

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

2018 CA 0417

**ATCHAFALAYA BASINKEEPER, LOUISIANA BUCKET BRIGADE,
AND 350 NEW ORLEANS**

PLAINTIFFS/APPELLANTS

VS.

BAYOU BRIDGE PIPELINE, LLC AND CHRIS MARTIN

DEFENDANTS/APPELLEES

**APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, CIVIL CASE NO. 665373
THE HONORABLE R. MICHAEL CALDWELL, DIV. 24**

REPLY BRIEF OF APPELLANTS

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CIVIL PROCEEDING

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Summary of Points of Rebuttal

Defendant-Appellee Bayou Bridge Pipeline, LLC (“BBP”) sidesteps the longstanding recognition in Louisiana jurisprudence that private entities, like BBP, that are vested with the power of eminent domain for a public and necessary purpose are “quasi-public corporations.” Instead, BBP attempts to cast itself as an ordinary private corporation, dramatically downplaying the fact that, unlike ordinary private corporations, it has been delegated the *extraordinary* power to take private property (described in its brief as a mere “default tool”) precisely because it is supposed to be fulfilling a public and necessary purpose.

In its brief in this appeal, BBP asserts it is operating its pipeline as a “private, for-profit business” and not “pursuant to any delegation or contract with the state.” Appellee Br. 15. But an expropriation for a private purpose would be unconstitutional. BBP’s depiction of itself in this appeal appears to contradict its representations in expropriation proceedings where it has emphasized its status as “a common carrier under Louisiana Revised Statute §45:251(1), which includes ‘all persons engaged in the transportation of petroleum as public utilities and common carriers for hire...’”, and that “Louisiana law grants the authority to expropriate property to common carriers” and further that “the Pipeline is in the public interest and necessity.” *See* R. 23, ¶ 4.

BBP cannot have it both ways. Either it is an ordinary private corporation engaged in a purely private enterprise, in which case it may not legally assert eminent domain authority; or it is engaged in the “transportation of petroleum as [a] public utilit[y] and common carrier” in the “public interest and necessity” (R. 23, ¶ 4) which allows it to wield the extraordinary power to take private property, in which case it is a quasi-public corporation. If the latter, it must be subject to the Public Records Law.

Further, it is also already established that a private corporation is subject to the Public Records Law when it is functioning as an instrumentality of a state, parish, or municipal government. BBP attempts to obscure and complicate this basic point of law. But the Louisiana Supreme Court has recently confirmed this basic premise. *See New Orleans Bulldog Soc'y v. Louisiana Soc'y for the Prevention of Cruelty to Animals*, 2016-1809 (La. 5/3/17, 10); 222 So.3d 679. Even the district court below did not question the fact that a private corporation can be subject to the law; and, as shown below, neither do the cases BBP cites.

The question presented in this appeal is whether *this* private corporation – BBP – is subject to the Public Records Law as an instrumentality of the state, because as a common carrier it is deemed to be fulfilling a public purpose for a public necessity, and has been delegated the extraordinary sovereign power of eminent domain – the power to take private property – in order to do so.

Given the purpose of the Public Records Law, the serious consequences for Louisiana citizens and landowners, and the enormous public privilege and trust underlying the delegation of an extraordinary state power to BBP, the answer must be yes.

REBUTTAL

I. BBP Is a Quasi-Public Corporation.

BBP avoids any mention in its brief of the public and necessary purpose of the function it is deemed to serve as a common carrier and the basis of its eminent domain authority. But Louisiana courts have long recognized that entities like BBP, which are engaged in the transportation of petroleum as a public utility and common carrier and vested with the power of eminent domain are “quasi-public corporations.” *See* Appellants’ Opening Br. at 12-18 citing, *inter alia*, *State ex rel. Coco v. Riverside Irr. Co.*, 76 So. 216, 218 (1917) (“A quasi public corporation may be said to be a private corporation which has given to it certain powers of a

public nature, such, for instance, as the power of eminent domain, in order to enable it to *discharge its duties for the public benefit*, in which respect it differs from an ordinary private corporation.”) (emphasis added).

In addition to the authorities cited in Appellants’ opening brief, other Louisiana courts have recognized the “quasi-public” nature and status of common carriers with the power of eminent domain. *See e.g., Crooks v. Placid Ref. Co.*, 2005-119 (La.App. 3 Cir. 6/1/05, 10), 903 So.2d 1154, 1161, *writ denied*, 2005-1756 (La. 1/13/06), 920 So.2d 242 (describing “private entit[ies]” upon which Article 1, §4 of the Louisiana Constitution of 1974 confers the power of expropriation as “public or quasi public corporations”).

Sidestepping mention of the public purpose or necessity of its “pipeline business” – the sole basis for vesting such entities with the authority to exercise eminent domain in the first place – BBP instead asserts, *inter alia*, that it “engages in the business and function of hydrocarbon pipeline transportation, which is not a ‘governmental or proprietary function’ of state or local government,” and that it is “not operating its pipeline business pursuant to any delegation or contract with the state but rather as a private, for-profit business.” Appellee Br. at 15.

But an expropriation for a purely private business and purpose would be unconstitutional. The Louisiana Constitution and statutes implementing it require that any expropriation by a private entity be for a public purpose and necessity. *See*, La. Const. Article 1, §4(B)(4) (“Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose...”); *See also, Louisiana Nav. & Fisheries Co. v. Doullut*, 114 La. 906, 911, 38 So. 613, 615 (1905) (“Under our laws private individuals cannot exercise the power of eminent domain.... We do not think it would be a reasonable construction to hold that the same sovereign which has refused to accord to the natural person the use of the power of eminent domain has consented to accord it

to an artificial person, qualified like the natural person to engage in business of a *purely private character.*”) (emphasis added).

In contrast to how it describes itself in this matter, BBP emphasized in expropriation proceedings that it is “a common carrier under Louisiana Revised Statute §45:251(1), which includes ‘all persons engaged in the transportation of petroleum as public utilities and common carriers for hire... .’” R. 23, ¶ 4; 79:8-11. BBP pointed out in those proceedings that “Louisiana law grants the authority to expropriate property to common carriers” and further that “the Pipeline is in the public interest and necessity.” *Id.* Thus, BBP has previously asserted that its pipeline business is pursuant to, and connected with, a delegation from the state. BBP also asserted in that proceeding that the “Pipeline will be a much needed expansion to and an integral part of the nation’s oil pipeline infrastructure and is being constructed to provide increased and needed access and to enable the transportation of larger volumes of domestically produced crude oil to existing Louisiana crude refining facilities.” R. 22-23, ¶ 3.

BBP also downplays its eminent domain authority – describing it as a “limited default power of expropriation” that “is utilized only when voluntary servitude agreements cannot be reached.” Appellee Br. at 19. Eminent domain authority does not simply commence at the moment an expropriating authority takes a landowner to court. BBP’s enjoyment and exercise of that power begin long before – when it decides on a route and which properties must be taken in Louisiana in order to complete its project and, certainly, upon first contact with landowners. Louisiana statutes place certain obligations on expropriating authorities that govern their interactions with landowners prior to bringing expropriation proceedings – not least that BBP notify landowners of its statutory authority to expropriate. *See, e.g.*, La. R.S. §19:2.2; Appellants’ Br. at 5-7. Landowners then know that they are caught in an offer they cannot refuse or walk

away from. That is to say, one party to the negotiation has the power of the state behind them to take the property if they cannot reach agreement; the other party is trapped in a negotiation they did not seek out and faced with the decision as to how best to protect their interests in light of diminution of the value of their property knowing that in all likelihood it will have an oil pipeline running through it. *See, e.g., Collins Pipeline Co. v. New Orleans East, Inc.*, 250 So.2d 29, 37 (La. Ct. App. 1971), *writ denied*, 259 La. 775, 252 So.2d 669 (1971) and 259 La. 776, 252 So.2d 670 (1971) (noting, in an expropriation case involving a petroleum pipeline, the Louisiana jurisprudence concerning the danger and psychological effect of pipelines impairing the market value of property). Landowners are faced with the choice between accepting what the company offers, or incurring the inconvenience and expense of court costs and attorney's fees if they get taken to court. BBP's attempt to minimize this enormous privilege and power is disingenuous. *See New Orleans Bulldog Soc'y v. Louisiana Soc'y for the Prevention of Cruelty to Animals*, 2016-1809 (La. 5/3/17, 10); 222 So.3d 679 at 685 (hereinafter "*New Orleans Bulldog Society*") (where Court notes that LSPCA also enjoyed certain privileges arising out of its function as an instrumentality of the municipality).

Either BBP is a quasi-public corporation with the power of eminent domain; or a purely private "ordinary" corporation whose exercise of eminent domain is *ultra vires* and unconstitutional. If the former, it must be subject to the Public Records Law.

II. Private Corporations Are Subject to the Public Records Law When They Are Functioning As Instrumentalities of a State, Parish, or Municipal Government.

BBP wrongly asserts more than once that "no Louisiana court has ever held a private corporation to be subject to the Public Records Law." *See e.g.*, Appellee Br. at 8, 9. However, the Louisiana Supreme Court has done just that. *See New Orleans Bulldog Society*, 222 So.3d 679 (La. 2017). In *New Orleans Bulldog*

Society, the Louisiana Society for the Prevention of Cruelty to Animals (“LSPCA”), a private corporation, was held subject to the Public Records Law because it was functioning as an instrumentality of a municipality. *Id.* at 688, n. 5.

In an *amicus curiae* brief submitted in *New Orleans Bulldog Society*, the Louisiana Municipal Association (“LMA”) urged the Court against finding the LSPCA was subject to the Public Records Law because the LSCPA, it said, was “strictly a private body, neither created by a governmental entity nor designated by the Governor, and [was] not primarily funded by public funds.” *See Amicus Curiae Brief of the Louisiana Municipal Association in New Orleans Bulldog Society v. Louisiana Society For The Prevention Of Cruelty To Animals, et al.*, No. 2016-C-1809, Louisiana Supreme Court, Feb. 13, 2017, 2017 WL 4214203 (La.).

According to the LMA, if the Court were to find LSPCA subject to the law, it would have a chilling effect on other public-private partnerships, including those involving “safety consultants, accountants, engineering firms, blight remediation, debris removal teams” among others. *Id.* Rejecting the LMA’s position, the Louisiana Supreme Court noted that it was “not unaware of the necessity of governmental entities contracting out services with private groups, but we must also be ever cognizant of the public’s well-established constitutional right to access information associated with public money.” *New Orleans Bulldog Society*, 622 So.3d at n. 8. The LMA did not make distinctions between types of private entities – whether non-profit or for-profit; and neither did the Court when it held LSPCA to be subject to the Public Records Law.

The Court emphasized that the correct focus of inquiry in determining applicability of the Public Records Law is on the “function” served by an entity as an instrumentality of government. *Id.* at 685. It specifically instructed that such inquiries are “fact-specific” and “should be specifically tailored to the facts at hand.” *Id.* at n. 7. As set out more fully in Appellants’ opening brief, for purposes

of the Public Records Law, “public body” includes any “instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function.” La. R.S. § 44:1(A)(1).

BBP as a common carrier “engaged in the transportation of petroleum as public utilities and common carriers for hire,” R. 23, ¶ 4, has been designated as an entity to fulfill a public purpose and necessity. As noted above and in Appellants’ opening brief, courts have repeatedly recognized that such entities are “quasi-public corporations.” The function such entities were deemed to be serving was considered so essential that the State delegated its extraordinary power of eminent domain to them. *See Bass v. State*, 34 La. Ann. 494, 499 (1882) (noting the basic principle that where “the State has the legal right to undertake a public work, the execution of which is likely, unavoidably, to entail private injury, the State has the right, as a corollary, [*sic*] of delegating the power to agents, who then are clothed with the necessary incidental authority to do that which the State herself primarily had the right of doing”).

BBP offers additional indicators of public purpose and function when it notes the permits and letters of support it has received from numerous federal, state, local governmental entities and agencies. Appellee Br. at 2. Another indication of the public function and purpose considered to be served by entities like BBP is the fact that pipelines have been added to the definition of critical infrastructure set out in La. R.S. § 14:61(B)(1). That law provides severe penalties for unauthorized entry onto or damage to infrastructure that is considered critical for the State, such that it warrants additional protections by the State through application of the criminal law. *See* La. R.S. § 14:61 as amended by 2018 La. Sess. Law Serv. Act 691 (H.B. 727).

BBP also attempts to deploy a red herring and confuse the issue by suggesting that holding a private entity subject to the public records law would “have wide-ranging implications in many areas other than public records requests,” such as making such entities subject to the state’s civil service laws, or exempt from sales and use taxes. Appellee Br. at 20; *id.* at 12-13. This argument is simply an attempt at diversion as the Louisiana Supreme Court’s holding in *New Orleans Bulldog Society* did not render the LSPCA an instrumentality of the state for all purposes, *e.g.* the organization’s staff would not then become civil servants. In fact, the Court noted that it was “undisputed from the record that the LSPCA is a private entity for purposes other than this Court’s holding herein” and further that “under different facts” the “LSPCA may *not* be deemed a quasi-public body or instrumentality” even for purposes of the Public Records Law in a different case. *New Orleans Bulldog Society*, 222 So.3d at n. 5, n. 7 (emphasis in original).

Even the case cited by BBP for the proposition that a federal court “determined that a private, for-profit oil and gas operator was not a ‘public body’ for public records purposes,” assumed that a private, for-profit corporation could be subject to the Public Records Law. *See* Appellee Br. at 14 citing *Frey v. Amoco Prod. Co.*, 741 F.Supp. 601 (E.D. La.1990). The court in *Frey* did not question or suggest that a private corporation could ever be subject to the Public Records Law; it simply held that under the facts in that case, there was no basis for holding that particular company subject to the law. The facts in *Frey* are very different from those at issue in this appeal. In *Frey*, the only basis for claiming Amoco was subject to the law was its status as a unit operator for which it needed a license, and the fact that it collected severance taxes from the minerals produced from the units in which it owned an interest. Those facts did not make the company a “quasi-public office or agency.” *Frey*, at 603.

BBP, as noted above and as Louisiana courts have long recognized, is a quasi-public corporation by virtue of the fact that it is a common carrier with the power of eminent domain.

III. The District Court Erred in Ruling BBP Not Subject to the Public Records Law.

BBP argues that the Court did not err when it applied the factors set out in *State v. Smith*, 357 So.2d 505 (La. 1978), which are used in some situations to determine when an entity is to be considered public, to the facts of this case. *See, e.g.*, Appellee Br. at 16-17; *See also*, R. 92:13-93:22. BBP asserts this despite the fact that the Louisiana Supreme Court clearly distinguished the *Smith* factors and cases applying them from situations like that in *New Orleans Bulldog Society* where a) the cases “did not involve the Public Records Law” and b) “it is undisputed from the record that the LSPCA is a private entity for purposes other than this Court’s holding herein.” *New Orleans Bulldog Society*, 222 So.3d at n. 5. It is clear the Louisiana Supreme Court believed those cases were distinguishable, and therefore not applicable to the LSPCA, because it said so. *Id.* (“We find, however, both *Theriot* and the *LHSAA* opinions are distinguishable, as they did not involve the Public Records Law, nor did they involve a contract with a municipality specifying that the entity perform a public purpose on behalf of a municipality, such as the LSPCA did in this instance.”).

A summary of *Smith*, *Theriot*, and *LHSAA* reveal why they are so distinguishable from cases like *New Orleans Bulldog Society*, and the instant matter, which seek to hold private entities subject to the Public Records Law when they function as instrumentalities of a state, parish, or local government. *Smith* was a criminal case in which corporate employees had been charged with violating a state law prohibiting malfeasance in office by public employees. *State v. Smith*, 357 So.2d 505 (La. 1978). The Court held that because the corporation was not a

state or parish agency, the defendants could not be charged with malfeasance as *public* employees. *Theriot* involved an effort by the legislative auditor to subject an insurance association to the state's ethics code, civil service laws, open meetings laws, audit laws, public bid law, and procurement laws. *Prop. Ins. Ass'n of Louisiana v. Theriot*, 2009-1152 (La. 3/16/10), 31 So.3d 1012. Because the insurance association's functions were not exclusively of a public character and performed solely for public benefit, it could not be considered a public entity "for all purposes." *Id.* at 1022. In *LHSAA*, the Court held that the Louisiana High School Athletic Association was a private corporation and the state could not interfere in its formulation of rules and by-laws, and that it could not be subject to legislative auditing or the Open Meetings Law. *Louisiana High Sch. Athletics Ass'n, Inc. v. State*, 2012-1471 (La. 1/29/13), 107 So.3d 583.

BBP cites a number of other cases which are likewise distinguishable (and therefore inapplicable) for the same reasons the Court noted in *New Orleans Bulldog Society*. See Appellee Br. 12-13 citing *Polk v. Edwards*, 626 So.2d 1128 (La. 1993) (finding casino corporation created and owned by the state subject to civil service laws); *Department of State Civil Service v. Housing Authority of East Baton Rouge*, 95-1959 (La. App. 1st Cir. 5/10/96), 673 So. 2d 726 (public housing authorities created by state legislature to further state goals and objectives and which perform state functions are instrumentalities of the state for purposes of the civil service laws); *Slowinski v. England Economic and Industrial Development District*, 2002-1089 (La. 10/15/02), 828 So.2d 520 (development district not subject to civil service laws). As the Louisiana Supreme Court noted in *New Orleans Bulldog Society* with respect to *Smith*, *Theriot* and *LHSAA*, none of these cases cited by BBP involve the Public Records Law, and in any event, it is undisputed that BBP is a private entity for purposes other than applicability of the Public Records Law.

BBP also points to the district court's reference to *State of Louisiana v. Nicholls College Found.*, 564 So.2d 682 (La. 1990), which it found instructive as it "addressed the nonprofit corporation of the foundation attempting to raise money for the use and benefit of the public entity, Nicholls State University, a state-run or state-owned and run university." See R. 91-94, Appellee Br. at 17. But the Court did not elaborate on why it found *Nicholls* "more telling" before it went on to apply the *Smith* factors. R. 92:5-13. As noted above, the Louisiana Supreme Court has instructed that such inquiries are "fact-specific" and "should be specifically tailored to the facts at hand." *New Orleans Bulldog Society*, 222 So.3d at n. 7. No, BBP is not promoting a state university and operating at low-cost from the university's premises, see *Nicholls*, *supra* at 687; it is exercising the power of eminent domain across eleven parishes in the state to build an oil pipeline deemed by the law to be for a public and necessary purpose and which is considered infrastructure that is critical to the state.

Public Money. BBP also asserts that it is not receiving public funds and therefore should not be subject to the Public Records Law. See *e.g.*, Appellee Br. at 18. At the same time, BBP acknowledges that receipt of public funding is not a requisite factor. *Id.* at 11 ("The holding of *New Orleans Bulldog Society* is consistent with other Louisiana decisions in which nonprofit or other entities have been held to be "public bodies" under the Public Records Law in light of their: (1) designated performance of an essential governmental function; *and/or* (2) public funding.") (emphasis added). Indeed, similar to the fact-specific inquiry to be used in determining whether an entity is functioning as an instrumentality for purposes of the Public Records Law, the Louisiana Supreme Court has also emphasized that the "consideration of public money in this type of inquiry will be on a case-by-case basis." *New Orleans Bulldog Society*, 222 So.3d at n. 6. The Court declined to set a specific sum which would require application of the Public Records. *Id.* It is

important to note that the Court first assessed the functions the LSPCA performed; and then subsequently also took note of the fact that public money was paid by the City to the LSPCA. *Id.* at 686.

Records Requested. The District Court held that because BBP is not a “public body,” the records requested in this matter were not public records. R. 94. BBP takes issue with the scope of records requested suggesting that the request is “nothing more than a fishing expedition” akin to the “discovery tool” rejected in *Frey v. Amoco Prod. Co.*, 741 F. Supp. 601 (E.D. La. 1991).¹ Appellee Br. at 14, 19. However, unlike the requesters in *Frey*, Appellants do not seek “all of [BBP’s] financial records, exploration and production activities, and trade secrets.” Rather, as set out in more detail in Appellants’ Opening Brief, 17-18, the categories of records sought concern “any documents or other types of records created, prepared, received, or maintained in connection with BBP’s function, public purpose, and exercise of eminent domain” as they relate to “any business, transaction, work, duty, or function which was conducted, transacted, or performed *by or under the authority of the constitution or laws of this state...*” or to “the receipt or payment of any money received or paid by *or under the authority of the constitution or the laws of this state...*” See La. R.S. § 44:1(A)(2)(a) (emphasis added).

CONCLUSION

As the Louisiana Supreme Court has repeatedly instructed, the right of public access set out in Article XII, § 3 of the constitution “must be construed liberally in favor of free and unrestricted access to the records,” and “access can be

¹ BBP points to Appellants’ opposition to its project as expressed through comments in public hearings and in the public square, i.e. in the exercise of their rights to speech, and to petition, protected under the First Amendment of the U.S. Constitution, and Article 1, §§ 7 and 9 of the Louisiana Constitution of 1974. BBP’s assertions and characterizations are immaterial and irrelevant in this matter. The Public Records Law does not permit inquiry by the custodian or a court into an applicant’s motive or purpose in requesting a public record. See La. R.S. § 44:32.

denied only when a law, specifically and unequivocally, provides otherwise.” *In re Matter Under Investigation*, 2007-1853 (La. 7/1/09); 15 So. 3d 972, 989.

Whenever there is doubt, “the doubt must be resolved in favor of the public's right to see.” *Id.*

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Respectfully submitted,

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