

Cite as 2018 Ark. App. 539
ARKANSAS COURT OF APPEALS
DIVISION IV
No. CV-17-990

MOSES WATTS, SR., AND RUBY WATTS APPELLANTS V. ENTERGY ARKANSAS, INC. APPELLEE	Opinion Delivered November 7, 2018 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. 35CV-15-259] HONORABLE ROBERT H. WYATT, JR., JUDGE AFFIRMED
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BRANDON J. HARRISON, Judge

Moses Watts, Sr., and Ruby Watts appeal a \$1,995 judgment representing just compensation for the condemnation of a utility easement over their property. A timeline is helpful to understand their arguments against the condemnation process.

- *June 1 (2015).* Entergy Arkansas, Inc., filed a petition in circuit court, titled an “application,” to condemn a portion of the Wattses’ property. The petition stated, in part, that Entergy engineers had determined a permanent utility easement was needed across the Wattses’ property and that an agreement with the property owners could not be reached.
- *June 15.* The circuit court granted Entergy an order of immediate possession of the

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easement. Entergy deposited \$1,995 into the court’s registry—what it considered to be the fair-market value of the property needed for the use. *See Ark. Code Ann. § 18-15-508 (Repl. 2015)* (When an electric-utility company deposits money in compliance with the order of the court, the company can enter the land and proceed with its work before a jury trial on just compensation.).

- *June 27.* Clay Nealy, a process server for The Covert Connection, LLC, personally served Moses Watts, Sr., with the June 1 petition and June 15 order. Substituted service was made on Ruby Watts. The summonses issued in the case stated that Ruby and Moses had thirty days to file a written answer to the lawsuit and “attached complaint.”
- *July 6.* Proof of service of the summonses was filed in the circuit court.
- *July 21.* The Wattses filed a “Motion for Dismissal of Application for Condemnation of Lands And For Immediate Possession Thereto.” They argued, among other things, that the circuit court’s order of immediate possession was “illegal,” “unreasonably wrong,” and a violation of their constitutional rights under the Fourteenth Amendment because “the Defendants [the Wattses] were served with Motion and Order at the same time.”
- *July 23.* Entergy responded to the motion to dismiss and argued that it had complied with all Arkansas laws allowing it to pursue

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eminent-domain rights to install and maintain electrical lines, poles, and facilities.

- *February 19 (2016).* Ruby Watts argued during a hearing on the Wattses' motion to dismiss that the Wattses were denied due process when the June 1 petition was filed and the immediate order of possession was given “seven, eight, nine days later.” “[W]e were not afforded the ten-day notice to come in and object or answer [the June 1 petition] . . . We didn’t get that right . . . due process under the Fourteenth Amendment.”
- *February 22.* The circuit court denied the Wattses' motion to dismiss. The court wrote that Entergy complied with “the applicable statutory law . . . Ark. Code Ann. §§ 18-15-501, et seq.” It concluded that the “due process rights of Moses Watts, Sr. and Ruby Watts have not been violated.”
- *August (2017).* A Jefferson County jury rendered a verdict on just compensation for the property Entergy took, and the circuit court entered a judgment according to the jury's verdict. Moses and Ruby Watts appealed.

The Wattses' first point on appeal is hard to decipher, but we read it to contend that the Wattses' due-process rights were violated because the circuit court issued the June 15 order of immediate possession on an ex parte basis and that they did not get the ten-day notice required in Ark. Code Ann. § 18-15-504(a). The Wattses also argue that they had a right to request a preliminary hearing and that it is contrary to public

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policy and judicial integrity to permit private utilities to delay service of condemnation-related papers to facilitate *ex parte* seizures of property.

We begin with the due-process concerns. Procedural due process generally includes the right to notice and an opportunity to be heard before a person may be deprived of a significant property interest, U.S. Const. amends. V, XIV; *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). In a condemnation proceeding, due process does not require the entity condemning the property to give the landowner notice in advance of the taking. *Bragg v. Weaver*, 251 U.S. 57 (1919); *see also Wilmoth v. Sw. Ark. Util. Corp.*, 2015 Ark. App. 185, at 3–4, 457 S.W.3d 694, 697–98. The constitutional minimum is that the owner be given an opportunity to be heard at some stage of the proceeding and reasonable notice of the pending suit. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding that due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”); *Walker v. City of Hutchinson, Kan.*, 352 U.S. 112 (1956) (holding that notice by publication in an eminent-domain action, even when *in rem*, is constitutionally inadequate when reasonable alternatives would provide better notice to the owner and interested parties).

We conclude that no due-process violation occurred. The Wattses received personal notice of the lawsuit when Entergy’s petition for condemnation and the court’s *ex parte* order were personally handed to

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Moses Watts and substituted service was given to Ruby Watts. Though it was (understandably) counter-intuitive to the Wattses, that the order of possession was obtained *ex parte* is not itself a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Wilmoth*, 2015 Ark. App. 185 at 3–4, 457 S.W.3d at 697–98. While the order of possession was entered before the Wattses received any notice, the circuit court heard the property owners’ arguments during several pretrial hearings. And the Wattses were permitted a jury trial during which they presented evidence on why they were not being justly compensated for Entergy’s taking. All this occurred before a final judgment was entered in the case. The constitutional minimum was met, and the circuit court correctly ruled that there were no due-process violations.

To the extent the Wattses argue here that we should reverse the adverse judgment because they did not receive the ten-day notice required under the statute, we also affirm. Here is the part of the statute at issue:

- (a) If an electric utility, having surveyed and located its line under the power conferred by this section . . . fails to obtain, by agreement with the owner of the property through which the line may be located, the right-of-way over the property, it may apply by petition to the circuit court of the county in which the property is situated to have the damages for the right-of-way assessed, giving the owner of the property at least ten (10) days’ notice in

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writing by certified mail, return receipt requested, of the time and place where the petition will be heard.

Ark. Code Ann. § 18-15-504(a).

Subsection 504(a) is part of a rather extensive legislative scheme allowing private corporations to condemn property for a public purpose. *See Ark. Code Ann. § 18-15-503(b)(1)*. A condemning authority like Entergy has broad discretion to determine the necessity of the taking of private land; but it may not condemn more property than is necessary, must use it for a public purpose, and must pay the owner just compensation for the taking. Ark. Const. art. 2, § 22. Each of Arkansas's eminent-domain statutes may require notices and procedures that depart from the Arkansas Rules of Civil Procedure.

There has been a call for the legislature to clarify the "patchwork of statutes on eminent domain." *City of Fort Smith v. Carter*, 364 Ark. 100, 110, 216 S.W.3d 594, 601 (2005).

As we mentioned earlier, the Wattses argued to the circuit court that they did not receive the type of notice related to Entergy's initial petition that Ark. Code Ann. § 18-15-504(a) requires. Specifically, they complain that the ex parte order of possession was entered before they received notice of the lawsuit. At no time did the Wattses challenge Ark. Code Ann. § 18-15-504(a) as being unconstitutional, nor did they argue that the June 27 personal service of process was invalid. Like the circuit court, we accept Entergy's position

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that subsection 504(a)'s ten-days' notice of the "time and place where the petition will be heard" refers to a trial date. *See Ark. Const., art. 12, § 9* (Arkansas Constitution gives landowners a right to a jury trial when a private corporation is the condemning authority). Entergy could not provide notice of a trial date to the Wattses when it initially served the landowners because the trial date had not yet been scheduled. It is undisputed, however, that the Wattses knew about Entergy's petition more than ten days before the jury trial convened; in fact, the trial was held more than two years after Entergy had filed its initial petition in the circuit court. Because the Wattses received notice of the jury-trial date more than ten days in advance of the trial, we see no reversible error and affirm the circuit court's order.

At the end of their brief filed in this court, the Wattses challenge the evidence supporting the jury's verdict as being "manifestly insufficient" for two reasons. First, the jury did not award damages for land that was severed from the rest of the property by the easement; second, the jury did not give separate compensation for the value of the timber within the easement.

When a private corporation takes property through the process of eminent domain, damages are properly awarded on the full fair-market value for the easement taken, plus any damage occurring to the remainder of the property. *Arkansas Louisiana Gas Co. v. Howell*, 244 Ark. 86, 90, 423 S.W.2d 867, 869 (1968). A landowner must prove by a preponderance of the

evidence the amount of just compensation. *Prop. Owners Imp. Dist. No. 247 of Pulaski Cty. v. Williford*, 40 Ark. App. 172, 181, 843 S.W.2d 862, 868 (1992). We review the jury's verdict to see if it is supported by substantial evidence. *Ark. St. Hwy. Comm'n v. Taylor*, 269 Ark. 458, 466, 602 S.W.2d 657, 661 (1980).

In this case, the circuit court granted Entergy's motion in limine to exclude any undisclosed expert witness and any other witness who was not also a record title owner from testifying about the property valuation. That ruling has not been challenged by the Wattses here. During the trial, the only person who testified about the property's value was Entergy's appraiser, J.T. Ferstl, who said that he considered, but did not apply, severance damages to the south end of the property during his appraisal. According to Ferstl, the southern part of the property severed by the easement was not damaged because the owners used the southern portion as timber property, it could continue to be used as a timber property, and the primary residential potential of the acreage was the home, which was on the north end of the property. This testimony is substantial evidence that supports the jury's conclusion that the Wattses suffered no severance damages. As for additional compensation for trees within the easement, that is not a separate item of damage under Arkansas law. *Cramer v. Ark. Ok. Gas Corp.*, 316 Ark. 465, 468, 872 S.W.2d 390, 392 (1994) (utility that acquired easement to construct gas pipeline through eminent domain proceeding was not required to compensate

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landowner for injury to trees occurring during construction of pipeline).

Affirmed.

ABRAMSON and BROWN, JJ., agree.

Sandy McMath, for appellants.

Friday, Eldredge & Clark, LLP, by: *Bruce B. Tidwell*, for appellee.

**IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ARKANSAS
2nd DIVISION**

ENTERGY ARKANSAS, INC. PLAINTIFF

v. Case No.: 35CV-2015-259

**MOSES WATTS, SR. and RUBY WATTS,
husband and wife; and any persons
or entities claiming any interest
in property in the Fractional SW 1/4
of Section 1, Township 6 South,
Range 11 West in Jefferson County,
Arkansas**

DEFENDANTS

JUDGMENT

(Filed Aug. 31, 2017)

On August 22, 2017, this cause came on to be heard, with the Plaintiff, Entergy Arkansas, Inc. (“Entergy”), appearing through its representatives, Janan Honeysuckle and Charles McGee, and through its attorney, Bruce Tidwell. Defendant Moses Watts, Sr. and Ruby Watts (collectively the “Watts”) appeared *pro se*.

All parties being prepared for trial, a jury composed of twelve (12) members of the regular panel of petit jurors of this Court was selected, impaneled and sworn according to law to try the issues of fact arising in this case.

After hearing all of the evidence introduced, the instructions of the Court and the arguments of counsel, the twelve (12) jurors retired to consider their verdict,

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and after deliberating thereon returned the following unanimous verdict relating to the just compensation to be paid to the Watts for the right-of-way/easement acquired by Entergy over, across and through their property:

We, the jury, find that the Just Compensation owed by Entergy Arkansas to the property owner – Moses Watts – for the taking of the Easement over his property on June 9, 2015, is as follows:

\$ 1,995.00 Fair market value of the Easement containing 0.95 acres as of June 9, 2015;

Plus

\$ - 0 - Damage, if any, to the remaining 16.30 acres of the Owner's property caused by the Easement.

=====

\$ 1,995.00 Total Compensation Owed to the Property Owner

/s/ Steven Moring, Foreperson

Pursuant to the verdict rendered by the jury, the Watts are entitled to have and recover from Entergy a total of one thousand nine hundred ninety-five and no/100 dollars (\$1,995.00) as just compensation for the right-of-way/easement over, across and through their property as specifically described on **Exhibit “A”** which is attached hereto and incorporated herein by reference (hereinafter referred to as the **“Easement”**).

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Entergy is a duly constituted public utility doing business in the State of Arkansas for the purpose of generating, transmitting and supplying electricity for public use and the Easement set forth herein is in furtherance of its provision of electrical service to residents of the State of Arkansas and is to allow Entergy Arkansas to construct, operate and maintain "such lines of wires, cables, poles or other structures necessary for the transmission or distribution of electricity." *See, ARK. CODE ANN. §18-15-503.*

The sum of one thousand nine hundred ninety-five and no/100 dollars (\$1,995.00) was previously deposited with this Court by Entergy and is currently being held in the registry of the Court by the Jefferson County Circuit Clerk. The Jefferson County Circuit Clerk is hereby ordered to pay the deposit amount of one thousand nine hundred ninety-five and no/100 dollars (\$1,995.00) to the Watts in full and complete satisfaction of this Judgment. Payment of this deposit/judgment amount to the Watts shall be mailed to them at the following address: P.O. Box 9207, Pine Bluff, AR 71611.

In addition, following entry of this Judgment, Entergy is hereby ordered to file a copy of the same with the Circuit Court of Jefferson County so that such Judgment and description of the Easements is included in the real property records of Jefferson County, Arkansas.

IT IS SO ORDERED this 28 day of August, 2017.

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/s/ Robert Wyatt, Jr.

HON. ROBERT H. WYATT, JR.

JUDGMENT PREPARED BY

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Attorneys for Entergy Arkansas, Inc.

By /s/ Bruce B. Tidwell
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Direct Phone – (501) 370-1496

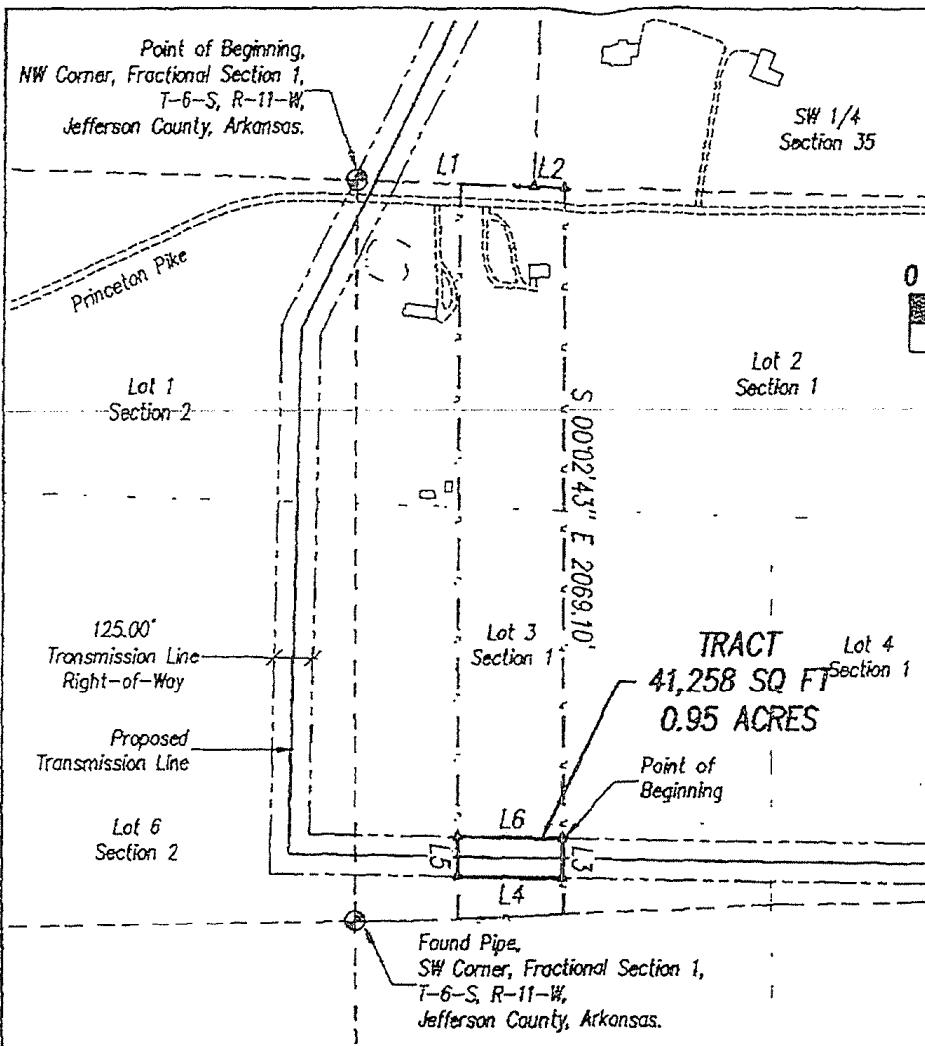
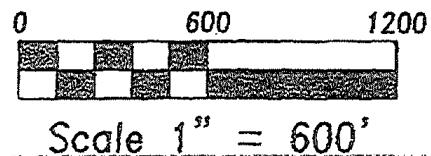
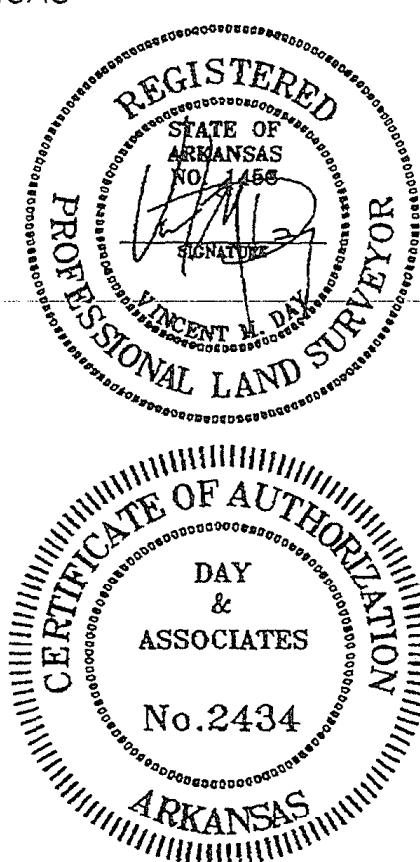


EXHIBIT "A"
JEFFERSON COUNTY, ARKANSAS
Located in the
Fractional Section 1, T-6-S, R-11-W.



SURVEYOR'S NOTES:
THIS PLAT REPRESENTS AN EASEMENT
AS DESCRIBED AND SHOWN AND IS NOT
INTENDED TO BE A BOUNDARY SURVEY.

Line	Bearing	Distance
L1	S 88°13'52" E	564.56'
L2	S 88°19'48" E	95.77'
L3	S 00°02'43" E	125.02'
L4	N 89°00'58" W	330.06'
L5	N 00°02'43" W	125.02'
L6	S 89°00'58" E	330.07'



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ENTERGY SERVICES, INC.	
WHITE BLUFF - WOODWARD CROSSING THE PROPERTY OF MOSES WATTS, SR DEED BOOK 922; PAGE 347	
APPROVED BY:	DATE: 3/17/2015
CHECKED BY: VMD	SCALE: 1" = 600'
DRAWN BY: LMR	CEA NO.
No.	
Entergy	PLOT
SH. 1 OF 1	

Legal Description:
A part of Fractional Section 1, Township 6 South, Range 11 West, Jefferson County, Arkansas and being more fully described as follows: Commencing at the Northwest Corner of the Fractional Section 1 and run thence South 88 deg. 13 min. 52 sec. East along the North line thereof for a distance of 564.56 feet; thence South 88 deg. 19 min. 48 sec. East along said North line for a distance of 95.77 feet; thence South 00 deg. 02 min. 43 sec. East for a distance of 2069.10 feet to the Point of Beginning of the land herein described; thence South 00 deg. 02 min. 43 sec. East for a distance of 125.02 feet; thence North 89 deg. 00 min. 58 sec. West for a distance of 330.06 feet; thence North 00 deg. 02 min. 43 sec. West for a distance of 125.02 feet; thence South 89 deg. 00 min. 58 sec. East for a distance of 330.07 feet to the Point of Beginning, containing 0.95 acres, more or less.

**IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ARKANSAS
2nd DIVISION**

ENTERGY ARKANSAS, INC. PLAINTIFF

v. **Case No.: 35CV-2015-259**

**MOSES WATTS, SR. and
RUBY WATTS, Husband
and wife; and any persons or
entities claiming any interest
in property in the Fractional
SW 1/4 of Section 1, Township 6
South, Range 11 West in
Jefferson County, Arkansas**

Jefferson County, Arkansas DEFENDANTS

ORDER OF IMMEDIATE POSSESSION

Before this Court is the Application for Condemnation of Lands and for Immediate Possession Thereof (the “Application”) of the Plaintiff, Entergy Arkansas, Inc. (“Entergy”), praying for immediate possession of the permanent “Easement” described in Exhibit “A” to the Application and this Order.

Entergy has alleged that the immediate possession of the Easement is necessary in order to not retard progress of its construction and operation of electrical lines, poles, equipment and facilities.

Entergy will deposit the sum of one thousand nine hundred ninety-five and no/100 dollars (\$1,995.00) into the registry of the Court which, in its opinion, is equal to the reasonable value of the Easement to be

condemned. Such deposit is for the purpose of making compensation and paying any damages that may be assessed against Entergy.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Circuit Clerk of Jefferson County, Arkansas, is hereby directed to accept as a deposit into the registry of the Court a check in the amount of one thousand nine hundred ninety-five and no/100 dollars (\$1,995.00) until damages can be determined for the purpose of awarding just compensation for the Easement. The Court reserves for future determination all issues concerning the amount of just compensation for the taking of the Easement.

2. Entergy is hereby granted the right of immediate entry onto and possession of the Easement as described on Exhibit "A" to the Application and this Order.

3. The Defendants, as well as their agents, successors, assigns, and anyone holding by, through, or under the Defendants are hereby required and directed to immediately surrender possession of the Easement to Entergy.

/s/Robert Wyatt, Jr.
HON. ROBERT WYATT, JR.

Order Prepared by:

FRIDAY, ELDREDGE & 6-9-15
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*Attorneys for
Entergy Arkansas, Inc.*

By: /s/Bruce B. Tidwell
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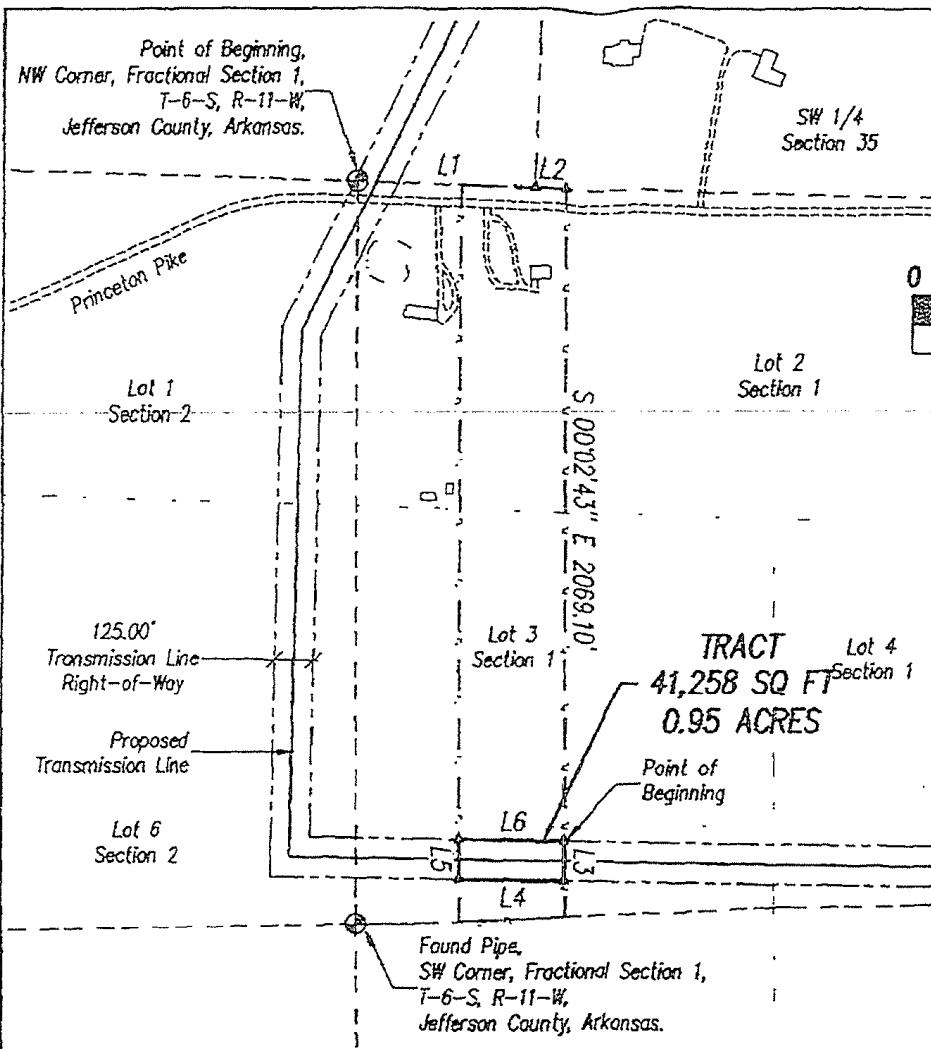
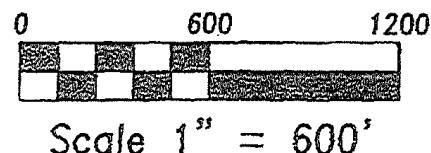
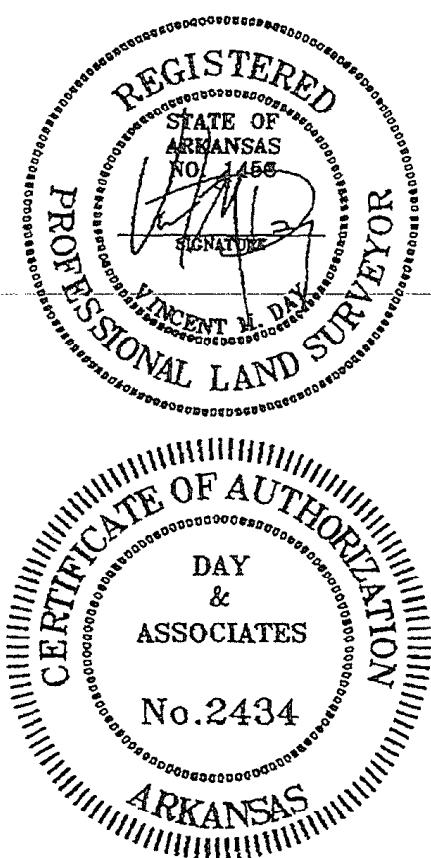


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Located in the
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JE-140

ENTERGY SERVICES, INC.	
WHITE BLUFF - WOODWARD CROSSING THE PROPERTY OF MOSES WATTS, SR DEED BOOK 922; PAGE 347	
APPROVED BY:	DATE: 3/17/2015
CHECKED BY: VMD	SCALE: 1" = 600'
DRAWN BY: LMR	CEA NO.
No.	
Entergy	PLOT
SH. 1 OF 1	

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OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

JANUARY 17, 2019

RE: SUPREME COURT CASE NO. CV-18-966
MOSES WATTS, SR., AND RUBY WATTS
V. ENTERGY ARKANSAS, INC.

THE ARKANSAS SUPREME COURT ISSUED
THE FOLLOWING ORDER TODAY IN THE ABOVE
STYLED CASE:

“APPELLANTS’ PETITION FOR REVIEW IS
DENIED. WOOD, J., NOT PARTICIPATING.”

/s/ Stacy Pectol
STACEY PECTOL, CLERK

CC: SANDY S. MCMATH
BRUCE B. TIDWELL
JEFFERSON COUNTY CIRCUIT COURT
(CASE NO. 35CV-15-259)

IN THE SUPREME COURT OF ARKANSAS

MOSES AND RUBY WATTS APPELLANTS
VS. NO. CV-18-966
ENTERGY ARKANSAS, INC. APPELLEE

PETITION FOR REVIEW OF COURT OF APPEALS,
DIVISION IV
DECISION OF NOVEMBER 7, 2018, NO. CV 17-990

(Filed Nov. 26, 2018)

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PETITION FOR REVIEW

COME APPELLANTS, Moses and Ruby Watts, by and through counsel and, pursuant to Rules 2-4 and 1-2(b), respectfully pray this Honorable Court to review and reverse the decision of the Court of Appeals, Division IV, in No. CV-17-990 which affirmed the Circuit Court of Jefferson County's ex parte Order granting Appellee's eminent domain seizure application for a high voltage power line easement over their property and the Circuit Court's subsequent Order awarding them a mere \$1,995 from Appellee for that taking.

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Their petition is based upon five (5) grounds required by the Rules:

1. There is a perceived inconsistency in the Court of Appeals' acknowledgement of the applicability of Article V and Amendment XIV of the United States Constitution, the central tenet of Appellants' appeal (and which the Court of Appeals agrees requires "a right to notice and an opportunity to be heard before a person may be deprived of a significant property interest") and the historical application of those requirements, all of which the Court then blithely dismisses with the unsupported premise that those hallowed requirements are not to be followed "in advance of the taking." The opinion simply states that they were satisfied since appellants were afforded a jury trial on the issue of **how much** they should be paid for the property after it was taken, but with no recourse to contest the taking itself. The opinion does not deal with appellants' further premise that preliminary hearings upon due notice in such matters often result in negotiated compromise.
2. There is a perceived conflict in the applicability of the notice requirement in highway condemnation matters pursuant to ACA 27-67-313 and the now-construed lack of same under ACA 18-15-504, the power line easement compensation statute in the case at bar, which appellants submit should be equally applicable to the seizures upon which those payments are based. It is a manifest denial of

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equal protection and denial of due process to require notice to a highway right-of-way owner who may then “raise any question with respect to the validity of the taking” yet deny that same right to an owner faced with identical seizures by a private utility wielding the same awesome state power. The “notice” relied upon by Appellee to satisfy constitutional requirements was, as appellants pointed out to their brief, a meaningless charade. It consisted of studiously belated service of the complaint (“Application”) along with the ex parte Order almost three weeks after the latter was signed, affording Appellants no opportunity to object or seek a hearing.

3. The matter involves issues concerning the interpretation of the Constitutions of the United States and the State of Arkansas.
4. The matter involves issues of substantial public interest.
5. The matter involves issues that require clarification or modification of current precedent.
6. The matter involves issues of first impression, including, in addition to those hereinabove enumerated, the patently inadequate award of such paltry damages for the practical severance of appellant’s property and the gratuitously destructive clear cutting of excessive right of way.

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WHEREFORE, Appellants pray that the cause be accepted for Review and an appropriate briefing schedule be ordered.

Most respectfully,

/s/ Sandy S. McMath
Sandy S. McMath
Counsel for Appellants
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Little Rock, Ar 72201
501-396-5414 Phone
501-274-5115 Fax
sandymcmath@aol.com
AR Bar No 66649

Certificate of Service

A copy hereof has today been served both electronically and by First Class U.S. Mail on appellee's counsel of record, Mr. Bruce Tidwell.

/s/ Sandy S. McMath
Sandy S. McMath
