission that the project does not affect the development of any water resources for public purposes (that) should be undertaken by the United States

itself. Thus, by definition, a licensed project does not implicate the interests of the United States to the degree that it is thought desirable that the project be undertaken by the United States itself." *Id.* (internal citation omitted).

Although the Eleventh Circuit has not extended *Sanders* to Natural Gas Act cases (or even considered such an extension), the Sixth Circuit has applied *Sanders* to a Natural Gas Act taking. *See Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992). As in *Sanders*, the conflict between federal and state law in *Columbia Gas* had to do with valuation methodology, not attorney's fees.

The Sixth Circuit did not analyze the legislative intent behind the Natural Gas Act other than to say that the eminent-domain provision of the Natural Gas Act is similar to the eminent-domain provision of the Power Act. *Id.* at 1199. Instead, the Sixth Circuit focused on weighing the federal and state interests at play. *See id.* at 1198. The court concluded that state-law interests outweighed any purported federal interest in a nationally uniform rule for several reasons, including that property rights have traditionally been defined by state law and that incorporating state law as the rule of decision would not frustrate the objectives of the Natural Gas Act. *See id.* at 1198-99; *accord Rockies Exp. Pipeline LLC v. 4.895 Acres*, 734 F.3d 424 (6th Cir. 2013); *Am. Energy Corp. v. Rockies Exp.*

Pipeline LLC, 622 F.3d 602 (6th Cir. 2010).

Sanders does not require, and *Columbia Gas* does not suggest, that this Court apply the Florida measure of full compensation in this case, for three separate and independent reasons.

A. Neither *Sanders* nor *Columbia Gas* involved applications of state law that would result in awards of attorney's fees and expenses to landowners.

Most fundamentally, neither *Sanders* nor *Columbia Gas* involved applications of state-law measures of compensation that would have resulted in awards of attorney's fees and expenses to landowners. Rather, both cases involved applications of state-law measures of compensation that would have altered the valuation of the property to be condemned.

Accordingly, neither the *Sanders* court nor the *Columbia Gas* court considered the argument – fully applicable here and set forth above, *see supra* Part II – that a federal district court lacks the authority to apply state-law measures of compensation to award attorney's fees or litigation costs in a Natural Gas Act case.

Critically, based on the analysis performed in *Sanders* and *Columbia Gas*, had those courts considered that argument, the result might have been different. Both *Sanders* and *Columbia Gas* rest on the conclusion that application of state-law measures of compensation will not frustrate federal objectives. However, in the specific context of the Natural Gas Act and attorney's fees and costs, that

conclusion is unsound. Indeed, for the same reasons that federal district courts lack authority to award attorney's fees and costs in a Natural Gas Act case, application of a state-law measure of compensation to reimburse those amounts *would* frustrate the objectives of the Natural Gas Act. Congress knows how to create a statutory authorization for attorney's fees and costs, and it declined to do so in the Natural Gas Act; further, Rule 71.1(l) provides that costs under Rule 54(d) are unavailable. As already explained, *see supra* at Part II, these circumstances support an inference that Congress's objective with respect to compensation for Natural Gas Act takings was to *exclude* attorney's fees and litigation costs. Application of state-law measures of compensation that would include those amounts necessarily frustrates that federal objective.

This distinction is critical. Because neither *Sanders* nor *Columbia Gas* involved application of state-law measures of compensation to award attorney's fees that those courts lacked authority to award, *Sanders* and *Columbia Gas* are non-responsive to Sabal Trail's request for a partial summary judgment.

B. Critical differences between the Natural Gas Act and the Power Act mean that for the same reasons that *Sanders* looked to state law to supply the federal measure of compensation, courts handling Natural Gas Act cases should look to federal common law to supply a uniform federal rule.

Separate and apart from the distinction relating to fees, critical differences between Section 21 of the Power Act and the Natural Gas Act mean that for the

same reasons that *Sanders* looked to state law to supply the applicable federal rule for compensation, courts handling Natural Gas Act cases should look to federal common law for a uniform federal rule. Critically, neither the *Sanders* nor the *Columbia Gas* court considered these differences.

As to the first step of the *Sanders* analysis, the Natural Gas Act embodies "an expression of legislative intent" that state law should *not* supply the federal rule. *Sanders*, 617 F.2d at 1115-16. Section 717(c) of the Natural Gas Act provides that certain enumerated matters are exempted from the Act and, as "matters primarily of local concern," are "subject to regulation by the several States." *See* 15 U.S.C. § 717(c). Compensation awards are not enumerated as an exemption. Accordingly, compensation awards are subject to federal rather than state regulation. Put differently, had Congress wanted state law to control compensation awards, it would have said so in Section 717(c).

Separately, as to the second step of the *Sanders* analysis, weighing the relative federal and state interests in a Natural Gas Act case produces a different result than in a Power Act case. The purpose, form, and function of the Natural Gas Act are qualitatively different from—and indicate a stronger federal interest than—those same aspects of the section of the Power Act that was at issue in *Sanders*. This is for two reasons.

First, there is a stronger interest in Natural Gas Act cases than in Section 21 Power Act cases in a uniform rule, which can only be federal. Section 21 of the Power Act (the section at issue in *Sanders*) facilitates projects that are almost always intrastate, *see* 16 U.S.C. § 814, and "frequently [are] on a local scale," *Tennessee Gas Pipeline Co.*, 2014 WL 690700, at *10. Accordingly, applying state law to a Section 21 taking will rarely, if ever, cause a condemnor to wrestle with a diversity of state-law rules. In other words, there is little, if any, need in a Section 21 case for a uniform federal rule because typically the rule is going to be uniform regardless whether it is supplied by federal or state law.

In contrast, Natural Gas Act takings facilitate entirely interstate projects. It grants eminent domain authority to any holder of a certificate of public convenience and necessity, 15 U.S.C. § 717f(h), and provides that such certificates may be issued "to a natural-gas company *for the transportation in interstate commerce* of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission[,]" *id.* § 717f(c)(2) (emphasis added). The Act specifically exempts intrastate transactions from its ambit. *Id.* § 717(c). Accordingly, there is a strong interest in a uniform rule in Natural Gas Act takings cases, *which can only be federal*.

Notably, these differences persuaded the *Tennessee Gas Pipeline* court to apply federal substantive law to determine just compensation in a Natural Gas Act

taking case. *See Tennessee Gas Pipeline Co.*, 2014 WL 690700, at *10 (applying federal measure of just compensation on the basis of *Miller* and distinguishing *Sanders* and *Columbia Gas* on the ground that "whereas private condemnors under the Federal Power Act frequently act on a local scale, the Natural Gas Act does not contain such a distinction, and private condemnors under the Natural Gas Act operate on a national scale with federally approved transmission pipelines") (internal quotation marks and citation omitted).

Had the *Columbia Gas* court considered this argument, it might have reached a different conclusion. In an analogous context, the Sixth Circuit has identified an important federal interest in uniformity. *See Sherwood v. Tennessee Valley Auth.*, 590 F. App'x 451, 461 (6th Cir. 2014) (property owners' lawsuit against TVA claiming environmental violations and involving dispute over whether federal or state law applied to determine size of buffer zone for easements for power transmission lines across multiple states). Acknowledging that "[o]rdinarily, property rights are defined by and governed by state law," the *Sherwood* court nevertheless identified a compelling federal interest in uniformity: "[W]hen … the underlying activities arise from a federal program, the federal interests implicated may warrant the protection of federal law. The question posed concerns the scope of the property interests of the United States. Those interests … were acquired under the authority of a federal statute. Because TVA has

acquired easements across seven states for the purpose of erecting and transmitting electric power, the United States has an interest in a uniform approach to the property rights in those easements.". *Id.*

Indeed, the Natural Gas Act is more like Section 216 of the Power Act than Section 21. Section 216, enacted in 2005, grants eminent domain power to private utilities to acquire right-of-way for electric transmission in a "national interest electric transmission corridor." 16 U.S.C. § 824p. By their nature, these corridors span great distances, often through multiple states. As a result, the Ninth Circuit has held that Section 216 creates "new federal rights, including the power of eminent domain, that are intended to, and do, curtail rights traditionally held by the states and local governments." *Cal. Wilderness Coal v. U.S. Dep't of Energy*, 631 F.3d 1072, 1101 (9th Cir. 2011). Similar to a transmission corridor, Sabal Trail's Project spans great distances through multiple states, unlike the primarily local project under Section 21 of the Power Act in *Sanders.*

Second, one of the key circumstances that weakened the federal interest in *Sanders* is absent from all Natural Gas Act cases. *Sanders* observed that when a licensee (rather than the United States itself) executes a taking under Section 21 of the PowerAct, the mere fact of the licensee's presence undercuts the applicable federal interest. *See* 617 F.2d at 1118. Not so in Natural Gas Act cases. The United States itself never builds natural gas pipelines; instead, it delegates to

private companies all activities necessary to further that federal interest. Because there is no inference that Sabal Trail is building this pipeline only because the United States is building other, more important pipelines, one of the key factors that weakened the federal interest in *Sanders* is missing here.

These kinds of distinctions have led other federal courts – most notably, the Second Circuit – to limit *Sanders*' result only to Power Act cases, and to hold that its analytical framework would look to federal law for a uniform rule in other takings contexts. *See, e.g., Winooski Hydroelectric Co. v. Five Acres of Land in E. Montpelier & Berlin, Vt.*, 769 F.2d 79, 81-82 (2d Cir. 1985) (adopting *Sanders* in Power Act case); *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1266-67 (2d Cir. 1987) (applying *Sanders* to require a different result because application of state law would frustrate a compelling federal interest in a uniform rule).

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Because this is a Natural Gas Act case, not a Power Act case, *Sanders* is not binding here. Because the Natural Gas Act is fundamentally different from the Power Act in key respects, neither *Sanders* nor *Columbia Gas* (which did not consider those differences) is even persuasive here. Nevertheless, even if this Court conducts an analysis similar to the one in *Sanders*, first considering legislative intent and then weighing the strength of the federal and state interests,

the court will reach the opposite result and should apply federal law to determine the measure of compensation. Such an approach would be consistent with the approach of courts in other circuits that have adopted *Sanders*. Accordingly, *Sanders* neither requires nor supports denial of Sabal Trail's motion.

C. Alternatively, the Power Act case applying state law as the applicable federal rule was wrongly decided and should be overruled.

In the alternative, Sabal Trail urges that *Sanders* wrongly looked to state law to supply the federal rule. *Sanders*' critical error was in its starting premise: *Sanders* should have started with the Supreme Court's ruling in *Miller* that state-law procedures do not affect questions of substantive federal rights, such as the measure of compensation. 317 U.S. at 380. Instead, *Sanders* began from the federalism-based premise that "state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case." 617 F.2d at 1115-16.

Sanders distinguished *Miller* on the erroneous ground that it applies only when the federal government is the condemnor, failing to account for the aged rule that the federal government's eminent-domain power "is not changed by its transfer to another holder." *Kohl*, 91 U.S. at 372.

Sanders' failure to adhere to *Miller* led the court into further error, causing it to undertake an analysis that was unnecessary and improper. *Miller*, together with

Kohl, told the *Sanders* court all that it needed to know to determine whether to apply the federal- or state-law measure of compensation in a federal taking case.

Notably, *Sanders* expressly overruled a prior panel precedent of the former Fifth Circuit that analyzed the *Miller* issue correctly. *See Georgia Power Co. v. 54.20 Acres of Land*, 563 F.2d 1178, 1182 (5th Cir. 1977) (Wisdom, J.), *overruled by Sanders*, 617 F.2d at 1113. In *Georgia Power*, the panel affirmed a trial court's ruling that compensation in a Power Act taking case should be determined by reference to federal law. The panel based its conclusion on *Miller*, and it expressly rejected the distinction that led the *en banc* court into error just three years later in *Sanders*. In *Georgia Power*, "[t]he appellants attempt[ed] to distinguish *Miller* on the ground that the plaintiff was the United States rather than a private licensee." *Georgia Power*, 563 F.2d at 1182. The panel rejected the distinction, saying: "We cannot see why in this context the identity of the plaintiff would change the meaning of virtually identical language." *Georgia Power*, 563 F.2d at 1182. That rejection – which is consistent with *Kohl* – led the *Georgia Power* court to a correct conclusion.

Although Sabal Trail understands that this Court lacks the authority to overrule *Sanders*, it includes this argument in the alternative for preservation purposes in the event this case reaches either the Eleventh Circuit *en banc* or the

United States Supreme Court, which do have such authority. *See Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997).

CONCLUSION

For the foregoing reasons, Sabal Trail respectfully requests that this Court enter a partial summary judgment that the measure of compensation in these actions is just compensation pursuant to the Fifth Amendment to the United States Constitution and federal law, which measure does not include a landowner's attorney's fees and litigation costs. Moreover, even if the Court decides that Florida law establishes the measure of compensation, this Court lacks the authority to award attorney's fees and costs as part of that compensation.

Certificate of Word Count

As required by Rule 7.1(F) of the Local Rules of the United States District Court, Northern District of Florida, I hereby certify that this document contains 7,839 words, excluding the parts of the document that are exempted.

Hearing Request

Pursuant to Rule 7.01(k) of the Local Rules of the United States District Court, Northern District of Florida Sabal Trail hereby requests oral argument on this Motion. The estimated time for the hearing is one hour.

Certificate of Service

I hereby certify that on March 31, 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to any filing users who may have entered an appearance in this action.

As to any Defendant who is unrepresented, does not utilize CM/ECF, and has an address known to Plaintiff, I hereby certify that on March 31, 2017, I mailed the foregoing to the party's last known address, as authorized by Federal Rule of Civil Procedure 5(b).

As to any Defendant who is unrepresented and whose address is unknown to Plaintiff, I hereby certify that on March 31, 2017, I have caused the foregoing to be served thereon by leaving a copy of the foregoing with the clerk, pursuant to Federal Rule of Civil Procedure 5(b)(2)(D).

HARRIS HARRIS BAUERLE ZIEGLER LOPEZ

/s/ Bruce M. Harris

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