

I. Background¹

Columbia Gas Transmission, LLC is an interstate natural-gas company as defined by the Natural Gas Act (“NGA”), 15 U.S.C. § 717a(6), that transports natural gas and its byproducts throughout the United States. Columbia Gas operates approximately 12,000 miles of pipeline facilities located in Delaware, Kentucky, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. As an interstate natural-gas company, Columbia Gas is subject to the jurisdiction of the Federal Energy Regulatory Commission (“FERC”). *See* 42 U.S.C. §§ 7172(a)(1)(C)-(E).

On May 20, 2015, Columbia Gas filed an application with the FERC for approval to abandon a section of its Line 138 system and certain associated facilities located in Fayette and Somerset Counties, Pennsylvania, as well as in Preston County, West Virginia, and Garrett County, Maryland. Specifically, Columbia Gas sought approval to abandon an approximately 32.8-mile section of Line 138, including two meter stations, one odorizer, one siphon, five ground valves, and eight mainline valves. In its application, Columbia Gas explained that it sought to abandon this segment of Line 138 due to its age and condition; Columbia Gas stated that much of Line 138 consists of pipeline that predates the 1950s and that several sections have become exposed. (*See* ECF No. 1-3 at 3.) According to Columbia Gas, the pipeline’s age and exposure had led to deterioration, which caused issues with reliability and imposed increased maintenance costs. (*See id.*) Columbia Gas predicted that continued operation of that section of Line 138 would require the operating pressure to be reduced to the point where Columbia Gas

¹ The background facts are taken from Columbia Gas’s complaint (ECF No. 1), defendants’ answers (ECF Nos. 5-6), and the parties’ briefing on Columbia Gas’s motion for a preliminary injunction (ECF Nos. 19, 23-24).

would no longer be able to serve its customers. (*See id.*) Columbia Gas sought to accomplish abandonment of the portion of Line 138 through both removal and abandonment in place. Columbia Gas further requested, pursuant to Section 7(c) of the NGA, a certificate of public convenience and necessity authorizing the construction and operation of a new lateral line to maintain service to a firm-transportation customer.

Notice of Columbia Gas's application was published in the Federal Register on July 8, 2015. 80 Fed. Reg. 39093-01 (July 8, 2015). Several interested parties timely intervened. (*See* ECF No. 1-3 at 4, 12.) Two of those parties filed comments expressing concerns about Columbia Gas's application; one party noted his concern with possible cost increases as a result of the abandonment, and another party voiced her concern about possible soil contamination as a result of gas leakage from part of the pipeline and requested that the pipeline be removed in the leaking areas rather than abandoned in place. (*Id.* at 4.)

On February 18, 2016, the FERC approved Columbia Gas's application, issued Columbia Gas a certificate of public convenience and necessity, and authorized Columbia Gas to proceed with abandonment. *Order Issuing Certificate & Approving Abandonment*, 154 FERC ¶ 61,116 (Feb. 18, 2016) (ECF No. 1-3 at 2-12). In its order approving Columbia Gas's application the FERC addressed the intervenors' comments but concluded that they were not grounds for denial of Columbia Gas's application. The FERC responded to the comment about soil contamination by writing that "to the extent there has been any past leakage of natural gas from the facilities to be abandoned, such leakage would have been localized and of minimal risk to the surrounding environment, as the gas would have dissipated into the atmosphere." (*Id.* at 10.) The FERC noted further that "[o]nce the facilities have been abandoned from use, there will be no

potential for future gas leakage,” and did not address the request for abandonment by removal.
(*Id.*)

On December 21, 2016, Columbia Gas filed this condemnation action under the NGA against Mark J. McCarty and Linda G. McCarty, Appalachian Timber Products, Inc., and so-called Unknown Persons and Interested Parties (jointly the “Landowners”). In its complaint, Columbia Gas stated that it already owns an easement on the Landowners’ properties which gives Columbia Gas the rights to operate and maintain Line 138 over those properties. Columbia Gas stated further that it needs additional temporary easements over the Landowners’ properties to accomplish Line 138’s removal, and that it filed this case because negotiations with the Landowners had been unsuccessful.

Columbia Gas seeks to condemn easements for (1) temporary access to existing access roads on the Landowners’ properties to support the abandonment in place of the pipeline and removal of the above-ground appurtenances to Line 138 after abandonment, and (2) an easement for temporary workspace on the McCartys’ property. Columbia Gas estimates that it needs the temporary easements for approximately two weeks. In its complaint, Columbia Gas requested immediate entry “prior to the determination of compensation upon deposit with the Court of a bond,” a trial to determine the just compensation due to the Landowners, and a determination and award of just compensation to the Landowners for the taking of the temporary easements. (ECF No. 1 at 4-5.)

On March 14, 2017, Columbia Gas moved for partial summary judgment as to its authority to condemn the temporary easements and requested affirmative injunctive relief in the form of immediate access to and possession of the temporary easements. (ECF No. 18.)

Columbia Gas contends that it needs immediate access and possession so that it can meet its contractual and regulatory obligations related to the pipeline's removal. Columbia Gas states that it must begin abandonment of the portion of the pipeline on the Landowners' properties by April 1, 2017, to meet those obligations. In its briefing, Columbia Gas also clarifies the extent of the easements it seeks; it seeks temporary access to 25 feet of existing access roads on the property of Appalachian Timber and to 2300 feet of existing access roads on the McCarty property, as well as temporary workspace of 0.1 acres on the McCarty property. (ECF No. 19 at 1-2.)

The Court held a hearing on Columbia Gas's motion on March 30, 2017. At the hearing, Columbia Gas presented exhibits and testimony from Tyler Hallinan. Mr. Hallinan is a project manager for Columbia Gas and oversees the abandonment of Line 138. The Landowners entered a photograph into evidence and presented testimony from John Mersch, owner of Appalachian Timber, and Mark McCarty.

II. Jurisdiction & Venue

This Court has jurisdiction under 15 U.S.C. § 717f(h) and 28 U.S.C. § 1331. Because the temporary easements Columbia Gas seeks are located in the Western District of Pennsylvania, venue is proper in this district under 28 U.S.C. § 1391(b)(2).

III. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). A preliminary injunction is appropriate only "upon a clear showing that the [movant] is entitled to such relief." *Id.* at 22 (citation omitted). In determining whether a party

is entitled to a preliminary injunction, courts consider four factors: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed without the preliminary injunction; (3) whether granting the preliminary injunction will result in even greater harm to the nonmovants; and (4) whether granting the preliminary injunction will be in the public interest. *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp.*, 768 F.3d 300, 315 (3d Cir. 2014) (citation omitted).

IV. Analysis

A. Columbia Gas's Motion for a Preliminary Injunction

Columbia Gas brings this case under Section 717f(h) of the NGA, which provides in relevant part that

[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). Section 717f(h) thus authorizes the exercise of the right of eminent domain by the holder of a FERC certificate of public convenience and necessity. Once the FERC issues such a certificate, and the necessary right-of-way cannot be acquired by agreement or contract, the holder has “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.” *Columbia Gas Transmission, LLC*, 768 F.3d at 304. Challenges to FERC certificates must be made to the FERC itself (with appeals to the United States Courts of

Appeals), *see* 15 U.S.C. § 717r, and “collateral attack of a FERC certificate in the District Court is impermissible.” *Steckman Ridge GP, LLC v. An Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres, More or Less, in Monroe Twp.*, No. 08-cv-168, 2008 WL 4346405, at *4 (W.D. Pa. Sept. 19, 2008).

For Columbia Gas to obtain a preliminary injunction it must demonstrate a reasonable probability of success on the merits of its claims. *Columbia Gas Transmission, LLC*, 768 F.3d at 315. And for Columbia Gas to succeed on its claims it must establish three elements, namely that: “(1) it holds a FERC certificate of public convenience and necessity; (2) the rights-of-way to be condemned are necessary for the construction, operation, and maintenance of the pipeline; and (3) it has been unable to acquire the proposed rights-of-way from the landowner[s].” *Columbia Gas Transmission, LLC v. An Easement To Construct, Operate and Maintain a 20-Inch Gas Transmission Pipeline Across Props in Wash. Cty.*, No. 16-cv-1243, 2017 WL 544596, at *3 (W.D. Pa. Feb. 9, 2017) (citing cases).

As to the first element, Columbia Gas holds a FERC certificate of public convenience and necessity for the abandonment of Line 138 (ECF No 18-1), and the Landowners do not appear to dispute this (*see* ECF No. 23). As to the second element, Mr. Hallinan—both in his declaration submitted in support of Columbia Gas’s motion and at the hearing—testified that Columbia Gas cannot begin abandonment of Line 138 without the temporary easements. (*See* ECF No. 18-2 ¶ 8 (“Columbia requires access to the defendants’ properties to safely and efficiently abandon the aging and deteriorating pipeline.”).) At the hearing, Mr. Hallinan testified that there is a shutdown valve on the Appalachian Timber property that must be closed and locked before the gas can be evacuated from the pipeline and abandonment can begin. Mr. Hallinan testified

further that there are two exposures on the McCarty property that must be removed as part of the abandonment. As to the third and final element, Columbia Gas stated that it has been unable to acquire the easements from the Landowners, which they concede. (ECF No. 23 at 2 (“[Columbia Gas] approached Defendants with respect to obtaining easements to their properties in 2016. However, the parties were unable to reach agreement.”).)

The Landowners offer two principal arguments for why Columbia Gas has not shown a reasonable likelihood of success. First, the Landowners make an argument that Columbia Gas has failed to establish that abandonment in place is necessary to the operation of the pipeline. They appear to hint at a statutory-interpretation argument along the lines of the following: Section 717f(h) allows takings for the “construct[ion], operat[ion], and maintain[enance]” of pipelines; Columbia Gas is taking this pipeline out of service, so this taking is not for the “construct[ion], operat[ion], and maintain[enance]” of a pipeline. (See ECF No. 123 at 3 (“If pipeline 138 is no longer used for the transportation of natural gas, then the activities which Plaintiff seeks to undertake pursuant to the within action are not within the spirit of the Act.”).) To the extent this is one of the Landowners’ arguments, the Court is unconvinced. Decommissioning a pipeline by abandonment fits comfortably within the parameters of Section 717f(h), which applies to the construction, operation, and maintenance of a pipeline for the transportation of natural gas. Thus, this argument is no bar to Columbia Gas’s motion.

Second, the Landowners argue that Columbia Gas has failed to establish that the FERC certificate is effective. The Landowners point out that the FERC certificate was issued on the condition that Columbia Gas comply with certain environmental requirements (ECF No. 18-1 at 11), and they argue that Columbia Gas has failed to establish its compliance with those

requirements. This argument is likewise no bar to Columbia Gas's motion; this argument challenges the validity of the FERC certificate itself, and seeks to call into question whether Columbia Gas is authorized to exercise the rights granted in the FERC certificate. In other words, this argument is a collateral attack on the FERC certificate, and therefore an improper one to make to this Court. See, e.g., *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements in (No Number) Thayer Road*, 777 F. Supp. 2d 475, 481 (W.D.N.Y. 2011) ("when a landowner contends that the certificate holder is not in compliance with the [FERC] certificate, 'that challenge must be made to FERC, not the court'" (citation omitted)); *Steckman Ridge*, 2008 WL 4346405, at *4 ("collateral attack of a FERC certificate in the District Court is impermissible"). And "[e]ven assuming, for argument's sake, that Columbia is violating the FERC Certificate conditions, this would not affect the validity of the FERC Certificate or Columbia's ability to exercise its authority of eminent domain." *Columbia Gas Transmission LLC v. 0.85 Acres, More or Less, in Harford Cty.*, No. 14-cv-2288, 2014 WL 4471541, at *4 (D. Md. Sept. 8, 2014) (footnote omitted)

Thus, the Court holds that Columbia Gas has established a reasonable probability of success on the merits of its claims.

Likewise, the Court holds that Columbia Gas has established that it will be irreparably harmed without the preliminary injunction. Mr. Hallinan testified that without immediate access to the temporary easements Columbia Gas will be unable to perform the necessary abandonment activities on Line 138. (ECF No 18-2 ¶ 9.) Furthermore, Mr. Hallinan testified that state regulations require all roadwork associated with the abandonment project to be completed by October 2017 and that Columbia Gas has contractual obligations to its customers

to complete abandonment before 2018. Without timely access to and possession of the temporary easements Columbia Gas will likely be unable to meet those contractual and regulatory obligations. These are not purely financial injuries to Columbia Gas; they involve potential legal liability and reputational harm, and therefore rise to the level of irreparable harm. *See Columbia Gas Transmission, LLC*, 768 F.3d at 316.

In addition, any harm suffered by the Landowners as a result of granting the preliminary injunction is minimal—use of a small portion of their land—and temporary. At the hearing, the Landowners testified about the ways in which they would be harmed; the owner of Appalachian Timber testified that granting immediate access would hurt his bargaining power in negotiating compensation for the use of his land, and Mark McCarty discussed ongoing issues of littering and people trespassing on his land.²

As for the harm identified by Appalachian Timber's owner, this appears to overlook one of the very reasons Columbia Gas brought this case: to "[a]scertain and award just compensation to the Landowner[s] for the taking of the temporary easements." (ECF No. 1 at 5.) Appalachian Timber's owner surely wishes to receive maximum compensation for the use of his land, and immediate access may affect his ability to do so. But in takings cases, "just compensation normally is to be measured by the market value of the property at the time of the taking." *Horne v. Dep't of Agric.*, ___ U.S. ___, 135 S. Ct. 2419, 2423 (2015) (internal quotation marks and citation omitted). Thus, the harm Appalachian Timber's owner complains of appears to be a reduction in his bargaining power to obtain more than the fair market value of

² The owner of Appalachian Timber testified also that granting immediate access would hurt his timber business—though he did not explain how this harm would occur.

the use of his land. Although arguably that may be a form of harm, the Court does not find it an appropriate one to consider in granting or denying a preliminary injunction.

As for the harm identified by Mr. McCarty, it simply has no relation to the temporary easements at issue in this case. Although it is unfortunate that people trespass and litter on Mr. McCarty's land, there is no relation between those issues and the temporary easements Columbia Gas seeks. There is no indication that littering and trespassing on Mr. McCarty's land will increase if Columbia Gas is granted the injunctive relief it seeks, so those problems have no bearing on this motion.

The principal harm alleged by the Landowners, however, appears to be Columbia Gas's plan to abandon the pipeline in place—leaving it in the ground—rather than removing the pipeline entirely. At the hearing, counsel for the Landowners alluded to potential safety and environmental concerns associated with abandonment in place. But the Landowners offered no convincing evidence in support of these concerns. And any objections the Landowners have to Columbia Gas abandoning the pipeline in place rather than removing it are objections they should have made to the FERC during the application process. *See Steckman Ridge*, 2008 WL 4346405, at *4.

In addition, the public interest weighs in favor of Columbia Gas obtaining the injunctive relief it seeks. Mr. Hallinan testified that delaying abandonment of the deteriorating pipeline would expose the public and nearby landowners to unnecessary safety risks and will jeopardize the reliability of natural-gas service to customers during the coming winter. (ECF No. 18-2 ¶¶ 8, 15-16.) These are valid public-interest considerations, *see Columbia Gas Transmission, LLC*, 768

F.3d at 316, and the Court finds that they support Columbia Gas obtaining the temporary easements.

B. The Landowners' Other Arguments

There remain several other arguments advanced by the Landowners. First, in their response in opposition, the Landowners argue that Columbia Gas is not entitled to immediate access—a so-called “quick take”—of the temporary easements. The Landowners rely on *Columbia Gas Transmission, LLC v. Booth*, No. 1:16-cv-1418, 2016 WL 7439348, at *7 (N.D. Ohio Dec. 22, 2016), to suggest that injunctive relief is unavailable in cases under the NGA and condemnation actions filed under Federal Rule of Civil Procedure 71.1.

This argument is unpersuasive; *Booth* explicitly acknowledges that “when a FERC certificate holder establishes a substantive right to condemn a property under the NGA, courts may exercise inherent equitable powers to grant immediate possession through the issuance of a preliminary injunction.” *Booth*, 2016 WL 7439348, at *7 (citing cases). In *Booth*, the Court declined to reach plaintiff’s request for an injunction because it found that plaintiff had not pleaded an injunctive-relief claim. That reasoning is suspect; although preliminary injunctions require “notice to the adverse party,” Fed. R. Civ. P. 65(a)(1), there is no requirement that a movant plead an injunctive-relief claim in its complaint. And even if there was such a requirement, Columbia Gas in its complaint requested “immediate entry on the above described easements prior to the determination of compensation upon deposit with the Court of a bond.” (ECF No. 1 at 5.) An injunctive-relief request is therefore squarely presented in this case and *Booth* is inapposite.

Second, at the hearing on Columbia Gas's motion the Landowners disputed that Columbia Gas needed immediate access to the temporary easements. The Landowners argue that Mr. Hallinan conceded that gas no longer moved through the pipeline and that this obviates the need for immediate access. But this misconstrues Mr. Hallinan's testimony; he stated that although the pipeline was no longer being used to serve customers, gas remained in the pipeline. And he testified that the abandonment could not proceed until the gas was evacuated, for which Columbia Gas requires access to the temporary easements. Thus, Columbia Gas has established it does need immediate access.

Third, the Landowners argue that injunctive relief should be denied because Columbia Gas failed to present any evidence regarding the security to be paid. Federal Rule of Civil Procedure 65(c) provides that a "court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Landowners correctly note that Columbia Gas presented no evidence regarding security. But the Landowners have offered no authority for the proposition that a movant's failure to present evidence regarding security is grounds for denial of a preliminary-injunction motion. In fact, at least one circuit court has suggested that the burden of proof regarding security falls on the nonmovant. *See Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1362 (10th Cir. 1990) (affirming district court's decision to set preliminary-injunction bond at \$10,000 because "[a]t the hearing on the preliminary injunction, defendant presented no evidence on the extent to which he would be harmed by an injunction"). Additionally, Columbia Gas stated in its motion that it "is prepared to post a bond equal to its estimate of the just compensation due to the defendant, (ECF No. 18

at 5) and counsel for Columbia Gas reiterated at the hearing that it was prepared to provide security in an amount the Court determines appropriate.

The Court has little information on which to base this determination. Columbia Gas seeks temporary access to 25 feet of existing access roads on the Appalachian Timber property, temporary access to 2300 feet of existing access road on the McCarty property, and temporary workspace of 0.1 acres on the McCarty property. There is no indication that Columbia Gas's access to the access roads would impede Appalachian Timber or the McCartys from using the access roads, nor is there any indication that the temporary workspace Columbia Gas seeks on the McCarty property would interfere with the McCartys' use of the property. And there is no indication that Columbia Gas's use of the temporary workspace would cause any damage to the McCartys' property.

After consideration of the parties' submissions and the testimony presented, the Court concludes that security in the amount of \$5000 for the temporary easements on the McCarty property is appropriate, and in the amount of \$3000 for the temporary easement on the Appalachian Timber property. Columbia Gas shall provide bonds in those amounts.

C. Columbia Gas's Motion for Partial Summary Judgment

There remains also the summary-judgment portion of Columbia Gas's motion. Columbia Gas seeks summary judgment as to its authority to condemn the temporary easements. (ECF No. 18.) The Landowners' response to this motion is sparse; they do not point to facts establishing a genuine dispute of material fact, but conclusorily assert in their response that genuine disputes remain and point out that discovery has not been completed. That may be true, but the proper procedure is not to make such assertions in a brief, but to attach a

declaration or affidavit explaining “that, for specified reasons, [the Landowners] cannot present facts essential to justify [their] opposition.” Fed. R. Civ. P. 56(d). The Landowners filed no such affidavit or declaration. Nevertheless, the Court acknowledges that the case remains in the infancy of discovery and that summary judgment may be premature; discovery may yet allow defendants to identify a genuine dispute of material fact as to the condemnation issue. The Court will therefore defer ruling on Columbia Gas’s summary-judgment motion for now.

The Court recognizes this creates a strange situation. Although the Court holds that Columbia Gas is entitled to an injunction—which incidentally gives it the principal relief it seeks in this case, namely the temporary easements—the Court does not at this time decide whether Columbia Gas is definitively entitled to condemn the temporary easements. And practically speaking, whether Columbia Gas is legally entitled to condemn the temporary easements will be somewhat irrelevant after it exercises its rights under this preliminary injunction; regardless of the answer to the condemnation question, essentially all that will be left to decide is the just compensation due the Landowners. But those are issues for a later date.

V. Conclusion

After weighing all relevant factors, the Court concludes that Columbia Gas is entitled to the injunctive relief it seeks and will therefore grant immediate access to and possession of the temporary easements. Columbia Gas’s motion for a preliminary injunction (ECF No. 18) is **GRANTED**. The Court defers its decision on Columbia Gas’s motion for partial summary judgment until a later time in the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COLUMBIA GAS TRANSMISSION, LLC,)

Case No. 3:16-cv-268

Plaintiff,)

JUDGE KIM R. GIBSON

v.)

TEMPORARY EASEMENTS FOR THE)

ABANDONMENT OF A NATURAL GAS)

TRANSMISSION PIPELINE ACROSS)

PROPERTIES IN SOMERSET AND)

FAYETTE COUNTIES, PENNSYLVANIA,)

OWNED BY MARK J. AND LINDA G.)

MCCARTY (PARCEL ID 42-38-0023 AND)

16-18-005); APPALACHIAN TIMBER)

PRODUCTS, INC. (PARCEL ID 02-014-)

038-00), and UNKNOWN PERSONS AND)

INTERESTED PARTIES,)

Defendants.)

ORDER

NOW, this 5th day of April 2017, upon consideration of Columbia Gas Transmission, LLC's motion for a preliminary injunction (ECF No. 18) and for the reasons set forth in the memorandum opinion accompanying this order, it is **HEREBY ORDERED** that Columbia Gas's motion for a preliminary injunction (ECF No. 18) is **GRANTED as follows**:

1. Columbia Gas is granted immediate access and possession of the following rights on the properties owned by defendants:
 - a. Temporary access to the 25 feet of existing access road on the property of Appalachian Timber Products, Inc. that Columbia Gas needs to access to effectuate the abandonment of Line 138;
 - b. Temporary access to the 2300 feet of existing access road on the McCarty property that Columbia Gas needs to access to effectuate the

abandonment of Line 138 and the removal of associated above-ground appurtenances; and,

- c. Temporary workspace of 0.1 acres on the McCarty property that Columbia Gas needs to effectuate the abandonment of Line 138.
2. **On or before April 19, 2017**, Columbia Gas shall pay to the Clerk of Court security in the amount of \$8,000. But this preliminary injunction is effective immediately, and Columbia Gas may exercise its rights under this injunction before paying the security.

The Court defers its decision on Columbia Gas' motion for partial summary judgment (also ECF No. 18) until a later stage in this litigation.

BY THE COURT:

A handwritten signature in black ink that reads "Kim R. Gibson". The signature is written in a cursive style with a large initial "K" and "G".

**KIM R. GIBSON
UNITED STATES DISTRICT JUDGE**