

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

CONSTITUTION PIPELINE,

Plaintiff

v.

CIVIL ACTION NO: 3:14-2458

A PERMANENT EASEMENT FOR 1.84  
ACRES AND TEMPORARY EASEMENTS  
FOR 3.33 ACRES IN NEW MILFORD  
TOWNSHIP, SUSQUEHANNA COUNTY,  
PENNSYLVANIA, TAX PARCEL  
NUMBER 127.00-1,603.00,000

Defendants.

**MOTION TO DISSOLVE INJUNCTION AND SET JURY TRIAL FOR  
DETERMINATION OF COMPENSATION**

**OVERVIEW**

In the three years since this Court granted Plaintiff Constitution Pipeline LLC's (Constitution) Emergency Motion for Preliminary Injunction for Possession of A Right of Way across property owned by the Defendant Landowners to construct and operate a 30-inch diameter, natural gas pipeline that would transport shale gas through New York and Pennsylvania, Constitution has been busy. Just weeks after the FERC Certificate issued, Constitution filed eminent domain complaints against dozens and property owners and once awarded possession, forged ahead on the Landowners' property, surveying and staking the right of way and pursuing contempt charges against the Landowners for their alleged

obstruction of tree-clearing activity, ultimately securing state police and heavily armed U.S. Marshals outfitted with assault weapons and bulletproof vests to protect Constitution crews as they invaded the property to chop down over 500 ash and sugar maple trees. Simultaneously on the regulatory front, Constitution pursued a Section 401 water quality certification for the pipeline from the state of New York (without which the project cannot be built) and when refused, appealed the denial all the way up through the United States Supreme Court, *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d. Cir. 2017), *cert. denied* 2018 U.S. LEXIS 2726 (Apr. 30, 2018), before unsuccessfully urging the Federal Energy Regulatory Commission (FERC) to find the Section 401 permit requirement waived. *Constitution Pipeline LLC*, CP18-5 (Declaratory Order Denying Waiver), 162 FERC ¶61,014 (2018). But there is one activity that Constitution has not accomplished during the past three years and never will: actually building the very pipeline that served as the rationale for the preliminary injunction to begin with.

“Two years is a long time for a preliminary injunction,” observed the Third Circuit in *Sprint Commc'ns Co. L.P. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 242 (3rd Cir. 2003). Here, the injunctive relief that this Court granted Constitution for the purpose of gaining immediate access has lasted over three years and circumstances have changed. With the passage of time, the pipeline that Constitution once insisted would face costly delays in the absence of immediate access to the Landowners' property now faces certain demise as the result of the New York's denial of the Section 401 water quality certificate. These changed circumstances eviscerate the original justification for the injunction and transform this Court's order into an “instrument of wrong” that violates the Landowners' Fifth Amendment rights.

The continued injunction has, and will continue to wreak severe hardship on the Landowners who continue to play involuntary host to a multi-billion company that has not paid a dime of compensation for the occupation and destruction of the Landowners' trees, land and business, or the retaliatory harassment inflicted on them for exercising their First Amendment rights to oppose occupation of their property. Moreover, with each passing day that Constitution holds the property hostage for a project that will never be built, the Landowners suffer a deprivation of their Fifth Amendment rights, which protect against uncompensated takings of property that will not serve a public use.

For all of these reasons, the Landowners ask this Court to expeditiously dissolve the injunction, eject Constitution from the property and restore full possession to the Landowners. This relief should not be difficult because Constitution never compensated the Landowners for their property and therefore never took title to the easement. *See E. Tennessee Nat. Gas Co. v. Sage*, 361 F.2d 808, 825 (4th Cir. 2004) (noting that title does not pass until compensation is paid and that Landowners are due compensation if pipeline is abandoned). Once property ownership is restored, this Court must establish a schedule for a jury trial to determine compensation for the destruction of the Landowners' property and cost of restoration (also known as "cost to cure," business losses, trespass, intentional infliction of emotional distress, attorneys' fees and all other damages. *Id.*, *see also* Rule 71.1(i)(c)(requiring court to hold compensation hearing where case is dissolved or dismissed but partial property interest has been taken). To alleviate the financial burden on Landowners, the Court should also permit the Landowners to draw down on the bond amounts posted by Constitution. *see also Sage*, 361 F.2d at 831 (observing that Landowners may draw down on

pipeline's posted deposit during pendency of compensation hearings).

## BACKGROUND

### A. Description of Landowners and Property

By way of background, the current Defendants in the above-captioned proceeding, Michael and Maryann Zeffer, Patricia Glover, Catherine Holleran, Dustin Webster ("Landowners"), own the approximately 23-acre-property in New Milford Township, Susquehanna County, Pennsylvania which is the subject of this case. Ex. 1, Holleran Decl., ¶ 1, 3. Ms. Zeffer is a life-tenant of the property and lives in one of the houses located on the parcel. *Id.* at ¶1.

Prior to Constitution's intrusion, the property supported a variety of uses. With two small cottages and abutting a natural spring-fed lake, the property has potential as a vacation or recreational destination as it is currently used by the Landowners. Ex. 1, Holleran Decl. ¶ 4-5. The two open fields on another portion of the parcel had been actively farmed, and the heavily wooded area was used for four-wheelers and walking while serving as a visual buffer to afford privacy from adjacent properties. Ex. 1, Holleran Decl. ¶ 3. The woods were comprised primarily of ash and sugar maple trees, which were tapped by the Hollerans to operate a small maple syrup business. Ex. 1, Holleran Decl. ¶3. Needless to say, once Constitution gained immediate possession of the property through this Court's injunctive powers and razed a swath through the wooded area, the Landowners' ability to use their property for the purposes just described was either substantially damaged or completely destroyed.

**B. Constitution’s Condemnation Complaint and Rule 65 Motion for Injunctive Relief for Immediate Possession.**

**1. The FERC Certificate**

This proceeding dates back to December 2, 2014 when the Federal Energy Regulatory Commission (FERC) issued a certificate of convenience and necessity to Constitution to construct and operate a 124-mile long, 30-inch diameter interstate pipeline and related facilities extending from two receipt points in Susquehanna County, Pennsylvania to a proposed interconnection in Schoharie County, New York. *See Constitution Pipeline LLC, Order Issuing Certificate*, 149 FERC ¶ 61,199, at P 1 (2014) (“Certificate”). Although the project as approved by FERC originates in Pennsylvania, 80 percent of the pipeline as planned– or approximately 98 miles – would run through New York.

The FERC certificate was not the only authorization required for the project. The pipeline would cross over 250 waterways, Certificate at P 77, necessitating water quality certificates under Section 401 of the Clean Water Act from both Pennsylvania and New York.

<sup>1</sup> *See Constitution Pipeline*, 868 F.3d at 90; *see also* 15 U.S.C. §717b(d) (preserving applicability of Section 401 to projects under the Natural Gas Act). Constitution timely initiated the Section 401 process in both states, but New York had not acted on Constitution’s application by the time FERC granted the certificate. Thus, the FERC Certificate contained a provision prohibiting Constitution from commencing project construction until it received all other required federal permits. *See Certificate*, App. at P 8. FERC described the conditioned certificate granted to Constitution as an “incipient authorization without current force or

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<sup>1</sup> Constitution applied for and obtained a Section 401 water quality certificate from Pennsylvania for the 20-plus-mile segment of pipeline that runs through the state. 44 Pa. Bull. 6287 (Oct. 4, 2014).

effect.” *Constitution Pipeline LLC*, Order Denying Rehearing, 154 FERC ¶ 61,046, at P 62 (2016).

**2. Constitution’s Condemnation Complaint and Motion for Rule 65 Injunctive Relief.**

Notwithstanding the incipient nature of the FERC certificate, on December 28, 2014, Constitution filed a condemnation complaint to seize a 1.84 acre right of way and 3.33 acre construction easement across the Landowners’ property. Compl., ECF No. 1. The Complaint alleged that Constitution, as a certificate holder, had a right to use eminent domain under Section 7f(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) to acquire a right-of-way across the landowners’ property to “construct, install, operate and maintain the pipeline facilities approved in the FERC Order,” Compl. ¶18, ECF No. 1.

Although the Natural Gas Act does not confer a right of immediate possession before compensation, Constitution availed itself of a process approved by the Fourth Circuit in *East Tennessee Natural Gas Co. v. Sage*, 361 F.2d 808 (4th Cir. 2004), to gain immediate entry: a motion for partial summary judgment to establish Constitution’s substantive right to take the property (Mot. for Partial Summ. J., Jan. 7, 2015, ECF No. 4) and for injunctive relief for immediate possession under FRCP 65. (Mot. for Prelim. Inj., Jan. 16, 2015, ECF No. 15). Constitution filed these motions for *Sage*-style relief on January 7, 2015 and January 16, 2017 respectively.

In its motion for summary judgment, Constitution argued that FERC’s award of a certificate conferred a substantive right to eminent domain under Section 717f(h) of the Natural Gas Act that could be enforced by the court through the issuance of a preliminary

injunction granting immediate possession. Mot. for Partial Summ. J., Jan. 7, 2015, ECF No. 4. Constitution next argued that injunctive relief was warranted because it satisfied the Third Circuit's four factor test for a preliminary injunction: likelihood of success on the merits, irreparable harm to the movant and lack of harm to the non-moving party, and that injunctive relief is in the public interest. Br. in Supp. 10, Jan. 16, 2015, ECF No. 16, *citing Columbia Gas Transmission LLC v. 1.01 Acres*, 768 F.3d 300, 315 (3d Cir. 2014). As to the first factor, Constitution asserted that there was a high likelihood of success on the merits because as holder of a certificate, it had a substantive right to use eminent domain to take property necessary for the project under 15 U.S.C. 717f(h) of the Natural Gas Act. Br. in Supp. 12-13, Jan. 16, 2015, ECF No. 16.

Next, Constitution urged that it would suffer irreparable harm if denied immediate access, explaining that the resulting delay would interfere with timely completion of the project by the certificate deadline of December 2, 2016 and give rise to lost revenue of \$358,000 a day, and work suspension and remobilization charges of \$720,000 per day. Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶¶ 34-36, Jan. 16, 2015, ECF No. 15-3. Constitution presented testimony from Project Manager Matthew Swift detailing the scope of work that Constitution needed to accomplish urgently and within a short time-frame, including performing cultural resource surveys, developing and implementing best practices and accessing and constructing in sensitive fish and wildlife habitat within state-mandated deadlines. Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶¶ 15-28, Jan. 16, 2015, ECF No. 15-3. Swift also explained that Constitution could only carry out many of these tasks during certain months to avoid harming certain wildlife and that missing these narrow

timeframes would force Constitution to wait a full season until the construction window reopened. At least half of the restricted and time-constrained activities described by Swift pertained to the New York segment of the pipeline. *See generally* Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶¶ 11-28, Jan. 16, 2015, ECF No. 15-3.

Constitution assured that Landowners would suffer no harm. Constitution explained that Landowners would eventually be compensated for the property taken and that Columbia would also post bond as security for future payment. Br. in Supp. 20, Jan. 16, 2015, ECF No. 16; Matthew Swift Decl. in Supp. of Mot. for Prelim. Inj. ¶ 32, Jan. 16, 2015, ECF No. 15-3. Constitution concluded that injunctive relief would serve the public interest because it would enable Constitution to timely comply with the terms of the FERC certificate and provide the public with access to natural gas supply. Br. in Supp. 2-22, Jan. 16, 2015, ECF No. 16.

On March 17, 2015, this Court granted Constitution's motion for summary judgment and injunctive relief. Balancing the equities, this Court agreed that Constitution would suffer irreparable harm if not granted immediate access and that injunctive relief would serve the public interest by providing additional natural gas capacity. Order, ECF No. 44.

### **C. Tree Clearing Activity on the Landowners Property Begins**

After the court's injunction issued in March 2015, Constitution began staking and surveying activities but did not immediately begin ground-breaking activities with permanent impacts such as tree-clearing or trenching on the Landowners' property. Nevertheless, based on Constitution's earlier representations regarding its need to move quickly to meet its in-service deadline, the Landowners reasonably expected that pipeline construction might begin at any moment. For that reason, once the Court awarded possession the Landowners'

saw no point in continuing maple syrup operations or making improvements to their property that would only be destroyed once the pipeline came through.

In January 2016, Constitution asked FERC for authorization to proceed with tree removal for the pipeline. Request for Partial Notice to Proceed (Jan. 8, 2015 [sic]), CP13-499, FERC eLibrary Accession No. 20160108-5125. Constitution limited its request for tree-clearing to Pennsylvania because New York had still not acted on Constitution's Section 401 application and the certificate prohibited commencement of construction without it. FERC granted Constitution's request on January 29, 2016. Letter Order (Jan. 29, 2016), CP13-499, FERC eLibrary Accession No. 20160129-3019.

Two weeks after receiving approval to start tree-clearing, Constitution returned to this Court with an Emergency Motion to Enforce the Injunction Order, inaccurately representing that the Landowners planned to interfere with tree clearing and should be subject to contempt findings. Mot. to Enforce Order, Feb. 12, 2016, ECF No. 46. In support of the Enforcement Motion, Matthew Swift offered a second declaration, reaffirming the urgent need to access the property and commence tree-clearing to complete work within an agency-approved window and reiterating the accumulation of damages resulting from delays. Mot. to Enforce Order, Feb. 12, 2016, ECF No. 46-1, ¶¶ 24-26. Following a brief hearing, this Court found that the Landowners were not in contempt, but nevertheless entered an order to enforce the Injunction Order and allow the tree-clearing to proceed. Order, Feb. 22, 2016, ECF No. 67.

On March 1, 2016, Constitution workers, accompanied by gun-toting security guards and U.S.marshalls entered the Landowners' property with chainsaws and cut 558 trees (a combination of ash and sugar maple) to clear the right-of-way. Ex. 1, Holleran Decl. at ¶¶

19, 25. A little over a month later, on April 22, 2016, the New York Department of the Environment denied Constitution's application for a Section 401 water quality certificate. *See Constitution Pipeline*, 868 F.3d at 88. Around that time, further activity on the Landowners' property ceased, though Constitution left the felled trees on the property for months. Ex. 1, Holleran Decl. at ¶¶ 22-23, 27-28. In the spring of 2017, Constitution crews returned to remove the trees, but the stumps and roots remain. Ex. 1, Holleran Decl. at ¶¶ 27-28.

#### **D. The Pipeline Reaches the End of the Line**

Since removing the trees felled over two years ago, Constitution has not taken any further steps to construct the project in either Pennsylvania nor New York. Nor can it. On April 22, 2016, the New York DEC denied Constitution's application for a Section 401 water quality certificate, which was affirmed by the Second Circuit in *Constitution Pipeline Co., LLC v. New York State Dep't of Env'tl. Conservation*, 868 F.3d 87 (2d. Cir. 2017), *cert. denied* 2018 U.S. LEXIS 2726 (Apr. 30, 2018). Under the Clean Water Act, "No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator . . ." 33 U.S.C. §1341(a), thus rendering the license invalid.

After losing its appeal of the NYDEC's denial of the Section 401 certificate, Constitution petitioned the Commission to waive the water quality certificate, arguing that the New York DEC failed to act within a year of receiving Constitution's application as required by Section 401. FERC denied Constitution's waiver request on January 11, 2018. *See Constitution Pipeline*, Order for Petition on Declaratory Order For Waiver, 162 FERC ¶ 61,014 (2018). Constitution sought rehearing of the FERC's waiver denial, but its chances of success are dim as the Landowners cannot identify a single case where FERC has reversed

itself on rehearing in a natural gas pipeline case under Section 7 of the Natural Gas Act. Moreover, Constitution's rehearing request for a waiver of the Section 401 requirement does not change the fact that New York's denial of the Section 401 certificate remains intact and bars construction of the pipeline under the terms of the FERC Certificate and the Clean Water Act.

Having exhausted its remedies, Constitution's pipeline has reached the end of the line. Because FERC certificate conditions commencement of project construction on receipt of all federal permits, Constitution's inability to obtain the Section 401 water quality certificate dooms the project by preventing Constitution from constructing the 80 percent of the pipeline located in New York. And although FERC also extended the original December 2016 in-service deadline for the pipeline to December 2, 2018,<sup>2</sup> all the time in the world will not save Constitution's pipeline because without the Section 401 permit, Constitution cannot build the project.

## ARGUMENT

### **I. THE INJUNCTION MUST BE DISSOLVED BECAUSE THE CIRCUMSTANCES JUSTIFYING A GRANT OF IMMEDIATE POSSESSION TO CONSTITUTION HAVE DRASTICALLY CHANGED AND CONVERTED THE INJUNCTION INTO AN "INSTRUMENT OF WRONG"**

#### **A. Changed Circumstances Justify Vacating a Preliminary Injunction**

A court may dissolve a preliminary injunction that it has previously issued. *Sprint v. Commc'ns Co. L.P. v. CAT Commc'ns Int'l*, 335 F.3d 235, 241 (3d Cir. 2003); *see also Twp. of Franklin Sewerage Auth. v. Middlesex Cty. Utils. Auth.*, 787 F.2d 117, 121 (3d Cir. 1986). Vacating a preliminary injunction is appropriate where "change of circumstances between

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<sup>2</sup> Letter Order (July 26, 2016) CP13-499, FERC eLibrary Accession No. 20160726-3006.

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.*, 7 F.3d 332, 337 (3d Cir. 1993), or transform the original mandate into “an instrument of wrong.” *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932). The changed circumstances standard prevents 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 (3rd Cir. 2003).

To demonstrate changed circumstances to dissolve an injunction, a movant must show (1) the emergence of new evidence; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or prevent manifest injustice. *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995); *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Applying this standard, a federal district court examined whether continuation of an injunction preventing a shipping company from using a particular software remained justified in light of changed circumstances. *Air Express Int'l v. Log-Net, Inc.*, 2014 U.S. Dist. LEXIS 89471, at \*14-15 (D.N.J. June 30, 2014). There, the court found that the shipping company's *raison d'être* for the injunction – that its operations would “come to a grinding halt” without access to the software – had evaporated after new evidence was presented that the shipping company's customers had been migrated to another provider. Similarly, in *Harper v. Global Geophysical Servs.*, 2011 U.S. Dist. LEXIS 2439, at \*14, the court dissolved an order enjoining a survey company from accessing a property to conduct seismic testing after learning that the company had ceased testing, thus obviating the

need to prohibit the company from entering the property to conduct tests.

In *DUSA Pharms., Inc. v. River's Edge Pharms.*, 2007 U.S. Dist. LEXIS 16005, \*10 (D.N.J. March 6, 2007), a change in an intervening administrative action enabled a defendant pharmaceutical company to dissolve an injunction restraining it from manufacturing, selling or importing an allegedly infringing product. After the preliminary injunction was issued, the US Patent and Trademark Office granted the defendant's request to reexamine the patent and rejected the claims of obviousness which had been the grounds for the infringement action. *Id.* As a result of the PTO's ruling, the court found that plaintiff was no longer likely to succeed on the merits and the injunction was no longer justified. *Id.*

**B. The “Changed Circumstances” Standard Applies to Sage-Style Injunctive Relief**

The Third Circuit's “changed circumstances” standard applies with equal force to injunctive relief under FRCP 65 awarding a gas company with a FERC certificate immediate possession in accordance with *Sage*. In *Tenn. Gas Pipeline, L.L.C. v. 1,693 Acres*, the district court, relying on *Sage*, granted Tennessee Gas immediate possession of a purportedly private road to transport workers to the site to construct project upgrades approved by a FERC certificate. *Tenn. Gas Pipeline, L.L.C. v. 1,693 Acres of land in the Twp. of Mahwah*, 2015 U.S. Dist. LEXIS 57995 (D.N.J. May 4, 2015). Tennessee Gas had argued that it would suffer irreparable harm without immediate possession because it would be unable to meet the project in-service dates specified by contract, thus triggering financial penalties. *Id.* at \*4. Two years later after the project was nearly completed, the court determined that the private road to which Tennessee Gas had been awarded access was actually classified under state law as by-road open to the public. As a result, the court found that “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.* at \*38-39.

**C. The NYDEC Denial of the Section 401 Certificate Is A Changed Circumstances That Eviscerates the Original Justification for the Injunction.**

With the passage of time and intervening events, this Court’s *Sage*-style grant of injunctive relief to Constitution has transformed from what has been characterized as “an approach of practical necessity”<sup>3</sup> into an “instrument of wrong.” The drop-dead December 2016 in-service deadline that Constitution used to justify the urgent need for immediate possession has come and gone. With New York’s denial of a Section 401 water quality permit, the FERC certificate that Constitution once invoked to prop up its claim of a substantive entitlement to use of eminent domain no longer authorizes project construction and cannot serve as a basis for condemnation under Section 717f(h) of the Natural Gas Act. Meanwhile, the court order -- though appropriate at its inception based on information presented at the time -- now functions only to compel Landowners to continue playing involuntary host to a private gas company for a project that will never be built, without a dime of compensation for Constitution’s three-year occupation of their land, destruction of their property and business, and infliction of emotional distress. All of these factors constitute the type of changed circumstances that eviscerate Constitution’s grounds for the underlying injunction under the familiar four-factor test and require immediate dissolution of the injunction. Additional discussion follows.

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<sup>3</sup> See J. Behnke and H. Dondis, *The Sage Approach to Immediate Entry*, 27 Energy L.J. 499 at 544 (2006).

**1. Constitution Does Not Have a Likelihood of Succeed on the Merits Because New York's Denial of a Section 401 Permit Stripped Constitution of Its Substantive Right to Condemn the Property.**

With the New York's denial of the Section 401 water quality certificate, Constitution's likelihood of success on the merits of retaining the power of eminent domain is diminished because Constitution no longer has a substantive entitlement to eminent domain. In this regard, this case resembles *DUSA Pharms.*, where an intervening event – the Patent Office's decision to reexamine the patent and reject of claims of obviousness – pulled the rug out from under the court's initial finding that an injunction was justified because the plaintiff was likely to succeed on the merits of its patent infringement argument. *DUSA Pharms., Inc. v. River's Edge Pharms.*, 2007 U.S. Dist. LEXIS 16005, \*10 (D.N.J. March 6, 2007). Likewise, New York's intervening denial of the Section 401 permit invalidates this Court's earlier findings related to Constitution's likelihood of success on its eminent domain claims.

Recall, that during the initial proceeding for injunctive relief before this Court, Constitution argued that as the holder of a valid FERC certificate, it had the right to invoke eminent domain under Section 717f(h) of the NGA to construct and operate the project. *See* Mot. for Partial Summ. J. 3, Jan. 7, 2015, ECF No. 4. But New York's denial of the water quality permit invalidates the FERC Certificate under the Clean Water Act, which expressly prohibits a federal agency from granting a license if Section 401 certification has been denied by the State. 33 U.S.C. §1341(a) (“No [federal] license or permit shall be granted if certification has been denied...”); *see also Alabama Rivers Alliance v FERC*, 325 F.3d 290, 300 (D.C. Cir. 2003) (“Because the Commission issued the license amendment to Alabama Power without having such [401] certification, we . . . vacate the Commission's orders.”).

Without a valid FERC certificate, Constitution's power to invoke eminent domain under Section 7f(h) of the Natural Gas Act evaporates because the statute limits condemnation authority to "certificate holders."

Even if the FERC certificate remains intact without New York's Section 401 certificate,<sup>4</sup> New York's denial still strips Constitution of a substantive entitlement to eminent domain under the terms of the Certificate itself. The certificate conditioned commencement of construction on Constitution's receipt of all required permits. Certificate, App. at P 8. As Without receipt of the required federal permits, the certificate order -- in FERC's own words -- is nothing but an 'incipient authorization without current force or effect' because it does not allow the pipeline to begin the proposed activity before the environmental conditions are satisfied." *Constitution Pipeline LLC*, Order Denying Rehearing, 154 FERC ¶ 61,046, at P 62 (2016). New York's denial of the Section 401 permit kills any chance of Constitution satisfying the FERC Certificate's environmental conditions and as a result, the certificate will forever remain an incipient authorization that is inadequate to support Constitution's claim of a substantive entitlement to eminent domain.

Finally, Constitution no longer entitled to use the power of eminent domain under the Natural Gas Act. Section 717f(h) confers certificate holders with the power of eminent domain only for the specific purpose of acquiring "the necessary right-of-way to **construct, operate and maintain a pipeline . . .** for the transportation of natural gas . . ." 15 U.S.C. §

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<sup>4</sup> On June 27, 2018, the Landowners asked FERC to vacate or rescind the certificate because the "construction and operation" authorized by the certificate can never take place now that New York has denied the Section 401 permit. But this Court need not wait for FERC to act, because the Landowners still satisfy the standard for dissolution of the injunction.

717f(h) (emphasis added). But Constitution cannot construct, operate or maintain the pipeline without the Section 401 permit and therefore, does not qualify for condemnation under Section 717f(h) of the Natural Gas Act.

**2. Constitution No Longer Faces Irreparable Harm From Delay For a Project That Will Not Be Built, While the Harm to the Landowners Is Substantial**

When Constitution sought injunctive relief for immediate possession, it argued that its inability to access the properties and clear all trees would prevent the project from meeting its December 2, 2016 in-service deadline and cause massive financial losses for this multi-billion dollar company. *See* Br. in Supp. 15, 17, Jan. 16, 2015, ECF No. 16, discussion *supra* at Background B.2. Constitution's witness Matthew Swift outlined the tasks that Constitution would need to complete to meet the 2016 service date - over half of which related to the New York segment of the project. Swift also explained that much of this work could only be performed during narrow seasonal windows that if missed, would require Constitution to wait months for its next opportunity to continue construction. *Id.*

Based on Constitution's claims of urgency, this Court found that injunctive relief in the form of immediate possession was necessary to prevent irreparable harm to Constitution. But the dire circumstances described by Constitution no longer exist. The December 2, 2016 deadline that Constitution cited as the basis for moving full speed ahead has come and gone. The lengthy to-do list of pre-construction tasks enumerated in Mr. Swift's declaration have already been largely completed on the Pennsylvania side of the pipeline, and no longer matter on the New York side with the denial of the Section 401 permit. At this point, Constitution has nothing left to do.

That FERC extended the in-service deadline to December 2, 2018 -- now five months away -- does not change anything. No amount of extra time will enable Constitution to get the pipeline in the ground when the lack of a Section 401 permit prohibits construction of the pipeline to begin with.

Importantly, the Landowners do not here question this Court's original order granting injunctive relief. As the saying goes, hindsight is 20-20. Back in 2015, this Court's findings that Constitution would suffer irreparable harm due to delay if denied injunctive relief were reasonable based on the facts presented -- but not so today. Denied a Section 401 permit, Constitution simply cannot build the pipeline authorized by the Certificate and will not be irreparably by a dissolution of the original injunction granting possession. *See also Tennessee Gas*, 2015 U.S. Dist. LEXIS 57995 (finding no irreparable harm to company in dissolving *Sage*-style order granting immediate possession of private roadway after determining that the road is open to the public and company no longer needs court-ordered access); *Harper*, 2011 U.S. Dist. LEXIS 2439 (dissolving injunction barring survey company from conducting seismic tests on property when testing is completed and property owner no longer has need for a court order prohibiting entry).

Meanwhile, the continuation of the injunctive inflicts substantial harm on the Landowners. For starters, even though Constitution has occupied the Landowners' property for three years and change, Constitution has not paid the Landowners a dime by Constitution for the occupation and destruction of their property, in violation of their property rights under the Fifth Amendment. The existence of a continuing constitutional violation constitutes proof of irreparable harm. *Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978). The

Landowners suffer other hardship from the continued occupation of their property. The court order also prohibits the Landowners from replanting the trees or putting any permanent structures in the easement. *See* Order, March 17, 2015, ECF No. 44; Order, Feb. 22, 2016, ECF No. 67. And Constitution can continue to access the property without the Landowners' consent. These continued encroachments on the Landowners for a project that cannot be constructed and for which Constitution has no right of eminent domain justify dissolution of the injunction.

### **3. The Injunction No Longer Serves the Public Interest**

This Court found that the injunction would serve the public interest by providing access to additional natural gas capacity. Order 3, March 17, 2015, ECF No. 44. With the denial of the Section 401 permit, this project will no longer carry gas and does not serve the public interest. In fact, light of the changed circumstances described throughout this motion, the continued injunction now runs counter to the public interest by taking the Landowners' property without just compensation in violation of their Fifth Amendment Constitutional rights. Whereas once the injunction might arguably have been justified as a practical solution to enable Constitution to move forward with its pipeline, now the injunction operates as an instrument of wrong – a taking of private property by a private company for a project that will not be built.

## **III. THE LANDOWNERS ARE ENTITLED TO RETURN OF FULL POSSESSION OF THE PROPERTY AND SUBSTANTIAL DAMAGES**

### **A. Both *Sage* and Rule 65 Contemplate Damages for an Unlawful Injunction**

In granting immediate possession, the *Sage* court nevertheless contemplated the

possibility that a regulatory approval might be reversed or that a pipeline might abandon a project midway through, leaving the Landowners with no recourse because they had not been compensated in advance. Thus, *Sage* put in place two safeguards that would protect Landowners from holding the bag if a project went south for whatever reason.

First, under *Sage*, “title does not pass until just compensation has been ascertained and paid.” 361 F.2d at 826. By retaining title, Landowners can easily reclaim full possession and ownership of easement rights without the need to reconvey title. Second, *Sage* requires gas companies to post a bond pending compensation to ensure that Landowners will be paid for damages if the company walks away from a project:

Likewise, if a FERC-regulated gas company was somehow permitted to abandon a pipeline project (and possession) in the midst of a condemnation proceeding, the company would be liable to the landowner for the time it occupied the land and for any "damages resulting to the [land] and to fixtures and improvements, or for the cost of restoration." 4 J. Sackman, *Nichols on Eminent Domain* § 12E.01 [07] (rev.3d ed).

*Sage*, 361 F.3d at 826. *Sage* also held that damages for trespass might be appropriate in circumstances where the company continued to occupy the property without payment. *Id.*

*Sage* is consistent with Federal Rules of Civil Procedure 65 and 71.1, which provide a similar result. FRCP 65 governing injunctive relief anticipates that if “any party is found to have been wrongfully enjoined or restrained,” recovery may be had from the bond posted as security. Rule 71.1 also prevents a company that has taken an interest in a property from dismissing an action so as to avoid payment of compensation. *See* FRCP 71.1 Both *Sage* and FRCP 71.1 leave no doubt that this Court has jurisdiction to remedy the harm suffered by the Landowners.

## **B. Damages**

The damages suffered by the Landowners in this matter are extensive and complex. As detailed in Landowner Catherine Holleran's declaration, the Landowners lost 558 trees, many of which were at least 200 years old and therefore irreplaceable and priceless. Ex. 1, Holleran Decl. ¶ 25. Moreover, the loss of trees gave rise to other permanent damage to the property itself. The wide swath of trees removed from the property along the border reduces that privacy that the fully wooded area provided. And 558 stumps now remain in the easement effectively rendering the area useless for building, replanting or other purposes. Ex. 1, Holleran Decl. ¶ 28. In addition, without the tree canopy, the easement is full of weeds and invasive plants, in contrast to the leafy forest floor that once existed. Ex. 1, Holleran Decl. ¶ 29. The slope of the property has also been permanently altered as a result of Constitution clearing a slope for road construction. Ex. 1, Holleran Decl. ¶ 29.

Constitution also put an end to the Landowners' nascent syrup business. Ex. 1, Holleran Decl. ¶ 26. The threat of pipeline construction in 2015 caused the Landowners to miss one year of tapping of the impacted property and thereafter, trees were taken down and could not be tapped. Ex. 1, Holleran Decl. ¶ 26. Constitution's actions also destroyed the gravity feed of the sap down the tubing. Ex. 1, Holleran Decl. ¶ 26. Constitution must compensate the Landowners for these significant business losses.

Meanwhile, Constitution has occupied the property for over three years now without any rental payment. And during much of that period, the Landowners were forced to live with felled, rotting trees that Constitution did not remove until the fall of 2017. The lengthy occupation without construction kept the Landowners in limbo, unable to make decisions

about future use of their property without knowing whether the pipeline would come through.

The Landowners have also been subjected to emotional stress through court hearings and the presence of armed guards on their property followed by the despair of realizing that the damage was entirely avoidable – since Constitution sent its crews home just a few weeks after having removed the trees. Ex. 1, Holleran Decl. ¶¶ 19-30..

The Landowners request a trial before a jury to determine the full extent of their damages. But pending trial, the Landowners ask the Court to release to the Landowners an initial payment of \$50,000 to cover the cost of expert witnesses to assist in evaluating the full scope of the damage and to enable them to begin to replace some of their lost business income and to begin to address some of the damages to their property.

## REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, the Landowners respectfully request that this Court (1) dissolve the injunction, divest Constitution of any possessory interests in the Landowner's property and restore full ownership of the easements to the Landowners; (2) immediately release \$50,000 to the Landowners from the bond consistent with *Sage* to enable them to address the most serious damage to their property and (3) award damages to fully compensate the Landowners for the full restoration of their property, lost business, trespass, infliction of emotional distress and attorneys fees in an amount to be set by jury trial and full amount of compensation for restoration of the property to the condition it was in prior to the taking damages for lost business, infliction of emotional distress and attorneys fees for a jury trial and (4) grant any other relief that this Court deems just.

Respectfully submitted,

*/s/Carolyn Elefant*

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July 9, 2018

**CERTIFICATE OF SERVICE**

I certify that on July 12, 2018, a copy of the above-motion was served on the parties through this Court's ECF System.

Respectfully submitted,

*/s/Carolyn Elefant*

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