

**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.

**DEFENDANT LANDOWNERS' BRIEF IN REPLY TO CONSTITUTION PIPELINE'S
OPPOSITION TO MOTION TO DISSOLVE**

August 8, 2018 (ERRATA)

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SUMMARY OF ARGUMENT

Constitution Pipeline LLC's (Constitution) Response Brief denies responsibility, reality and the requirements of Rule 71.1. First, Constitution refuses to acknowledge its responsibility to pay the Landowners for taking their property and shockingly, faults the Landowners for failing to initiate a court proceeding to obtain the compensation *to which they are constitutionally entitled*.

Second, Constitution denies the reality that the project approved by the Certificate cannot be built without a valid Section 401 permit that was denied by the NYSDEC and affirmed on appeal. That Constitution plans to drag out the proceeding to avoid the inevitable by appealing FERC's refusal to waive the Section 401 requirement all the way up to the United States Supreme Court (*See* Constitution Br. at 8) is irrelevant because FERC's finding that a waiver does not apply is effective upon issuance unless stayed. *See* Section 717r(a), Natural Gas Act 15 U.S.C. §717r(c) ("The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.") As the posture of this case currently stands, the project lacks a Section 401 certificate without which the project cannot be built and without which a grant of a FERC pipeline certificate is prohibited -- as FERC itself admits. *See Constitution Pipeline Co., LLC*, 164 FERC ¶61,029 at P. 22 (2018)(Attached) (Rehearing Order on Waiver).

Finally, Constitution devotes a full three pages of its brief to arguing that the Landowners are not entitled to damages under FRCP 65 (which the Landowners never asserted as an independent basis for recovery). By contrast, Constitution does not address the detailed

guidance of Rule 71.1 which establishes a procedure for compensating Landowners where a project is abandoned as has been the case (albeit involuntarily due to the denial of a permit) here. **ARGUMENT**

Constitution's brief raises few points not already addressed in the Landowners Motion to Dissolve¹ and the Landowners thus, do not repeat those arguments here. Instead, this Reply focuses only on those points that now deserve response.

I. CONSTITUTION CONTINUES TO RESIST RESPONSIBILITY TO COMPENSATE THE LANDOWNERS.

Throughout its Response, Constitution refuses to acknowledge its responsibility under the Fifth Amendment to pay the Landowners for property taken. Instead, Constitution blames the Landowners for failing to chase it down to obtain the compensation to which the Landowners are constitutionally entitled to begin with. Even at this late stage - three and a half years after this Court's March 17, 2015 Order granting Constitution immediate entry and access to the property (ECF Doc. 44)("March 17 Order), Constitution does not even propose to commence a compensation proceeding as a fallback position.

In any event, regardless of which party is to blame for a compensation proceeding not having been initiated, the bottom line is that three and a half years after this Court's entry order, compensation has not been paid. As a result, the Landowners continue to retain legal

¹ The Landowners recognize that Local Rule 7.5 requires a motion to be accompanied with a brief setting forth the legal arguments in support of the motion. Here, the Landowner's motion incorporated its legal arguments and Constitution has since responded - so rather than withdraw and refile the motion, the Landowners ask this court to treat the opening motion as a brief for purposes of compliance with the local rule.

title to the easement which does not transfer until just compensation is paid. *See East Tennessee Gas Company v. Sage*, 361, F.3d 808, 826 (4th Cir. 2004)(observing that landowners in condemnation actions under the Natural Gas Act are protected by "the rule that title does not pass until just compensation has been ascertained and paid."). Constitution has no legal claim to the Landowners' property, but only the equitable grant of access and entry awarded by the March 17 Order which specifies that upon posting of the bond and "prior to the award of just compensation" Constitution shall have "immediate entry and access...to begin construction" of the pipeline. Order at 3. Because Constitution failed to pay just compensation and convert its equitable award of entry into a legally protected property interest, it took the risk that this equitable remedy might eviscerate if circumstances changed and the underlying injunction dissolved. In short, the predicament that Constitution now faces - *i.e.* - the loss of access to the Landowners' property -- is of its own making and as such, Constitution does not deserve a continuation of the equitable remedy granted by this Court.

II. CONSTITUTION REFUSES TO ACCEPT THE REALITY THAT ITS PIPELINE CANNOT BE CONSTRUCTED.

Constitution refuses to accept the reality of the present situation which is that the pipeline, as proposed, cannot and will not be built. The New York State Department of Environmental Conservation (NYSDEC) denial of a Section 401 permit is final and FERC recently affirmed its decision refusing to waive the Section 401 permit requirement. *see also* Constitution Br. at 8. FERC's order denying the waiver request is effective on issuance, which means that the NYSDEC denial stands. Whether or not Constitution has a right to appeal the denial of the waiver all the way up to the United States Supreme Court is thus irrelevant.

Today, the project has no water quality certificate which means definitely that the project as approved by the certificate cannot be constructed. Therefore, the project is no longer within the scope of the certificate which by its own terms and Section 7 of the Natural Gas Act, may only authorize projects that are capable of being built. *See Constitution Pipeline*, Order Issuing Certificates and Approving Abandonment, 140 FERC ¶61,199 (2014), Ordering Para A p 4 (issuing certificate for construction and operation of project)(Attachment 1); 15 U.S.C. 717b(e)(authorizing issuance of certificate for construction and operation of pipeline).

Constitution argues that a condition requiring a pipeline to obtain a federal permit as a condition precedent to commencing construction does not prevent the exercise of eminent domain. Constitution Br. at 13. But the cases that Constitution cites² never addressed FERC's characterization of a conditioned certificate as an "incipient authorization without force or effect." *See* Landowners Motion at 5-6. Moreover, the cases are also distinguishable because involved requirements related to permits or mitigation that had not yet been satisfied but could still be accomplished. Here, the Constitution Pipeline authorized and approved by the Commission certificate cannot be built without the Section 401 water quality certificate which has now been denied. Indeed, even FERC acknowledged in its Rehearing Order on Waiver that the project cannot be constructed without a Section 401 water quality certificate and that the Clean Water Act *prohibits* issuance of a certificate where a Section 401 certificate has been denied. *See Constitution Pipeline Co., LLC*, 164 FERC ¶61,029 at P. 22. In other words, New York's denial of a Section 401 effectively invalidates the certificate itself and supercedes or

² Constitution Br. at 13, *citing Columbia Gas Transmission LLC v. 370.393 Acres*, 2014 WL 5092880 at *4 (D. Md. 2014), *Portland Nat. Gas Transmission Sys. v. 4.83 Acres of Land*, 26 F.Supp. 2d 332, 336 (D.N.H. 1998), *Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427, 433 (D.R.I. 1990).

overrides this Court's finding of a substantive right to condemn.

Further, even assuming that Constitution's substantive right to condemn remained intact, Constitution also denies the reality that circumstances have changed so drastically as to eviscerate the original grounds for the injunction. *See* Landowners' Motion at 14-19 (describing changes). In March 2015, this Court granted Constitution "immediate entry and access onto the subject property and/or easement...prior to the award of just compensation, to begin construction...." Order, ECF Doc. 44 (March 17, 2015) at 3. The very purpose of the injunction - to allow Constitution *specifically* to begin construction of the project to meet in-service deadlines -- no longer exists because Constitution cannot build the project without the water quality certificate.

Meanwhile, Constitution's claims that it is required to maintain access to the property to comply with the terms of its state permit do not justify continuation of the injunction. The state permit (which Constitution did not append) does not entitle Constitution to remain on the Landowners' property. Moreover, Constitution can do what any other permittee does in circumstances where it does not have eminent domain powers: negotiate an agreement with the Landowners or quit the property.

III. CONSTITUTION IGNORES THE REQUIREMENTS OF *SAGE* AND RULE 71.1.

Constitution contends that the Landowners are not entitled to compensation under Rule 65 which the Landowners had referenced as a secondary grounds for release of the bond. But Constitution never addresses the Landowners' primary argument that is type of case -- where a pipeline project is abandoned either voluntarily or due to the reversal of a permit -- is expressly

contemplated by *Sage*. To reiterate:

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. Moreover, *Sage* also confirmed that the Landowners were entitled to draw down on the bond posted by the pipeline while awaiting adjudication of just compensation. *Id.* at 829. Yet despite the Landowners' mounting losses as described in Catherine Holleran's declaration accompanying the Motion to Dissolve, Constitution cannot even bring itself to agree to allow a release of interim funds.

CONCLUSION

In March 2015, this Court awarded Constitution an extraordinary equitable remedy allowing it to immediately enter and access the Landowners' property and raze 558 trees all in advance of payment of compensation. The Landowners strenuously disagreed with the outcome, but did not challenge the ruling on appeal then or seek to second guess the Court's judgment now.

But much as changed since March 2015. With the denial of the Section 401 permit affirmed, Constitution lacks both the ability and the right to construct the project and as a result, the FERC certificate (which cannot be issued if a Section 401 has been denied) is effectively invalid and the March 17 Order (which authorized entry for the purpose of construction) no longer serves a purpose. The balance of equities has also shifted. A huge 558-tree swath has been cut through the wooded area on the Landowners' property for a

project that will not be built and the Landowners have yet to be paid for the damage.

Meanwhile, Constitution has had three years to compensate the Landowners and convert the temporary grant of access and entry into enforceable legal title to the easement but failed to do so - and now, it is too late.

CONCLUSION

WHEREFORE for the foregoing reasons stated herein and previously, the Landowners ask this court to GRANT the Motion to Dissolve and all relief requested therein. In addition, the Landowners further request that this Court convene a hearing on the Motion to Dissolve as expeditiously as possible.

Respectfully submitted,

/s/ Carolyn Elefant

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2018, I electronically filed the foregoing Reply Brief by using the aCM/ECF system, and served copies via the CM/ECF system on all ECF-registered counsel.

Respectfully submitted,

/s/ Carolyn Elefant

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