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Constitution¹ respectfully submits this Response in Opposition to Defendants' Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation (Dkt. 74) ("Motion to Dissolve Injunction").

I. INTRODUCTION.

On March 17, 2015, this Court held that (1) Constitution had the right to condemn certain Rights of Way on Landowners' Property and (2) as a necessary corollary to this right to condemn, Constitution had the right to possess and access those Rights of Way. See Dkt. 43. The Court's decision, which resulted in an Order (the "Condemnation Order") granting partial summary judgment and a preliminary injunction in favor of Constitution (Dkt. 44), was predicated on the fact that FERC had issued the FERC Order, which both authorized the Project and gave rise to Constitution's right to acquire via eminent domain the Rights of Way needed to construct and maintain it.

The Court administratively closed this, and other cases, after the grant of possession, but any party could reopen a case and proceed to seek a determination of the compensation due from Constitution for the condemnation. The Landowners have not sought to reopen the case and commence compensation proceedings, but have brought this proceeding seeking to dissolve the injunction.

¹ The same definitions used in the Verified Complaint (Dkt. 1) are used herein.

Although the Project has not yet been constructed, the FERC Order as well as the right to eminent domain contemplated therein remain in full effect.² Further, Constitution has obligations regarding environmental conditions on the Rights of Way on Landowners' Property pursuant to a permit which remains in effect, and continues to require access to the Landowners' Property.

Notwithstanding the fact that the FERC Order is as valid today as it was on March 17, 2015, Landowners now claim that the preliminary injunction granted through the Condemnation Order (the "Preliminary Injunction") should be dissolved. In support of their claim, Landowners point the Court to a lengthy series of events that have nothing whatsoever to do with this condemnation action. Specifically, Landowners recite at length the complex litigation surrounding Constitution's Project for the past three years, particularly regarding the New York State Department of Environmental Conservation's ("NYSDEC") decision to deny Constitution's application for a certification under the Clean Water Act (the "New York 401 WQC"), which relates to a federal authorization needed to construct the Project. Landowners claim that the Project cannot be built without a New York 401 WQC, and summarily predict that Constitution will never receive one. Landowners fail to note that their property in Pennsylvania is subject to

² See FERC Dkt. CP13-499-000, Issuance No. 20160726-3006 (granting Constitution's request to extend the Project's in-service deadline to December 2, 2018).

Pennsylvania's 401 WQC, which was issued in September, 2014, and that PADEP has issued other permits to Constitution, which require Constitution's access to the Rights of Way on Landowners' Property.

Landowners argue that the Preliminary Injunction should be dissolved and that they should receive damages under Federal Rule of Civil Procedure 65. Although Landowners attempt to make much ado about all that has purportedly changed with respect to the Project, Landowners ignore that for purposes of the limited issues before this Court, virtually nothing material has changed since this Court issued injunctive relief in March 2015. Constitution continues to hold a valid FERC Order, and although Constitution has not obtained a New York 401 WQC, this was true at the time the Court issued the Preliminary Injunction. That these material facts have not changed fundamentally undermines Plaintiff's claim that changed circumstances obviate the basis of the Preliminary Injunction.

Because Constitution has indisputably succeeded on the merits of its condemnation claim, injunctive relief in the form of possession of the Rights of Way remains appropriate under Third Circuit case law, and the Court need not reconsider the other elements of what Plaintiff characterizes as the "familiar four-factor test." See Motion to Dissolve Injunction at 14. Nevertheless, even if the Court were to consider the other injunction factors, the Preliminary Injunction should still be maintained, as explained below.

Landowners also request damages under Federal Rule of Civil Procedure 65, but this argument fails because the Preliminary Injunction should not be dissolved. Even if this Court decides to dissolve the Preliminary Injunction, Landowners' claim for Rule 65 damages ignores existing precedent and should be rejected. Damages under Rule 65 are only appropriate when an injunction is "wrongfully issued." Where, as here, an injunction was properly issued but circumstances thereafter changed, damages under Rule 65 are inappropriate. See, e.g., 42 Am. Jur. 2d Injunctions § 320 ("[I]f a court determines that a temporary injunction was rightfully issued, there is no right of recovery on the temporary injunction bond even if the injunction is subsequently dissolved."). Landowners could seek compensation under Rule 71.1, but have not sought to do so to date.

Because Landowners fail to prove that they are entitled to the relief they seek, their Motion to Dissolve Injunction should be denied.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND.

A. Procedural History of this Action.

Constitution initiated this condemnation action by filing a Verified Complaint on December 28, 2014. Dkt. 1. Shortly thereafter, on January 7, 2015, Constitution filed a motion for partial summary judgment on its substantive right to condemn the Rights of Way and an omnibus motion for preliminary injunction for possession of the Rights of Way by February 16, 2015. Dkt. 12, 15. Following

briefing on Constitution's motions and a February 13, 2015 evidentiary hearing, the Court entered its Condemnation Order granting Constitution's motions and issued an accompanying Opinion ("Opinion") on March 17, 2015. Dkt. 43.

In the Opinion, the Court recognized that under Third Circuit precedent (namely, Columbia Gas Transmission, LLC v. 1.01 Acres, 768 F.3d 300 (3d Cir. 2014)³), once a condemnor's right to condemn under the Natural Gas Act is established, injunctive relief in the form of a possession order follows as a consequence of the right to condemn. Specifically, the Court held as follows:

The Columbia Gas case makes it clear a district court is well within its power to grant possession through an injunction if the right to condemn has already been established. Here, the right of Constitution to access the land is no longer in question. As such, this court is bound by the unambiguous and controlling precedent as to whether to grant injunctive relief.

³ In Columbia Gas, the Third Circuit held that a motion for preliminary injunction in the Natural Gas Act condemnation context was not a "'normal' preliminary injunction, where the merits await another day." 768 F.3d at 315. The Third Circuit explained that:

In those situations, the probability of success is not a certainty such that weighing the other factors is paramount. Here, there is no remaining merits issue; we have *ruled* that Columbia has the right to the easements by eminent domain. The only issue is the amount of compensation – which will definitely be determined on remand, but the result of which can have no [e]ffect on Columbia's rights to the easements.

Id. (emphasis in original).

See Opinion at 7.

Less than one year after this Court granted injunctive relief in favor of Constitution, Landowners began to interfere with Constitution's operations on the Rights of Way. Constitution therefore filed an emergency motion to enforce the Condemnation Order on February 12, 2016. Dkt. 46. Following a hearing, this Court denied Constitution's Emergency Motion on February 22, 2016, but found that Landowners had interfered with the Condemnation Order. See Dkt. 67. The Court therefore issued an Order authorizing "the U.S. Marshals Service . . . to arrest any person, whether he/she be a party defendant in this case, a person authorized by a defendant to be on the subject property, or a person not authorized to be on the subject property, who violates the [Condemnation Order] and interferes with Constitution's tree felling operation" See id.

B. Litigation Relating to Constitution's New York 401 WQC Application.

The FERC Order requires Constitution to obtain all required federal authorizations before construction on the Project may begin, which includes 401 WQC's from the affected States. See FERC Order at Appendix ¶ 8. Constitution received the Pennsylvania 401 WQC for the Project in September, 2014. Constitution applied to NYSDEC for a New York 401 WQC prior to the

commencement of this action.⁴ Constitution's application was pending at the time the Condemnation Order issued and Landowners did not argue in their oppositions to Constitution's partial summary judgment and preliminary injunction motions that a New York 401 WQC was a prerequisite to Constitution's right to condemn or its right to possess the Rights of Way. See Dkt. 31, 32, 33, 37.

In April 2016, NYSDEC denied Constitution's application for a New York 401 WQC. Constitution appealed NYSDEC's denial decision to the United States Court of Appeals for the Second Circuit, which affirmed NYSDEC's denial. Constitution Pipeline Co., LLC v. N.Y. State Dep't of Env'tl. Conservation, 868 F.3d 87 (2d Cir. 2017). Constitution then filed a petition for writ of certiorari in the United States Supreme Court, which was denied in April 2018. Constitution Pipeline Co., LLC v. N.Y. State Dep't of Env'tl. Conservation, 138 S. Ct. 1697 (2018).

In October 2017, while Constitution was in the process of appealing NYSDEC's denial decision, Constitution also petitioned FERC for a declaratory

⁴ The Natural Gas Act, 15 U.S.C. §§ 717-717z, sets out provisions regarding the construction of transportation facilities for natural gas, see id. § 717f. Such projects are subject to restrictions under other federal statutes, including provisions of the Clean Water Act ("CWA"), see, e.g., id. § 717b(d)(3). Section 401 of the CWA requires an applicant for a federal permit to conduct any activity that "may result in any discharge into the navigable waters" of the United States to obtain "a certification from the State in which the discharge ... will originate ... that any such discharge will comply with," inter alia, the state's water quality standards. 33 U.S.C. § 1341(a)(1).

order finding that NYSDEC waived its authority to issue a 401 WQC for the Project by failing to act within the appropriate time period designated by statute. FERC denied Constitution's petition for declaratory order on January 11, 2018. See Constitution Pipeline Co., LLC, 162 FERC ¶ 61,014 (2018). Constitution filed a request for rehearing of FERC's denial decision, but FERC affirmed its decision on July 19, 2018. See Constitution Pipeline Co., LLC, 164 FERC ¶ 61,029 (2018).

Under the Natural Gas Act, Constitution has the right to appeal FERC's denial of Constitution's petition for declaratory order regarding the waiver issue to select United States Courts of Appeals, see 15 U.S.C. § 717r(d)(1), and Constitution intends to file such an appeal. If this appeal is denied, Constitution has the right to again petition the United States Supreme Court for a writ of certiorari. Alternatively, Constitution can reapply to NYSDEC for a New York 401 WQC.

III. STANDARD OF REVIEW.

In the Third Circuit, “[m]odification of an injunction is proper only when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable.” Favia v. Indiana Univ. of Pa., 7 F.3d 332, 337 (3d Cir. 1993). The need for “a change of circumstances” fosters efficiency and judicial economy by “prevent[ing] an enjoined party from constantly challenging the

imposition of a preliminary injunction and relitigating arguments on motions to dissolve that have already been considered by the district court in its initial decision.” Sprint Commc’ns Co. L.P. v. CAT Commc’ns Int’l, Inc., 335 F.3d 235, 242 (3d Cir. 2003). Any requested modification of an injunction “must be undertaken with the injunction’s purpose in mind,” including the preservation of the status quo until a full trial can be held. See Favia, 7 F.3d at 341 n.14.

IV. ARGUMENT.

A. Landowners Have Not Carried Their Burden to Show that the Preliminary Injunction Should Be Dissolved.

Landowners claim that the Preliminary Injunction should be dissolved because NYSDEC denied Constitution’s application for a New York 401 WQC. Without justification, Landowners sweepingly conclude that the Project will never be constructed and proclaim that Constitution has “exhausted its remedies.” Motion to Dissolve Injunction at 11. In truth, Constitution has several legal avenues open with respect to the 401 WQC issue, as explained above in Section II.B. Should a United States Court of Appeals overrule FERC and conclude that NYSDEC waived its authority to issue a New York 401 WQC, construction of the Project will commence in short order. Thus, Landowner’s claims of the Project’s purported death have been greatly exaggerated.

Setting aside the fact that Landowners misrepresent the status of the Project and Constitution’s legal remedies regarding the 401 WQC issue, Landowners’

argument fails because there has not been a material change in circumstances from when the Preliminary Injunction issued – Constitution lacked a New York 401 WQC at that time, and nothing has changed in this regard. Constitution’s eminent domain authority arises from the FERC Order, and because the FERC Order remains in effect, none of the operative facts that gave rise to the Condemnation Order have changed. As this Court has determined, the right to possess the Rights of Way flows from Constitution’s right to condemn. Constitution’s right to condemn remains intact, so Landowners’ Motion to Dissolve Injunction should be denied.

1. The FERC Order and Constitution’s Right to Condemn and Possess All Remain in Effect.

In the Condemnation Order, this Court determined that Constitution had the substantive right to condemn the Rights of Way because there were no material facts in dispute with respect to this right – Constitution held a FERC certificate of public convenience and necessity and was unable to reach an agreement with Landowners as to compensation for the Rights of Way. See 15 U.S.C. § 717f(h). Accordingly, this Court determined that under Third Circuit precedent, a “district court is well within its power to grant possession through an injunction if the right to condemn has already been established.” See Opinion at 7 (citing Columbia Gas). Thus, according to this Court, under Columbia Gas, once Constitution’s

right to condemn was established, “the right of Constitution to access the land [was] no longer in question.” See id.

This Court’s findings in the Opinion are dispositive with respect to Landowners’ Motion to Dissolve Injunction and require denial of that Motion. Constitution still holds the substantive right to condemn, and because the FERC Order remains in effect, nothing has changed with respect to that substantive right. Accordingly, *this Court has already ruled that Constitution has the right to condemn and that possession follows as a logical consequence to Constitution’s right to condemn.* The factual circumstances that are material to Constitution’s right to possess are quite limited, and none of them have changed since this Court issued the Condemnation Order. Accordingly, Landowners’ Motion to Dissolve Injunction should be denied.

2. Constitution’s Right to Condemn and Right to Possess Are Not Predicated on Its Receipt of a New York 401 WQC.

Landowners’ argument that circumstances have changed due to NYSDEC’s denial of Constitution’s New York 401 WQC application is contradicted by the facts. Constitution is effectively in the same place with respect to the New York 401 WQC issue as it was in March 2015, when the Condemnation Order was entered. Possession of the Rights of Way was not predicated on Constitution’s receipt of a New York 401 WQC then, and the same holds true now.

Notably, during briefing on Constitution's motion for summary judgment and motion for preliminary injunction, Landowners did not argue that a New York 401 WQC was a condition precedent for Constitution's right to condemn or corresponding right to possess. Even if Landowners had advanced this argument, it would have been meritless. The FERC Order, upon which Constitution relies, does not condition the exercise of the right of eminent domain upon any condition precedent.

In contrast to the conditions in the Constitution FERC Order, FERC has, in the past, imposed conditions precedent upon exercise of eminent domain by a holder of a certificate of public convenience and necessity. For example in Transcontinental Gas Pipe Line Corp., 124 FERC ¶ 61,160, at 61,801 (2008), FERC included a condition in the Appendix that "Transco shall not exercise eminent domain authority granted under section 7(h) of the Natural Gas Act to acquire permanent rights-of-way until the required site-specific residential construction plans have been reviewed and approved by the Director of OEP." **No such condition precedent exists in Constitution's FERC Order.**

Similarly, Section 717f(h) of the Natural Gas Act does not condition the exercise of the right of eminent domain on compliance with any other Act, or the requirement in the FERC Order that Constitution obtain all required federal authorizations. Indeed, case law clearly shows that, lacking such a clear

imposition of a condition precedent, conditions will not defeat the right of eminent domain. All of the authority under the Act rejects arguments that the conditions in the FERC Order are a condition precedent to the exercise of the authority plainly granted in the Act, unless expressly stated as a condition precedent to the exercise of eminent domain. E.g., Columbia Gas Transmission, LLC v. 370.393 Acres, Civ. A. No. 1:14-0469-RDB, 2014 WL 5092880, at *4 (D. Md. Oct. 9, 2014)⁵ (citation omitted); Portland Nat. Gas Transmission Sys. v. 4.83 Acres of Land, 26 F. Supp. 2d 332, 336 (D.N.H. 1998) (“Compliance with FERC conditions cannot be used as a defense to the right of eminent domain and cannot be cited to divest the court of the authority to grant immediate entry and possession to the holder of a FERC certificate.”); Tenn. Gas Pipeline Co. v. 104 Acres of Land, 749 F. Supp. 427, 433 (D.R.I. 1990) (holding that “requirements in the FERC order arise after ownership of the rights of way are obtained and do not operate as a ‘shield’ against the exercise of eminent domain power”).

Additionally, other courts have *specifically held* that a 401 WQC is not a condition precedent for the exercise of eminent domain or possession of condemned rights of way. See Constitution Pipeline Co., LLC v. A Permanent Easement for 0.67 Acres & Temp. Easement for 0.68 Acres, No. 1:14-CV-2023 NAM, 2015 WL 1638477, at *2 (N.D.N.Y. Feb. 21, 2015) (“Defendant contends

⁵ All unpublished opinions cited herein are attached hereto as exhibits.

that Constitution must wait until it has obtained a CWA 401 certificate before it can initiate eminent domain proceedings. This argument is defeated by a plain reading of the FERC Order in light of relevant case law.”); see also Constitution Pipeline Co., LLC v. A Permanent Easement for 1.18 Acres & Temp. Easement for 0.31 Acres, No. 314-CV-2004, 2015 WL 12556148, at *2 (N.D.N.Y. Mar. 12, 2015) (“To the extent defendants also claim that plaintiff cannot proceed with the condemnation until it obtains a certificate under section 401(a)(1) of the Clean Water Act (‘CWA’), the Court rejects this argument”).

3. All of the Cases Cited by Landowners Are Fundamentally Distinguishable.

The material facts here have not changed, unlike the cases cited in Landowners’ Motion to Dissolve, all of which involved situations in which the fundamental purpose of the injunction at issue was undermined by subsequent developments. See Air Express Int’l v. Log-Net, Inc., No. CV 12-1732, 2014 WL 12657262, at *5 (D.N.J. June 30, 2014) (dissolving injunction where “the circumstance on which [movant] grounded its claim to extraordinary relief” had “evaporated”); Harper v. Glob. Geophysical Servs., Inc., No. 10-CV-1540, 2011 WL 94210, at *6 (W.D. Pa. Jan. 11, 2011) (dissolving injunction where the activity being enjoined had “ceased”); DUSA Pharm., Inc. v. River’s Edge Pharm., LLC, No. 06-1843-SRC, 2007 WL 748448, at *3 (D.N.J. Mar. 7, 2007) (dissolving

injunction where patent that the injunction was grounded upon was shown to be potentially invalid).

Landowners strain to analogize this case to Tennessee Gas Pipeline Co., L.L.C. v. 1,693 Acres of land in the Twp. of Mahwah, where a court dissolved a possession order based on changed circumstances. No. 2:12-CV-7921 WJM, 2015 WL 2079661, at *13 (D.N.J. May 4, 2015). In Tennessee Gas, the company condemned a road access, which the court later determined was a public road which Tennessee Gas already had the right to traverse and use to access its facilities. Id. The injunction at issue was dissolved because the very purpose it served, providing road access, was no longer necessary since Tennessee Gas already had the right to use the road:

Here, the Court previously entered a preliminary injunction in favor of Tennessee Gas because the company could not reach its pipeline facilities without gaining immediate possession of its temporary access easement rights. Because the Court has found that Bear Swamp Road is a by-road, Tennessee Gas can access its pipeline facilities without a preliminary injunction. Consequently, Tennessee Gas will not suffer irreparable harm absent the injunction, and dissolution of the injunction is appropriate.

Id. Here, as explained above, Constitution's right to condemn – the Condemnation Order – remains fully intact, and Constitution has a need to access the Rights of Way on the Landowners' Property to comply with the terms of its permits. Accordingly, Landowners' attempt to analogize this case to cases in which

injunctions were dissolved based on changed circumstances falls flat. Landowners have not shown that any material circumstances have changed from when the Preliminary Injunction issued. Their Motion to Dissolve Injunction should therefore be denied.

B. The Remaining Factors for Injunctive Relief Continue to Be Satisfied.

Based on Columbia Gas and the law of this case as set forth in the Opinion, this Court need not reach the issues of irreparable harm, the balance of the harms, and the public interest to deny Landowners' Motion to Dissolve Injunction; the FERC Order and Constitution's corresponding right to condemn remain in full effect, so Constitution's right to possess also remains intact. However, should the Court decide to reconsider these issues, they favor maintaining the status quo of Constitution's possession of the Rights of Way.

1. Maintenance of the Status Quo Is Necessary to Prevent Irreparable Harm to Constitution.

Although the Project cannot be constructed at this time, Constitution will suffer irreparable harm in three ways if the Preliminary Injunction is dissolved.

First, under the permits it holds, Constitution is obligated to monitor and maintain the Rights of Way to prevent erosion and sedimentation on the Landowners' Property pursuant to an Erosion and Sediment Control General Permit ("ESCGP") for stormwater discharges (Permit No. ESG00115140002). See

Declaration of Joseph E. Dean, attached hereto as Exhibit A. The ESCGP requires Constitution to maintain the Rights of Way under the ESCGP until a Notice of Termination is accepted, and Constitution is subject to fines and other penalties if it cannot maintain the Rights of Way to prevent erosion and sedimentation on the Landowners' Property. Id. Further, Constitution is required through its Certificate Order to monitor the Rights of Way for earth disturbance and erosion and perform corrective measures for continued soil stabilization. Id. Without access to and possession of the Rights of Way, Constitution will violate its permits and thereby suffer irreparable harm. Second, if Constitution loses possession of the Rights of Way, Constitution will be unable to prevent Landowners from interfering with the Rights of Way, which could irreparably damage Constitution's interests therein. Based on Landowners' previous behavior and the fact that this Court has already found that Landowners have interfered with the Rights of Way, see February 22, 2016 Order at 2-3, there is a significant risk that Landowners will interfere with the Rights of Way if the Preliminary Injunction is dissolved.

Third, if Constitution prevails in the above-referenced New York 401 WQC litigation, or reapplies to NYSDEC for a New York 401 WQC, construction of the Project will commence shortly thereafter. Without possession of the Rights of Way, Constitution will have to move for another injunction, which would cause irreparable harm to Constitution by delaying the Project. As set forth in

Constitution's motion for preliminary injunction, delay is a well-recognized form of irreparable harm. See Dkt. 15, 16. Accordingly, while the irreparable harm Constitution faces if the injunction is dissolved has evolved from the irreparable harm Constitution stood to suffer when this Court originally granted injunctive relief, the risk of irreparable harm absent such relief remains significant.

2. The Remaining Injunction Factors Favor Maintaining the Status Quo.

With respect to the balance of the harms and the public interest, all of the reasons supporting Constitution's possession of the Rights of Way remain fully applicable. As Constitution demonstrated through its motion for preliminary injunction, any damages to Landowners can be compensated with money to be determined during a future compensation hearing. See Dkt. 15, 16. Although the parties are in a holding pattern at the current time, there is no imminent damage to Landowners, as the trees on the Rights of Way have already been felled and cleared. Additionally, the public interest continues to favor Constitution, as the need for natural gas supply remains a compelling public interest. See id. Importantly, with respect to the FERC-recognized public need for the Project, nothing has changed. The Preliminary Injunction should remain in place and Landowners' Motion to Dissolve Injunction should be denied.

C. Landowners Are Not Entitled to Damages Under Federal Rule of Civil Procedure 65.

Because Landowners have failed to demonstrate that the Preliminary Injunction should be dissolved, this Court need not consider their prayer for damages under Federal Rule of Civil Procedure 65 and should summarily deny same. However, even if this Court decides to dissolve the Preliminary Injunction, Rule 65 damages are inappropriate for the reasons set forth below, and this Court should deny Landowners' request for such damages.

Damages under Rule 65 are available if a party has been “wrongfully enjoined.” Fed. R. Civ. P. 65(c); see also Sprint, 335 F.3d at 240 (noting that “the injunction bond provides a fund to use to compensate incorrectly enjoined defendants”). As another District Court within the Third Circuit has explained, “[a] party will have been wrongfully enjoined and entitled to recover against an injunction bond if ‘it is ultimately determined that the enjoined party in fact had the right all along to pursue the enjoined conduct.’” Fishkin v. Susquehanna Partners, G.P., No. 03-3766, 2010 WL 547509, at *3 (E.D. Pa. Feb. 9, 2010) (quoting Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1054 (2d Cir. 1990)). Under this standard, Landowners have not been “wrongfully enjoined,” as they concede that the Preliminary Injunction was properly granted. See Motion to Dissolve Injunction at 14 (noting that the Condemnation Order was “appropriate at its inception based on information

presented at the time”); see also id. at 18 (“Importantly, the Landowners do not here question this Court’s original order granting injunctive relief.”). Because Landowners concede that the Preliminary Injunction was proper at the time it was issued, they cannot prove that they “had the right all along to pursue the enjoined conduct.” See Fishkin, 2010 WL 547509, at *3. Thus, Landowners have not been “wrongfully enjoined” and are not entitled to Rule 65 damages.

Landowners’ claim for Rule 65 damages also fails because the law recognizes a distinction between an injunction that should never have been issued and an injunction that is no longer supportable due to changed circumstances. In the former situation, damages under Rule 65 may be appropriate. In the latter situation, however, Rule 65 damages are not appropriate. See 42 Am. Jur. 2d Injunctions § 320 (“[I]f a court determines that a temporary injunction was rightfully issued, there is no right of recovery on the temporary injunction bond even if the injunction is subsequently dissolved.”); see also State of Kan. ex rel. Stephan v. Adams, 705 F.2d 1267, 1270 (10th Cir. 1983) (finding that where temporary restraining order was dissolved due to intervening events and not due to wrongful issuance, Rule 65 damages were inappropriate); New England Fiber Co. v. Bath Fiber Co., 347 A.2d 169, 171 (N.H. 1975) (“[W]here an injunction is properly issued, but circumstances change so that it is no longer required, no liability arises on the bond”); Van-Go Transportation, Inc. v. Sampson Cty.,

803 S.E. 2d 215, 219 n.1 (N.C. Ct. App. 2017) (“[A] trial court’s subsequent refusal to grant a preliminary injunction to a plaintiff does not, in itself, constitute a determination that the defendant was wrongfully enjoined . . .”). Here, there is no dispute that the Preliminary Injunction was proper at the time it was issued. Thus, Landowners’ have no claim to damages for being “wrongfully enjoined.”

Finally, Landowners’ claim that East Tennessee Natural Gas Company v. Sage, 361 F.3d 808 (4th Cir. 2004) permits them to draw down on the bond during the pendency of the compensation hearings is incorrect. See Motion to Dissolve Injunction at 20. Sage only stands for the proposition that a condemnor pipeline company is liable for damages to land resulting from the company’s occupation thereof. See Sage, 361 F.3d at 825-26. Landowners conflate their right to just compensation for Constitution’s occupation of the Property with their right to damages for a “wrongful injunction,” but these are two distinct forms of relief and, as explained above, Landowners have no credible claim to the latter.⁶ Landowners do have a claim for compensation under Rule 71.1, but have not pursued that claim.

⁶ Landowners’ claim for Rule 65 damages is also premature. As the Third Circuit has recognized, “the ultimate determination [of] whether a party was wrongfully enjoined and can recover on the injunction bond generally *must wait until after a trial and final judgment on the merits.*” Sprint, 335 F.3d at 242 n.9 (emphasis added) (quotation omitted).

V. CONCLUSION.

For all of the foregoing reasons, Constitution respectfully requests that the Court deny Landowners' Motion to Dissolve Injunction.

Respectfully submitted,

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Dated: July 26, 2018

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8

I, Elizabeth U. Witmer, hereby certify pursuant to Local Rule 7.8(b)(2) that the foregoing Brief includes 4,959 words according to Microsoft Word's word-count feature and thus complies with the length requirement of the Middle District of Pennsylvania Local Rules.

/s/ Elizabeth U. Witmer
Elizabeth U. Witmer

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2018, I caused a true and correct copy of the foregoing *Plaintiff Constitution Pipeline Company, LLC's Response in Opposition to Defendants' Motion to Dissolve Injunction and Set Jury Trial for Determination of Compensation* and accompanying proposed Order and Exhibits to be served on the following counsel via the Court's electronic filing system:

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Date: July 26, 2018