

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

TRANSCONTINENTAL GAS PIPE LINE :
COMPANY, LLC, :
Plaintiff, :
v. : No. 5:17-cv-00715
PERMANENT EASEMENTS FOR 2.14 ACRES :
AND TEMPORARY EASEMENTS FOR 3.59 :
ACRES IN CONESTOGA TOWNSHIP, :
LANCASTER COUNTY, PENNSYLVANIA; :
HILLTOP HOLLOW LIMITED PARTNERSHIP; :
HILLTOP HOLLOW PARTNERSHIP, LLC :
GENERAL PARTNER OF HILLTOP HOLLOW :
LIMITED PARTNERSHIP; and LANCASTER :
FARMLAND TRUST, :
Defendants. :

TRANSCONTINENTAL GAS PIPE LINE :
COMPANY, LLC, :
Plaintiff, :
v. : No. 5:17-cv-00723
PERMANENT EASEMENT FOR 2.02 ACRES :
AND TEMPORARY EASEMENTS FOR 2.76 :
ACRES IN MANOR TOWNSHIP, LANCASTER :
COUNTY, PENNSYLVANIA; and :
STEPHEN HOFFMAN, :
Defendants. :

OPINION
Plaintiff's Omnibus Motion for Preliminary Injunction - Denied

Joseph F. Leeson, Jr.
United States District Judge

April 6, 2017

I. Introduction

Plaintiff Transcontinental Gas Pipeline Company, LLC (“Transco”) is involved in a project to operate and construct a natural gas pipeline running through five states, including a portion of Lancaster County, Pennsylvania. The Federal Energy Regulatory Commission (FERC) issued a certificate on February 3, 2017, authorizing the construction and operation of the pipeline. Transco thereafter filed fourteen complaints in condemnation in this Court seeking to acquire the rights-of-way on Defendants’ properties. Presently pending in two of these actions is Transco’s Omnibus Motion for Preliminary Injunction. For the reasons set forth below, a determination as to whether Transco has a right to condemn, which must be established before the Court may grant injunctive relief, would be premature. Regardless, Transco has failed to show that it will suffer irreparable harm because it may obtain access to Defendants’ property to conduct surveys pursuant to 26 Pa. Cons. Stat. § 309. The Omnibus Motion for Preliminary Injunction is denied, but Transco will be granted limited access pursuant to § 309.

II. Legal Standard – Motion for Preliminary Injunction

To prevail on a motion for a preliminary injunction, the moving party must show: (1) a likelihood of success on the merits;¹ (2) a likelihood of suffering irreparable harm without the injunction;² (3) the balance of equities weighs in the moving party’s favor; and (4) the public

¹ For a natural gas company “to establish a right to condemn, the following elements must be proved: (1) [the company] has been issued a certificate of public convenience and necessity; (2) [the company] has been unable to acquire the needed land by contract with the Defendants; and (3) [t]he value of the subject property claimed by the owner exceeds \$ 3,000.00.” *Steckman Ridge GP, LLC v. Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres*, No. 08-168, 2008 U.S. Dist. LEXIS 71302, at *39-40 (W.D. Pa. Sept. 19, 2008) (citing 15 U.S.C. § 717f(h) of the Natural Gas Act of 1938 (NGA)).

² “[O]f critical importance, ‘the irreparable harm requirement contemplates the inadequacy of alternate remedies available to the plaintiff.’” *Contech Casting, LLC v. ZF Steering Sys., LLC*, 931 F. Supp. 2d 809, 818 (E.D. Mich. 2013) (quoting *Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978, 982 (W.D. Tenn. 2006)). “[I]rreparable harm is not demonstrated when there are available alternatives even when the alternatives are less convenient.” *Corbett v. United States*, No. 10-14106, 2011 U.S. Dist. LEXIS 38531, at *14 (S.D. Fla. Mar. 1, 2011).

interest favors the injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The moving party bears the burden of showing that each of these four factors tips in its favor.

Ferring Pharm., Inc. v. Watson Pharm., Inc., 765 F.3d 205, 210 (3d Cir. 2014) (“The ‘failure to establish any element . . . renders a preliminary injunction inappropriate.’” (quoting *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999))). “A preliminary injunction is an extraordinary remedy never awarded as a matter of right,” *Winter*, 555 U.S. at 24, and is reserved for “limited circumstances,” *Kos Pharm., Inc. v. Andrx Corp.* 369 F.3d 700, 708 (3d Cir. 2004).

III. Findings of Fact³

“In granting or refusing an interlocutory injunction, the court must . . . state the findings and conclusions that support its action,” Fed. R. Civ. P. 52(a)(2), which requires the court to “find the facts specially and state its conclusions of law separately,” Fed. R. Civ. P. 52(a)(1). While “Rule 52 does not require hyper-literal adherence,” findings of fact and conclusions of law must be delineated in such a manner that does not leave an appellate court “unable to discern what were [the court’s] intended factual findings.” *See In re Frescati Shipping Co.*, 718 F.3d 184, 197 (3d Cir. 2013); *see also* 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2579 (3d ed. 2008) (“The district court should state separately its findings of fact and conclusions of law without commingling them . . .”). Accordingly, this Court’s findings of facts pertinent to the disposition of Transco’s Motion follows.

1. Transco is an interstate natural gas transmission company that will be the operator of a proposed natural gas pipeline that will cross Defendants’ respective properties. Sztroin Decl. ¶¶ 3, 6, ECF No. 6-6 (No. 17-715); Hoffman Aff. ¶¶ 5-7, 11, ECF No. 23 (No. 17-723);

³ These findings of fact, which are made after an independent review of the record, including all exhibits and briefs filed in regard to the Omnibus Motion for Preliminary Injunction, are drawn from the two sides’ proposed findings of fact and conclusions of law. *See* No. 17-715, ECF Nos. 25, 28; No. 17-723, ECF Nos. 18, 21.

Erb Aff. ¶¶ 6-7, ECF No. 30 (No. 17-715); *Transcontinental Gas Pipe Line Co.*, 158 FERC ¶ 61,125 (Feb. 3, 2017) (hereinafter FERC Order).

2. Defendants Stephen and Dorothea Hoffman reside at 3409 Safe Harbor Road, Manor Twp., Millersville, Lancaster County, PA 19551. They own approximately 110 acres and have lived there for approximately 10 years. Hoffman Aff. ¶ 2.

3. The appraised value of the Hoffmans' property is \$13,970. Pl.'s Hr'g Ex. 17.⁴

4. Defendants Gary and Michelle Erb, the principals of Defendant Hilltop Hollow Limited Partnership, live at 415 Hilltop Rd., Conestoga Twp., Conestoga, Lancaster County, PA 17516. They own about 72 acres and have lived there for approximately seven years. The Erbs' property is also enrolled in the Lancaster Farmland Trust. Erb Aff. ¶ 2.

5. The appraised value of the property on Hilltop Road is \$23,570. Pl.'s Hr'g Ex. 17.

6. Transco's proposed current route for the pipeline crosses both aforementioned properties, running close to their homes. Hoffman Aff. ¶¶ 5-7, 11; Erb Aff. ¶¶ 6-7; FERC Order.

7. In 2015, Transco submitted an application under section 7(c) of the NGA, seeking a certificate of public convenience and necessity authorizing Transco to construct and operate the pipeline project. FERC Order.

8. The project involves approximately 199.5 miles of pipeline running through Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. Sztrouin Decl. ¶¶ 3, 6.

9. FERC issued a certificate on February 3, 2017, authorizing the construction and operation of this pipeline. FERC Order.⁵

⁴ Plaintiff submitted additional exhibits in support of the Omnibus Motions for Preliminary Injunction at the hearing on March 20, 2017.

⁵ For the reasons discussed below, this Court offers no opinion, at this time, as to the validity of this certificate in light of Defendants' due process challenges.

10. Transco entered into a contract with its shippers that requires the project be completed and in service for the 2017-2018 winter heating season, or as soon as commercially practicable thereafter. Sztroin Aff. ¶ 10, ECF No. 7-4 (No. 17-715).⁶

11. Between February 15, 2017, and March 7, 2017, Transco filed multiple condemnation complaints in this Court, claiming immediate entitlement to rights-of-way across the properties based on the FERC Order. *See* Nos. 5:17-cv-711 to -723 (E.D. Pa. filed Feb. 15, 2017); No. 5:17-cv-1010 (E.D. Pa. filed Mar. 7, 2017).

12. Between February 20, 2017, and February 22, 2017, Transco filed an Omnibus Motion for Preliminary Injunction, seeking injunctive relief granting Transco immediate possession of the rights-of-way in each case.

13. Transco alleges that in order to complete the pipeline project on time, it must have survey access to the properties by March 20, 2017. Sztroin Aff. ¶ 12.

14. The FERC Order imposes environmental conditions on the project, at least twelve of which require access to the rights-of-way to conduct field surveys and the submission of additional documentation to FERC based on the results of the surveys. Sztroin Aff. ¶¶ 14-16.

15. There are limited, seasonal windows of time during which certain surveys, such as threatened and endangered species surveys, may occur. Sztroin Aff. ¶ 17.

16. If Transco misses those windows, it may have to wait until the following year to complete the surveys. Sztroin Aff. ¶ 17.

17. Some of these surveys have taken an average of two to three months to complete. Sztroin Aff. ¶ 17.

⁶ To avoid confusion between the Declaration of Sztroin attached to the Motion for Summary Judgment (“Sztroin Decl.”) from the Declaration attached to the Omnibus Motion for Preliminary Injunction, this Court will refer to the later as “Sztroin Aff.”

18. Transco alleges that if the project is delayed it will suffer approximately \$500,000 in additional costs each month, may lose up to \$1.1 million in revenues each day, and will lose customer confidence if unable to provide service to its shippers by the promised date. Sztroin Aff. ¶¶ 33-35.

19. Between February 20, 2017, and March 17, 2017, Transco filed a Motion for Partial Summary Judgment in all pending cases, seeking orders of condemnation pursuant to the NGA to provide Transco with the substantive right to condemn the rights-of-way sought on the properties in the FERC Order.

20. The motions for partial summary judgment, although filed separately in each case, are almost identical and are based on substantially the same facts.

21. Transco entered into stipulations with Defendants in eight cases to grant Transco access to and entry upon the rights-of-way of their properties for the sole purpose of conducting the surveys required by the FERC Order. *See, e.g.*, ECF No. 27 (No. 17-711).

22. Pursuant to the stipulations, Transco agreed to withdraw its Omnibus Motion for Preliminary Injunction in those cases.

23. Transco also agreed in the stipulations in four of the cases to extend the time for Defendants to respond to the motions for partial summary judgment until April 15, 2017. *See, e.g.*, ECF No. 16 (No. 17-714).

24. Defendants in the above-captioned cases have opposed the Complaints, the Omnibus Motion for Preliminary Injunction, and the motions for partial summary judgment, raising complex questions of constitutional law regarding the FERC Order and proceedings.

25. On March 16, 2017, Transco's cases were reassigned to the Undersigned.

26. A hearing on the Omnibus Motion for Preliminary Injunction was held on March 20, 2017.

IV. Conclusions of Law

In the NGA, Congress granted condemnation power to private corporations. *See E. Tenn. Nat'l Gas Co. v. Sage*, 361 F.3d 808, 821-25 (4th Cir. 2004) (citing 15 U.S.C. § 717f(h)). The general procedure in such cases is that a gas company applies for a certificate of public convenience and necessity from FERC to build and operate a new pipeline. *Id.* at 818-19. Once a certificate is issued, the NGA empowers the company to exercise the right of eminent domain to acquire the lands needed for the project. *Id.* The company usually enters negotiations with landowners to acquire their property, but if these negotiations are unsuccessful, the company may institute condemnation proceedings, asking the court to enter an order of condemnation declaring that the company has the substantive right to condemn the property in the FERC certificate. *See Kirby Forest Indus. v. United States*, 467 U.S. 1, 3-6 (1984); *E. Tenn. Nat'l Gas Co.*, 361 F.3d at 820-25.

A condemnation action can take three paths: (1) straight condemnation, (2) quick-take, and (3) legislative taking. *Id.* In a straight condemnation action, the plaintiff (gas company) files a complaint setting forth its authority for the taking, the use for which the property is being taken, a description identifying the property, the interest to be acquired, and a designation of the owners. *Id.* The court determines how much compensation is due to the landowner and once that amount is tendered, the right to possession passes. *Id.* The second method of taking provides the government with a more expeditious procedure, requiring the filing of a declaration of taking that sets forth the authority for the taking, the public use for which the land is taken, and an estimate of just compensation. *Id.* Once the estimated amount is deposited with the

court, the government is authorized to take immediate possession of the condemned property.

Id. Finally, a legislative taking occurs when Congress exercises the power of eminent domain directly by, for example, enacting a statute. *Id.*

Here, Transco followed the first path by filing condemnation complaints pursuant to the NGA and Federal Rule of Civil Procedure 71.1. However, in its motions for partial summary judgment, Transco seeks an order of condemnation declaring that it has the substantive right to condemn. The Omnibus Motion for Preliminary Injunction then asks the Court to grant Transco immediate possession prior to a determination of just compensation. This is not an avenue recognized by the NGA. *See E. Tenn. Nat'l Gas Co.*, 361 F.3d at 822-23 (concluding that the NGA “contains no provision for quick-take or immediate possession”).

Nevertheless, once Transco has established its right to condemn, the Court may use its equitable power to award preliminary injunctive relief. *See Id.* (holding that a court has the power to grant equitable relief after the gas company establishes a substantive right to condemn). Until it is determined that Transco has the authority to condemn Defendants’ property, however, this Court is without jurisdiction to grant Transco’s Omnibus Motion for Preliminary Injunction. *See Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 308 (3d Cir. 2014) (explaining that once it is determined that a gas company has the right to eminent domain over the property sought from the landowners, the court will conduct a preliminary injunction analysis); *Mid-Atlantic Express, LLC v. Balt. Cty.*, 410 F. App’x 653, 657 (4th Cir. 2011) (holding that because the company did not have the authority to condemn the property, “the district court was without jurisdiction to enter the preliminary injunction”); *Transwestern Pipeline Co., LLC v. 17.19 Acres*, 550 F.3d 770, 776 (9th Cir. 2008) (holding that “a district court lacks authority to grant a preliminary injunction under Rule 65 if the party does not have a

substantive right to the injunction” and that the gas company’s “substantive right to condemn the affected parcels accrues only through the issuance of an order of condemnation by the district court”); *E. Tenn. Nat’l Gas Co.*, 361 F.3d at 823 (concluding that a “federal court has the power to grant equitable relief, but this power is circumscribed by the venerable principle that ‘equity follows the law’” (citations omitted)).

A decision on Transco’s substantive right to relief is premature. Although Transco’s Partial Motion for Summary Judgment and Omnibus Motion for Preliminary Injunction are fully briefed and ripe for disposition in the two above-captioned cases, the summary judgment motions are not ripe⁷ in four other related cases because Transco granted those Defendants additional time to prepare their responses. Transco’s motions in all these cases are substantially identical, and any decision by this Court addressing the validity of the FERC Order, which is the first step in determining whether Transco has a substantive right to condemn any of the properties, will therefore likely apply to all the pending cases. Because the Court has not had the benefit of reviewing briefs from Defendants in all the related cases, there is the possibility of inconsistent decisions. This delay is of Transco’s own making as it stipulated to the extension of time for Defendants to respond in the other cases. Consequently, this Court will not render a decision on Transco’s substantive right to condemn at this time.⁸

The fact that the validity of the FERC Order raises difficult questions of constitutional law further counsels against resolving this issue definitively in the rushed atmosphere of a request for immediate injunctive relief, without full briefing from all interested parties. *See*

⁷ *See Cluck-U Corp. v. Docson Consulting, LLC*, No. 1:11-CV-1295, 2011 U.S. Dist. LEXIS 96638, at *2 n.1 (M.D. Pa. Aug. 29, 2011) (explaining that a motion is not ripe for review until the nonmoving party has had an opportunity to file a brief).

⁸ “This time” amounts to a matter of weeks, as the summary judgment motions should be fully briefed by the end of April.

Sovereign Order of St. John of Jerusalem-Knights of Malta v. Messineo, 572 F. Supp. 983, 990 (E.D. Pa. 1983) (holding that the existence of difficult legal questions of law may create sufficient doubt about the probability of plaintiff’s success to justify denying a preliminary injunction); *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 605 (D. Del. 1971) (“A Court should not decide doubtful and difficult questions on a motion for a preliminary injunction.”); *Coffee Dan’s, Inc. v. Coffee Don’s Charcoal Broiler*, 305 F. Supp. 1210, 1213 (N.D. Cal. 1969) (“On an application for a preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.”).

Moreover, even if Transco has a right to condemn, it has not shown that it will be irreparably harmed because it has an alternative remedy to obtain the immediate relief it needs. *See McHenry v. Comm’r of Internal Revenue*, No. 1:10-cv-00021, 2011 U.S. Dist. LEXIS 77977, at *8 (D.V.I. 2011) (“[T]he availability of an adequate alternative remedy generally precludes a finding of irreparable harm sufficient to warrant injunctive relief.”); *Curtis 1000 v. Youngblade*, 878 F. Supp. 1224, 1248 (N.D. Iowa 1995) (“Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary.”). By withdrawing its Omnibus Motion for Preliminary Injunction in those cases in which it entered into stipulations with the landowners to obtain access to the properties to conduct surveys, Transco has essentially conceded that it will not suffer irreparable harm if granted survey access.⁹ Pennsylvania law

⁹ Notably too, Transco’s claimed irreparable harm is in the nature of additional costs, diminished revenues, and loss in customer confidence, all of which are not the types of harms that usually suffice for an injunction to issue. *See Checker Cab of Phila. Inc. v. Uber Techs., Inc.*, 643 F. App’x 229, 232 (3d Cir. 2016) (concluding that the plaintiff failed to show that it was entitled to a preliminary injunction because the only harm alleged “is the loss of customers,” which “is a purely economic harm that can be adequately compensated with a monetary award following adjudication on the merits”). Further, Transco’s alleged additional costs and loss in customer confidence with its shippers if unable to complete the project on time appears to be a self-inflicted harm because Transco entered into this contract with suppliers before knowing

provides a procedure for which Transco can obtain survey access. *See* 26 Pa. Cons. Stat. § 309 (providing that, upon notice to the landowner, “the condemnor or its employees or agents shall have the right to enter upon any land or improvement in order to make studies, surveys, tests, soundings and appraisals”). Consequently, Transco’s Omnibus Motion for Preliminary Injunction is denied.

Although Transco sought injunctive relief under the NGA, this Court will grant Transco limited survey access to the properties pursuant to § 309. In applying § 309, this Court recognizes the potential conflict between the conformity clause in the NGA, which can be found at 15 U.S.C. § 717f(h),¹⁰ and Rule 71.1(a) of the Federal Rules of Civil Procedure.¹¹ The conformity clause was repealed by Rule 71.1, but only insofar as it required federal courts to conform state procedures to secure a condemnation. *See United States v. 93.970 Acres*, 360 U.S. 328, 333 n.7 (1959); *Guardian Pipeline, L.L.C. v. 295.49 Acres of Land, more or less*, 2008 U.S. Dist. LEXIS 35818, at *43-44 (E.D. Wis. Apr. 11, 2008) (concluding that because Rule 71.1 addressed the subject of condemnation procedure, the conformity clause in the Natural Gas Act

whether it would need to initiate formal condemnation proceedings. These alleged harms may have been avoidable. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) (“If the harm complained of is self-inflicted, it does not qualify as irreparable.” (citing 11A Charles A. Wright, *Federal Practice & Procedure* § 2948.1 pp. 152-53 (1995)); *San Francisco Real Estate Investors v. Real Estate Inv. Trust*, 692 F.2d 814, 818 (1st Cir. 1982) (concluding that the alleged harm caused by investor apprehension over the litigation was largely “self-inflicted” and “entirely avoidable”).

¹⁰ Section 717f(h) provides in part that “[t]he practice and procedure in any action or proceeding [to exercise the right of eminent domain] in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated.”

¹¹ Rule 71.1(a) provides: “[t]hese rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.” “The purpose of Rule [71.1] is to provide a uniform procedure for condemnation in the federal district courts.” Fed. R. Civ. P. 71.1 advisory committee’s note (“Rule 71[.1] affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain ... and supplants all statutes prescribing a different procedure.”).

was preempted and does not apply to any state *mandated* procedures). Section 309, however, does not deal with the steps that must be followed to secure a condemnation and its use in a federal condemnation proceeding is therefore not prohibited by Rule 71.1, nor does it conflict with Rule 71.1.

Congress has prescribed that “[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b). However, “there is no federal law that deals specifically with entries to survey property, so there is nothing to preempt state law in such a proceeding.” *Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362, 367 (8th Cir. 2014); *Sabal Trail Transmission, LLC v. 72 Acres of Land*, No: 5:16-cv-162, 2016 U.S. Dist. LEXIS 62857, at *6 (M.D. Fla. May 12, 2016) (concluding that “federal law does not provide a right to survey, so there exists no conflict between state law and federal law”). Although some courts have been of the belief that Rule 71.1 prohibits the federal courts from applying any state laws in the area of eminent domain, *see, e.g. Tenn. Gas Pipeline Co. v. Garrison*, No. 3:10-CV-1845, 2010 U.S. Dist. LEXIS 94422, at *7-8 (M.D. Pa. Sept. 10, 2010) (concluding that because the plaintiff filed for condemnation under the NGA that it could not use Pennsylvania’s Eminent Domain Code to gain pre-condemnation access to the land), “the NGA certainly does not operate to completely preempt state eminent domain law,” *Bowyer v. Rover Pipeline, LLC*, No. 1:16CV203, 2017 U.S. Dist. LEXIS 8892, at *8 (N.D. W. Va. Jan. 23, 2017) (explaining that the NGA only “preempts state law when the two are in conflict”).

V. Conclusion

Considering that the same Omnibus Motion for Preliminary Injunction, which is the subject of the instant opinion, was filed by Transco in twelve related actions, along with

substantially identical motions for partial summary judgment, four of which are not yet ripe in light of the stipulated extensions of time entered into between those Defendants and Transco, this Court will not render a decision on Transco's right to condemn at this time. Regardless, Transco has failed to show that it will suffer irreparable harm if not granted injunctive relief because it has an alternative remedy under Pennsylvania law to obtain the survey access it needs.

Accordingly, the Omnibus Motion for Preliminary Injunction is denied, but, pursuant to § 309, Transco is granted access to and entry upon the rights-of-way, as defined in the respective complaints, for the sole purpose of conducting surveys required under the FERC Order.

Appropriate orders will follow.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.

JOSEPH F. LEESON, JR.

United States District Judge