

NO. 02-0216

IN THE SUPREME COURT OF TEXAS

KUTACH FAMILY TRUST, DARRYL WAYNE KUTACH, TRUSTEE

Petitioner

v.

SAN JACINTO GAS TRANSMISSION COMPANY,

Respondent

On Petition For Review From Case No. 01-99-00959-CV
in the First Court of Appeals at Houston, Texas

RESPONDENT'S BRIEF ON THE MERITS

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RECORD REFERENCES

The record will be referred to herein as follows:

Clerk's Record

"CR ___"

Explanation:

By way of example, references to specific pages of the record and exhibits will be made as follows:

The reference to Volume 1 of the Clerk's Record at pages 17-19 will be cited as CR 1:17-19.

- a. When more than one group of pages in one volume is being cited, the pages will be separated by commas, *e.g.*, CR 1:17-19, 21.
- b. When more than one volume of the record is being cited, the references will be separate by semi-colons, *e.g.*, CR 1:17; 4:15.

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ISSUE PRESENTED

Does a condemning authority, as a matter of law, satisfy the statutory requirement for good faith negotiations prior to instituting a condemnation proceeding by relying on the expert opinion of an independent real estate appraiser and then making an offer to a landowner in excess of the property's value?

STATEMENT OF FACTS

Respondent generally agrees with the statement of facts set forth by Petitioner but notes the following:

1. Petitioner owns a tract of land in rural western Ft. Bend County. CR 1:5-11.
2. Respondent sought to purchase an easement across this property for the construction, operation and maintenance of a pipeline. CR 1: 156.
3. Respondent hired an independent certified real estate appraiser to appraise the value of the property and on at least three occasions offered the Petitioner more than what the property was appraised for, each time by a factor of at least two. *Id.* at 159-160.
4. Petitioner refused these offers of compensation and Respondent filed a Petition in Condemnation to acquire the rights necessary to construct, operate and maintain a natural gas pipeline on the subject property. CR 1: 5-11.
5. This case is one among four companion cases all tried separately in the County Courts at Law of Fort Bend County, Texas. In one opinion, the First Court of Appeals at Houston affirmed the trial courts' granting of San Jacinto's motions for summary judgment on the statutory requirement that the parties be "unable to agree" consistent with Texas Property Code section 21.012. *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex.App. Houston [1st Dist.] 2001, pet. filed).

SUMMARY OF THE ARGUMENT

A condemning authority conclusively demonstrates its compliance with section 21.012 of the Texas Property Code, as a prerequisite to filing a petition in condemnation, when it shows compliance with that standard as interpreted by the relevant case law .

A condemning authority dispatches its burden of proof by demonstrating a reasonably thorough investigation of market value and then an offer made on that basis, particularly when the offer exceeds the market value opinion of the real estate appraiser and it is refused by the condemnee.

While Petitioner continues to press the argument that a condemning authority cannot negotiate for rights which it allegedly cannot condemn, the argument remains a purely hypothetical one because *there is no evidence that anything that the Petitioner complains about had any affect on market value or the likelihood that the parties would have been able to agree on compensation.* Finally, Petitioner insisted on terms that rendered negotiations futile.

Petitioner essentially asks this court to engraft upon existing law, by judicial fiat, the requirement that a condemnor may negotiate only for easement terms which it later condemns. This requirement does not exist in the relevant statutory framework. This court should refuse the invitation to legislate it for the same sound policy reasons

announced in the appellate court’s opinion on motion for rehearing of this case and in the majority of the Texas courts of appeals.

ARGUMENT AND AUTHORITIES

A. THE CONSTITUTIONAL IMPERATIVE OF JUST COMPENSATION

1. Substance

The power of eminent domain inheres exclusively in the sovereign state of Texas. *Texas Highway Department v. Weber*, 219 S.W.2d 70, 72 (Tex. 1949). The state of Texas may in turn delegate the power of eminent domain to certain entities for certain undertakings as long as the enterprise at issue has a sufficiently public purpose. *Imperial Irrigation Co. v. Jayne*, 104 Tex. 395, 138 S.W. 575, 587 (1911); *Housing Authority of the City of Dallas v. Higginbotham*, 143 S.W.2d 79, 84-85 (Tex. 1940).

San Jacinto Gas Transmission Company is a gas utility. TEX. UTIL. CODE ANN. § 121.001, *et seq.* The business of a gas utility is just such an enterprise as carries with it the power of eminent domain. TEX. UTIL. CODE ANN. §§ 181.004 and 181.008.¹ See, *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 563-564 (Tex.App. San Antonio 1998, pet. denied); *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 717-19 (Tex.App. Corpus Christi 2000, pet. denied); *Loesch v. Oasis Pipe Line Company*, 665 S.W.2d 595, 598 (Tex.App. Austin 1984, writ ref’d n.r.e.).

Article 1 Section 17 of the Texas Constitution provides:

¹ The relevant codification of the Cox Act reads: “A gas utility . . . is affected with a public interest. TEX. UTIL. CODE ANN. § 121.051(a).”

“No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made TEX. CONST. art. 1 § 17

The Constitution guarantees to any private citizen the right to receive adequate compensation upon the taking of his property for any legislated public purpose. *Maher v. Lasater*, 354 S.W.2d 923, 924-26 (Tex. 1962). This constitutional imperative is guaranteed by the statutory framework contained in Chapter 21 of the Texas Property Code which provides, among other things, that a landowner whose property is taken can insist upon a trial by jury to determine what it believes is adequate compensation after hearing evidence on the issue. TEX. PROP. CODE ANN. §21.001, *et seq.*

This case does not raise a constitutional public use issue; the landowner does not complain that more was taken from him than can be taken for a public use. Indeed, the rights actually condemned are a textbook example of the minimum necessary property rights for a natural gas pipeline project. *See* Original Statement and Petition in Condemnation. CR 1: 1-11. Appendix Tab 6.

2. Procedure

a. The policy of adequate compensation

The statutory requirement to demonstrate engaging in good faith negotiations prior to instituting a condemnation proceeding is a procedural, not constitutional, imperative. This requirement is designed merely to prevent resort to litigation in instances where a condemning authority and a condemnee could otherwise have

reached a voluntary agreement short of litigation. *Schlottman v. Wharton Co.*, 259 S.W.2d 325, 330 (Tex. Civ. App. Fort Worth 1953, writ dismissed).

While it is procedural in nature, the “inability to agree” requirement should nevertheless be viewed consistently within the larger constitutional framework of securing adequate compensation upon the taking of private property for a public purpose.

Therefore, if a condemning authority offers to a landowner an amount of money which the condemning authority believes in good faith exceeds the very market value of the property at issue, then this should always suffice to meet the statutory prerequisite, particularly when the offer is unequivocally refused.

Every case that addresses good faith offers pursuant to TEX. PROP. CODE §21.012 turns on whether the amount of compensation offered was made in good faith for the property to be condemned. In those cases, the landowners typically challenged the actual amount of the precondemnation offer. Whether the amount of the damages is too low as to amount to bad faith is a question of fact, which is decided by the trial court. *See, e.g., Precast Structures, Inc. v. City of Houston*, 942 S.W.2d 632, 633-634 (Tex. App.--Houston [14th Dist.] 1996, no writ); *State v. Hipp*, 832 S.W.2d 71 (Tex.App. Austin 1992, *rev'd on other grounds*, 867 S.W.2d 781 (Tex. 1993); *Anderson v. Clajon Gas Co.*, 677 S.W.2d 702, 706 (Tex. App. Houston [1st Dist.] 1984, no writ); *Willoughby v. Upshur Rural Electric Cooperative Corp.*, 562 S.W.2d

33, 35 (Tex.App. Tyler 1978, writ ref'd n.r.e.).

Petitioner has produced no evidence and has not argued that the *amount* of the offers in this case were made in bad faith. All of the evidence in the record supports the conclusion that the amounts of San Jacinto's offers to the Petitioner were made in good faith after a reasonably thorough investigation of property value, consistent with the lead case on the issue. *Hipp*, 832 S.W.2d at 71.

b. The elements of "inability to agree"

Texas Property Code § 21.012 requires that a condemning authority make a "good faith offer or engage in "good faith negotiations prior to instituting condemnation proceedings. This requirement is satisfied if the condemnor makes a single bona fide offer that the condemnor in good faith believed is the amount of compensation due, i.e., the true value of the land. *State of Texas v. Dowd*, 867 S.W.2d 781, 782 (Tex. 1993); *State v. Schmidt*, 894 S.W.2d 543, 544-45 (Tex. App. Austin 1995, no writ); *Texas-New Mexico Power Co. v. Hogan*, 824 S.W.2d 252, 254 (Tex. App. Waco 1992, writ denied). An offer is bona fide if it is based on a reasonably thorough investigation and an honest assessment of the amount of just compensation. *Hipp*, 832 S.W.2d at 78-79. The condemnor need only make a single offer that is rejected and may then determine that no agreement can be reached. *Dyer v. State of Texas*, 388 S.W.2d 226, 229-30 (Tex. Civ. App. El Paso 1965, no writ) (indicating the requirement is satisfied by a single offer being made and refused); *Schlottman v.*

Wharton Co., 259 S.W.2d 325, 329 (Tex. Civ. App. Fort Worth 1953, writ dismissed).

The requirement is met once "the landowner has refused an offer by the condemnor . . . failed to respond to an offer by the condemnor . . . or demanded a higher price than that offered by the condemnor." *Hipp*, 832 S.W.2d at 77.

The provenance of the "good faith offer" or "good faith negotiations" is Chapter 21 of the Texas Property Code. It sets forth the procedure controlling the filing and prosecution of every statutory eminent domain proceeding in the State of Texas. As a prerequisite to the filing of an eminent domain proceeding, a condemning authority must be, according to the statute, "unable to agree" with the landowner on *the amount of compensation* owing. The relevant statute reads, in pertinent part, as follows:

- (a) if . . . a corporation with eminent domain authority . . . wants to acquire real property for public use but is *unable to agree* with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.
- (b) the petition must: . . .
 - (4) state that the entity and the property owner are *unable to agree* on the damages. TEX. PROP. CODE § 21.012 (emphasis added), Appendix Tab

2.

With respect to "inability to agree," "good faith offer" or "good faith negotiations" (or any of its variants), this is all the statute says. It requires nothing else.

The landowners in none of the cases on review to this Court present record

evidence that the three “property rights negotiated for and about which they complain would *make a difference in the amount which should have been offered*. Assuming that the landowners were correct in their legal position concerning the non-condemned rights, *there still remains no showing that they were material to price*.² Likewise, landowners do not present any record evidence that the rights sought by San Jacinto made any difference in their decision whether to enter into a voluntary agreement to sell an easement.

The first time a Texas court of appeals squarely addressed the issues raised in the case at hand, the Corpus Christi Court of Appeals said:

Thus, the evidence showed that MidTexas [the condemning authority] made a bona-fide attempt to agree on damages because it made a bona-fide offer to pay an amount which was twice the value set by the appraisal district. *Mercier*, 28 S.W.3d at 720.

Because the company in *Mercier* offered more than what the property was apparently worth, the court concluded:

The evidence does not show that MidTexas made an arbitrary or capricious offer. We hold that MidTexas met the unable-to-agree requirement and that it engaged in good faith negotiations with the Merciers. *Id.*

² A condemnor may “condemn whatever interest is necessary for public use. *Valero Eastex Pipeline Co. v. Jarvis*, 926 S.W.2d 789, 793 (Tex.App. Tyler 1996, writ denied); *Houston N. Shore Ry. Co. v. Tyrrell*, 98 S.W.2d 786, 793 (Tex. 1936). Although the substantive issue of whether an assignable easement may be condemned is not joined in this case, it turns out that in Texas, and everywhere else the issue has been addressed, the courts have found that a condemnor has the power to condemn an assignable easement. *Tyrrell*, 98 S.W.2d at 793; *Valero Eastex Pipeline Co. v. Jarvis*, 990 S.W.2d 852, 855 (Tex.App. Tyler 1999, pet. denied); *Florida Blue Ridge Corp. v. Tennessee Elec. Power Co.*, 106 F.2d 913, 916 (6th Cir. 1939); *Boorstein v. Massachusetts Port Auth.*, 345 N.E.2d 668, 671 (Mass. 1976); *Hennick v. Kansas City S. Ry. Co.*, 269 S.W. 2d 646, 651-52 (Mo. 1954); *United States v. Kansas City, Kan.*, 159 F.2d 125, 129 (10th Cir. 1946); *Garlick v. Pittsburgh & W. Ry. Co.*, 65 N.E. 896, 899 (Ohio 1902).

The Corpus Christi court had the opportunity, once again, to write squarely on this issue in *Cusack Ranch Corporation v. MidTexas Pipeline Company*, 71 S.W.3d 395 (Tex.App. Corpus Christi 2001, pet. filed). Recognizing that market value is the issue, the Cusack court points out the central and decisive issue:

No evidence shows that Cusack ever indicated that it would be amenable to settlement if only the additional property rights contained in the proposed right of way agreement were omitted. *Id* at 400.

The lower court in the present case also recognizes that satisfactory proof of an offer more than market value should always constitute compliance with the statute:

Because the evidence shows San Jacinto offered the landowners far more for the easements than their appraised values, and the landowners did not accept the offers, San Jacinto, in accordance with the purposes of section 12.012 [sic] established, as a matter of law, the “unable-to-agree requirement. *Hubenak*, 65 S.W.3d at 800.

Consistent with the constitutional imperative that “adequate compensation be made for the taking of private property, the lower court points out as follows:

Therefore, our focus must be on the compensation offered. A condemning entity, like any person or entity, is, of course, free to negotiate for, offer to buy, and buy what it desires. *Id*.

B. THE EVIDENCE WAS CONCLUSIVE ON EVERY LEGAL ELEMENT

1. The Issue

Conceding that the burden of proof is on San Jacinto to establish compliance

with the statutory mandate with respect to “inability to agree on the damages,³ that burden, however, is discharged upon a showing of the following elements:

1. A reasonably thorough investigation and an honest assessment of just compensation; and
2. (a) a refusal of this offer; *or*
(b) a failure to respond to this offer; *or*
(c) a demand for a higher price.

The landowner in the instant case has never challenged requirement number one. It is established. The landowner points to no evidence which would raise an inference that requirement number two did not take place. It is established. Period.

In the instant case, the question becomes: was there conclusive evidence before the trial court to support a finding that San Jacinto negotiated with Petitioner in accordance with TEX. PROP. CODE §21.012 as construed by controlling precedent? Clearly the answer is yes. The record evidence before the trial court was uncontroverted.

³ Texas Property Code § 21.012 reads as follows:

§ 21.012. Condemnation Petition

(a) If the United States, this state, a political subdivision of this state, a corporation with eminent domain authority, or an irrigation, water improvement, or water power control district created by law wants to acquire real property for public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.

(b) The petition must:

- (1) describe the property to be condemned;
- (2) state the purpose for which the entity intends to use the property;
- (3) state the name of the owner of the property if the owner is known; and
- (4) state that the entity and the property owner are unable to agree on the damages.

See Appendix Tab 2.

2. The Good Faith Offers

The evidence conclusively demonstrates the following. It is not controversial:

San Jacinto retained Randy L. Seale, a State Certified General Real Estate Appraiser, to appraise Petitioner's property. Mr. Seale estimated the value of the taking prior to rerouting the pipeline to be \$2,670.00.

Affidavit of David M. Dunwoody, CR 1:156.

On July 16, 1996, San Jacinto's right of way agent negotiated with Petitioner to pay for the proposed right of way and was told that San Jacinto could not build its pipeline on Petitioner's property, and if it did, it would cost \$500 per foot. Daily Right of Way Negotiation Report, CR 1:182.

On July 18, 1996, San Jacinto submitted a right of way to Petitioner, offering \$6,360.00. Offer Letters, CR 1:159-160.

On August 6, 1996, San Jacinto's right of way agent spoke with Petitioner who again stated he did not want pipeline, but would have to discuss the situation with his father. Right of Way Negotiation Report, CR 1:182.

On August 9, 1996, San Jacinto's right of way agent met with Petitioner to discuss the proposed pipeline, and was told that if the pipeline proceeded on the same route, San Jacinto would have to condemn the

property. They discussed rerouting to meet Petitioner's wishes.

Petitioner said that they did not want the pipeline. Daily Right of Way Negotiation Report, CR 1:181.

On August 15, 1996, San Jacinto made a final offer to Petitioner in the amount of \$6,360.00. Offer Letters, CR 1:162-169.

On August 19, 1996, San Jacinto's right of way agent met with Petitioner and agreed to reroute the pipeline and would finalize the damages and right of way agreement after revising the plat. Daily Right of Way Negotiation Report, CR 1:180.

On September 5, 1996. San Jacinto made a revised final offer to Petitioner, after compensating for rerouting the pipeline as Petitioner requested, in the amount of \$4,632.00. Affidavit of David M. Dunwoody, CR 1:156; Offer Letters, CR 1:171-178.

Clearly, the trial court impliedly found that Petitioner failed to respond to San Jacinto's offers of compensation, refused them or demanded higher prices or terms unacceptable to San Jacinto. Any one or combination of these satisfies the test announced in *Hipp*. See *State v. Hipp*, 832 S.W.2d 71, 77 (Tex.App. Austin 1992), *rev'd on other grounds*, 867 S.W.2d 781 (Tex. 1993).

3. Futility

Despite its considerable efforts to offer adequate compensation and avoid the

expense of litigation, San Jacinto was nonetheless exempt from having to make a bona fide offer in the first place because any offer to the Petitioner would have been futile. It is well settled Texas law that if an offer made as a prelude to filing a condemnation action is futile, then no offer need be made. *Tyrrell*, 98 S.W.2d at 795; *Anderson v. Clajon Gas Co.*, 677 S.W.2d 702, 706 (Tex. App. Houston [1st Dist.] 1984, *no writ*). Over the course of nearly two months of negotiations Petitioner said at least three times she did not want a pipeline on her property. CR 1: 164-178.

The summary judgment evidence shows that the Petitioner insisted on terms that San Jacinto could not agree to. There is no evidence in the record to support any inference that San Jacinto would have agreed to the landowner's demands. The demands were deal-breakers. Further negotiations were futile as a matter of law.

C. PETITIONER'S ARGUMENTS AND THE DERNEHL MISTAKE

1. Inconsequential "Property Rights"

Petitioner's briefing to the trial court, the court of appeals, and thus far, to this Court, has concerned itself with questions of substantive law, about the assignability of easements in gross and whether there is a "public necessity" for the transmission of products other than natural gas and for a warranty of title. The disposition of these issues is immaterial to the result in this case. They are all moot. The lower court properly recognized this.

To suppose that warranty of title, assignability or "other products" had any

bearing on the negotiations between San Jacinto and the Petitioner is to indulge a fiction conceived after the negotiations were concluded and became unambiguously futile. There is no record evidence to support the inference that the Company and the Petitioner would have been able to agree on compensation prior to filing the lawsuit if it had not negotiated for assignability or for products other than natural gas or for a warranty of title.

Petitioner points to no evidence that any of these “property rights” impact the amount of compensation which should have been offered or that they would have been more or less likely to sign a voluntary agreement with their exclusion.⁴ Petitioner cannot point out any evidence of causation here because there is none. These issues were discussion points only after negotiations were over and litigation commenced.

If the argument posed by the Petitioner prevailed, the law would require that any time a condemnor makes an offer that includes more rights than it may be able to condemn for, then that offer would be in bad faith. Until the majority opinion in *Dernehl* was handed down, no Texas case or statute required that an offer of compensation must contain the same enumeration of property and correlative rights as

⁴ Finally recognizing that in order to join the issue properly, Petitioners should point to some evidence that these terms impact market value, Petitioners cite rather tentatively to the record in another case. *Exxon mobil Pipeline Company v. Zwahr*, 35 S.W.3d 705, 710 (Tex.App. Houston [1st Dist.] 2000), reversed, 45 Tex. Sup. Ct. J. 691 (May 23, 2002). Apparently, Petitioners maintain that because an appraiser (whose opinions were held by this Court to be decidedly inadmissible) says that assignability has value standing on its own and that the trial court submitted a question on the issue, then this constitutes some evidence of that term’s impact on market value. The court of appeals summarily dismissed the notion and held that one question on market value is the proper way to submit the issue to the jury, market value itself subsuming this property right.

the petition for condemnation. See *MidTexas Pipeline Company v. Dernehl*, 71 S.W.3d 852 (Tex.App. Texarkana 2002, pet. filed). Appendix Tab 5.

To the contrary, the law merely requires that any offer made by the condemning authority must be a bona fide offer made in subjective good faith before the condemning authority can file a proper condemnation action under TEX. PROP. CODE § 21.012. The lower court got it right and this Court should affirm. The *Dernehl* result is the subject of another petition for review and should be reversed.

2. There Is No Public Use Issue

Petitioner, in her briefing to every court which has faced these issues, attempts to further confuse the simple good faith negotiation requirements of TEX. PROP. CODE § 21.012 by injecting an irrelevant discussion of the constraint on the power of eminent domain that there be a public necessity for the acquisition of private property. Because San Jacinto never sought to condemn any of the three “property rights” allegedly at issue, whether these rights serve a public necessity is beyond the scope of this appeal.

Under the statutes providing for the exclusive procedure in eminent domain cases, a taking of private property does not take place until a petition has been filed, commissioners have been appointed, they have heard the evidence, entered an award and the condemning authority posts the award and meets the bonding requirements of TEX. PROP. CODE ANN. § 21.021. The constitutional issue of “public use” or “public necessity” is not implicated until this point.

If a person whose property has been taken then wishes to contest the public nature of that taking, hence its constitutionality, he may do so by filing a plea to the jurisdiction or a motion to dismiss on that basis. *See, e.g., Precast Structures, Inc. v. City of Houston*, 942 S.W.2d 632, 633 (Tex.App. Houston[14th Dist.] 1996, no writ); *Austin Home Ctr. Assocs. v. State*, 794 S.W.2d 593,594 (Tex.App. Austin 1990, no writ).

Among the complaints a landowner may have is that a condemning authority has not properly declared the public necessity to require a taking of his property. *See Maberry v. Pedernales Electric Co-op, Inc.*, 493 S.W.2d 268, 271 (Tex.Civ.App. Austin 1973); *see also Horton v. County of Mills*, 468 S.W.2d 876, 877 (Tex.Civ.App. Austin 1971, no writ). The landowner in this case has never made this complaint.

Petitioner consistently cites to *City of Houston v. Hamons*, 496 S.W.2d 662 (Tex. App. Houston [14th Dist.] 1973, writ ref'd n.r.e.). In that case, the public necessity only required an aerial easement instead of the fee simple interest that the airport sought to condemn. *Hamons*, 496 S.W.2d at 665. The *Hamons* case involved a condemning authority abusing its power of eminent domain by seeking more rights than it needed in the condemnation process. This scenario is inapposite. In this case, San Jacinto never sought to condemn the three “property rights, but merely sought to purchase these rights by offering more than its state certified appraiser valued the

property. As a result, Petitioner's analysis is misguided.

Petitioner has also cited to *City of Wichita Falls v. Thompson*, 431 S.W.2d 909 (Tex. App. Fort Worth 1968, writ ref'd n.r.e.) and *Brazos River C. & Reclamation Dist. v. Harmon*, 178 S.W.2d 281 (Tex. App. Eastland 1994, writ ref'd w.o.m.) for the proposition that a condemning authority condemning and then conveying the property to private entities that do not possess the power of eminent domain is against public policy. Neither of these cases concern negotiations; they contemplate the scope and propriety of the *actual condemnation* of the property. *Thompson*, 431 S.W.2d at 911; *Harmon*, 178 S.W.2d at 290.

The parties were unable to agree on the amount of compensation to be paid for the voluntary acquisition of an easement. The question then is: was the evidence sufficient to show the fact of such inability? But, in her briefing, Petitioner persists in the pattern of briefing not the evidence nor the inferences to be drawn from it but the same old inconsequential questions of substantive law which have nothing to do with this case.

D. COMPENSATION IS THE ISSUE

Unless the property rights sought, and which the condemnees complain about (the ability to transport products other than natural gas, assignability and warranty of title), have some impact on the compensation which should be offered, then an offer of compensation by a condemning authority should always be sufficient when the offer

exceeds the market value of the property.

1. Whether the Rights at Issue Can in Fact Be Condemned Is a Hypothetical Question

The Petitioner in this matter and the Respondents to this Court in the other MidTexas matters on petition for review from Texarkana (as a result of *Dernehl*), have consistently advanced the technical and very tenuous argument that a condemning authority simply cannot negotiate for terms in a voluntary agreement for which it does not have the power to condemn or which, in fact, it does not actually condemn. They complain specifically about the terms negotiated for that would provide the easement is assignable, that multiple products can be transported through the pipeline and that the agreement carry a warranty of title. Not until the Texarkana Court of Appeals heard the argument had any court of appeals been persuaded that this is true as a matter of law.⁵

Whether a condemning authority may or may not condemn for either assignability, products other than natural gas or warranty of title is, on these facts, irrelevant. The lower court agrees:

Notably, San Jacinto never sought to condemn the three additional property rights, but merely sought to purchase them, along with the easements for the natural gas pipeline. Thus, the issue of whether San

⁵ A condemning authority may condemn for anything which is necessary for a particular public purpose. If San Jacinto had actually condemned the property for the transportation of products other than natural gas then the issue could have been joined by the landowners whether there was a public use sufficient to substantiate the right to transport any other such product. Whether the easement actually condemned is an assignable easement is, likewise, not presently before the court (it has not been assigned). No one argues with the proposition that a condemned easement does not carry with it a warranty of title.

Jacinto could actually condemn the three additional property rights is simply irrelevant. *Hubenak*, 65 S.W.3d at 801.

2. A Condemning Authority May Negotiate for More than it Takes

It can never cause harm to a condemnee to have a lesser estate condemned than that initially negotiated for.⁶ A lesser burden condemned has a lesser impact on the before and after-taking value of the taken property. To negotiate for more and then, finally, to condemn less, has never caused confusion among the courts when someone has alleged that this constitutes non-compliance with the statute.

An instructive case is found in *Audish v. Clajon Gas Company*, 731 S.W.2d 665 (Tex.App. Houston [14th Dist] 1987, *writ ref'd n.r.e.*). The *Audish* case quite closely parallels this one. In *Audish*, the company, also a condemning authority, initially filed a lawsuit to condemn the landowner's property for a pipeline. Because of an error in the description of the easement the company dismissed that case and filed a new lawsuit with the correct legal description for the easement. *Id.* at 667-68. In the new lawsuit, the company offered the landowners "\$10,800.00 for a two-line natural gas pipeline easement. The first line was to be laid immediately, the second within two years. *Id.* at 671. This offer was refused. Ultimately, the company condemned only for one easement, not two. Only one was necessary. *Id.* at 672.

⁶ A condemning authority has the unrestricted right to dismiss its petition in condemnation as to a portion of land sought to be condemned or to relinquish rights previously sought for which there is no public need. *Texas Power & Light Co. v. Cole*, 313 S.W.2d 524, 530 (Tex. 1958); *State v. Nelson*, 334 S.W.2d 788, 790 (Tex. 1960); *Sabine River Authority v. Crabb*, 372 S.W.2d 575, 578 (Tex.Civ.App. Dallas 1963, *no writ*).

The trial court granted Clajon's motion for summary judgment with respect to the good faith negotiation requirement. *Id.* at 671. Clearly, Clajon negotiated for more rights than it condemned and for which there was a public necessity. The company made one offer for two lines and condemned for only one.

Negotiating for more rights but then condemning for less is a judicially recognized fact, and it may be undertaken without violating any public policy implied in § 21.012.⁷

To negotiate for the voluntary acquisition of rights beyond those which are condemned always constitutes compliance with section 21.012 as long as a landowner is offered more money for the property than its appraised value. To hold otherwise is to depart from precedent and to ignore the plain, conclusive and uncontroverted evidence that the parties would not have agreed on compensation.

E. THE MAJORITY OF APPELLATE COURTS AGREE

The issues joined in this appeal have been advanced by Petitioner and similarly situated landowners in five different Texas courts of appeals. Squarely dealing with precisely the legal issue involved in this case, three courts of appeals have now dispatched with the argument and held, as a matter of law, that the condemning

⁷ The landowners in the cases on review to this Court have called the Company's perceived negotiation tactics criminal. They suggest that a jury in a civil case could be submitted questions concerning criminal conduct sufficient to form the basis for the recovery of exemplary damages. Petitioners, however, omit to mention the obvious and unassailable proposition of law that there is no independent civil cause of action for an alleged failure to negotiate in good faith consistent with Section 21.012. *Marburger v. Seminole Pipeline Co.*, 957 S.W. 2d 82 (Tex.App. Houston[1st Dist.] 1999, pet. denied). Nor is there evidence of the requisite intent.

authorities in each case have met the statutory jurisdictional prerequisite to filing an eminent domain case.

In addition to the First Court of Appeals opinion in this matter, the Corpus Christi court holds consistently in *Cusack Ranch* and *Mercier*.

Most recently, the Fourteenth Court of Appeals has had occasion to entertain the strained and technical good faith arguments made by the landowners and finds the jurisdictional requirement of “inability to agree” satisfied, on, once again, essentially identical facts. *Exxonmobil Pipeline Company v. Harrison Interests, Ltd*, No. 14-00-01392-CV, 2002 WL 1438627 (Tex.App.--Houston [14 Dist.], July 3, 2002) at page 5. Appendix Tab 4.

In the course of providing a very thorough summary of the respective courts’ opinions in the matters now on petition for review, that court reaches the same conclusion that this Court should reach:

We agree with the reasoning expressed by Justice Cornelius [in the *Dernehl* dissent] and the *Hubenak* and *Cusack* courts. The inclusion of additional property rights that may or may not be condemnable in a final offer prior to condemnation does not evidence, as a matter of law, the condemnor’s failure to negotiate in good faith. (citations omitted) In determining whether a condemnor negotiated in good faith, the focus of the determination of the jurisdictional requirement must be on the amount of the compensation offered. (citation omitted). ***To hold otherwise would unnecessarily complicate the negotiation process and frustrate the purpose behind the good faith negotiation requirement of promoting the resolution of property acquisitions through negotiations rather than litigation. Id.***

The dissenting opinion by Justice Cornelius, referred to by the court in *Harrison*

Interests, bears quoting because it puts plainly the legal issue which should be resolved in favor of San Jacinto:

The purpose of the unable-to-agree requirement of the statute is to avoid litigation and prevent needless appeals when the matter of price might have been settled by the parties. This purpose should not be thwarted by a hypertechnical interpretation of the requirement. [citation omitted]. The majority in this case, by holding that an offer for the property to be condemned, together with certain incidental rights, does not also constitute an offer for the lesser property to be condemned, honors hypertechnicality to the ultimate. **This is especially true where, as here, the parties' respective offers are so far apart it is obvious they will not be able to agree.** *Dernehl*, 71 S.W.3d at 860 (emphasis supplied).

CONCLUSION AND PRAYER

This Honorable Court should refuse Petitioner's Petition for Review and affirm the appellate court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the _____ day of July, 2002, a copy of Respondent's Brief on the Merits was forwarded by certified mail, return receipt requested, to the following:

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APPENDIX

1. *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex.App. Houston [1st Dist.] 2001, pet. filed)
2. TEX. PROP. CODE § 21.012
3. *Cusack Ranch Corporation v. MidTexas Pipeline Company*, 71 S.W.3d 395 (Tex.App. Corpus Christi 2001, pet. filed)
4. *Exxonmobil Pipeline Company v. Harrison Interests, Ltd*, No. 14-00-01392-CV, 2002 WL 1438627 (Tex.App.--Houston [14 Dist.], July 3, 2002)
5. *MidTexas Pipeline Company v. Dernehl*, 71 S.W.3d 852 (Tex.App. Texarkana 2002, pet. filed)
6. Plaintiff's Original Statement and Petition for Condemnation