COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. **SUPERIOR COURT**
CIV. NO. 16-0083

TENNESSEE GAS PIPELINE COMPANY, L.L.C.

Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS and others[1]

Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO CONFIRM AUTHORITY TO CONDEMN EASEMENTS AND MOTION FOR INJUNCTIVE RELIEFAUTHORIZING IMMEDIATE ENTRY

INTRODUCTION

This litigation is based on plans by the plaintiff, Tennessee Gas Pipeline Company, L.L.C. (Tennessee), to construct an interstate natural gas pipeline through a 2.3 mile stretch of conservation land in the Otis State Forest in Sandisfield.[2] On July 31, 2014, Tennessee filed an application under the Natural Gas Act (NGA), 15 U.S.C. § 7(c), for authorization to construct and operate pipeline facilities in Massachusetts, New York and Connecticut.

On March 11, 2016, the Federal Energy Regulatory Commission (FERC) issued a Certificate of Public Convenience and Necessity (the Certificate) pursuant to the NGA, 15 U.S.C. § 717, authorizing Tennessee to construct and operate the pipeline and to file an action to acquire easements in the land along the pipeline by eminent domain if Tennessee were unable to acquire them by agreement. Tennessee has not yet reached an agreement to acquire the easements from the conservation land's owner, the defendant Commonwealth of Massachusetts Department of Conservation and Recreation (DCR).

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[1]Leo P. Roy, Commissioner of the Massachusetts Department of Conservation and Recreation, Massachusetts Department of Conservation and Recreation, Office of the Board of Assessors of the Town of Sandisfield, William S. Bolt, Six Acres of Land, more or less, of Permanent Easements in Sandisfield, Massachusetts, Office of the Board of Assessors of the Town of Sandisfield and Unknown Landowners.

[2] After the hearing on the plaintiff's motion for a preliminary injunction, there were media reports that Tennessee was suspending further work on the Northeast Energy Direct ("NED") Project. The subject of this litigation is the Certificate received by Tennessee for the Connecticut Expansion Project, a separate project from the NED.

The DCR cannot convey easements in this conservation land for the pipeline unless it is authorized by a supermajority vote of the Massachusetts Legislature in accordance with Article 97 of the Amendments to the Massachusetts Constitution. That authorizing vote has not occurred.

Relying on the Certificate, Tennessee brought this action asserting its right to take by eminent domain temporary and permanent easements[3] to begin work, including tree felling, for the construction of the pipeline. Tennessee's amended complaint filed on March 24, 2016, seeks an order confirming its authority to condemn the easements (Count 1), and orders for preliminary and permanent injunctive relief, granting it immediate possession of the property (Count 2). Before the court are Tennessee's Motion to Confirm Authority to Condemn Easements and Motion for a Preliminary and Permanent Injunction Authorizing Immediate Entry. For the reasons explained below, Tennessee's motions are *ALLOWED*.

BACKGROUND

The relevant facts are as follows, with some details reserved for the legal analysis.

A. The FERC Certificate

The Certificate calls for the construction and operation of an underground natural gas pipeline adjacent to two existing underground natural gas pipelines owned and operated by Tennessee ("Project"). The Project consists of the construction of a 3.8 mile, 36 inch pipeline, with appurtenant facilities, within or adjacent to the existing Tennessee right-of-way in Sandisfield.

The purpose of the Project is to increase the volume of gas that can be transported along the existing section of pipeline for the benefit of three natural gas utility companies in Connecticut and their respective customers. The Project will be located within the Otis State Forest, which is owned and managed by the DCR. The Project will require a new permanent easement of approximately 6 acres and and approximately 15 acres of temporary workspace.

The Certificate directs that the Project be constructed and made available within two years of the date of its issuance, thus by March 10, 2018. Tennessee hopes to be able to begin and complete tree cutting for this month, May of 2016, so that it can commence construction and have the pipeline operational by November 1st, in time for next winter.

Having been issued the Certificate, Tennessee now must acquire temporary and permanent easements in the property and obtain certain further authorizations from FERC to proceed with tree cutting and construction. As noted above, the Certificate provides that if Tennessee cannot obtain the easements through an agreement, it "can commence eminent domain proceedings in a court action." (Certificate para. 99).

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[3] The temporary easement includes work space and roadway access for the construction and preconstruction of the pipeline. The permanent easement is for the land through which the pipes are to run.

The Certificate acknowledges that Tennessee had been unable thus far to obtain by agreement with the DCR easements through the Otis State Forest, yet "encourages applicants to cooperate with state and local agencies regarding the location of pipeline facilities, environmental mitigation measures, and construction procedures." Certificate para. 85. The Certificate instructs that the "rule of reason must govern both the state and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements." The Certificate explains that its goal is to "include state and local authorities to the extent possible in the planning and construction activities of pipeline applicants," and advises that some additional state and local procedures and requirements which trigger delays and additional costs are not unreasonable. See Certificate para. 85.

Because the Project will impact conservation land, even with the Certificate in place, it faces major hurdles for the Project to proceed: (1) Article 97 of the Amendments to the Massachusetts Constitution, and (2) a myriad of approvals, including environmental permitting and certification.

B. Article 97 of the Amendments to the Massachusetts Constitution

In 1972, the Massachusetts Legislature adopted Article 97 of the Amendments to the Massachusetts Constitution, which provides that land acquired by the Commonwealth for Article 97 conservation purposes shall not be subject to any change in use or other disposition except by laws enacted by a two-thirds vote of each branch of the Legislature.[4] Consequently, Article 97 requires a two-thirds vote of the Legislature to authorize DCR to grant the easements through the Otis State Forest for the Project.

On July 10, 2015, a bill was filed on Tennessee's behalf in the Massachusetts House of Representatives seeking legislative approval for the easements for the Project. On July 23, 2015, the Massachusetts House and Senate jointly referred to the State Administration and Regulatory Oversight (SARO) House Bill 3690 to convey the easements. Massachusetts State Representative Peter V. Kocot, who is the House Chair of the Joint Committee on SARO, states in his affidavit that Tennessee has not provided SARO with all of the requested information necessary for the Committee to report House Bill 3690 with a recommendation.[5] Rep. Kocot states that once SARO receives all the pending responses from Tennessee, it will determine its recommendation on the disposition of the bill.

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[4]The Commonwealth acquired the 900 acre Otis State Forest as conservation land in 2007 at a cost of $5.2 million. According to the DCR, Tennessee's project would impact more than 20 acres of that land and permanently impact six acres.

[5]Rep. Kocot has asked Tennessee for certain information about discussions with the Town of Sandisfield and the EOEEA as related to the wetlands protection and other mitigation efforts and has asked for updates on the progress of mitigation discussions and copies of mitigation agreements. Rep. Kocot's requests were made, orally, between the referral of House Bill 3690 and the public hearing on the bill on November 10, 2015.

Because Tennessee has been unsuccessful so far in obtaining the easements by agreement, it brought this action on March 16, 2016, asserting its right to the easements by eminent domain as set forth in the FERC certificate and argues that the Certificate preempts Article 97.

C. Pre-Certificate Environmental Reviews

The Project has been scrutinized by federal and state entities amid considerable public debate since August 20, 2014, when the Federal Register published Tennessee's notice of application to FERC. Among the many areas of debate regarding the Project have been environmental concerns. On October 19, 2014, FERC issued a Notice of Intent to Prepare an Environmental Assessment (NOI), and received dozens of comment letters prior to and in response to issuing the NOI. In late October 2014, FERC held meetings to provide the public information about the project and to comment on environmental issues to be addressed in FERC's Environmental Assessment.

As the FERC process moved forward, the Project was also subject to extensive review by environmental agencies and the public pursuant to the Massachusetts Environmental Policy Act (MEPA), G. L. c. 30, §§ 61-62H. As part of that review, on April 17, 2015, the Massachusuetts Executive Office of Energy and Environmental Affairs (EOEEA) issued a Final Environmental Impact Review (FEIR) certificate and on June 5, 2015, the EOEEA issued required findings under G. L. c. 30, § 61 (the Section 61 Certificate). In the FEIR certificate, the EOEEA concluded that alternative routes for the project would have a greater environmental impact than the proposed route.

On October 23, 2015, FERC issued an Environmental Assessment of the Project in compliance with the National Environmental Policy Act of 1969 (NEPA). The Environmental Assessment addressed, *inter alia*, the proposed Project's impact on geology and soils, water resources, wetland, fisheries, vegetation, wildlife, land use, and threatened, endangered and special status species. A thirty day public comment period followed that publication.[6]

On March 11, 2016, FERC issued the 64 page Certificate, addressing the concerns and comments it had received up to that point about the Project. The Certificate states that the Project's "impacts to the Otis State Forest will be minor" and that Tennessee "has

[6] On November 5, 2015, the Attorney General's Office issued "Comments of [AG Healey] to [the FERC Secretary] on the October 23, 2015, Environmental Assessment for [Tennessee's Project] Docket No. CP14-529-000." The AG stated that "In accordance with the FEIR Certificate and Section 61 Certificate, DCR has agreed that Tennessee Gas would assure no net loss of Article 97 land by paying $300,000 into the Conservation Trust established by G. L. c. 132A, § 1, to be used by DCR to acquire land in the vicinity with conservation values and ecological functions 'equivalent to those that will be impacted by the project, including wetland resource areas, vernal pools and habitat.' See Section 61 Certificate, p. 5. Tennessee Gas has also agreed to pay $ 239,380 to compensate for construction impacts to temporary and permanent easement areas in Article 97 land (in addition to the compensation it will provide for the permanent pipeline easement itself, in an amount to be determined by an independent appraisal commissioned by [DCAMM]." It is unclear if those comments reflect binding agreements on the amounts of compensation to be paid.

complied with the state process and submitted the required information to the appropriate state agencies, pursuant to [MEPA] and its implementing agencies." The Certificate discusses and addresses in detail the environmental concerns raised with respect to the Project, including comments by the Sandisfield Board of Selectmen, private citizens, Mass Audubon, Sandisfield Taxpayers Opposed to the Pipeline (STOP), the Massachusetts Attorney General, and the DCR. FERC explains in the Certificate that its staff consulted with the United States Army Corps of Engineers regarding impacts on wetlands and with the United States Fish and Wildlife Service (Fish and Wildlife) regarding impacts on federally-listed threatened and endangered species, and complied with its consultation requirements.

The Certificate instructs, "Prior to receiving written authorization from the Director of [The Office of Energy Projects] to commence construction of any project facilities, Tennessee shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)." Certificate, App. B, Condition 9, at p. 60. The requisite authorizations include certificates under Sections 401(a)(1) and 404 of the Federal Clean Water Act and compliance with Federal conservation laws enforced by Fish and Wildlife concerning protected species.

D. Post-Certificate Regulatory Proceedings

Even with the Certificate, Tennessee must obtain Notices to Proceed from FERC to authorize the commencement of onsite work such as tree clearing and construction. To that end, on March 22, 2016, Tennessee filed with FERC a request for a Limited Notice to Proceed, which, if granted, would allow Tennessee to perform non-mechanized tree clearing to prepare for the construction phase of the Project.

On March 25, FERC responded to Tennessee's implementation plan and request for a limited Notice to Proceed with its first request for information so that FERC could complete its review. FERC asked Tennessee (1) to confirm that it would not cut trees in any area for which it has no easement, "including lands protected under Article 97 of Massachusetts State Constitution"; (2) to submit evidence that the U.S. Army Corps of Engineers concurs that a permit under Section 404 of the Clean Water Act is not required for non-mechanized tree felling for the project; and (3) to provide evidence that the MA DEP concurs that Water Quality Certificates under Section 401 of the Clean Water Act are not required for non-mechanized tree felling for the proposed project. The record shows that the MA DEP has not issued Section 401 certification and is in the process of assessing potential impacts from tree felling on the easement area and determining whether a Section 401 Certificate is required.

On March 30, 2016, FERC issued a second request for information needed for FERC's analysis of the Tennessee's implementation plan and request for a Limited Notice to Proceed. That second request sought, among other information, correspondence between Tennessee and Fish and Wildlife concerning a request for permission to fell trees after the March deadline. In a letter dated April 12, 2016, Fish and Wildlife opined that while no extension is needed to protect certain species of bats, tree felling during

migratory birds' breeding season, usually from early spring to early fall, would injure or kill migratory birds which are likely to be present within the Project area, and thus such tree felling would contravene the Migratory Bird Treaty Act.

DISCUSSION

Tennessee filed in this action its Verified Complaint for Condemnation under the Act pursuant to 15 U.S.C. § 717F(h), seeking to condemn a permanent and perpetual right of way and easement (the "Permanent Right of Way"), as approved and certificated by FERC, and a temporary right of way and easement for work space (the "Temporary Work Space"), as approved and certificated by FERC, under, upon, across and through land owned by the Defendants. Tennessee also asked this Court to enter an order confirming that Tennessee has the substantive right to condemn under the NGA.

Tennessee argues that this Court must order condemnation and immediate possession because: (1) the NGA and the Certificate preempt state laws, (2) Tennessee satisfies the three conditions necessary for condemnation of the easements, and (3) condemnation is routinely ordered on an expedited basis.

The Commonwealth asserts that Article 97 is not preempted by the NGA because "that unique constitutional provision implicates the structure of Massachusetts state government and separation of powers between the legislative, executive and judicial branches." Commonwealth Memorandum at p. 26. In fact, the Commonwealth argues that any constitutional provision "that promotes conservation and environmental welfare" would be exempt from the Supremacy Clause. *Id*. In support of these assertions, the Commonwealth cites *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991).

The Commonwealth also views Tennessee's motions as premature, before Tennessee has made reasonable efforts to comply with Article 97 and before FERC and other federal permitting processes are complete. The Commonwealth points out that it is highly unlikely that FERC will authorize Tennessee to clear trees and begin construction this month, and that such authorization will not likely occur before October 2016, making it impossible for Tennessee to stay on track with its construction deadline of having the pipeline operational by November 2016.

At this point, it is necessary to digress and briefly review the applicable federal legislations and the Supremacy Clause.

A. The Natural Gas Act

The Natural Gas Act, 15 U.S.C. § 717 et seq., was passed in 1938 in order to give the federal government regulatory power over those areas where the states could not act independently. The NGA gave the Federal Power Commission, now identified as the FERC, broad authority to establish just and reasonable rates for the interstate transportation and interstate sale and resale of natural gas and to issue certificates for the interstate transportation and sale of natural gas and the construction and operation of facilities for such sales and transportation.

Through the enactment of the NGA and related statutes,[7] Congress has expressed its intent to establish a regulatory scheme to provide adequate supplies of natural gas to the interstate market. To accomplish its goals, Congress has delegated certain power and authority to FERC, an independent regulatory agency within the Department of Energy. 42 U.S.C. § 7171(a). It is responsible for administering the enforcement, among other things, of various provisions of the NGA, including the issuance of certificates of public convenience and necessity pursuant to § 7 of the NGA, 15 U.S.C. § 717f. It is also responsible for the administration and enforcement of the NGPA, 15 U.S.C. § 3301, et seq., NGPA §§ 501(a), 504, 15 U.S.C. §§ 3411(a), 3414.

Congress enacted the NGA with the "principal purpose" of "encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices," *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976). "[S]ubsidiary" purposes include respecting "conservation, environmental, and antitrust" limitations. *Id.* at 670 & n.6. The NGA specifically vests FERC with authority to regulate the transportation and sale of natural gas in interstate commerce, including authority to issue certificates permitting the construction or extension of natural gas transportation facilities. 15 U.S.C. § 717f(c).

Before any applicant may construct or extend natural gas transportation facilities, it must obtain a "certificate of public convenience and necessity" from FERC pursuant to Section 7(c) of the NGA. 15 U.S.C. § 717f(c)(1)(A). FERC may issue a certificate to "any qualified applicant" if it finds that "the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service" and "construction . . . is or will be required by the present or future public convenience and necessity." § 717f(e). As part of its certificate authority, FERC has the "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

With respect to environmental issues, federal statutes and regulations specify that environmental and land use issues be reviewed, and ultimately approved, by FERC prior to the issuance of a FERC certificate to begin construction. Environmental review is a substantial part of the certificate application process. Substantively, the FERC certificate process considers and determines a full range of environmental and land restoration standards surrounding the construction of interstate natural gas pipelines. The breadth of these statutes and regulations, when combined with extensive safety regulations applicable to pipeline construction, compels the conclusion that Congress has annexed the field of interstate gas pipeline regulation, including land maintenance, environmental and restoration standards. See *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 577-79 (2d Cir. 1990).

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[7] The related statutes are the Natural Gas Pipeline Safety Act (NGPSA), the Pipeline Safety Improvement Act of 2002 (PSA), the Hazardous Liquids Pipeline Safety Act of 1979 (HLPSA) and the Natural Gas Policy Act (NGPA).

The issue of eminent domain is a prominent aspect of the NGA. The Act provides "[w]hen any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts." 15 U.S.C. § 717f(h). Accordingly, a certificate of public convenience and necessity gives its holder the ability to obtain automatically the necessary right of way through eminent domain, with the only open issue being the compensation the landowner defendant will receive in return for the easement.

B. The Supremacy Clause and the Natural Gas Act

The Supremacy Clause of Article VI of the United States Constitution grants Congress the power to preempt state or local law.[8] Under the doctrine of preemption, a federal law can displace state law through (1) express preemption, (2) field preemption, or (3) conflict preemption. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988).

First, Congress may, through a statute's plain language, explicitly preempt state regulation in an area. *Schneidewind* 485 U.S. at 299. Second, in the absence of such explicit or functionally overt preemption, Congress may imply an intent to "occupy the field" through pervasive and comprehensive federal laws and regulations in an area or where the federal interest in an area is sufficiently dominant. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

Finally, state law is preempted to the extent that it actually conflicts with federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). An actual conflict occurs when it is impossible to comply with both the state and federal laws or where "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Col. Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572, 581 (1987), quoting *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 248 (1984).

Several general rules of interpretation set the stage for a preemption analysis. First, "[a] pre-emption question requires an examination of congressional intent." *Schneidewind v. ANR Pipeline Co*., 485 U.S. at 299. Second, "the best indication of Congress' intentions, as usual, is the text of the statute itself." *South Port Marine, LLC v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (1st Cir. 2000). Finally, to determine Congress' intent, the Court must consider not only the statute itself, but the federal regulations

[8]Article VI, clause 2 states, "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

implementing and explaining it. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).

Courts presume that "the historic police powers of the States" are not to be curtailed by federal law unless Congress indicates a "clear and manifest purpose" to do so. *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992), quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. at 230. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id*. at 517. See also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (noting that, in interpreting scope of preemption, courts must apply a "presumption against the pre-emption of state police power regulations" affecting, inter alia, "matters of health and safety").

With these guidelines in mind, it is obvious that Congress specifically granted FERC, through the NGA, plenary power over (1) the transportation of natural gas in interstate commerce; (2) the sale of natural gas in interstate commerce; and (3) the companies who transport and sell natural gas in interstate commerce. See 15 U.S.C. § 717(b) (2006). Similarly, it gives FERC jurisdiction over the siting of natural gas facilities, as a natural gas company must obtain a certificate of public convenience and necessity from FERC before constructing an interstate natural gas facility. See 15 U.S.C. § 717f(c)(1)(A) (2006). Congress, as reflected in the statute's plain language, explicitly preempts state regulation in this area.

In identifying this explicit preemption, the Supreme Court, in *Schneidewind*, held that "[t]he NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind*, 485 U.S. at 300-301, citing *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 89 (1963).[9] The "Gas Act was intended to provide . . . the FERC with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers." *Maryland v. Louisiana*, 451 U.S. 725, 748 (1981).

Throughout the last half century, the United States Supreme Court has consistently upheld the authority which Congress has granted to FERC under the NGA to implement the Act. The first decision was rendered by the Supreme Court shortly after the NGA was enacted. In *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co*., 314 U.S. 498 (1942), the Supreme Court held that an order issued by the Illinois Commerce Commission directing a natural gas pipeline company to supply a local distributor with gas for distribution to consumers in Illinois was invalid. The Court stated:

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[9] In *Schneidewind*, natural gas companies brought a declaratory judgment action challenging the assertion of jurisdiction over the issuance of securities by the Michigan State Public Service Commission. The Supreme Court affirmed the decision of the Sixth Circuit, holding that the state statute seeking to regulate the issuance of securities was preempted by the NGA. *Schneidewind*, 485 U.S. at 309. The Court concluded that, when applied to natural gas companies, the statute amounted to "a regulation of rates and facilities, a field occupied by federal regulation." *Id*. at 307.

> "We think it plain that these provisions, read in the light of the legislative history, were intended to bring under federal regulation wholesale distribution, like that of appellant, of gas moving interstate . . . the Act has given plenary authority to the Federal Commission to regulate extensions of gas transportation facilities and their physical connection with those of distributors, as well as the sale of gas to them . . . ."

314 U.S. at 508, 510.

Later, in *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959), the Supreme Court reaffirmed the power of FERC to carry out the responsibility and implement the provisions of the NGA. See also *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137 (1960); *United Gas Pipe Line Co. v. Federal Power Commission*, 385 U.S. 83, 87 (1966); *California v. Southland Royalty Co*., 436 U.S. 519 (1978); *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529 (1979).

Regarding the first type of preemption, I believe that Congress has explicitly preempted state laws and regulations with respect to construction, maintenance and expansion of interstate natural gas lines.

Turning to the second type of preemption, in enacting the NGA and related statutes and regulations, Congress intended to create a comprehensive and effective regulatory scheme which would occupy the field to the exclusion of state regulations. Congress sought to achieve this objective by creating a comprehensive regulatory framework through which, among other things, the movement of natural gas through the interstate pipelines could be coordinated. See *Federal Power Commission v. Louisiana Power & Light Co*., 406 U.S. 621 (1972); *Panhandle Eastern Pipe Line Company v. Public Service Comm'n of Indiana*, 332 U.S. 507 (1947); *Public Utilities Comm'n v. United Fuel Gas Co*., 317 U.S. 456, 467 (1943); *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954). Simply stated, Congress intended to "occupy the field" through pervasive and comprehensive federal laws and regulations.

The need for paramount federal authority here is compelling. An individual state would be powerless to authorize and implement a coherent and comprehensive gas production and distribution system throughout the United States. Given the disparate interests of each state, particularly those producing and those consuming the gas products, only a central authority with plenary power and the national interests at stake could effectively install and maintain such a system. "The Natural Gas Act was designed ... to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." *FPC v. Panhandle Eastern Pipe Line Co*., 337 U.S. 498, 513 (1949).

Given the dominant federal interest, the expression of congressional purpose and the pervasiveness of the federal regulatory system, Congress intended to preempt this area and left no room in this field for a state to incorporate its rules and laws.

Finally, as to the third type of preemption, it is beyond cavil that Article 97, by giving the Commonwealth an unfettered right to stop this and similar projects, would directly and substantially conflict with federal law. In fact, permitting the states to exercise the unilateral ability to interfere with federal policy in this area would eviscerate the NGA. It would be impossible to comply with both the state and federal laws if the Commonwealth had the ability to stop the Project by a vote of its legislators. The regulatory objectives of the two government entities are simply incompatible.

Accordingly, through the enactment of the NGA, Congress has expressed its intent to establish a regulatory scheme to provide adequate supplies of natural gas to the interstate market. The NGA's text, its legislative history, administrative implementation, and judicial interpretation attest to federal preemption of this field with respect to the establishment and enforcement of standards regulating the interstate transmission of gas by pipeline. In enacting this federal regulatory scheme, Congress intended to pre-empt the field of regulating natural gas. Congress' expressed objectives, moreover, involve "a federal interest . . . so dominant that the federal interest will be assumed to preclude enforcement of state laws on the same subject" *Rice v. Santa Fe Elevator Corp*., 331 U.S. at 218.

C. Article 97 and Preemption

Central to this dispute is the assertion by the Commonwealth that Article 97 is not preempted by the NGA. Although it concedes that preemption by the NGA is generally available, particularly regarding environmental and eminent domain issues, the Commonwealth argues that it is question of first impression whether there is preemption of "a public trust doctrine provision in a state constitution entrusting the state legislature with sole authority to allow---by supermajority, a roll call vote only---a change in use or easement through conservation land when such land is dedicated and protected under express provisions of the state constitution." Commonwealth Memorandum, p. 22.

The Commonwealth asserts that Article 97 governs "a critical component of the Commonwealth's sovereignty," the ability to protect its forests, mountains and national resources. It cites the case of *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), arguing "an exception from federal preemption for state law provisions that are fundamental to state sovereignty and implicate the structure of state government, the exercise of state government authority and the way in which state defines itself as a sovereign."

The argument of the Commonwealth is so expansive that it would preclude any activity by the federal government that would seek to intrude on such conservation territory. Moreover, with such power on the side of the Commonwealth, it could simply thwart preemption for any purpose by bringing any land under the umbrella of Article 97. For the following reasons, I suspect that the appellate courts would not look favorably on this power sharing arrangement.

The case cited for support by the Commonwealth, *Gregory v. Ashcroft*, is not a Natural Gas Act case. The plaintiffs in *Gregory* brought a federal Age Discrimination in

Employment Act ("ADEA") challenge to a provision in the Missouri constitution that required municipal judges to retire at the age of seventy.[10] The case concerned a state constitutional provision through which the people of Missouri establish the qualifications for those who sit as their judges.

As with virtually every other preemption case considered by the Supreme Court, it acknowledged that,

> "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute. . . . Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States. . . . [T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision . . . . This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."
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> *Gregory*, 501 U.S. at 460–61 (citations and quotation marks omitted).

The Supreme Court in rejecting any intrusion of federal law on Missouri constitutional prohibitions, ultimately found that judges are not "employees" under ADEA and, consistent with prior decisions, that each state has the power to prescribe the qualifications of its officers and judges. See *Boyd v. Thayer*, 143 U.S. 135, 161 (1892).

In a similar vein, the Supreme Court has carved exceptions to the Supremacy Clause involving issues in which states have a special and paramount interest, including jurisdiction to determine the conditions under which the right of voting may be exercised within the state, *Carrington v. Rash*, 380 U.S. 89, 91 (1965), to prescribe the qualifications of its officers and the manner in which they shall be chosen, *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892), and drawing lines for congressional districts *Perry v. Perez*, 565 U.S. ——, ——, 132 S.Ct. 934, 940, 181 L.Ed.2d 900 (2012). In cases involving the NGA, preemption is unwarranted when the issues involved are uniquely suitable for state jurisdiction, such as tort claims, property disputes and contract issues.

The Commonwealth has not cited a single case that would prevent preemption regarding a subject that has historically and necessarily been within the exclusive province of the federal government, such as the NGA. As noted above, the United States Supreme Court has consistently sustained the jurisdiction and preemption regarding pipelines and other endeavors of interstate commerce. Nothing in the NGA suggests that the Commonwealth share power to regulate these practices.

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[10] In this case, Congress acted pursuant to its Commerce Clause power in extending the ADEA to the States.

To the extent that the Commonwealth seeks support from the fact that Article 97 is a constitutional provision and, thereby, afforded greater deference from the Supremacy Clause, the law is littered with numerous state constitutional provisions felled by federal preemptions. See *Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("[w]hen there is an unavoidable conflict between the Federal and State constitution, the Supremacy Clause of course controls").

Our Supreme Judicial Court has also recognized the overriding power of the Supremacy Clause, even against a state constitutional provision. See *Boston Med. Cent. Corp. v. Secretary of the Exec. Office of Health & Human Servs*., 463 Mass. 447, 461-462 (2012) ("The purpose of the Supremacy Clause is… to ensure that, in a conflict with state law, whatever Congress says goes" quoting *Douglas v. Independent Living Ctr. of S. Cal., Inc*. 132 S.Ct. 1204, 1212 (2012) (Roberts, C.J. dissenting); *Schaffer v. Leimberg*, 318 Mass. 396, 405 (1945) ("an act of Congress and administrative regulations made under its authority and consequently made substantially a part of the act becomes part of the 'supreme law of the land,' under art. 6 of the Constitution of the United States, which provides that 'the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding'"), quoting *Florida v. Mellon*, 273 U. S. 12, 17 (1927); *Commonwealth v. Welosky*, 276 Mass. 398, 412 (1931) ("no provision of a state constitution or statute in conflict with the paramount Constitution of the United States . . . has any validity").

These principles have been uniformly established in other jurisdictions as well. See, e.g., *Columbia Gas v. Exclusive Natural Gas Storage* Easement, 747 F. Supp. 401 (N.D. Ohio 1990); *Lucas v. People of the State of Michigan*, 420 F.2d 259, 263 (6th Cir. 1970); *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 95 (S.D.N.Y. 2003); *Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F. Supp. 282, 289 (W.D. Tex. 1986); *Tenneco, Inc. v. Sutton*, 530 F.Supp. 411 (D. La. 1981); *United States v. 20.53 Acres of Land in Osbourne County, Kansas, City of Downs*, 263 F.Supp. 694, 698 (D. Kan. 1967); *Buckley v. Hoff*, 234 F.Supp. 191, 198 (D.Vt. 1964).

I would be remiss if I did not address the consequences of the Commonwealth's position. The Supremacy Clause is about allocating power between the federal and state governments with preemption the glue that ties the states together in a federation. What is particularly troubling about the Commonwealth's argument is the ease at which a state has the ability to stop a federal interstate project, be it a pipeline, highway, telecommunications network or electrical transmission lines by simply invoking a state constitutional provision geared to protect the environment. If accepted by the appellate courts, other states would be well advised to adopt this road to confederation, particularly those states that have expressed a less than harmonious relationship with Washington. I strongly suspect that this is a road that the appellate courts will not take.[11]

[11] Given that there have been 117 successful Articles of Amendments to the Massachusetts Constitution, introducing similar language to state constitutions throughout the country would not appear to be a daunting task.

Considering the judicial history and purposes of the NGA, I conclude that Article 97 of the Massachusetts Constitution violates and conflicts with the Supremacy Clause of the United States Constitution and, therefore, is unavailable to hinder or prevent the project.

D. Cooperation and the Rule of Reason

Despite the preemption of Article 97, the Certificate does not give Tennessee an unrestrained right to ignore the Commonwealth. Instead, the Certificate expressly requires Tennessee to make a good faith, reasonable effort to "cooperate with state and local agencies regarding the location of pipeline facilities, environmental mitigation measures, and construction procedures."

The Certificate states in paragraphs 85-86,

> "The Commission encourages applicants to cooperate with state and local agencies regarding the location of pipeline facilities, environmental mitigation measures, and construction procedures. That a state or local authority requires something more or different than the Commission does not necessarily make it unreasonable for an applicant to comply with both the Commission's and state or local agency's requirement . . . .The Commission's practice of encouraging cooperation between interstate pipelines and local authorities does not mean, however, that those agencies may use their regulatory requirements to undermine the force and effect of a certificate issued by the Commission. A rule of reason must govern both the state and local authorities' exercise of their power and an application's bona fide attempts to comply with state and local requirements.
>
> "We note that the Commission cannot act as a referee between applicants and state and local authorities regarding each and every procedure or condition imposed by such agencies. In the event compliance with a state or local condition conflicts with a Commission certificate, parties are free to bring the matter before a Federal court for resolution."

The motivation and purpose of this provision is not clear. Not surprisingly, the Commonwealth points to this language and argues that Tennessee must make a "reasonable, good faith effort to comply with Article 97," and if unsuccessful, seek rehearing before FERC, followed by judicial review in federal court. Tennessee asserts that such cooperation language is "standard in most FERC decisions and is not intended to be used to "prohibit or unreasonably delay the construction of facilities approved by this Commission."[12]

[12] Tennessee cites FERC decisions in support of these assertions; decisions to which I do not have access. See *Maritimes & Ne. Pipeline, LLC*, 81 FERC para. 61166, 61730 (Nov. 4, 1997)("Finally, we note that the Commission in recent years has included language in virtually every order in which a construction certificate is issued…explaining its policy of requiring applicants to cooperate with State and local agencies," but noting that such agencies may not, "through the application of state and local laws, prohibit or unreasonably delay the construction of facilities approved by this Commission'").

The rule of reason identified by FERC is a rule "inherent in NEPA [National Environmental Policy Act] and its implementing regulations . . . which ensures that agencies determine whether and to what extent to prepare an EIS [environmental impact statement] based on the usefulness of any new potential information to the decisionmaking process." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)(emphasis added). This "reasonableness" review does not materially differ from an "arbitrary and capricious" review. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 n. 23 (1989) (noting that "difference between the 'arbitrary and capricious' standard and the 'reasonableness' standard is not of great pragmatic consequence").

I agree with Tennessee that FERC has encouraged the parties to engage in a spirit of cooperation with respect to disputes that arise after the Certificate has issued, not an invitation to revisit the decision-making of the agency. Article 97 affords the Commonwealth a legislative ability to address such items. The Commission genuinely wants consensus among the parties but fully recognizes its authority to mandate the terms and conditions of a project. In other words, after the issuance of the Certificate, Tennessee should be amenable to thoughtful comments and recommendations of the aggrieved parties on issues that inevitably arise during the surveying and construction phases of the Project, without having to compromise the integrity of the project.[13]

Regarding whether Tennessee must "make a good faith, reasonable effort to comply with Article 97," Commonwealth's Memorandum. p. 13, I do not believe that the parties must engage in good faith negotiations as a prerequisite of exercising condemnation authority. See *Maritimes & NE Pipeline, LLC v. Decoulos*, 146 Fed. Appx. 495, 498 (1st Cir. 2005) ("Absent any credible authority making good faith negotiation a requirement precedent to the condemnation action, we decline the invitation to create one in this case").

This "good faith" argument is not based on the requirements of the NGA or the Certificate or any legal authority identified. It appears that the Commonwealth is conflating FERC's encouragement to cooperate with a "good faith" standard. However, a good faith standard has been used in pipeline litigation to address the compensation issue. There are NGA cases in which FERC has indicated that it is incumbent upon the applicant to make "good faith" efforts to negotiate with landowners regarding compensation, and if the parties cannot reach agreement on the issue of compensation for land taken by eminent domain, the matters may be addressed in state or federal court. See *Northern Natural Gas v. 9117.53 Acres in Pratt*, 781 F.Supp.2d 1155, 1160-61 (D. Kan. 2011). The issue of compensation offered by Tennessee has not been raised by the Commonwealth and, if necessary, will be determined by a court hearing.

Although House Bill 3690 has languished for months, it is unclear from the record whether Tennessee has made a reasonable effort to respond to legitimate legislative

[13] I do not believe that the parties must engage in good-faith negotiations as a prerequisite of exercising condemnation authority. See *Maritimes & Ne. Pipeline, LLC v. Decoulos*, 146 Fed. Appx. 495, 498 (1st Cir. 2005)("Absent any credible authority making good faith negotiation a requirement precedent to the condemnation action, we decline the invitation to create one in this case").

questions with respect to the pipeline project's environmental impacts and mitigation efforts, or whether the hoops through which the Project has already passed (i.e., obtaining the FEIR and Section 61 Certificates, etc.) and continues to face[14] render the legislative queries for additional information duplicative, unnecessary and a contrivance to delay the project.[15] In any event, an evidentiary hearing would be conducted to resolve this factual dispute if so required.

The Commonwealth has given no indication that it only seeks to address forthcoming issues or whether it simply wants to stop the project. Furthermore, the suggestion by the Commonwealth that Tennessee, if there is a disagreement with the Legislature, must return to FERC for a decision and then to federal court, would permit the Commonwealth to use this language to derail the project. It is an aspirational goal for compromise and consensus on issues that arise after the Certificate issues.

However, based on a suggestion by the Commonwealth at the hearing, this issue need not be ultimately resolved. As noted by the assistant attorney general, the legislative session for this fiscal year ends on July 31, 2016. By giving the Legislature until July 31 to conduct a hearing and issuing any directives or recommendations regarding the project, this factual dispute and the significance of this "*Kumbaya*" language in the Certificate will be moot or simply be reduced to a legal argument for the appellate courts. This additional period to permit the Legislature to consider the project will not unfairly or unreasonably delay the project. In fact, it seems unlikely that Tennessee will be able to secure all the necessary permits to allow it to begin construction in the near future.

In any event, the Court finds that Tennessee is the holder of a valid Certificate of Public Convenience and Necessity issued by FERC, that FERC has determined that the defendants' property is needed for the pipeline, and that Tennessee has been unable to acquire the defendants' property by agreement, and thus that Tennessee has satisfied all requirements of the Natural Gas Act, 15 U.S.C. § 717f(h). The Court further finds that the interests condemned by Tennessee are consistent with the authority granted it by the Certificate and within the scope of such authority, and that Tennessee is authorized by the Act to exercise the power of eminent domain. Therefore, the Court hereby confirms Tennessee's right to condemnation of the easement.

E. Motion for Injunctive Relief

Tennessee also requests that the Court grant it preliminary and permanent injunctions authorizing it to enter upon the property to begin construction-related activities on the Project. This action by Tennessee is a straight condemnation proceeding

[14] FERC will not issue notices to proceed with tree felling or construction until it is satisfied that the remaining environmental impact concerns, including compliance with the Water Quality Act and the Migratory Bird Treaty Act, are resolved.

[15] I am not unmindful that the storm clouds surrounding this dispute are not solely in response to an easement over a 2.3 mile corridor of property owned by the Commonwealth. Global issues regarding the continued use of fossil fuel and hydraulic fracturing (fracking) are lurking in the background.

pursuant to the NGA, 15 U.S.C. § 717(h).[16] Courts have allowed non-governmental condemnors to seek injunctive relief for immediate possession of the property if they can show that a threat of irreparable harm and other circumstances warrant such relief. See *E. Tennessee Natural Gas Co. v. Sage,* 361 F.3d 808 (4th Cir. 2004).

Tennessee argues that it should be granted immediate possession of the easements by entering a preliminary injunction. It urges that further delay will be harmful to it and the public. As stated in the affidavit of James M. Flynn, Tennessee "needs immediate possession to perform pre-construction activities" already authorized. Delayed entry will, it argues, jeopardize the timely completion of the project.

The Commonwealth argues that a preliminary injunction should not be ordered as Tennessee has failed to obtain all of its permits or comply with all of the construction conditions prior to the exercise of eminent domain. The Commonwealth has not cited any legal support for such a contention. In contrast, courts have routinely granted possession to a natural gas company after its condemnation authority is confirmed. See *East Tennessee Natural Gas Company v. Sage*, 361 F.3d 808 (4th Cir. 2004); *Constitution Pipeline Co. LLC*, 2015 WL 1638250, at *3 ("if [natural gas company] were not allowed to exercise eminent domain authority until it had satisfied all conditions in the FERC Order, the Project could never be constructed"). More importantly, the Certificate in paragraph 34 notes that the Commission "does not wait for the issuance of federal, state and local permits to assess project impacts in order to make conclusion under the NEPA." The permitting process proceeds on a "parallel, but separate, review process" to avoid undue delay to a project.

I find that the failure of Tennessee to obtain all of the permits or to satisfy all of the construction conditions is not grounds to prevent the requested relief. It is axiomatic that the project cannot commence without complying with the conditions in the Certificate, however, this does not prevent the exercise of eminent domain power and preliminary relief.[17]

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[16] Generally, the power of eminent domain is accomplished through the process of condemnation—the judicial transfer of real property. Before the judicial process for condemnation may begin there must be a law authorizing the condemnation; in this case, 15 U.S.C. § 717F(h). Once an entity with the power of eminent domain makes its initial determination to engage in a condemnation action of property, the matter moves to the Federal or Superior Court for the condemnation, which involves the court confirming the use and necessity, fixing the amount of just compensation, and transferring title.

[17] To the extent that the Commonwealth challenges Tennessee's compliance with the conditions of the Certificate to defeat the condemnation, this Court does not have jurisdiction to evaluate plaintiff's compliance with the terms of the Certificate because those are matters reserved to FERC. See *Transwestern Pipeline Co. v. 11.19 Acres of Prop. Located in Maricopa Cnty.*, 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, it only allows enforcement of its provisions"); *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262 (10th Cir. 1989) ("We agree with the appellants that the eminent domain authority granted the district courts under § 7(h) of the NGA, 15 U.S.C. § 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function under the statute is not appellate but, rather, to provide for enforcement"). "[W]hen a landowner contends that the certificate holder is not in compliance with the certificate, that challenge must be made to FERC, not the court."

This is not the typical preliminary injunction, where the merits await another day. Here, there is no remaining issue as the court has ruled that Tennessee has the right to the easement by eminent domain. The only issue is the amount of compensation, but the result of which can have no effect on Tennessee's rights to the easements.

A preliminary injunction is an equitable and extraordinary remedy, and thus is not appropriately granted in those circumstances where it would impose an unfair or inequitable advantage on one party. *Cote-Whitacre* v. *Dep't of Pub. Health*, 446 Mass. 350, 357 (2006) (Spina, J., concurring). To prevail on its request for a preliminary injunction, the plaintiff must show a strong likelihood of success on the merits of the claims, that he will suffer irreparable harm without the requested injunctive relief and that the harm, without the injunction, outweighs any harm to the defendant from being enjoined. *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 616-617 (1980). See *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue*, 406 Mass. 701, 710 (1990). In appropriate cases, the court may also consider the risk of harm to the public interest. *GTE Prods. Corp.* v. *Stewart*, 414 Mass. 721, 723 (1993).[18]

1. Success on the Merits

Because the Court finds that Tennessee is entitled to exercise eminent domain under the Gas Act, this finding establishes, without more, a likelihood of success on the merits. The first factor, accordingly, favors immediate possession. See *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa.*, 768 F.3d 300, 314-315 (3d Cir. 2014) (finding that plaintiff's right of eminent domain under the Gas Act demonstrates, without more, compliance with the first factor). Here Tennessee has met the requirements for an order of condemnation and, therefore, has shown its likelihood of success on the merits with respect to possession of the property.

2. Irreparable Harm

With respect to the second factor, Tennessee asserts that it will suffer irreparable harm if not permitted immediate access to the property because (1) delay to the start of construction will add more costs which Tennessee cannot recover, (2) delay will

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Millennium Pipeline Co., L.L.C. v. Certain Permanent and Temp. Easements, 777 F. Supp. 2d 475, 481 (W.D.N.Y. 2011). "Disputes as to the propriety of FERC's proceedings, findings, orders or reasoning must be brought to FERC by way of request for hearing . . . . Appeals may thereafter be brought before a U.S. Court of Appeals only. 15 U.S.C. §717r(b); *Tennessee Gas Pipeline Co. v. MBTA*, 2 F.Supp. 2d 106, 109-110 (D. Mass. 1998).

[18] Economic harm, compensable in money, is traditionally not considered irreparable and the few exceptions found involve cases in which the plaintiff was in danger of going out of business due to the economic damage. "Economic harm alone ... will not suffice as irreparable harm unless 'the loss threatens the very existence of the movant's business,'" *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 227-228 (2001), quoting from *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 399 Mass. 640, 643 (1987).

jeopardize Tennessee's ability to meet its November 1, 2016 in-service date as set forth in binding agreements with three gas shippers, and (3) further delay can create additional environmental constraints, as weather events could have a significant disruptive effect and potentially delay the replacement of the pipeline. Given that construction must be sequential and the activities must be coordinated, timing is critical. Tennessee, through the affidavit of James Flynn, asserts that potential delays may cost Tennessee an additional $1,000,000.00 in construction cost.

Tennessee further asserts through the Flynn affidavit that if this Project is delayed, the utility customers will be denied the "opportunity for lower natural gas prices in the upcoming winter season, and "preventing them from meeting supply forecasts included in contracts with their customers."

Tennessee points to the case of *East Tennessee Natural Gas Company v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004), in arguing that a preliminary injunction is warranted where a delay in construction of a pipeline would cause "significant financial harm" to both a gas company and its customers. *Id*. at 828–29. The Fourth Circuit explained that East Tennessee Natural Gas Company would be forced to breach certain contractual obligations if it were compelled to delay construction in order to hold hearings on just compensation. *Id*. See also *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 125 F.Supp.2d 299, 301 (N.D. Ill. 2000) (delay from not awarding pipeline company immediate possession would result in increased construction costs which pipeline company could not recover from the defendants in any proceeding, making its harm irreparable). It is well settled that "the district court does have the equitable power to grant immediate entry and possession where such relief is essential to the pipeline construction schedule." *Tennessee Gas Pipeline Co. v. New England Power*, 6 F.Supp. 2d 102, 104 (D. Mass. 1998).

For all of these reasons, the Court finds that Tennessee would suffer irreparable harm in the absence of an order granting it immediate possession of the requested easements. See *Columbia Gas Transmission, LLC*, 768 F.3d at 315-16 (finding irreparable harm where delay might have caused the plaintiff to miss the in-service deadline); *Tenn. Gas Pipeline Co. v. 0.018 Acres of Land in the Twp. of Vernon, Sussex Cty., N.J.*, 2010 WL 3883260, at *2-*3 (D.N.J. Sept. 28, 2010) (finding that plaintiff's failure to meet the in-service contract date would result in irreparable harm). I am convinced that delaying the work authorized by FERC until the litigation is resolved would cause irreparable injury to both the plaintiff and its customers. The second factor, accordingly, favors immediate possession of the easements.

3. Harm to the Defendants

In an NGA condemnation action "[t]he harm to be analyzed [by the court] is not the harm of possession, since that is a given, but, rather, the harm of immediate possession." *Tenn. Gas Pipeline Co. v. 0.018 Acres of Land in the Twp. of Vernon, Sussex Cnty., New Jersey*, 2010 WL 3883260, at *2 (D.N.J. Sept. 28, 2010)(citing *E. Tenn. Natural Gas Co.*, 361 F.3d at 830). Here any harm to the defendants caused by the

construction of the additional pipeline will be the same regardless of when Tennessee is granted possession. The Commonwealth has not pointed to any special or particular harm that will result from immediate possession of the property rather than from possession at a later date. The Certificate describes that there would be "minimal adverse effect on landowners or surrounding communities." Certificate, para 17. FERC specifically indicated that alternative routes that were considered would have a greater impact on the environment and that the environmental "impacts to the Otis State Forest will be minor." Certificate, para 83.

4. Public Interest

With regard to the fourth factor, it is self-evident that the timely completion of the proposed pipeline furthers the public interest, because the Project will help meet the current and future demand for natural gas and will support the overall reliability of the energy infrastructure. "Congress passed the [NGA] and gave gas companies condemnation power to ensure that consumers would have access to an adequate supply of natural gas at reasonable prices." *Columbia Gas Transmission, LLC*, 2014 WL 2960836, at *16 (quoting *E. Tenn. Natural Gas Co.*, 361 F.3d at 830). Thus, by granting the Certificate, FERC determined that this Project promoted the goals of Congress and the NGA.

Finally, it is within FERC's authority to determine whether a proposed Project advances the public interest. FERC's issuance of the Certificate is evidence that it has so determined. Indeed, FERC specifically found in the Certificate that "public convenience and necessity require approval of Tennessee's proposal, as conditioned in this order." Certificate para. 17. Moreover, it is logical given the anticipated capacity of the proposed pipeline, that the timely completion of such pipeline may assist in ensuring an adequate supply of natural gas for the public during the upcoming heating season. See *Fla. Power & Light Co. v. FERC*, 598 F.2d 370, 379 (5th Cir. 1979) ("It is well established . . . that the overall purpose of the Natural Gas Act is to protect the interest of customers in an adequate supply of gas at reasonable rates").

The Court therefore finds that granting immediate possession of the disputed easements advances the public interest. The fourth factor, accordingly, favors immediate possession.[19]

For all of the above reasons, Tennessee's motion for a preliminary injunction will be granted. However, this relief will be subject to a Stay until July 29, 2016, for two reasons. First, as suggested by the Attorney General, the Stay will allow sufficient

[19] Numerous federal courts have held that if the standard for injunctive relief is satisfied in favor of granting the relief, pipeline companies with the authority of eminent domain under the NGA may be granted immediate access to property. See, e.g., *East Tennessee Natural Gas Co., v. Sage*, 361 F.3d 808, 826-828 (4th Cir. 2004); *Maritimes & Northeast Pipeline, LLC v. Decoulos*, 146 Fed. Appx. 495, *2-3 (1st Cir. 2005); *Northwest Pipeline Corp. v. The 20' by 1,430' Pipeline Right-of-Way*, 197 F.Supp.2d 1241, 1245 (E.D.Wash. 2002) ("[w]here there is no dispute about the validity of [the gas company's] actual right to the easement, denying authority to grant immediate possession would produce an absurd result").

opportunity for the Massachusetts Legislature to discharge its responsibilities pursuant to Article 97 of the Massachusetts Constitution, thereby eliminating any factual issue. Second, given the importance and novel nature of the issues involved in this litigation, the Stay will allow the parties sufficient time to seek an immediate review of this decision and, if appropriate, a stay from the appellate courts.

IT IS ORDERED

A. That pursuant to the Natural Gas Act, as the holder of a valid Certificate of Public Convenience and Necessity issued by FERC on March 11, 2016, Tennessee has the substantive right to condemn property rights needed for the Project;

B. That Tennessee shall be awarded preliminary and permanent injunctions permitting it an immediate right of entry upon the Permanent Right of Way as approved and certificated by FERC, and the Temporary Work Space as approved and certificated by FERC, under, upon, across and through land owned by the Defendants;

C. That the above Orders are Stayed until July 29, 2016;

D. Tennessee shall post a bond with the Court in the amount of $500,000 pending the determination of the amount of compensation due;

E. That the parties confer and propose to the Court an appropriate litigation schedule to resolve the compensation issue.

/s/

_____ _____

Date

John A. Agostini
Associate Justice, Superior Court