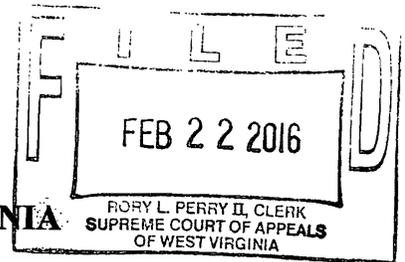


**IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**



Docket No. 15-0919

Appeal from a Final Order of the
Circuit Court of Monroe County (Case No. 15-C-19)

MOUNTAIN VALLEY PIPELINE, LLC,

Defendant/Petitioner,

v.

BRIAN C. MCCURDY and
DORIS W. MCCURDY,

Plaintiffs/Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

 A. THIS WILL BE AN OPEN ACCESS PIPELINE,
 WHICH MUST PROVIDE TRANSPORTATION
 OF GAS ON A NONDISCRIMINATORY BASIS 2

 B. AN OPEN ACCESS INTERSTATE PIPELINE IS
 FOR A PUBLIC USE 4

 C. THE PIPELINE WOULD SATISFY THE FIXED AND
 DEFINITE USE TEST..... 7

 1. *The Fixed and Definite Use Test Should Not Be
 Read as Requiring Deliveries to Consumers in
 West Virginia* 7

 2. *The Pipeline Has the Potential to Deliver Gas to
 Consumers in West Virginia* 10

 D. THE COURT CAN FIND A RIGHT OF ENTRY
 WITHOUT REACHING THE QUESTION OF
 PUBLIC USE..... 13

CONCLUSION 16

CERTIFICATE OF SERVICE.....

TABLE OF AUTHORITIES

Cases:

<i>Adams v. Greenwich Water Co.</i> , 83 A.2d 177 (Conn. 1951).....	7
<i>Associated Gas Distribs. v. F.E.R.C.</i> , 824 F.2d 981 (D.C. Cir. 1987)	3
<i>Bd. of County Comm’rs of San Miguel v. Roberts</i> , 159 P.3d 800 (Colo. Ct. App. 2006)	15
<i>Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.</i> , No. 2014-CA-000517-MR, 2015 WL 2437864 (Ky. Ct. App. May 22, 2015)	7, 14
<i>Bradley v. Degnon Contracting Co.</i> , 120 N.E. 89, 93 (N.Y. 1918)	11
<i>Carlisle v. Dep’t of Pub. Utilities</i> , 234 N.E.2d 752 (Mass. 1968)	13
<i>Carnegie Natural Gas Co. v. Swiger</i> , 72 W. Va. 557, 79 S.E. 3 (1913)	8, 9, 11, 12, 13
<i>Charleston Natural Gas Co. v. Low</i> , 52 W. Va. 662, 44 S.E. 410 (1901).....	9
<i>City of Melvindale v. Trenton Warehouse Co.</i> , 506 N.W.2d 540 (Mich. Ct. App. 1993)	15
<i>Clark v. Gulf Power Co.</i> , 198 So.2d 368 (Fla. Dist. Ct. App. 1967)	7
<i>Cleveland Bakers Union Local No. 19 Pension Fund v. State, Dept. of Admin. Servs.-Pub. Works</i> , 443 N.E.2d 999 (Ohio Ct. App. 1981)	15
<i>Columbus Waterworks Co. v. Long</i> , 25 So. 702 (Ala. 1899)	7

<i>Crawford Family Farm P’ship v. Transcanada Keystone Pipeline, L.P.</i> , 409 S.W.3d 908 (Tex. Ct. App. 2013)	6
<i>Duke Power Co. v. Herndon</i> , 217 S.E.2d 82 (N.C. Ct. App. 1975)	15
<i>Paso Natural Gas Co. v. F.E.R.C.</i> , 96 F.3d 1460 (D.C. Cir. 1996)	4
<i>Equitrans, L.P. v. 0.56 Acres</i> , No. 1:15CV106, 2015 WL 7300548 (N.D. W. Va. Nov. 18, 2015)	4, 5
<i>Gauley & S.R. Co. v. Vencill</i> , 73 W. Va. 650, 80 S.E. 1103 (1914)	12
<i>Handley v. Cook</i> , 162 W. Va. 629, 252 S.E.2d 147 (1979)	6
<i>Hardman v. Cabot</i> , 60 W. Va. 664, 55 S.E. 756 (1906)	8
<i>Hawaii Housing Auth. v. Midkiff</i> , 467 U.S. 229 (1984)	5
<i>In re K.R.</i> , 229 W. Va. 733, 735 S.E.2d 882 (2012)	12
<i>In re Assessment of Pers. Prop. Taxes</i> , 234 P.3d 938 (Okla. 2008)	4
<i>Iowa RCO Ass’n v. Illinois Commerce Comm’n</i> , 409 N.E.2d 77 (Ill. App. Ct. 1980).....	6
<i>Klemic v. Dominion Transmission, Inc.</i> , No. 3:14-CV-00041, 2015 WL 5772220 (W.D. Va. Sept. 30, 2015).....	5, 15
<i>Lewis v. Texas Power & Light Co.</i> , 276 S.W.2d 950 (Tex. Civ. App. 1955)	15

<i>Linder v. Arkansas Midstream Gas Servs. Corp.</i> , 362 S.W.3d 889 (Ark. 2010).....	6
<i>Mid-Am Pipe Line Co. v. Missouri Pac. R.R. Co.</i> , 298 F. Supp 1112 (D. Kan. 1969).....	5
<i>Midwestern Gas Transmission Co. v. Baker</i> , No. M2005-00802-COA-R3-CV, 2006 WL 461042 (Tenn. App. Jan. 11, 2006).....	1, 14
<i>Montana Co. v. St. Louis Min. & Milling Co.</i> , 152 U.S. 160 (1894).....	15
<i>Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.</i> , 503 U.S. 407 (1992).....	5
<i>Northville Dock Pipe Line Corp. v. Fanning</i> , 237 N.E.2d 220 (N.Y. 1968).....	13
<i>Oglethorpe Power Corp. v. Goss</i> , 322 S.E.2d 887 (Ga. 1984).....	15
<i>Ohio Oil Co. v. Fowler</i> , 100 So.2d 128 (Miss. 1958).....	6
<i>Peck Iron & Metal Co. v. Colonial Pipeline Co.</i> , 146 S.E.2d 169 (Va. 1966).....	6
<i>Pittsburgh & W. Va. Gas Co. v. Cutright</i> , 83 W. Va. 42, 97 S.E. 686 (1918).....	12
<i>Ralph Loyd Martin Revocable Trust v.</i> <i>Arkansas Midstream Gas Servs. Corp.</i> , 377 S.W.3d 251 (Ark. 2010).....	6
<i>Rockies Express Pipeline, LLC v. Billings</i> , No. 2:07-CV-982, 2007 WL 3125320 (S.D. Ohio Oct. 23, 2007).....	13
<i>Smith v. Arkansas Midstream Gas Servs. Corp.</i> , 377 S.W.3d 199 (Ark. 2010).....	6
<i>Square Butte Elec. Coop. v. Dohn</i> , 219 N.W.2d 877 (N.D. 1974).....	13

<i>State v. Simons</i> , 40 So. 662 (Ala. 1906)	15
<i>Town of Clinton v. Schrempp</i> , No. CV044000684, 2005 WL 407716 (Conn. Super. Ct. Jan. 14, 2005)	15
<i>Tudor’s Biscuit World of Am. v. Critchley</i> , 229 W. Va. 396, 729 S.E.2d 231 (2012)	12
<i>United Distrib. Cos. v. F.E.R.C.</i> , 88 F.3d 1105 (D.C. Cir. 1996)	3
<i>Varner v. Martin</i> , 21 W. Va. 534 (1883).....	8, 9
<i>Walker v. Gateway Pipeline Co.</i> , 601 So.2d 970 (Ala. 1992)	13
<i>Waynesburg S.R. Co. v. Lemley</i> , 154 W. Va. 728, 1778 S.E.2d 833 (1970)	6, 11, 12, 14
Statutes:	
W. Va. Code § 22C-9-1(a)(1).....	2
W. Va. Code § 24-3-3a.....	4
W. Va. Code § 54-1-1	15
W. Va. Code § 54-1-3	1, 2, 5, 14, 15, 16
W. Va. Code § 54-1-23	2
15 U.S.C. § 717f(e)	1
Regulations	
18 C.F.R. § 284.7(b).....	3
50 Fed. Reg. 42408 (Oct. 18, 1985)	3
Rules:	
W. Va. R. App. P. 10(c)(3).....	12

I. SUMMARY OF ARGUMENT

It is important to keep in mind what this case involves and what it does not involve. This case involves the right of a natural gas company to survey property along the proposed route for its pipeline. The survey is necessary to determine whether the proposed route is geographically and environmentally appropriate.

West Virginia Code § 54-1-3 and statutes like it in other states allow pipeline companies to survey proposed routes before any potential condemnation. In doing so, the statutes serve the interests of both the company and landowners. The company can select an appropriate route, and landowners can avoid unnecessary and unexpected condemnations. Landowners whose properties are not suitable for the pipeline will not be condemned, and landowners who thought they were out of the path of the pipeline will not be surprised by a relocated route across their property. *Midwestern Gas Transmission Co. v. Baker*, No. M2005-00802-COA-R3-CV, 2006 WL 461042, at *15 (Tenn. App. Jan. 11, 2006).

This case does not involve any taking or damaging of the McCurdys' property. The only question is whether MVP may enter the property for the short period of time necessary to complete a survey. The McCurdys do not contend that § 54-1-3 is unconstitutional. Rather, they argue that the statute does not apply because the proposed pipeline is not for a public use.

This pipeline is for a public use. In fact, the pipeline will not be built unless the Federal Energy Regulatory Commission ("FERC") finds that the pipeline serves a "public convenience and necessity." 15 U.S.C. § 717f(e). If the pipeline serves

a public use under the Natural Gas Act, it should likewise be found to serve a public use under § 54-1-23.

This will be an open access pipeline. It will allow vast amounts of natural gas in West Virginia to be developed and transported to the markets in the Southeast. (Appx. 301-02.) The pipeline will provide needed capacity for additional development of natural gas in West Virginia. (Appx. 239.) This will benefit both gas producers and gas owners in this state on a nondiscriminatory basis. (Appx. 223-25, 239, 272-73.)

The McCurdys contend that a pipeline is public use under West Virginia law if, and only if, it provides gas to consumers in West Virginia along its entire route. (Respondents' Brief at 6.) Under the McCurdys' view, a pipeline that transports gas from producers outside West Virginia to consumers in West Virginia is a public use, but a pipeline that transports gas from producers in West Virginia to consumers in other states is not a public use. This makes no sense, and it is contrary to West Virginia's policy and "public interest" to encourage and promote development, production, and utilization of the state's gas resources. W. Va. Code § 22C-9-1(a)(1). As explained below, both types of pipelines serve a public use, and companies should have the right to survey locations for them under § 54-1-3.

II. ARGUMENT

A. THIS WILL BE AN OPEN ACCESS PIPELINE, WHICH MUST PROVIDE TRANSPORTATION OF GAS ON A NONDISCRIMINATORY BASIS

MVP is seeking a certificate from FERC to construct an open access pipeline. (Appx. 303.) By Order 436, FERC required all interstate pipeline operators to

provide open access transportation services for all shippers. 50 Fed. Reg. 42408 (Oct. 18, 1985). By law, the operators must provide services “without undue discrimination, or preference.” 18 C.F.R. § 284.7(b). This means that producers in West Virginia will have the opportunity to sell their gas to downstream buyers and to have the gas transported through the pipeline on a nondiscriminatory basis.

Over 95% of the gas that will be transported through this pipeline will be produced from land in West Virginia. (Appx. 226-27.) MVP will not produce the gas or purchase the gas. (Appx. 224-25, 270.) Rather, it simply will transport the gas for others at rates approved by FERC. (Appx. 223-26, 270.)

In their brief, the McCurdys profess not to understand these principles (Respondents’ Brief at 18-19), but they all flow from the nature of the pipeline and applicable federal law. *See* 18 C.F.R. § 284.7(b).

The McCurdys cite *Associated Gas Distribs. v. F.E.R.C.*, 824 F.2d 981, 1002 (D.C. Cir. 1987), for the proposition that interstate pipelines are not common carriers. (Respondents’ Brief at 20.) In *Associated Gas*, the court upheld FERC Order 436, which imposed the open access requirement. And while the court held that Order 436 did not subject interstate pipeline operators to all the duties of common carriers, the court said that the order did “impose obligations encompassing the core of a common carriage duty.” *Id.* at 997. As the court later described Order 436, “In effect, the Commission for the first time imposed the duties of common carriers upon interstate pipelines.” *United Distrib. Cos. v. F.E.R.C.*, 88 F.3d 1105, 1123-24 (D.C. Cir. 1996) (upholding FERC Order 636, which further promoted competition by separating the sale

of gas from the transportation of natural gas); *see El Paso Natural Gas Co. v. F.E.R.C.*, 96 F.3d 1460, 1462 (D.C. Cir. 1996) (describing an open access pipeline as “one that is obligated, like a common carrier, to provide transportation service on a non-discriminatory basis”); *In re Assessment of Pers. Prop. Taxes*, 234 P.3d 938, 956 (Okla. 2008) (“In FERC Order No. 436, FERC imposed common carrier status on natural gas pipeline companies, conditioning their receipt of a critical certification on their ‘acceptance of non-discrimination requirements guaranteeing equal access for all customers’ to certain transportation services.”).

Likewise, West Virginia Code § 24-3-3a is entitled “Gas utility pipelines declared as common carriers; commission approval of certain transportation.” The section goes on to provide for regulation of both intrastate and interstate pipelines in certain particulars.

Whether one uses the term “contract carrier” or “common carrier” to describe MVP makes no difference. The fact is that MVP will operate an open access interstate pipeline, which will provide transportation to West Virginia producers on a nondiscriminatory basis. As discussed below, this fact alone establishes that the pipeline is for a public use.

B. AN OPEN ACCESS INTERSTATE PIPELINE IS FOR A PUBLIC USE

The federal courts in both West Virginia and Virginia have held that interstate pipelines represent a public use. In *Equitrans, L.P. v. 0.56 Acres*, No. 1:15CV106, 2015 WL 7300548, *5 (N.D. W. Va. Nov. 18, 2015), the court held that an

interstate pipeline serves the public interest in the transportation and marketing of natural gas. *Id.* The court further held that the delegation of condemnation authority to an interstate carrier “furthers a legitimate public interest and does not violate the Fifth Amendment.” *Id.*

Likewise, in *Klemic v. Dominion Transmission, Inc.*, No. 3:14-CV-00041, 2015 WL 5772220, *15-16 (W.D. Va. Sept. 30, 2015), the court held that an interstate pipeline was in the public interest and served a public purpose. The court rejected the landowners’ argument that the company had to have a certificate from FERC before it could survey. *Id.* The court further held that the Virginia statute allowing surveys facilitates the transportation and selling of natural gas and thereby serves a public purpose. *Id.*

The *Equitrans* and *Klemic* cases recognize that the public use concept should be construed broadly. “[T]he Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking ‘is rationally related to a conceivable public purpose.’” *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (quoting *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)). The Court should follow these cases and find that an interstate gas pipeline that moves gas from producers in West Virginia to consumers in other states constitutes a public use under § 54-1-3.

Other courts addressing the issue have uniformly held that providing open access to shippers satisfies any requirement that the pipeline be for a public use. *See Mid-Am. Pipe Line Co. v. Missouri Pac. R.R. Co.*, 298 F. Supp. 1112, 1123 (D. Kan.

1969); *Ralph Loyd Martin Revocable Trust v. Arkansas Midstream Gas Servs. Corp.*, 377 S.W.3d 251, 258 (Ark. 2010); *Linder v. Arkansas Midstream Gas Servs. Corp.*, 362 S.W.3d 889, 897 (Ark. 2010); *Smith v. Arkansas Midstream Gas Servs. Corp.*, 377 S.W.3d 199, 205-06 (Ark. 2010); *Iowa RCO Ass’n v. Illinois Commerce Comm’n*, 409 N.E.2d 77, 80 (Ill. App. Ct. 1980); *Ohio Oil Co. v. Fowler*, 100 So.2d 128, 131 (Miss. 1958); *Crawford Family Farm P’ship v. Transcanada Keystone Pipeline, L.P.*, 409 S.W.3d 908, 923-24 (Tex. App. 2013); *Peck Iron & Metal Co. v. Colonial Pipeline Co.*, 146 S.E.2d 169, 172 (Va. 1966).

A public use is not determined by the number of users but by the nature of the use. In *Waynesburg S.R. Co. v. Lemley*, 154 W. Va. 728, 735-36, 178 S.E.2d 833, 837-38 (1970), the railroad at issue was established to serve only two customers – two coal companies in the area. *Id.* Nevertheless, the Court found the railroad served a public use because the railroad was required to provide nondiscriminatory access to other shippers, if any, in accordance with federal regulations. *Id.* See also *Handley v. Cook*, 162 W. Va. 629, 633, 252 S.E.2d 147, 149 (1979) (holding that, for purposes of determining public use, there is “no distinction between residential and commercial users”).

In their brief, the McCurdys argue that shippers are “a small class” and “are not the general public.” (Respondents’ Brief at 21) But the McCurdys admit on the very next page of their brief that public use is *not* determined ““by the number of persons who avail themselves of the use.”” (*Id.* at 22) (quoting *Lemley*, 154 W. Va. at 736, 178 S.E.2d at 838). Moreover, the McCurdys and the circuit court have left out of their analysis the

many landowners who will benefit by having their gas developed and shipped. (Appx. 224-25, 239, 272-73.)

The McCurdys cite *Bluegrass Pipeline Co., LLC v. Kentuckians United to Restrain Eminent Domain, Inc.*, No. 2014-CA-000517-MR, 2015 WL 2437864 (Ky. Ct. App. May 22, 2015). In that case, the proposed pipeline would transport gas from Pennsylvania, West Virginia, and Ohio to the Gulf of Mexico. *Id.* at *1. Therefore, not only would the proposed pipeline not serve Kentucky consumers, it would also not serve Kentucky producers or mineral owners.

The McCurdys also cite *Columbus Waterworks Co. v. Long*, 25 So. 702, 703 (Ala. 1899), *Adams v. Greenwich Water Co.*, 83 A.2d 177, 182 (Conn. 1951), and *Clark v. Gulf Power Co.*, 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967), for the proposition that a state can only authorize the exercise of eminent domain for a public use within the state's borders. (Respondents' Brief at 10.) However, the McCurdys do not cite any case holding that open, nondiscriminatory access to producers and shippers within the state is not such a public use, and MVP is aware of no such case.

C. THE PIPELINE WOULD SATISFY THE FIXED AND DEFINITE USE TEST

1. *The Fixed and Definite Use Test Should Not Be Read as Requiring Deliveries to Consumers in West Virginia.*

The McCurdys rely upon a line of cases from the late 1800s and early 1900s to support their argument that an interstate gas pipeline does not represent a public

use. The McCurdys first cite *Varner v. Martin*, 21 W. Va. 534, 556 (1883), as establishing test for public use:

First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the Legislature; second, this *public use* must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property.

Next, the McCurdys cite *Carnegie Natural Gas Co. v. Swiger*, 72 W. Va. 557, 79 S.E. 3, 9 (1913), for how this test should be applied to a gas pipeline. In that case, the Court said:

Pipe line companies organized for transporting gas must serve the people with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities.

Id. Based on this sentence, the McCurdys contend that MVP's proposed pipeline is not a public use because it will not deliver gas to West Virginia consumers along its entire length.

In the cases cited by the McCurdys, the pipelines did not provide open access to any other producers and shippers. *See Swiger*, 72 W. Va. 557, 79 S.E. at 10 (holding pipeline to be owned and used by single producer to ship its gas to its customers located primarily out-of-state was for a public use); *Hardman v. Cabot*, 60 W. Va. 664,

55 S.E. 756, 759 (1906) (holding that pipeline to be owned and used by single producer to ship gas to its customers in the town of Brooksville was for a public use); *Charleston Natural Gas Co. v. Low*, 52 W. Va. 662, 44 S.E. 410, 410, 412-13 (1901) (holding that pipeline to be owned and used by single producer to ship its gas to its customers in Charleston was for a public use). Because the pipelines in those cases did not provide open access, deliveries to consumers were found to be the public use.

Delivering gas to consumers in West Virginia is *a* way of establishing public use, but it is not the *only* way. Certainly, if a pipeline delivers gas to West Virginia consumers it serves a public use, but a pipeline should also be found to serve a public use if it delivers gas from West Virginia landowners and producers to consumers in other states.

Using the test from *Varner*, without any added requirement from *Swiger*, the public has a fixed and definite use in the MVP pipeline because it will be an open access pipeline that will serve shippers in a nondiscriminatory manner. *Varner*, 21 W. Va. at 556. The pipeline is “a needful one for the public.” *Id.* And it would be difficult, if not impossible to transport the gas without the pipeline. *Id.*

It makes no sense to add a requirement from *Swiger* – as the circuit court did here – that the pipeline deliver gas to West Virginia consumers along its entire length. For a pipeline of this size and pressure, it is not feasible to add taps for all businesses or communities along the way. (Appx. 257-58, 260.) Even if it were feasible, such a requirement fails to recognize that a pipeline can serve the public interest by transporting gas as well as by delivering gas.

2. *The Pipeline Has the Potential to Deliver Gas to Consumers in West Virginia.*

Even if the fixed and definite use test were found to require deliveries to consumers in West Virginia, the pipeline would meet that requirement.

The record clearly shows that the MVP pipeline will have two interconnections. One will be to the WB pipeline near Charleston, and the other is to the Transco pipeline in Pittsylvania County, Virginia. (Appx. 225-27.) The WB line has its own interconnections in West Virginia. (Appx. 227-28.) Those interconnections deliver gas to consumers in West Virginia. (Appx. 228, 259.)

As Mr. Posey explained at the hearing, MVP does not own the gas being transported. (Appx. 224, 270.) The shippers, not MVP, decide where the gas goes. (Appx. 224-26, 259, 264, 270.) Therefore, given this fact and the fact that the pipeline is yet to be built, Mr. Posey could not cite specific contracts for the delivery of gas in West Virginia. Nevertheless, it is undisputed that there is a potential for deliveries to consumers in West Virginia through the WB line. (Appx. 227-28, 259.)

In addition to deliveries through the WB line, gas may also be delivered to consumers in West Virginia through agreements with local distribution companies. (Appx. 228, 231-32, 239-41, 248.) At present, MVP does not have any agreements with local distribution companies in West Virginia, but it does have an agreement with a local distribution company in Virginia. (Appx. 247-48, 256.) Mr. Posey testified, however, that he expects business with local distribution companies in West Virginia to develop. (Appx. 228, 231-32.) Negotiations are ongoing. (Appx. 240-41, 248, 258-59.)

Because there are no current contracts to deliver gas to consumers in West Virginia, the circuit court found that it is only “possible” that the MVP pipeline will make such deliveries. (Appx. 4.) With respect to the WB line, the circuit court said it “cannot find that any West Virginia consumers would be served by gas that would flow through the [MVP] Pipeline via the WB Pipeline.” (Appx. 5.)

While MVP was unable to show existing contracts for deliveries of gas to consumers in West Virginia, it was able to show a strong potential for deliveries to consumers in West Virginia. The record clearly shows that shippers will have the ability to deliver gas in West Virginia through the interconnection with the WB line. (Appx. 228, 259.) Likewise, local distribution companies in West Virginia may make agreements with MVP for taps. (Appx. 231, 239-40.) Given that MVP is still in the process of obtaining a certificate to construct the line, this potential for deliveries in West Virginia should satisfy any local delivery requirement under *Swiger*.

Swiger does not require proof that deliveries of gas are guaranteed along the pipeline’s entire length. Rather, it is enough to show the company has a “willingness to serve all persons applying, subject to its proper rules and regulations,” in other words that it “is seeking business.” *Swiger*, 72 W. Va. 557, 79 S.E. at 10. And the Court found a public use in *Swiger* despite that “but few are shown to be taking gas from the particular line sought to be extended.” *Id.*; see *Lemley*, 154 W. Va. at 736, 178 S.E.2d at 838 (holding public use “is to be determined by the character of such use and not by the number of persons who avail themselves of the use”); *Bradley v. Degnon Contracting Co.*, 120 N.E. 89, 93 (N.Y. 1918) (holding that public use “is determined by the extent of

the right by the public to its use, and not by the extent to which that right is or may be exercised”). MVP has proven its willingness to serve West Virginia consumers, and it is actively seeking such business. (Appx. 240-41, 248, 258-59.) This evidence satisfies *Swiger*.

Although the circuit court said the burden was on MVP to prove public use (Appx. 9), the burden is actually on the landowner to prove that a proposed project is not for a public use. *Lemley*, 154 W. Va. at 735, 178 S.E.2d at 837; *Pittsburgh & W. Va. Gas Co. v. Cutright*, 83 W. Va. 42, 97 S.E. 686, 688 (1918). In their brief, the McCurdys say it is not “clear” that the burden of proof is on them. (Respondents’ Brief at 7.) They cite *Gauley & S.R. Co. v. Vencill*, 73 W. Va. 650, 80 S.E. 1103, 1106 (1914), in which Court questioned – without deciding – whether the burden should be on the landowner. That question was answered four years later in *Cutright*, and 56 years later in *Lemley*.

In their brief, the McCurdys suggest that MVP should have assigned error to the Court’s finding that deliveries of gas in West Virginia are not certain. (Respondents’ Brief at 13.) This argument fails for two reasons. First, under W. Va. R. App. P. 10(c)(3), an assignment of error “will be deemed to include every subsidiary question fairly comprised therein.” The Court liberally construes assignments of error when determining the issues presented for review. *Tudor’s Biscuit World of Am. v. Critchley*, 229 W. Va. 396, 402 n.8, 729 S.E.2d 231, 237 n.8 (2012); see *In re K.R.*, 229 W. Va. 733, 744 n.23, 735 S.E.2d 882, 893 n.23 (2012). In this case, MVP assigned error to the Court’s finding that the pipeline does not represent a public use. Under Rule 10(c)(3), this assignment of error includes all subsidiary issues that have been adequately

briefed in this case. Whether the pipeline must or will deliver gas to consumers in West Virginia has been fully briefed by the parties. (Petitioner's Brief at 10-20; Respondents' Brief at 8-27.)

Second, whether deliveries of gas to consumers in West Virginia are guaranteed is not the determinative issue. As explained earlier, the pipeline represents a public use whether or not it will deliver gas to consumers in West Virginia. And, even if deliveries to consumers in West Virginia are relevant or required under *Swiger*, the record adequately shows a potential for deliveries through the WB line or through agreements with local distribution companies. (Appx. 228, 231, 239, 259.) In fact, in its final order, the circuit court itself recognized the potential for deliveries. (Appx. 4-5.) There was no need for MVP to assign any separate error on this point.

D. THE COURT CAN FIND A RIGHT OF ENTRY WITHOUT REACHING THE QUESTION OF PUBLIC USE.

As MVP explained in its opening memorandum, a number of courts have held that an analysis of public use is premature where – as here – the company is only seeking a right of entry for surveying. These courts recognize that while a public use must be shown in order to condemn land, a public use does not have to be shown in order to survey land. See *Walker v. Gateway Pipeline Co.*, 601 So.2d 970, 975 (Ala. 1992); *Carlisle v. Dep't of Pub. Utilities*, 234 N.E.2d 752, 754 (Mass. 1968); *Northville Dock Pipe Line Corp. v. Fanning*, 237 N.E.2d 220, 222 (N.Y. 1968); *Square Butte Elec. Coop. v. Dohn*, 219 N.W.2d 877, 883-84 (N.D. 1974); see also *Rockies Express Pipeline, LLC*

v. *Billings*, No. 2:07-CV-982, 2007 WL 3125320, at *2 (S.D. Ohio Oct. 23, 2007); *Baker*, 2006 WL 461042, at *14.

In support of their argument that public use must be proven before any entry for surveying, the McCurdys cite *Bluegrass Pipeline*, 2015 WL 2437864, but that case did not involve a surveying statute. Rather, that case decided whether the company had the power to condemn land and construct a pipeline. *Id.* at *1, 4. It was undisputed that the condemnation of land for a permanent easement was an exercise of eminent domain. In obvious contrast, MVP is not seeking to condemn the McCurdys' land at this time. MVP seeks only a temporary right of access for surveying under § 54-1-3.

The McCurdys also cite *Lemley*, 154 W. Va. 728, 178 S.E.2d 833, but that case does not support them. Again, a temporary right of entry of surveying was not at issue there. Public use was at issue because the company sought to acquire a permanent easement to construct a railroad track – a clear exercise of eminent domain. *Id.* at 730, 178 S.E.2d at 834. The McCurdys have not cited a single case in which a court held that establishing a public use was a prerequisite to the exercise of a statutory right of entry for surveying, and MVP is unaware of any such case.

If MVP condemns the McCurdys' property, it will have to show a public use. That requirement will be easily met by issuance of a certificate from FERC declaring that the pipeline is a public convenience and necessity. Indeed, if the pipeline is not found to be for a public use, the certificate will not be issued. MVP should not have to show a public use, however, in order to survey for a *proposed* pipeline.

Under W. Va. Code § 54-1-1, the Court should find that MVP is an internal improvement company with the power of eminent domain. As a result, § 54-1-3 gives MVP the right to enter property to survey for proposed projects. The question of public use only arises for a taking or damaging of property, and there is no taking or damaging in this case. In *Klemic*, 2015 WL 5772220, at **13-15, 17, the court upheld Virginia's statute providing pipeline companies with a right of entry for surveying, holding that entry for surveying did not take or damage property or otherwise violate the landowners' right to exclude. Numerous other cases have reached the same conclusion. See *Montana Co. v. St. Louis Min. & Milling Co.*, 152 U.S. 160, 169 (1894); *State v. Simons*, 40 So. 662, 662 (Ala. 1906); *Bd. of County Comm'rs of San Miguel v. Roberts*, 159 P.3d 800, 805-06 (Colo. Ct. App. 2006); *Town of Clinton v. Schrempp*, No. CV044000684, 2005 WL 407716, at *5 (Conn. Super. Ct. Jan. 14, 2005); *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890 (Ga. 1984); *City of Melvindale v. Trenton Warehouse Co.*, 506 N.W.2d 540, 541 (Mich. Ct. App. 1993); *Duke Power Co. v. Herndon*, 217 S.E.2d 82, 84 (N.C. Ct. App. 1975); *Cleveland Bakers Union Local No. 19 Pension Fund v. State, Dept. of Admin. Servs.-Pub. Works*, 443 N.E.2d 999, 1002 (Ohio Ct. App. 1981); *Lewis v. Texas Power & Light Co.*, 276 S.W.2d 950, 956 (Tex. Civ. App. 1955).

III. CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court and enter final judgment declaring that MVP has the right to enter upon the McCurdys' land for surveying under West Virginia Code § 54-1-3.

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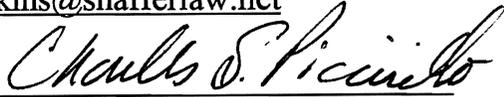
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**IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Docket No. 15-0919

Appeal from a Final Order of the
Circuit Court of Monroe County (Case No. 15-C-19)

MOUNTAIN VALLEY PIPELINE, LLC,

Defendant/Petitioner,

v.

BRIAN C. MCCURDY and
DORIS W. MCCURDY,

Plaintiffs/Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2016, a true copy of the

foregoing Petitioner's Reply Brief has been mailed to:

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