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2 Circuits Clear Up NGA Questions For Pipeline Cos.

By Arthur Schmalz

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Recently, the U.S. Courts of Appeals for the Eleventh and Sixth Circuits — in *Transcontinental Gas Pipe Line Co. v. 6.04 Acres* and *Nexus Gas Transmission v. City of Green*, respectively — joined a growing chorus of other circuits holding that a Natural Gas Act, or NGA, condemnor can obtain immediate, pretrial possession of condemned land through a preliminary injunction, or PI, remedy so long as it demonstrates its substantive power of eminent domain as a Federal Energy Regulatory Commission certificate holder under NGA § 7(h).¹ The Sixth Circuit’s ruling also rejected arguments that export-related aspects of a domestic pipeline project somehow negated a pipeline company’s public interest showing for PI purposes. In addition, the two rulings address several commonly arising procedural issues in a manner favorable to pipeline companies seeking immediate possession in NGA condemnations. Six circuits now hold that immediate possession through PI is permitted in NGA condemnations. The Eleventh Circuit’s ruling observed that every circuit since the Fourth Circuit’s seminal decision in *East Tennessee Natural Gas Co. v. Sage*,² has held that “a preliminary injunction granting immediate access [to condemned property] is permissible so long as the pipeline company’s right to condemn has been finally determined, such as through the grant of a motion for summary judgment and all other requirements for issuance of a preliminary injunction have been met.”³ The Sixth Circuit’s decision similarly noted that, “[s]ince Sage, dozens of courts have held that after a federal court determines the petitioner has a substantive right to condemn the disputed property, it possesses inherent equitable power to grant this type of injunction” authorizing immediate possession.⁴ Both decisions also followed the other circuits’ rejection of arguments that the NGA’s lack of a “quick-take” remedy suggests Congress’s intent to foreclose a federal district court’s inherent equitable power to grant immediate possession by way of a PI motion.⁵ Additionally, each of the decisions found that the district courts below had properly applied the familiar four-part preliminary injunction rubric in granting immediate possession to the pipeline companies. Specifically, in addition to demonstrating in summary judgment motions their power to condemn under the NGA as FERC certificate holders, the pipeline companies in each case offered un rebutted proof that immediate possession of the easements being taken was needed to avoid irreparable harm from missed project deadlines set by FERC and the failure to meet customer gas supply commitments; that such harm outweighed any potential harm to the landowner arising from early possession and use of the easements; and that granting such relief to ensure timely completion of the pipeline projects was in the public interest, particularly given FERC’s underlying public interest determinations.⁶

Gas export doesn’t undermine the public interest showing required to obtain a PI granting immediate possession. Notably, the Sixth Circuit disagreed with a landowner’s argument that the public interest showing required for Nexus’ immediate possession PI couldn’t be satisfied because “much of the natural

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gas transported by the pipeline 'is destined for Canada and international markets.'⁷ In rejecting that argument, the court observed that any benefit foreign consumers would enjoy from the pipeline "does not preclude a finding that it will also benefit consumers in the United States," just as FERC had concluded in the project certificate.⁸ Consolidation of multiple cases for summary judgment and immediate possession hearings is permissible. The two decisions provide useful guidance on a number of procedural issues that frequently arise in NGA eminent domain proceedings. Among them, the Eleventh Circuit's ruling in *Transco* endorses the common practice in NGA condemnations of consolidating summary judgment motions on the right to condemn and PI motions for immediate possession in multiple eminent domain cases in a single hearing. The court disagreed with landowners' arguments that the district court should have held separate hearings on the motions in each of the 60-plus cases filed by the pipeline company. As part of their "inherent managerial power to control the disposition of the causes on [their] docket," district courts have discretion to consolidate such proceedings in multiple NGA condemnation cases.⁹ Given that *Transco* had clearly established its right under the NGA to condemn all of the tracts at issue, requiring separate hearings in every case "would have resulted in unnecessary delay and duplication of effort, without any corresponding benefit," the court wrote.¹⁰ Prehearing discovery and evidentiary hearing on PI motion is not necessary. In addition, both decisions held that the courts below did not err by denying landowner requests for prehearing discovery and evidentiary hearings on the PI motions. District courts have broad discretion over such matters, and, given the lack of any material factual disputes on the relevant issues, the trial courts did not abuse that discretion by refusing requests for prehearing discovery or by entertaining the PI motions without an evidentiary hearing.¹¹ The Eleventh Circuit further explained that, "[a]n evidentiary hearing is required for the entry of a preliminary injunction only where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue."¹² FRCP 71.1 supersedes the state-practice-and-procedure provisions of the NGA. In *Transco*, the Eleventh Circuit followed the holdings of four other circuits in ruling that the provisions of NGA §7(h) that incorporate state law condemnation practice and procedure have been "superseded by Rule 71.1 of the Federal Rules of Civil Procedure," which provides a uniform set of procedures for federal condemnation proceedings.¹³ "Accordingly, the practices and procedures of federal eminent domain actions, including those filed pursuant to the Natural Gas Act, 15 U.S.C.S. § 717f(h), are governed by Fed. R. Civ. P. 71.1 and not by state law," the court held.¹⁴

The Fifth Amendment does not require a cash deposit as security for immediate possession, and security for an immediate possession PI is governed by federal, not state, law. The Eleventh Circuit in *Transco* also rejected the landowners' argument that the Fifth Amendment compels an NGA condemnor to make a cash deposit as security for a PI granting immediate possession of the landowner's property and not merely post a surety bond as the district court had required.¹⁵ The court noted that the "Fifth Amendment does not require that compensation be paid before a taking occurs, but only "reasonable, certain and adequate provision for obtaining compensation ... at the time of the taking."¹⁶ The condemnation procedures under Federal Rule 71.1 fully satisfy those constitutional requirements, the court found.¹⁷ The Eleventh Circuit additionally rebuffed the landowners' contention that a cash deposit should have been required under provisions of Georgia substantive condemnation law. Citing a 1951 advisory committee's note to Rule 71.1 and a leading federal practice treatise, the court explained that "the necessity of a deposit is governed by the substantive law under which the plaintiff seeks to condemn the relevant property ... '[F]ederal statutes control [the necessity for a deposit] in federal condemnations."¹⁸ Since neither the NGA nor Federal Rule 65 (governing injunctions) specify any particular type or amount of bond, the Eleventh Circuit held that the district court had discretion to require a security bond as security for the PI instead of a cash bond.¹⁹ Implications *Transco* and *Nexus* are the latest in an unbroken line of federal appellate decisions confirming the permissibility of PI motions granting immediate possession in

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NGA condemnations. The two recent cases also provide helpful guidance to pipeline companies on a number of procedural issues that frequently arise in immediate possession PI proceedings. Given the growing demand for natural gas, the concomitant need for pipelines to transport it to market, and often tight in-service project deadlines under FERC certificates, these rulings are certainly favorable developments for the pipeline industry.

Notes

¹ See *Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres*, No. 16-17503, 2018 U.S. App. LEXIS 34398 (11th Cir. Dec. 6, 2018) (“Transco”); *Nexus Gas Transmission, LLC v. City of Green*, No. 18a0613n.06, 2018 U.S. App. LEXIS 34484 (Dec. 7, 2018) (unpublished) (“Nexus”).

² *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004)

³ *Transco*, 2018 U.S. App. LEXIS at *32 (citing *Transcon. Gas Pipe Line Co., LLC v. Permanent Easements*, 907 F.3d 725 (3d Cir. 2018)); *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 314-16 (3d Cir. 2014); *All. Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362, 368-69 (8th Cir. 2014); *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop.*, 550 F.3d 770, 776-78 (9th Cir. 2008); *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823-30 (4th Cir. 2004)). The court included a “cf.” citation to *N. Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 471-72 (7th Cir. 1998), where the Seventh Circuit affirmed the denial of a pipeline company’s motion for immediate possession because it not only failed to argue its substantive right to condemn as a FERC certificate holder, but, oddly, also “disavowed any such substantive argument.” *Id.* Accordingly, the ruling in *N. Border* is not at odds with the other circuits’ later holdings endorsing immediate possession through a PI motion, as at least one district court within the Seventh Circuit has found. See *Guardian Pipeline, LLC v. 295.49 Acres*, No. 08-C-0028, 2008 U.S. Dist. LEXIS 35818, at *72 & n.11 (E.D. Wis. Apr. 11, 2008).

⁴ *Nexus*, 2018 U.S. App. LEXIS 34484, at *4-*5 & N. 2.

⁵ *Id.*; *Transco*, 2018 U.S. App. LEXIS 34398, at *34-*36.

⁶ *Id.* at *8-*15; *Transco*, 2018 U.S. App. LEXIS 34398, at *58-*68.

⁷ *Nexus*, 2018 U.S. App. LEXIS 34484, at *14-*15 (citations omitted).

⁸ *Id.*

⁹ *Transco*, 2018 U.S. App. LEXIS 34398, at *62-*63.

¹⁰ *Id.*

¹¹ *Nexus*, 2018 U.S. App. LEXIS 34484, at *16-*17; *Transco*, 2018 U.S. App. LEXIS 34398, at *40-*45, *73-*77. The district court in *Transco* held a four-hour nonevidentiary hearing on the consolidated summary judgment and PI motions. 2018 U.S. App. LEXIS 34398, at *73.

¹² *Transco*, 2018 U.S. App. LEXIS 34398, at *73 (citations and internal marks omitted).

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¹³ Id. at *35 (citing All. Pipeline, 746 F.3d at 367; Transwestern Pipeline, 550 F.3d at 776 n.7; Sage, 361 F.3d at 822; *N. Border Pipeline Co. v. 64.111 Acres of Land*, 344 F.3d 693, 694 (7th Cir. 2003)).

¹⁴ Id.

¹⁵ Id. at *78.

¹⁶ Id. (citations omitted).

¹⁷ Id.

¹⁸ Id. at *80 (citations omitted).

¹⁹ Id. at *80-*81.

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