

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MOUNTAIN VALLEY PIPELINE, LLC,)	
)	
Plaintiff,)	
)	
)	
v.)	Case No. 7:17cv492-EKD
)	
)	
EASEMENTS TO CONSTRUCT, OPERATE,)	
AND MAINTAIN A NATURAL GAS)	
PIPELINE OVER TRACTS OF LAND IN)	
GILES COUNTY, CRAIG COUNTY,)	
MONTGOMERY COUNTY, ROANOKE)	
COUNTY, FRANKLIN COUNTY, AND)	
PITTSYLVANIA COUNTY, VIRGINIA,)	
<i>et al.</i> ,)	
)	
Defendants.)	

PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS MOTION FOR
PARTIAL SUMMARY JUDGMENT AND IMMEDIATE POSSESSION

Pursuant to its power of eminent domain as authorized by the Natural Gas Act, 15 U.S.C. §§ 717-717z, and Federal Rule of Civil Procedure 71.1, Mountain Valley Pipeline, LLC (“MVP”) has filed this action to condemn easements necessary for the construction, operation, and maintenance of an interstate pipeline and associated appurtenances necessary for its operation (“Project”) across properties of defendants (“Landowners”). MVP has the authority to condemn the easements because it holds a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory

Commission (“FERC”). The rights-of-way are necessary for the Project, and MVP has been unable to acquire the rights-of-way by agreement with Landowners.

MVP plans to place the pipeline in service by December 2018. MVP needs access to Landowners’ properties by February 1, 2018, to safely and effectively construct the Project on schedule. The Project will help meet the public’s demand for natural gas in the Northeast, Mid-Atlantic, and Southeast regions of the country. FERC has found that the Project is in the public interest. Delaying the construction of the Project will cause irreparable harm to both the public and MVP because it will unnecessarily postpone the delivery of natural gas to both regional and local markets where additional supplies are needed. The delay will only increase the costs of the Project and postpone its benefits. Landowners will not suffer any harm by the grant of immediate access because they may continue to use and enjoy their properties as long as that use does not interfere with MVP’s work. By requiring a bond, the Court can secure Landowners’ right to just compensation.

I. FACTS

1. On October 13, 2017, FERC issued an Order Issuing Certificates (“Certificate Order”) to MVP to construct a new interstate natural gas pipeline. ECF No. 1-1.

2. MVP is a natural gas company. *Id.* ¶ 4.

3. The pipeline will run 303 miles from Wetzel County, West Virginia, to Pittsylvania County, Virginia. *Id.* ¶¶ 1, 7.

4. The pipeline is designed to transport up to two million dekatherms a day of natural gas. *Id.* ¶ 1.

5. The pipeline will move gas from producing regions in the Marcellus and Utica shales to the Transco pipeline system in the east. *Id.* ¶ 7.

6. The pipeline will also interconnect with Columbia's WB line supplying gas to the Washington, D.C. area. *Id.* ¶ 7.

7. In addition, the pipeline will supply gas to Roanoke Gas, a local distribution company. *Id.*

8. MVP has entered into contracts with various shippers for the full capacity of the line. *Id.* ¶ 9.

9. The Project was under review by FERC for three years. Numerous landowners and other interested parties intervened and commented. To address landowner requests and environmental concerns, MVP made hundreds of route variations before the final route was selected and approved. *Id.* ¶¶ 1, 57, 122. In issuing the Certificate Order, FERC found that MVP took sufficient steps to minimize adverse impacts on landowners and surrounding communities. *Id.* ¶ 57.

10. MVP has acquired a number of the easements required for the Project by agreement with landowners. MVP made offers of at least \$3,000 to acquire the required easements from Landowners, but Landowners have not accepted the offers. Decl. of Robert J. Cooper ("Cooper Decl.") ¶¶ 7-8, Exhibit 1 to Plaintiff's Motion for Partial Summary Judgment and Immediate Possession.

11. In issuing the Certificate Order, FERC found that the Project is a public convenience and necessity and that the public interest will be served by the Project ECF No. 1-1 ¶¶ 61, 62; Cooper Decl. ¶ 27. Specifically, FERC found that the “public at large will benefit from the increased reliability of natural gas supplies” and that “upstream natural gas producers will benefit . . . by being able to access additional markets for their product.” ECF No. 1-1 ¶ 62.

12. The Certificate Order requires that the Project be constructed and placed in service within three years. ECF No. 1-1 ¶ 310(c)(1).

13. The Certificate Order authorizes MVP to condemn the necessary right-of-way to construct, operate, and maintain the Project. 15 U.S.C. § 717f(h).

14. The easements condemned by MVP (“Easements”) are necessary to safely construct, operate, and maintain the Project as certificated by FERC. Cooper Decl. ¶ 10.

15. MVP plans to complete construction of the Project by winter 2018. Cooper Decl. ¶ 20. To meet this schedule, MVP needs possession of the Easements by February 1, 2018. *Id.* ¶ 12, 24.

16. The Project will be constructed simultaneously across 11 segments, each approximately 30 miles in length. *Id.* ¶ 14.

17. By February 2018, MVP plans to begin mobilizing the construction crews on all of the segments. *Id.* ¶ 15.

18. MVP and its contractors will first fell and clear trees from properties used for service facilities and access roads, and those properties impacted by endangered species. *Id.* ¶ 16.

19. MVP has contractual requirements to begin clearing activities by February 2018. MVP must comply with regulations of the United States Fish and Wildlife Service requiring that clearing be complete by March 31, 2018, and that construction of roads be complete by March 31, 2018. If construction is delayed, MVP will be unable to comply with those contractual requirements, and agency approvals and permits, it may be subject to fines, and it will incur damages. Cooper Decl. ¶ 25.

20. For each of the 11 segments, MVP and its contractors will work in a continuous straight line down the path of the pipeline and rights-of-way, clearing and grading the rights-of-way, ditching the line, and moving the pipe from the laydown yard to the rights-of-way. *Id.* ¶ 17.

21. In April or May, MVP and its contractors are scheduled to begin welding the pipe in each of the segments. *Id.* ¶ 18.

22. After welding is complete, MVP and its contractors will test the welds, lower the pipe into the trench, cover and grade the surface over the pipeline, work on crossings and tie-ins, clean and dry the pipeline, and finally place natural gas into the pipeline. *Id.* ¶ 19.

23. MVP plans to place the meters in service in late November or December 2018. *Id.* ¶ 20. The planned in-service date of the pipeline is December 2018. *Id.* ¶ 13.

24. MVP's construction schedule is designed to protect a number of environmentally sensitive species of bats and migratory birds along dozens of miles of the pipeline's path. *Id.* ¶ 21.

25. Tree clearing and other pre-construction activities must be completed in compliance with environmental restrictions, which require the tree clearing to be complete prior to March 31, 2018, for locations with protected bats, and prior to May 31, 2018, for locations with protected migratory birds. Cooper Decl. ¶ 22.

26. In addition, many properties have identified wetlands or streams that are subject to environmental regulations that restrict MVP's construction activities and schedule. *Id.* ¶ 23.

27. If MVP is unable to commence tree clearing and construction by February 1, 2018, it will be unable to work according to its construction schedule and will incur additional delay fees and contractor costs. *Id.* ¶ 24.

28. MVP has entered into contracts to begin shipping gas in 2018. *Id.* ¶
26.

29. Landowners will not be harmed by allowing construction to commence pending a determination of just compensation. MVP has a right of eminent domain, and the payment of just compensation can be secured through an appropriate bond. MVP is prepared to post a bond for the just compensation due Landowners. *Id.* ¶¶
30-31.

30. Landowners may continue to use and enjoy their property so long as they do not interfere with or obstruct MVP's rights-of-way. *Id.* ¶ 29.

31. The Project is in the public interest. It will benefit both consumers and producers of gas to make the pipeline operational as soon as possible. ECF No. 1-1 ¶¶ 61, 62.

32. Delaying the Project will unnecessarily postpone its benefits, increase the costs of completing the work, and result in the substantial loss of revenue to MVP. Cooper Decl. ¶ 28.

II. STANDARD OF REVIEW

The granting of immediate possession involves two steps. The first step is a partial summary judgment establishing MVP's right to condemn the Easements. Fed. R. Civ. P. 56(a). The second step is a preliminary injunction granting MVP immediate possession of the Easements. *East Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004); *see* Exhibit 1 (listing by circuit some of the many decisions following *Sage* or reaching the same conclusion).

Summary judgment procedure under Rule 56 is an integral part of the Federal Rules, which are as a whole designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). A party may move for summary judgment as to all or any part of a claim. Fed. R. Civ. P. 56(a). The Court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. *Id.* The movant can make the requisite showing by citing to particular parts of the record, including declarations and documents. Rule 56(c)(1)(A).

After the movant has made the required showing, the burden of production shifts to the non-moving party to show sufficient evidence to create a genuine issue of material fact. *Temkin v. Frederick Cty. Comm'rs*, 945 F.2d 716, 718-19 (4th Cir. 1991). The non-moving party must present specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

MVP has the power to condemn the Easements under Section 7(h) of the Natural Gas Act because MVP holds a FERC certificate, the Easements are necessary for the Project, and Landowners have not accepted an offer of at least \$3,000 for each property. 15 U.S.C. § 717f(h). These facts are all established by the Certificate Order and the Declaration of Robert J. Cooper. ECF No. 1-1; Cooper Decl. As a result, MVP is entitled to partial summary judgment on its right to condemn. *E.g., Transcontinental Gas Pipe Line Co. v. Permanent Easement Totaling 2.322 Acres*, No. 3:14-CV-00400, 2014 WL 4365476, at *5 (E.D. Va. Sept. 2, 2014) (granting partial summary judgment confirming gas company's authority to condemn); *Columbia Gas Transmission Corp. v. Easement to Construct, Operate, & Maintain 24-Inch Gas Transmission Pipeline*, No. 3:07-CV-00028, 2007 WL 2220530, at *3 (W.D. Va. July 31, 2007) (same).

With a partial summary judgment establishing its right to condemn, MVP may seek injunctive relief under Rule 65. *E.g., Sage*, 361 F.3d at 828 (“[O]nce a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.”).

To receive a preliminary injunction, MVP must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm without preliminary relief, that the balance of equities tips in MVP's favor, and an injunction is in the public interest. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (stating test for preliminary injunction).

As shown below, MVP meets the test for injunctive relief. Consequently, the Court should enter an order granting MVP immediate possession of the Easements. *See, e.g., Dominion Carolina Gas Transmission, LLC v. 1.169 Acres*, 218 F. Supp. 3d 476, 478-81 (D.S.C. 2016) (applying test for preliminary injunction and granting immediate possession to gas company); *Columbia Gas Transmission, LLC v. 252.071 Acres*, No. CV 15-3462, 2016 WL 1248670, at *12 (D. Md. Mar. 25, 2016) (same); *Transcontinental Gas Pipe Line Co. v. Temporary Easement Totaling 0.119 Acres*, No. 3:14-CV-00409, 2014 WL 4365477, at *4 (E.D. Va. Sept. 2, 2014) (same).

III. ARGUMENT

A. MVP IS ENTITLED TO A PARTIAL SUMMARY JUDGMENT ESTABLISHING ITS AUTHORITY TO CONDEMN THE EASEMENTS

1. *MVP Holds a Certificate of Public Convenience and Necessity*

MVP holds the required FERC Certificate of Public Convenience and Necessity. On October 13, 2017, FERC issued the Certificate Order to MVP. ECF No. 1-1.

2. *The Easements Are Necessary*

The Certificate Order authorizes MVP to condemn the property interests that are necessary to construct, operate, and maintain the Project. 15 U.S.C. § 717f(h) (authorizing condemnation of necessary property interests). The Easements condemned by MVP are “necessary to safely construct, operate, and maintain the MVP Project as certificated by FERC.” Cooper Decl. ¶ 10.

FERC has determined that the Project is a matter of public convenience and necessity. ECF No. 1-1 ¶¶ 61-62. That determination cannot be challenged in this action. Collateral attacks on FERC’s finding that the construction, operation, and maintenance of a project constitute a public convenience and necessity are improper and not permitted. *See, e.g., Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 778 n.9 (9th Cir. 2008) (“The NGA does not allow landowners to collaterally attack the FERC certificate in the district court. . . .”); *Alliance Pipeline L.P. v. 4.500 Acres*, 911 F. Supp. 2d 805, 813 (D.N.D. 2012) (“In a condemnation action, a district court lacks jurisdiction to hear collateral attacks on certificates issued by FERC.”); *Hardy Storage Co. v. Property Interests Necessary to Conduct Gas Storage Operations*, No. 2:07-CV-5, 2009 WL 689054, *4 (N.D. W. Va. Mar. 9, 2009) (noting that FERC’s decision of necessity cannot be attacked in a district court proceeding); *Kansas Pipeline Co. v. 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1256 (D. Kan. 2002) (“Once the holder of a FERC certificate of public convenience and necessity asks a district court to enforce its right to condemn, the findings in the FERC certificate are conclusive.”). Accordingly, any objections to the findings of FERC may not be raised in this action.

It is the duty of courts to order the condemnations that are authorized by FERC certificates. *E.g., Transcontinental Gas Pipe Line Co. v. Permanent Easement for 0.03 Acres*, No. 4:17-CV-00565, 2017 WL 3485752, at *4 (M.D. Pa. Aug. 15, 2017); *Columbia Gas Transmission*, 2016 WL 1248670, at *5; *USG Pipeline Co. v. 1.74 Acres*, 1 F. Supp. 2d 816, 821 (E.D. Tenn. 1998).

3. *MVP Has Been Unable to Acquire the Easements by Agreement*

MVP attempted to acquire each of the properties by agreement, but it could not do so. Cooper Decl. ¶ 8. MVP has therefore satisfied its obligations under the Natural Gas Act. *See Hardy Storage*, 2009 WL 689054, at *5 (holding that the plaintiff had no legal duty under the Natural Gas Act or Rule 71.1 to engage in good faith negotiation and that it need only show that it was unable to reach an agreement regarding just compensation with the property owners); *Columbia Gas Transmission Corp. v. Easement to Construct, Operate & Maintain 24-Inch Pipeline*, No. 5:07-CV-04009, 2008 WL 2439889, *4 n.4 (W.D. Va. June 9, 2008) (“All the NGA requires is a showing that the plaintiff has been unable to acquire the property by contract or has been unable to agree with the owner of the property as to the compensation to be paid.”); *Kansas Pipeline Co.*, 210 F. Supp. 2d at 1257; *Maritimes & Ne. Pipeline, L.L.C. v. Decoulos*, 146 Fed. Appx. 495, 498 (1st Cir. 2005).

4. *Conclusion*

MVP has satisfied the requirements for condemnation under § 717f(h). The Court should therefore enter a partial summary judgment establishing MVP’s authority to

condemn the Easements. *E.g.*, *Transcontinental Gas Pipe Line*, 2014 WL 4365476, at *5 (granting partial summary judgment confirming gas company's authority to condemn); *Columbia Gas Transmission*, 2007 WL 2220530, at *3 (same).

B. MVP IS ENTITLED TO IMMEDIATE POSSESSION OF THE EASEMENTS

Because MVP has authority to condemn the Easements, the Court has equitable power under Rule 65 to grant MVP immediate possession of the Easements. *E.g.*, *Sage*, 361 F.3d at 828 (“[O]nce a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction.”); *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 315-16 (3d Cir. 2014) (ordering district court to enter preliminary injunction granting immediate possession); *Alliance Pipeline L.P. v. 4.360 Acres*, 746 F.3d 362, 369 (8th Cir. 2014) (affirming order granting immediate possession).

1. *MVP Will Likely Succeed on the Merits*

As stated above, MVP has eminent domain power by virtue of the Certificate Order and the Natural Gas Act, 15 U.S.C. § 717f(h). For this reason, MVP is likely to succeed on the merits of its claim. MVP has satisfied the requirements of the Natural Gas Act: It holds a FERC Certificate of Public Convenience and Necessity for the MVP Project; the property interests condemned are necessary for the construction, operation, and maintenance of the MVP Project; and MVP and Landowners have been unable to reach agreements for MVP to acquire the Easements.

2. *Immediate Possession Is in the Public Interest*

Congress gave gas companies condemnation power to ensure that consumers would have access to an adequate supply of natural gas. *Sage*, 361 F.3d at 826, 830 (recognizing “need for natural gas supply” as a “substantial public interest”). Before issuing the Certificate Order, FERC conducted a careful analysis of the Project and determined that it will promote these Congressional goals and serve the public interest. ECF No. 1-1 ¶¶ 61-62. Specifically, FERC found that the “public at large will benefit from the increased reliability of natural gas supplies” and that “upstream natural gas producers will benefit . . . by being able to access additional markets for their product.” *Id.* ¶ 62.

Delaying the construction of the MVP Project will unnecessarily postpone the public benefits that the pipeline will provide. *Sage*, 361 F.3d at 830 (finding immediate possession is in public interest); *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres*, No. CV 17-715, 2017 WL 3624250, at *10 (E.D. Pa. Aug. 23, 2017) (same); *Transcontinental Gas Pipe Line*, 2017 WL 3485752, at *5 (same); *Columbia Gas Transmission, LLC v. 171.54 Acres*, No. 2:17-CV-70, 2017 WL 838214, at *8-9 (S.D. Ohio Mar. 3, 2017) (same); *Sabal Trail Transmission, LLC v. 1.44 Acres*, No. 5:16-CV-164, 2016 WL 2991151, at *5 (M.D. Fla. May 24, 2016) (granting immediate possession and explaining that timely construction advances the public interest).

3. *MVP Will Suffer Irreparable Harm Without Preliminary Relief*

If MVP and its contractors are unable to access the properties and begin clearing and construction activities by February 1, 2018, MVP will be unable to complete the work in accordance with its construction schedule, and it will incur substantial damages. Cooper Decl. ¶ 24. MVP will be unable to meet its contractual requirements to begin clearing activities in February 2018. *Id.* ¶¶ 25. MVP is also subject to regulations from the United States Fish and Wildlife Service requiring that tree clearing be complete by March 31, 2018, and that construction of roads be complete by March 31, 2018. *Id.* MVP also has agreements in place to begin shipping gas in 2018. *Id.* ¶ 26. Delay would also result in substantial loss of revenue to MVP. *Id.* ¶ 28. These costs and losses constitute irreparable harm. *Sage*, 361 F.3d at 828-29 (finding inability to meet contractual obligations to be irreparable harm); *Transcontinental Gas Pipe Line*, 2017 WL 3485752, at *3 (finding irreparable harm because company would “suffer substantial costs and loss of profits if it cannot begin the project as soon as possible”); *Columbia Gas Transmission*, 2017 WL 838214, at *8 (finding irreparable harm where pipeline “would be subjected to significant monthly revenue losses unless and until it both completes the Pipeline and replaces any volume lost as a result”); *Sabal Trail Transmission*, 2016 WL 2991151, at *4 (additional construction costs due to delays constitute irreparable injury); *Dominion Carolina Gas*, 218 F. Supp. 3d at 479 (finding irreparable harm where “[f]urther delay also will cause financial harm to both DCGT and its customer”).

MVP cannot avoid financial losses by starting work on the rights-of-way it has acquired by agreement. As the Fourth Circuit determined in *Sage*, skipping a parcel and returning later to complete the work creates unnecessary expense amounting to irreparable harm. *Sage*, 361 F.3d at 828-29; *see also Columbia Gas Transmission*, 2017 WL 838214, at *7 (granting immediate access, in part, because “industry standards dictate linear construction of pipelines to minimize costs and maximize efficiency”); *Sabal Trail Transmission*, 2016 WL 2991151, at *4 (“The irreparable injury that would be suffered includes significant additional construction costs”); *Florida Se. Connection, LLC v. 0.821 Acres*, 223 F. Supp. 3d 1227, 1232 (M.D. Fla. 2016) (recognizing skip-over costs as irreparable harm); *Southeast Supply Header, LLC v. 180 Acres*, No. 2:07-CV-280, 2008 WL 160700, at *3 (S.D. Miss. Jan. 9, 2008) (finding “skip-around costs” violate public policy).

4. *The Balance of Equities Is in MVP’s Favor*

By contrast, Landowners will not suffer any harm by the grant of immediate access to and possession of the Easements. The grant of immediate access does not affect Landowners’ rights to receive just compensation. *See Sage*, 361 F.3d at 829 (stating that any opposition to immediate possession is “simply a timing argument” because the gas company will eventually obtain possession); *Transcontinental Gas Pipe Line*, 2017 WL 3624250, at *9 (“It is natural for some landowners to want to delay possession as long as possible, but there is no legal basis for further delay.”); *Sabal Trail Transmission*, 2016 WL 2991151, at *5 (finding immediate possession will not harm defendants’ right to compensation); *Dominion Carolina Gas*, 218 F. Supp. 3d at 480

(“‘[T]he Fifth Amendment guarantees the landowners just compensation for their land no matter when the condemnor takes possession.’”) (quoting *Sage*, 361 F.3d at 829); *Columbia Gas Transmission LLC v. 0.85 Acres*, No. CV 14-2288, 2014 WL 4471541, at *7 (D. Md. Sept. 8, 2014) (“Nothing indicates that the Defendants will suffer any greater harm by allowing Columbia to possess the property immediately instead of after trial and the determination of just compensation.”); *Columbia Gas Transmission*, 2007 WL 2220530, at *4 (finding immediate possession will not affect defendants’ interest in compensation).

MVP is willing to post a bond as a condition to immediate possession, which will fully protect Landowners’ interests. Cooper Decl. ¶ 31; *Sage*, 361 F.3d at 829. Courts routinely find that the balance of equities favors immediate possession when a bond is given. *E.g., Florida Se. Connection, LLC v. 0.107 Acres*, No. 8:16-CV-653, 2016 WL 2752677, at *5 (M.D. Fla. May 11, 2016); *Columbia Gas Transmission*, 2014 WL 4471541, at *7; *Northwest Pipeline Corp. v. 20' by 1,430' Pipeline Right of Way Easement*, 197 F. Supp. 2d 1241, 1246 (E.D. Wash. 2002).

Finally, Landowners may still use and enjoy their properties as long as that use is not inconsistent with MVP’s rights, as described specifically in the Complaint. Cooper Decl. ¶ 29.

IV. CONCLUSION

MVP has authority to condemn the Easements and meets the test for a preliminary injunction. Consequently, the Court should enter a partial summary judgment establishing that MVP has authority to condemn the Easements and issue a preliminary injunction granting MVP immediate possession of the Easements.

Respectfully submitted,

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By /s/ Wade W. Massie
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CERTIFICATE OF SERVICE

I hereby certify that, on October 27, 2017, I electronically filed this Memorandum with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record, and I will subsequently attempt to arrange personal service of this Memorandum on the defendants who can be personally served.

/s/ Wade W. Massie

Wade W. Massie