**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF OKLAHOMA**

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| ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC,<br><br>Plaintiff,<br><br>v.<br><br>A 25 FOOT WIDE EASEMENT and right-of-way for underground natural gas pipeline lying and situated in the Southwest Quarter of the Southeast Quarter and the West Half of the Southeast Quarter of the Southeast Quarter in Section 28, Township 7 North, Range 11 West of the I. B. & M., in Caddo County, State of Oklahoma, et al.,<br><br>Defendants. | ) | Case No. 5:15-cv-01250 |

**REPLY IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' MOTION FOR RECOVERY OF ATTORNEYS' FEES AND EXPENSES**

## INTRODUCTION

Plaintiff admits that the individual Defendants are entitled to recover attorneys' fees and expenses in this case, but contends that the fees claimed by them are excessive and that some of the claimed expenses are not recoverable. However, Plaintiff's opposition to Defendants' Motion is untimely, in violation of the rules of this Court. Moreover, in challenging the fees and expenses of Defendants' counsel Plaintiff ignores the unique circumstances of this case – that Defendants could not afford counsel, that the Plaintiff seeking to take their land had tremendous financial and legal resources, it involved a specialized area of law, and the individual Defendants were unable to identify any local counsel who had the means, willingness and ability to handle a case of this magnitude. Poverty should never be a bar to representation. This Court should award the individual Defendants' attorneys' fees and expenses as requested in Defendants' Motion (Dkt. 57), plus the additional attorneys' fees that Defendants' have since incurred responding to Plaintiff's Motion for New Trial and to Stay (Dkt. 59), and in preparing this Reply.

### I. Plaintiff's Objection to Defendants Fee Request Is Untimely Under LCvR 54.2.

As a threshold matter, Plaintiff's objection to Defendants' Motion for Attorneys' Fees and Expenses should be disregarded because it was not filed within the time limits prescribed by this Court's local rules. Local Rule 54.2 states that "[o]bjections to the allowance of attorney's fees *must* be filed within 14 days from the date the motion for attorney's fees is filed." LCvR 54.2 (emphasis added). This is the same amount of time

Defendants were allowed to file their fee motion. *See* Fed. R. Civ. P. 54(d)(2)(B)(i) (motions for attorneys' fees must be filed within 14 days after entry of judgment). Defendants' Motion for Attorneys' Fees and Expenses (Dkt. 57) was filed on September 1, 2016, making Plaintiff's objection due September 15, 2016. Yet, Plaintiff did not file its objection until almost a week later, on September 21, 2016. (Dkt. 60.) Plaintiff offers no explanation for its belated filing.[1]

"District Courts have broad discretion to set filing deadlines and enforce local rules." *Reasonover v. St. Louis Cnty.*, 447 F.3d 569, 579 (8th Cir. 2006); *see also* Fed. R. Civ. P. 83.[2] "Local rules governing motions practice are among the most common of local rules and are routinely upheld" and "[p]arties who fail to observe the applicable local rules do so at their peril." Fed. R. Civ. P. 83, Cmt. (citing *Hernandez v. Phillip Morris USA, Inc.*, 486 F.3d 1, 7 (1st Cir. 2007); *see also Texas v. United States*, 798 F.3d 1108, 1114 (D.C. Cir. 2015) ("We have repeatedly held … that a material failure to follow the rules in district court can doom a party's case."). Thus, the Court may disregard Enable's late-filed Objection on this ground alone. *See, e.g.*, *Simington v. Zwicker & Assocs., P.C.*, No. CIV-11-1391-M, 2012 WL 5873310, at *3 (W.D. Okla. Nov. 20, 2012) (treating motion for summary judgment, in part, as unopposed because plaintiff did not file a response within the time limits established under the local rules); *Immigrant Assistance Project of the L.A. Cnty. Federation of Labor v. Immigration and*

[1] "[I]t is well established that inadvertence, ignorance of the rules, and mistakes construing the rules do not constitute excusable neglect …." *Quigley v. Rosenthal*, 427 F.3d 1232, 1238 (10th Cir. 2005).

[2] The Local Rules are published on the Court's website, meeting the notice and publication requirements of FRCP 83(a)(1).

*Nationalization Service*, 306 F.3d 842, 849 n.4 (9th Cir. 2002) (plaintiff's untimely filing of a motion for class certification was an independent ground to deny the motion).

## II. The Requested Attorneys' Fees Are Reasonable Considering the Circumstances of this Case.

### A. The Hourly Rates for Defense Counsel Are Reasonable

Plaintiff does not challenge the rates charged by Defendants' counsel for the regions of the country in which they work. However, it argues that the relevant rate is that of the local legal community, and provides the affidavit of Mr. Ottaway to the effect that rates in Oklahoma for attorneys engaged in complex civil litigation does not exceed $450 per hour. (Dkt. 60-2 at ¶ 8.) However, Plaintiff also concedes that under this Circuit's authority the rates of an out-of-state attorney may be used where the subject of the litigation is "unusual or requires such special skills." (Pl.'s Opp.. at 6 [Dkt. No. 60] (*quoting Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10th Cir. 2006); *see also Ramos v. Lam*, 713 F.2d 546, 555 (10th Cir. 1983).) One of the key factors considered is whether there was counsel available in the local community who was able to represent the Defendants under the circumstances of this case.

In *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360 (D. Kan. 1987), *aff'd*, 899 F.2d 951 (10th Cir. 1990), the court considered a fee application submitted by both local and out-of-state counsel in a complex civil matter. In rejecting the argument that rates should be limited to that of the local legal community – in that case Wichita – the court explained that the Tenth Circuit in *Ramos* did not set an absolute rule that rates were limited to that of the forum in which the litigation was pending.

Rather, it opened the door to higher rates in "unusual circumstances." *Reazin*, 663 F. Supp. at 1453. The fact that there was "neither a lawyer nor a firm in this town which could have devoted to this case the timely expertise, experience, and manpower put forth" was exactly such a circumstance warranting application of the higher out-of –state rates. *Id.* at 1454. The Tenth Circuit agreed, finding that under the circumstances application of local rates was not necessary. *Reazin*, 899 F.2d at 983. Other courts have similarly held. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982) (out-of-town rates should be awarded unless defendant shows that a local lawyer was available with the requisite skills to handle the complex and specialized nature of the case); *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) (affirming award of out-of-town rates to counsel when there was "no evidence" that lawyers of similar expertise and specialization were available in the locality where trial took place); *United States v. Community Health Systems, Inc.*, No. 05-279 WY/ACT, 2013 WL 10914086, * 20 (D. N.M. Aug. 9, 2013) (awarding out-of –town rates where there was "neither a lawyer nor a firm in this town that can devote to this case the timely expertise, experience, and manpower" required); *Kersh v. Board of County Com'rs of Natrona County, Wyo.*, 851 F. Supp. 1541 (1994) (applying *Ramos* and holding that application of out-of –town rates was proper where legal representation was not available in the local community); *Dunn v. The Florida Bar*, 726 F. Supp. 1261, 1279–1280 (M.D. Fla. 1988), *aff'd*, 889 F.2d 1010 (11th Cir. 1989) (awarding Washington, D.C. rates in Florida civil rights case where local counsel needed specialized assistance from out-of-state that was unavailable in local community); *American Booksellers Assn., Inc. v. Hunt*, 650 F. Supp. 324, 328 (S.D. Ind. 1986)

(awarding out-of-town rates to counsel with special expertise, and noting that defendants had not demonstrated that counsel with similar expertise was available locally).

The "unusual circumstances" justifying utilization of the actual billing rates of Defendants' counsel in the localities in which they work are certainly present here. The Plaintiff cavalierly remarks that "Defendants were free to hire a law firm in Washington, D.C. with offices nationally to represent them in this litigation," but could just have easily hired local counsel. (Pl.'s Opp. at 8.) Yet Plaintiff ignores that the Defendants could not afford to hire counsel. They were unable to locate any counsel who would represent them locally let alone an attorney with expertise in Indian law. Affidavit of David C. Smith (Dkt. 58 at ¶ 2). Moreover, this was an action that Plaintiff, itself, instigated, instituting this unlawful condemnation action fully aware that the individual Defendants, themselves, did not have the financial resources to respond.

The problem with finding *pro bono* representation of indigent individual Indians in matters integral to Indian law in a case of this magnitude against a plaintiff like Enable with substantial resources, even in a state like Oklahoma with legal programs directed toward Indian law specialization, is underscored by the Affidavit of Stephanie Hudson, Executive Director of Oklahoma Indian Legal Services ("OILS"). Exhibit 1. OILS was unable to represent the entire group of Defendants, in part because it only had five attorneys with full caseloads to cover the entire state of Oklahoma. *Id.* at ¶ 7. It did not have the manpower or financial resources to take on an action of this size. There are a limited number of attorneys in Oklahoma who practice Federal Indian law and even fewer who do so on a *pro bono* basis. *Id.* at ¶ 6. Contrary to the characterization by

Plaintiff of the nature of this action, it is not a simple action involving an easement across land. To the contrary, it involves "the intersection of federal law, state law, tribal law and a government agency coupled with thirty-eight individual members with varying sizes of interests in the original Kiowa allotment." *Id.* at ¶ 8. It, thus, further requires counsel that has built relationships of trust with those tribal members. *Id.* at ¶ 6. OILS could identify no Oklahoma attorney who could represent the Defendants in this action, and they likely would have not found any relief if Kilpatrick Townsend had not agreed to represent them. *Id.* at ¶¶ 3, 10.

**B. The Time Spent by Defense Counsel on this Action Was Reasonable and Necessary.**

Plaintiff briefly suggests that the time spent on this case by the individual Defendants' counsel was unreasonable as it never went beyond the pleading stage. (*See* Pl.'s Opp. at 5 (arguing that the claimed fees are excessive considering the "limited activities" involved in this action). However, Plaintiff never identifies a single entry it deems inappropriate and its characterization of these proceedings fails to take into account their actual complexity, particularly from the perspective of the individual Defendants.

*First*, unlike Plaintiff's counsel, which has only one client, Defense counsel has 38 individual clients of various ages and capacities located throughout the country from whom they must gather information, communicate and discuss strategic decisions. Frequent meetings and communications have been essential, resulting in necessary travel to Oklahoma.

*Second*, Defense counsel was required to spend significant time investigating the facts of this case including compiling information from all individual clients, investigating the history of Enable's easement and identifying the acquisition by the Kiowa Tribe of Oklahoma of its undivided interest in the tract.

*Third*, many of the issues are necessarily unique and complex including: Plaintiff's condemnation rights under 25 U.S.C. § 357 given the tribal interest; tribal sovereign immunity; and joinder of tribes as required parties under Federal Rules of Civil Procedure 19 and 71.1.

*Fourth*, much of the time that Plaintiff criticizes Defense counsel for spending on this case was necessitated by Plaintiff, itself. This factor is also taken into account in determining if Defendants' fee application is reasonable. *See Ramos*, 713 F.2d at 554 (considering "the responses necessitated by the maneuvering of the other side"). For example, Plaintiff alleges that Defense counsel spent excessive time traveling to and attending the court mandated settlement conference. Yet, it was Plaintiff that asked the Court to Order the parties and their counsel to attend the settlement conference, rather than responding initially to Defendants' Motion to Dismiss. (Dkt. 37.) The Settlement Conference Order required attendance by "lead counsel who will try the case" (Dkt. 39 at 2), not just Defendants' local counsel as Plaintiff suggests (Pl.'s Opp. at 5). In addition, Defense counsel was required to coordinate the appearance of all 38 of their clients. The Court's Order made clear that sanctions could be imposed for non-compliance. (Dkt. 39 at 4.) Fee applications for similar travel time have been approved by Oklahoma courts in condemnation actions and upheld by the Oklahoma Supreme Court. *See Oklahoma*

*Turnpike Authority v. Little*, 860 P.2d 226, 227 (Okla. 1993) (affirming fee award that included "18 hours of billable travel time" to visit the property at issue, and for "visits with appraisers and judges concerning the case"). Plaintiff should not be allowed to penalize Defendants for having their counsel attend a settlement conference that Plaintiff itself requested, as ordered by the Court.

Finally, these issues are important to the parties. Notably, while this action was pending Plaintiff's counsel, on behalf of a nationwide organization that included Plaintiff, filed an *amicus* brief at the Tenth Circuit raising the identical issues presented here. Plaintiff has been utilizing tremendous resources in an effort to defeat Defendants' rights to their land. Defendants should be entitled to utilize resources available to them as well.

**III. Defendants Have Requested Recoverable Expenses.**

Plaintiff has also challenged Defense counsel's travel related expenses and Defendants' legal research costs. Both sets of costs are recoverable.

With respect to the Westlaw charges claimed by Defendants, courts, including the Tenth Circuit, "have repeatedly clarified that computer research is not a separately taxable cost, but a substitute for an attorneys' time that is compensable under an application for attorneys' fees." *Sorbo v. United Parcel Service*, 432 F.3d 1169, 1180 n.10 (10th Cir. 2005); *see also InvesSys, Inc. v. McGraw-Hill Co.*, 369 F.3d 16, 22 (1st Cir. 2004) (holding that computer-based legal research should be "reimbursed under attorney's fee statutes"); *Cox v. Council for Developmental Disabilities, Inc.*, No. CIV-12-0183-HE, 2013 WL 1915066, at *4, n. 13 (W.D. Okla. May 8, 2013) (awarding costs of computer-assisted legal research as part of attorneys' fee application). The rationale

for this rule is simple, "[i]f it saves attorney time to do research [on-line], probably the hours billed are fewer … and in any event Westlaw and Lexis are now as much part of legal service as a lawyer's taxi to the courthouse." *InvesSys*, 369 F.3d at 22–23. Thus, the expenses of Defendants' computer assisted legal research on Westlaw are properly recoverable as part of Defendants' application for attorneys' fees.

Defendants travel expenses are also recoverable because this is an unusual case where special expertise is needed. In *Standard Oil Co. v. Osage Oil & Transp., Inc.*, 122 F.R.D. 267 (N.D. Okla. 1988), the Court allowed recovery of travel expenses incurred by trademark counsel from Washington, D.C. because the case required the expertise of experienced trademark counsel. *Id*. at 268, 270 (awarding "the costs of airfare, hotel, car rental, and meal expenses"). Defendants could find no one locally willing to represent them. Given that fact, coupled with Defense counsel's specific expertise in Indian law, which Plaintiff does not dispute, the claimed travel expenses should also be awarded.

## IV. The Court's Order Should Include an Award of Fees Incurred After Defendants' Motion to Recover Attorneys' Fees and Expenses Was Filed.

Finally, any award of fees and expenses made by the Court should include those fees incurred by Defendants after their initial motion to recover attorneys' fees and expenses was filed. Defendants filed their fee motion within the deadlines established by Federal Rule of Civil Procedure 54(d) and this Court's local rules. However, Plaintiff subsequently filed a Motion for New Trial and to Stay (Dkt. 59 (filed 9/14/16)), and also filed their Opposition to Defendants' Motion to Recover Attorneys' Fees (Dkt. 60). Defendants have thus incurred an additional $11,802 in attorneys' fees and $1,188.30 in

additional expenses responding to both motions, as documented in the attached Supplemental Affidavit of David C. Smith (Exhibit 2). This amount should also be included in the Court's fee award.

## CONCLUSION

Based on the foregoing, the individual Defendants respectfully request that the Court grant their Motion for Recovery of Attorneys' Fees and Expenses.

Respectfully submitted this 28th day of September, 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 28, 2016, I electronically filed the foregoing **INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RECOVERY OF ATTORNEYS' FEES AND EXPENSES** with the Clerk of Court. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the Electronic Case Filing System.

s/David C. Smith
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